No. 02-1865

IN THE
Supreme Court of the United States

3M COMPANY (MINNESOTA MINING AND MANUFACTURING COMPANY),
Petitioner,
v.

LEPAGE'S INCORPORATED AND LEPAGE'S MANAGEMENT CO., L.L.C.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Date: July 28, 2003

QUESTION PRESENTED

Whether a dominant firm's discounted but above-cost prices for volume purchases, of either individual products or multiple products, may be condemned as unlawful under Section 2 of the Sherman Act based on the incentive such low prices offer to shift purchases away from smaller rivals.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 7

I. THE DECISION BELOW THREATENS TO CHILL COMPETITION BY DEPRIVING PRODUCERS OF A BRIGHT-LINE RULE THAT ALLOWED THEM TO CUT PRICES WITHOUT FEAR OF ANTITRUST LIABILITY 8

II. THE DECISION BELOW INAPPROPRIATELY ALLOWS DOMINANT FIRMS LESS FREEDOM THAN OTHER PRODUCERS TO ENGAGE IN PRICE COMPETITION 15

III. THE DECISION BELOW INCREASES THE ABILITY OF INEFFICIENT PRODUCERS TO USE THE ANTITRUST LAWS TO PROTECT THEMSELVES FROM COMPETITION 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases:

Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,
472 U.S. 585 (1985) 15
Atlantic Richfield Co. v. USA Petroleum Co.,
495 U.S. 328 (1990) 9
Barry Wright Corp. v. ITT Grinnell Corp.,
724 F.2d 227 (1st Cir. 1983) 16
Brooke Group Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209 (1993) . . . . . *passim*
Brown Shoe Co. v. United States,
370 U.S. 294 (1962) 18
Cargill, Inc. v. Monfort of Colorado, Inc.,
479 U.S. 104 (1986) 9, 17
Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC, 148 F.3d 1080 (D.C. Cir. 1998) 5, 10
Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992) 12, 16
Jefferson Parish Hosp. Dist. No. 2 v. Hyde,
466 U.S. 2 (1984) 12
Northern Pacific R. Co. v. United States,
356 U.S. 1 (1958) 12
Tampa Electric Co. v. Nashville Coal Co.,
365 U.S. 320 (1961) 13
United States v. AMR Corp.,
___ F.3d ___, 2003 U.S. App. LEXIS 13530
(10th Cir., July 3, 2003) 10

Page

Statutes:

Sherman Act § 1, 15 U.S.C. § 1 . . . . . 4, 12, 17

Sherman Act § 2, 15 U.S.C. § 2 . . . . . *passim*

Robinson Patman Act, 15 U.S.C. § 13(a) 4

Clayton Act § 3, 15 U.S.C. § 14 9

Miscellaneous:

William J. Baumol and Alan S. Blinder, *Economics: Principles and Policy* (8th ed. 2000) 18-19

William J. Baumol and Janusz Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. ECON. 248 (1985) 19

Edward A. Snyder and Thomas E. Kauper, *Misuse of the Antitrust Laws,* 90 MICH. L. REV. 551 (1991) 18

BRIEF OF WASHINGTON LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government. To that end, WLF had frequently appeared as *amicus curiae* in this and other federal courts to address the proper scope of the antitrust laws. *See, e.g., Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP,* No. 02-682 (U.S., dec. pending); *U.S. Tobacco Co. v. Conwood Co., cert. denied,* 123 U.S. 876 (2003); *Hartford Fire Ins. Co. v. California,* 509 U.S. 764 (1993); *In re Stock Exchanges Options Trading Antitrust Litigation,* 317 F.3d 134 (2d Cir. 2003); *Abbott Laboratories v. Louisiana Wholesale Drug Co.,* No. 02-12091-J (11th Cir., dec. pending).

The National Association of Manufacturers is the nation's largest industrial trade association. The NAM represents more than 12,000 members (including 9,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

Amici believe that the object of the antitrust laws should be to promote competition and thereby provide consumers with lower prices. Accordingly, producers who lower their prices should generally be applauded. The antitrust laws do, of course, prohibit "predatory" price decreases whose effect is to lessen future competition. But the types of price decreases that are condemned as "predatory" must be very clearly defined, or otherwise producers will be dissuaded from engaging in vigorous price competition (the very type of conduct that should be encouraged by the antitrust laws) by the threat that such conduct may cause them to incur antitrust liability. *Amici* fear that the Third Circuit's decision, if allowed to stand, will lead to just such a chill in competition because it deprives producers of what had been relatively clear standards for acceptable pricing.

Amici have no direct financial interest in the outcome of this case. They are filing due solely to their interest in ensuring that the antitrust laws are used to promote competition, not to protect less-efficient producers against competition. *Amici* are filing this brief with the consent of all parties. The written consents have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby adopt by reference the Statement contained in the petition.

In brief, Petitioner 3M Company is the dominant firm in the market defined for purposes of this case: invisible and transparent tape for home and office use sold in the United States. Respondents (collectively, "LePage's") entered the tape market in the 1980s; in 1992, its share of the market was

14.44%, including virtually all of the "private-label" tape sold in the name of individual retailers.

LePage's objects to marketing strategies adopted by 3M beginning in 1993 in an effort to compete with LePage's in the tape market. Those strategies included lowering 3M's prices by offering a variety of discount programs to its customers. For some customers, the discounts were bundled, meaning that customers were offered rebates at the end of the year based on their total purchases not only of tape but also of other 3M products. LePage's contends that the discounts were designed to encourage customers to buy *all* of their tape from 3M; *i.e.,* customers could maximize their discounts only by substantially increasing the quantity of tape purchased from 3M.

In the years following introduction of 3M's discount programs, its average prices for tape fell, and it experienced a rise in tape volume sales. LePage's claims that it was unable to match 3M's price decreases, its sales fell, and its profits suffered. By 1997, its share of the (growing) tape market had fallen to 9.35%. Of crucial significance, and as the Third Circuit recognized, LePage's has not contested that at all relevant times, 3M's "pricing was above its costs however costs are calculated." Pet. App. 7a n.5.

LePage's thereafter filed this suit, alleging assorted violations of the antitrust laws. As described by the Third Circuit, LePage's alleged that 3M "used its monopoly power over its Scotch tape brand to gain a competitive advantage in the private label tape portion" of the market. *Id.* 3a. LePage's also alleged that:

> 3M wilfully maintained its monopoly in the transparent tape market through exclusionary conduct, primarily by bundling its rebates and entering into contracts that expressly or effectively required dealing exclusively with 3M, which LePage's characterized as *de facto* exclusive.

Id. at 7a.

By the time of trial, LePage's had dropped its claim that 3M's conduct constituted an illegal tying arrangement. At the conclusion of the trial, the jury rejected LePage's claims under § 1 of the Sherman Act (that 3M had entered into unlawful agreements in restraint of trade) and under § 3 of the Clayton Act (exclusive dealing). Id. 3a-4a. But the jury found in favor of LePage's on both its monopolization and attempted monopoly maintenance claims under § 2 of the Sherman Act and assessed damages of nearly $23 million on each. *Id.* The district court granted 3M judgment as a matter of law on the attempted monopoly maintenance claim, but otherwise denied 3M all post-trial relief and entered judgment for LePage's. *Id.* at 144a-167a.

A panel of the Third Circuit reversed the judgment, holding that 3M's conduct did not violate the antitrust laws. *Id.* at 73a-143a. The appeals court then voted to vacate the panel decision and to rehear the case *en banc*. In March 2003, the court voted 7-3 to affirm the district court's judgment and uphold the jury's finding that 3M's conduct constituted exclusionary conduct in violation of § 2 of the Sherman Act. *Id.* at 1a-72a.

The *en banc* court rejected 3M's assertion that above-cost pricing cannot give rise to an antitrust offense; it held

that such pricing can in some cases constitute monopolization in violation of § 2 of the Sherman Act when the monopolist's conduct is sufficiently "exclusionary." *Id.* at 7a-8a. The court stated that this Court's decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), did not support 3M's assertion. It stated that *Brooke Group* arose in the context of an oligopoly and does not apply in the context of "a monopolist with its unconstrained market power." *Id.* at 16a.

The appeals court stated that "exclusionary" (or "predatory" or "anticompetitive") conduct that violates § 2 of the Sherman Act is not susceptible of any easy definition. "'Anticompetitive conduct can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties,'" the court explained. *Id.* at 17a (quoting *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC,* 148 F.3d 1080, 1087 (D.C. Cir. 1998). After reviewing the record, the court concluded that 3M had engaged in two types of exclusionary conduct: bundled rebates and exclusive dealing. *Id.* at 20a-30a. In finding that 3M's bundled rebates violated § 2, the court held:

> The principal anticompetitive effect of bundled rebates as offered by 3M is that when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer.

Id. at 23a.

While conceding that the number of 3M contracts that contained an express exclusive dealing provision (two) was insignificant, *id.* 26a, the appeals court held that 3M engaged in "*de facto*" exclusive dealing by offering rebates and discounts that provided retailers with financial incentives to purchase all of their tape from 3M "to the exclusion of LePage's." *Id.* at 27a. The court stated that the structure of 3M's discounts led retailers to deal exclusively with 3M to "avoid being severely penalized financially for failing to meet their quota in a single product line." *Id.* at 30a. In other words, retailers would have paid higher prices if they purchased products from producers other than 3M. *Id.*

The court went on to find that 3M's "exclusionary conduct" had an anticompetitive effect because it created the danger that LePage's would be driven from the tape market and 3M might thereafter be able to charge monopolistic prices without fear of competition. *Id.* at 30a-37a. The court also found that 3M's exclusionary conduct lacked a valid business justification. *Id.* at 38a-39a.

The three dissenting judges would have granted judgment to 3M as a matter of law on the § 2 monopolization claim. *Id.* 50a-72a. The dissent stated:

> LePage's simply did not establish that 3M's conduct was illegal, as LePage's did not establish that 3M's pricing was below cost (a point that is not in dispute) and, in the absence of such proof, the record does not supply any other basis on which we can uphold the judgment.

Id. at 57a.

REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional importance to thousands of companies that do business within the States that make up the Third Circuit: whether their pricing policies can be condemned as predatory under the antitrust laws despite uncontested evidence that their prices are above cost. Prior to the decision in this case, companies could engage in aggressive price competition without fear of antitrust repercussions, provided only that they did not sell below costs. But if the Third Circuit's decision is allowed to stand, that safe harbor will no longer be available to companies. They will be unable to design their price-reduction activities in such a way as to preclude future antitrust liability based on claims that they engaged in exclusionary/predatory conduct.

Review is warranted because the uncertainty created by the decision below will chill competition among producers who seek to avoid possible antitrust liability. That chill in competition cannot be good for consumers, who rely on competition to hold down the prices they must pay for goods and services. Indeed, avoiding such a chill was a principal basis for this Court's *Brooke Group* holding that above-cost pricing is not actionable under the antitrust laws. The Third Circuit has now held, contrary to numerous other federal appeals courts, that *Brooke Group* is inapplicable to dominant firms. The Court should grant review to resolve that conflict.

Review is also warranted to resolve a conflict among the appeals courts regarding whether dominant firms should be less free than other producers to engage in price competition. The Third Circuit held below that antitrust law requires monopolists to trim their sails when it comes to price

competition with smaller rivals "because there is no market constraint on a monopolist's behavior." Pet. App. 16a. Review of this issue is particularly appropriate because at least one opinion in this Court may have led the Third Circuit to conclude (erroneously, *amici* submit) that the Court holds that monopolists must avoid buyer-benefitting offers, including lower prices, that nonmonopolists may use to compete.

Finally, review is warranted because of the need for the Court to take steps to prevent the antitrust laws from being used as a tool by inefficient producers to protect themselves from competition from their more efficient rivals. Antitrust scholars have long warned against permitting the antitrust laws to be hijacked in this manner. *Amici* are concerned that the Third Circuit decision, by exposing price-cutting firms to whole new avenues of antitrust challenge, will facilitate efforts by inefficient producers to stymie price-cutting efforts.

I. THE DECISION BELOW THREATENS TO CHILL COMPETITION BY DEPRIVING PRODUCERS OF A BRIGHT-LINE RULE THAT ALLOWED THEM TO CUT PRICES WITHOUT FEAR OF ANTITRUST LIABILITY

This Court recognized in *Brooke Group* that, as a theoretical matter, above-cost price reductions might inflict injury to competition. *Brooke Group,* 509 U.S. at 223. The Court was nonetheless unwilling to impose antitrust liability in such situations because doing so would "court[] intolerable risks of chilling legitimate competition." *Id.* The Court stated that imposing liability on a producer that was not engaged in predatory pricing is "especially costly" to

competition because doing so "'chill[s] the very conduct the antitrust laws are designed to protect.'" *Id.* at 226 (quoting *Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104 (1986)). *See also Matsushita Elec. Industrial Co. v. Zenith Radio,* 475 U.S. 574, 594 (1986).

To protect against any such chilling effect, the Court established a bright-line rule in pricing cases: above-cost price reductions are not actionable under the antitrust laws, no matter how much those reductions may injure a competitor. *Id.* at 223. *See also Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . . We have adhered to this principle regardless of the type of antitrust claim involved").

The court below held, however, that *Brooke Group*'s bright-line rule is inapplicable when (as here) the price-cutting firm is a monopolist.[2] That holding appears to be inconsistent with *Brooke Group*, which said that its standards applied "whether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line discrimination under the Robinson-Patman Act." *Brooke Group,* 509 U.S. at 222. Moreover, as 3M has noted, Petition at 25-26, the Third Circuit's narrow interpretation of *Brooke Group* conflicts with decisions from several other federal appeals court, which hold that *Brooke Group*'s bright-line rule is fully applicable to monopolists. One week after the filing of the Petition, the Tenth Circuit joined the list of federal appeals

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[2] *Brooke Group* involved an oligopoly (the cigarette industry) in which the price-cutting firm was not the largest member of the oligopoly.

courts that disagree with the Third Circuit. *United States v. AMR Corp.*, ___ F.3d ___, 2003 U.S. App. LEXIS 13530 (10th Cir., July 3, 2003). *AMR Corp*. held that *Brooke Group*'s bright-line rule is fully applicable to monopolists and applies to all pricing claims, regardless of which antitrust law the plaintiff invokes. *Id.*, 2003 U.S. App. LEXIS 13530 at *13-*14 & n.5. The need to resolve the conflict on this issue among the federal appeals courts is reason enough by itself to grant review.

More importantly, the decision below creates an untenable situation for producers that wish to engage in price competition yet at the same time wish to avoid being sued under the antitrust laws for predatory pricing. If they hold monopoly power in the relevant market, they can no longer rely on *Brooke Group*'s bright-line rule to protect them from predatory pricing suits, even when they maintain above-cost pricing. The likely response of producers is not difficult to predict: under the Third Circuit's rule, they will be increasingly reluctant to engage in price cutting of any sort. The impact will be felt nationwide, because any nationwide company that does business within the Third Circuit can be sued there and thus can be made subject to its rule.

The Third Circuit did not merely reject application of *Brooke Group*'s bright-line rule to monopolists; it went out of its way to disavow *any* bright-line rules for evaluating claims under § 2 of the Sherman Act. Rather, it emphasized the need for case-by-case adjudication of § 2 claims: "'Anticompetitive conduct can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties.'" Pet. App. 17a (quoting *Caribbean Broad. Sys.*, 148 F.3d at 1087). The inability to enumerate all varieties of conceivable

monopolizing conduct, however, is no excuse for abandoning all coherent and workable standards for differentiating permissible from impermissible ways of doing what monopolists must be allowed to do: target their rivals and take business from them. More to the point, it is no excuse for eschewing all bright-line rules, even where, as in *Brooke Group,* such rules are of crucial importance to avoid chilling the very conduct the antitrust laws are designed to protect.

At times, the Third Circuit appeared to agree with Respondents' insistence that this is not a predatory pricing case at all. The Third Circuit stated that 3M was being punished not simply for excessive price cutting but because the manner in which it implemented the price cutting was exclusionary. *See, e.g.,* Pet. App. at 21a (straight volume discounts "are concededly legal and often reflect cost savings," but 3M ran afoul of antitrust laws by conditioning discounts "on purchases spanning six of 3M's diverse product lines."). But *Brooke Group*'s bright-line rule cannot so easily be evaded. When a producer offers discounts that are not conditioned on the purchaser's refusal to deal with other producers, any antitrust challenge to the discount raises a predatory pricing claim that must be examined under *Brooke Group*'s bright-line rule.

The Third Circuit condemned 3M's bundled rebates as "exclusionary" because "when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and therefore cannot make a comparable offer." *Id.* at 23a. That assertion is without merit. Only inefficient rivals are foreclosed from making a "comparable offer" so long as the price at which the product is being offered is an above-cost price. Because it is uncontested that 3M never

sold tape at below-cost prices, LePage's apparent inability to match 3M prices can only be attributed to its relative inefficiency, not to exclusionary practices by 3M.[3]

Bundling of product sales *can* present antitrust concerns if the seller insists on some form of tying arrangement. "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from some other supplier.'" *Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 461 (1992) (quoting *Northern Pacific R. Co. v. United States,* 356 U.S. 1, 5-6 (1958)).[4] *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 12, 15-16 (1984) (coercion to buy second market product as condition of buying first). But LePage's made no tying claim at trial, nor could it realistically have done so. There is no allegation that 3M ever conditioned the sale of any of its products on an

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[3] Antitrust scholars disagree regarding how to calculate a product's real price (for purpose of determining whether a product is being sold below cost) when the producer offers bundled rebates. Some scholars suggest that the entire package discount offered on all products should be attributed to the one product on which the two parties compete; others disagree. *See id.* at 62a n.2 (Greenberg, J., dissenting). If the former approach is applied, an antitrust plaintiff could more easily demonstrate that the defendant was selling its products below cost. But this disagreement among scholars is irrelevant here, because there is no dispute that 3M tape prices were at all times above cost, even if one attributes its entire bundled rebates to private-label tape sales.

[4] Such an arrangement violates § 1 of the Sherman Act if the seller has "appreciable economic power" in the tying product and if the arrangement "affects a substantial volume of commerce in the tied market." *Id.* at 462.

agreement to purchase some other 3M product. LePage's claims that large retailers have no choice but to purchase 3M's Scotch brand tape, but those retailers' access to Scotch brand tape was never conditioned on their purchase of any product from a second market or even private-label or other tape. The only claim is that by bundling rebates for all tape purchases, 3M effectively offered its private-label tape at a price LePage's could not match; but that claim is, in essence, nothing more than a predatory price claim.

The Third Circuit also faulted 3M for engaging in what it termed "*de facto*" exclusive dealing by offering rebates and discounts that provided retailers with financial incentives to purchase all of their tape from 3M "to the exclusion of LePage's." *Id.* at 27a. While the courts have correctly perceived that contracts *requiring* the buyer for an extended period of time to purchase all of its product needs from a single producer can have anticompetitive effects, this Court has never endorsed the concept of "*de facto*" exclusive dealing. The Third Circuit cited *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961), for the proposition that arrangements should be deemed to constitute exclusive dealing, even if not "expressly exclusive," if they "effectively foreclose[] the business of competitors." *Id.* at 27a. *Tampa Electric* is inapposite. That case involved a requirements contract under which a utility committed to purchase its "total requirements" for coal over a 20-year period from a single supplier. Although the contract did not *expressly* prohibit the utility from purchasing coal from other coal suppliers, the Court recognized that that was the "practical effect" of the utility's commitment to purchase its "total requirements" for coal from the Respondent for such a long period of time. *Tampa Electric,* 365 U.S. at 324, 327. The contracts entered into between 3M and its

customers were not even remotely similar. Those contracts provided for volume discounts if the customers increased their purchases of 3M products, but they neither explicitly nor implicitly prohibited the customers from making additional purchases from 3M's rivals. If some 3M customers chose to purchase all their tape from 3M, it can only be because they found 3M's prices (or product/service quality) to be superior to anything LePage's had to offer. Under those circumstances, LePage's "*de facto* exclusive dealing" claim amounts to nothing more than a predatory pricing claim, a claim that should be examined under *Brooke Group*'s bright-line rule.

In essence, then, the Third Circuit has affirmed a nearly $69 million judgment against 3M based solely on its disapproval of 3M's pricing policies. The Court deemed those policies "exclusionary" and lacking in any valid business justification, despite the uncontested evidence that: (1) 3M's sales were above cost; and (2) 3M's pricing policies led to an increase in product sales volume. Any rational business would seek to engage in such competition if doing so would likely lead to greater sales and market penetration. Yet, the Third Circuit's decision is likely to chill such competition among producers who fear that aggressive but above-cost pricing may cause them to incur antitrust liability. Because that chilling effect is bad for consumers and undercuts the very conduct the antitrust laws are designed to protect, review of the Third Circuit's decision is warranted.

II. THE DECISION BELOW INAPPROPRIATELY ALLOWS DOMINANT FIRMS LESS FREEDOM THAN OTHER PRODUCERS TO ENGAGE IN PRICE COMPETITION

In conflict with other federal appeals courts, the Third Circuit held that dominant firms should be less free than other producers to engage in price competition. In explaining why it did not believe that 3M should be permitted to rely on *Brooke Group*'s bright-line rule, the court held:

> 3M is a monopolist; a monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior. *See, e.g., Aspen Skiing* [*Co. v. Aspen Highlands Skiing Corp.*], 472 U.S. [585,] 601-04 [(1985)].

Pet. App. 16a. The court concluded that the absence of such market constraints requires the antitrust laws to fill the breach to ensure some constraints on supracompetitive pricing.

In imposing greater constraints on monopolists than on other producers when it comes to reducing prices, the Third Circuit's decision conflicts with the decisions of numerous other federal appeals courts. Indeed, the First Circuit has gone so far as to hold that the need to provide a company the freedom to lower prices is at its *greatest* when the company is a monopoly or is part of a highly concentrated industry:

> Price cutting in concentrated industries seems sufficiently difficult to stimulate that we hesitate before embracing a rule [permitting predatory price claims against companies selling above cost] that could, in

> practice, stabilize "tacit cartels" and further encourage interdependent pricing behavior.

Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 235 (1st Cir. 1983) (Breyer, J.).

Review is warranted to resolve this conflict. Review is particularly warranted because the courts below may have been led astray in part by language in at least one antitrust opinion in this Court. For example, the district court instructed the jury that "behavior that might otherwise not be of concern to the antitrust laws, or that might be viewed as pro-competitive, [can] take on an exclusionary connotation when practiced by a firm with monopoly power." Pet. App. at 151a. Calling this the "Scalia charge," *id.* at 160a, the Court was relying on the following language from Justice Scalia's dissenting opinion in *Eastman Kodak*:

> Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws -- or that might even be viewed as procompetitive -- can take on exclusionary connotations when practiced by a monopolist.

Eastman Kodak, 504 U.S. at 488 (Scalia, J., dissenting).

That passage really conveys an uncontroversial point: a non-monopolist producer can engage in conduct that, while of little value to competition, is nothing to get worked up about because the producer is too small a fish to cause any harm to competition. For example, a small producer that insists on tying arrangements (it will not sell Product A to anyone unwilling to purchase Product B as well) does not run

afoul of § 1 of the Sherman Act if it lacks appreciable economic power in Product A or the arrangements do not affect a substantial volume of commerce in Product B.

However, it is also possible to read the passage (as the district court did in this case) as indicating that a monopolist has less freedom than other producers to engage in price competition because of the danger that such conduct might drive the monopolist's competitors from the market. Because such an interpretation would be inconsistent with *Brooke Group* and other decisions of this Court, it is unlikely that that interpretation was intended. Nonetheless, because the confusion in the federal appeals courts on this issue may derive at least in part from ambiguous statements in the Court's own decisions, granting review to clear up the confusion would be particularly appropriate.

III. THE DECISION BELOW INCREASES THE ABILITY OF INEFFICIENT PRODUCERS TO USE THE ANTITRUST LAWS TO PROTECT THEMSELVES FROM COMPETITION

Competition is not always welcomed by all producers, of course; while vigorous competition benefits the public as a whole, it can often harm individual producers and can even drive them out of business. Thus, a producer that is threatened by a rival's price cut may well file a lawsuit claiming that the cut constitutes predatory pricing. That producer has an economic incentive to do so whether the price cut is predatory or nonpredatory; as *Cargill* recognized, "[T]he mechanism by which a firm engages in predatory pricing -- lowering prices – is the same mechanism by which a firm stimulates competition." *Cargill,* 479 U.S. at 122 n.17.

A central focus of *Brooke Group* was establishing clear rules of conduct to ensure that antitrust law not be used to impose sanctions on legitimate price cutting. The Court explained that while price cutting "may impose painful losses on its target," that is

> [O]f no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed "for the protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962).

Brooke Group, 509 U.S. at 224. By refusing to apply *Brooke Group* to monopolists, the Third Circuit is increasing the ability of inefficient producers to use the antitrust laws as a tool to protect themselves from competition from their more efficient rivals. Review is warranted to prevent the antitrust laws from being hijacked in this manner.

Numerous commentators have noticed the tendency of producers to use the antitrust laws as a means of reducing competition. A detailed study of antitrust lawsuits alleging horizontal restraints filed in five federal district courts revealed that a significant percentage of those suits were filed by one of the defendant's competitors, rather than (as one might expect) by the defendant's customers -- the group most likely to be harmed by horizontal restraints on trade. Edward A. Snyder and Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff,* 90 MICH. L. REV. 551 (1991). Based on their finding that a significant percentage of the cases lacked merit, the authors concluded that misuse of the antitrust laws by those seeking to reduce competition was widespread. *Id.* at 596. *See also* William J. Baumol and Alan S. Blinder, *Economics: Principles and Policy* 425-26

(8th ed. 2000) ("One problem haunting most antitrust litigation . . . is that vigorous competition may look very similar to acts that *undermine* competition. The resulting danger is that the courts will prohibit . . . acts that *appear* to be anticompetitive but really are the opposite.").

Other leading commentators have observed, "Antitrust, whose objective is the preservation of competition, by its very nature lends itself to use as a means to undermine effective competition. This is not merely ironic. It is very dangerous for the workings of our economy." William J. Baumol and Janusz Ordover, *Use of Antitrust to Subvert Competition,* 28 J.L. ECON. 248, 252 (1985). Baumol and Ordover recommended establishing bright-line antitrust rules to minimize the danger of misuse of the antitrust laws:

> [O]bscurity and ambiguity are convenient tools for those enterprises on the prowl for opportunities to hobble competition. . . . The potential defendant who cannot judge in advance with any reasonable degree of certainty whether its behavior will afterward be deemed illegal is particularly vulnerable to guerrilla warfare and intimidation into the sort of gentlemanly competitive behavior that is the antithesis of true competition.

Id. at 254.

Brooke Group was a step in the direction of certainty. It provided a safe harbor for all above-cost price competition, thereby providing producers with clear guidance regarding how to compete without running afoul of the antitrust laws. The Third Circuit's decision is a giant step backwards. It eliminates all bright-line pricing rules for monopolists and thereby ensures that producers can be browbeaten by their

competitors' threats of lawsuits into avoiding vigorous price competition. Review is warranted to correct this highly anti-competitive result.

CONCLUSION

Amici curiae respectfully request that the Court grant the petition for a writ of certiorari.

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Dated: July 28, 2003