No. 12-1045

IN THE

Supreme Court of the United States

EATON CORPORATION,

Petitioner,

v.

ZF MERITOR LLC and
MERITOR TRANSMISSION CORPORATION,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in refusing to overturn a jury verdict pursuant to the "pricing practices" exception to the antitrust Rule of Reason in a "rare case" in which the defendant monopolist, unable to match plaintiffs' advanced new heavy-duty transmission, instead used its monopoly power to induce every direct customer in the market to agree (1) in practical effect to make virtually all of its purchases of heavy-duty transmissions from the monopolist for five to seven years, and (2) to engage in a further array of joint activity artificially to raise the price, reduce the benefits, and obstruct the availability of plaintiffs' transmissions to the ultimate consumers (truck buyers), all with the result of increasing consumer prices, decreasing consumer benefits, retarding technological development, and eliminating consumer choice?

RULE 29.6 STATEMENT

ZF Meritor LLC's parent corporations are Meritor Transmission Corporation (an indirect subsidiary of Meritor, Inc.) and ZF Group North American Operations, Inc. (a ZF Friedrichshafen AG company). Meritor Transmission Corporation's parent corporation is ArvinMeritor Holdings Mexico, LLC (an indirect subsidiary of Meritor, Inc.). No publicly held company directly holds 10% or more of the stock of ZF Meritor LLC or Meritor Transmission Corporation.

Meritor, Inc. is the ultimate parent company of Meritor Transmission Corporation, which in turn is both a party to the instant litigation and a parent company of ZF Meritor LLC, a party to the instant litigation.

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STATEMENT

Unable to contend with the "rare" collection of facts involved here, *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 285 (3d Cir. 2012), Eaton ignores, misstates, and improperly compartmentalizes them just as it did below. As the Court of Appeals recognized, this case is not governed by the "price-cost test" because it does not involve use of "unilateral pricing measures" to defeat a less efficient competitor by providing consumers lower prices. *Id.* at 269 ("We decline to adopt Eaton's unduly narrow characterization of this case as a 'pricing practices' case . . . ."). Rather, lacking a product comparable to the new, advanced FreedomLine transmission offered by plaintiffs ("ZFM") and seeking to quash the "real threat" of being technologically leap-frogged, Eaton "hatched a plan" to eliminate consumer choice and perpetuate its long-time position as a monopolist. C.A. App. 1777 (Sweetnam-Eaton); C.A. App. 2226 (Eaton Presentation); C.A. App. 4608 (Eaton Presentation). Making what it describes as only "modest" price concessions, Pet. 4, Eaton focused its efforts on using its monopoly power to obtain from every direct purchaser in the market (the "OEMs") agreements that denied the ultimate consumers (truck buyers) their traditional right to select the transmissions in their trucks. Eaton thus damaged consumer welfare, and excluded from the market its only significant rival, a company that Eaton's economist acknowledged at trial to be an "equally efficient competitor." C.A. App. 1496-97 (Murphy); *see also* Eaton C.A. Br. 44 n.11 (conceding ZFM to be a "sufficiently efficient competitor").

Eaton's concerted anticompetitive conduct began with the execution of long-term *de facto* exclusive dealing contracts, under which each of the OEMs agreed in practical effect to buy from Eaton virtually all the heavy-duty truck transmissions it purchased for five to seven years. *ZF Meritor*, 696 F.3d at 265, 282-83. As ZFM responded competitively by promoting the advantages of their products and offering additional discounts and incentives to OEMs and truck buyers, C.A. App. 276 (Kline-ZFM); C.A. App. 551-52 (Martello-ZFM); C.A. App. 1978 (Internal Eaton Commc'n); C.A. App. 2652 (Eaton Summary), Eaton further invoked its monopoly power, pushing the OEMs into a long list of "partnership" activities to obstruct the truck buyers' access to ZFM transmissions, and artificially increase the truck buyers' cost and reduce their benefits of buying those transmissions. C.A. App. 1673 (Buck-Eaton); C.A. App. 1978 (Internal Eaton Commc'n); C.A. App. 3002-14 (Eaton/Volvo/Mack Commc'n); C.A. App. 2161 (Internal Eaton Commc'n). This joint activity included not only enormous (up to 97.5%) market share thresholds, but also:

1. Removing or downplaying ZFM's products in the OEMs' databooks (product catalogs that truck buyers use to select components for their trucks), including removing ZFM's FreedomLine transmission from databooks at the behest of Eaton even though Eaton was offering no comparable product (C.A. App. 2546 (PACCAR); C.A. App. 1948

(Freightliner); C.A. App. 3867 (International); C.A. App. 3973 (Volvo); C.A. App. 2057 (Mack); D.I. 299 at 261-73 (Kline-ZFM Test.));

2. Imposing a "penalty" on, and "artificially" increasing, the resale prices of ZFM's transmissions from OEM to truck buyer (C.A. App. 2161-62 (International); C.A. App. 1982-83 (Freightliner); C.A. App. 2629-31 (PACCAR));

3. Removing trucks with ZFM's transmissions from OEM sales and warranty promotions (C.A. App. 1872 (Eaton Summary));

4. Removing trucks with ZFM's transmissions from OEM residual (end of useful life) buy-back programs (C.A. App. 2623 (Internal Eaton Commc'n));

5. Telling truck buyers that ZFM's transmissions were unavailable when they were available (C.A. App. 1991 (Internal Eaton Commc'n); C.A. App. 2370 (Eaton Sales Plan)); and

6. Imposing a limit on the monetary incentives ZFM was allowed by an OEM to offer its truck buyer customers (C.A. App. 2629-31 (Internal Eaton Commc'n)).

Eaton did not win a battle of consumer choice; it conspired with the OEMs to deny consumers a choice. Even if Eaton's OEM collaborators obtained some money as a result, this conduct did not benefit the truck buyers/consumers. To the contrary, Eaton's actions resulted in higher consumer prices and lower consumer benefits, less consumer choice, and delayed technological development. *See, e.g.*, C.A. App. 651-53 (Simpson-Eaton); C.A. App. 2534 (Eaton Presentation); C.A. App. 2508-09 (Freightliner Commc'n); C.A. App. 1894-902 (Eaton Presentation).

It therefore is not surprising that Eaton does not seek review by contending that the Court of Appeals failed properly to implement the Rule of Reason. As the Court has established, that Rule is the presumptive mode of antitrust analysis, weighing anti-competitive effects against any procompetitive justifications. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (Rule of Reason is method of analysis presumptively applied to antitrust claims); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) ("[M]ost antitrust claims are analyzed under a 'rule of reason.'"). For particular circumstances, the Court has created some limited exceptions to that usual approach -- both negative (the *per se* rule) and positive ("safe harbors") -- for, among other reasons, provision of greater clarity for businesses. *See Texaco*, 547 U.S. at 8 (exceptions to the Rule of Reason are restricted to a "narrow category of activity"). If Eaton really had wanted the "clarity and predictability" it now so values (Pet. 3), it easily could have tailored its conduct to fit into the "unilateral pricing measures" "safe harbor" -- just confine its conduct to offering volume rebates, as did the defendant in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber* Co., 549 U.S. 312, 322 (2007) (price-cost safe harbor applies where method of exclusion is "unilateral pricing measures"). Eaton chose not to do so, and its own expert testified at trial that the "small" rebates Eaton did offer the OEMs were not the factor that excluded ZFM from the market. C.A. App. 1497 (Murphy).

As a result, even the dissent in the Court of Appeals concedes that the applicable test here is the Rule of Reason. *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 320 (3d Cir. 2012) (Greenberg, J., dissenting) ("[T]he question the jury considered at the trial and that we face on appeal is whether Eaton's rebate program and conduct as a whole was procompetitive or anticompetitive."). And, far from showing Eaton's conduct to be of a type that is "ubiquitous," Pet. 35, the Circuit decisions Eaton cites involve situations that were so different from the "rare case" here that the Court of Appeals was easily able to harmonize such opinions with its ruling in this matter. *ZF Meritor*, 696 F.3d at 274-75, 278-79, 285. Eaton can identify no inconsistency with any decision of the Court, no split among the Circuits, and no basis to consider taking this case from the jury. The Court should deny the Petition.

STATEMENT OF FACTS

The "rare" set of facts in this case is far more extensive than the two-page rendition by Eaton suggests. Pet. 4-5.

A. Eaton's Monopoly Power And The Heavy-Duty Transmissions Market In North America

Heavy-duty trucks include 18-wheeler "linehaul" vehicles, which are used to travel long distances on highways, and "performance" vehicles, such as cement mixers, garbage trucks, and dump trucks. C.A. App. 3215 (Stipulated Facts). These trucks use heavy-duty transmissions, typically three-pedal manual transmissions, which use a clutch to change gears, or two- or three-pedal automated mechanical transmissions, which engage the gears mechanically through electronic controls. *Id.* The relevant market in this case is the sale of class 8 heavy-duty transmissions in North America, C.A. App. 1837 (Verdict Sheet); C.A. App. 1826 (Jury Instructions), a finding Defendant-Petitioner Eaton Corporation ("Eaton") does not contest here.

1. Eaton and ZFM

As the jury found, Eaton has monopoly power in the relevant market, *id.*, a finding Eaton also does not contest here. *See ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 264 & n.2 (3d Cir. 2012) ("Eaton has long been a monopolist in the market for HD transmissions in North America"; "on appeal, [Eaton] does not challenge the jury's finding that it possessed monopoly power"). During 1998-2007, Eaton controlled virtually 100% of the supply of "performance" transmissions, and its share of external linehaul transmissions sales rose from just under 80% during 2000-2002 to close to 100% thereafter. C.A. App. 2647-48 (Eaton-PACCAR Commc'n); C.A. App. 4756 (DeRamus Report). "Aside from [ZFM], no significant external supplier of HD transmissions has entered the market in the past 20 years." *ZF Meritor*, 696 F.3d at 264.[1]

As the monopolist supplier of an essential component for building a truck, Eaton held immense power over the OEMs: No transmission, no truck. *See, e.g.*, C.A. App. 419 (Meegan-International); C.A. App. 520 (Lopes-Volvo/Mack). Eaton did not hesitate to remind the OEMs of its monopoly power. *See, e.g.*, C.A. App. 2647-48 (Eaton reminding PACCAR there are no alternative sources for performance transmissions).

In 1989, based in part upon customer requests that it provide competition, Plaintiff-Respondent Meritor Transmission Corporation ("Meritor") began manufacturing heavy-duty manual transmissions in North America. C.A. App. 1584 (Gosnell-ZFM); C.A. App. 3214 (Stipulated Facts). By 1999, Meritor was

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[1] One OEM, Volvo Group, produced some heavy-duty transmissions for use in its own trucks. C.A. App. 220-21 (Kline-ZFM).

earning a profit, and had obtained approximately 17% of the market. C.A. App. 271, 274 (Kline-ZFM). And it planned to do more.

That year, Meritor entered into a joint venture with ZF Friedrichshafen AG ("ZF"), a global leader in heavy-duty transmissions technology, C.A. App. 436-38 (Lutz-ZFM), to form Plaintiff-Respondent ZF Meritor LLC ("ZF Meritor"). C.A. App. 445 (Lutz-ZFM). A German company, ZF has been manufacturing transmissions for nearly 100 years, offers a complete line of transmissions, and sold close to two million transmissions around the world in 2008. C.A. App. 3214 (Stipulated Facts); C.A. App. 434, 437-38 (Lutz-ZFM).

Meritor knew venturing with ZF would add technology to its portfolio and enhance its credibility with the OEMs. C.A. App. 247-49 (Kline-ZFM). ZF joined with Meritor because it wanted to bring its transmissions technology to North America, and found Meritor to be a "well established" company, with an existing distribution capability and sales force, as well as strong customer relationships. C.A. App. 444-45 (Lutz-ZFM). Together, they created a strong rival to Eaton; as Eaton's own expert testified, ZF Meritor was an "equally efficient competitor." C.A. App. 1495-96 (Murphy).

Among the benefits ZF brought to the venture was a two-pedal (no clutch), automated mechanical transmission, the ASTronic, which, as adapted for North America, was called the

FreedomLine. C.A. App. 442-43 (Lutz-ZFM). ZF had been selling the ASTronic successfully in Europe and elsewhere. C.A. App. 440 (Lutz-ZFM). In North America, the two-pedal FreedomLine was the first of its kind and a great improvement over manual transmissions and existing three-pedal (with clutch) automated mechanicals. C.A. App. 451 (Lutz-ZFM); C.A. App. 438 (advantages of FreedomLine included "ease of operation, possibility not to shift gears, not to select gears, and not to operate the clutch pedal"); D.I. 226 at 198 (Kline-ZFM Test.) (economic advantages included "better fuel mileage, enhance[d] driver safety, reduced truck weight, lower training costs"). Truck buyers highly anticipated the introduction of the FreedomLine. *See* C.A. App. 1926 (Internal Eaton Commc'n) (Eaton describing "overwhelming response from customers who claim they want a unit NOW!").

Eaton recognized that automated mechanical transmissions were a great growth segment, projecting that they would account for up to 50% of the market by 2005. *ZF Meritor*, 696 F.3d at 264; C.A. App. 2997 (Eaton Strategic Plan) ("50% of all trucks sold in NA, Europe, and Japan will have automated transmissions by 2005"). But this was a major vulnerability for Eaton -- the FreedomLine was a "technological innovation for which Eaton did not offer a technically comparable product." *ZF Meritor*, 696 F.3d at 349 (Greenberg, J., dissenting). Eaton did not produce, and would not fully release, a two-pedal automated mechanical transmission until 2004, and its efforts at automation before that time proved problematic, given significant quality issues with its three-pedal automated mechanical transmissions. C.A. App. 2155 (PACCAR/Eaton Commc'n); C.A. App. 2784 (Internal Eaton Commc'n); C.A. App. 2646 (PACCAR/Eaton Commc'n).

As a result, Eaton saw the FreedomLine as a "Real Threat." *See, e.g.*, C.A. App. 2226 (Eaton Presentation); C.A. App. 2956 (Internal Eaton Commc'n); C.A. App. 4279 (Eaton Strategic Plan) ("Our [North American] Position is at Risk!"). ZFM similarly saw the FreedomLine as a way to "leapfrog" Eaton technologically, and become the leader in heavy-duty transmission automation. C.A. App. 527-28, 586 (Martello-ZFM).

2. The OEMs

The North American market for heavy-duty truck transmissions has only four direct customers: Freightliner, LLC ("Freightliner"), International Truck and Engine Corporation ("International"), PACCAR, Inc. ("PACCAR"), and Volvo Group ("Volvo/Mack"). *ZF Meritor*, 696 F.3d at 264. These purchasers are truck builders, not transmission distributors. C.A. App. 240 (Kline-ZFM). While a transmission is only one component of a truck, it is essential. It therefore is crucial to the OEMs that they be able to obtain the number and type of transmissions they need when they need them. *See, e.g.*, D.I. 241 at 3320 (Buck-Eaton Test.).

3. The Truck Buyers/Consumers

The ultimate consumers of heavy-duty transmissions are truck buyers: fleets and owner-operators that purchase heavy-duty trucks. C.A. App. 3216 (Stipulated Facts). These consumers "historically have selected the transmissions and other components that go into the trucks they purchase (called 'spec'ing')." *Id.; see also* C.A. App. 227 (Kline-ZFM). The OEMs traditionally provided truck buyers with the components they desired, and assembled "custom," as opposed to "off-the-shelf," trucks. C.A. App. 683 (Lampert-Freightliner). The ability of truck buyers to choose the components for their trucks is reflected by the OEM "databooks," product catalogs that list transmissions and other components for inclusion in heavy-duty trucks. C.A. App. 3216 (Stipulated Facts); C.A. App. 227-29 (Kline-ZFM).

ZFM and Eaton marketed their transmissions through "push" and "pull" marketing. "Push" marketing involves sales techniques directed at the OEMs. *E.g.*, D.I. 230 at 476 (Kline-ZFM Test.). "Pull" marketing addresses the truck buyer directly, building on the truck buyers' historical ability to specify the components of their trucks. This type of marketing includes factory rebates and other discounts and incentives provided directly to truck buyers. D.I. 230 at 767-69 (Kline-ZFM Test.).

B. Eaton's Use Of Its Monopoly Power To Obtain Long-Term, *De Facto* Exclusive Dealing Agreements With Every Direct Purchaser In The Market

Facing competition from ZF Meritor and its FreedomLine transmission, Eaton "hatched a plan" to protect its monopoly. C.A. App. 4608 (Eaton Presentation). Under this plan, Eaton entered into "unprecedented" long-term agreements ("LTAs") with each of the OEMs in the market. *ZF Meritor*, 696 F.3d at 265, 286-87. By 2001, Eaton had signed five- or seven-year LTAs with three of the OEMs, and it followed in 2002 with five-year LTAs with Volvo/Mack. With these LTAs, Eaton locked up virtually all the business of all the direct purchasers for an extended period. C.A. App. 1879 (Eaton "LTA Update"); C.A. App. 2786-808 (Eaton Presentation); C.A. App. 1914 (Eaton Document: LTAs "will increase market share at International from 73% to 90%" and "solidify our position for the next 7 years" at PACCAR); C.A. App. 1931 (Freightliner 92% commitment); C.A. App. 3891 (International 87.5%-97.5% commitment); C.A. App. 2547-48 (PACCAR 90%-95% commitment); C.A. App. 3982 (similar thresholds at Volvo/Mack when taking into account Volvo/Mack's own heavy-duty transmissions production).

While offering the OEMs the prospect of obtaining what Eaton and its expert have called "modest" or "small" rebates, Pet. 4; C.A. App. 1497

(Murphy),[2] Eaton's LTAs also included an array of novel restrictive provisions, such as extremely high market share penetration requirements, long duration, exclusive databook position for Eaton transmissions, requirements for artificially high resale pricing for rival transmissions, and termination and other punitive provisions should the OEMs not comply with the penetration requirements. *See, e.g.*, C.A. App. 430-31 (Sharp-Freightliner: LTA contained multiple terms that were not "common"); C.A. App. 545 (Martello-ZFM); C.A. App. 417 (Meegan-International); C.A. App. 23 (District Court finding that for "Freightliner, if not for all of the OEMs, these LTAs represented a substantial departure from their previous supply contracts").

Eaton, not the OEMs, pressed to include these requirements in the LTAs. C.A. App. 415-16 (Meegan-International: not OEM's strategy "to have rebates tied to . . . market share"); C.A. App. 525 (Lopes-Volvo/Mack: "We wanted to actually eliminate it [the market share penetration provision]."). And, Eaton used these provisions as a "lever" to create a "high level of pressure and focus" at the OEMs. C.A. App. 1904 (Eaton Analysis); C.A. App. 1669-70 (Buck-Eaton).

Given Eaton's monopoly power, the OEMs understood that they were in no position to refuse Eaton's demands. *See, e.g.*, C.A. App. 2648

[2] Dr. Murphy, Eaton's economics expert, testified at trial that "such small rebates" are "not going to exclude competitors." C.A. App. 1497 (Murphy).

(Eaton/PACCAR Commc'n); C.A. App. 2649-50 (Internal Eaton Commc'n). Without assurance from Eaton of adequate and prompt supply of transmissions at competitively equal prices, an OEM could be unable to compete in the sale of trucks. C.A. App. 2098 (Volvo/Mack Memorandum). No OEM could face the risk of "[n]o delivery performance commitment (possibly disastrous)" from Eaton, or the competitive disadvantage resulting from the likelihood that "Eaton will retaliate and raise prices" to that OEM. C.A. App. 2101 (Volvo/Mack Presentation); C.A. App. 2098 (Volvo/Mack Memorandum). As an OEM explained, if it failed to meet Eaton's penetration requirement, it would "have a big risk of cancellation of the contract, price increases and shortages if the market is difficult." C.A. App. 687-88 (Louya-Volvo/Mack); *see also* C.A. App. 29 (District Court finding it reasonable for jury to conclude that "compliance with [Eaton's] market penetration targets was mandatory because no risk averse business would jeopardize its relationship with the largest manufacturer of transmissions in the market").

Under these circumstances, contract provisions that allowed the OEMs "in theory," C.A. App. 28, to buy from other suppliers, invoke "competitive clauses," or assert purported termination rights, Eaton C.A. Br. 9-10, were of little practical value. *ZF Meritor*, 696 F.3d at 287. As International's Director of Purchasing testified: "where you don't have any alternatives, it takes the meaningness [sic] out of the [competitive] clause." C.A. App. 426. Indeed, the few efforts by OEMs to invoke the "competitive clause" with respect to the FreedomLine were rebuffed by Eaton even though it did not offer a two-pedal, automated mechanical transmission of its own. C.A. App. 2647-48 (Eaton/PACCAR Commc'n); C.A. App. 2275 (Eaton/International Commc'n regarding International's attempt to invoke competitive clause); C.A. App. 1871-72 (Internal International Commc'n); C.A. App. 2156-57 (Eaton/PACCAR Commc'n).

The LTAs included the following:

Market Share Commitments. Each LTA was conditioned on the OEM's meeting an enormous market share commitment. C.A. App. 1931 (Freightliner 92% commitment); C.A. App. 3891 (International 87.5%-97.5% commitment); C.A. App. 2547-48 (PACCAR 90%-95% commitment); C.A. App. 3995 (similar thresholds as to Volvo/Mack when taking into account Volvo/Mack's own production). These percentages were high enough to prevent any other supplier -- including the "equally efficient competitor" Eaton concedes ZFM to have been, C.A. App. 1496-97 -- from reaching viable scale. C.A. App. 830-31 (DeRamus).

While Eaton claims that its rebates helped it develop "economies of scale," Pet. 2, in contrast to those offered in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 215 (1993), Eaton's rebates were not based on volume. *See* C.A. App. 1429 (Davis-Eaton); C.A. App. 1902 (Eaton Slide); *see also* C.A. App. 416-17, 421

(Meegan-International). Thus, if hypothetically in 2002 Freightliner bought from Eaton 900 of the 1,000 transmissions it purchased annually, it would not qualify for a rebate. But it would qualify for a rebate if it bought a much smaller number, e.g., 460 units, from Eaton during that year, so long as it did not buy more than, e.g., 40 units from ZFM.

Market Scope and Duration. The LTAs were signed with every direct purchaser of heavy-duty transmissions in the market, and spanned terms of five to seven years, C.A. App. 2057 (Eaton/Mack); C.A. App. 3973 (Eaton/Volvo); C.A. App. 3867 (Eaton/International); C.A. App. 2541 (Eaton/PACCAR); C.A. App. 1930 (Eaton/Freightliner), with Eaton and Freightliner amending their contract to "remain in effect for a period of 10 years." C.A. App. 2033 (Third Amendment to LTA). Obtaining contracts of such duration, with the entire customer base, was unprecedented in this market. *See, e.g.*, C.A. App. 2584 (Eaton Summary: 2000 Eaton/PACCAR seven-year LTA, "longest Agreement PACCAR has ever signed"). And, as discussed *supra* pp. 14-15, any theoretical OEM termination rights were not meaningful in practice.

Databook Position. The LTAs also required OEMs to publish Eaton as the standard/preferred supplier in the OEM databooks, and (in two cases, for current and/or future models) as the exclusive databook offering, even though Eaton did not have a two-pedal alternative to the FreedomLine until 2004. C.A. App. 2646

(PACCAR/Eaton Commc'n); C.A. App. 2546 (PACCAR); C.A. App. 1948 (Freightliner: "Freightliner agrees to exclusively publish [Eaton's] transmission."); C.A. App. 3867 (International: "For next generation vehicle models . . . Buyer's data books and its Diamond Spec Solution will publish exclusively [Eaton's] manual transmission, automated mechanical transmission, and clutch Products."); C.A. App. 3973 (Volvo); C.A. App. 2057 (Mack). Preferred publication meant Eaton transmissions were used unless the buyer "expressly requests an alternative component." C.A. App. 3973 (Volvo/Eaton). Exclusive publication meant just that -- the only published product.

Eaton states (without a record citation) that "even when certain of respondents' transmissions were not listed in some databooks, truck buyers could (and did) specify them in lieu of Eaton transmissions." Pet. 5. Specification can be made, however, only if the truck buyer knows of the product's availability, and databook publication is, in Eaton's own words, how suppliers obtain "visibility," the vessel through which "dealers and their customers would have access to the product." C.A. App. 693 (Fouch-Eaton); C.A. App. 1318-19 (Davis-Eaton). In addition, unpublished transmissions are taxed with price "penalties" that increase their cost to the truck buyer, C.A. App. 1975 (Internal Eaton Commc'n), and truck dealerships generally do not want to deal with the delay and complexity of trying to order unlisted components, C.A. App. 233-34 (Kline-ZFM). At times, requests are simply denied. *See, e.g.*, C.A.

App. 3015-16 (list of "Freedom transmissions request for quote — denied/not available"). Consequently, if a product is unpublished in the databooks, it is a "disaster" for its manufacturer. C.A. App. 233 (Kline-ZFM).

Artificially Disadvantageous Resale Pricing of Rival Transmissions to Truck Buyers. The LTAs also required the OEMs to price non-Eaton transmissions higher than comparable Eaton transmissions, further to deter truck buyers from selecting ZFM's products. *See, e.g.*, C.A. App. 1948 ("Freightliner agrees to preferential price [Eaton's] transmissions and clutches against equivalent competitor products . . . ."); C.A. App. 2546 (PACCAR LTA: Eaton to be the "lowest priced option in the data book"). While Eaton claims that it sought these provisions to "ensure that Eaton's low prices were passed on to truck buyers," Eaton C.A. Br. 14, there is no requirement in any of the LTAs that the OEMs pass on any lower Eaton pricing to consumers. C.A. App. 1427 (Davis-Eaton). And the OEMs did not lower Eaton prices in the databooks; they "[a]rtificially" raised the prices of rival transmissions, imposing a price "penalty" on ZFM products. *See, e.g.*, C.A. App. 2161 (Internal Eaton Commc'n: International has "[a]rtificially penalized Meritor transmissions"); C.A. App. 2629-31 (PACCAR) ("invoking a penalty to Meritor transmissions"); C.A. App. 1975 (Internal Eaton Email: Freightliner to publish FreedomLine at "$1000 premium"); C.A. App. 1982-83 (Eaton/Freightliner Commc'n: "Meritor products to be priced at $200 premium"); C.A. App. 515-16

(Lopes-Volvo/Mack: "Mack and Eaton had agreed to put the Mack transmission at a $3,500 disadvantage," resulting in Eaton share increasing 35%).

Eaton's Rights to Punish OEMs If They Did Not Achieve Their Penetration Percentages. The LTAs also gave Eaton rights to punish an OEM if it failed to reach Eaton's share requirements -- by compelling repayment of rebates paid in prior years, forcing that OEM to pay higher prices than its competitors, and/or terminating the LTA and walking away from any supply commitment. *E.g.*, C.A. App. 2714 (Eaton summary: International to repay 2003 incentives if 90% share commitment not achieved in 2004); C.A. App. 1931 (Freightliner LTA: Eaton "has the right to terminate the agreement if penetration goals are not reached."); C.A. App. 524 (Lopes-Volvo/Mack: LTA "null and void" if penetration not achieved).

Eaton did not have to tell the OEMs what these provisions meant to their businesses: The OEMs knew that Eaton was a monopolist (and had total control with respect to performance transmissions), as well as the significance of that position. C.A. App. 2647-48 (Eaton reminding PACCAR there are no competitive alternatives to its performance transmissions); C.A. App. 2714 (Memorandum re: Eaton/International Dinner); C.A. App. 2542 (PACCAR LTA); C.A. App. 1931 (Freightliner LTA); C.A. App. 524 (Lopes-Volvo/Mack).

C. Eaton's Continued Use Of Its Monopoly Power To Engage In Further Joint Action To Block Consumers From Access To ZFM's Transmissions

ZF Meritor responded aggressively to Eaton's LTAs, making persistent competitive efforts through both "push" and "pull" marketing. It offered discounts, additional rebates, and other benefits to the OEMs and the truck buyers to try to level the playing field that Eaton had drastically tilted. C.A. App. 2629-31 (ZFM Promotion); C.A. App. 2536 ($1000 incentives); C.A. App. ($750 to $1450 incentives). But Eaton's exercise of its monopoly power was too strong. For the first time since Meritor entered the transmissions business in 1989, attempts to increase volume through offering lower prices did not work. Dennis Kline, ZF Meritor Vice-President of Global Sales, with over 30 years of industry experience, C.A. App. 212, recounted the market abnormality as follows: "This was the first time in my experience that the channel was not responding in a normal way, the way it had done my entire career. And, in fact, there had to be something external that was going on that was making that change happen." C.A. App. 276; *see also* C.A. App. 266 ("[N]othing like this had happened before."). Richard Martello, ZF Meritor's former president, added: "[N]o matter what we did in the market to pull through our product, [the Eaton] agreements were stronger than anything we could do in the marketplace . . . ." C.A. App. 551-52.

Eaton quashed ZFM's "push" efforts by forcing the OEMs to honor their LTA share commitments through threats of retribution. C.A. App. 1999 (Eaton Summary); C.A. App. 1953 (Internal Freightliner Commc'n); C.A. App. 1954-55 (Eaton/Freightliner Commc'n); C.A. App. 2647-48. The threats worked, blocking purchases from Eaton's only significant rival. *See, e.g.*, C.A. App. 2107 (Volvo/Mack); C.A. App. 276-78 (Kline-ZFM).

Having squelched ZFM's "push" efforts, Eaton, together with its OEM collaborators, turned to block ZFM's "pull" efforts directed at the truck buyers. Eaton and the OEMs entered into "partnerships," C.A. App. 1673 (Buck-Eaton); C.A. App. 1978 (Eaton Summary); C.A. App. 1424-25 (Davis-Eaton), and engaged in joint activities to ensure that the OEMs met their LTA share requirements and to deprive truck buyers of access to ZFM's products. These activities, included, *inter alia*: excluding/downplaying ZFM's products in OEM databooks; imposing unwarranted pricing penalties on the resale of ZFM's products; removing trucks with ZFM's transmissions from OEM sales and warranty promotions and residual (end of useful life) buy-back programs; informing truck buyers that ZFM's transmissions were not available when they were; jointly targeting fleets to convert them from ZFM transmissions to Eaton transmissions; and imposing a limit on the incentives ZFM was allowed by an OEM to offer its truck buyer customers. *See, e.g.*, C.A. App. 1988 (Eaton Executive Summary: Freightliner); C.A. App. 2653 (Eaton Executive Summary: International); C.A. App. 2629-31 (Internal Eaton

Commc'n); C.A. App. 1991 (Internal Eaton Commc'n); C.A. App. 1978 (Eaton Sales Analysis); C.A. App. 1872 (International Commc'n); C.A. App. 2623 (Internal Eaton Commc'n).

Regardless of how hard ZFM competed, Eaton's concerted action with the OEMs cemented Eaton's control of the market. Eaton's conduct left ZFM without an opportunity to compete for even 10 % of the market, not enough to remain viable. D.I. 232 at 1001-1002 (Lutz-ZFM Test.).

D. The Anticompetitive Effects Of Eaton's Conduct

Eaton's conduct eliminated its only significant competitor for decades. ZF Meritor "exited the market in 2003, followed by Meritor in 2006, because they could not maintain high enough market shares to remain viable." *ZF Meritor*, 696 F.3d at 289. Eaton contemporaneously bragged that ZF Meritor was "contained because of our actions with LTAs and aggressive field force." C.A. App. 2604-05. OEMs likewise identified Eaton's concerted actions as the cause of ZFM's elimination from the market. In 2002, a Freightliner executive wrote: "This is a dangerous situation. We have already killed Meritor's transmission business. It is just a matter of time now before they close their doors." C.A. App. 2502. In 2007, a Volvo/Mack executive noted: "We just killed ArvinMeritor['s] transmission business with this contract."; "Eaton succeeded to eliminate their only and last competitor in the US. This is just an unvaluable [sic] upside for Eaton (be now in a monopolistic situation!) that they got through our last contract." C.A. App. 2153-54 (Volvo/Mack).

Eaton's conduct came at a great cost to consumers. *ZF Meritor*, 696 F.3d at 287-89. Even while ZFM remained in the market, Eaton blocked the access of the truck buyers to ZFM's transmissions, including the innovative, cost-saving FreedomLine, and "artificially" increased consumers' cost and reduced their benefits of purchasing ZFM products. *See supra* pp. 16-19. ZFM's exit from the market further deprived the truck buyers of any choice or competition (through price, quality, innovation, or otherwise), leaving the market with only one significant external supplier, Eaton -- which promptly raised its prices to them. C.A. App. 852-62 (DeRamus); C.A. App. 651-53 (Simpson-Eaton) (Eaton giving sales reps "marching orders . . . to reduce incentives year after year"); C.A. App. 2534 (Eaton Presentation: "wins" include millions of dollars of reductions in incentives to truck buyers).

Even Eaton's partner OEMs recognized that Eaton's conduct had destroyed competition, leaving them with no alternative but to deal with Eaton. C.A. App. 419-20 (Meegan-International: without competition, dominant supplier can offer "take it or leave it" terms); C.A. App. 2272 (Eaton Presentation: Volvo/Mack "not happy without having more competition"); C.A. App. 2153-54 (Volvo/Mack Commc'n). As a result, after ZFM's exit an OEM asked Meritor to re-enter the market, in an effort to "develop alternatives to Eaton." C.A. App. 425-26 (Meegan-International); C.A. App.

283-84 (Kline-ZFM). But it made no sense to do so, since Eaton's exclusionary practices remained in effect. C.A. App. 284-85 (Kline-ZFM).

PROCEEDINGS BELOW

A. The District Court

In October 2006, ZFM sued Eaton, asserting claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14. During a four-week bifurcated trial on liability, Eaton had every opportunity to try to persuade the jury that its conduct amounted to nothing more than procompetitive price discounts. *See, e.g.*, C.A. App. 1477-86 (Murphy); D.I. 243 at 3880-81 (Eaton Closing Arg.). Likewise, the District Court's jury instructions and verdict form provided ample recognition of Eaton's position. *See* C.A. App. 1829-32 (Jury Instructions) ("If you find that defendant's anticompetitive conduct was reasonably necessary to achieve competitive benefits, then you must balance those competitive benefits against the competitive harm resulting from the same conduct."); C.A. App. 1837-40 (Jury Verdict).

The jury nevertheless delivered a verdict for ZFM, finding that Eaton had violated all three of the cited statutes, and that Eaton's unlawful conduct had caused ZFM antitrust injuries. C.A. App. 1836-40 (Jury Verdict).

Eaton moved for judgment as a matter of law or a new trial, arguing that this case merely involves above-cost pricing. The District Court denied that motion, rejecting Eaton's "price-cost test" position, App. 207a, and holding that "[t]here is sufficient evidence for the jury to have found that the LTAs were unreasonable restraints of trade," given the evidence of substantial market foreclosure, the long duration of the LTAs, and significant barriers to entry. App. 209a.

B. The Court Of Appeals

Eaton appealed to the Third Circuit Court of Appeals. It did not challenge any of the District Court's jury instructions or the verdict form, nor did it contest the jury's findings of market definition, monopoly power, or concerted action. Eaton C.A. Brief at x; *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 284 (3d Cir. 2012). Rather, it once again argued that the "pricing practices" "safe harbor" of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), et al. should apply to this case since Eaton's conduct included some rebates to the OEMs.

A majority of the Third Circuit rejected this contention and upheld the jury verdict. While recognizing Eaton's rebates to the OEMs, *ZF Meritor*, 696 F.3d at 277, the Court of Appeals disagreed with "Eaton's unduly narrow characterization of this case as a 'pricing practices' case, i.e., a case in which price is the clearly predominant mechanism of exclusion," and held that the "pricing practices" exception to the Rule of Reason "has not established a *per se* rule of non-liability under the antitrust laws for *all* contractual practices that involve above-cost pricing." *Id.* at 269, 278.

In reaching this conclusion, the majority addressed the price-cost test decisions of the Court, in which "pricing itself operated as the exclusionary tool," *id.* at 275, and found nothing inconsistent in their facts, analyses, or holdings. *Id.* at 279-81. The majority also reviewed cases from other Circuits that involved the price-cost test, and likewise determined that none of them suggested any reason to reverse the jury verdict here. *See id.* at 275, 278 ("Nothing in the case law suggests, nor would it be sound policy to hold, that above-cost prices render an otherwise unlawful exclusive dealing agreement lawful." (discussing *NicSand*, *Concord Boat*, and *Barry Wright*)).

The majority thus applied a standard Rule of Reason analysis, and concluded that "this case involves precisely the combination of factors that we explained would be present in the rare case in which exclusive dealing would pose a threat to competition." *Id.* at 285; *see id.* at 287 (LTAs "replete with provisions that a reasonable jury could find anticompetitive"). Eaton does not seek review of the Court of Appeals' implementation of the Rule of Reason.

A lengthy dissent disagreed with the majority's result, but concurred with important parts of its analysis. Recognizing that Eaton's conduct was not limited to offering rebates to the OEMs, *id.* at 320, the dissent conceded that the Rule of Reason, not the price-cost test, governs this case. *Id.* ("[T]he question the jury considered at the trial and that we face on appeal is whether Eaton's rebate program and conduct as a whole was procompetitive or anticompetitive . . . ."). The dissent also acknowledged that no presumption of lawfulness applies to above-cost pricing when plaintiff "establishes that the defendant's conduct as a whole was anticompetitive notwithstanding the pricing aspect of its conduct." *Id.* at 321; *see also id.* at 318 n.17 ("I concur fully with the majority's point that a firm may engage in anticompetitive conduct without engaging in below-cost pricing.").

The dissent proceeded, however, to propose a special Rule of Reason for this case: "the *Brooke Group* price-cost test would operate only as one element, though a significant one, of a court's and jury's inquiry under the rule of reason"; it should operate as a "high barrier" to a plaintiff's success, and be given "persuasive effect." 696 F.3d at 312, 320-21. The dissent cited no precedent for such a novel Rule of Reason presumption. Nor did it explain why price should be so elevated above other forms of competition (e.g., quality, service, technological innovation) under the Rule of Reason, or why typical Rule of Reason analysis does not allow adequate room for a defendant -- as Eaton did here -- to maintain that its conduct was not anticompetitive.

The dissent also incorrectly criticized the majority for assertedly holding that the application of *Brooke Group* depends on how a plaintiff casts its claim, *id.* at 321, and mistakenly suggested that the majority gave no weight to Eaton's above-cost pricing practices. *Id.* at 311. The majority did not base its decision on ZFM's characterization of its claims, but on the facts of the case, i.e., whether "price is the clearly predominant mechanism of exclusion." *Id.* at 269. And the majority explicitly recognized and discussed Eaton's pricing, including its rebates to the OEMs (*see*, *e.g.*, *id.* at 265-67). The majority, however, also recognized that the rebates were offered in return for huge market share commitments and the OEMs' agreements to block truck buyers from access to ZFM's transmissions, and took account of, e.g., Eaton's LTA enforcement efforts, its "partnerships" with the OEMs to deny truck buyers their choice in transmissions, the exclusion/downplaying of ZFM's products in the OEM databooks, and the imposition of resale pricing penalties on ZFM's products. *Id.* at 286-88. The dissent mostly ignored these facts, just as it mostly ignored the impact of Eaton's conduct on the consumers/truck buyers.

Eaton petitioned for panel rehearing and/or rehearing en banc. The Court of Appeals denied that petition on October 26, 2012. App. 226a.

REASONS FOR DENYING THE PETITION

Eaton's Petition is based on avoidance of much of the evidence before the jury. Consideration of the full array of Eaton's concerted, anti-consumer conduct in this "rare case" confirms that nothing in the Court of Appeals' opinion conflicts with any decision of the Court or other

Circuit, or provides any other reason warranting review.

I. The "Pricing Practices" "Safe Harbor" Does Not Apply To Eaton's Array Of Concerted, Anti-Consumer Conduct In This "Rare Case"

A. The "Price-Cost" Test Applies Only To Cases In Which Defendant Excluded Competition Through "Unilateral Pricing Measures" That Benefit Consumers

Eaton bases its argument on a false premise -- that the "pricing practices" "safe harbor" is the general rule for analyzing antitrust cases, from which ZFM purportedly seeks an exception. Pet. 1, 11, 29. To the contrary, the Court long has established that the Rule of Reason is the presumptive mode of analysis for antitrust claims. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (Rule of Reason is method of analysis presumptively applied to antitrust claims); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) ("[M]ost antitrust claims are analyzed under a 'rule of reason.'"). While the Court has created exceptions to the Rule of Reason for conduct that "always or almost always" injures competition, *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007), or is virtually always procompetitive, *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993), it keeps those exceptions narrow, so that they do not grow beyond their *raisons d'être*. *See Texaco*, 547 U.S. 1, 8 (2006) (exceptions to the Rule of Reason are limited to a "narrow range of activity").

As the *per se* rule of illegality operates as a circumscribed exception to Rule of Reason analysis where the conduct at issue is of a type that is "manifestly anticompetitive," *see Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977),[3] the Court has created a limited "safe harbor" for cases in which above-cost "unilateral pricing measures" are the claimed method of exclusion, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 322 (2007). The reason for this exception is promotion of consumer welfare -- because "allowing such claims could, perversely, 'chil[l] legitimate price cutting,' which directly benefits consumers." *Id.*; *Brooke Group*, 509 U.S. 209, 223 (1993) ("'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 . . . .'" (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990))).

In *Brooke Group*, a predatory pricing case, the defendant had no monopoly power (only 12% of the market), 509 U.S. at 213, and no product quality advantage over plaintiff (as relevant, both offered generic, black-and-white cigarettes), *id.* at

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[3] *See also*, *e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

215. Defendant's only available means to defeat plaintiff therefore was to offer volume rebates. *Id.* at 231-32. The Court concluded that discounts are virtually always pro-consumer, and held that below cost pricing is required for a predatory pricing claim. *Id.* at 223.

To keep this "safe harbor" consistent with its underlying rationale of promoting consumer welfare through lower prices, the Court consistently has confined it to "the context of pricing practices," *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990), or, as the Court later described, to "unilateral pricing measures," *Weyerhaeuser*, 549 U.S. 312, 322 (2007) (involving claim of buy-side predatory pricing). *See ZF Meritor*, 696 F.3d at 279 ("safe harbor" applies where "the defendant's pricing itself operated as the exclusionary tool"). This careful limitation on the scope of the "safe harbor" also is necessary because, as the Court has recognized: competition can come in many forms besides price, (e.g., quality, service, innovation), *see Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007); restraints on competition can come in innumerable varieties, *see generally*, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984); and in many circumstances concerted action can impose greater dangers to competition than can unilateral measures, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). Thus, in successfully opposing an earlier petition for a writ of certiorari, the Solicitor General emphasized that the Court's decision in *Brooke Group* was not of broad application to multiple types of conduct, but instead "provided more specific guidance for Section 2 cases in the context of a particular form of potentially exclusionary conduct -- aggressive price-cutting." *See* Brief for the United States as Amicus Curiae at 10, *3M Co. v. LePage's Inc.*, No. 02-1865, 2004 WL 1205191 (May 28, 2004).[4]

This case is very different. Pricing was not Eaton's primary exclusionary tool -- indeed, according to Eaton's expert it was only a "small" tool that was "not going to exclude competitors." C.A. App. 1497 (Murphy). Rather, Eaton used its monopoly power to engage in an array of exclusive dealing and other concerted action with the OEMs to deny consumers access to ZFM's products, including to block the "Real Threat" of ZFM's technologically superior FreedomLine transmission. *See* C.A. App. 2226 (Eaton Presentation); *ZF Meritor*, 696 F.3d at 286-90.

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[4] Eaton gains nothing from its citation to *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438, 450 (2009), for the proposition that "there is no reason to distinguish between the price and nonprice components of a transaction." Pet. 22. Read in context, the Court there was simply commenting that, given the absence of a duty to deal, there was no meaningful difference between the denial of service alleged in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) and the defendant's refusal to offer lower prices to its wholesale customers in *linkLine*.

Moreover, the object and effect of Eaton's conduct were not to increase sales by benefitting consumers, as in *Brooke Group*, but to increase sales by harming consumers. In *Brooke Group*, customers got lower prices; here, the truck buyers got higher resale prices, fewer benefits, blocked innovation, and no choice. As a result, Eaton's conduct is not properly analyzed under the price-cost test but under the Rule of Reason -- a conclusion with which even the dissent had to agree. *ZF Meritor*, 696 F.3d at 279.

Eaton nevertheless claims that the Court of Appeals erred because its decision assertedly "restrain[s] discounts by more-efficient companies in order to aid less-efficient rivals." Pet. 17-18. This effort fails on both the facts and the law. Eaton cannot avoid recognition that its conduct went far beyond offering rebates to the OEMs, and its own economic expert conceded at trial that ZFM was an "equally efficient competitor." C.A. App. 1496-97 (Murphy); s*ee also* Eaton C.A. Br. 44 n.11 (Eaton conceding ZFM was a "sufficiently efficient competitor"). Indeed, ZFM had a more advanced, consumer-desired product than did Eaton.

Eaton's argument also ignores that any cited concern with "aid[ing] less efficient competitors" is limited to a desire to promote consumer welfare by avoiding a rule that would chill pro-consumer unilateral discounting by efficient firms. *Weyerhaeuser*, 549 U.S. at 322 (2007); *Brooke Group*, 509 U.S. at 223 (1993). Eaton did not engage in unilateral pro-consumer discounting; it used its monopoly power to engage in concerted action that was specifically designed to and did harm consumers -- by artificially blocking and penalizing truck buyers' access to the products of Eaton's sole significant competitor, and ultimately eliminating such consumer choice altogether. None of Eaton's citations immunizes such conduct.[5]

B. Eaton's Conduct Must Be Assessed "As A Whole" And Not Compartmentalized

By its compartmentalized argument, *see* Pet. 14-25, Eaton also asks the Court to examine its conduct on a piecemeal basis, e.g., consider Eaton's "multi-year terms and high share-penetration targets," Pet. 15, separately from its databook removal, resale price penalties and other concerted action to bar consumer access to ZFM's products. Eaton offers no factual basis to so dismember its overall course of conduct, and its approach conflicts directly with *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), in which the Court declared that "'[t]he character and effect of [an antitrust] conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.'" 370 U.S. at 699 (citation omitted). This mode of analysis is so well

[5] Eaton thus obtains no benefit from its contention that its "prices were lower than respondents' prices at all times . . . ." Pet. 4, 29. Moreover, Eaton fails to show that its assertion includes incentives to truck buyers, addresses product mix, or recognizes that Eaton's conduct so harmed the competitive process that it prevented ZFM from selling more transmissions by offering lower prices. *See supra* pp. 22-24.

established that the dissent agreed, stating: "[T]he question the jury considered at the trial and that we face on appeal is whether Eaton's rebate program and conduct as a whole was procompetitive or anticompetitive." *ZF Meritor*, 696 F.3d at 320.

Moreover, the Court has twice emphasized, in the context of exclusive dealing cases, that review of defendant's conduct as a whole focuses on its cumulative "practical effect," not, as Eaton requests, by resort to counterfactual theory, Pet. 12-22. In *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), the Court applied the Rule of Reason to an exclusive dealing claim. 365 U.S. at 329 (quoted at *ZF Meritor*, 696 F.3d at 271); *see also* 696 F.3d at 268-69, 271 (legality of exclusive dealing agreements judged under the Rule of Reason). In so doing, the Court referred three times in one paragraph alone to the "practical effect" of the challenged conduct, and discussed with approval its prior decisions that had found antitrust violations because of the cumulative practical effect of the various exclusionary agreements entered into by the defendant. *Id.* at 326-27. Similarly, in *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 457 (1922), the Court focused on the cumulative "practical effect" of the restricted use clauses in defendants' multiple leases with shoe manufacturers, and held that defendant had violated the antitrust laws. The Court of Appeals used the appropriate standard, assessing Eaton's pricing arguments against the actual anticompetitive effect of its conduct as a whole, and found no basis to overturn the jury verdict. *See ZF Meritor*, 696 F.3d at 286-89.

II. Eaton Identifies No Split Among The Circuits

1. Intertwined with its argument that the Court of Appeals erred in refusing to apply the price-cost test is Eaton's claim that the rejection of its position created a potpourri of Circuit splits. Petition at 11-22. Far from supporting Eaton's position, its Circuit citations confirm the inapplicability of the price-cost test here: While some of those decisions employed a price-cost test with respect to predatory pricing claims, they otherwise applied the Rule of Reason. And none of those decisions addressed a situation comparable to the "rare" set of facts here, involving a monopolist that conspired with its direct customers to deprive consumers of access to the products of the only significant competitor, including a novel product that was in great consumer demand and as to which the monopolist had nothing analogous to offer.

In *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000), the court applied the price-cost test to plaintiff's predatory pricing claim under Section 2 of the Sherman Act, but employed the *Tampa Electric* Rule of Reason standard to plaintiff's claim of unlawful *de facto* exclusive dealing agreements under Section 1. *Id.* at 1058-60. Similarly, in *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236-38 (1st Cir. 1983) (Breyer, J.), the First Circuit applied a price-cost test to plaintiff's predatory pricing claim, but employed the *Tampa Electric* Rule of Reason framework with regard to plaintiff's claim of unlawful exclusive dealing agreements, balancing the foreclosure created by "the nature of the contracts and the market" with "their business justifications."

In *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 451-55 (6th Cir. 2007), the plaintiff conceded that defendant's pricing was not below cost, and the court analyzed plaintiff's antitrust claims under the *Tampa Electric* Rule of Reason approach. The court added that it must be mindful that "'[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue,'" *id.* at 454 (quoting *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004)), and explained that "[h]ad the large retailers and [defendant] 3M conspired to eliminate [plaintiff] NicSand from the market, that would be another matter. And should 3M use these contracts and its current market dominance to establish unreasonable barriers to entry in the future, a potential competitor might have a legitimate antitrust claim," *id.* at 457. In this case, such concerns are not hypothetical: Eaton conspired with every one of the OEMs to exclude ZFM (and harm consumers), and Eaton used its monopoly power and its LTAs and other concerted conduct to eliminate its only significant competitor for many years.

Eaton's other Circuit cites help it no more. In *Virgin Atlantic Airways Ltd. v. British Airways*

Plc, 257 F.3d 256, 261 (2d Cir. 2001), the court used a price-cost test where plaintiff only claimed that it had been harmed by virtue of predatory pricing. The court also noted that the defendant had no market power and had not economically coerced customers into buying from it, and that the plaintiff was excluded from a very small portion of the market (if at all). *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008), likewise applied a price-cost test where plaintiff's only claim was that it had been excluded by defendant's discounts (which, in any event, addressed only 9%-15% of the market). And, while Eaton asserts that the court in *Southeast Missouri Hospital v. C.R. Bard, Inc.*, 642 F.3d 608 (8th Cir. 2011) "applied the price-cost test to reject an antitrust challenge," Pet. 16, the court there actually held for defendant because plaintiff had failed to identify a relevant market. *Id.* at 613, 618. Nowhere in that decision does the majority even discuss defendant's pricing practices.

2. As another example of a supposed Circuit split, Eaton points to the citation by the Court of Appeals of two statements by OEM executives about the implication for their supply from Eaton if they bought ZFM's transmissions. Pet. 22-25. Eaton did not object to the admission of these statements at trial, on the grounds that they assertedly were speculative or otherwise. D.I. 233 at 1135 (PTX 257r); D.I. 234 at 1568 (PTX 272). And Eaton does not even try to show that, if the Court of Appeals had not cited these statements, a different judgment would have been warranted. *See Tenn. Elec. Power Co. v. Tenn. Valley Auth.*,

306 U.S. 118, 145-46 (1939). Moreover, Eaton does not contest the jury's finding that it has monopoly power, and it takes no speculation for executives to know that a monopolist exists in their industry, or that a monopolist can do what a monopolist can do, i.e., exercise the "power" in "monopoly power." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). As a result, it is perhaps not surprising that, in each of the cases Eaton cites on this point (*Roland Machinery*, *Austin Travel*, *Omega Environmental*, *Konik*), there is virtually no evidence of exclusionary conduct, and, in most of the cases, the defendant lacked monopoly power.

Likewise, Eaton can create no Circuit split by noting the Court of Appeals' reference to Eaton's monopoly power. Pet. 25-26 (citing to App. 32a, 34a). Far from Eaton's assertion, the court was not saying that the price-cost test cannot apply to a monopolist in the appropriate circumstances; it was saying that the price-cost test does not apply to this monopolist under these circumstances. *ZF Meritor*, 696 F.3d at 285.

CONCLUSION

Eaton asks the Court to hold that concerted, anticompetitive conduct by a monopolist cannot violate the antitrust laws so long as the monopolist offers its direct customers some rebate, however "small" or "modest." The Court of Appeals declined so to "place a significant portion of anticompetitive conduct outside of the reach of the antitrust laws without adequate justification." 696 F.3d at 278. The Court equally should decline Eaton's invitation, and deny its Petition for a Writ of Certiorari.

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