IN THE SUPREME COURT OF THE UNITED STATES

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ILLINOIS TOOL WORKS INC., :

ET AL., :

Petitioners :

v. : No. 04-1329

INDEPENDENT INK, INC. :

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Washington, D.C.

Tuesday, November 29, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

ANDREW J. PINCUS, ESQ., Washington, D.C.; on behalf of the Petitioners.

THOMAS G. HUNGAR, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

KATHLEEN M. SULLIVAN, ESQ., Redwood Shores, California; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first in Illinois Tool Works Inc. v. Independent Ink, Inc.

Mr. Pincus.

ORAL ARGUMENT OF ANDREW J. PINCUS

ON BEHALF OF THE PETITIONERS

MR. PINCUS: Thank you, Mr. Chief Justice, and may it please the Court:

In its opinion in Jefferson Parish, the Court stated that the key characteristic of illegal tying is the seller's exploitation of its control over the tying product to force the purchase of the tied product. The Court held that the per se rule against tying applies only if the plaintiff proves that the seller has -- and I'm quoting from that opinion. The quote is on page 12 of our brief -- the special ability, usually called market power, to force the purchaser to do something that he would not do in a competitive market.

If the Court were confronted today for the first time with the question whether the presence of a patent on some aspect of the tying product by itself demonstrates the existence of this forcing power, it's inconceivable that the Court would adopt that rule.

Not only is there no empirical evidence to support it, there's no logical basis for such a presumption.

The focus of patent rights is very different from antitrust market analysis. Patent rights are tied to a particular invention. Market power is buyer-centric. A buyer may be able to choose from a number of different products, some patented, some not, to satisfy his or her need. The existence of a patent on one of those devices does not preclude at all the existence of alternatives that are equally attractive, maybe even more attractive, to the customer.

JUSTICE O'CONNOR: Let me ask you about patents and tying products. Are there component parts that are patented in today's complicated world, and do they -- do they -- do the component parts become part of the tying product? I mean, how does that work?

MR. PINCUS: Absolutely, Your Honor. One of the -- one of the evils of the presumption is that there's nothing that says that the patent has to be on the entire product. The -- the patent could be on a component of a product. And in today's world, as Your Honor says, television sets, CD devices, cell phones, all of those devices are loaded with components, one of which may happen to be patented. It may not be the one that makes the -- it may not have to do with anything

that makes that product attractive in the marketplace, but the presence of that patent would be relied upon to make the presumption applicable.

JUSTICE O'CONNOR: Well, does the patent somehow spread to cover the larger product? I -- I don't see how it works.

MR. PINCUS: Well, I think -- I think the theory of the application of the presumption is, first of all, obviously, if the whole product is patented, then the presumption would be applicable. But I think there also is an argument that even if some component is -- is patented, that component, because it's in that product, gives that product market power because the theory would go the patent would exclude the ability of other competitors in the market to use that component.

JUSTICE KENNEDY: Well, I suppose -- I suppose we could say -- I just hadn't thought of it. I -- I suppose we -- we could say that it's not a separate product. I mean, no -- no -- there's no market for the -- for the small micro-component in the TV. You're selling a TV.

MR. PINCUS: But then I think the argument --

JUSTICE KENNEDY: It's an -- a very interesting question, but it seems to me that we could handle that by just saying, well, there's not a

separate product.

MR. PINCUS: Well, you could, but I think the question -- the question would be whether that product as a whole in the marketplace, which is -- part of it is made up by this component. The argument would be, if I'm a competitor, I can't duplicate that product because that component is patented, and therefore, that product that contains the patented component should get the benefit of this market power presumption.

JUSTICE GINSBURG: It's not a --

JUSTICE BREYER: Well, why would the person want if he thought that? I mean, why would a person want a patent if, in fact, he didn't think that it gave him the power to raise price above what the price would be in its absence?

MR. PINCUS: Well, Your Honor, at the -- at the time that -- that the inventions are patented, it's not clear -- many inventors don't know what the market value of their product will be.

JUSTICE BREYER: Now, you see, you're talking about the wide -- you -- you say there are a lot of failed patents. The person got it because he thought it would, but he shouldn't have because it actually made no difference.

MR. PINCUS: Well --

JUSTICE BREYER: There might be. I don't know.

MR. PINCUS: Our system encourages -- there -- it -- it certainly is possible there are many patents that -- that are -- there are many inventions that are patented that don't have value in the marketplace. There are some that do. The problem with this --

JUSTICE BREYER: Well, there might be. There's a set of valueless patents.

MR. PINCUS: Yes, but the fact --

JUSTICE BREYER: And in respect to there being a valueless patent, the owner would not be able to raise the price over what it otherwise would be. And why not then make that a defense, that a person could say, I have a valueless patent, and he could introduce evidence to prove it?

MR. PINCUS: Well, Your Honor, I -- I think there are -- there are two answers to that question. First of all, there's no empirical showing and -- and no logical evidence that there -- the set of valuable patents is larger than the set of valueless ones. And, in fact, it's probably the evidence is to the contrary, that the set of valueless patents is quite considerable. So by creating a presumption and

shifting the burden based on something that's demonstrably not true doesn't have a logical basis.

JUSTICE GINSBURG: As I understand the respondent's position, it's not the component. They're not arguing that. So you're answering a hypothetical case that isn't presented here.

And also, respondent says that we are talking only about patents where there is a successful tie. So leave out all those cases where I have a patent and it's never produced a penny, and somehow I can make mileage out of that.

MR. PINCUS: Yes, Your Honor. I -- I think respondent has moved away from -- from the Loew's assertion that the mere existence of a patent shows uniqueness sufficient to -- to satisfy the market power test. And -- and one of the next level presumptions that they propose is that if the -- if the patent ties successful in the marketplace that shows market power. But that's inconsistent with this Court's recognition in -- in a number of cases that ties can be successful in the marketplace not because they're backed by market power, but because they are attractive to consumers in a competitive market.

JUSTICE SOUTER: Well, let's go to --

JUSTICE SCALIA: Mr. Pincus, you -- you had a

second point you were going -- in response to Justice Breyer's question. What was your second point?

MR. PINCUS: Well, my second point, in response to Justice Breyer, if I can recall it, was that in the component situation, which was one of the situations that we were talking about, that the problem with the component test, the presumptions are supposed to be easy to apply. And if you say, well, the entire device has to be patented, then the next case is going to be a case where 85 percent of the key ingredients are patented, 15 percent aren't, and the question will be, does the presumption apply? So you're -- you're setting up a presumption which is designed to -- for ease of application that will become extremely difficult to apply.

JUSTICE SCALIA: Isn't the refutation of the presumption really the same thing as a demonstration of market power?

MR. PINCUS: Yes. The -- the --

JUSTICE SCALIA: And -- and we usually leave the demonstration of market power to the -- to the plaintiff in the case.

MR. PINCUS: Absolutely, Your Honor, and --

JUSTICE SCALIA: So it -- it'd be rather strange to -- to have in this one category of cases the

market power has to be -- or lack of market power has to be demonstrated by the defendant.

MR. PINCUS: It would be extremely strange especially because there's the lack --

JUSTICE STEVENS: Do you think there's a distinction -- do you think there's a distinction between components in cases where there's a one-on-one relationship between the tied product and the tying product and cases like this which involve metering? Do you think there's a different possible approach between the two?

MR. PINCUS: No, Your Honor, we don't because the -- the economic literature --

JUSTICE STEVENS: But your earlier point was we know that a whole lot of patents are not all that important. But is it not fair to assume that when a patent can generate metering in this particular kind of situation, that it -- that it's a likelihood that it has more power than the average patent?

MR. PINCUS: No. I -- I think, A, it's not reasonable to assume that, Your Honor, and it's certainly not reasonable to assume it has the level of market power that Jefferson Parish required, which was significant market power. The Court there held that a 30 percent share of the relevant market was not enough.

So we're talking, in the tying context, of a very considerable market power test.

JUSTICE STEVENS: But if it's -- if it is true, as your opponent says -- and I don't know if it is or not -- that you're able to get twice the price for the ink than you otherwise would get, does that -- is that any evidence of market power?

MR. PINCUS: Well, first of all, that -- that is not -- not true. The record reflects that the --

JUSTICE STEVENS: Well, if it were what the record reflected.

MR. PINCUS: Well, if it were what the record reflected and there was a relevant market that was -- that was restricted to this ink, yes. But we don't think that the existence of a patent, even in the requirements context, fulfills that test for the reason that the economic literature is quite clear that price discrimination, which is what their theory -- their -- their theory is metering should be sufficient to give rise to a presumption because price discrimination supposedly signals market power. But as we discuss in our reply brief, there is a tremendous amount of economic literature that says that is in fact not true, that price discrimination occurs in very competitive markets from airlines to restaurants to coupons.

JUSTICE STEVENS: But isn't it also true that some -- some economists disagree? And I'm just wondering if there's disagreement among economists, should we take one view over the other?

MR. PINCUS: Well, I think the problem, Your Honor, is that the presumption does take one view over another based on -- based on something that was adopted at the time there was no analysis. The presumption says we're going to presume market power, and as Justice Scalia said, we're going to put the entire burden of refuting market power, in this one context, separate from all of antitrust analysis, on the defendant. And we're only going to do it in tying. We're not going to do it in exclusive -- vertical exclusive dealing arrangements where the product is a tie. In that situation, which theoretically should be exactly the same, there's never been a assumption that there should be a market power presumption when the product that's the subject of the exclusive dealing arrangement is patented. Territorial arrangements. There's never been an assertion that that's true.

This -- this is a relic really of the fact that when the Court decided these patent tying cases, there was a hostility to the expansion of -- of intellectual property rights beyond the scope of the

patent. That first was reflected in patent misuse doctrine, and then it was carried over to antitrust doctrine without any analysis about whether the assertion that the patent was unique, and therefore there were anticompetitive effects, had anything to do with the level of anticompetitive effect that the Court required to show an illegal tie.

JUSTICE SOUTER: Mr. Pincus, let me go -- ask you to follow up on that and, in effect, go back to -- to Justice Ginsburg's question. I will assume that patents as such do not give market power. I will assume that there are many successful ties in which that is also not true.

What is -- is your kind of short answer to the -- to the argument, which I think Justice Ginsburg was getting to, that if it is, in fact, worth litigating in an antitrust case, that is a pretty good -- darned good reason to assume that there is market power and that it is, of course, having a discriminatory price effect? What's the short answer to that?

MR. PINCUS: I think the short answer to that, Your Honor, is that there are a lot of antitrust cases that are filed that aren't successful, and there's no reason to believe that just because a

plaintiff files a case, that it is going to be successful. And, in fact, establishing a rule that the filing of the case meets an element is -- is a bit of an attractive nuisance.

JUSTICE SOUTER: I was going to say I --

MR. PINCUS: It's going to attract claims --

JUSTICE SOUTER: -- I would have thought the answer was you could say that in any case in which an antitrust case is -- is brought. So essentially it -- it gets to be reductionist.

MR. PINCUS: Well, and I think it's an attractive nuisance. If that's the rule, if I can satisfy the rule by filing a lawsuit, I'm certainly encouraged to file a lawsuit regardless of whether there's underlying really market power or not because I -- no one will ever -- I won't have to worry about it. The burden will be shifted to my opponent.

JUSTICE SOUTER: In other words, the fact --

JUSTICE KENNEDY: Do you think the existence of the laws of -- of -- the existence of the lawsuit -- of -- of the presumption is what drives a lawsuit?

MR. PINCUS: Yes, exactly, Your Honor.

JUSTICE SOUTER: Well, does it drive the -- I mean, it -- it drives the lawsuit with respect to one

element. And -- and I -- I guess one argument is if -- if we reaffirm the rule that you're challenging, it will invite more lawsuits. They'll say, boy, the Supreme Court really means it with this presumption now.

Has that, in fact, been the case that the presumption, at least as it has been understood up to this point, has driven lawsuits and, in fact, has driven lawsuits that ultimately were unsuccessful even though the market power point was, of course, satisfied?

MR. PINCUS: Well, there certainly have been lawsuits that are unsuccessful, but -- but, Your Honor, one of the problems with our litigation system is many cases are not tried to completion on the merits, especially expensive antitrust cases. So if a case --

JUSTICE SOUTER: Yes, but this is -- this is basically a practical question, and I -- I'm trying to get a -- I guess because I'm not an antitrust lawyer, I'm trying to get a handle on how the presumption is actually working in the system, and I'm not sure that I understand it.

MR. PINCUS: Well, right now I would say the presumption status is somewhat murky. When the -- when the Antitrust Division in the FTC came out with their

guidelines and essentially disavowed and rejected the recognition of a presumption and the Sixth Circuit also rejected the existence of the presumption, there was a -- both a conflict among the courts of appeals and certainly amongst the district courts. And also, you had the Federal regulators saying this presumption doesn't make sense. That, I think, chilled to a large extent -- not completely, but to some extent -- what would otherwise have been -- what would have happened in the lower courts if there had been a full-throated affirmance of the presumption.

And I think the issue now is prognosticating a bit what will happen if the Court were to affirm the presumption. And I think it is a fair assumption that a presumption that says if you file a lawsuit alleging tying of a product that has a patent or is patented, then the filing of the lawsuit plus the patent means that the burden of market power has shifted, then if I'm a competitor trying to put some cost on my competitor in a market, that's a pretty low-cost thing to do because all I do is file the lawsuit. I get the benefit of presumption. They've got to spend the money to disprove market power.

And the market power element is peculiarly important in the tying context because we're dealing

here with a per se rule, although a somewhat peculiar per se rule because it has these four prerequisites. But the market power one is the critical one and certainly one that the Court identified --

JUSTICE BREYER: Suppose it's the other one that's the critical one.

MR. PINCUS: Well, Your Honor, I think the --

JUSTICE BREYER: And the other one being that -- the attack on the problem is there happens to be instances where tying is justified for procompetitive reasons, risk-sharing, maintaining product quality, probably Jerrold Electronics. There are a number of them. And the real problem is that the law hasn't admitted a defense. But where the attack should be is on the tied product, not the tying product. What do you think of that?

MR. PINCUS: Well, Your Honor, I -- I think there obviously is -- a lot of commentators have expressed concern about the -- whether the per se rule makes sense. And -- and Justice O'Connor. writing for four Justices in Jefferson Parish, made exactly that point.

But I think whether or not the per se rule applied, there's no logic underlying this presumption. And -- and at least as the law stands now, the other

elements are their two products. There are a hundred pages in Areeda and Turner --

JUSTICE STEVENS: Can I ask you --

MR. PINCUS: -- with the jurisprudence of two products. So that's not a test that's going to be effective in screening out unjustified claims.

Yes, sir.

JUSTICE STEVENS: Can I ask you how far your position extends? I think there's a good argument that if a patent is really a good patent, it doesn't really matter whether the patentee charges a very high royalty or gets a -- reduces the royalty and gets profits out of the tied -- tied product.

In your view, is the rule sound that if it is a monopoly in the tied product, that there is an antitrust problem?

MR. PINCUS: If there's a monopoly in the tied product?

JUSTICE STEVENS: In -- in the tying product. Excuse me. In the tying product.

MR. PINCUS: All we're asking for is --

JUSTICE STEVENS: I know that's all you're asking for --

MR. PINCUS: -- is the opportunity to demonstrate market power, and if --

JUSTICE STEVENS: -- but I'm just wondering if it isn't -- if it isn't the logical conclusion of your position that it really doesn't matter, even if there is a monopoly in the tying product.

MR. PINCUS: No. If there is a monopoly in the tying product, Your Honor, that's one of the elements that the Court requires. That would be satisfied, and obviously, the existence of the patent would be a factor.

JUSTICE STEVENS: No, but I'm -- I'm asking sort of an economic question rather than a legal question.

MR. PINCUS: Whether even if there was a --

JUSTICE STEVENS: If your position is all the economists say this is a lot of nonsense, I think maybe it's a lot of nonsense even if there's a monopoly in the tying product is what I'm suggesting.

MR. PINCUS: I think there are some that hold that view, Your Honor, but there are some that don't. But all agree that it is critical to show market power in the tying product. If you can't meet that test, there's really no problem. If you can meet that test, then there's a division. Some say there's a problem and some say there's not.

JUSTICE GINSBURG: There was a -- a point

that you were in the process of answering. The -- the argument is made that this tying product had such clout that you were able to extract not twice but three times the price for the tied product. And you were saying no to even double the price.

MR. PINCUS: Yes, Your Honor. As we note in our reply brief, the -- the document that was the basis of respondent's own damages study in this case said that the average price charged by Trident was $85. So there's no proof of that. And the district court specifically found, in fact, that respondent was not relying on so-called direct evidence of market power in this case, such as supracompetitive prices.

I'd like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Pincus.

Mr. Hungar, we'll hear from you.

ORAL ARGUMENT OF THOMAS G. HUNGAR

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

MR. HUNGAR: Thank you, Mr. Chief Justice, and may it please the Court:

The presumption that patents confer market power is counterfactual, inconsistent with this Court's modern antitrust jurisprudence, out of step

with congressional action in the patent area, contrary to the views of leading antitrust commentators and the Federal antitrust enforcement agencies, and unnecessarily harmful to intellectual property rights and procompetitive conduct. For all those reasons, the presumption should be rejected.

There's no plausible economic basis for inferring market power from the mere fact that a defendant has a patent on a tying product. As this Court has recognized, many commercially viable products are the subject of patents that do not confer market power because there are reasonable substitutes. Nor does the combination of a tie in a patent provide a valid basis for presuming market power. The patent may be entirely incidental and tying is ubiquitous in fully competitive markets.

JUSTICE O'CONNOR: Mr. Hungar, is the issue of the presumption, as it applies to copyright, part of the question presented? And do we have to decide that issue here?

MR. HUNGAR: Strictly speaking, it's not, Your Honor, because of course, this is a patent case.

JUSTICE O'CONNOR: Right.

MR. HUNGAR: And the only case in which this Court has actually applied a presumption of economic

power is the Loew's case, which was a copyright case. In fairness, however, Loew's based the presumption that it recognized in the copyright context entirely on the reasoning of the patent misuse cases. So a -- a holding that there is no presumption in the patent context would eviscerate the underlying rationale for Loew's.

Indeed, as we explain in our brief, Congress in our view has already done that because, again, Loew's expressly states that the rationale for the presumption it adopts is that in the patent misuse cases, the Court has -- at that time, had rejected any attempt to extend the monopoly. But Congress, in 1988 in the Patent Misuse Reform Act, overruled those cases and held that there cannot be patent misuse in the absence of an actual showing, based on all the circumstances, of market power. So the rationale and underpinnings of Loew's have been entirely repudiated, which is one of the reasons why we think that this Court ought to make it clear that there is no presumption of market power in a tying case where there --

JUSTICE BREYER: And market power -- you mean price -- ability to charge a price higher than otherwise would be the case?

MR. HUNGAR: As this Court defined market power --

JUSTICE BREYER: As you're defining it. As you're defining.

MR. HUNGAR: Well, yes. The ability to raise price --

JUSTICE BREYER: Fine. Then you're talking about patents where the person who paid for the attorney went to the Patent Office and so forth. That was just a mistake.

MR. HUNGAR: No, Your Honor. Certainly many patents are valueless, which is one of the reasons why --

JUSTICE BREYER: But then are you relying on that, the existence of valueless patents?

MR. HUNGAR: Well, that's -- that's part but not all.

JUSTICE BREYER: If you're going beyond that, which patents are you talking about?

MR. HUNGAR: Patents can be valuable, but not confer meaningful, significant market power. What this Court said in Jefferson Parish is significant market power. I mean, there can be lots of circumstances in which a competitor has the ability for some customers in some circumstances to raise price to some extent,

but we wouldn't consider that significant market power.

And patents can confer value in other ways. For instance, in many high-tech industries in the modern high-tech environment, a patent library is necessary merely in order to get cross licenses from your competitors that would allow each of you to compete. They're fully competitive markets, but without a patent library, you can't get in the door. And all the competitors have their patent libraries and they agree to cross licenses to avoid the -- the inconvenience and cost of patent infringement.

JUSTICE BREYER: No, I see.

JUSTICE O'CONNOR: Mr. Hungar, one of the amicus briefs for the respondent was submitted by a professor, I think, named Barry Nalebuff --

MR. HUNGAR: Yes, Your Honor.

JUSTICE O'CONNOR: -- which took the view that the Court should, in any event, retain the presumption where a patent is being used to impose a variable or a requirements tie. Do you have any comment on that view?

MR. HUNGAR: Yes, Your Honor. We think that's wrong for several reasons.

In the first place, the presumption recognized in Loew's, of course, has nothing to do with

a requirements tie. So, in effect, what that brief is urging the Court to do is not to retain the Loew's presumption but, rather, to create a new one. And there is certainly not the requisite evidentiary basis or consensus among --

JUSTICE STEVENS: Well, it wouldn't be a new one. It would be just following the old IBM case and all those cases.

MR. HUNGAR: Well, Your Honor, those -- those cases don't state a presumption of market power. Market power wasn't even relevant in those days.

JUSTICE STEVENS: No, but that's the example they're saying it would be following. It's not a brand new idea.

MR. HUNGAR: Well, it is a brand new idea in the sense that they would -- they would ask the Court to adopt a presumption of market power, which the Court did not recognize in the IBM case or any of those cases because market power was not a part of the analysis in those cases. It wasn't relevant. It wasn't relevant in the -- even in the International Salt case where the Court -- where the Court later made clear that the -- the ability to prove the absence of market power was deemed irrelevant by the Court in International Salt. Market power's relevance didn't even begin to be

recognized --

JUSTICE STEVENS: But your -- your answer to Justice O'Connor is there should be no distinction even if there is evidence that there's a long-term relationship, a requirements relationship, and an increase in price.

MR. HUNGAR: Well, an increase in price is a separate issue which might or might not, depending on the circumstances, be probative of market power in the -- in the tied product market or, again, depending on the circumstances, it might be probative of market power in the tying market and certainly a plaintiff would be able to rely on such evidence if they could establish it.

But the -- the fact of a requirements tie, standing alone together with a patent, is not meaningfully probative of market power. His thesis is that requirements tie is always used for metering, and metering is evidence of price discrimination, and price discrimination is evidence of market power. But again, there's a great deal of disagreement and, indeed, the majority view is that price discrimination is not necessarily or even usually evidence of market power. In fact, price discrimination is common in entirely competitive

markets such as grocery retailing, airline industry, and many other contexts. So -- so the -- the logic of the -- of the presumption he urges doesn't even hold together, and certainly there isn't the relevant -- the requisite consensus that would justify the fashioning of a new presumption that has never been recognized by the Court before.

The Loew's --

CHIEF JUSTICE ROBERTS: Does the Government have -- I'd like to ask you the same question Justice Stevens asked Mr. Pincus about the broader question. Much of the economic literature on which you rely sort of sweeps aside the particular question today because it rejects the notion of tying as a problem in the first place. But does the Government have a position on that? Assuming there's monopoly power in the tying product, the Government's position is that that still presents an antitrust problem?

MR. HUNGAR: Well --

CHIEF JUSTICE ROBERTS: This is not part of a broader approach to get rid of the tying issue altogether, is it?

MR. HUNGAR: Certainly we have not asked the Court to -- to do that, and that's not necessary to address in this case. The -- they're really two

separate issues. That is, is it -- is it rational to presume market power from the existence of a patent is quite separate and distinct in our view from the question whether it's rational to have a per se tying rule when there is market power. They're completely distinct.

CHIEF JUSTICE ROBERTS: And -- and what is the Government's position on the latter question?

MR. HUNGAR: Well, Justice O'Connor made persuasive points in her concurring opinion in Jefferson Parish in which she explained why, in the view of those Justices, that the per se rule does not make a whole lot of economic sense. We have not taken a position on that question in this case because, in our view, it's not necessary to reach that in order to reverse the judgment below which -- which rests entirely on the presumption.

The Loew's presumption is also, in our view, undermined by this Court's modern antitrust cases, such as Jefferson Parish and Eastman Kodak, because the presumption -- the fact that the Loew's presumption recognizes is not market power in the modern sense of the term, as it is understood and required under Eastman Kodak and Jefferson Parish. Rather, what the Loew's Court said is that uniqueness suffices to

establish the requisite economic power regardless of the ability to control price. The Court specifically said on page 45 of the decision that -- that ability to control price need not be shown. That's a different fact that -- that is being presumed in Loew's than the fact that is now required as part of the Court's modern per se tying jurisprudence, which is actual, significant market power.

So even if the Loew's presumption had any continuing force, which we don't think it does, it doesn't presume the relevant fact under this Court's modern cases. So for that reason as well, the judgment of the court of appeals is incorrect.

As has been discussed, we think that the presumption is not only wrong but has deleterious consequences. It essentially imposes a litigation tax on the ownership of intellectual property and -- and --

JUSTICE STEVENS: But isn't that also true even if there's monopoly power? That's what -- I really think it's a very interesting question as to whether it makes any difference whether the monopolist who happened to have a patent just charges high prices for product A or decides to charge a little less for product A and make hay out of product B.

MR. HUNGAR: Well, as Justice O'Connor

explained in her Jefferson Parish concurrence, there's significant force to that argument. But -- but again, it's not presented here because there's --

JUSTICE STEVENS: No. I understand it's not. I'm just kind of curious about where we're going down -- we're going down a new road in this whole area. I'm just wondering how -- what our destination is.

MR. HUNGAR: Well, I think, as I said, those are completely separate and -- and really, I would say, unrelated points because what we're talking about here is not whether -- whether market power is relevant, but rather, whether the plaintiff should be required to prove an element of its case, which is the normal rule that this Court and the lower courts apply in -- in the whole array of contexts, including in antitrust cases in every other context.

JUSTICE STEVENS: We're talking about components, for example. It doesn't seem to me it makes any difference whether General Motors has a monopoly or not when it wants to sell, you know, two components as part of the same package. Anyway, I've gone astray too much.

MR. HUNGAR: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Hungar.

Ms. Sullivan.

ORAL ARGUMENT OF KATHLEEN M. SULLIVAN

ON BEHALF OF THE RESPONDENT

MS. SULLIVAN: Mr. Chief Justice, and may it please the Court:

Petitioners and the Government have fallen far short of the -- meeting the burden that would be required to overrule a presumption that has been in force for nearly 60 years since the International Salt decision, a presumption that, as Justice Stevens acknowledged, reflected the Court's prior experience dating back to the enactment of the Clayton Act in 1914 with the use of patents to enforce requirements ties like the one at issue here, buy our printhead and you have to buy our ink at whatever price we set for the life of the product, even after the patent has expired.

It was precisely the Court's experience with a series of patent cases in which such requirements ties had been imposed that led it to set forth the presumption in International Salt.

JUSTICE O'CONNOR: Well, this isn't a requirements tie case, is it?

MS. SULLIVAN: Yes, it is, Justice O'Connor. This is absolutely a requirements tie case. This is a case in which Independent Ink seeks to sell ink that is

required to operate Trident's printheads, their piezoelectric impulse ink jet printheads used to put carton coding directly onto cartons. And the requirement here -- a requirements tie is that if you buy our good A, you need to buy good B that's a necessary --

JUSTICE BREYER: But that --

MS. SULLIVAN: -- operating it in perpetuity.

JUSTICE BREYER: -- that, I would think, would be one of the strongest cases for not having a per se rule because if, in fact, you have a justification, in terms of sharing risk with a new product, that would be one of the cases where you would expect to find a tie. And -- and so I'm not really very persuaded by the effort to draw a wedge between requirements and other things.

But what I do find very difficult about this case is -- you can see from what I'm saying -- that at the bottom, I think there are cases where tying is justified. But the way to attack that would be to say here, here, and here it's justified and that would have to do with the tied product. It would abolish the per se rule, making it into a semi-per se rule.

But here, we're attacking a different thing. We're attacking the screen, which is a -- the tying

product. Now there, that's just a screen. And -- and so I'm -- I'm not certain whether attacking the screen and insisting on a higher standard of proof is better than nothing or whether you should say, well, leave the screen alone and let's deal with the tied product on the merits. That I think is what Justice Stevens was getting at too.

And -- and I'm -- I'm not being too clear. You understand where I'm coming from, and I -- I want you to say what you want about that. But that's what's bothering me here.

MS. SULLIVAN: Justice Breyer, this is not Jerrold Electronics. There's no indication that in this case there was any price discount given on the printheads in order to make it up through a supracompetitive royalty payment extracted from the end users by requiring them to pay three times the market for ink. The end users are charged three times what Independent Ink would sell them the ink for directly. And -- and the original equipment manufacturers, the printers who put the Trident printhead into the printer to sell to the end users like General Mills and Gallo Wines -- they're charged twice the price. So there is a markup on the ink. This is a case in which a supracompetitive profit is being extracted as a kind of

royalty on the ink sales for life.

JUSTICE BREYER: All right. This case isn't what's bothering me.

MS. SULLIVAN: No. Justice Breyer, if I could just remind us how narrow the presumption is here. The presumption here attaches to one element in a tying case. There are still other screens. The other screens -- the plaintiff still bears the proof of showing that there are two separate products. As Justice Kennedy pointed out, if two products are bundled together, if the tie is bundling two products together, there may well be a single product. If there's a procompetitive reason for a bundle, that will be screened out by the requirement that a tie involved tying product A to product B. If products A and B are combined as components in a single product, the screen of separability will operate. And --

CHIEF JUSTICE ROBERTS: But this in -- as a practical matter, this screen is really the heavy lifting in the antitrust cases. This is where you need all the economic studies, you have the discovery, the experts. This is what costs a lot of money and shifts a lot of the litigation burden on the other side if you have a presumption.

MS. SULLIVAN: With respect, Mr. Chief

Justice, this does not entail a heavy burden on the defendant. What the presumption does is simply presume from a patent used to effect, as here, a requirements tie. And Justice O'Connor, it's not just a component in the larger product. The patent has to be used through the licensing of the patent to effect the tie. We're not suggesting that the presumption attaches to any product that happens to contain a patent in the component.

But when that happens, Mr. Chief Justice, the -- when the patent is used through its license to exact in perpetuity -- you have to buy a requirement for life -- it is quite fair to ask the defendant to come forward and say, well, that's not so bad because there are reasonable substitutes. We just looked at them when we got our patent in order to show that it was novel. We looked at what the prior art was, and we've studied our competitors and the printhead market closely --

JUSTICE KENNEDY: Well, except that the -- the Chief -- Chief Justice's question -- and it -- it's the same question as Justice Souter had and is what concerns me. My -- my understanding -- and it's not an understanding based on any experience litigating in this area -- is that when you hire economists, in order

to establish market power, this is a substantial undertaking. It's -- it's a significant part of litigation costs. And what you're saying is that this is an important rule so that we -- we vindicate the important rule by putting the presumption on -- on the defendant. But you can say that with many important rules in many other areas.

MS. SULLIVAN: Justice Kennedy, the patent presumption makes economic sense because, more likely than not, a patent used to effect a requirements tie will have market power. Justice Breyer said at the outset that a patent is intended to confer market power. That's what a patent is -- is registered for. It's intended to create legally enforceable barriers to entry that make it rivals -- entrance into the market more difficult. That's what it's intended to do. It doesn't matter that 95 percent --

JUSTICE SCALIA: More often than not, it doesn't.

MS. SULLIVAN: 95 percent of patents are valueless according to petitioners' own statistics, but they won't arise in a patent tying case because if they're valueless, they won't be licensed. And if they're not licensed, they can't be used to effect the tie.

JUSTICE BREYER: Well, that isn't so. I mean, you could have a patent that was valueless or didn't itself confer very much, but the person is trying to establish the market for the product. It's a component, and he attaches this tied product as a counting device knowing that if it's successful, everybody makes money, and if it's not successful, he and everybody else lose. That's -- that's the kind of justification. And that could happen with --

MS. SULLIVAN: Justice Breyer, Justice Souter asked before to petitioners' counsel, has there been any evidence of frivolous litigation, tying litigation, brought where there was a valueless patent to which a tie to a requirement was -- was made, and petitioners' counsel could name none.

The focus here has been on the wrong pool. The arguments are about valueless patents, which there's no evidence they've been used to tie --

JUSTICE BREYER: Let me be more specific. A person has a patent on an item in a machine. This is a great machine. It's fabulous. We've all had friends who have tried to get us to invest in such machines. We don't know what it does, nor does anyone.

(Laughter.)

JUSTICE SOUTER: But if it's a success, we'll

all be rich.

Now, he decides to tie something to that.

MS. SULLIVAN: To try to --

JUSTICE BREYER: To tie something to the great machine.

MS. SULLIVAN: To make up the money through a requirements tie in perpetuity.

JUSTICE BREYER: Correct, if it takes off.

MS. SULLIVAN: If it takes off.

JUSTICE BREYER: If it takes off, everybody will be rich, and if it doesn't take off, who cares.

Now --

MS. SULLIVAN: Justice Breyer --

JUSTICE BREYER: -- that could happen.

MS. SULLIVAN: Justice --

JUSTICE BREYER: And there often does, I guess.

MS. SULLIVAN: Justice Breyer, that couldn't happen unless there was market power in the patented product. There's reason -- there's no reason why a consumer would agree to pay supracompetitive prices for the requirement --

JUSTICE BREYER: I'll put this machine in your store for a penny. A penny.

MS. SULLIVAN: Not the case here.

JUSTICE BREYER: By the way, a penny and you have to buy marvelous component. And by the way, if it takes off, you'll buy a lot of marvelous component, and if not, not.

MS. SULLIVAN: This returns us to Justice Stevens' question. Can metering be procompetitive? And the petitioners and Government have utterly failed to show how metering could be procompetitive in a requirements tie case. The briefs of Professor Nalebuff and Professor Scherer, the only economist briefs submitted in the case, show how metering is not necessarily efficient. Even if it produces -- produces some kind of gain to production, it transfers surplus from consumers.

And in any event, metering -- if -- if the goal here were to try to impose the royalty on the ink, if the goal here -- if -- if Trident really wanted to say we want to be efficient price discriminators, we're charging less for the printhead -- and there's no evidence there was any kind of discount on the printhead here. This is not a penny for the product. These are $10,000 printheads that go into $20,000 printers that last for 20 years. So this is not --

JUSTICE STEVENS: I have to interrupt to say --

MS. SULLIVAN: -- the discount case.

JUSTICE STEVENS: -- I think your opponent would say the district court made a finding to the contrary.

MS. SULLIVAN: Justice Stevens, we believe the district court erred in holding that there was no --

JUSTICE STEVENS: Okay.

MS. SULLIVAN: -- direct evidence of market power here, and we urge, as an alternative ground for affirmance, that there's ample direct evidence of market power here.

Mr. Chief Justice?

CHIEF JUSTICE ROBERTS: If your -- if your arguments are right, isn't that going to typically be the case? In which case, why do you need a presumption at all?

MS. SULLIVAN: Mr. Chief Justice, that is not typically going to be the case. This is an unusual case in that the direct evidence of market power comes from defendants' own customer surveys, which at pages 393-394 of the joint appendix indicate that the customers here were deeply dissatisfied with having to pay supracompetitive prices for ink when Independent Ink and other independent providers were offering them

discounted ink on the market. The license here precluded either the original equipment manufacturers or the end users from buying that ink. The license extends to customers of Trident and to their end users. And the original equipment manufacturers were deeply dissatisfied.

Jefferson Parish says that there's evidence of market power when a -- the producer in the tying product market is able to impose onerous conditions that it could not impose in a competitive market --

JUSTICE SCALIA: But the -- the only issue is who has to prove that. I mean, you -- you could find out who their customers are in -- in discovery and -- and go to their customers and then, you know, show that all of the customers are dissatisfied and wouldn't buy -- wouldn't buy the machine -- wouldn't buy the ink were it not that they needed the machine. I mean, it's just a question of -- of who has to prove it. That's all.

MS. SULLIVAN: That's correct, Justice Scalia, but it's -- there -- there -- it would take a far better showing than the petitioners and the Government have made to overturn a sensible rule of thumb that makes sense as a matter of theory and makes sense of -- as a matter of practice. They've failed to

indicate a single case in which there's been frivolous litigation over a patent tie. The presumption, if it was going to unleash this wave of frivolous litigation because the screen was too low, you would think that they could name a single case over the last 60 years in which that occurred.

JUSTICE SCALIA: We don't know how many people paid -- paid off the plaintiff. We -- you know, frivolous litigation becomes evident only when it proceeds far enough that it's -- it's reported.

What -- what I assume would happen most often is that the -- the person who has the patent would just say it's just not worth the litigation. Here. Go away. We don't know how much of that there is.

MS. SULLIVAN: Well, in this case that isn't so because the petitioner initiated the litigation. Let us remember that this case began as a patent infringement action in which Trident came after Independent Ink for patent infringement claims, which were dismissed with prejudice by the district court, found to be unsustainable.

But, Mr. Chief Justice, just to go back to the direct evidence point, you asked before isn't market power doing all the heavy lifting. Market power can be shown through expert evidence, and that's what

the district court erroneously said that we had failed to provide.

But it can also be shown, as this Court has acknowledged in Kodak, as -- and in FTC v. Indiana Dentists, market power can be shown directly. If there's direct evidence of anticompetitive effects in the tied product market -- here, three times the price one wants to pay for ink in order to use the patented printhead for 20 years and thereafter -- if there's evidence directly of anticompetitive effect in the tying -- in the tied product market, then there's no need for that expert evidence.

This happens to be the rare case in which the petitioner was cooperative enough to have taken customer surveys showing the -- the dissatisfaction its customers had over a long period of years with having to pay supracompetitive prices for ink. But that won't be the general case.

And in other cases, the patent rule is a sensible rule of thumb -- the patent presumption, not a rule, is a sensible rule of thumb for capturing the wisdom that patents used to enforce requirements ties are more likely than not to show market power. That's what they're intended to do through barriers to entry, and that's what they have done. In fact, the

petitioners and Government have been able -- unable to show a single procompetitive requirements tie.

CHIEF JUSTICE ROBERTS: Are you conceding that the presumption makes no sense outside of the requirements metering context?

MS. SULLIVAN: Mr. Chief Justice, there could be a sensible argument that you should always presume requirements ties to indicate market power. That's not the law, and we don't urge it here. We think that you capture the same point if you retain the presumption, as it was stated in Salt, as it was restated again by this Court in Jefferson Parish, as -- by the Court in Loew's --

JUSTICE STEVENS: I'm kind of curious what your answer is to the Chief Justice's question.

(Laughter.)

MS. SULLIVAN: Do we -- we argue that the rule should continue to be, as it has always been, that when a patent is used to enforce a tie for a requirement -- sorry -- when a patent is used to enforce a tie, that's presumptive evidence of market power.

JUSTICE STEVENS: No, but the question is does the presumption make any sense at all outside of the requirements context.

MS. SULLIVAN: We -- it -- it's not the law and we don't urge it in any other context. You need not reach, Justice O'Connor, the question of copyrights here. They are not presented. Loew's was a copyright bundling case. This is a patent requirements case, and that's all that's at issue.

JUSTICE BREYER: Let me try this again, and I'm thinking of a way of saying this more clearly. This is my actual dilemma.

If I decide this case against you in my view -- and suppose it came out that way -- I would be concerned lest there be a lot of big companies in the technology area that have real market power in tying products and get people -- and they extend that power through a tie into a second market and thereby insulate themselves from attack. I would be afraid of that really happening, and everything gets mixed up in a war of experts in a technology area about do we have the power, don't we have the power, and who knows.

If I decide this case in your favor, I would then be afraid that particularly in the patent area, there will be lots of instances where new technology, uncertain technology, uncertain new technology, does not get off the ground because a very easy way to finance the risk through a requirements contract, for

example, so that we make the money if the product succeeds, because people buy the required product at a higher price. That will never happen. And patents is an area where new technology is particularly at risk.

So I see a problem both ways, and I'm really not certain what to do.

MS. SULLIVAN: Justice Breyer, you should affirm the court of appeals.

(Laughter.)

MS. SULLIVAN: The reason is that we've had the patent presumption for 60 years. It is not murky. It is not the least bit murky. Congress is open, willing, and -- and able to change this Court's rulings --

JUSTICE GINSBURG: But why can Congress --

CHIEF JUSTICE ROBERTS: Well, didn't they do that? Didn't they do that in the Patent Misuse Reform Act?

MS. SULLIVAN: They -- they did not. They did not, Mr. Chief Justice. The Patent Misuse Reform Act of 1988 eliminated a market power presumption as a patent misuse defense to an infringement action -- in -- in a patent misuse defense to an infringement action. But Congress declined to remove the presumption from the antitrust laws. And while

congressional inaction might not always be a good guide to what Congress is thinking, here the Senate actually placed legislation in the -- in the bill that was sent to the House to remove the presumption from the antitrust laws as well, and the House took it out and the Senate acquiesced.

CHIEF JUSTICE ROBERTS: But isn't it logically inconsistent for Congress --

MS. SULLIVAN: Not at --

CHIEF JUSTICE ROBERTS: -- to say that a patent is insufficient evidence of market power in the misuse context and then just turn around and say, but if you're having a straight lawsuit under antitrust, it is sufficient as a presumption?

MS. SULLIVAN: It's not inconsistent, Your Honor, at all because the patent misuse context lacks the other screens that are present here, the other screens that are present here from the other elements, and the affirmative defenses, like the business justification defense in Jerrold Electronics, like the business justification defense in Microsoft. The -- the other --

CHIEF JUSTICE ROBERTS: So it gets back to how important you think and how -- whether it's true or not that the market power is the heavy lifting, as far

as all these screens go.

MS. SULLIVAN: That's correct, Your Honor. We believe that if -- the narrowness of the presumption here is we're only talking about patent cases, not copyright cases. We're only talking about one element of four. The plaintiff still bears the burden on substantial effect on commerce, separate products, and forcing. There is still affirmative defenses available to the plaintiff. In your case --

JUSTICE BREYER: Well, I mean, once you start that, then you're saying that -- which I thought was the -- I would have agreed with the dissent -- the concurrence in -- in Jefferson Parish, but that's not the law. And so now what you're saying is, well, we have to go and really make that the law.

MS. SULLIVAN: No, no, not --

JUSTICE BREYER: If you're going to give me -- if you're going -- well.

MS. SULLIVAN: Justice Breyer, with respect to your concerns about stopping innovation, there's no reason to think that the presumption of market power in a patent tying case has had the slightest adverse effect on the important new technological developments you've described. To the contrary, patents have increased exponentially in the 20 years since Jefferson

Parish restated the presumption of market power in -- in a patent case.

So the -- the fears about innovation have -- the burden is on the petitioners and the Government to show that a 60-year-old rule, settled precedent of this Court, in a statutory case in which Congress is free to overrule it and which it hasn't --

JUSTICE GINSBURG: May I just ask your point on that? You are giving -- your main argument is there are good reasons to retain this presumption. But then you said even if there aren't, leave it to Congress. The Court created this rule, the market power rule, not Congress. Why, when we're dealing with a Court-created rule, should we say, well, the Court has had it in play for 60 years, so it's the legislature's job to fix it up, instead of the Court correcting its own erroneous way?

MS. SULLIVAN: Justice Ginsburg, the presumption here arises in a very special statutory context. The Clayton Act was passed in 1914 in response to a decision of this Court which Congress viewed as erroneously upholding a patent tie just like the one here. A.B. Dick wanted to sell you its mimeograph machine only if you bought its fluid and stencil paper in perpetuity from A.B. Dick. It was

Congress' dissatisfaction with permitting such a -- the anticompetitive effects of such a patent requirements tie that led to the passage of the Clayton Act. And so the presumption of stare decisis with respect to this Court's rules to effectuate the anti-tying goals of the Clayton Act is accorded -- should be accorded more weight than just ordinary common law --

JUSTICE STEVENS: As I remember the text of section 3, it applies to other products patented or unpatented.

MS. SULLIVAN: It does. It does, indeed, Justice Stevens. It eliminated a patent exemption from the antitrust laws.

But we're not suggesting that patented and unpatented products are -- are different with respect to the showing of market power. Both have to be shown to have market power when they're used to effect a tie. We're simply arguing that when the -- when a patent is used to force the tie, it makes sense -- it makes good economic sense today, as it did in 1914, and in all the cases that led up to International Salt -- to assume that it's only through market power that the patent is able to effect -- effectuate the tie.

Patents are intended to confer market power. They do in a small set of cases. Professor Scherer,

whose amicus brief supports the presumption, has demonstrated that there's an innovation lottery in which only some patents are successful, but those that are successful are highly successful, highly valuable.

JUSTICE SCALIA: We're not even sure, are we, Ms. Sullivan, that -- that you can extend, assuming that there is market power in the patent -- we're not really sure that you can extend it through tying. I mean, there's -- there's dispute among the economists even on that question.

MS. SULLIVAN: Justice Scalia, the -- the economic theories that focus on the relevant pool, which is patents that have sufficiently high value to be used to enforce a tie, is unanimously on our side that there's no procompetitive value, that there are anticompetitive effects.

JUSTICE BREYER: There are no -- I thought we were just talking about several.

MS. SULLIVAN: The -- they're focusing on the pool. Petitioners and the Government have cited a number of economists who talk about price discrimination in the abstract. We're not talking here about senior citizen discounts at the movies. We're talking about price discrimination with respect to a tying market, in which, by the way, the dangers of

shrouding information to the consumer are demonstrated by this case.

The -- the petitioners --

JUSTICE BREYER: Price discrimination, I gather, sometimes good, sometimes not. If it pushes out sales --

MS. SULLIVAN: But the --

JUSTICE BREYER: -- on the low side, it's good. If it just extracts profits on the high side, it's bad.

MS. SULLIVAN: It --

JUSTICE BREYER: And so I think most economists -- in fact, everyone I've ever read agrees with that.

MS. SULLIVAN: Most -- the majority view is that price discrimination does reflect market power, that you can't discriminate without it, and that's reflected in Judge Posner's recent decisions, for example.

So if they're -- if they're using metering here to price discriminate, all the more reason for you to uphold the presumption here because the metering is being used to price discriminate the very thing that shows there's market power.

But if -- to go back to Justice Stevens'

point about whether metering can ever be a good way for the monopolist to take his profit on the ink, rather than on the printhead, there's very good reason to think it's bad, inefficient, and certainly bad for consumers for the monopolist to take his profit on the ink rather than on the printhead because the consumer can't make, as this Court pointed out in Eastman Kodak, a good judgment at the beginning of how much ink he's going to need for the life of the product and what it's going to cost.

And in this case, petitioners did everything possible to keep its -- its customers from knowing what the ink would cost over its lifetime. On page 396 of the appendix, you'll see the customers complaining in petitioners' own survey that they couldn't get the ink consumption rates out of Trident.

This is a case in which, if you shroud to the consumer the true life cycle cost of using the printhead with the ink need -- needed to run it, you're going to create lots of inefficiencies in the market. You're going to create, first of all, the inefficiencies of enforcing the tie. You're going to create the inefficiencies and social costs of creating alternative routes when the customers seek to go elsewhere. Think of chop shops for auto parts.

JUSTICE STEVENS: Of course, one of the interesting aspects of this kind of discrimination is the victim of the discrimination is the more powerful buyer in these cases.

MS. SULLIVAN: Well, we would argue that the presumption makes sense no matter whether the patentee is a big or a small company, and the reason is, to go back to Justice Scalia's question, that the -- the patentee will always have better information about the market for the tying product. Here, Trident is the expert in printheads. Independent Ink, the plaintiff, doesn't know about printheads. It knows about ink. For Independent Ink to try to show that there are no reasonable substitutes for the printhead is a very arduous burden to place on Independent Ink, whereas it's a very sensible burden to place on the defendant to say, show us that there are reasonable, noninfringing substitutes for your printhead.

JUSTICE SCALIA: You could probably say that in every -- in -- in every antitrust case where -- where the defendant is -- is alleging a -- a monopoly on the part of the plaintiff. It's almost always the case that the plaintiff knows -- knows more about his business than the defendant does. It's not distinctive here, it seems to me.

MS. SULLIVAN: Justice Scalia, we argue simply that it's fair to shift the burden to the defendant. Remember, this is a narrow presumption. It's not a per se invalidity rule. It's just a rebuttable presumption.

CHIEF JUSTICE ROBERTS: But isn't -- it's in fact easier for you here. You can go down to the Patent Office and see what they've distinguished as -- the sense in which their product is an innovation and why it's not just like the other products that might be available that you could use.

MS. SULLIVAN: That's correct, Mr. Chief Justice. But it is harder for us to find out what new competitors have come into the tying product market in the meantime, and it is easier for defendants to prove the affirmative, that there is a reasonable substitute. Of course, in their own promotions and advertising, they said that nothing else is as good as their printer. But it's reasonable to ask them to prove that there is a reasonable substitute. It's far harder to ask the plaintiff to prove that there's no reasonable substitute because we don't have access to the information about their competitors that they could be expected to keep as a matter of ordinary business records.

But, Justice Ginsburg, to return to your point, if there's any doubt about whether metering can ever be efficient, if there's any doubt about whether there could be a procompetitive reason for a requirements tie, evidence that has utterly been failed to be presented here, where there's no economist brief on their side and several economist briefs on our side by very distinguished economists cited by the other side, if there is any doubt about that kind of economic wisdom, then indeed it should be decided by Congress. It's a matter of economic policy to be decided by Congress. Congress has not only failed to reform the antitrust laws in 1988, when it looked at a bill that the Senate had written and the House rejected it, it's failed five times since then to reject this presumption. So there's nothing murky about the presumption. It's still the law.

If petitioners really believe they can come forward with an economic record they haven't come forward with so far, Congress is open and able to correct it. But when this Court has guided plaintiffs and defendants for 60 years with a presumption that still makes good economic sense -- and Justice Stevens, if there were anything to the metering argument, why wouldn't Trident simply put a counting chip in the printhead and say we're

going to charge you a per-use fee? Every time you put a bar code on a carton, you pay us a royalty. That would be the way to have metering and to capture the monopoly profit through the ink market without all the inefficiencies that come with tying the -- the sales of ink, keeping other rivals out of the ink market --

JUSTICE STEVENS: I suppose you can do that under modern computer technology. You couldn't have done it 20 years ago.

MS. SULLIVAN: Justice Stevens, that's correct. Had -- had that technology existed in 1984, maybe Jefferson Parish might have mentioned it. But it's certainly the case that today there's no reason for -- to get the efficiency gains from metering through tying arrangements. Tying arrangements are a very inefficient way of getting the efficiency gains from metering when there is this completely transparent alternative. Trident might not want to tell people what it's really costing them to put a bar code on a carton because if you tell the consumer, they might defect. But it -- the -- the metering argument is satisfied by a transparent use of counting technology today.

So there's no procompetitive reason here. This is not a bundle. This is not a case where, as the

concurring opinion in Jefferson Parish suggested, there might be very sensible ways to see efficiencies in a bundle where I buy two products at the same time, an air -- a car that comes with tires and an air conditioner. But it's quite a different matter because the cost savings from that accrue to the consumer. There are efficiencies that can be passed on to the consumer by bundling two products that can be simultaneously purchased and consumed together.

But this is a requirements tie case. There's no efficiency that's been demonstrated in selling the car but requiring you to buy gasoline from the car manufacturer for the rest of the life of the car, long after any patents exist. And in the absence of that kind of evidence, there's no reason to overrule a sensible rule that does not just date to Loew's, as Mr. Hungar incorrectly suggested. It dates back to Salt, to 1947 for arguments in our -- we've argued in our brief that Salt had to depend on the presumption.

And the Court was -- with respect to the petitioners' argument that the Court didn't know what it was doing when it decided those cases, we respectfully disagree. The Court was well aware, as it indicated 2 years later in Standard Stations that there might be some substitutes for a patented product, and

it reaffirmed the -- the presumption anyway.

The presumption makes good economic sense. It makes good litigation sense.

And -- and as an alternative to the argument that you should affirm the Federal Circuit on the presumption, we respectfully suggest that there's -- there was direct evidence of market power here, the supracompetitive prices charged on ink to both the original equipment manufacturers and the end users, the customer dissatisfaction displayed in the petitioners' own customer surveys in the joint appendix at 393. But, Mr. Chief Justice, that is the unusual case. It won't be every case in which a defendant is so imprudent as to create a -- a record of its own anticompetitive effects on its tying -- on its tied product requirements market.

And in the other cases, it would be a -- there's danger, Justice Breyer, that -- there's been no harm to innovation shown here. The presumption has been in effect for 60 years, but there could be grave danger to this Court lifting it. There may be many meritorious anticompetition cases screened out by that rule. So we respectfully urge you affirm the Federal Circuit.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Sullivan.

Mr. Pincus, you have 2-and-a-half minutes remaining.

REBUTTAL ARGUMENT OF ANDREW J. PINCUS

ON BEHALF OF THE PETITIONERS

MR. PINCUS: Thank you, Mr. Chief Justice. Just a few points.

With respect to respondent's last argument about affirming on the basis of direct evidence, that's an argument that the district court found to have been waived. On page 30a of the joint -- of the appendix to the petition, the court noted that the plaintiff prefers no direct evidence of market power, such as supracompetitive prices. And in fact, the price evidence that they rely on here was not even cited or attached to the summary judgment motions on the market power issue.

Respondent's argument is a little peculiar. It -- it basically is because we can't establish a procompetitive justification for this particular tie, the presumption should be upheld. Of course, the issue in the district court wasn't whether or not this tie was procompetitive, so we didn't introduce evidence about whether or not the tie was procompetitive. We

introduced evidence about market power because the issue was market power. I think respondent is putting the cart before the horse here in that respect.

And there is no consensus of economists. And we discuss this on pages 11 to 13 of our reply brief, that respondent's syllogism of metering equals requirements tie equals proof of market power. Each of those three things are wrong. There are procompetitive justifications for metering. Metering and price discrimination is not evidence of -- of market power of the type that the Court required in Jefferson Parish. It's evidence of some modicum of market power, but not enough market power to meet the tying requirement. And -- and I -- that's very clear from the economic literature.

And there are other justifications that are advanced. In this case preservation of quality was advanced as a justification. But that's why the market power issue is so important. It is the principal screen that -- that the lower courts used.

Respondent mentioned no proof of frivolous litigation. On page 13 of the petition, we cite a number -- page 23 of the petition. I'm sorry. We cite a number of lower court decisions granting summary judgment for defendants in cases where, once the

presumption fell out of the case, there was no proof of market power. So there is quite a record here of this presumption -- attempts to misuse this presumption.

Respondent also talks about -- frames the presumption as patents used to enforce a tie, as if the presumption required some causal connection between the patent and the tie. It doesn't. All the presumption requires is that the tying product be patented. It doesn't require anything about --

CHIEF JUSTICE ROBERTS: Thank you, Mr. Pincus.

MR. PINCUS: Thank you.

CHIEF JUSTICE ROBERTS: The case is submitted.

(Whereupon, at 11:09 a.m., the case in the above-entitled matter was submitted.)