

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 ILLINOIS TOOL WORKS INC., :

4 ET AL., :

5 Petitioners :

6 v. : No. 04-1329

7 INDEPENDENT INK, INC. :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, November 29, 2005

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

14 APPEARANCES:

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

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

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

23

24

25

1 P R O C E E D I N G S

2 (10:08 a.m.)

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

6 Mr. Pincus.

7 ORAL ARGUMENT OF ANDREW J. PINCUS

8 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

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

1 separate product.

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

10 JUSTICE GINSBURG: It's not a --

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

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

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

25 MR. PINCUS: Well --

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

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

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

11 MR. PINCUS: Yes, but the fact --

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

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

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

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

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

12 MR. PINCUS: Yes, Your Honor. I -- I think
13 respondent has moved away from -- from the Loew's
14 assertion that the mere existence of a patent shows
15 uniqueness sufficient to -- to satisfy the market power
16 test. And -- and one of the next level presumptions
17 that they propose is that if the -- if the patent ties
18 successful in the marketplace that shows market power.

19 But that's inconsistent with this Court's recognition
20 in -- in a number of cases that ties can be successful
21 in the marketplace not because they're backed by market
22 power, but because they are attractive to consumers in
23 a competitive market.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. PINCUS: No. I -- I think, A, it's not
21 reasonable to assume that, Your Honor, and it's
22 certainly not reasonable to assume it has the level of
23 market power that Jefferson Parish required, which was
24 significant market power. The Court there held that a
25 30 percent share of the relevant market was not enough.

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

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

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

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

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

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

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

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

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

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

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

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

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

5 JUSTICE SOUTER: I was going to say I --

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

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

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

18 JUSTICE SOUTER: In other words, the fact --

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

23 MR. PINCUS: Yes, exactly, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 JUSTICE STEVENS: Can I ask you --

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

7 Yes, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE GINSBURG: There was a -- a point

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

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

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

15 CHIEF JUSTICE ROBERTS: Thank you, Mr.
16 Pincus.

17 Mr. Hungar, we'll hear from you.

18 ORAL ARGUMENT OF THOMAS G. HUNGAR

19 ON BEHALF OF THE UNITED STATES,

20 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

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

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

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

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

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

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

23 JUSTICE O'CONNOR: Right.

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

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

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

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

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

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

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

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

11 MR. HUNGAR: No, Your Honor. Certainly many
12 patents are valueless, which is one of the reasons why
13 --

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

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

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

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

1 but we wouldn't consider that significant market power.

2 And patents can confer value in other ways.

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

12 JUSTICE BREYER: No, I see.

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

16 MR. HUNGAR: Yes, Your Honor.

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

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

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

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

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

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

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

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

1 recognized --

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

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

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

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

8 The Loew's --

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

19 MR. HUNGAR: Well --

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

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

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

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

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

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

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

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

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

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

25 MR. HUNGAR: Well, as Justice O'Connor

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

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

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

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

23 MR. HUNGAR: Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Thank you, Mr.
25 Hungar.

1 Ms. Sullivan.

2 ORAL ARGUMENT OF KATHLEEN M. SULLIVAN

3 ON BEHALF OF THE RESPONDENT

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

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

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

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

23 MS. SULLIVAN: Yes, it is, Justice O'Connor.

24 This is absolutely a requirements tie case. This is a
25 case in which Independent Ink seeks to sell ink that is

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

7 JUSTICE BREYER: But that --

8 MS. SULLIVAN: -- operating it in perpetuity.

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

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

24 But here, we're attacking a different thing.

25 We're attacking the screen, which is a -- the tying

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

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

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

1 royalty on the ink sales for life.

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

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

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

25 MS. SULLIVAN: With respect, Mr. Chief

1 Justice, this does not entail a heavy burden on the
2 defendant. What the presumption does is simply presume
3 from a patent used to effect, as here, a requirements
4 tie. And Justice O'Connor, it's not just a component
5 in the larger product. The patent has to be used
6 through the licensing of the patent to effect the tie.

7 We're not suggesting that the presumption attaches to
8 any product that happens to contain a patent in the
9 component.

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

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

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

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

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

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

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

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

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

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

24 (Laughter.)

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

1 all be rich.

2 Now, he decides to tie something to that.

3 MS. SULLIVAN: To try to --

4 JUSTICE BREYER: To tie something to the
5 great machine.

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

8 JUSTICE BREYER: Correct, if it takes off.

9 MS. SULLIVAN: If it takes off.

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

12 Now --

13 MS. SULLIVAN: Justice Breyer --

14 JUSTICE BREYER: -- that could happen.

15 MS. SULLIVAN: Justice --

16 JUSTICE BREYER: And there often does, I
17 guess.

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

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

25 MS. SULLIVAN: Not the case here.

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

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

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

24 JUSTICE STEVENS: I have to interrupt to say
25 --

1 MS. SULLIVAN: -- the discount case.

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

5 MS. SULLIVAN: Justice Stevens, we believe
6 the district court erred in holding that there was no
7 --

8 JUSTICE STEVENS: Okay.

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

13 Mr. Chief Justice?

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

18 MS. SULLIVAN: Mr. Chief Justice, that is not
19 typically going to be the case. This is an unusual
20 case in that the direct evidence of market power comes
21 from defendants' own customer surveys, which at pages
22 393-394 of the joint appendix indicate that the
23 customers here were deeply dissatisfied with having to
24 pay supracompetitive prices for ink when Independent
25 Ink and other independent providers were offering them

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 (Laughter.)

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

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

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

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

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

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

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

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

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

9 (Laughter.)

10 MS. SULLIVAN: The reason is that we've had
11 the patent presumption for 60 years. It is not murky.
12 It is not the least bit murky. Congress is open,
13 willing, and -- and able to change this Court's rulings
14 --

15 JUSTICE GINSBURG: But why can Congress --

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

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

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

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

9 MS. SULLIVAN: Not at --

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

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

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

1 as all these screens go.

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

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

16 MS. SULLIVAN: No, no, not --

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

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

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

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

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

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

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

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

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

14 But we're not suggesting that patented and
15 unpatented products are -- are different with respect
16 to the showing of market power. Both have to be shown
17 to have market power when they're used to effect a tie.

18 We're simply arguing that when the -- when a patent is
19 used to force the tie, it makes sense -- it makes good
20 economic sense today, as it did in 1914, and in all the
21 cases that led up to International Salt -- to assume
22 that it's only through market power that the patent is
23 able to effect -- effectuate the tie.

24 Patents are intended to confer market power.

25 They do in a small set of cases. Professor Scherer,

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

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

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

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

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

1 shrouding information to the consumer are demonstrated
2 by this case.

3 The -- the petitioners --

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

7 MS. SULLIVAN: But the --

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

11 MS. SULLIVAN: It --

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

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

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

25 But if -- to go back to Justice Stevens'

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

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

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

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

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

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

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

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

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

1 But, Justice Ginsburg, to return to your
2 point, if there's any doubt about whether metering can
3 ever be efficient, if there's any doubt about whether
4 there could be a procompetitive reason for a
5 requirements tie, evidence that has utterly been failed
6 to be presented here, where there's no economist brief
7 on their side and several economist briefs on our side
8 by very distinguished economists cited by the other
9 side, if there is any doubt about that kind of economic
10 wisdom, then indeed it should be decided by Congress.

11 It's a matter of economic policy to be decided by
12 Congress. Congress has not only failed to reform the
13 antitrust laws in 1988, when it looked at a bill that
14 the Senate had written and the House rejected it, it's
15 failed five times since then to reject this
16 presumption. So there's nothing murky about the
17 presumption. It's still the law.

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

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

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

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

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

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

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

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

1 it reaffirmed the -- the presumption anyway.

2 The presumption makes good economic sense.

3 It makes good litigation sense.

4 And -- and as an alternative to the argument
5 that you should affirm the Federal Circuit on the
6 presumption, we respectfully suggest that there's --
7 there was direct evidence of market power here, the
8 supracompetitive prices charged on ink to both the
9 original equipment manufacturers and the end users, the
10 customer dissatisfaction displayed in the petitioners'
11 own customer surveys in the joint appendix at 393.

12 But, Mr. Chief Justice, that is the unusual case. It
13 won't be every case in which a defendant is so
14 imprudent as to create a -- a record of its own
15 anticompetitive effects on its tying -- on its tied
16 product requirements market.

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

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, Ms.
2 Sullivan.

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

5 REBUTTAL ARGUMENT OF ANDREW J. PINCUS

6 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.
11 Pincus.

12 MR. PINCUS: Thank you.

13 CHIEF JUSTICE ROBERTS: The case is
14 submitted.

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

17
18
19
20
21
22
23
24
25