No. 02-1865

In the Supreme Court of the United States

3M COMPANY FKA MINNESOTA MINING AND MANUFACTURING COMPANY, PETITIONER

v.

LEPAGE'S INCORPORATED, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals applied an improper liability standard in affirming a judgment, based on a jury verdict, that petitioner violated Section 2 of the Sherman Act, 15 U.S.C. 2, by unlawfully maintaining a monopoly through a "bundled rebates" program.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States. For the reasons set out below, the Court should deny the petition for a writ of certiorari.

STATEMENT

Respondents LePage's Incorporated and LePage's Management Corporation (collectively LePage's) brought this antitrust action against petitioner 3M Company, alleging, among other things, that 3M unlawfully maintained a monopoly in the market for transparent tape, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2, through the use of a "bundled rebate" program for retailers that sold 3M products. A jury returned a verdict for LePage's on the monopoly maintenance count, and the district court entered judgment. Pet. App. 144a-173a. A divided court of appeals panel reversed the district court's judgment on the monopoly maintenance count, *id.* at 73a-143a, but the court of

appeals granted rehearing en banc and affirmed the district court's judgment on that count, *id.* at 1a-72a.

1. 3M manufactures Scotch-brand tape and other products. Until the early 1990s, 3M had more than a 90% share of the United States market for transparent and invisible tape. Pet. App. 2a. Thereafter, 3M's share began to erode with the rise of office supply "superstores" (such as Staples and Office Depot) and the growth of mass merchandisers (such as Wal-Mart and Kmart), which sold products, including tape, under "private labels." LePage's expanded its tape line to include private label tape and, by 1992, LePage's had an 88% share of the growing private label market segment (but only 14.4% of the overall market). *Id.* at 2a, 34a. 3M reacted by entering the private label segment and by selling some tape under the "Highland" label. *Id.* at 2a. Like other private label products, private label tape sold at a price lower than that of the leading brand, so a customer's shift from purchases of Scotch to private label tape, including Highland, would reduce 3M's profits. See *ibid.*

LePage's filed a four-count antitrust suit against 3M, charging unlawful restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, anticompetitive exclusive dealing in violation of Section 3 of the Clayton Act, 15 U.S.C. 14, and both maintenance and attempted maintenance of monopoly in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. Pet. App. 144a. The alleged unlawful conduct included various "exclusive dealing arrangements" 3M secured through cash incentives, *id.* at 3a, "bundled rebate" programs that "offered higher rebates when customers purchased products in a number of 3M's different product lines," *ibid.*, and other conduct, *id.* at 20a.

The challenged bundled rebate programs "offered discounts to certain customers conditioned on purchases spanning" multiple product lines, with the size of the rebate dependent on the customer's success in meeting 3M-estab-

lished growth targets for the individual product lines. Pet. App. 21a. LePage's contended those bundled rebates helped 3M maintain its monopoly, because failure to meet the target for one product (such as tape) could cause a customer to lose rebates across multiple products. *Ibid.* To make a purchase of LePage's private label tape financially attractive to a potential customer, LePage's alleged, it would not be sufficient to match 3M's price on similar tape. Rather, LePage's would have to reduce its private label tape price by an amount sufficient to compensate the purchaser for the loss of rebates based on the far larger volume of purchases the customer made on the full range of 3M products (including Scotch tape and non-tape products). *Id.* at 87a. 3M's strategy, LePage's alleged, was designed to forestall competition to its higher priced Scotch brand from private label tape. *Id.* at 30a.

The jury returned a verdict for 3M on the exclusive dealing claims under Sections 1 and 3, but for LePage's on the two Section 2 claims, awarding damages of more than $22 million (before trebling) on each claim. Pet. App. 3a-4a. The district court instructed the jury that exclusionary or predatory conduct "either does not further competition on the merits, or does so in an unnecessarily restrictive way. If 3M has been attempting to exclude rivals on some basis other than efficiency, you may characterize that behavior as predatory." *Id.* at 151a. The court further instructed the jury,

> you may not find that a company willfully maintained monopoly power, if that company has maintained that power, solely through the exercise of superior foresight or skill in industry, or because of econom[ic] o[r] technological efficiencies, or because of size * * *. The acts or practices that result in the maintenance of monopoly power must represent something other than the

> conduct of business that is part of the normal competitive process * * *. They must represent conduct that has made it very difficult or impossible for competitors to engage in fair competition.

Ibid. The verdict form did not require the jury to specify the conduct that it found to be exclusionary. *Id.* at 149a.

On post-trial motions, the district court rejected 3M's claim that the charge "vested too much discretion in the jury to determine for itself what conduct was exclusionary." Pet. App. 160a. The court also found the monopoly maintenance verdict to be "supported by sufficient evidence adduced at trial." *Id.* at 151a-152a. The court relied heavily on evidence concerning "bundled rebates," but noted that the evidence of exclusive dealing also supported the Section 2 verdict. *Id.* at 152a-156a.[1]

2. A divided panel of the court of appeals reversed the district court's denial of 3M's motion for judgment as a matter of law with respect to the maintenance of monopoly claim. Pet. App. 73a-143a. The court of appeals noted that it had previously affirmed a judgment finding Section 2 liability for a monopolist's use of bundled rebates linking its patented drugs to unpatented drugs, *SmithKline Corp.* v. *Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir.), cert. denied, 439 U.S. 838 (1978). See Pet. App. 88a-89a. The court noted, however, that, unlike the plaintiff in *SmithKline*, LePage's did not offer specific calculations demonstrating that it "could not compete" by cutting its prices on one product to meet the defendant's multi-product rebates. *Id.* at 90a. The court further observed that LePage's had "not satisfied the stricter tests devised by other courts considering bundled

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[1] The district court granted judgment as a matter of law to 3M on the attempted maintenance of monopoly count. Pet. App. 167a. LePage's cross appealed on that issue, but the decision before this Court does not address it. See *id.* at 48a-49a.

rebates in situations such as that here." *Id.* at 92a. The court of appeals also rejected what it took to be LePage's argument that "the linkage of a monopoly product with a competitive one * * * is the significant factor to be considered rather than the pricing," because, otherwise, "competitors unwilling to accept lower profits could use the law to insulate themselves from competition." *Id.* at 94a.[2]

3. The court of appeals granted rehearing en banc, and a divided en banc court affirmed the monopoly maintenance judgment. Pet. App. 1a-72a. Noting that 3M concededly has a monopoly in the United States transparent tape market, *id.* at 2a, the court focused on 3M's contention that, under *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), its "conduct was legal as a matter of law because it never priced its transparent tape below its cost." Pet. App. 7a. Although the court understood LePage's not to contest 3M's assertion that "its pricing was above its costs however costs are calculated," *id.* at 7a n.5, the court distinguished *Brooke Group* on the grounds that (1) *Brooke Group* did not involve a "monopolist with its unconstrained market power," and (2) LePage's, unlike the plaintiff in *Brooke Group*, did "not make a predatory pricing claim," *id.* at 16a. The appropriate standard of liability, according to the court, was whether 3M had "engage[d] in exclusionary or predatory conduct without a valid business justification." *Id.* at 17a.

The en banc court concluded that 3M's bundled rebates constituted exclusionary conduct, analogizing their effect to

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[2] Judge Sloviter dissented. She argued that the panel majority improperly overlooked the "synergistic effect of [3M's] conduct," Pet. App. 113a, and that *SmithKline* supported the district court's judgment because the gravamen of the violation in that case was that the defendant "linked a product on which it faced competition with products on which it faced no competition," *id.* at 115a, much as 3M had done in this case. See *id.* at 116a.

the foreclosure effects of tying. It stated that, "[d]epending on the number of products that are aggregated [in the bundle on which rebates are offered] and the customer's relative purchases of each, even an equally efficient rival may find it impossible to compensate for lost discounts on products that it does not produce." Pet. App. 22a (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 749, at 83-84 (Supp. 2002)). The en banc court did not say, however, that there was sufficient evidence for the jury to conclude that an equally efficient rival would have found it impossible to compensate for 3M's rebates.

3M's conduct, the court asserted, was "substantially identical" to Lilly's in *SmithKline*, a decision recognizing that the "principal anticompetitive effect of bundled rebates * * * 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." Pet. App. 23a. But the court did not say there was sufficient evidence for the jury to conclude that LePage's could not have made comparable offers. It explained that the "gravamen of Lilly's § 2 violation was that Lilly linked a product on which it faced competition with products on which it faced no competition," *id.* at 24a, and it asserted that "3M's rebates were even more powerfully magnified than those in *SmithKline* because 3M's rebates required purchases bridging 3M's extensive product lines," *id.* at 25a. The en banc court did not say, however, that 3M lacked competition, or had any significant market power, in any of the items in its extensive product lines, other than Scotch tape.

The en banc court rejected 3M's argument that the exclusive dealing arrangements "should not be relevant to the § 2 analysis" because the jury found in [3M's] favor on the non-monopolization claims. Pet App. 26a. The court stated that, because "the foreclosure caused by exclusive dealing prac-

tices was magnified by 3M's discount practices," the jury "could reasonably find that 3M's exclusionary conduct violated § 2." *Id.* at 30a. In the court's view, the evidence of "the anticompetitive effect of 3M's exclusionary practices considered together," *id.* at 35a, was sufficient to support a jury conclusion that "the long-term effects of 3M's conduct were anticompetitive," *id.* at 37a.

Finally, the en banc court held that the jury was entitled to conclude that 3M's conduct had no legitimate business justification. Pet. App. 38a-39a. It suggested that, in general, a valid business justification "relates directly or indirectly to the enhancement of consumer welfare" and that "pursuit of efficiency and quality control might be legitimate competitive reasons," although the "desire to maintain a monopoly market share or thwart the entry of competitors would not." *Id.* at 38a (quoting *Data Gen. Corp.* v. *Grumman Sys. Support Corp.*, 36 F.3d 1147, 1183 (1st Cir. 1994)). The en banc court noted that 3M had cited no evidence of "actual economic efficiencies in having single invoices and/or single shipments," *id.* at 38a-39a, although it did not expressly consider whether there was evidence that 3M had enhanced consumer welfare by lowering prices or otherwise offering more attractive terms.[3]

Judge Greenberg, joined by Judges Scirica and Alito, dissented. Pet. App. 50a-72a. The dissenting judges relied on substantially the same analysis of *SmithKline* set forth in the vacated panel opinion, *id.* at 58a-64a, and rejected the court's interpretation of *Brooke Group*, *id.* at 64a-67a. They also suggested, without citing supporting record evidence,

[3] The court also rejected 3M's challenge to the jury instructions, noting that the district court had "closely followed the ABA sample instructions when instructing the jury as to predatory and exclusionary conduct" and that the instructions "were a modified version" of those approved in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Pet. App. 47a.

that there were valid business justifications for 3M's conduct. *Id.* at 65a, 67a.

DISCUSSION

The court of appeals' decision in this case addresses the application of Section 2 of the Sherman Act to the business practice of "bundled rebates." The en banc court of appeals rejected petitioner's primary contention that this Court's decision in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), precludes Section 2 liability for the bundled rebates at issue here because they did not result in below-cost pricing. That ruling does not conflict with the decisions of any other court of appeals. While it would be desirable to provide the business community, consumers, and the lower courts with additional guidance on the application of Section 2 to bundled rebates, this case does not provide a suitable vehicle for providing such guidance. The court of appeals was unclear as to what aspect of bundled rebates constituted exclusionary conduct, and neither it nor other courts have definitively resolved what legal principles and economic analyses should control. In addition, there is substantial uncertainty in the record below concerning facts that may be significant. Because the issues here are novel and difficult, and because petitioner fails to demonstrate an urgent need justifying this Court's immediate intervention, the Court should deny the petition for a writ of certiorari and allow the lower courts an opportunity to refine and clarify the application of Section 2 to this particular business practice.

A. The Court Should Not Grant Review To Consider The Applicability Of *Brooke Group* To This Case

This Court has interpreted Section 2 with caution in light of the danger that incautious interpretations of its broadly phrased terms could actually stifle competition. That danger arises because, while some forms of conduct are unam-

biguously anticompetitive, it is often "difficult to distinguish robust competition from conduct with long-run anti-competitive effects." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767-768 (1984). "Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 882 (2004) (citation omitted).

In the face of those dangers, this Court has provided incremental guidance for applying Section 2. In *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966), the Court defined the "offense of monopoly" as "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* at 570-571.[4] In *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the Court endorsed the view that Section 2 required "the willful acquisition, maintenance, or use of that [monopoly] power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes." *Id.* at 595-596. The Court further stated that the challenged conduct must be "fairly characterized as 'exclusionary' or 'anticompetitive' * * * or 'predatory,'" in light of evidence on intent and other factors. *Id.* at 602. The Court focused on whether there has been an attempt "to exclude rivals on some basis other than efficiency." *Id.* at 605.[5]

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[4] The Court's decision in *Grinnell* understandably did not elaborate upon the distinction. In that case, the purpose of achieving and maintaining monopoly power was clear, 384 U.S. at 571, and the conduct—largely market division agreements and the like among competitors or potential competitors, *id.* at 576—was anticompetitive on its face.

[5] The Court stated that the evidence in that case supported an inference that the defendant "was not motivated by efficiency concerns

The Court's decision in *Brooke Group* has provided more specific guidance for Section 2 cases in the context of a particular form of potentially exclusionary conduct—aggressive price-cutting.[6] That subject had received extensive attention in judicial decisions and in the academic legal and economic literature.[7] Drawing on those decisions and that literature, the Court held that a plaintiff seeking to establish the competitive injury that is an element of its Section 2 claim "must prove that the prices complained of are below an appropriate measure of its rival's costs," 509 U.S. at 222, in

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and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Aspen Skiing Co.*, 472 U.S. at 610-611. The Court has recently emphasized that it is "very cautious" in imposing antitrust liability for an alleged refusal to cooperate with a rival "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm," *Verizon Communications Inc.*, 124 S. Ct. at 879, and that "*Aspen Skiing* is at or near the outer boundary of § 2 liability," *ibid.*

[6] In *Brooke Group*, one cigarette company, Liggett, alleged that another, Brown & Williamson (B&W), gave volume-based rebates to wholesalers as part of a predatory pricing scheme designed to force Liggett to raise its retail prices, 509 U.S. at 217, thus preserving B&W's supracompetitive profits through tacit collusion with other cigarette companies in an oligopolistic market. Liggett brought this claim under the price discrimination provision of the Robinson-Patman Act, 15 U.S.C. 13(a), but the Court viewed the essence of the claim as identical to that of a predatory pricing claim under Section 2 of the Sherman Act: "A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." 509 U.S. at 222.

[7] The classic academic analysis is Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975). For a thorough overview, see *Antitrust Law* ¶¶ 723-745 (2d ed. 2002). See also, *e.g.*, *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104 (1986); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986).

addition to proving a likelihood of the defendant's "recouping its investment in below-cost prices," *id.* at 224. The Court made pricing below the defendant's costs the touchstone, not because above-cost pricing would necessarily guarantee the absence of anticompetitive price-cutting, but because, in the specific context of aggressive price-cutting, that standard provided a sensible dividing line that preserves the important role of price-cutting as a primary means of competition on the merits.[8]

Petitioner urges this Court to extend the Court's reasoning in *Brooke Group* to the practice of bundled rebates. See Pet. 14-22. Petitioner contends, as it did in the court of appeals, that *Brooke Group* establishes a bright-line test

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[8] The Court explained, first, that "[l]ow prices benefit consumers regardless of how those prices are set." *Brooke Group*, 509 U.S. at 223 (quoting *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990)). Barring forms of price-cutting that yield above-cost pricing would deprive consumers of a clear benefit in exchange for speculative future benefits, and it is better to encourage the reduction of prices closer to efficient, competitive levels, despite some competitive risk. Second, low but above-cost pricing may exclude a competitor simply because of "the lower cost structure of the alleged predator, and so represents competition on the merits," *id.* at 223, while the societal benefits of preserving higher-cost—less efficient—competitors are questionable. Cf. *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 87 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982). Third, attempting to police price-cutting that yields pricing above costs for anticompetitive price-cutting may be "beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting," 509 U.S. at 223, because it is not clear how courts could distinguish reliably between the two. Finally, the Court reasoned that anticompetitive price-cutting not prohibited by the Court's ruling (*i.e.* false negatives) would be both rare and generally without serious consequences, since prevailing scholarship indicated that "predatory pricing schemes are rarely tried, and even more rarely successful," while the more common false positives would "chill the very conduct the antitrust laws are designed to protect." *Id.* at 226 (internal quotation marks and citation omitted).

precluding courts from treating bundled rebates or discounts as exclusionary conduct in the absence of proof of below-cost sales or a showing that the challenged conduct constitutes an unlawful tying arrangement. See Pet. 16-19. See generally *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2 (1984) (discussing tying). That approach, however, fails to take account of potentially significant differences between predatory pricing and bundled rebates.[9]

Bundled rebates are widespread and are likely, in many cases, to be procompetitive. See Pet. 22-23; see also Br. for Amici Curiae Bellsouth Corp. et al. 3-4 (Bellsouth Brief) (cataloging consumer benefits and economic efficiencies that could result from bundled discounts in particular instances). But the bundling of rebates (as distinct from price reductions that may result) is not necessarily procompetitive. Unlike a

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[9] The practice of bundled rebates has received far less judicial and scholarly scrutiny than predatory pricing. Only two other litigated cases, *SmithKline* and *Ortho Diagnostic Sys., Inc.* v. *Abbott Lab., Inc.*, 920 F. Supp. 455 (S.D.N.Y. 1996), have squarely focused on such practices. *Virgin Atlantic Airways Ltd.* v. *British Airways PLC*, 69 F. Supp. 2d 571, 580-581 (S.D.N.Y. 1999), aff'd, 257 F.3d 256 (2d Cir. 2001), involved allegations of similar anticompetitive conduct, but the district court found them to be unsupported by fact. *Concord Boat Corp.* v. *Brunswick Corp.*, 207 F.3d 1039 (8th Cir.), cert. denied, 531 U.S.979 (2000), involved loyalty discounts in the context of a single product. At least two cases involving bundled discounts have been filed since the en banc decision in this case. *Applied Medical Res. Corp.* v. *Johnson & Johnson, Inc.*, No. 03-CV-1329 (C.D. Cal. filed Sept. 5, 2003); *ConMed Corp.* v. *Johnson & Johnson*, No. 03-CV-8800 (S.D.N.Y. filed Nov. 6, 2003). Although there are references to bundled rebates in the scholarly literature, the theoretical and empirical analysis of that practice as a potentially exclusionary mechanism is relatively recent and sparse. See, *e.g.*, Barry Nalebuff, *Bundling as an Entry Barrier*, 119 Q.J. Econ. 159 (2004); Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak Are Misguided*, 68 Antitrust L.J. 659 (2001); Willard K. Tom et al., *Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing*, 67 Antitrust L.J. 615 (2000).

low but above-cost price on a single product, a bundled rebate or discount can—under certain theoretical assumptions—exclude an equally efficient competitor, if the competitor competes with respect to but one component of the bundle and cannot profitably match the discount aggregated over the other products, even if the post-discount prices for both the bundle as a whole and each of its components are above cost.[10]

The district courts in *Ortho* and *SmithKline*, see note 9, *supra*, recognized that possibility. They discussed actual or hypothetical claims of exclusion based on bundled above-cost discounts that could not be profitably matched by a competitor competing with respect to one component of the bundle (e.g., when the attribution of the discount for the entire bundle to the plaintiff's product would yield a below-cost price). In *Ortho*, the district court concluded that "a firm that enjoys a monopoly on one or more of a group of complementary products, but which faces competition on others, can price all of its products above average variable cost and yet still drive an equally efficient competitor out of the market." 920 F. Supp. at 467. In *SmithKline*, the district court found a mechanism that made a similar practice exclusionary. 427 F. Supp. 1089, 1108 (E.D. Pa. 1976)

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[10] Determining whether a particular firm should be considered equally efficient is far from simple. One might judge "equal efficiency" strictly on the basis of the product that the competitor produces, but efficiencies associated with all bundled products could be considered. See *Antitrust Law* ¶ 749, at 139-140 (Supp. 2003) (considering but rejecting on policy grounds definition of "'equally efficient' rival [as] one that could have entered all the product lines that the defendant sold, and thus match multi-product discounts point-by-point"). In addition, it might be appropriate to consider the impact of economies of scale. Firms with equal costs at any common level of output may have different costs because they produce different levels of output, perhaps as a result of allegedly exclusionary conduct, which calls into question their comparative efficiency.

("When the effect of the rebates SmithKline would have to give on Ancef in order to compete effectively with Lilly's [bundled rebate scheme] is taken into consideration, SmithKline's profitability disappears, *even if SmithKline were able to reduce its costs of goods to Lilly's levels*.") (emphasis in original). See *Antitrust Law* ¶ 749, at 136-137 (Supp. 2003); Pet. 5 n.4.

There is insufficient experience with bundled discounts to this point to make a firm judgment about the relative prevalence of exclusionary versus procompetitive bundled discounts. Relative to the practice of predatory pricing analyzed in *Brooke Group*, there is less knowledge on which to assess whether, or to what extent, the legal approach to a monopolist's allegedly exclusionary bundled discounts should be driven by a strong concern for false positives and low risk of false negatives. Cf. 509 U.S. at 224, 226. Further empirical development may shed light on that question. Further experience may also shed light on whether certain aspects of bundled discounts—*e.g.*, the exact nature of the discounting mechanism or the presence or absence of increases in pre-discount prices—may be indicative of an enhanced likelihood that a particular bundled discount program is pro- or anti-competitive.

In light of all of these concerns, the United States submits that the better course at this time is to defer plenary review of the question whether to extend "the essential *Brooke Group* bright-line rule" (Pet. 22) to bundled rebates.[11] While

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[11] The Third Circuit declined to apply *Brooke Group* primarily because it thought that "nothing in the decision suggests that its discussion of the [price-cost test] is applicable to a monopolist with its unconstrained market power." Pet. App. 16a. But this Court's language plainly applies to a monopolist. The Court stated, without qualification, that in a "claim alleg[ing] predatory pricing under § 2 of the Sherman Act . . . a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate mea-

the considerations that motivated this Court's decision in *Brooke Group* may, upon further study, provide useful guidance in resolving the proper treatment of bundled rebates, the applicability of the *Brooke Group* approach to this business practice would benefit from further judicial and scholarly analysis.[12]

B. The Court Should Not Grant Review To Develop Prematurely An Alternative Test For Applying Section 2 To Bundled Rebates

If the Court concludes that it should not grant review to consider petitioner's proposed extension of the *Brooke Group* rule to bundled rebates, the Court might nevertheless consider granting review to provide alternative guidance for applying Section 2 principles to such rebates. But all of the factors that suggest that consideration of the application of the *Brooke Group* test to the bundled rebate practice would benefit from additional judicial experience with the practice also suggest, a fortiori, that the Court should not attempt to craft an alternative test. Instead, the Court would be well served to await further development of the case law, and further insights from academic commentary, before

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sure of its rival's costs." 509 U.S. at 222. Whether to extend *Brooke Group* to bundled pricing properly depends on considerations other than whether the defendant is a monopolist.

[12] As respondents explain (Br. in Opp. 19-21), the court of appeals' decision has not produced a conflict among the courts of appeals. There is also no merit to petitioner's suggestion (Pet. 22-23) that the court of appeals' decision conflicts with the government's brief in *Verizon*. The government's *Verizon* brief stated that, in the specific case of a monopolist's refusal to assist a competitor, the conduct would violate Section 2 if it "ma[d]e no economic sense for the defendant but for its tendency to eliminate or lessen competition." Brief for the United States and the Federal Trade Commission at 15, *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, *supra* (No. 02-682); see *id.* at 13-20. Nothing in the decision of the court below conflicts with that position.

attempting to devise a standard to govern an important business practice of currently uncertain exclusionary effect.

The court of appeals, exercising its role to review and correct trial error, affirmed the district court's judgment, rendered after a jury verdict, and accordingly resolved 3M's liability in this particular case. The court, however, provided few useful landmarks on how Section 2 should apply as a general matter in future cases involving bundled rebates. The court of appeals cited the general principles set forth in *Grinnell*, *Aspen Skiing*, and *Brooke Group*, see Pet. App. 11a-17a; it described how 3M used bundled rebates in this case, *id.* at 20a-22a; and it identified, in general terms, their possible anticompetitive effects, *id.* at 22a-24a. But the court of appeals failed to explain precisely why the evidence supported a jury verdict of liability in this case, including what precisely rendered 3M's conduct unlawful.

For example, the court referred to the potential of bundled rebates to exclude an equally efficient competitor, Pet. App. 22a, but it did not point to any evidence supporting a jury conclusion that an equally efficient competitor would have been excluded here. It suggested a test based on a plaintiff's ability to match the discounts, *id.* at 23a, but it did not point to any evidence that LePage's could not do so here and did not explain why discounts that exclude only less-efficient competitors would violate Section 2. In rejecting 3M's argument that it had a valid business justification, the court noted that an exclusionary practice has been defined as "a method by which a firm . . . trades a part of its monopoly profits, at least temporarily, for a larger market share, by making it unprofitable for other sellers to compete with it." *Id.* at 38a (quoting Richard A. Posner, *Antitrust Law: An Economic Perspective* 28 (1976)). But the court did not elaborate on what evidence might support a conclusion that 3M's conduct fit that pattern. See pp. 5-7, *supra*.

To be sure, the court of appeals' decision identifies factors that could form the basis for standards under which to evaluate the exclusionary potential of bundled rebates involving multiple products. In particular, the court suggested that the anticompetitive effects of bundled rebates are "best compared with tying," Pet. App. 22a (quoting *Antitrust Law*, *supra*), and noted that a monopolist may use bundled rebates to "foreclose portions of a 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. But the court did not elaborate on the complications that arise from those comparisons.

For example, the applicability of tying concepts depends on whether the structure of the discounts results in coercion of the buyer, and that in turn requires consideration of price and cost factors. As previously noted, see notes 8-9, *supra*, inquiries into the proper measure of price, cost, and comparative efficiency present matters that could benefit from further development prior to this Court's consideration.[13]

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[13] Similarly, the equally efficient competitor concept relied on in *Ortho* and *SmithKline* may warrant further study, although these decisions have not resolved the difficulties of comparing efficiency in this context. See note 10, *supra*. The *Ortho* decision effectively applies the *Brooke Group* price-cost test to the defendant's net price of the product facing competition, after apportioning the entire aggregated discount to that product. That approach effectively attributes the entire discount to the product sold by a particular plaintiff. Although that test may ultimately prove useful in identifying bundled discounts that pose relatively minor threats to competition (because attribution of the entire discount to the plaintiff's product still does not yield below-cost pricing), it ignores the possibility that a group of sellers might collectively be able to compete profitably against the package discount even if one of them considered separately could not. *Ortho* also limited recovery to circumstances in which the plaintiff "is at least as efficient a producer of the competitive product as the defendant," 920 F. Supp. at 469, and would thus deny recovery to less

Clear and objective guidance on standards of liability can certainly benefit both businesses and consumers. Moreover, the court of appeals' failure to identify the specific factors that made 3M's bundled discount anticompetitive may lead to challenges to procompetitive programs and prospectively chill the adoption of such programs. Nevertheless, any attempt to provide guidance in this case would require the Court to develop a Section 2 standard in the abstract, without a clear connection to the facts of this or any other case. If the court of appeals' decision does lead to additional litigation, the lower courts can refine the analysis in the first instance.

The court of appeals focused exclusively on petitioner's proposed below-cost sales standard, Pet. App. 7a-8a, and the meager case law addressing bundled rebates offers little assistance in determining how alternative standards might work in practice. Because the courts below did not attempt to apply alternative standards to the facts, their decisions offer little to illuminate such potentially significant questions as whether an equally efficient supplier of private label tape could profitably have matched 3M's discounts and rebates; whether lowered prices resulting from the bundled discounts would have increased quantities of tape purchased by an amount sufficient to make the lowering of prices profitable, even if LePage's had matched the discounts; and whether 3M's "discounts" and "rebates" actually resulted in reduced prices for 3M's customers, as 3M contends, or whether the net result was a price increase structured to discourage trade with LePage's, as LePage's apparently claims.[14]

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efficient plaintiffs even for conduct that would exclude equally efficient plaintiffs.

[14] It is also not clear whether the status of bundled rebates is the determinative question in this case. Respondent argues that the evidence of exclusive dealing suffices to support the judgment. See Br. in Opp. 21-24. The district court did point to evidence of exclusive dealing as

In sum, although the business community and consumers would benefit from clear, objective guidance on the application of Section 2 to bundled rebates, this case does not present an attractive vehicle for this Court to attempt to provide such guidance. Furthermore, there is no pressing need for the Court to address the matter at this time. While bundled rebates may be a common business practice, it is not clear that monopolists commonly bundle rebates for products over which they have monopolies with products over which they do not. The United States submits that, at this juncture, it would be preferable to allow the case law and economic analysis to develop further and to await a case with a record better adapted to development of an appropriate standard.

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supporting the jury's verdict on the Section 2 claims. See Pet. App. 152a-156a. The courts below do not appear to have determined, however, whether the evidence of exclusive dealing, considered apart from the evidence of bundled rebates and discounts, was sufficient to support the jury verdict and thus the judgment. See *id.* at 26a-30a. Nevertheless, that understanding of the courts' rationale is not free from doubt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2004