PER SE ILLEGALITY OF EXCLUSIVE DEALS AND TYINGS AS FAIR COMPETITION

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I. INTRODUCTION

Exclusive deals and tyings are deeply intertwined restrictive and unfair business practices. Dominant corporations routinely use exclusive deals and tyings to forcefully deprive customers, distributors, and suppliers of their freedom to conduct business with whom they like and purchase the products and services they want.

Exclusive deals require a firm to entirely limit or restrict their purchases or use of a service with rivals. Exclusive deals can occur explicitly through contract or through a myriad of implicit practices (known as "de facto exclusive dealing"); the latter includes direct coercion, as well as significant financial inducement or penalty.[1] Tyings operate similarly. In a tying arrangement, a firm requires the purchase or use of a product or service in conjunction with the purchase or use of another product or service. Like exclusive deals, tyings can operate explicitly by contract or implicitly in practice. Since a tying can also require the exclusive use of a service or product, in some cases, there is hardly a distinction between what is a tying and an exclusive deal.[2]

Exclusive deals and tyings create a range of public harms, including: (1) unfairly inhibiting and degrading the freedom of businesses to engage in competition; (2) suppressing the entry and success of new and small firms; (3) degrading firm rivalry; (4) unfairly entrenching and extending a firm's dominance; (5) narrowing the channels of firm growth and destroy competition; (6) reducing consumers' and firms' choices to engage in business with whom they would like; (7) enhancing the adverse effects of other unfair, predatory, and exclusionary conduct; and (8) causing consumers or other dependent firms to incur higher costs, lower quality products or services, and worse terms. This Article will explain how exclusive deals and tyings are potent

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1. ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 289 n.20 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 2025 (2013) (defendant's agreements "as a whole functioned as exclusive dealing agreements that adversely affected competition").

2. *See generally* Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), *abrogated on other grounds by* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006); *see also* Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1178 ("Section 1 [of the Sherman Act] also forbids 'negative' ties—arrangements conditioning the sale of one product on an agreement not to purchase a second product from competing suppliers.").

weapons of subjugation that dominant corporations routinely and almost effortlessly use to exert power over, maintain control of, and punish dependent firms.

Exclusive deals and tyings can also have other ancillary adverse and unintended effects, such as creating fragile supply chains and restricting the ability of consumers to repair their products. Often exclusive deals and tyings are not negotiated, but simply demanded. Dominant corporations present them in an all-or-nothing manner to smaller dependent firms, limiting their freedom to choose which products or services they purchase or determine whom they do business with. Exclusive deals and tyings are also nearly costless methods of competition to employ—and thus can function as a form of "cheap exclusion" or "naked exclusion," where significant harm is caused to afflicted firms or the public at only a negligible cost to the initiator.[3] In combination with both practices being almost exclusively reviewed under the antitrust law's exceptionally deferential rule of reason, both practices are routinely used by corporations.

Congress explicitly enacted the antitrust laws to promote fair competition between firms.[4] Fair competition requires firms to engage in activities that "ensure[] the economic liberty and social welfare of workers, market participants, and consumers… [and] prevents firms from engaging in exclusionary, predatory, or otherwise unfair conduct that unduly harms these parties."[5] It creates an economy free from domination and coercion from concentrated corporate power, and establishes democratically enacted market rules where firms succeed only through socially beneficial conduct rather than engaging in unfair practices. Fair competition ensures that firms with excessive market power have obtained that power fairly through internal expansion (such as investing in product development, productive capacity, increased pay to workers, offering superior terms to distributors or customers, or developing

3. Steven C. Salop, *Condition Pricing Practices and the Two Anticompetitive Exclusion Paradigms*, FED. TRADE COMM'N (June 23, 2014), https://www.ftc.gov/system/files/documents/public_events/302251/salop_0.pdf; Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 ANTITRUST L.J. 311, 360–61 (2002); Ilya R. Segal & Michael D. Whinston, *Naked Exclusion: Comment*, 90 AM. ECON. REV. 296, 296 (2000); Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 977, 989–90 (2005).

4. Daniel A. Hanley, *How Self-Preferencing Can Violate Section 2 of the Sherman Act*, COMPETITION POL'Y INT'L, June 15, 2021, at 3–4, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3868896; 50 CONG. REC. 12,146 (1914) (statement of Senator Hollis).

5. DANIEL A. HANLEY, EYES EVERYWHERE: AMAZON'S SURVEILLANCE INFRASTRUCTURE AND REVITALIZING A FAIR MARKETPLACE, OPEN MARKETS INST., (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4089858.

"superior product[s]"[6]) or through the exclusive usage of fair business practices such as aggressive pricing (so long as it remains above cost), offering significant (but fair and equitable) volume discounts on their products, investing in research and development, providing better terms to suppliers and customers, increased pay and benefits to workers, or increasing the quality or quantity of products and services. Fair competition also prevents firms from unfairly exploiting their power to expand, entrench, or perpetuate their dominant market position.[7] A market governed by fair competition makes certain that the public derives the greatest amount of benefit from vigorous firm rivalry, and ensures the primacy of democratic institutions rather than having markets controlled by private ordering; this in turn prevents the erosion of our political system and ensures widespread, equitable, and fair economic prosperity.[8] Indeed, the antitrust laws prohibit a range of conduct and work in conjunction with other laws to ensure firms are competing fairly and in socially beneficial ways.[9] Given the stated harms of exclusive deals and tyings, both practices violate notions of fair competition and thus the spirit and Congress's intent with the antitrust laws—and thus should be substantially restricted and, in some cases, prohibited outright.[10]

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6. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966); *see also* United States v. Paramount Pictures, 334 U.S. 131, 174 (1948) (methods of competition violate the antitrust laws if they "restrain or suppress competition." Firms should engage in "[internal] expansion to meet legitimate business needs.").

7. James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257, 296 (1989); *id.* at 295 ("For most of the nineteenth century, however, small proprietors were considered to be the vibrant heart of economic life, indeed, archetypical examples of the 'free laborers' who were thought to be central to the natural economic order of classical economic theory."); *see also* Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175 (2022).

8. Warren J. Samuels, *The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale* in ESSAYS IN THE HISTORY OF HETERODOX POLITICAL ECONOMY 184 (1992) (citing Robert Hale's papers and quoting Hale as stating, "There is government whenever one person or group can tell others what they must do and when those others have to obey or suffer a penalty."); *see generally* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 238 (2017) (describing the public harms associated when markets are concentrated and firms acquire significant market power).

9. *See, e.g.*, Verizon Commc'ns Inc. v. Law Off.'s of Curtis V. Trinko, L.L.P., 540 U.S. 398, 408 (2004) (Stating when refusals to deal can violate § 2 of the Sherman Act); Robinson-Patman Act of 1936*,* Pub. L. No. 74-692, 49 Stat. 1526 (1936) (codified at 15 U.S.C. §§ 13, 21a) (prohibiting extraction of preferential terms from powerful buyers and price discrimination); Lanham Act, Pub. L. No. 79-489, 60 Stat. 427 (1946), codified at 15 U.S.C. § 1051 et seq. (protecting trademarks and prohibiting deceptive marketing).

10. 21 CONG. REC. 3152 (1890) (statement of Senator Hoar) ("[Monopoly is more than just commercial success] it involve[s] something like the use of means which made it impossible for other person to engage in fair competition."); 21 CONG. REC. 2457 (1890)

Despite exclusive deals and tyings being repeatedly litigated and analyzed for more than a century,[11] both practices have caused reviewing courts significant trouble with developing a consistent legal analysis to determine precisely when they violate the antitrust laws. Moreover, the confusing and unpredictable litigation concerning these practices only further incentivizes their use and has resulted in exclusive deals and tyings becoming pervasive throughout the economy.

Prior to the landmark antitrust case that the DOJ initiated against Google in 2020, the DOJ has not initiated another antitrust case alleging tying since 1996.[12] Over the same time period, the Federal Trade Commission (FTC) has only initiated one lawsuit alleging illegal tying.[13] Concerning exclusive deals, the Federal Trade Commission has initiated, litigated, or settled at least fourteen suits since 1998 and the Department of Justice has only initiated three lawsuits since 1999.[14]

(statement of Sen. Sherman) (His namesake act was meant to secure "free and fair competition"); 21 CONG. REC. 2570 (1890) (statement of Sen. Sherman); David Millon, *The Sherman Act and the Balance of Power*, 61 S. CALIF. L. REV. 1219, 1275–88 (1988); 21 CONG. REC. 2570 (1890) (statement of Sen. Sherman).

11. Daniel A. Hanley, *American History Provides a Valuable Lesson on How Monopolists Use Exclusive Deals to Fortify Their Market Power*, PROMARKET (July 4, 2021), https://promarket.org/2021/07/04/history-exclusive-deals-monopolists-market-power/; Motion Picture Co. v. Universal Film Co., 243 U.S. 502 (1917).

12. The complaint was filed in 1996. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

13. *In re* Intel Corp., FTC Docket No. 9341, 2010 WL 4542454 (Nov. 2, 2010).

14. The Federal Trade Commission has initiated, litigated, or settled the following cases:

- Complaint, Broadcom Inc., FTC Docket No. C-4750 (June 30, 2021), https://www.ftc.gov/system/files/documents/cases/1810205c4750broadcomcomplaint.pdf.
- Complaint, Vitrex plc, FTC Docket No. C-4586 (July 14, 2016), www.ftc.gov/system/files/documents/cases/160714victrexcmpt.pdf.
- Complaint for Injunctive and Other Equitable Relief, FTC v. Cardinal Health, Inc. (S.D.N.Y. 2015) (15-CV-3031), https://www.ftc.gov/system/files/documents/cases/150420cardinalcmpt.pdf.
- Complaint, IDEXX Laboratories, Inc., FTC Docket No. C-4383 (Dec. 21, 2012), https://www.ftc.gov/sites/default/files/documents/cases/2012/12/121221idexxcmpt.pdf.
- Complaint, Sigma Corp., FTC Docket No. C-4347 (Jan. 10, 2012), https://www.ftc.gov/legal-library/browse/cases-proceedings/101-0080-sigma-corporation-matter.
- Complaint, McWane, Inc., FTC Docket No. 9351 (Jan. 4, 2021) (the case went to trial), https://www.ftc.gov/sites/default/files/documents/cases/2012/01/120104ccwanestaradmincmpt.pdf.

Given the vast jurisprudence, repeated instances of litigation, difficulty of succeeding in litigation under the current analysis employed by courts, and the clear public harms associated with these practices, this Article suggests that all explicit and implicit exclusive deals and tyings should be subject to a bright line rule that clearly defines when they are illegal.

The specific rule this Article proposes is that all exclusive deals that foreclose a substantial share of the relevant market should be per se illegal. Concerning tyings, if they foreclose a substantial share of the relevant market

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- Complaint, Transitions Optical, Inc., FTC Docket No. 4289 (Mar. 3, 2010), https://www.ftc.gov/sites/default/files/documents/cases/2010/04/100427transopticalcmpt.pdf.
- Redacted Amended Complaint for Injunctive and Other Equitable Relief, FTC v. Vyera Pharmaceuticals, LLC (S.D.N.Y. 2020) (No. 20-CV-00706), https://www.ftc.gov/system/files/documents/cases/161_001_vyera_pharm_-_amended_complaint_-_redacted.pdf.
- Complaint for Equitable Relief, FTC v. Qualcomm Inc. (N.D. Cal 2017) (17-CV-00220), https://www.ftc.gov/system/files/documents/cases/170117qualcomm_redacted_complaint.pdf.
- Complaint for Injunctive and Other Equitable Relief, FTC v. Surescripts, LLC (D.D.C. 2019) (19-CV-01080), https://www.ftc.gov/system/files/documents/cases/surescripts_redacted_complaint_4-24-19.pdf.
- Complaint, Pool Corp. FTC Docket No. 4345 (Jan. 13. 2012), https://www.ftc.gov/legal-library/browse/cases-proceedings/1010115-pool-corporation.
- Complaint for Injunctive and Other Equitable Relief, FTC v. Mylan Labs., Inc. (D.D.C. 1998) (98-CV-03114), https://www.ftc.gov/sites/default/files/documents/cases/1998/12/mylancmp.htm.
- Complaint, FTC v. Syngenta Crop Protection Ag. (M.D.N.C. 2022) (No. 22-CV-00828), https://www.ftc.gov/system/files/ftc_gov/pdf/SygentaComplaint.pdf.
- Complaint, Intel Corp. FTC Docket No. 9341 (Dec. 16, 2009), https://www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf.

The Department of Justice has initiated and litigated the following cases:

- United States v. United Regional Health Care Sys., (N.D. Tex. Sept. 29, 2011) (No 11-CV-00030-0) (consent decree).
- United States v. Dentsply Int'l., Inc., 399 F.3d 181 (3d Cir. 2005) (complaint filed in 1999).
- Amended Complaint, United States v. Google, (D.D.C. 2021) (20-CV-03010), https://www.justice.gov/atr/case-document/file/1428271/download.

and if there are two separate products or services, where the sale of one of the products or services is conditioned on the purchase or use of another, then they should be per se illegal. A substantial share of the relevant market would be defined as: (1) a firm with a market share of 30% or more in a relevant market uses exclusive arrangements or tyings with all its customers, suppliers, or distributors; (2) a firm that uses exclusive arrangements or tyings with customers, suppliers, or distributors that collectively possess a market share of 30% or more in their relevant market; (3) a firm in a concentrated relevant market that engages in exclusive arrangements or tyings with the top three or more customers, suppliers, or distributors; (4) the leading three firms have a combined market share of 50% or more in a relevant market and use exclusive arrangements or tyings with their customers, suppliers, or distributors; (5) the leading three firms in a relevant market use exclusive arrangements or tyings with customers, suppliers, or distributors that collectively possess a share of 50% or more of their relevant market; or (6) the leading three firms in a concentrated relevant market engage in exclusive arrangements or tyings with the top five or more customers, suppliers, or distributors.

Additionally, this Article proposes a financial metric bright line rule such that all exclusive deals and tyings involving two or more separate products or services, where the sale of one of the products or services is conditioned on the purchase or use of another, are per se illegal when used by firms with over $1 billion in revenue. This financial threshold would allow firms significant flexibility to use exclusive deals and tyings, and prohibit exclusive deals and tyings when a firm becomes too dominant and the practices would create significant and clear public harms. This rule could be enacted by an act of Congress amending the antitrust laws or through the FTC using its unfair methods of competition rulemaking power.

To justify these proposals, this Article examines the jurisprudence of the Supreme Court, which once enacted strict restrictions on exclusive deals and tyings, and details public harms caused by both practices as they relate to the right of consumers or other businesses to repair their products and their usage by technology firms. Moreover, this Article analyzes some of the justifications for exclusive deals and tyings and concludes that they are unpersuasive and many of the asserted benefits can be obtained by firms using more socially beneficial conduct.

II. THE LAW GOVERNING EXCLUSIVE DEALS

Exclusive deals (also called "exclusive agreements") prohibit firms from purchasing or using rivals' products and services. Due to their ability to expand and fortify a firm's market power, exclusive deals are broadly prohibited by the antitrust laws. Congress has provided several causes of action to potential litigants. The use of exclusive deals can violate §§ 1 and 2 of the Sherman Act, § 3 of the Clayton Act, and § 5 of the Federal Trade Commission (FTC) Act.[15] Despite the wide range of causes of action available to litigants with different standards of illegality to challenge exclusive deals under the antitrust laws, many courts currently review exclusive deals under a similar analysis.[16]

Exclusive agreements can occur overtly through contract or through implicit actions that include significant financial inducement, coercion, or severe penalty.[17] For example, in *Lorain Journal Co. v. United States*, the defendant threatened to remove all advertising from its dominant newspaper if advertisers in the area did not exclusively advertise with it.[18]

Originally, exclusive agreements were determined to be illegal if they solely "foreclosed [competition] in a substantial share of the line of commerce affected."[19] The Supreme Court, in a landmark decision known as *Standard Stations*, held that exclusive agreements violated § 3 of the Clayton Act since the defendant had a market share of 23%, the agreements foreclosed almost 7% of the market, and where the industry was already facing 67% foreclosure due to exclusive deals.[20] The Supreme Court's analysis became known as the quantitative substantiality test.[21] The quantitative substantiality test operated as a near-bright line rule that demarcated when an exclusive arrangement would be illegal based on a simple variable without the need to engage in a morass of economic analysis and justification.[22] Foreclosure is typically measured in the proportionate volume of commerce affected or outlets closed off and is the

15. Standard Oil Co. v. United States (*Standard Stations*), 337 U.S. 293 (1949) (§ 3 of the Clayton Act); FTC v. Brown Shoe Co., 384 U.S. 316 (1966) (§ 5 of the Federal Trade Commission Act); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (§ 2 of the Sherman Act); Omega Env't., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1166–67 (9th Cir. 1997), *cert. denied*, 525 U.S. 812 (1998) (§ 1 of the Sherman Act).

16. *See, e.g.*, Roland Mach. Co. v. Dresser Indus., 749 F.2d 380, 393 (7th Cir. 1984); *Omega Env't.*, 127 F.3d at 1162; LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003); Jacobson, *supra* note 3, at 327.

17. ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012) (de facto exclusive dealing); McWane, Inc. v. FTC, 783 F.3d 814, 820–21 (11th Cir. 2015) (coercion); *Dentsply*, 399 F.3d at 181 (de jure exclusive dealing agreements).

18. Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

19. *Standard Stations*, 337 U.S. at 314.

20. *Id.* at 295–97, 309, 314.

21. Jacobson, *supra* note 3, at 320.

22. *See Standard Stations*, 337 U.S. at 309–13 (seeking to avoid "economic investigation . . . of the same broad scope as was adumbrated with reference to unreasonable restraints of trade in Chicago Board of Trade," and acknowledging that Section 3 of the Clayton Act was meant to reach farther than the Sherman Act).

primary vice of exclusive deals due to its "tendency to restrain competition and to develop a monopoly."[23]

As a result of the economization of antitrust and the purposeful and precipitous decline in antitrust enforcement since the late 1970s,[24] exclusive agreements have—like many restraints including minimum and maximum resale price maintenance[25] and vertical territorial restraints[26]—transitioned to being analyzed under the rule of reason. In 1961, the Supreme Court in *Tampa Electric* modified its holding in *Standard Stations* and changed how exclusive deals are to be analyzed by establishing a three-part test.[27] The first two parts of the *Tampa Electric* test require plaintiffs to define the relevant product market and geographic market.[28] The third part of the test requires plaintiffs to show that "the competition foreclosed" by the exclusive arrangement constitutes "a substantial share of the relevant market."[29] But the Supreme Court in *Tampa Electric* amended its *Standard Stations* holding by listing other relevant factors that affect and determine when foreclosure is substantial.[30] Thus, while foreclosure still remains the primary variable to determine whether an exclusive arrangement is illegal,[31] it is not the sole variable.

Typically, a market share and foreclosure of 30% or more is required to find that an exclusive agreement violates the antitrust laws.[32] But, due to the broad market considerations allowed by the rule of reason and what the Court stated in *Tampa Electric*, courts consider other factors such as high barriers to

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23. *See* Tampa Elec. Co. v. Nashville Coal Co. (*Tampa Elec.*), 365 U.S. 320 (1961); United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd*, 343 U.S. 922 (1952); FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 397 (1953).

24. *See generally* MARC ALLEN EISNER, ANTITRUST AND THE TRIUMPH OF ECONOMICS INSTITUTIONS, EXPERTISE, AND POLICY CHANGE (1991).

25. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007), Albrecht v. Herald Co., 390 U.S. 145 (1968), *and* State Oil Co. v. Khan, 522 U.S. 3 (1997).

26. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by* Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); *see also* Brian Callaci & Sandeep Vaheesan, *Antitrust Remedies for Fissured Work*, CORNELL L. REV. ONLINE (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4076274.

27. *Tampa Elec.*, 365 U.S. at 325–30.

28. *Id.*

29. *Id.*

30. *Id.* at 329.

31. *See* Jefferson Par. Hosp. Dist. No. 2 v. Hyde (*Jefferson Par.*), 466 U.S. at 45 (1984) (O'Connor, J., concurring) ("In determining whether an exclusive dealing contract is unreasonable, the proper focus is on the structure of the market for the products or services in question . . . . Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal . . . .").

32. *Jefferson Par.*, 466 U.S. at 26–29; *Tampa Elec.*, 365 U.S. at 329.

entry,[33] the prevalence of the practice in the industry,[34] the essential nature of the product or service at issue,[35] the necessity of the agreement,[36] entry or exit of firms in the industry,[37] and other "particularized considerations of the parties' operations"[38] to determine if foreclosure is "substantial."[39] Courts have determined that each of the factors can lower or raise the threshold for illegality.[40]

Concerning the foreclosure analysis, under *Tampa Electric*, litigants must also show:

> [T]he probable effect of the [exclusive arrangement] on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.[41]

Some courts have also determined that the duration and terminability of an exclusive deal can decrease or increase the amount of foreclosure required for the conduct to violate the antitrust laws.[42]

Other qualifiers are also relevant for courts to determine whether an exclusive deal is illegal. For example, monopolists (or firms with a "dominant position") face increased scrutiny when exclusive deals are used because the

33. ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 309 (3d Cir. 2012); McWane, Inc. v. FTC, 783 F.3d 814, 838 (11th Cir. 2015).

34. *See Standard Stations*, 337 U.S. at 314; *Tampa Elec.*, 365 U.S. at 334 ("industry-wide practice").

35. *See* United States v. Dentsply Int'l., Inc., 399 F.3d 181, 195 (3d Cir. 2015).

36. *See Standard Stations*, 337 U.S. at 307–08; United States v. Jerrold Elecs. Corp., 187 F. Supp. 545, 557 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961); Brown Shoe Co. v. United States, 370 U.S. 294, 330–31, (1962) (an exclusive arrangement "may escape censure if only a small share of the market is involved, if the purpose of the agreement is to insure to the customer a sufficient supply of a commodity vital to the customer's trade or to insure to the supplier a market for his output and if there is no trend toward concentration in the industry.").

37. *McWane*, 783 F.3d at 838.

38. *Tampa Elec.*, 365 U.S. at 335.

39. *Id.* at 328 ("a substantial share of the relevant market").

40. *Id.* at 334–35 (20-year term justified because "in the case of public utilities the assurance of a steady and ample supply of fuel is necessary in the public interest."); United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001) (exclusive contracts may violate Section 2 "even though the contracts foreclose less than the roughly 40% or 50% share usually required").

41. *Tampa Elec.*, 365 U.S. at 329 (emphasis added).

42. *See Microsoft*, 253 F.3d at 82.

action would be occurring where competition is already limited in the market.[43] Moreover, evidence such as internal documents (commonly known as "hot docs") can override any (often pretextual) assertions that the agreement is pro-competitive or beneficial to consumers.[44] In all, due to the Supreme Court's holding in *Tampa Electric*, the analysis for exclusive deals is now highly subjective. Indeed, the highly subjective nature of the *Tampa Electric* case and other future Supreme Court cases that weakened enforcement led to the landmark FTC *Beltone* decision in 1982.[45] The case is important because it is credited with being highly deferential and approving of efficiency justifications for the use of exclusive deals and "contributed to a trend towards upholding exclusive dealing arrangements even at increasingly higher levels of foreclosure."[46]

Judicial precedent also reveals two important points relating to the legality of exclusive deals. First, exclusive deals do not need to be expressed in clear and definite terms. Instead, the Supreme Court has stated that the "practical effect" and the "impact of the particular practice on competition, not the label" of an action that results in exclusivity is what matters to determine if the conduct violates the antitrust laws.[47] Second, complete foreclosure or monopoly power is not required for an exclusive arrangement to violate the antitrust laws.[48] Significant explicit or implicit foreclosure of 30% or more can deprive firms of critical and essential market channels or inputs that can inhibit

43. United States v. Dentsply Int'l., Inc., 399 F.3d 181, 187 (3d Cir. 2015) ("Behavior that otherwise might comply with antitrust law may be impermissible exclusionary when practiced by a monopolist."); *Tampa Elec.*, 365 U.S. at 334 ("dominant position").

44. McWane, Inc. v. FTC, 783 F.3d 814, 821–22, 840–42 (11th Cir. 2015).

45. Beltone Elecs. Corp., 100 F.T.C. 68 (1982).

46. Jacobson, *supra* note 3, at 324.

47. *See Tampa Elec.*, 365 U.S. at 326–27 (citing United Shoe Mach. Corp. v. United States, 258 U.S. 451, 457 (1922) and examining the "practical effect" of the challenged conduct); United States v. United Shoe Mach. Corp., (*United Shoe III*), 110 F.Supp. 295, 324–25 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (discussing a leasing system that is "buttressed by a study of features…which have a special deterrent effect and….[among other things, causes dependent firms to] be reluctant to experiment with a competitive machine to the extent he would wish."); FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 397 (1953); LePage's Inc. v. 3M, 324 F.3d 141, 162 (3d Cir. 2003) ("the relevant inquiry is the anticompetitive effect of 3M's exclusionary practices considered together … courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation."). Indeed, looking at substance over form is a consistent theme in antitrust and prevents the broad prohibitions imposed by the antitrust laws from being circumvented. *See* United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947), *overruled by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984); Apple Inc. v. Pepper, 139 S. Ct. 1514, 1523 (2019).

48. *See* United States v. Microsoft Corp., 253 F.3d 34, 64 (D.C. Cir. 2001); ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 696, 270 (3d Cir. 2012) ("[T]he law is clear that an express exclusivity requirement is not necessary because de facto exclusive dealing may be unlawful.").

their growth, development of economies of scale, and opportunities to succeed in the market.[49]

III. THE LAW GOVERNING TYINGS

A tying is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."[50] Like exclusive deals, tyings are broadly prohibited by the antitrust laws. Litigants can challenge tyings under §§ 1 and 2 of the Sherman Act, § 3 of the Clayton Act, and § 5 of the Federal Trade Commission Act.[51] Tyings can occur explicitly through contract or through implicit actions such as coercion or financial inducement.[52]

Tyings are an unfair business practice and were originally held to be per se illegal under the antitrust laws.[53] In 1949, the Supreme Court forcefully asserted that tyings serve "hardly any purpose beyond the suppression of competition."[54] As such, the Supreme Court adopted a per se analysis to avoid "elaborate inquiry as to . . . the business excuse for their use."[55] The Supreme Court also adopted a strict per se test to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of

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49. *Motion Picture Advert. Serv. Co.*, 344 U.S. at 392 (foreclosure of 40% of outlets using exclusive deals is unlawful under § 5 of FTC Act); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922) (foreclosure of 40% is unlawful); Mytinger & Casselberry, Inc. v. FTC, 301 F.2d 534 (D.C. Cir. 1962) (foreclosure of 61.5% and 34.6% is unlawful); United States v. Dentsply Int'l., Inc., 399 F.3d 181, 184 (3d Cir. 2015) (Defendant had market share between 67–80% and agreements held illegal); *id.* at 194 ("dealers have a strong economic incentive to continue carrying Dentsply's teeth."); *id.* at 189 (direct sales [as an alternative channel] were not "a practical alternative for most [competing] manufacturers[.]"); *Microsoft*, 253 F.3d at 70 (noting "roughly 40% or 50%" market foreclosure can establish a violation of § 1 of the Sherman Act but less foreclosure can be required when exclusive arrangements are used by a monopolist); Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 59–60 (2004); Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837, 839–40 (1990); Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 ANTITRUST L.J. 371, 384, 386–87 (2017).

50. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5–6 (1958).

51. *See generally id.*; 15 U.S.C. § 14.

52. *See, e.g.*, *United Shoe III*, 110 F.Supp. at 340; Amerinet, Inc, v. Xerox Corp., 972 F.2d 1483, 1500–01 (8th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993), Stephen Jay Photography v. Qian Mills, Inc., 903 F.2d 988, 991 (4th Cir. 1990); Datagate, Inc, v. Hewlett-Packard Co., 60 F.3d 1421, 1426 (9th Cir. 1995).

53. Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947), *abrogated by* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006).

54. *See Standard Stations*, 337 U.S. at 305.

55. *N. Pac Ry. Co.*, 356 U. S. at 5.

the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often *wholly fruitless when undertaken*."[56]

Despite the economization of antitrust law which has weakened significant parts of its legal potency,[57] today, tyings can still be classified as per se illegal—although the test has been modified from a traditional per se test that governs conduct such as horizontal market allocation or price-fixing.[58] Like exclusive deals, there is increased scrutiny when tyings are engaged in by a monopolist.[59]

Under the current modified per se test, a tying violates the antitrust laws if:

1) Two separate products or services exist, where the sale of one of the products or services is conditioned on the purchase of the other.[60]
2) The arrangement forecloses a substantial volume of commerce in the tied market.[61]

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56. *Id.*

57. EISNER, *supra* note 24, at 2–5.

58. The test is often called a "quasi-per se rule," *see* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 400 (2009).

59. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 488 (1992) (Scalia, J. dissenting) ("Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist.").

60. *Jefferson Par.*, 466 U.S. 2 at 16 ("[W]hen a purchaser is forced to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed."); *id.* at 19 ("[T]he answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items."); *id.* at 19 n.30 ("We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices."); *see also* Fortner Enters., Inc. v. U. S. Steel Corp. (*Fortner I*), 394 U.S. 495, 504–07 (1969) (focusing on the functional relationship of products).

61. *Jefferson Par.*, 466 U.S. at 16, ("we have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby"); *id.* at 28 ("[probably] foreclosed a choice [in the tied product market] that would have otherwise been made 'on the merits.'"); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 11 (1958); *Fortner I*, 394 U.S. at 501 ("[T]he controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie."); *id.* at 502 ("For purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, therefore, the relevant figure is the total volume of sales tied by the sales policy under challenge, not the portion of this total accounted for by the particular plaintiff who brings suit."); Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947), *abrogated by* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006)

3) The seller has "appreciable economic power" in the tying product market.[62]
4) There is some presence of "condition[ing]" or "forc[ing]" the purchaser to buy the tied product or to not purchase a competitor's product.[63]

The requirement for two separate products can be fulfilled by showing "the functional relation between them" and also the "character of the demand for the two items."[64] Other factors that are considered by courts to determine if there are two separate products or services include historical practice and the utility of both products when combined or separated.[65] The conditioning of a product can be shown by depriving purchasers of other options and forcing them to make a purchase they did not want or "preferred to purchase elsewhere on different terms."[66]

Appreciable economic power does not require a showing of monopoly power or dominance.[67] What constitutes appreciable economic power is highly flexible. The Supreme Court has stated that "no magic inheres in numbers; the relative effect of percentage command of a market varies with the setting in which that factor is placed."[68] Moreover, the Supreme Court has stated that

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(the volume of commerce involved must be sufficient enough so that it "cannot be said to be insignificant or insubstantial[.]").

62. *Eastman Kodak*, 504 U.S. at 462 (quoting *Fortner I*, 394 U.S. at 503); *see also* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28, 42–43 (2006) (holding tying arrangements are *per se* illegal when a plaintiff presents "proof of power in the relevant market").

63. *Eastman Kodak*, 504 U.S. at 461–62; *Jefferson Par.*, 466 U.S. at 12–18; United States v. Loew's Inc., 371 U.S. 38, 45 (1962), *abrogated by* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); *see also* Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1178 (1st Cir. 1994), *abrogated on other grounds by* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010) ("Section 1 also forbids 'negative' ties—arrangements conditioning the sale of one product on an agreement not to purchase a second product from competing suppliers.").

64. *Jefferson Par.*, 466 U.S. at 19.

65. *See Eastman Kodak*, 504 U.S. at 462–63 ("We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices.").

66. *Jefferson Par.*, 466 U.S. at 12; *Eastman Kodak*, 504 U.S. at 462.

67. *Eastman Kodak*, 504 U.S. at 462 ("Such an arrangement violates § 1 of the Sherman Act if the seller has "appreciable economic power" in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.) (quoting *Fortner I*, 394 U. S. at 503); *see also* U.S. Steel Corp. v. Fortner Enterprises, Inc. (*Fortner II*), 429 U.S. 610, 620 (1977); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 11 (1958) ("the vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another, regardless of the source from which the power is derived and whether the power takes the form of a monopoly or not.").

68. Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 612 (1953) (quoting United States v. Columbia Steel Co., 334 U.S. 495, 528 (1948)).

other factors such as consumer lock-in, information deficiencies, high switching costs, high barriers to entry, uniqueness or desirability of the product, and other "market realities," their "inherent nature," or "effect" can lower the market power requirement.[69] For example, in *Eastman Kodak*, the Supreme Court rejected the claim that a supplier did not have market power in the original equipment market for its copies when it had less than 23% market share.[70] The Court accepted the lower threshold for illegality because of concerns related to information deficiencies, high switching costs, and product lock-in.[71]

The requirement for a tie foreclosing a substantial volume of commerce is also quite low. In *International Salt*, the Supreme Court found that $500,000 in sales of a tied product was sufficient.[72] In *United States v. Loews*, the Court found just over $60,000 to be sufficient.[73] Additionally, the cost of the tied good is often irrelevant to determining illegality.[74] The Supreme Court justifies its position on the basis that (along with low prices) market foreclosure is "facially anticompetitive and exactly the harm that [the] antitrust laws aim to prevent."[75]

Lastly, the element of "condition[ing]" or "forc[ing]" is, at best, loosely defined and substantially linked to the level of market power of the corporation selling the products and the degree of freedom the purchaser has to not purchase the tied product.[76] Determining whether this element exists requires a somewhat simple, although highly factual, investigation as to whether a buyer "either did not want at all, or might have preferred to purchase [the tied product] elsewhere on different terms."[77]

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69. *Eastman Kodak*, 504 U.S. at 466; United States v. Loew's Inc., 371 U.S. 38, 45 (1962), *abrogated by* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006) ("uniqueness in its attributes"); *id.* at 49 ("It is therefore clear that the tying arrangements here both by their "inherent nature" and by their "effect" injuriously restrained trade.) (quoting United States v. Am. Tobacco Co., 221 U. S. 106, 179 (1911)); *Fortner I*, 394 U.S. at 500; *Fortner II*, 429 U.S. at 617–22.

70. *Eastman Kodak*, 504 U.S. at 466–71; Image Technical Servs., Inc. v. Eastman Kodak Co., 903 F.2d 612, 618 (9th Cir. 1990).

71. *Eastman Kodak*, 504 U.S. at 474–77.

72. Int'l Salt Co. v. United States, 332 U.S. 392, 395 (1947).

73. *Loew's*, 371 U.S. at 49.

74. *See, e.g.*, United States v. Microsoft Corp., 87 F. Supp. 2d 30, 50 (D.D.C. 2000), *aff'd in part*, *rev'd in part*, *remanded in part*, 253 F.3d 34 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 952 (2001) (cost of Internet Explorer was free); Multistate Legal Stud., Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'ns, Inc., 63 F 3d 1540, 1548 (10th Cir. 1995) (An illegal tie can be found if the cost of the tied product is reflected in the price of tying product).

75. *Eastman Kodak*, 504 U.S. at 478.

76. *Jefferson Par.*, 466 U.S. at 12–18

77. *Id.* at 12.

Even when tying conduct is not held per se illegal, tyings can also be reviewed under the rule of reason.[78] The rule of reason test is substantially similar to the modified per se test. The rule of reason test includes all of the factors for the per se test with the addition that courts will balance asserted pro-competitive effects of the tie against its anticompetitive effects to ultimately determine if the tying is unreasonable.[79]

IV. THE PUBLIC HARMS OF EXCLUSIVE DEALS AND TYINGS

Exclusive deals and tyings impose a range of harms on society and constitute unfair methods of competition. This Section will detail how exclusive deals and tyings unfairly entrench and extend firm dominance, narrow the channels of firm growth and destroy competition, deter potential competition, coerce consumers and firms and reduce their choice to engage in business with whom they would like, create fragile supply chains, and enhance the adverse effects of other unfair, predatory, and exclusionary conduct.

First, tyings and exclusive deals can entrench and extend a firm's dominant position and control over a market. Both tactics accomplish this by shutting out the opportunity for rival firms to compete for the business of the dependent firm and potentially depriving the dependent firm of necessary inputs—particularly when the market is concentrated and there are few, if any, alternative providers.[80] In the case of exclusive deals, a rival firm can explicitly (via contract) or implicitly (through direct payment or coercion, such as threatening to withdraw business or issue financial penalties) impose an exclusive relationship that prevents firms from conducting business with their rivals. Tyings are not much different. By requiring the purchase of one product or service with another, the effect is the same.[81] While tying is in some cases not as overt as an exclusive deal, if a firm is already required to purchase or use a substitutable or bundled product or service, engaging in business with another firm providing a substantially similar one is redundant. Thus, with a tying or exclusive deal, a firm can secure and extend its business relations while

78. *Id.* at 35 (O'Conner, J. concurring).

79. *Fortner I*, 394 U.S. at 500; *Jefferson Par.*, 466 U.S. at 29 ("In order to prevail in the absence of per se liability, respondent has the burden or proving that the [allegedly unlawful tying arrangement] violated the Sherman Act because it unreasonably restrained competition.").

80. McWane, Inc. v. FTC, 783 F.3d 814, 820–21, 840–42 (11th Cir. 2015).

81. United States v. Loew's Inc., 371 U.S. 38, 44–45 (1962) ("[Tying arrangements] . . . may force buyers into giving up the purchase of substitutes for the tied product . . . and they may destroy the free access of competing suppliers of the tied product to the consuming market.").

shutting out current and even potential rivals. Insulation from competition also has the added adverse effect of suppressing a firm's incentive to make necessary investments to improve their products and services and promote internal growth.[82]

The shutting out of firms to competition has the immediate effect of blocking and slowing a rival firm's expansion and (in the case of future entrants as well) relegating a firm's growth to less efficient or more costly and obscure commercial channels.[83] Such a circumstance inhibits the growth of rivals by impeding their ability to reach a minimum efficient scale for profitability, often causing them to exit the market entirely.[84] Tying, by forcing or conditioning the use or purchase of a product or service on the use or purchase of another, has the added effect of potentially converting a firm's dominance in one market into dominance in a new market.[85]

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82. *See, e.g.*, Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation—Update* 3, SYNTHESIS PROJECT (2012), https://www.researchgate.net/profile/Martin_Gaynor/publication/283910115_The_Impact_of_Hospital_Consolidation_-_Update/links/564a017508ae44e7a28d805e.pdf.

83. United States v. Dentsply Int'l., Inc., 399 F.3d 181, 189 (3d Cir. 2015) ("A set of strategically planned exclusive dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its products or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth."); *McWane*, 783 F.3d at 833–34, 839–41; *see also* United States v. Griffith, 334 U.S. 100, 108 (1948) (detailing how monopoly power, particularly in the context of the granting of exclusive privileges, in this case concerning first or second-run movies, "may [not] be used to stifle competition by denying competitors less favorably situated access to the market.") (citing United States v. Paramount Pictures, 334 U.S. 131 (1948)).

84. *McWane*, 783 F.3d at 833–34, 839–41; Lorain Journal Co. v. United States, 342 U.S. 143, 150, 153 (1951); Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 59–60 (2004); Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837, 839–40 (1990); Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 ANTITRUST L.J. 371, 384, 386–87 (2017); Jacobson, *supra* note 3, at 353–55 ("Exclusive distribution provides incentives to the distributor to maximize sales of the supplier's brand.").

85. Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 611 (1953) ("[T]he essence of illegality in tying arrangements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next."); Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 459 (1940); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 6 (1958) (The Supreme Court recognized tyings "den[ied] competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market."); Sheridan v. Marathon Petrol. Co., 530 F.3d 590, 592 (7th Cir. 2008) (Posner, J.) ("The traditional antitrust concern with such an agreement is that if the seller of the tying product is a monopolist, the tie-in will force anyone who wants the monopolized product to buy the tied product from him as well, and the result will be a second monopoly."); *Jefferson Par.*, 466 U.S. at 14.

Both tyings and exclusive deals are effectively weapons of subjugation that allow dominant corporations to exert their power to maintain their control and punish dependent firms. In *Shell Oil Co. v. FTC*, the Seventh Circuit Court of Appeals captured this idea by stating:

> A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord. When he hears that Shell will benefit from his patronage of sponsored TBA outlets, the velvet glove of request has within it *the mailed fist of command*.[86]

Second, by virtue of closing off avenues for competition and entrenching and extending a firm's dominant position, tyings can unfairly destroy current competition, deter potential competition, and raise barriers to entry.[87] Justice White, in his dissent in *Fortner I*, aptly encapsulated this point. His comment in full states:

> The tying seller may be working toward a monopoly position in the tied product and, even if he is not, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market. They must be prepared not only to match existing sellers of the tied product in price and quality, but to offset the attraction of the tying product itself. Even if this is possible through simultaneous entry into production of the tying product, entry into both markets is significantly more expensive than simple entry into the tied market, and shifting buying habits in the tied product is considerably more cumbersome and less responsive to variations in competitive offers.[88]

Exclusive deals can have a similar effect.[89] In *LePage's Inc. v. 3M*, 3M, in combination with substantial all-or-nothing rebates, implemented exclusive agreements with LePage's customers that forced them to exclusively purchase

86. Shell Oil Co. v. FTC, 360 F.2d 470, 487 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967).

87. *See Times-Picayune*, 345 U.S. at 605 ("[T]o the extent the enforcer of the tying arrangement enjoys market control, other existing or potential sellers are foreclosed from offering up their goods to a free competitive judgment; they are effectively excluded from the marketplace."); Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 485 (1992) (citing *Jefferson Par.*, 466 U.S. at 14) (stating "one of the evils proscribed by the antitrust laws is the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously."); Fortner Enters., Inc. v. U. S. Steel Corp. (*Fortner I*), 394 U.S. 495, 509 (1969).

88. *Fortner I*, 394 U.S. at 513 (White, J., dissenting).

89. *Jefferson Par.*, 466 U.S. at 45, (O'Connor, J., concurring) ("Exclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods . . . ."); *McWane*, 783 F.3d at 822–24, 831.

transparent tape from them.[90] These agreements enhanced 3M's market power—where it already controlled 90% of the market—and inhibited the growth and entry of its rivals.[91]

Firms using tyings can entrench and expand their own dominance and unfairly exclude current and potential competitors by foreclosing channels of competition. Such practices can also increase barriers to entry. Specifically, tyings can be used to require firms to compete in two product or service markets simultaneously (commonly known as "two-step" or "two-stage" entry).[92] Tying also places consumers in an unfair situation because they are restricted from making (or significantly incentivized to avoid) alternative purchases. Tyings can also mask the actual cost of the tied product or service.[93] Exclusive deals can have a similar effect.[94]

Third, tyings and exclusive deals lessen competition by reducing the freedom of consumers and businesses to engage in business with whom they like—depriving them of their "independent judgment" and thus causing them to incur higher costs, lower quality products or services, and worse terms.[95]

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90. LePage's Inc. v. 3M, 324 F.3d 141, 154–59 (3d Cir. 2003).

91. *Id.* at 144, 159, 162–63.

92. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 6 (1958) ("[Tying agreements] deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market.");*Times-Picayune*, 345 U.S. at 605 ("[T]o the extent the enforcer of the tying arrangement enjoys market control, other existing or potential sellers are foreclosed from offering up their goods to a free competitive judgment; they are effectively excluded from the marketplace."); *id.* ("By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and *insulates it from the competitive stresses of the open market.*") (emphasis added); *Fortner I*, 394 U.S. at 513–14 (White, J., dissenting) ("The tying seller may be working toward a monopoly position in the tied product and, even if he is not, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market. They must be prepared not only to match existing sellers of the tied product in price and quality, but to offset the attraction of the tying product itself. Even if this is possible through simultaneous entry into production of the tying product, entry into both markets is significantly more expensive than simple entry into the tied market, and shifting buying habits in the tied product is considerably more cumbersome and less responsive to variations in competitive offers."); Daniel A. Hanley, *A Topology of Multisided Digital Platforms*, 19 CONN. PUB. INT. L.J. 271, 320 (2020).

93. *Jefferson Par.*, 466 U.S. at 15 ("the freedom to select the best bargain in the second market is impaired by [the consumer's] need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product when they are available only as a package.").

94. *See generally Standard Stations*, 337 U.S. at 320–21 (Douglas, J. dissenting); *see also* McWane, Inc. v. F.T.C., 783 F.3d 814, 838 (11th Cir. 2015).

95. *See Times-Picayune*, 345 U.S. at 605 ("By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market.")

The Supreme Court has repeatedly supported this point. In *FTC v. Brown Shoe*, the Supreme Court stated that exclusive dealing arrangements violate the Sherman Act and the Clayton Act because they "take away freedom of purchasers to buy in an open market."[96] In *Jefferson Parish*, the Supreme Court explained that "the freedom to select the best bargain in the second market is impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product when they are available only as a package."[97] It further stated:

> [T]he 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."[98]

In other words, the Supreme Court clearly views exclusive deals and tyings as unfair business practices that reduce the freedom of consumers and businesses by forcing them to act a specific way and function as tools of control to limit choice.

Tyings and exclusive deals, like increases in concentration from mergers, can also create supply chains that are less resilient—particularly to black swan and other economy wide events like a financial crisis or natural disaster that shock an entire system.[99] Through private ordering of the economy, exclusive deals and tyings practices restrict who can sell or buy a product or service, artificially limit the number of alternative outlets and potential entrants to supply that product. By artificially concentrating supply chains, tyings and exclusive deals make them less resilient and therefore exacerbate the adverse effects of supply and demand shocks when they occur.[100]

(emphasis added); United States v. Paramount Pictures, 334 U.S. 131, 156–57 (1948) ("Block-booking prevents competitors from bidding for single [movies] *on their individual merits*.") (emphasis added). Block-booking is similar to tying such that it is the practice of licensing, or offering for license, one movie or set of movies on condition that the theater exhibitor will also license another movie or set of movies.

96. FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966).

97. *Jefferson Par.*, 466 U.S. at 15.

98. *Id.* at 12.

99. Norman W. Hawker & Thomas N. Edmond, *Avoiding the Efficiency Trap: Resilience, Sustainability, and Antitrust*, 60 ANTITRUST BULL. 208, 215 (2015).

100. *See, e.g.*, Julio Ortiz, *Spread Too Thin: The Impact of Lean Inventories*, VOX EU (Dec. 17, 2021), https://voxeu.org/article/impact-lean-inventories; *How to Fix Supply Chains? Break the Chain.*, OPEN MARKETS INST. (Feb. 25, 2021), https://www.openmarketsinstitute.org/publications/how-to-fix-supply-chains-break-the-chain; Hawker & Edmond, s*upra* note 99, at 216–18; Peter C. Carstensen & Robert H. Lande, *The Merger Incipiency Doctrine and the Importance of "Redundant" Competitors*, 2018 WIS. L. REV. 781, 828–31 (2018).

Lastly, exclusive deals and tyings have been repeatedly used by dominant firms to achieve unfair, exclusionary, and predatory ends. Their prevalence as additional and ancillary means to extend and entrench power is a significant indicator of their effectiveness and exemplifies their designation as a near-costless form of "cheap exclusion."[101] Tyings and exclusive deals have been used in combination with other unlawful acts including deception,[102] refusals to deal,[103] overt collusion or conscious parallelism,[104] restrictive price maintenance practices,[105] and used as a tool to facilitate price discrimination.[106] Additionally, all of these harms are exacerbated and amplified when used by many firms at once.[107]

It is clear that when used by dominant corporations both exclusive deals and tyings often arise not from superior investments, internal growth, or happenstance.[108] Rather they are often unfair business practices that are purposefully implemented to forcefully control dependent firms, shut out competitors, and entrench and extend a firm's market power.[109]

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101. Creighton, et al., *supra* note 3, at 977, 989–90.

102. Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

103. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 458 (1992); United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 422 (2d Cir. 1945) (describing an enforcement action by the government in 1912).

104. United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003).

105. *See* Ethyl Gasoline v. United States, 309 U.S. 436, 458 (1940).

106. Fortner Enters., Inc. v. U.S. Steel Corp. (*Fortner I*), 394 U.S. 495, 513–14 (1969) (White, J. dissenting); *see also* United States v. United Shoe Mach. Corp., (*United Shoe III*), 110 F.Supp. 295, 336, 340, 349 (D. Mass. 1953).

107. *See* FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 395 (1953).

108. *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 429–30 (2d Cir. 1945) ("A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although, the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster[.]").

109. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 6 (1958) ("[Tying agreements] deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market."); *id.* ("buyers are forced to forego their free choice between competing products."); United States v. Loew's Inc., 371 U.S. 38, 45 (1962), *abrogated by* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006) ("[Tying arrangements]…may force buyers into giving up the purchase of substitutes for the tied product . . . and they may destroy the free access of competing suppliers of the tied product to the consuming market.").

V. MANY OF THE JUSTIFICATIONS FOR EXCLUSIVE DEALS AND TYINGS FOR CORPORATIONS WITH MARKET POWER ARE UNPERSUASIVE

Tyings and exclusive deals have been repeatedly analyzed by courts to determine if they violate the antitrust laws. Economists, academics, and other scholars have heavily contributed to the intellectual firepower of dominant firms by supplying them with nearly endless reasons to justify their exclusionary conduct.

Listing and responding to each of the justifications for exclusive deals and tyings individually is beyond the scope of this Article. However, this Article will address three primary justifications that have been repeatedly asserted by litigants, scholars, and other academic proponents. In short, the justifications for exclusive deals and tyings are unpersuasive and, at the very least, are not outweighed by less restrictive, more socially beneficial, practices a firm can use to accomplish similar goals.

First, proponents assert that tyings and exclusive deals enhance a firm's operations by providing necessary economies of scale which can vicariously secure firm loyalty, be used to expand operations or break into a new market, or ensure a minimum level of purchases for the firm (or adequate supply for the distributor).[110] This argument is faulty on the grounds that tyings and exclusive deals are not the only methods for firms to expand their operations. Indeed, tyings and exclusive deals are merely a limited set of business practices among a plethora of other available and more socially beneficial practices that firms can use to achieve these goals.[111] For example, firms can engage in aggressive (above-cost) pricing,[112] offer significant (but fair and equitable) volume discounts on their products,[113] provide enhanced financial incentives and better terms to firms to persuade them to make a purchase, or invest in innovation to make their products more attractive to potential and existing

110. A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—-Are There Unifying Principles*, 73 ANTITRUST L.J. 375, 377, 408 (2006); J. Gregory Sidak, *Do Free Mobile Apps Harm Consumers?*, 52 SAN DIEGO L. REV. 619, 627 (2015); FTC v. Brown Shoe Co., 384 U.S. 316, 330–31 (1966); Charles J. Smaistrla, *An Analysis of Tying Arrangements: Invalidating the Leveraging Hypothesis*, 61 TEX. L. REV. 893, 911 (1983) (stating "A firm may tie together products used in a fixed proportion because, for one reason or another, it cannot recover a profit in the sale of the tying good."); Jacobson, *supra* note 3, at 357–58 (discussing loyalty).

111. Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, 78 ANTITRUST L.J. 313, 319 (2012).

112. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993).

113. Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 435 (1983); FTC v. Morton Salt Co., 334 US 37, 50–51 (1948).

buyers.[114] Moreover, while the use of exclusive deals and tyings may provide some increases in economies of scale for the firm using them, they often do so (particularly for firms with significant market power) at the cost of impeding or completely preventing economies of scale for other firms. They also mitigate the effects of the excluded firms from using the other less restrictive tactics to obtain scale.

The use of exclusive deals and tyings to obtain economies of scale is further mitigated when used by firms that are already established market participants and have preexisting operations. Unlike a new entrant, incumbent firms have established infrastructure and capital to obtain additional business.

Second, proponents also justify exclusive deals and tyings on the grounds that both practices provide firms robust protection of their brand—both in the eyes of consumers and to ensure the product is being used correctly by purchasers as an incident may harm the manufacturer's brand. In the case of exclusive deals, proponents assert that they protect the firm's goods from being "passed off," which takes place when a distributor switches a higher-margin but inferior product as a lower-margin, higher-quality brand.[115] In the case of tyings, firms assert that tyings protect goodwill concerning their brand name or trademark, thus ensuring customers receive the quality of the product they expect.[116]

This argument is faulty for at least five reasons. First, neither tyings nor exclusive deals extinguish the threat of a distributor passing off or damaging the goodwill of a firm's product or brand. Stealth purchases or the use of non-compatible products can always occur. Second, under this circumstance, a firm using exclusive deals or tyings for this purpose will always still have to incur some monitoring costs to ensure the compliance it seeks.[117] Third, a firm

114. Willard K. Tom, David A. Balto and Neil W. Averitt, *Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing*, 67 ANTITRUST L.J. 615, 629 n.39 (2000).

115. FTC v. Sinclair Refining Co., 261 U.S. 463, 475 (1923) ("[The stuff is highly inflammable and the method of handling it is important to the refiner. He is also vitally interested in putting his brand within easy reach of consumers with ample *assurance of its genuineness*.") (emphasis added); Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty*, 74 ANTITRUST L.J. 473, 480 (2007).

116. *See* Ethyl Gasoline v. United States, 309 U.S. 436, 459–60 (1940). Lawful intent does not override unlawful means. *See* Int'l Salt Co. v. United States, 332 U.S. 392, 400 (1947); Int'l Bus. Machs. Corp. v. United States (*IBM*), 298 U.S. 131, 139–40 (1936); *Eastman Kodak*, 504 U.S. at 485.

117. Benjamin Klein, *Exclusive Dealing As Competition for Distribution "On the Merits"*, 12 GEO. MASON L. REV. 119, 153 (2003) ("[T]he manufacturer [even with vertical restraints in place] must monitor distributor efforts along noncontractible dimensions, as well as monitor the exclusive and other contracted elements of promotional performance."); *see, e.g.*, Brian

caught by consumers passing off inferior goods will likely face significant consumer backlash for being lied to and deceived by the firm. Fourth, firms are also governed by other laws, such as the Lanham Act and other state and federal consumer protection laws that punish passing off.[118] Fifth, as it specifically concerns tying two products together, nothing prevents a firm from providing detailed instructions and (truthful) warnings to firms about compatibility or quality requirements that other firms should follow to ensure the product is being used in the manner in which it was intended and built for which can exculpate the firm from potential liability, protect their good will, and protect their reputation from being harmed.[119] In summary, there are many less restrictive avenues firms can take to protect their brand or goodwill, rather than rely on exclusive deals and tyings.

Third, exclusive deals and tyings are justified on the grounds that they prevent firms from "free riding."[120] Free riding is defined as "the externality that arises when investments by one firm increase demand or reduce costs for rivals, and the first firm is not compensated for providing this benefit."[121] For example, consider when a manufacturing firm provides training to a distributor on how to display the manufacturer's products. The free riding supposedly

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Callaci, The Historical and Legal Creation of a Fissured Workplace: The Case of Franchising 28 (Oct. 2019) (Ph.D. dissertation, University of Massachusetts Amherst), https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=2719&context=dissertations_2 ("Franchisors also invest in monitoring. They send 'secret shoppers' to franchised establishments, and monitor franchisee cash registers and operations through real time 'point of sale' systems.").

118. *E.g.*, 18 U.S.C. § 2320(a) (criminalizing intentional use of, among other things, "counterfeit mark on or in connection with such goods or services"); *see also* Lexmark Inter., Inc. v. Static Control Components, Inc. 572 U.S. 118, 140 (2014) ("To invoke the Lanham Act's cause of action for false advertising, a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentations."); POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 115 (2014) ("Competitors who manufacture or distribute products have detailed knowledge regarding how consumers rely upon certain sales and marketing strategies. Their awareness of unfair competition practices may be far more immediate and accurate than that of agency rulemakers and regulators. Lanham Act suits draw upon this market expertise by empowering private parties to sue competitors to protect their interests on a case-by-case basis."); *see* Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?*, 63 SMU L. REV. 1069, 1077–80 (2010); *see id.* at 1077 ("In the United States, for example, numerous federal laws (such as prohibitions on false statements; bank, mail, wire, and securities fraud) and state laws (such as forgery; fraudulent use of a credit or debit card; and deceptive business practice) criminalize deception.").

119. *See, e.g.*, *Int'l Salt*, 332 U.S. at 397–98.

120. Klein, *supra* note 115, at 480; Andy C. M. Chen & Keith N. Hylton, *Procompetitive Theories of Vertical Control*, 50 Hastings L.J. 573, 604–06 (1999).

121. Jonathan B. Baker, *Exclusion as A Core Competition Concern*, 78 ANTITRUST L.J. 527, 580 n.251 (2013).

occurs when the distributor then takes that knowledge and applies it to the manufacturing firm's competitor's products.[122] The problem with this justification for exclusive deals and tyings is that it is based on highly disputable assumptions and ignores that less restrictive alternatives are available.

Free riding assumes that a firm that shares any knowledge or makes any investment in another firm should be entitled to extract all or almost all of the returns that investment provides. Such a situation allows firms to be allowed to impose economic "rents" on the firms they are engaging in business with and obtain above fair and adequate returns.[123] The existence of adequate returns on any training or other investments made indicates that exclusive deals and tyings are not needed at all and that they merely serve as a means to extract excessive gains greater than their initial investment. Moreover, higher than reasonable returns are not necessary to incentivize such investment making activities.

Free riding also assumes that firms make product-specific as opposed to brand-specific investments in dealers.[124] Whenever a firm invests time and money into another firm for using, selling, and promoting of product, often that training cannot be used for using, selling, and promoting a rival's product—in which case, concerns of free riding would not exist.[125] Additionally, brands that possess strong demand from purchasers—whether it be through their reputation for high quality, name or brand recognition, favorable price point for their products or services, established consumer preference, or some other factor—create a circumstance where distributors, even if they were to free ride off of training provided from a manufacturer, have limited capability to alter that demand. Such a situation also serves as ample incentive for a distributor to carry such products regardless of the margin obtained for selling that product or training received or not received.[126]

Moreover, to the extent that free riding exists at all,[127] there are other less restrictive means to achieve the ends that exclusive dealing and tying is asserted

122. The training example is modified from Benjamin Klein, *Exclusive Dealing As Competition for Distribution "On the Merits"*, 12 GEO. MASON L. REV. 119, 137 (2003).

123. A. ALLAN SCHMID, CONFLICT AND COOPERATION INSTITUTIONAL AND BEHAVIORAL ECONOMICS 131 (2004) ("'Economic Rent' is a return above opportunity cost due to natural limits to supply.").

124. *See* Klein, *supra* note 115, at 447, 477, 484, 512–13.

125. *See* Howard P. Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1, 8 (1982).

126. Warren S. Grimes, *The Future of Distribution Restraints Law: Will the New Learning Take Hold?*, 2006 UTAH L. REV. 885, 888 (2006).

127. *See* Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance: Where Chicago Has Overshot the Mark, in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 196, 200–01 (Robert Pitofsky ed., 2008) ("[V]ery few products require dealer

to accomplish. For example, firms that provide specific training to their distributors for using, selling, or promotion of their products can charge, through establishing a contract with a distributor, for the training they are providing.[128] Charging for services in this manner would allow a firm to obtain the value of their investment, eliminate any free riding that potentially exists, and do so without relying on exclusive deals or tyings.

VI. EXAMPLES OF PUBLIC HARMS CAUSED BY THE USE OF EXCLUSIVE DEALS AND TYINGS

There is a surfeit of examples of dominant corporations using tyings and exclusive deals to unfairly injure competitors, downstream firms, and end-use consumers. Both tyings and exclusive deals are used repeatedly to entrench and extend their existing monopoly positions into new markets, cause dependents to incur unnecessary costs, and unfairly supplant competition. This section explores a set of factual allegations and news sources that detail some examples of how exclusive deals and tyings are used in unfair ways.

A. PRODUCT REPAIR

1. *McDonald's' Ice Cream Machines*

Evidence reveals that McDonald's' ice cream machines are perpetually broken, depriving consumers of the dessert and franchisees of the revenue derived from the sale of the product to customers. Some third-party data shows that at any given point, 11% of McDonald's ice cream machines are inoperable.[129] This situation is the result of the unfair use of exclusive deals and tyings.

McDonald's uses exclusive agreements to grant Taylor Company, a food equipment manufacturer, the right to supply ice cream machines to its franchisees.[130] As the manufacturer of the ice cream machines, Taylor makes deliberate choices about how its products will be designed. Taylor uses a variety of technical and contractual means to prevent franchisees from making

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demonstrations, consumer education, operational expertise, special showrooms, and the like for effective marketing, and few dealers actually provide any such services.").

128. Chen & Hylton, *supra* note 120, at 607; Robert L. Steiner, *The Nature of Vertical Restraints*, 30 ANTITRUST BULL. 143, 162–63 (1985).

129. Lauren Barry, *An Estimated 11% of McDonald's Ice Cream Machines Broken in the US*, AUDACY (Mar. 5, 2022), https://www.audacy.com/kcbsradio/news/national/why-are-around-11-of-mcdonalds-ice-cream-machines-broken.

130. Complaint at 2, Kytch v. McDonald's, (D. Del.) (No. 22-cv-00279) [hereinafter Kytch McDonalds Complaint]; Complaint for Damages, Injunctive Relief and Demand for Jury Trial at 2, Kytch v. Gamble, (Cal. Super. Ct., Alameda Cnty.) (RG21099155) [hereinafter Kytch California Complaint]

the repairs themselves and making repairs overly complicated.[131] In particular, Taylor ties the supply of its ice cream machines with its repair services so that if a number of issues occur (as detailed in the operations manual for the machine), a franchisee must call Taylor and is forced to use their (and only their) repair technicians.[132] Franchisees already have very thin margins and thus hiring an authorized service technician to repair the machine further eats into their already limited profits.[133] In some cases, the cost for a repair technician can be several hundred dollars for merely an hour of work.[134] And, since franchisees are required to exclusively use Taylor's machines, there is no alternative action they can make—either the costly repair is made by Taylor, or the machine is not repaired at all.

Like other companies,[135] Taylor is heavily dependent on making these repairs for their revenue. The company disclosed in corporate documents that up to 25% of their revenue comes from repairs.[136] Thus, in this case, McDonald's' exclusive agreements provide Taylor a distribution channel shielded from competition and provides the company with a highly lucrative recurring revenue source by tying its products to its repair services.

2. Tractors, Combines, and Other Farming Equipment

John Deere is the largest provider of agricultural equipment with a U.S. market share for tractors and combines that exceeds 50%.[137] Tractors and combines are essential for farmers to harvest their crops to obtain the yield they need to have a viable business and in a timely manner to optimize their overall yield and quality.[138] Over the years, Deere has purposefully implemented a series of restrictions on their products that inhibit or entirely block farmers from being able to repair their equipment.[139]

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131. Kytch California Complaint, *supra* note 130, at 15.

132. Kytch McDonalds Complaint, *supra* note 130, at 16.

133. Brian Callaci, *What Do Franchisees Do? Vertical Restraints as Workplace Fissuring and Labor Discipline Devices*, 1 J.L. & POL. ECON. 397, 407 (2021) (on average 43 percent of supplies in my sample of franchise contracts are from sources of supply restricted by the franchisor).

134. Johnny Harris, *The REAL Reason McDonalds Ice Cream Machines Are Always Broken*, YOUTUBE (Apr. 23, 2021), https://youtu.be/SrDEtSlqJC4 (starting at 14:28).

135. DANIEL A. HANLEY, CLAIRE KELLOWAY AND SANDEEP VAHEESAN, FIXING AMERICA: BREAKING MANUFACTURERS' AFTERMARKET MONOPOLY AND RESTORING CONSUMERS' RIGHT TO REPAIR, OPEN MKTS. INST. (Apr. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4089852.

136. Harris, *supra* note 134, at 15:53 (25% of revenue comes from repair and parts service).

137. Nat'l Farmers Union, Complaint for Action to Stop Unfair Methods of Competition and Unfair and Deceptive Trade Practices 8 (2022), https://farmaction.us/wp-content/uploads/2022/03/Deere-Right-To-Repair-FTC-Complaint.pdf.

138. *Id.* at 14.

139. *Id.* at 2.

Deere requires the use of proprietary software and the exclusive use of its repair technicians to make the repairs farmers need for their machines. The repairs are costly for farmers in multiple ways. First, the farmers have to wait significantly long periods to actually get the repairs completed. The time spent waiting can irreparably disrupt farmers' already tight window to optimally harvest their crops.[140] Second, these repairs are expensive. In fact, Deere makes three to six times more profits on repairs than actual equipment sales—so the incentives are aligned for Deere to restrict repair whenever they can.[141] Third, farmers cannot use an alternative repair service provider. Farmers must use Deere's technicians and software to make their tractors operable and to have them repaired.[142] Enhancing Deere's power over farmers is that these machines are so costly to replace.[143] In fact, according to Deere's terms of service, farmers must use Deere's authorized repair services and, in some cases, if unauthorized attempts at repair are made, the farming equipment, in many cases costing several hundred thousand dollars, can be rendered inoperable because Deere designs their products such that all replaced parts have to be accepted by their proprietary repair software.[144] In other words, farmers are forced to comply with Deere's restrictive demands.

3. *Hospital Ventilators*

Restrictions on repair can have significant unintended consequences. Ventilators are a lifesaving piece of equipment that can assist a person's breathing and provide their body time to recover if they have a severe case of COVID-19. At the onset of the COVID-19 pandemic, journalists and advocates revealed that manufacturers imposed on hospitals and other medical outlets restrictive repair requirements on their ventilators. Manufactures required that either proprietary software or authorized technicians were needed to make the repairs on ventilators.[145] Similar restrictions applied to other medical devices such as defibrillators, anesthesia machines, and imaging machines.[146]

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140. *Id.* at 14.

141. *Id.* at 16.

142. *Id.* at 11.

143. *Id.* at 23.

144. *Id.* at 19; Class Action Complaint Demand for Jury Trial at 11, Underwood v. Deere, (E.D. Tenn.) (No. 22-CV-00005).

145. Markian Hawryluk, *As Ventilators Become Crucial, Repair Roadblocks Remain*, FIERCE BIOTECH (Apr. 17, 2020), https://www.fiercebiotech.com/medtech/as-ventilators-become-crucial-repair-roadblocks-remain.

146. Kate Gibson, *Manufacturers Hinder Repairs of Crucial COVID Hospital Equipment, Critics Warn*, CBS NEWS (July 8, 2020), https://www.cbsnews.com/news/medical-equipment-makers-hinder-repairs-of-ventilators-says-consumer-group/.

With so many ventilators needed at once due to the extreme rise in COVID-19 cases in late 2020, shortages were practically inevitable, but unnecessary repair restrictions drastically exacerbated the situation.[147] Hospitals eventually had stockpiles of broken ventilators standing by waiting for authorized repair personnel or access to specialized parts.[148] While some manufacturers loosened restrictions, the use of tyings and exclusive deals were unnecessary and the justifications for those restrictions, such as ensuring adequate security, were pretextual.[149]

B. TECHNOLOGY SECTOR

1. *Google*

Google has made repeated use of exclusive deals and tyings as they pertain to establishing the default placement of its search engine, Google Play Store (its smartphone application store), its smartphone application payment system, and its Chrome web browser. Concerning its search engine, between 2014 and 2019, Google entered an exclusive deal with Apple and paid Apple more than twenty-five billion to be the default search engine on its mobile smartphone operating system iOS.[150] Additional agreements ranged between eight to twelve billion in 2020, and estimates show that Google could have paid Apple fifteen billion in 2021.[151] Google's payments to Apple are not just substantial in numerical terms, but in percentage terms as well. In total, Google's payments constituted 17% to 26% of Apple's total revenue for its services division in 2019.[152] Collectively, iOS and Android control well over 90% of the

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147. Kevin O'Reilly, *Hospital Technicians Renew Urgent Call for Right to Repair Medical Equipment*, U.S. PIRG (Feb. 10, 2021), https://uspirg.org/blogs/blog/usp/hospital-technicians-renew-urgent-call-right-repair-medical-equipment.

148. *Id.*

149. FED. TRADE COMM'N, NIXING THE FIX: AN FTC REPORT TO CONGRESS ON REPAIR RESTRICTIONS 29 (2021), https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.

150. Hanley, *supra* note 92, at 298–99, 317.

151. Tim Hardwick, *Google Basically Pays Apple to Stay Out of the Search Engine Business, Class Action Lawsuit Alleges*, MACRUMORS (Jan. 5, 2022), https://www.macrumors.com/2022/01/05/google-pays-apple-stay-out-of-search/; Chance Miller, *Analysts: Google to pay Apple $15 billion to remain default Safari search engine in 2021*, 9TO5 MAC (Aug. 25, 2021), https://9to5mac.com/2021/08/25/analysts-google-to-pay-apple-15-billion-to-remain-default-safari-search-engine-in-2021/.

152. Kif Leswing, *Apple's Services Success Story Relies on Massive Payments From a Single Partner: Google*, CNBC (Oct. 21, 2020), https://www.cnbc.com/2020/10/21/apple-services-success-story-bolstered-by-huge-google-payments.html.

total smartphone operating system market.[153] With Google's agreements, rivals have almost no opportunity to access this essential growth channel.[154]

Similarly, Google has entered into exclusive agreements and tying arrangements with phone manufacturers to ensure its search engine and application store remained the exclusive default application as well as tied its Application Store to its Android smartphone operating system.[155] Google has also tied its payment processing system to its Android operating system, inhibiting consumers from using alternative payment services, which are often significantly cheaper to use since they charge less to the user per transaction.[156] In 2022, Google decided to enact further restrictions to ensure all applications developers and customers are forced to use its payment system on Android.[157]

In a lawsuit against Google in 2018, the European Commission determined that Google violated the European antitrust laws by establishing exclusive agreements with phone manufacturers to pre-install Google search and set it as the default search engine across all devices that used the Android operating system.[158] The European Commission eventually fined Google almost five billion euros for its actions.[159]

Google has also used exclusivity agreements with website publishers that prohibited them from using alternative digital advertising services. Even though Google changed its exclusivity provisions to a "Premium Placement"

153. Hanley, *supra* note 92, at 346.

154. In some cases, users can switch the search engine they want to use as the default, but this is a significant barrier to entry. Indeed, being the default provider is practically the goal to succeed. *Id.* at 298–99, 317.

155. Over the years, Google has taken deliberate steps to close off Android despite continued marketing that it is an open platform. *See* First Amended Complaint for Injunctive Relief at 2, Epic Games, Inc. v. Google LLC, (N.D. Cal.) (No. 20-CV-05671).

156. *Id.* at 57–58.

157. Jay Peters, *Google Crackdown Means You Won't Be Able to Buy Barnes & Noble Ebooks on Android*, VERGE (Apr. 4, 2022), https://www.theverge.com/2022/4/1/23006695/audible-barnes-noble-in-app-purchases-google-android. However, apparently Google is letting a select few application developers use alternative payments systems, but this is in a pilot program. *See* Jay Peters, *Google Will Test Letting Android Developers Use Their Own Billing Systems, Starting with Spotify*, VERGE (Mar. 23, 2022), https://www.theverge.com/2022/3/23/22993417/google-pilot-test-android-alternate-billing-systems-spotify.

158. Antitrust Procedure Council Regulation Commission Decision on Google Android (EC) No. 1/2003 of 18 July 2018, art. 7, 2018 O.J. (C AT.40099) 2, 168, n.753

159. *Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine*, EUROPEAN COMM'N (July 18, 2018), http://europa.eu/rapid/press-release_IP-18-4581_en.htm.

provision, the European Commission found that Google violated the European Union's antitrust laws in March 2019.[160]

In each of these actions (and others[161]), Google has unfairly foreclosed competition and entrenched its market dominance in multiple essential markets and, in combination with other conduct,[162] made it nearly impossible for rivals to overcome Google's monopoly control.

2. *Apple*

Like Google, Apple also ties its application payment system to its smartphone operating system (and thus vicariously to its iOS App Store), mandating that its service is the only acceptable one to accept user financial transactions or download applications.[163] Here again, the financial incentive for these tying arrangements is clear. For each transaction, Apple obtains 30% of the charged amount.[164] While Apple does not disclose how much the company makes from commission fees from its App Store, third-party calculations estimate the company makes well over twenty billion dollars.[165]

3. *Microsoft*

Microsoft is no stranger to tying its products and services together and using exclusive deals. Indeed, significant aspects of the blockbuster antitrust lawsuit initiated against Microsoft in the 1990s were a tie between the Windows operating system and the Internet Explorer web browser and Microsoft's use of exclusive deals with the top internet access providers and other online service providers like AOL (prohibiting these providers from promoting or

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160. *Antitrust: Commission Fines Google €1.49 billion for Abusive Practices in Online Advertising*, EUROPEAN COMM'N (Mar. 20, 2019), https://europa.eu/rapid/press-release_IP-19-1770_en.htm.

161. Amended Complaint, United States v. Google, (D.D.C. 2021) (20-CV-03010); Second Amended Complaint, Texas v. Google, (E.D. Tex. 2021) (20-CV-00957); First Amended Complaint, Utah v. Google, (N.D. Cal. 2021) (21-CV-05227).

162. MAJORITY STAFF OF HOUSE SUBCOMM. ON ANTITRUST, COMMERCIAL & ADMIN. LAW, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 174-247 (2020) [hereinafter HOUSE TECH REPORT].

163. Epic Games, Inc. v. Apple Inc., No. 4:20-CV-05640-YGR, 2021 WL 4128925, at *18–29 (N.D. Cal. Sept. 10, 2021); HOUSE TECH REPORT, *supra* note 162, at 342.

164. HOUSE TECH REPORT, *supra* note 162, at 342.

165. Therese Poletti, *How Much Does Apple Make From the App Store? Even a Landmark Antitrust Trial Couldn't Reveal It*, MARKETWATCH (June 2, 2021), https://www.marketwatch.com/story/how-profitable-is-apples-app-store-even-a-landmark-antitrust-trial-couldnt-tell-us-11622224506 (estimating 22 billion in profits for 2020); Kif Leswing, *Apple's App Store Had Gross Sales Around $64 billion Last Year and It's Growing Strongly Again*, CNBC (Jan. 8, 2021), https://www.cnbc.com/2021/01/08/apples-app-store-had-gross-sales-around-64-billion-in-2020.html (estimating $64 billion in revenue for 2020).

providing alternative internet browsers besides Internet Explorer).[166] Microsoft also used exclusive deals to force Apple and other software vendors to make Internet Explorer the default browser on their platforms.[167]

Despite more than twenty years since its federal antitrust case, Microsoft has not changed its strategy much. The company engages in prolific tying of its services. Microsoft ties together its lines of productivity software in a massive bundle known as Microsoft 365.[168] Microsoft repeatedly finds rival products to imitate and then bundles its nominally new product with its Microsoft 365 service. This practice, while not completely foreclosing competition for alternative services, deeply disincentivizes consumers from using alternative services because they are already paying to use Microsoft's products and thus increases barriers to entry for rival products.

An example of the adverse effects of Microsoft's practices concerns its rivalry with Slack. Slack is a communications platform that helps teams connect through providing various chat functions. Microsoft, recognizing the value of Slack's business model, decided to significantly copy Slack's functionality into its own product.[169] Then Microsoft bundled its new product (known as Microsoft Teams) into its Microsoft 365 productivity suite. Microsoft effectively leverages and exploits its dominance in office productivity software into the business communications industry.

Microsoft Teams on its own would normally have to grow its user base from zero. Instead, through Microsoft's tying, Teams was immediately able to access over 200 million customers.[170] Microsoft's use of tying has been exceptionally effective. Microsoft Teams went from twenty million users in 2019 to over 270 million in January 2022.[171] While the COVID-19 pandemic undoubtedly accelerated the consumer demand for video conferencing software, Teams would not have been able to automatically access Microsoft's

166. United States v. Microsoft Corp., 253 F.3d 34, 67, 71–72 (D.C. Cir. 2001).

167. *Id.* at 73.

168. *Apps and Services*, MICROSOFT, https://www.microsoft.com/en-us/microsoft-365/products-apps-services (last visited Apr. 20, 2022).

169. Steve Lohr, *Slack Accuses Microsoft of Illegally Crushing Competition*, N.Y. TIMES (July 22, 2020), https://www.nytimes.com/2020/07/22/technology/slack-microsoftantitrust.html.

170. Tony Redmond, *Office 365 Hits 200 Million Monthly Active Users*, OFFICE365 IT PROS (Oct. 24, 2019), https://office365itpros.com/2019/10/24/office-365-hits-200-million-monthly-active-users; Casey Newton, *How Microsoft Crushed Slack*, PLATFORMER (Dec. 2, 2020), https://www.platformer.news/p/how-microsoft-crushed-slack?s=r.

171. *Number of daily active users (DAU) of Microsoft Teams worldwide as of April 2021 (in millions)*, STATISTA (Jan. 2022), https://www.statista.com/statistics/1033742/worldwide-microsoft-teams-daily-and-monthly-users/; Mary Jo Foley, *Microsoft: Teams Now Has More Than 270 Million Monthly Active Users*, ZDNet (Jan. 25, 2022), https://www.zdnet.com/article/microsoft-teams-now-has-more-than-270-million-monthly-active-users/.

large customer base without the company's tying practices. At the same time, Microsoft's actions neutralize or at least significantly weaken a growing rival—not by producing a better product but by exploiting its dominant position.[172]

4. *Amazon*

Amazon also makes routine use of tying. Amazon deeply integrates its services that results in the tying of its products and services.[173] For example, Amazon effectively forces sellers to adopt their "Fulfillment by Amazon" (FBA) product storage, packaging, delivery, and customer management service because Amazon penalizes third-party sellers that do not use its FBA service.[174] Amazon penalizes third-party sellers by potentially depressing their search ranking when users search for a product.[175] Alternatively, Amazon rewards third-party sellers that use their FBA service. For example, Amazon is significantly more likely to reward a third-party seller with a Buy Box (a digital button that simplifies the process a user endures to purchase a product) if the seller uses its FBA service.[176] Thus, Amazon appears to be leveraging its dominance in online ecommerce as a way to maintain and extend its dominance in logistic services. Other parties have alleged that Amazon ties its online bookstore for print-on-demand with its printing services.[177]

VII. PROPOSED RULE TO PROHIBIT EXCLUSIVE DEALS AND TYINGS THAT FORECLOSE A SUBSTANTIAL SHARE OF THE RELEVANT MARKET

This Section outlines a proposed rule regarding how exclusive deals and tyings should be treated under the antitrust laws. The proposed rule could be enacted either through formal legislation from Congress amending the Clayton Act and Sherman Act or from state legislatures amending their respective antitrust laws. Alternatively, the FTC could enact the proposed rule using its

172. Lohr, *supra* note 169 ("'Slack threatens Microsoft's hold on business email, the cornerstone of Office, which means Slack threatens Microsoft's lock on enterprise software,' Jonathan Prince, vice president of communications and policy at Slack, said in a statement.").

173. HOUSE TECH REPORT, *supra* note 162, at 289; Hanley, *supra* note 4, at 6–7.

174. Hal Singer, *Top 10 Admissions from Tech CEOs Secured at the Antitrust Hearing*, PROMARKET (July 31, 2020), https://www.promarket.org/2020/07/31/top-10-admissions-from-tech-ceos-secured-at-the-antitrust-hearing/.

175. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, PETITION FOR THE INVESTIGATION OF AMAZON.COM, INC. BEFORE THE FTC, 5–7 (Feb. 27, 2020).

176. Hanley, *supra* note 5, at 6.

177. BookLocker.com, Inc. v. Amazon.com, Inc., 650 F. Supp. 2d 89, 95 (D. Me. 2009). A federal district court denied Amazon's motion to dismiss the plaintiff's tying claim. *Id.* at 105, 107.

unfair methods of competition rulemaking authority.[178] In the meantime, enforcers should continue to bring cases against dominant corporations using exclusive deals and tyings.[179]

A. FORMAL WRITTEN RULE

Exclusive dealing contracts, exclusionary payments, exclusive arrangements and other related and analogous practices such as bundled discounts (collectively "exclusionary agreements"), either explicit through contract or implied (through coercion, financial inducement, or other behavior) are declared unlawful and unfair methods of competition if: (1) the arrangement causes substantial foreclosure of customers, distribution channels, or suppliers for rivals in the relevant market or (2) when used by any firm with over $1 billion in revenue.

Tyings, either explicit through contract or implied (through coercion, bundling of products or services together, financial inducement or penalty, or other behavior), are hereby declared unlawful and unfair methods of competition if: two separate products or services exist, where the sale of one product or service is conditioned on the purchase of another product or service, and either (1) if the conduct causes substantial foreclosure of customers, distribution channels, or suppliers for rivals in the relevant market or (2) when used by any firm with over $1 billion in revenue.

B. RULE DEFINITIONS AND DETAILS

1. *Exclusive Dealing Contracts, Exclusionary Payments, Exclusive Arrangements*

Under exclusive arrangements, firms require customers or distributors to purchase all or substantially all of a specified product or service from them or require suppliers to sell all, or substantially all, of a specified product to them. An exclusive agreement restricts rivals from accessing customers or distribution outlets or obtaining essential inputs from suppliers. Exclusionary arrangements can be implemented explicitly, such as through a contract.

178. Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 661–63, 656 (2017); FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966) ("[T]he Commission has power under § 5 to arrest trade restraints in their incipiency, without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws."); FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972); Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 232–38 (1980); *see also* 15 U.S.C. §§ 46(g), 57a(a)(2) (authorizing the FTC "to make rules and regulations for the purpose of carrying out the provisions of this subchapter").

179. Litigants can still make use of the modified per se test for tyings.

Exclusionary arrangements can also be instituted through threats that the firm will terminate its relationship with a customer or impose significantly less favorable business terms if the customer conducts business with the firm's competitors.

2. Tyings

Tying arrangements (hereinafter "tyings") require customers, suppliers, or distributors to purchase or use an additional (often ancillary and unnecessary) product or service upon the purchase of some other product or service. Tyings restrict the freedom of customers from purchasing or using the products or services they want by being required or forced to purchase or use some other product or service. Tyings can be implemented explicitly, such as through a contract. Tyings can also be instituted implicitly such as through coercion or financial inducement.

3. Substantial Foreclosure

Substantial foreclosure of rivals from customers or distributors occurs when any one of the following six conditions is satisfied:

1) A firm with a market share of 30% or more in a relevant market uses exclusive arrangements or tyings with all its customers, suppliers, or distributors;
2) A firm that uses exclusive arrangements or tyings with customers, suppliers, or distributors that collectively possess a market share of 30% or more in their relevant market;
3) A firm in a concentrated relevant market that engages in exclusive arrangements or tyings with the top three or more customers, suppliers, or distributors;
4) The leading three firms have a combined market share of 50% or more in a relevant market and use exclusive arrangements or tyings with their customers, suppliers, or distributors;
5) The leading three firms in a relevant market use exclusive arrangements or tyings with customers, suppliers, or distributors that collectively possess a share of 50% or more of their relevant market; or
6) The leading three firms in a concentrated relevant market engage in exclusive arrangements or tyings with the top five or more customers, suppliers, or distributors.

4. Two Separate Products or Services

For tyings, separate products should be determined by:

1) Their functional necessity, such that if product or service X is entirely operable, mostly operable, or can be reasonably designed to be operable without product or service Y or if either is operable with a readily available substitute, there are two products or services; or
2) There is clear evidence of separate consumer demand for both products and services. Clear evidence of separate consumer demand can be shown through qualitative evidence such as surveys, historical practice, or industry practice for each product or service.

5. *Examples of Two Separate Products or Services*

A product and service are always two separate items. For example, Company A requires the purchase of its repair services with its computers. Since the computer is a product and repair is a service, both are separable items for purposes of the stated tying test.

Company A bundles Software Program X with Software Programs Y and Z. Since Software Program X can be entirely operable, mostly operable, or can be reasonably designed to be operable without Software Programs Y and Z, Software Program X is a separate product.

Company A sells Hardware X with Default Program Y. Since Hardware X can be entirely operable, mostly operable, or can be reasonably designed to be operable without Default Program Y, both are separate products.

6. *Relevant Market*

For determining the relevant market, litigants should rely on the qualitative factors detailed by the Supreme Court in *Brown Shoe v. United States* and its progeny, and should not use quantitative methods such as the hypothetical monopolist test.[180]

For determining whether a relevant market is concentrated, enforcers should adopt the definition that was used in the Department of Justice's 1968 Merger Guidelines.[181] The 1968 Merger Guidelines state that a relevant market is concentrated when the four largest firms in the relevant market amount to 75% or more of the total market share.[182]

VIII. JUSTIFICATIONS FOR THE PROPOSAL

The rule proposed, *supra*, is justified on several grounds. First, the requirement that a firm possesses 30% or more market share or where the

180. *Brown Shoe*, 370 U.S. at 325.
181. *See 1968 Merger Guidelines*, U.S. DEP'T JUST. (1968), https://www.justice.gov/archives/atr/1968-merger-guidelines.
182. *Id.*

agreement forecloses 30% or more of the market ensures that only the most competitively harmful exclusive agreements or tyings are prevented by the antitrust laws.[183] Tyings and exclusive deals can provide some benefits to firms, such as breaking into a new market, matching consumer tastes and preferences, and can be used for benign purposes (particularly in the short run and when not used by monopolists).

Such a high market share and foreclosure requirement, along with the $1 billion revenue threshold provides ample room for firms (both large and small) in an industry to utilize exclusive deals or tyings in limited cases.[184]

183. *See* Sandeep Vaheesan, *Reconsidering Brooke Group: Predatory Pricing in Light of the Empirical Learning*, 12 BERKELEY BUS. L.J. 81, 99 (2015) (detailing and providing justification for a market share threshold for predatory pricing). Indeed the 30% threshold is used in other areas of antitrust law such as horizontal mergers, see United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 364 (1963) ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat."); United States v. Visa U.S.A., Inc., 344 F.3d 229, 240 (2d Cir. 2003) ("[T]he court inferred market power from the defendants' large shares of a highly concentrated market: In 1999, Visa U.S.A. members accounted for approximately 47% of the dollar volume of credit and charge card transactions, while MasterCard members accounted for approximately 26%.").

184. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 7 (1958) ("[I]f one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."); *Standard Stations*, 337 U.S. at 306–07 ("In the case of the buyer, they may assure supply, afford protection against rises in price, [and] enable long-term planning on the basis of known costs .... From the seller's point of view ... [they] may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and ... offer the possibility of a predictable market."); FTC v. Sinclair Refining Co., 261 U.S. 463, 475 (1923) (concerning a misguided but sanctioned reason by the Supreme Court detailing that an exclusive arrangement did not violate the antitrust laws since in the specific case the material was highly dangerous, thus giving the defendant a "vital[] interest[]" in protecting their brand); *see also* Data Gen. Corp. v. Digidyne Corp., 473 U.S. 908, 908 (1985) (White, J., dissenting) ("As we have consistently explained, a particular tying arrangement may have procompetitive justifications, and it is thus inappropriate to condemn such an arrangement without considerable market analysis.").

Consider in *Pick Mfg. Co. v. Gen. Motors Corp.*, 299 U.S. 3 (1936) (per curiam), *aff'g* 80 F.2d 641 (7th Cir. 1935), the Supreme Court approved the use of a tie to ensure defective or otherwise inappropriate parts were not used in repairing General Motors's cars. But also note that this justification is a narrow one. The Supreme Court detailed just how narrow this justification was in *Int'l Bus. Machs. Corp. v. United States* (*IBM*), 298 U.S. 131, 139–40 (1936). In *IBM*, the Supreme Court rejected the use of a tie concerning the use of IBM specific tabulating cards with their machines. IBM asserted a similar argument made in *Pick Mfg.* based on assuring high product quality and proper functioning of the machines. *Id.* at 138–39. The Supreme Court rejected this argument on the grounds that other less restrictive business practices were available. *Id.* at 138–40.

Additionally, a firm without such a substantial share of the market or without foreclosing a significant share of the market or with less than $1 billion in revenue is unlikely to harm dependent firms and consumers using tyings and exclusive arrangements.

The proposed rule would also prevent agencies and the courts from engaging in repeated and protracted litigation concerning tyings and exclusive deals. As explained, both practices have been subject to such circumstances—a bright line rule would prevent that.[185]

Along the same lines, a bright line rule would also provide members of the public a clear sense of what the law is and how to comply with it.[186] Currently, the courts and enforcers offer no such guidance or clarity, and instead, the public must guess if their use of exclusive deals and tyings are legal.

Furthermore, under the current enforcement environment, both practices are also predominantly analyzed under the rule of reason. Effectively that means they are per se legal. In a comprehensive study of 897 rule of reason cases, scholars Michael Carrier and Christopher Sagers have found that courts determined that plaintiffs asserting antitrust claims failed to establish anticompetitive effects to overcome the first step of the rule of reason in nearly all cases and thus dismissed their lawsuits.[187]

The evidence detailed above clearly shows that tyings and exclusive deals cause immense public harm. The proposed rule thus acknowledges the

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Similarly, the one billion dollar and market share thresholds are also justified on the grounds that tying while useful and generally harmless for smaller firms becomes unnecessary given the availability of alternative, more socially beneficial business practices that are available and as a firm grows larger in size. Consider in *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 557–58 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961) (per curium), a district court, in an opinion affirmed by the Supreme Court, found that the use of a tying arrangement was initially lawful because it helped with "launching of a new business with a highly uncertain future," but the practice became unlawful as those concerns were no longer relevant or controlling.

185. OPEN MARKETS INSTITUTE ET AL., PETITION FOR RULEMAKING TO PROHIBIT EXCLUSIONARY CONTRACTS 83–86 (2020); Kevin Caves & Hal Singer, *When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer-Welfare Standard*, 26 GEO. MASON L. REV. 395, 419 (2018); Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675. 691–94 (2010).

186. Indeed, significant events in antitrust jurisprudence have taken place precisely to make the "broad terms" of the antitrust laws more "workable." *See* United States v. E. I. du Pont de Nemours & Co. (*Cellophane*), 351 U.S. 377, 387–88 (1956) (incorrectly asserting that the rule of reason made the Sherman Act more workable. Also in the case, the Supreme Court expanded and refined the process to define the relevant product market, which was also meant to accomplish the same goal.).

187. Michael A. Carrier & Christopher L. Sagers, *The Alston Case: Why the NCAA Did Not Deserve Antitrust Immunity and Did Not Succeed Under a Rule-of-Reason Analysis*, 28 GEO. MASON L. REV. 1461, 1476, 1476 n.114 (2021).

evidence that tyings and exclusive deals can cause harms, that they should not be allowed in nearly all circumstances, and that they should particularly be restricted when used by dominant firms.

The proposed rule would also limit the role and discretion of the judiciary. Currently, the rule of reason grants judges enormous discretion to determine how the economy is governed and forces the judiciary to "sail on a sea of doubt"[188] and "ramble through wilds of economic theory."[189] As the Supreme Court in *Topco Associates* stated:

> "[C]ourts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required."[190]

A bright line rule ensures that courts adequately adhere to Congress's intent with the antitrust laws and ensures that Congress and the administrative agencies it has delegated its legislative authority to, rather than the courts or private enterprises, are ultimately the political bodies that establish and enforce the rules governing the economy.

Along similar lines of reducing the role and discretion of the judiciary, and specifically concerning the enactment of a financial metric-based test (which prohibits both tyings and exclusive deals for firms with over $1 billion in revenue), the proposal would completely avoid the requirement of litigation to define the relevant market. As currently practiced by antitrust enforcers, the analysis for defining the relevant market involves an overly complex investigation—one that is currently heavily dependent on the use of expensive economists and econometric analysis.[191] Even if litigants were to exclusively

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188. United States v. Addyston Pipe & Steel Co., 85 F. 271, 283–84 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899).

189. United States v. Topco Assocs., Inc., 405 U.S. 596, 609 n.10 (1972); *see also Jefferson Par.*, 466 U.S., at 15 n.25 ("The rationale for per se rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct.").

190. *See, e.g.*, *id.* at 611–12; *see also* United States v. United Shoe Mach. Corp., (*United Shoe III*), 110 F.Supp. 295, 345 (D. Mass. 1953) ("It is for Congress, not for private interests, to determine whether a monopoly, not compelled by circumstances, is advantageous. And it is for Congress to decide on what conditions, and subject to what regulations, such a monopoly shall conduct its business.").

191. Andrew P. Vassallo, *Can One (Ever) Accurately Define Markets?*, 13 J. COMPETITION L. & ECON. 261 (2017); FTC v. Brown Shoe Co., 384 U.S. 316, 325, 343 n.69 (1966); United States v. Cont'l Can Co., 378 U.S. 441, 449 (1964); United States v. Phillipsburg Nat'l Bank &

rely on the qualitative approach for defining the relevant market as the Supreme Court outlined in *Brown Shoe*,[192] current antitrust jurisprudence places an undue amount of weight on litigants to define the relevant market.[193] Although the qualitative market definition process the Supreme Court detailed in *Brown Shoe* and its progeny is a highly workable process for enforcers and the courts to use, a financial metric-based test would be superior as it would prevent and relieve courts of the burden of engaging in this analysis and bring even more certainty to the public as to the legality of exclusive deals and tyings.

A bright line rule is also justified on the grounds that, as this Article has explained, many of the justifications for exclusive deals and tyings are unpersuasive.[194] Many of the purported reasons why exclusive deals and tyings are needed can also be achieved through less restrictive, more socially beneficial, means.

Lastly, such a rule would—in line with both the Federal Trade Commission Act and the Clayton Act—operate as a prophylactic measure to both deter, significantly curtail, and prohibit exclusive deals and tyings in their "incipiency" before the harms from the practices completely manifest themselves.[195]

Tr. Co., 399 U.S. 350, 360 (1970); Berlyn, Inc. v. Gazette Newspapers, Inc., 214 F. Supp. 2d 530, 537 (D. Md. 2002) (the court excluded testimony provided to define the relevant market because the witness lacked "specific education, training, or experience in economics or antitrust analysis"); Va. Vermiculite Ltd. v. W.R. Grace & Co.-Connecticut, 98 F. Supp. 2d 729, 733 (W.D. Va. 2000) (the court excluded to define the relevant market by a witness lacking the "skill and training of a professional economist necessary to define a relevant market for antitrust purposes").

192. *Brown Shoe*, 370 U.S. at 325.

193. Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129 (2007) ("Throughout the history of U.S. antitrust litigation, the outcome of more cases has surely turned on market definition than on any other substantive issue."); United States v. Grinnell Corp., 384 U.S. 563, 572–73 (1966) (Applying same relevant market analysis under Section 7 of the Clayton Act and Section 2 of the Sherman Act).

194. *See infra* Part V.

195. *See* FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392. 394–95 (1953) ("[T]he Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act—to stop in their incipiency acts and practices which, when full blown, would violate those Acts, as well as to condemn as 'unfair method of competition' existing violations of them.") (internal citations omitted); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 356 (1922) (Principally in reference to § 3, "The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency[.]").