No. 12-1016

In the Supreme Court of the United States

POLYPORE INTERNATIONAL, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed the determination of the Federal Trade Commission (Commission) that petitioner's acquisition of a business rival likely would substantially lessen competition, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, when that rival was petitioner's only competitor in two product markets and was expanding into a third product market controlled by petitioner and only one other firm.

2. Whether the court of appeals correctly affirmed the Commission's remedial order requiring petitioner to divest, among other assets formerly held by the acquired business rival, a production plant that had enabled the rival to compete more effectively in the relevant markets.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 686 F.3d 1208. The opinion and order of the Federal Trade Commission (Pet. App. 22a-170a) is not yet published in the *Federal Trade Commission Decisions* but is available at 2010 WL 5132519. The decision of the Administrative Law Judge (Pet. App. 171a-830a) is reported at 149 F.T.C. 501.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2012. A petition for rehearing was denied on October 17, 2012 (Pet. App. 831a-832a). The petition for a writ of certiorari was filed on January 15, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a consummated merger of two of the only three firms that produce and sell battery separators—microporous membranes installed between the positive and negative plates in flooded lead-acid batteries to prevent electrical short circuits—to customers (battery manufacturers) in North America. Petitioner, through its Daramic division, manufactures battery separators for a variety of applications, including deep-cycle batteries (used in products such as golf carts and floor scrubbers), motive power batteries (used in mobile industrial products such as forklifts), and automotive starter-lighter-ignition (SLI) batteries. Microporous Products L.P., whose acquisition by petitioner is at issue here, was the only other supplier of separators for deep-cycle and motive batteries in North America. The only other supplier of separators for flooded lead-acid batteries in North America is Entek, which produces only SLI battery separators. Pet. App. 2a-3a, 22a-24a.

Before it was acquired, Microporous also was competing for SLI business, although it did not yet have sales in that market. Microporous first took steps to enter the SLI separator market in 2003, after the world's largest automotive battery manufacturer, Johnson Controls (JCI), approached Microporous about supplying SLI separators to create more competition in that market. When petitioner—then JCI's supplier of SLI separators in Europe—learned that Microporous was bidding on a portion of JCI's SLI business, petitioner used the threat of cutting off its supply to JCI in Europe to secure a long-term supply contract with JCI. JCI nonetheless continued to work with Microporous to develop an additional source of SLI separators, and after it test-

ed samples from Microporous, it qualified Microporous's SLI separators for its batteries in 2007. JCI later entered into a supply contract with Entek for SLI separators when its contract with petitioner expired. Pet. App. 4a-5a, 62a-63a, 372a-373a, 396a.

Microporous also began discussions in 2007 with two other manufacturers of automotive batteries, Exide and East Penn Battery, about supplying SLI separators. Microporous and Exide entered into a memorandum of understanding, which documented their intention that Microporous would supply SLI separators to Exide beginning in 2010. East Penn Battery, a customer of petitioner's, also was interested in entering into a long-term contract with Microporous for SLI separators. When petitioner learned of Microporous's overtures to East Penn Battery, petitioner offered price concessions for its SLI and other battery separators to keep East Penn Battery's business. Pet. App. 5a, 62a, 78a-79a, 385a-391a, 423a-424a.[1]

At the same time, Microporous was working to expand its production capacity beyond its existing production plant in Piney Flats, Tennessee. Microporous constructed a plant in Feistritz, Austria, that was equipped to produce either motive or SLI battery separators. The Feistritz plant was completed and scheduled to commence operating in early 2008. Microporous planned to shift production of its motive battery separators for European customers from Piney Flats to Feistritz, allowing it to increase production for its North American customers at Piney Flats. Microporous also

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[1] Petitioner asserts (Pet. 23 n.8) that its concessions did not relate to SLI separators. The testimony of petitioner's own officials, however, established that petitioner was concerned about the loss of East Penn's SLI business. See Pet. App. 418a.

planned to install an additional production line at Piney Flats, which could produce either motive or SLI separators. Pet. App. 6a, 408a-410a, 548a.

Petitioner's executives had long viewed Microporous as a significant competitive threat. In 2003, the president of petitioner's Daramic division put Microporous at the top of his list of possible acquisitions to "[e]liminate price competition." In 2005, Daramic's head of sales warned Daramic's CEO that Microporous's plans for expansion would result in "our loss of current customers or further reduction in our market pricing, hence loss of margins." Over the next two years, the threat of Microporous's expansion was the subject of numerous memoranda by petitioner's executives, who discussed acquiring Microporous as a way to avoid costly competition, including in the SLI separator market. Petitioner's 2008 budget for Daramic projected that without the acquisition, petitioner would lose increasing amounts of business to Microporous and would be forced to reduce prices, but that with the acquisition, petitioner could increase prices. Pet. App. 5a-6a, 79a-82a, 354a, 358a, 401a-404a, 433a-442a.

Petitioner acquired Microporous on February 29, 2008. Within months after the acquisition, petitioner began to announce price increases on sales of its deep-cycle, motive, and SLI battery separators that were not covered by long-term contracts. Pet. App. 24a, 83a-84a, 450a-454a.

2. In September 2008, the Federal Trade Commission (Commission) issued an administrative complaint alleging, as relevant here, that petitioner's acquisition of Microporous may substantially lessen competition or tend to create a monopoly in several relevant markets, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18

(Section 7). After a full administrative trial at which more than 2100 exhibits were admitted and 35 witnesses testified (Pet. App. 175a), an Administrative Law Judge (ALJ) concluded that the acquisition was unlawful. *Id.* at 171a-830a.

3. a. On de novo review, the Commission affirmed the ALJ's determination that the acquisition would substantially lessen competition in three relevant markets: the North American markets for deep-cycle, motive, and SLI battery separators.[2] Pet. App. 22a-107a.

Adopting the ALJ's findings of fact (Pet. App. 25a), the Commission found that, before the acquisition, petitioner and Microporous had been the only competitors in the deep-cycle and motive separator markets, and that the acquisition was therefore a merger to monopoly in those markets. The Commission also found that Microporous had been an actual competitor in the SLI separator market, poised to challenge petitioner and Entek's hold on that market. The Commission based that finding on evidence that (1) Microporous had been actively competing for SLI business, (2) Microporous had made meaningful progress toward supply arrangements with JCI and Exide, and (3) petitioner had viewed Microporous as a competitive threat for SLI business and had responded by lowering its prices. Although petitioner sought to downplay Microporous's incursion into the SLI separator market and argued that Microporous's board of directors did not support the company's SLI expansion plans, the Commission found

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[2] The Commission reversed the ALJ's decision that the acquisition would harm competition in a fourth product market (separators for certain batteries used in computer and telecommunication systems), finding the evidence insufficient to show that Microporous was a participant in that market. Pet. App. 66a-68a.

that the evidence demonstrated otherwise. *Id.* at 60a-65a.

The Commission analyzed the competitive impact of the acquisition in each of these markets, applying "th[e] traditional burden-shifting framework" courts have used in Section 7 merger cases. Under that framework, the government can establish a presumption of liability by showing that a merger will lead to undue concentration in a relevant market, and the burden then shifts to the defendant to rebut the presumption with evidence that competitive harm is unlikely. See *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963) ("[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."). The government can support its prima facie case based on market structure with other evidence showing that anticompetitive effects are likely. See Pet. App. 40a-43a (citing, *inter alia*, *FTC* v. *H.J. Heinz Co.*, 246 F.3d 708, 715-717 (D.C. Cir. 2001); *Chicago Bridge & Iron Co.* v. *FTC*, 534 F.3d 410, 423 (5th Cir. 2008)).

The Commission concluded that a presumption of liability was warranted for each of the three separator markets because the acquisition created a monopoly in the deep-cycle and motive separator markets, and it eliminated Microporous's competitive impact in the SLI separator market, returning that market to an entrenched duopoly. Pet. App. 60a-65a, 68a-76a. The Commission further concluded that the presumption extended to both unilateral effects and coordinated effects.

See *id.* at 85a ("By eliminating Microporous as a third player in the SLI market, the acquisition increased the likelihood of anticompetitive coordinated effects [on the part of petitioner and Entek]."); *id.* at 85a-86a (rejecting petitioner's arguments in rebuttal on that point). The Commission also found, in the alternative, that a prima facie case for liability with respect to the SLI separator market was established by the acquisition's elimination of potential competition in that market. *Id.* at 75a n.41.

Even apart from these inferences based on market structure, the Commission found "strong qualitative evidence of anticompetitive unilateral effects in the deep-cycle, motive, and SLI markets." Pet. App. 84a. In particular, the Commission determined that pre-acquisition competition between petitioner and Microporous had resulted in lower prices in each of the three markets, and that petitioner had been motivated to acquire Microporous at least in part to eliminate competition. The Commission also relied on actual anticompetitive effects, finding that, after the acquisition, petitioner had promptly announced price increases consistent with those projected in its pre-acquisition documents. *Id.* at 76a-84a. The Commission went on to reject petitioner's rebuttal arguments that "entry [by other firms] and power [exercised by large] buyers would counteract any potential anticompetitive effects from the acquisition." *Id.* at 87a; see *id.* at 87a-95a.

b. Commissioner Rosch concurred. Pet. App. 108a-117a. He explained that, although he agreed with the Commission's analysis, the case could also be resolved simply "on the direct evidence of competitive effects, including the parties' motives for the merger and their post-merger behavior." *Id.* at 108a. He noted that "[t]he ultimate inquiry * * * is whether the transac-

tion is likely to result in anticompetitive effects." *Id.* at 109a. Commissioner Rosch further explained that, "[i]n the case of a consummated merger, which this is, there is generally no need to predict whether the transaction is likely to result in anticompetitive effects because that will be apparent from what has actually occurred." *Id.* at 111a; see *id.* at 114a (explaining that "[e]vidence about what actually happened following the transaction may * * * reduce the need to employ economic theories in order to predict the relevant market or what is likely to happen").

Applying that approach, Commissioner Rosch found "two types of evidence [to be] particularly helpful in illuminating the transaction's effects: [Petitioner's] documents describing the transaction's purpose, and post-merger price increases." Pet. App. 115a. As to the former, he noted that "[b]oth the ALJ and the Commission found that [petitioner's] documents established that [petitioner] acquired Microporous (1) to eliminate a key competitive threat in the motive, deep cycle, and SLI separator markets; (2) to eliminate a threat to its revenues and profits; and (3) to enable price increases." *Id.* at 116a (citing *id.* at 79a-82a). As to the latter, he noted that "[b]oth the ALJ and the Commission opinion also found that [petitioner] announced significant and wide-ranging post-acquisition price increases that were consistent with its pre-acquisition intent documents." *Ibid.* (citing *id.* at 83a-84a).

c. To restore the competition lost through the acquisition, the Commission ordered petitioner to divest the assets it had acquired from Microporous, including the plant in Feistritz, Austria. The Commission found that, although the Feistritz plant was located abroad, divestiture of the plant would be necessary to give the acquirer

of the divested assets the ability to compete effectively within the relevant North American markets. In particular, including the Feistritz plant in the divested assets would relieve the same capacity constraints that Microporous itself had faced before it constructed the Feistritz plant, and it would give the acquirer the same ability to offer customers a global supply that Microporous would have been able to offer. Pet. App. 96a-105a.

4. The court of appeals affirmed. Pet. App. 1a-21a. The court upheld the Commission's factual findings, including the Commission's assessment of the extent and competitive impact of Microporous's activities in the SLI separator market. In particular, the court found petitioner's challenges to the Commission's factual findings to be "wholly without merit"

> with respect to whether Microporous's dealings with JCI, Exide, and East Penn involved the SLI market; with respect to whether Microporous's board of directors was on board with the expansion plans of management; with respect to the imminent capability of Microporous to supply the SLI market; and with respect to whether before acquisition, [petitioner] did in fact act in procompetitive ways (in the SLI market as well as the other two markets) in response to Microporous's dealings in the market.

Id. at 15a n.11.

The court rejected petitioner's argument "that the Commission erred * * * [in] treating Microporous as an actual competitor in the SLI separator market rather than a potential competitor." Pet. App. 8a; see *id.* at 8a-16a. The court explained that the merger here resembled the merger this Court condemned in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964). The court of appeals noted that in *El Paso*, prior to the ac-

quisition, the acquired firm had made efforts to sell in the relevant market, and that those efforts, though unsuccessful, had induced the acquiring firm to reduce its prices in that market. See Pet. App. 10a. The court of appeals pointed out the factual resemblance of this case:

> Like the acquired company in *El Paso* that was already enaged in the business of selling gas in other markets, Microporous was already making similar separators. * * * It had begun discussions with several companies and had produced a sample product satisfactorily for at least one large customer. It had even submitted quotes and entered into memoranda of understanding with another large customer. Both [petitioner] and El Paso certainly considered the companies that they acquired to be competitive threats. Both companies lowered their prices and gave other concessions in response to their customers' dealings with the acquired companies.

Id. at 11a.

The court of appeals further explained that the acquisitions in *El Paso* and in this case had similar effects on the market structures:

> In both cases, the pre-acquisition relevant market was highly concentrated. In both cases, the acquisition ensured a continuation of the high concentration and eliminated the decrease in concentration that would result from the acquired company's entry into the market. In both cases, the pre-acquisition market activity by the acquired company—although resulting in no actual sales—had a substantial, actual pro-competitive effect on the market. In both cases, the perception by the acquiring company of the competitive threat posed by the acquired company pro-

> vided additional evidence of the acquired company's competitive presence.

Pet. App. 12a (footnotes ommitted). The court of appeals added that, in light of petitioner's post-acquisition price increases, the government's case was stronger here than in *El Paso*. *Id.* at 13a.

The court of appeals noted that, although this Court in *El Paso* itself had not described the acquired company in that case as an actual competitor, the Court had later explained in *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974), that "*El Paso* was an actual competitor case, rather than a potential competitor case." Pet. App. 13a; see *Marine Bancorporation*, 418 U.S. at 623 n.24 ("The merger declared unlawful in *El Paso* removed not merely a potential, but rather an actual, competitor.") (internal quotation marks and citation omitted). The court of appeals held that, because the acquisition at issue here had likewise eliminated an actual competitor, the Commission had correctly relied on *Philadelphia National Bank* in presuming that the acquisition substantially lessened competition in the SLI separator market. Pet. App. 13a-14a. The court noted that petitioner had "not pointed to any evidence that negates this evidence of anticompetitive effect," and it accordingly affirmed the Commission's determination. *Id.* at 15a. The court of appeals did not decide whether the Commission's determination with respect to the SLI separator market could also have been supported by an analysis treating Microporous as a potential competitor. *Id.* at 16a n.12.[3]

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[3] The court of appeals went on to consider petitioner's challenges to the Commission's analysis of the deep-cycle and motive separator markets. The court found that substantial evidence supported the

The court of appeals affirmed the Commission's remedial order, holding that the Commission had properly exercised its discretion in requiring divestiture of Microporous's Feistritz plant. Pet. App. 19a-21a. The court noted that this requirement was supported by the Commission's findings that divestiture of the Feistritz plant would be necessary to provide the acquirer of the divested assets the ability to compete effectively within the North American market, by relieving capacity constraints that Microporous had remedied by constructing the Feistritz plant, and by giving the acquirer the same advantages of a global supply that Microporous was able to offer its customers once it constructed the Feistritz plant. *Ibid.* Finally, the court declined to entertain petitioner's argument that the Commission had erred in refusing to allow a "safety valve" permitting petitioner to withhold the Feistritz plant from divestiture under certain circumstances. *Id.* at 21a n.13. The court explained that petitioner had failed to raise that issue before the Commission and had not properly presented it in its briefing on appeal. *Ibid.*

ARGUMENT

1. Petitioner primarily argues (Pet. 13-22) that the court of appeals erred in treating its acquisition of Microporous as the elimination of an actual rather than a potential competitor in the SLI separator market. Petitioner questions the court of appeals' reliance on *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964), and *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974), and the Commission's use of the pre-

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Commission's determinations that the acquisition was an unlawful merger to monopoly in both of these markets. Pet. App. 16a-19a. Petitioner does not renew those challenges in this Court.

sumption of liability arising from analysis of market structure that this Court established in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963). The court of appeals correctly upheld the Commission's analysis, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is unwarranted.

a. Contrary to petitioner's contention, the court of appeals properly relied on *El Paso* to conclude that the acquisition at issue here eliminated an actual competitor in the SLI separator market.

i. The Court in *El Paso* addressed El Paso's acquisition of a rival natural gas supplier (Pacific Northwest) that was undertaking to expand into a market supplied by El Paso. A California utility (Edison) had approached Pacific Northwest, which at that time had not made actual sales in the California market, about supplying natural gas. When Edison and Pacific Northwest reached a tentative agreement, El Paso responded by lowering its price and offering a firm supply of gas (as opposed to the intermittent supply that it had been providing) to Edison. As a result, the tentative agreement between Pacific Northwest and Edison was terminated, and no sales pursuant to that agreement were made. Shortly thereafter, El Paso and Pacific Northwest reached an agreement through which El Paso acquired 99.8% of Pacific Northwest's outstanding stock. *El Paso*, 376 U.S. at 654-655.

This Court held that the acquisition violated Section 7 because it had eliminated a competitor that was shown to have been a "substantial factor" in the California market. *El Paso*, 376 U.S. at 658. The Court emphasized that Section 7 was concerned with "probabilities, not certainties," *ibid.*, and was intended "to arrest the

trend toward concentration, the *tendency* to monopoly, before the consumer's alternatives disappeared through merger," *id.* at 659 (quoting *Philadelphia Nat'l Bank*, 374 U.S. at 367). The fact that Pacific Northwest had not made actual sales in the California market was not dispositive because "[u]nsuccessful bidders are no less competitors than the successful one." *Id.* at 661.

The court of appeals cataloged the deep resemblance between *El Paso* and this case, see pp. 10-11, *supra*, including the fact that Microporous's pre-acquisition activities in the SLI separator market, like Pacific Northwest's activities in California, had a "substantial, actual pro-competitive effect on the market," Pet. App. 12a. Having recognized those factual parallels, the court of appeals properly relied on *El Paso* to uphold the Commission's decision. The court explained that in both cases, elimination of the acquired company's actual competitive presence in the market likely substantially lessened competition and thus violated Section 7. See *id.* at 11a-14a.

Petitioner observes that, at the time of the acquisition at issue here, Microporous had not made actual sales of SLI separators, "had no firm offers or contracts to supply" SLI separators, and had not formulated an "approved business plan to enter" the SLI separator market. Pet. 13. Petitioner posits a "stark contrast" between those facts and the circumstances in *El Paso*, noting that Pacific Northwest had decided to enter the California market and was acting on its plan. Pet. 15. It appears, however, that Pacific Northwest also had no "firm offers or contracts" to supply natural gas in California at the time it was acquired by El Paso. The acquired entities in both cases had made concrete plans to enter the relevant markets, and were regarded by the

acquiring companies as significant competitive threats, even though the nascent competitors had not yet made actual sales in those markets.

The Commission's findings show that Microporous was as vigorous a competitor in the SLI separator market as Pacific Northwest was in the California natural gas supply market when the respective firms were acquired. The Commission found that (1) Microporous had developed an SLI separator and had bid on a portion of JCI's business; (2) Microporous had entered into a memorandum of understanding with Exide to supply SLI separators, and Exide intended to purchase Microporous's SLI separators when its existing supply contract expired in 2010; (3) Microporous was installing a new production line at its Tennessee plant that could produce SLI separators; (4) Microporous's board of directors was in accord with management's plans to supply the SLI separator market; and (5) petitioner itself considered Microporous a sufficiently serious competitive threat to its SLI business that it made price concessions to East Penn in response to Microporous's discussions with East Penn about an SLI supply contract. See Pet. App. 4a-6a, 11a-12a, 61a-65a. The court of appeals found petitioner's challenges to these and similar factual findings to be "wholly without merit." *Id.* at 15a n.11.

ii. The Court in *El Paso* did not identify Pacific Northwest as an "actual" competitor in the California market and indeed used the term "potential competitor." 376 U.S. at 659. This Court later made clear, however, that "*El Paso* was in reality * * * an actual-competition rather than a potential-competition case," *Marine Bancorporation*, 418 U.S. at 623. The Court relied (*id.* at 623 n.24) on Professor Turner's explanation:

> [T]he acquisition of Pacific Northwest removed not merely a potential, but rather an actual, competitor. Of course, the extent of Pacific Northwest's probable future influence on the market for natural gas in California was not certain. * * * But barring some exceptional proof that future events would minimize or eliminate the competitive significance of a merging firm, it was certainly reasonable to conclude that at least as of the time of the acquisition the merger would probably have resulted in a substantial lessening of competition.

Donald P. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev., 1313, 1371 (1965) (*Conglomerate Mergers*). The Court in *Marine Bancorporation* further explained that "[t]he degree of entry that the acquired firm had achieved into the market of the acquiring firm"—referring to Pacific Northwest's tentative supply agreement with Edison and to El Paso's competitive response to retain Edison as a customer—"distinguishes *El Paso* from subsequent cases truly presenting a potential-competition situation." 418 U.S. at 624 n.24. The court of appeals was faithful to that understanding of *El Paso* when it recognized that Microporous's dealings with SLI separator customers, and petitioner's competitive response to those dealings, signaled that petitioner's acquisition of Microporous eliminated an actual competitor from the SLI separator market.

Petitioner argues (Pet. 18) that *Marine Bancorporation* is "not helpful as legal guidance" because it has "blurred the important doctrinal line" between mergers of actual competitors and mergers of potential competitors. Although the pre-acquisition competitive posture of the acquired firm is an important consideration in a

Section 7 case, petitioner's criticism of *Marine Bancorporation* is unfounded. As leading commentators have explained, "a firm that submits bids against the dominant firm but loses is clearly an 'actual' competitor, perhaps even forcing the dominant firm to lower its bid in the face of a rival bidder." 4 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 912a, at 59 (3d ed. 2009) (*Antitrust Law*).

As this Court in *Marine Bancorporation* recognized, Pacific Northwest's pre-acquisition activities in *El Paso* had precisely that effect. Although Pacific Northwest had not yet made actual sales in the California market, its efforts to compete in that market had "compell[ed] the acquiring firm [El Paso] to make significant price and delivery concessions in order to retain [an important] customer." *Marine Bancorporation*, 418 U.S. at 624 n.24. The Commission and the court of appeals correctly recognized that the same is true here.[4]

Petitioner points out that this Court (or individual Justices) had, in cases before *Marine Bancorporation*,

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[4] It may sometimes be a close question whether a firm's entry overtures are more fairly deemed actual competition or a sign of potential competition. See, *e.g.*, 5 *Antitrust Law* ¶ 1123a, at 60 ("[T]he acquisition [in *El Paso*] removed not merely a potential but also an actual competitor. * * * Although the impact was direct and clearly substantial in *El Paso*, in other situations it may be very uncertain."); *Conglomerate Mergers*, 78 Harv. L. Rev. at 1371 ("[I]n the absence of the kind of direct proof found in *El Paso*, it obviously becomes more difficult to determine the existence and substantiality of the competitive influence of a firm not actually selling in the market."). This case is not an "uncertain" or "difficult" one, however, given the ample "direct proof" (*ibid.*) of Microporous's actual competition that the Commission and the court of appeals cataloged below. In any event, this Court has unequivocally rejected petitioner's proposed bright-line rule that status as an "actual competitor" requires actual sales in the relevant market.

referred in passing to *El Paso* as involving a potential competitor. Petitioner suggests that these cases undermine *Marine Bancorporation*'s characterization of *El Paso* as involving the elimination of actual competition. See Pet. 17 (citing *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 536 n.13 (1973); *United States* v. *Penn-Olin Chem. Co.*, 378 U.S. 158, 170 (1964); *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 586 (1967) (Harlan, J., concurring)). But the Court that decided *Marine Bancorporation* was well aware of what it had said in those earlier cases. In the very sentence after it described *El Paso* as "an actual-competition rather than a potential-competition case," the Court cited *Falstaff Brewing*, *Penn-Olin*, and *Procter & Gamble* as "defin[ing]" the "potential-competition doctrine." *Marine Bancorporation*, 418 U.S. 623-624 & n.25. In none of those decisions, moreover, did the Court suggest that a firm like Microporous—which had developed products, courted customers, made unsuccessful bids for their business, and prompted a competitive response from its rival—should be regarded as anything less than an actual competitor.

The Court in *Marine Bancorporation* recognized that "[t]he term 'potential competitor'" had been used in *El Paso*, but stated that "*El Paso* was *in reality* * * * an actual-competition case." 418 U.S. at 623 (emphasis added). The Court's reference to *El Paso* as an "actual-competition case" thus was not an unconsidered use of imprecise language. To the contrary, the evident purpose of the Court's discussion was to acknowledge the imprecision of its *prior* language, while rejecting unambiguously the very reading of *El Paso* that petitioner advances here—*i.e.*, that actual sales by a competitor in

the relevant market are a prerequisite to "actual competition."

iii. Petitioner contends (Pet. 18-19) that the decision below conflicts with decisions of several circuits. Petitioner's only basis for its claim of conflict, however, is that other courts of appeals have occasionally referred to *El Paso* as a potential-competition case, notwithstanding this Court's disavowal of that reading in *Marine Bancorporation*. None of the cases petitioner cites involved facts resembling those found by the Commission here, and none addressed whether the acquisition of a firm actively seeking business (but without actual sales) in the relevant market is properly analyzed as the acquisition of an actual competitor.

b. In a related vein, petitioner contends (Pet. 20-22) that Microporous's lack of actual sales in the SLI separator market renders inoperative the *Philadelphia National Bank* presumption of liability—"that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market * * * [presumptively] must be enjoined," 374 U.S. at 363. Petitioner construes *Philadelphia National Bank* too narrowly, and its claim of a division of authority among lower courts is unfounded.

i. Petitioner does not dispute that, in important respects, the acquisition here presents a paradigmatic case for applying the *Philadelphia National Bank* presumption. Petitioner's acquisition of Microporous returned the SLI separator market to an entrenched duopoly, among the most concentrated market structures possible. Under those conditions, where "concentration is already great, the importance of preventing even slight increases in concentration and so preserving the

possibility of eventual deconcentration is correspondingly great." *Philadelphia Nat'l Bank*, 374 U.S. at 365 n.42. That concern is especially acute when a nascent rival is the target of the acquisition. See 4 *Antitrust Law* ¶ 912a, at 59-60 ("The acquisition by an already dominant firm of a new or nascent rival can be just as anticompetitive as a merger to monopoly. * * * [T]he acquisition eliminates an important route by which competition could have increased in the immediate future. It thus bears a very strong presumption of illegality that should rarely be defeated."). Petitioner does not contend in this Court, moreover, that it could rebut the *Philadelphia National Bank* presumption if that presumption applies.

Instead, petitioner's objection to applying the *Philadelphia National Bank* presumption rests on its view that the acquisition at issue here did not "result[] in a significant increase in the concentration of firms in th[e] market," 374 U.S. at 363. See Pet. 21 ("[A] firm not yet supplying customers in the relevant market at the time of the merger (like Microporous in the SLI market) has a market share of zero, and thus, by definition its combination with a firm already participating in the market cannot increase the level of concentration."). Petitioner's analysis is flawed because it assumes that an "increase in the concentration of firms" (in the sense in which that phrase is used in *Philadelphia National Bank*) can be measured only by shares of actual past sales.

To be sure, relying on shares of actual past sales to project future market shares, and in turn to assess the concentration of a market, is one way to detect an increase in concentration. The Court in *Philadelphia National Bank* analyzed the increase in concentration

from the bank merger there by reference to the existing firms' percentages of "control * * * of the area's commercial banking business." 374 U.S. at 365. The Court concluded that "these percentages raise an inference that the effect of the contemplated merger of [the firms] may be substantially to lessen competition." *Ibid.* The Court in *Philadelphia National Bank* did not suggest, however, that this comparison is the *only* permissible way to determine whether an acquisition of one firm by another will increase concentration in the relevant market. Rather, the analysis used by the Court to compare pre- and post-merger concentration simply reflected the theory and evidentiary proof advanced by the United States in that case. See *id.* at 334, 364-365.

An increase in market concentration can properly be identified by other measures, such as a reduction in the number of independent firms vying for business in a market. Cf. *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 769 (1984) (explaining that concerted action is condemned by Section 1 of the Sherman Act, 15 U.S.C. 1, because it "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands"). That was the core of the Commission's analysis of the SLI separator market: "The acquisition eliminated the impact that Microporous had on competition in the market and returned the market to a duopoly controlled by the two long-time incumbents." Pet. App. 75a. Likewise, the court of appeals concluded that petitioner's acquisition of Microporous "did increase concentration in that it eliminated the pre-acquisition influence on the market exercised by Microporous" and, indeed, "eliminated the competition in the market which [petitioner] itself contemplated." *Id.* at 14a n.9. Because the Commission and the court of ap-

peals properly found an increase in concentration in an already highly concentrated market, they were correct to rely on the *Philadelphia National Bank* presumption.[5]

ii. Petitioner contends that the decision below conflicts with decisions it characterizes as holding that the *Philadelphia National Bank* presumption applies "only [to] mergers of current competitors." See Pet. 22 (citing *United States* v. *Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990) (Thomas, J.); *United States* v. *Waste Mgmt., Inc.*, 743 F.2d 976 (2d Cir. 1984)). There is no conflict. Petitioner asserts that those decisions treat as "current competitors" only "firms that are direct and current rivals." Pet. 22 & n.7. The Commission found, however, that Microporous *was* in every relevant sense petitioner's "direct and current rival," having competed to win the business of petitioner's existing customers, and having thereby induced petitioner to make pricing concessions it would not otherwise have made.

Petitioner's claim of a conflict with the cited decisions appears to rest on the premise that petitioner and Microporous could not have been "current competitors" in the SLI separator market because Microporous had made no actual sales in that market prior to the acquisition. Neither of the decisions that petitioner cites, however, endorsed that line of reasoning or addressed the

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[5] Contrary to petitioner's contention (Pet. 22), the fact that *El Paso* did not expressly invoke the *Philadelphia National Bank* presumption does not render unsound the court of appeals' reliance on both cases together. If anything, the *El Paso* Court's swift decision to condemn the acquisition there, based upon a finding that the acquisition eliminated a firm that had been a "substantial factor" in the relevant market, 376 U.S. at 658, illustrates how far *El Paso* and this case lie from the margin at which the *Philadelphia National Bank* presumption might be outcome-determinative.

application of the *Philadelphia National Bank* presumption to the acquisition of a rival that was competing for business in the relevant market but that had not yet made actual sales. Rather, both *Baker Hughes* and *Waste Management* concerned the factual and legal standards for *rebutting* a concededly sufficient prima facie case under *Philadelphia National Bank*. See *Baker Hughes*, 908 F.2d at 982-984; *Waste Mgmt.*, 743 F.2d at 981-984.

c. For two reasons, this case would be a poor vehicle for resolving the legal questions of Section 7 liability that petitioner presents with respect to the SLI separator market, even if those issues otherwise warranted this Court's review.

First, the Commission's finding of liability in the SLI separator market relied not only on the *Philadelphia National Bank* presumption, but also on direct evidence of the acquisition's anticompetitive effects, including evidence that petitioner had increased prices for SLI separators after the acquisition. See Pet. App. 13a, 76a-84a. The Commission principally relied on that evidence to "corroborate[]" its use of the *Philadelphia National Bank* presumption, see *id.* at 84a, but the evidence is powerful even standing alone. Indeed, as Commissioner Rosch's concurring opinion explained, the unlawfulness of petitioner's acquisition of Microporous was evident simply from "the direct evidence of competitive effects, including the parties' motives for the merger and their post-merger behavior." *Id.* at 108a; see 108a-117a. Commissioner Rosch's observations make especially clear why a case involving a consummated merger is a relatively unattractive vehicle for addressing the application of a predictive presumption like the one endorsed in *Philadelphia National Bank*. As he explained, "[i]n

the case of a consummated merger, which this is, there is generally no need to predict whether the transaction is likely to result in anticompetitive effects because that will be apparent from what has actually occurred." *Id.* at 111a.[6]

Second, even if the Court granted certiorari and ruled in petitioner's favor on the Section 7 liability issue presented by the petition, petitioner would not likely derive any long-term practical benefit from the Court's decision. The Commission's remedial order does not depend exclusively on its finding of a violation of Section 7 with respect to the SLI separator market. Independent of its analysis of that market, the Commission found, and the court of appeals affirmed, that the acquisition violated Section 7 with respect to the deep-cycle and motive separator markets because it created an outright monopoly in those markets. Pet. App. 16a-19a, 61a, 74a-76a. Petitioner does not seek this Court's review of those determinations, which on their own would support the Commission's remedial order.

That order directs petitioner to divest Microporous's Piney Flats plant, which produced separators for the deep-cycle and motive separator markets. The order also directs petitioner to divest Microporous's Feistritz plant, which (as explained below, pp. 26-27, *infra*) is necessary to allow the acquirer to compete effectively

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[6] Although proof of actual anticompetitive effects from a consummated merger is an independently sufficient basis for condemning the merger under Section 7, such proof is not required. See *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 505 (1974) ("[T]he mere nonoccurrence of a substantial lessening of competition in the interval between acquisition and trial does not mean that no substantial lessening will develop thereafter; the essential question remains whether the probability of such *future* impact exists at the time of trial.").

for North American customers—including motive and deep-cycle customers. See Pet. App. 101a-103a. Those considerations would warrant complete divestiture to fully restore the competition eliminated in the motive and deep-cycle separator markets, regardless of petitioner's liability as to the SLI separator market.

To be sure, if this Court were to vacate or reverse the Commission's Section 7 liability determination with respect to the SLI separator market, principles of administrative law likely would require that the Commission, not this Court, pass in the first instance on whether the Commission's liability finding could be reinstated on other grounds and whether its remedial order would stand undisturbed. See *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). But the strong likelihood that the Commission would ultimately make the same Section 7 liability finding and impose the same remedy counsels against discretionary review by this Court. That is especially so because further review would give petitioner the windfall of a continued monopoly position while the divestiture order remains suspended by operation of law, see 15 U.S.C. 21(b), 45(g)(4).

2. Petitioner asks this Court to grant review "to clear the tangled underbrush from the orchard of the potential competition doctrine." Pet. 28. Because the court of appeals agreed with the Commission that the acquisition eliminated petitioner's actual competitor in the SLI separator market, the court did not address whether the acquisition could also have been condemned on an analysis that treated Microporous as a potential competitor. Pet. App. 16a n.12. Because this is "a court of final review and not first view," *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) (quoting *Adarand Construc-*

tors, Inc. v. *Mineta*, 534 U.S. 103, 110 (2001)), that question is not suitably presented in this case.

Petitioner acknowledges, moreover, that the question is not independently certworthy. Petitioner states that the "alternative basis [for the Commission's decision] w[ould] be at issue in this case" only if this Court reviewed and rejected the Commission's principal framework for analyzing the acquisition. Pet. 23. For the reasons given above, the primary question petitioner presents does not warrant review.

3. Petitioner contends (Pet. 28-34) that the decision below implicates a disagreement among the courts of appeals about the Commission's authority to order divestiture of assets outside the relevant market. The court of appeals correctly upheld the Commission's remedial order, and no circuit conflict exists.

a. Petitioner asserts that the court of appeals upheld the Commission's authority to order the divestiture of an asset that "bears no logical relation" to the competitive harm found (here, the elimination of competition in North American separator markets). Pet. 28. That assertion mischaracterizes the Commission's rationale for the scope of its remedial order and the court of appeals' reasons for upholding that order. As the court below recognized, the Commission included Microporous's Feistritz plant in its divestiture order so that the acquirer of the divested assets could compete effectively *within the North American markets*. This aspect of the Commission's remedy therefore had the necessary connection to the competitive harm that the divestiture order was intended to address.

The Commission found that, when Microporous produced motive separators for its foreign customers at its Piney Flats plant, capacity constraints limited its ability

to compete for additional North American business. Construction of the Feistritz plant promised to relieve the Piney Flats plant of the burden of production for European customers, enabling Microporous to commit to additional North American sales and making it a more effective competitor in North America. See Pet. App. 20a-21a. The Commission separately found that including the Feistritz plant in the divestiture package would allow the acquirer to compete on terms demanded by customers, such as having multiple plants as insurance against supply disruptions and the ability to provide local supply points for customers' global operations. The Commission therefore determined that divestiture of the Piney Flats plant alone would not produce an adequate substitute for the more attractive competitor lost through the unlawful acquisition. See *id.* at 98a-105a. Although petitioner disputes those factual findings, that factbound dispute would not warrant this Court's review. In any event, ample evidence supports those findings. See *id.* at 99a-105a, 412a-415a, 549a-551a.

b. Contrary to petitioner's contention (Pet. 31-34), the decision below does not reflect legal disagreement among lower courts about the scope of the Commission's remedial authority. To be sure, some courts have modified ancillary provisions of Commission remedies found to be unrelated to the violation. See *Beatrice Foods Co.* v. *FTC*, 540 F.2d 303, 313-314 (7th Cir. 1976); *Seeburg Corp.* v. *FTC*, 425 F.2d 124, 129-130 (6th Cir.), cert. denied, 400 U.S. 866 (1970); *Abex Corp.* v. *FTC*, 420 F.2d 928, 933 (6th Cir.), cert. denied, 400 U.S. 865 (1970). But the court below did not question its own authority to insist that the Commission's chosen remedy have a reasonable nexus to the competitive harm sought to be addressed. Rather, the court simply recognized that di-

vestiture of the Feistritz plant was a reasonable means of protecting competition in the relevant North American markets. The fact that the court below upheld the Commission's remedial order, while other court of appeals reviewing unrelated Commission orders have sometimes reached different results, is not evidence of a circuit conflict.

The decision below is consistent, in particular, with the Fifth Circuit's decision in *Chicago Bridge & Iron Co.* v. *FTC*, 534 F.3d 410 (2008), on which petitioner principally relies (see Pet. 31-33). The court in *Chicago Bridge* upheld a Commission order requiring the divestiture of assets for building water tanks, even though the relevant product market was cryogenic tanks, because cryogenic tank sales were irregularly timed and water tank sales would provide the regular income stream needed for the divestiture buyer's viability. The Fifth Circuit thus recognized that the Commission may appropriately order divestiture of assets outside the relevant market if divestiture of those assets is necessary to restore competition within the relevant market. *Id.* at 441-442. The court of appeals' decision in this case reflects the same basic principle.

Petitioner emphasizes that the Commission included in the *Chicago Bridge* remedial order, but not in the remedial order at issue here, a provision allowing the exclusion of certain assets from divestiture if the acquirer and monitor trustee both found them unnecessary. See Pet. 32. Such a narrow and subsidiary quarrel with the precise terms of a divestiture order does not present a matter of recurring importance warranting this Court's review. And the fact that two courts of appeals have sustained Commission remedial orders having

slightly different parameters does not suggest the existence of a circuit conflict.

In any event, the court below properly declined to reach the question whether the remedial order at issue in this case should have included a *Chicago Bridge*-like provision. The court explained that petitioner had forfeited that challenge by failing to raise it before the Commission or in its initial brief on appeal. Pet. App. 21a. This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). The Court should adhere to that rule here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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