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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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NYNEX CORP. ET AL. *v.* DISCON, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 96–1570. Argued October 5, 1998– Decided December 14, 1998

Respondent Discon, Inc., sold "removal services"– *i.e.*, the removal of obsolete telephone equipment– through petitioner Materiel Enterprises Company, a subsidiary of petitioner NYNEX Corporation, for the use of petitioner New York Telephone Company, another NYNEX subsidiary. After Materiel Enterprises began buying such services from AT&T Technologies, rather than from Discon, Discon filed this suit, alleging that petitioners and others had engaged in unfair, improper, and anticompetitive activities. The District Court dismissed the complaint for failure to state a claim. The Second Circuit affirmed with an exception, holding that certain of Discon's allegations– that Materiel Enterprises paid AT&T Technologies more than Discon would have charged because it could pass the higher prices on to New York Telephone, which could then pass them on to telephone consumers through higher regulatory-agency-approved service charges; that Materiel Enterprises would receive a year-end rebate from AT&T Technologies and share it with NYNEX; that Materiel Enterprises would not buy from Discon because it refused to participate in this fraudulent scheme; and that Discon therefore went out of business– stated a claim under §1 of the Sherman Act. Noting that the ordinary procompetitive rationale for discriminating in favor of one supplier over another was lacking in this case, and that, in fact, the complaint alleged that Materiel Enterprises' buying decision was anticompetitive, the court held that Discon may have alleged a cause of action under, *inter alia*, the antitrust rule set forth in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, 212, that group boycotts are illegal *per se*. For somewhat similar reasons the court believed the complaint stated a valid conspiracy to monopolize claim under §2 of the Act.

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Held: The *per se* group boycott rule does not apply to a single buyer's decision to buy from one seller rather than another. Pp. 4–11.

(a) Precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors. See, *e.g.*, *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 734. The *per se* rule is inapplicable here because this case concerns only a vertical agreement and a vertical restraint, in the form of depriving a supplier of a potential customer. Nor is there a special feature that could distinguish this case from such precedent. Although petitioners' behavior hurt consumers by raising telephone service rates, that consumer injury naturally flowed not so much from a less competitive market for removal services, as from the exercise of market power lawfully in the hands of a monopolist, New York Telephone, combined with a deception worked upon the regulatory agency that prevented the agency from controlling the exercise of monopoly power. Applying the *per se* rule here would transform cases involving business behavior that is improper for various reasons into treble-damages antitrust cases and would discourage firms from changing suppliers– even where the competitive process itself does not suffer harm. Moreover, special anticompetitive motive cannot be found in Discon's claim that Materiel Enterprises hoped to drive Discon from the market lest Discon reveal its behavior to New York Telephone or to the relevant regulatory agency. That motive does not turn Materiel Enterprises' actions into a "boycott" under this Court's precedents, and Discon's reasons why the motive's presence should lead to the application of the *per se* rule are unconvincing. Finally, Discon's allegations that New York Telephone (through Materiel Enterprises) was the largest buyer of removal services in the State, and that only AT&T Technologies competed for New York Telephone's business, are not sufficient to warrant application of a *per se* presumption of consequent harm to the competitive process itself, absent a horizontal agreement. Discon's complaint suggests that other actual or potential competitors might have provided roughly similar checks upon "equipment removal" prices and services with or without Discon, which argues against the likelihood of anticompetitive harm. Pp. 4–10.

(b) Unless petitioners' purchasing practices harmed the competitive process, they did not amount to a conspiracy to monopolize in violation of §2, and Discon cannot succeed on this claim without prevailing on its §1 claim. Pp. 10–11.

(c) Petitioners' argument that Discon's complaint should be dismissed because it fails to allege that petitioners' purchasing decisions harmed the competitive process itself lies outside the questions presented for certiorari, which were limited to the application of the *per se*

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rule, and cannot be raised in this Court. P. 11.

93 F. 3d 1055, vacated and remanded.

BREYER, J., delivered the opinion for a unanimous Court.