No.

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**

PETITION FOR A WRIT OF CERTIORARI

JAMES F. RILL
JOSEPH A. OSTOYICH
ERIK T. KOONS
BAKER BOTTS LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 639-7000

THEODORE B. OLSON
Counsel of Record
THOMAS G. HUNGAR
GEOFFREY C. WEIEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Petitioner

QUESTION PRESENTED

This Court has made clear that, "regardless of the type of antitrust claim involved," there can be no antitrust liability by virtue of a defendant's "pricing practices" when the defendant did not price below cost, because liability for above-cost discounts or rebates would chill competition. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339, 340 (1990). The Court has repeatedly reiterated this price-cost test and applied it to a variety of antitrust claims. *See*, *e.g.*, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). In this case, the court of appeals imposed antitrust liability on petitioner based on sales agreements that incentivized additional sales by giving customers above-cost rebates if they purchased specified percentages of their requirements from petitioner. The court of appeals refused to apply the price-cost test to uphold petitioner's facially non-mandatory above-cost conditional-rebate agreements, instead deeming them unlawful "*de facto* partial exclusive dealing" arrangements. The First, Second, Sixth, Eighth, and Ninth Circuits, by contrast, have applied the price-cost test to reject antitrust challenges to comparable conditional-rebate agreements. The question presented is:

Whether the court of appeals erred in holding that conditional-rebate agreements can give rise to antitrust liability in the absence of any showing of below-cost pricing.

PARTIES TO THE PROCEEDING

Petitioner, who was Defendant-Appellant-Cross-Appellee below, is Eaton Corporation.

Respondents, who were Plaintiffs-Appellees-Cross-Appellants below, are ZF Meritor LLC and Meritor Transmission Corporation. ZF Meritor LLC is a 50% joint venture of Meritor Transmission Corporation and ZF Friedrichshafen AG, a German company that is not a party to this case.

RULE 29.6 STATEMENT

Eaton Corporation is a publicly traded company. No other publicly traded company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Eaton Corporation ("Eaton") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-188a) is reported at 696 F.3d 254. Opinions of the district court (App. 189a-198a, 199a-224a) are reported at 646 F. Supp. 2d 663 and 769 F. Supp. 2d 684.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2012. A petition for rehearing en banc was denied on October 26, 2012. App. 225a-226a. On December 19, 2012, Justice Alito extended the time for filing the petition to and including February 25, 2013. No. 12A621. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in the appendix to the petition. App. 227a-229a.

STATEMENT

This Court has consistently held that antitrust liability may not be predicated on a defendant's pricing practices so long as the defendant's prices remain above its costs. *E.g.*, *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990). This "price-cost test" is based on sound economic and judicial principles: Equally efficient competitors can match any above-cost price, and thus above-cost price incentives do not foreclose competition; courts and juries are not well suited to determine whether above-cost prices are somehow anticompetitively low; and any risk of antitrust liability for price reductions would chill vigorous price competition, which the antitrust laws are designed to encourage. *Brooke Grp.*, 509 U.S. at 223, 226-27. The price-cost test satisfies the compelling need for "clear rules in antitrust law" by providing a "safe harbor" within which businesses may "know they will not incur liability" for their pricing practices. *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 452-53 (2009). Although this test originated in the predatory pricing context, it applies "'regardless of the type of antitrust claim involved.'" *Brooke Grp.*, 509 U.S. at 223 (citation omitted).

In this case, respondents brought an antitrust challenge to Eaton's sales agreements, which gave customers above-cost rebates if they purchased specified percentages of their requirements from Eaton. The agreements thus tended to expand output by allowing economies of scale that lowered the prices paid for transmissions. Although respondents could have competed by offering their own reduced pricing to match Eaton's lower prices, they did not. Nevertheless, the Third Circuit held that the price-cost test did not provide a safe harbor for Eaton's above-cost conditional-rebate agreements because, in the court's view, the plaintiffs were also complaining about purportedly non-price aspects of the agreements. App. 32a. The court also pointed to speculative concerns by employees of a single customer about the possible consequences if the customer did not meet its nonbinding purchase targets under its agreement with Eaton. App. 33a-34a.

The Third Circuit's refusal to apply the price-cost test to uphold Eaton's agreements is irreconcilable with this Court's price-cost precedents. It also conflicts with decisions of the First, Second, Sixth, Eighth, and Ninth Circuits holding that analogous conditional-rebate agreements do not give rise to antitrust liability as long as the discounted prices remain above the defendant's incremental costs.[1] The Third Circuit's rationale, if not overturned by this Court, will create a glaring loophole that will destroy the clarity and predictability of the price-cost test's safe harbor, making it impossible for leading companies to engage in aggressive above-cost price competition with confidence that their conduct will not subject them to treble-damage liability in antitrust suits brought by less successful competitors or plaintiffs' lawyers.

As the dissenting judge below correctly recognized, the court of appeals' approach permits the price-cost test to be evaded as "long as the plaintiff is clever enough to claim that the non-price aspects of the defendant's pricing practices, not the prices themselves, were anticompetitive." App. 124a (Greenberg, J., dissenting). Certiorari is necessary to resolve the conflicts between the decision below and the decisions of this Court and other courts of appeals, and to provide guidance to the lower courts concerning the correct legal standards and criteria governing review of the ubiquitous practice of conditional-rebate agreements.

---

[1] Agreements that provide conditional discounts, rebates, or other forms of conditional price reductions are referred to herein as "conditional-rebate agreements" for brevity.

I. FACTUAL BACKGROUND

Petitioner Eaton manufactures and sells heavy-duty truck transmissions to the four major original equipment manufacturers ("OEMs") of commercial trucks in North America: Freightliner, International, PACCAR, and Volvo. Truck buyers specify which manufacturer's components (including transmissions) should be included in the trucks they purchase from OEMs. Eaton and respondents (ZF Meritor LLC and Meritor Transmission Corporation) were the primary non-OEM transmission manufacturers between 1989 and 2006; Volvo, and Freightliner's parent (Daimler), also made some of their own transmissions. App. 5a-6a, 8a n.8, 12a; C.A. App. 1193.

Following a steep reduction in demand for trucks in 1999-2000, OEMs signed long-term agreements ("LTAs") under which Eaton committed to various output-enhancing terms, including price reductions and engineering and technical support for OEMs. App. 192a. The LTAs also provided for additional modest price rebates that were conditioned on OEMs' achievement of share-penetration targets (*i.e.*, purchases of specified percentages of their transmission needs from Eaton). The LTAs "did not expressly require the OEMs to purchase a specified percentage of their needs from Eaton" (App. 8a), so OEMs "remained free to buy [heavy-duty] transmissions from other suppliers, including [respondents]" (App. 192a). The OEMs chose Eaton's LTAs over respondents' competing bids because of Eaton's lower prices and more desirable products. App. 92a-96a (Greenberg, J., dissenting).

Eaton's prices were lower than respondents' prices at all times, but were always above Eaton's costs.

The market-penetration targets (ranging from 65% to 97.5%), when met, ensured Eaton sufficient volume to lower its production costs. In return for Eaton's lower prices, OEMs' "databooks," which are publications (printed or electronic) that list truck components and serve as a form of advertising for component manufacturers, listed Eaton's transmissions in the "standard" position among several options, the "preferred position" (*i.e.*, the lowest-priced transmission), or (for some listings of two OEMs) the exclusive position. Each transmission supplier also engaged in marketing efforts aimed directly at truck buyers. Thus, even when certain of respondents' transmissions were not listed in some databooks, truck buyers could (and did) specify them in lieu of Eaton transmissions. Each LTA gave the OEM the right to terminate or modify the agreement if respondents or another manufacturer offered better products or lower prices. App. 5a-6a, 9a, 10a, 11a, 193a; C.A. App. 1638, 2297, 4262.

Respondents' market share had declined sharply before the LTAs were signed, but "increased at three of the four OEMs" from 2000 to 2003 while the LTAs were in effect. App. 203a. Respondents refused requests from OEMs to lower their transmission prices, however, and Eaton's prices remained lower than respondents'. Indeed, respondents raised prices substantially on their top transmission in 2003. Respondents' sales subsequently declined, and they dissolved their joint venture in late 2003 and stopped selling transmissions altogether in early 2007. App. 12a, 96a, 192a; C.A. App. 1259-61, 3235, 3790.

II. PROCEEDINGS IN THE DISTRICT COURT

Respondents filed suit against Eaton, asserting antitrust claims under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. Respondents contended that they were foreclosed from selling transmissions because OEMs sought to purchase primarily from Eaton in order to achieve share-penetration targets and earn rebates. App. 12a.

The jury found Eaton liable. Eaton filed post-trial motions, arguing, among other things, that it could not be held liable because its prices were always above its costs. The district court denied Eaton's motions, reasoning that Eaton had used its "rebates as a 'big hammer'" to foreclose respondents. App. 200a, 209a.

III. PROCEEDINGS IN THE COURT OF APPEALS

A divided panel of the Third Circuit affirmed the liability judgment. App. 1a-86a. The majority acknowledged that the price-cost test governs "above-cost discounting or rebate programs, which condition the discounts or rebates on the customer's purchasing of a specified volume or a specified percentage of its requirements." App. 28a. The majority held, however, that the price-cost test is subject to a broad exception: It applies only when "price is the clearly predominant mechanism of exclusion," a phrase that the majority did not further define. App. 17a.

The majority then applied its newly fashioned "clearly predominant" exception to hold that the price-cost test was "inapposite" because respondents "did not rely solely on the exclusionary effect of Eaton's prices," and thus "price itself was not the clearly predominant mechanism of exclusion." App. 32a. The court based this conclusion on aspects of the LTAs that it viewed as distinct from "the exclusionary effect of Eaton's prices." *Id.* These supposed non-price factors include: (1) the LTAs' duration and high penetration targets; (2) databook positioning that allegedly "block[ed] customer access" to respondents' products; (3) the greater economies of scale that Eaton possessed because of respondents' lower "market share"; and (4) Eaton's "position as a supplier of necessary products" (*i.e.*, strong customer preference for Eaton's transmissions). *Id.*

The majority also held that, although the LTAs were facially non-mandatory because they did not obligate OEMs to purchase even a single transmission from Eaton and were readily terminable, they nonetheless constituted "*de facto* partial exclusive dealing." App. 8a, 34a, 42a-44a. The court based this holding on speculative internal concerns by employees of a single OEM about whether it might face "supply shortages" if it did not meet its purchase targets. App. 33a-34a, 43a-44a.

On these grounds, the majority declined to follow this Court's recent extensions of the price-cost test in *linkLine* and *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007). App. 40a. Accordingly, the majority held that respondents were not required to prove that Eaton was pricing below cost.

Senior Judge Greenberg dissented. App. 87a-188a. He emphasized that the price-cost test "is a cornerstone of antitrust jurisprudence that applies regardless of whether the plaintiff focuses its claim on the price or non-price aspects of the defendant's pricing program." App. 104a. He concluded that where "a plaintiff attacks both the price-based and non-price-based elements of a defendant's pricing practices, a court should apply and give persuasive effect to the *Brooke Group* price-cost test." App. 122a.

Judge Greenberg explained that this approach serves the dual purposes of "exercis[ing] caution" before condemning "generally procompetitive" price discounting, and of encouraging "predictability" in antitrust law. App. 123a. "The result of the majority's approach," by contrast, "is that the strong procompetitive justifications driving the Supreme Court's repeated charge that inferior courts exercise caution before condemning above-cost pricing practices suddenly disappear so long as the plaintiff is clever enough to claim that the non-price aspects of the defendant's pricing practices" were anticompetitive. App. 124a.

Judge Greenberg also emphasized that the supposed non-price aspects of Eaton's LTAs "and indeed the LTAs themselves would not exist without the reduced prices that Eaton offered as an incentive for the OEMs to enter the agreements." App. 124a. Thus, it "ignores the economic realities" to "conceptually sever[]" supposed non-pricing conduct from pricing conduct. *Id.*

Judge Greenberg further observed that the leading antitrust treatise, Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2000), would apply a price-cost test to preclude liability for conditional-rebate agreements like Eaton's. App. 125a-130a. This is because an "aggressive rival," as long as it is equally efficient, "can steal sales by matching" the price reductions. App. 127a (emphasis omitted) (quoting Areeda & Hovenkamp, *supra*, ¶ 768b). Here, "the prices offered under [the LTAs] were at all times above-cost such that an equally-efficient competitor could have matched them." App. 105a.

Judge Greenberg also recognized that "there is not a scintilla of evidence that if an OEM did not meet its LTA's market-share target Eaton would have refused to supply it with transmissions." App. 154a. He explained (without contradiction) that the only evidence of OEM concerns about supply were two passing statements of "second-hand speculation" from employees of a single OEM. App. 156a. Judge Greenberg concluded that such speculation could not "sustain the inference" that the majority ascribed to it. *Id.*

Judge Greenberg cautioned that "erroneous judgments" like the majority's ruling "do not come without a cost to the economy as a whole." App. 185a. That is because, notwithstanding this Court's emphasis on the need for clear rules in antitrust law, it is impossible to "glean [any] clear rule from the majority's opinion." App. 186a. A company "that seeks to expand sales through a discount program" is now unable to know in advance whether its conduct is lawful or will instead create treble-damages antitrust liability. *Id.* As a result, "firms will play it safe by not formulating discount programs" and "the result of this case will be an increase of prices to purchasers and the stifling of competition." App. 187a.

The court of appeals denied Eaton's petition for rehearing or rehearing en banc. App. 225a-226a.

REASONS FOR GRANTING THE PETITION

This Court's review is necessary to address the Third Circuit's creation of a glaring exception to the price-cost test, an exception that violates this Court's precedents, conflicts with numerous decisions of other courts of appeals, and will inevitably chill vigorous price competition unless overturned. This Court has repeatedly confirmed the importance of the price-cost test by granting certiorari to consider other courts' refusals to apply that test in the context of antitrust challenges to pricing-related conduct. *E.g.*, *linkLine*, 555 U.S. at 451; *Weyerhaeuser*, 549 U.S. at 318. Like this case, both *linkLine* and *Weyerhaeuser* involved plaintiffs that were unwilling or unable to compete on price and instead sought to invoke the antitrust laws to punish their rivals. In both cases, this Court rejected attempts by lower courts to create loopholes in the price-cost test. "To avoid chilling aggressive price competition," this Court has required plaintiffs that challenge pricing conduct to demonstrate, among other things, that "'the prices complained of are below an appropriate measure of its rival's costs.'" *linkLine*, 555 U.S. at 451 (quoting *Brooke Grp.*, 509 U.S. at 223).

The price-cost test implements the fundamental principle that no cognizable anticompetitive harm can arise from customer conduct incentivized by above-cost pricing practices, because an equally efficient competitor can compete simply by lowering its prices. Any "exclusionary effect" of above-cost price-related conduct merely "reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate pricecutting." *Brooke Grp.*, 509 U.S. at 233.

The decision below conflicts directly with these principles. Notwithstanding this Court's repeated guidance that courts should not condemn above-cost pricing practices, the Third Circuit's opinion creates a roadmap for inefficient competitors to do precisely that: Under the decision below, plaintiffs are encouraged to challenge output-enhancing rebate conditions that are inextricably intertwined with the defendant's price reductions and serve as the incentive for customers to agree to purchase more from the defendant. The judgment below also conflicts with decisions of the First, Second, Sixth, Eighth, and Ninth Circuits holding that the price-cost test precludes liability regarding conditional-rebate agreements like those at issue here. Moreover, the Third Circuit's decision frustrates this Court's mandate of clear, predictable rules that provide a "safe harbor" for above-cost pricing, and its insistence that the antitrust laws should encourage even monopolists to use their "business acumen" to compete aggressively. *linkLine*, 555 U.S. at 448, 453; *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

Absent this Court's review, plaintiffs will have little difficulty evading the price-cost test in future antitrust cases simply by bringing their challenges in the Third Circuit and emphasizing purportedly non-price aspects of conditional-rebate agreements. Leading businesses will no longer enjoy a safe-harbor for price reductions that are subject to output-enhancing conditions, and consumers will suffer from the resulting chill on aggressive price competition. Certiorari is warranted.

I. THE DECISION BELOW CREATES A WIDESPREAD CIRCUIT CONFLICT

The court below held that supply agreements giving customers the option of lowering their input prices further by buying a greater proportion of their requirements from the defendant (and thus improving the defendant's economies of scale) can create antitrust liability even when the defendant's discounted prices remain above cost. As the leading antitrust treatise explains, however, such conditional-rebate agreements are procompetitive because they create incentives to expand the seller's output and thereby improve efficiencies and economies of scale: "Most quantity discount programs are undoubtedly designed to reflect the reduced costs of larger transactions. As such, they are clearly competitive and antitrust should encourage them." Areeda & Hovenkamp, *supra*, ¶ 1807b2.

The Third Circuit's refusal to apply the price-cost test to uphold Eaton's conditional-rebate agreements is irreconcilable with the decisions of other courts of appeals that have applied the price-cost test to such agreements. And the Third Circuit's proffered grounds for manufacturing a glaring exception to the price-cost test are directly at odds with those decisions, which involved functionally indistinguishable features.

A. The Decision Below Conflicts With Decisions Of Other Circuits That Have Applied The Price-Cost Test To Uphold Conditional-Rebate Agreements

In a long line of decisions, other courts of appeals have consistently applied the price-cost test to reject challenges to conditional-rebate agreements involving above-cost prices. In *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983), for example, then-Judge Breyer applied the price-cost test to preclude antitrust liability where the defendant offered a special discount to incentivize a large customer purchase amounting to nearly three years of the customer's expected needs.

Similarly, in *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000), the Eighth Circuit applied the price-cost test to preclude liability where the defendant gave discounts that increased as customers bought greater percentages of their needs from the defendant. The Eighth Circuit reaffirmed that holding in *Southeast Missouri Hospital v. C.R. Bard, Inc.*, 642 F.3d 608 (8th Cir. 2011), which barred liability for supply contracts that gave discounts in exchange for exclusive listings.

In *Virgin Atlantic Airways Ltd. v. British Airways Plc*, 257 F.3d 256 (2d Cir. 2001), the Second Circuit applied the price-cost test to preclude liability where the defendant awarded discounts and commissions to agents and customers that encouraged them to meet specified purchase targets. In *NicSand, Inc. v. 3M Co.*, 507 F.3d 442 (6th Cir. 2007) (en banc), the Sixth Circuit applied the price-cost test to preclude liability where the defendant made up-front payments in exchange for exclusivity at retailers' stores. And in *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008), the Ninth Circuit applied a specialized version of the price-cost test (the "attribution" test) to preclude antitrust liability absent below-cost pricing where the defendant offered bundled discounts to hospital customers to incentivize them to make the defendant their "sole preferred provider." *Id.* at 892.

The court below, by contrast, deemed the price-cost test "inapposite" based on factors that the majority viewed as establishing that "price itself was not the clearly predominant mechanism of exclusion." App. 32a. As demonstrated below, however, the majority's reliance on those factors as justification for evading the price-cost test simply confirms the existence of a square circuit conflict, because the decisions discussed above applied the price-cost test notwithstanding the presence of those same factors.

1. The Third Circuit's Holding That High Penetration Targets And Multi-Year Terms Render The Price-Cost Test Inapposite Creates A Circuit Conflict

As purported justification for its refusal to apply the price-cost test, the majority cited the LTAs' purchase targets of "roughly 90%" for "at least five years." App. 32a. But other courts of appeals have applied the price-cost test to comparable multi-year agreements conditioning price reductions on attainment of high purchase targets. In *Barry Wright*, for example, then-Judge Breyer applied the price-cost test to "special . . . discounts" that the customer obtained by agreeing to purchase from the defendant the great bulk of its expected needs for the next three years. 724 F.2d at 229.

Similarly, in *Concord Boat*, the Eighth Circuit applied the price-cost test to the defendant's system of multi-year contracts that gave increasing discounts where customers bought 60%, 70%, or 80% of their needs from the defendant. 207 F.3d at 1044 & n.3. The defendant's "discounts, because they were significantly above cost, left ample room for new competitors," and thus were not anticompetitive. *Id.* at 1059, 1061.

In *NicSand*, the Sixth Circuit applied the price-cost test to "up-front discounts" (cash payments ranging from $200,000 to $1 million) that the defendant paid in exchange for the right to be the ***exclusive*** brand of sandpaper carried on the shelves of retail stores for "multi-year terms." 507 F.3d at 448, 451, 453. Offering above-cost discounts "to win the retailers' business did not offend the antitrust laws, much less undermine the competitive environment those laws were designed to foster." *Id.* at 452-53. Nor did the exclusivity of the agreements create an exception to the price-cost test: because there were sufficient "margins" (*i.e.*, prices remained above costs), the plaintiff could have competed for the same contracts simply by "match[ing] [the defendant's] discounts." *Id.* at 454.

Because other courts of appeals apply the price-cost test notwithstanding the presence of multi-year terms and high share-penetration targets, the Third Circuit's reliance on these factors as a basis for evading the price-cost test creates a circuit conflict.

2. The Third Circuit's Holding That Preferential Advertising And Product Placement Terms Render The Price-Cost Test Inapposite Creates A Circuit Conflict

The panel majority also held that databook placement constituted non-price conduct that rendered the price-cost test inapposite. App. 32a. Databooks are "a form of advertising" that inform truck purchasers of preferred truck configuration options. App. 6a. Some of the LTAs conditioned Eaton's rebates on OEMs' agreement to list Eaton's transmissions as "standard" and/or "preferred" (lowest-price) options in some databooks, and two of the OEMs agreed to publish only Eaton transmissions in certain categories and years, while continuing to list some of respondents' transmissions as well. App. 9a-10a. The purpose of such databook placement was to increase Eaton's output and sales and thereby help

OEMs achieve their purchase targets, because "customers are more likely to purchase [standard or preferred position] components." App. 6a. Even exclusive listing of an Eaton transmission did not preclude respondents from competing, however, because truck buyers "may, and sometimes do, request components that are not published in a data book." *Id*.

The majority nonetheless reasoned that databook placement served "to block customer access to [respondents'] products" and constituted non-price conduct exempt from the price-cost test. App. 32a. That holding squarely conflicts with the decisions of other courts of appeals that have correctly applied the price-cost test to similar contractual provisions involving advertising or product placement because the allegedly excluded party could have competed for the preferred placement with its own low prices.

In *Southeast Missouri Hospital*, 642 F.3d at 610-13, the Eighth Circuit applied the price-cost test to reject an antitrust challenge to discounting contracts that made the defendant "the only supplier" of products listed on group purchasing organizations' "price list[s] provided to" hospitals, although hospitals retained the right to "purchase off-contract," *i.e.*, from providers not appearing on the price lists. *Id.* at 611. Similarly, in *NicSand*, the Sixth Circuit applied the price-cost test to contracts under which retailers, in exchange for up-front payments, agreed to carry only the defendant's products at their stores. 507 F.3d at 447-48.

Under these cases, the price-cost test applies even where a distributor's incentive to obtain lower prices in exchange for increased purchases from a single supplier causes it to limit the choices offered to downstream retail buyers. Indeed, in *NicSand*, downstream customers who purchased from the retailers covered by the defendant's exclusive agreements could not choose the plaintiff's products ***at all***, because those products were excluded altogether from the retailers' stores. 507 F.3d at 448. In this case, by contrast, truck buyers could always specify respondents' transmissions for their trucks, regardless of those transmissions' position in, or absence from, particular databooks. App. 6a. The panel majority's holding that the conditioning of Eaton's discounts on preferred databook placement rendered the price-cost test inapplicable cannot be reconciled with these decisions.

3. The Third Circuit's Reliance On Eaton's Economies Of Scale As A Basis For Evading The Price-Cost Test Creates A Circuit Conflict

The Third Circuit also refused to apply the price-cost test because of Eaton's economies of scale, stating that Eaton's high market share "ensur[ed] that Plaintiffs would be unable to build enough market share to pose any threat to Eaton's monopoly." App. 32a. This exception threatens to swallow the entire price-cost test, because defendants in cases challenging pricing conduct are invariably highly successful companies with larger market shares than the plaintiffs that challenge their pricing. Treating a defendant's greater efficiency as a reason for imposing antitrust liability turns antitrust law on its head, and is irreconcilable with this Court's holding in *Trinko* that "[t]o safeguard the incentive to innovate" and to "induce[] risk taking," the antitrust laws must not penalize even monopolists for using their "business acumen" to compete. 540 U.S. at 407. As the leading antitrust treatise explains, a rule restraining discounts by more-efficient companies in order to aid less-efficient rivals "must be denied on grounds of both principle and administrability," because "no firm, not even a monopolist, is a trustee for another firm's economies of scale." Areeda & Hovenkamp, *supra*, ¶ 768b4.

The Third Circuit's holding also cannot be reconciled with the Sixth Circuit's decision in *NicSand*, which applied the price-cost test even though the effect of the defendant's conditional discounts was that the plaintiff suffered "a significant drop in its sales volume[and] lost its economies of scale" such that "it could no longer 'fill existing orders at an appropriate cost'" and thus "could 'no longer . . . compete.'" 507 F.3d at 448-49 (citations omitted; second alteration in original). The decision below thus conflicts with *NicSand* on this ground as well.

4. Any Suggestion That Loss Of Rebates Constitutes A Penalty That Is Not Subject To The Price-Cost Test Would Exacerbate The Circuit Conflict

The majority also asserted that OEMs' perception of the risk of "financial penalties" (*i.e.*, the loss of advantageous pricing under the LTAs) meant that Eaton had "forced" OEMs to agree to the LTAs' terms, and that Eaton was thereby holding OEMs "hostage." App. 33a. The majority cited the possibility of "price increases" "if the market penetration targets were not met." App. 33a-34a. What the majority called "financial penalties" and "price increases," however, are inherent in any conditional-rebate agreement, such as a volume discount. It simply means that a customer that does not satisfy the condition for receiving a greater discount does not receive that discount.

A holding that the possibility of such "financial penalties" is a basis for avoiding the price-cost test would squarely conflict with all of the price-cost decisions of the other courts of appeals discussed above, because each of those decisions applied the price-cost test where customers stood to lose access to advantageous pricing by not meeting specified purchasing targets. *E.g.*, *NicSand*, 507 F.3d at 448, 451-52 (customers would not have received "up-front discounts" in the form of "cash payments" if they did not agree to "exclusive dealing agreements"); *PeaceHealth*, 515 F.3d at 892 (customers would not receive "discounts of 35% to 40% on tertiary services" if they did not make the defendant the "sole preferred provider for *all* services"); *Virgin Atl.*, 257 F.3d at 261 (agents and customers would not have received "commissions or discounts" if they did not meet "specified thresholds of sales"); *Concord Boat*, 207 F.3d at 1044 (customers would not earn "a discount off the list price" if they did not "purchase a certain percentage of their engine requirements" from the defendant); *Barry Wright*, 724 F.2d at 229 (customer would not have received a "special price break," which was a "large 30 percent/25 percent discount[]," if it did not agree to a large purchase expected "to meet [the customer's] estimated needs for the next twelve months").

5. The Third Circuit's Proffered Distinctions Only Deepen The Conflict

The panel majority's reliance on the foregoing factors as justification for evading the price-cost test also conflicts with the price-cost decisions of the other courts of appeals in two deeper respects.

First, contrary to the majority's suggestion that the plaintiffs in other price-cost cases "rel[ied] solely on the exclusionary effect of [the defendants'] prices" (App. 32a), none of those other cases involved direct attacks on the defendant's prices standing alone. Instead, the plaintiffs in those cases attacked the conditions and incentives attached to the defendants' prices and claimed competitive harm from the consequences of those conditions. For example, in *Barry Wright*, the plaintiff claimed that it could not make additional sales because the customer, incentivized by the defendant's conditional discount, had already "promise[d] to buy all its [purchase] requirements from [the defendant] for three years." 724 F.2d at 237. In *Concord Boat*, the plaintiff claimed that it could not make additional sales because the defendant's conditional discounts subjected customers to "golden handcuffs" that incentivized them to give more of their business to the defendant. 207 F.3d 1060. And in *NicSand*, the plaintiff claimed that it could not make additional sales because its products were no longer carried on customers' shelves due to the attractiveness of the defendant's up-front payments, which were conditioned on shelf-space exclusivity. 507 F.3d at 448.

In all of these cases, as here, the alleged foreclosure of the plaintiff was attributable to customers' incentives to give most or all of their business to the defendant in order to qualify for the defendant's conditional price reductions. Thus, even if it were true that respondents here did not "rely solely" on Eaton's prices (App. 32a), that would not distinguish the conditional-rebate decisions of the other courts of appeals.

Second, and more fundamentally, the Third Circuit's holding conflicts with the decisions of other courts of appeals by purporting to disentangle Eaton's pricing practices from the supposedly non-price terms and conditions of Eaton's LTAs. *See* App. 32a. Other courts of appeals have correctly recognized that low prices are analytically inseparable from the conduct they incentivize. For example, in *NicSand*, the Sixth Circuit explained that "[f]rom the perspective of a retailer, multi-year agreements permit the retailer to insist that the supplier charge lower prices." 507 F.3d at 453. Similarly, the court explained that the plaintiff could have, and should have, competed for the same exclusive contracts that it challenged by "match[ing] [the defendant's] discounts." *Id.* at 454. In other words, for the Sixth Circuit, multi-year terms and exclusivity incentivized by the offer of more attractive pricing were *pricing* conduct; they could not be challenged so long as prices were above cost.

Similarly, in *Southeast Missouri Hospital*, the Eighth Circuit held that the price-cost test applied despite plaintiff's argument that the test was inapplicable because the plaintiff was challenging "sole-source contracts." 642 F.3d at 613. The court explained that "[t]he legal principles in *Concord Boat* do apply in this case" because "share-based discounts [were] the heart of the sole-source contracts." *Id*. By the same token, Eaton's attractive prices were the "heart" of its LTAs, and provided the incentive for OEMs to enter into those agreements. Even the panel majority recognized the fundamental linkage between Eaton's attractive prices and the other terms of the LTAs, conceding that "Eaton's post-rebate prices were attractive to the OEMs, and Eaton's low prices may, in fact, have been an inducement for the OEMs to enter into the LTAs." App. 32a. Indeed, two OEMs signed LTAs with Eaton only after respondents refused to lower their prices (C.A. App. 640-41, 3049), and another emphasized that Eaton's prices were more attractive than respondents' even without the conditional rebates (C.A. App. 1294-96). The majority's holding that attractive prices are analytically distinct from the OEM conduct and effects they incentivize (such as enhanced sales volume, exclusivity, or advertising) is thus internally inconsistent, as well as contrary to the price-cost decisions of other courts of appeals. *See also linkLine*, 555 U.S. at 450 ("[F]or antitrust purposes, there is no reason to distinguish between price and nonprice components of a transaction.").

B. The Third Circuit's Reliance On Customer Concerns Also Conflicts With Decisions Of Other Courts Of Appeals

In holding that Eaton's above-cost pricing did not immunize it from liability for what it called "*de facto* partial exclusive dealing," the Third Circuit also relied on speculation by two employees of a single OEM (Volvo) regarding whether Eaton might reduce supply if Volvo failed to meet its purchase targets. Specifically, the court stated that customers believed they "risk[ed] . . . supply shortages" for failing to meet Eaton's targets (App. 33a-34a), and cited this both as a reason for not applying the price-cost test (*id.*) and as the justification for transforming Eaton's non-mandatory LTAs into so-called "*de facto* partial exclusive dealing" agreements (App. 42a, 44a). The majority did not contradict Judge Greenberg's observation that this claim of OEM concern about possible supply shortages was not based on any conduct or statement by Eaton, but solely on internal employee speculation at Volvo. App. 155a-156a.

The majority's reliance on customer concerns as a basis for imposing antitrust liability on Eaton conflicts with decisions of other courts of appeals that have refused to permit such concerns on the part of customers or others to transform otherwise lawful behavior into actionable anticompetitive conduct. In *Konik v. Champlain Valley Physicians Hospital Medical Center*, 733 F.2d 1007, 1015-16 (2d Cir. 1984), for example, the Second Circuit held that a nonexclusive agreement was not transformed into an unlawful exclusive agreement simply because of an outside party's "mental processes." The Second Circuit again refused to allow customer concerns to transform otherwise permissible conduct into an antitrust violation in *United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737, 742 (2d Cir. 1989). There, the counterclaim plaintiff challenged the defendant's contracts as "*de facto* exclusive dealing" even though customers were "free to use any other" provider for 50% of their needs. *Id*. There was evidence that the defendant's customers were "reluctant" to deal with competitors, but because that evidence was not based on the defendant's own "practices," the court rejected the claim of exclusivity and interpreted the contract as nonexclusive in conformance with its express terms. *Id*.

Similarly, in *Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997), the Ninth Circuit rejected the plaintiff's attempt to rely on customer concerns as grounds for transforming facially terminable agreements into unlawful exclusive dealing arrangements. The defendant argued that its agreements were not anticompetitive because they were readily terminable. The plaintiff countered that the termination rights were not effective in practice because customers feared to exercise them because they were afraid to shift their business to "an untested product with no reputation." *Id.*; *see also id.* at 1177 (Pregerson, J., dissenting). The Ninth Circuit squarely rejected that argument, holding that customer concerns could not override the agreements' express termination rights. *Id.* at 1164 (majority opinion).

Finally, in *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 392 (7th Cir. 1984), the Seventh Circuit held that a facially nonexclusive dealing agreement that did not "even hint[] at a requirement of exclusive dealing" could not be transformed into an exclusive dealing agreement merely because the customer thought there was a "'secret' term" requiring exclusivity.

These cases stand for the principle that contractual terms preserving termination rights and disclaiming binding exclusivity cannot be nullified by mere expressions of speculative concerns from customers or others, at least in the absence of any threats or equivalent communications from the defendant that substantiate those concerns. That principle and the cases applying it cannot be reconciled with the Third Circuit's holding that Eaton's LTAs, which did not obligate OEMs to purchase anything and were readily terminable by them, could nonetheless be transformed into purportedly binding "*de facto* partial exclusive dealing" arrangements based on nothing more than speculative concerns by two Volvo employees about a risk of supply shortages, without any evidence that Eaton ever threatened or even hinted at such an outcome. Exposing defendants to potential treble-damages liability based on speculative internal expressions of concern by their customers makes a mockery of this Court's insistence on clear, predictable rules for antitrust liability. *See infra* Part II.A.

C. The Third Circuit's Reliance On Customer Demand For Eaton's Products As An Anticompetitive Factor Conflicts With Decisions Of This Court And Other Courts Of Appeals

The panel majority also pointed to Eaton's "position as a supplier of necessary products" as justification for its refusal to apply the price-cost test. App. 32a; *see also* App. 34a. But this is an exception that swallows the rule. Defendants in conditional-rebate cases are inevitably successful companies that enjoy a substantial customer following. Nothing in this Court's jurisprudence suggests that the price-cost test is inapplicable to market-leading companies. If that were a valid exception, the Court would not have invoked the test in *Weyerhaeuser* and *linkLine*, which involved "a monopolist" and a "monopsonist." App 27a n.11. The decisions of this Court and courts of appeals demonstrate that the price-cost test is applicable to market leaders, which are virtually always "necessary" suppliers, because it is perfectly lawful and procompetitive even for a dominant company to take advantage of demand for its products to increase its sales.

For example, in *Trinko*, this Court explained that "[t]he mere possession of monopoly power" is actually "an important element of the free-market system" because the opportunity to earn monopoly profits "attracts 'business acumen'" and "induces risk taking that produces innovation and economic growth." 540

U.S. at 407. And one way to acquire such power is to provide goods or services that "render [firms] uniquely suited to serve their customers." *Id.*

Similarly, the Ninth Circuit has held that "a competitor with a proven product and strong reputation is likely to enjoy success in the marketplace," but the court "reject[ed] the notion that this is anticompetitive"; instead, "[i]t is the essence of competition." *Omega Envtl.,* 127 F.3d at 1164. The Second Circuit has also explained that the fact that "consumers may prefer" the defendant's offerings due to its "'proven track record'" is not an "impediment to . . . competition," but is rather the "natural result of[] competition." *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 984 (2d Cir. 1984).

Under these cases, continuing to compete vigorously while being a supplier of desirable products is the "essence" of competition, and generating customer preference is the "natural result" of that competition. The panel majority's decision, which penalizes Eaton for its past success, cannot be reconciled with those cases.

II. THE DECISION BELOW VIOLATES FUNDAMENTAL PRINCIPLES OF ANTITRUST LAW

A. The Decision Below Conflicts With The Equally Efficient Competitor Principle

This Court's price-cost precedents rest ultimately on the principle that it is both permissible and desirable for businesses to succeed on the basis of greater efficiency and, accordingly, pricing-related conduct that could not exclude an "equally efficient competitor" is lawful even for monopolists. The Court applied this principle in *Cargill, Inc. v. Monfort of Colo-*

rado, Inc., 479 U.S. 104, 114-15 (1986), an early price-cost case that rejected a challenge to a merger that would lead to increased price competition and thus a reduction in the plaintiff's profits. "To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result." *Id.* at 116; *see also Atl. Richfield*, 495 U.S. at 338-41.

Similarly, *Brooke Group* explained that "the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate pricecutting." 509 U.S. at 233. Thus, a more efficient competitor that uses its efficiencies to compete on price and thereby "exclude" its competitor is competing on the merits, which is entirely lawful.

These cases reflect the principle that the antitrust laws are addressed to conduct that is "likely in the circumstances to exclude" "an equally or more efficient competitor." Richard A. Posner, *Antitrust Law* 194-95 (2d ed. 2001). The fact that a firm has monopoly power does not mean that the law should "prevent it from competing"; to the contrary, "practices that will exclude only less efficient firms" are generally "not actionable, because we want to encourage efficiency." *Id*. at 196; *see* Herbert Hovenkamp, *Discounts and Exclusion*, 2006 Utah L. Rev. 841, 844 (2006) ("One of the factors driving the predatory pricing rule is that, as long as prices are above the relevant measure of cost, the discounts cannot exclude an equally efficient rival. The same is true of single-product discounts.”).

The courts of appeals have enforced the equally efficient competitor principle in their conditional-rebate price-cost decisions. In *Barry Wright*, then-Judge Breyer explained that above-cost prices do not “have a tendency to exclude or eliminate equally efficient competitors” because such competitors could “permanently match [an above-cost] low price and stay in business.” 724 F.2d at 232. Similarly, the Ninth Circuit in *PeaceHealth* relied extensively on the principle that the antitrust laws should only condemn practices that could exclude “equally efficient rivals.” 515 F.3d at 900, 904, 906-09. The Eleventh Circuit has also recognized that it is “not a function of the antitrust laws” to require monopolists to “support artificially firms that cannot effectively compete on their own.” *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991); *see also Morgan v. Ponder*, 892 F.2d 1355, 1363 (8th Cir. 1989); *LePage's Inc. v. 3M*, 324 F.3d 141, 177 (3d Cir. 2003) (Greenberg, J., dissenting, joined by Scirica and Alito, JJ.) (rejecting argument that plaintiffs should “not have to show that [the defendant's] package discounts could prevent an equally efficient firm from matching or beating [them]”).

Because foreclosure of less-efficient rivals is the inevitable consequence of competition on the merits, the antitrust laws preclude recovery by a company whose foreclosure is a consequence of its unwillingness or inability to compete with the defendant's above-cost prices. Yet that is precisely what occurred here. Because Eaton's lower prices were always above its costs, an equally efficient competitor could have matched or beaten Eaton's prices to capture additional sales. But respondents kept their prices consistently higher than Eaton's even in the face of customer requests to reduce prices. App. 98a-99a (Greenberg, J., dissenting). Their failure in the marketplace is thus attributable to their failure to make competitive bids to OEMs. By permitting respondents to impose antitrust liability despite their consistently higher prices, the Third Circuit rewarded respondents for their unwillingness or inability to compete on the merits.

B. The Decision Below Creates A Glaring But Amorphous Exception To The Price-Cost Test, Flouting This Court's Mandate That Antitrust Rules Affecting Pricing Practices Must Provide Clear Guidance

1. Certiorari is also warranted because the Third Circuit's decision deprives businesses of the clarity and "predictability" that antitrust rules should provide, particularly when, as here, they affect pricing practices. App. 123a (Greenberg, J., dissenting). As Judge Greenberg correctly explained, the majority's decision creates "no . . . clear rule" for companies to follow. App. 186a. Instead, it creates an easily exploited, but amorphous and unpredictable, exception to the price-cost test "safe harbor." *linkLine*, 555 U.S. at 453. Unless overturned, it will allow disappointed rivals and class action plaintiffs' lawyers to impose, through artful pleading, the massive burdens of modern antitrust litigation and the risk of treble damages liability for procompetitive conduct that benefits consumers by lowering prices.

This Court has "repeatedly emphasized the importance of clear rules in antitrust law." *linkLine*, 555 U.S. at 452. This compelling need is motivated by at least two distinct concerns.

First, absent clear rules like the price-cost test, "firms that seek to avoid . . . liability will have no safe harbor for their pricing practices." *linkLine*, 555 U.S. at 453. A safe harbor is essential in the pricing context because, without it, "aggressive price competition" would be "chill[ed]" as "[f]irms might raise their retail prices or refrain from aggressive price competition to avoid potential antitrust liability." *Id.* at 451, 452. The *linkLine* Court quoted with approval then-Judge Breyer's articulation of this principle in *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990), which explained that antitrust rules "must be clear enough for lawyers to explain them to clients." The First Circuit similarly explained in *Barry Wright* (also written by then-Judge Breyer) that when antitrust rules touch on price-reducing behavior, they must avoid ambiguities that discourage price cutting. That is because "the consequence of a mistake here is not simply to force a firm to forego legitimate business activity it wishes to pursue; rather, it is to penalize a procompetitive price cut, perhaps the most desirable activity (from an antitrust perspective) that can take place." 724 F.2d at 235.

Second, "institutional concerns [of the judiciary] counsel against recognition" of pricing-based antitrust claims that do not entail below-cost pricing (like the "price-squeeze" claim at issue in *linkLine*) because "[c]ourts are ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'" 555 U.S. at 452 (quoting *Trinko*, 540 U.S. at 408).

The need for clear rules was also recognized by the bipartisan Antitrust Modernization Commission ("AMC"), which was created and commissioned by Congress to study possible improvements to the antitrust laws. AMC, Report and Recommendations (2007). The AMC specifically stated that monopolization laws "should be clear and predictable in application," and that the "lack of clear standards" (especially in areas such as conditional price-cutting conduct) "may discourage conduct that is procompetitive." *Id.* at 82-83, 88.

The Third Circuit's decision fails to provide the clear rule that this Court's teachings require. Under the decision below, virtually any conditional rebate designed to attract more business (and thereby deny the same business to a rival) can be attacked without regard to the price-cost test as long as the plaintiff does not allege that the discounted prices themselves were the "clearly predominant mechanism" of exclusion. App. 32a. A successful business cannot know in advance whether a conditional offer to lower prices constitutes lawful price competition or will instead expose the company to treble-damages liability. Any conditional rebate by a leading company can be alleged to fall within the Third Circuit's ill-defined test.

The lack of a clear rule is exacerbated by the majority's reliance on mere customer concerns to transform non-mandatory contracts into effectively mandatory contracts. *See* Part I.B., *supra*. Under the majority's holding, there is no way for a leading company to engage in conditional discounting without running the risk that discovery will later reveal some passing speculation by some customer about possible consequences of failing to meet purchase targets.

Antitrust rules are anything but clear and predictable if liability may turn on such speculations, of which the defendant may not even be aware.

The majority decision thus conflicts with this Court's repeated admonitions that antitrust rules affecting pricing practices must be clear and predictable, because it bases liability for conditional-rebate agreements on unpredictable recharacterizations of pricing practices and unknowable speculations of third parties. This Court should grant certiorari to address that conflict and resolve the confusion created by the Third Circuit's amorphous and unpredictable rule.

2. Certiorari is also necessary because the decision below creates a road map for plaintiffs to evade *Brooke Group* and its progeny and impose liability for conduct that would have been clearly lawful under the price-cost test. A rival that is unwilling or unable to compete on price is now able to sue a price-cutter and claim unlawful foreclosure from the market. Although the Third Circuit recognized the broad judicial consensus that the "condition[ing] [of] discounts or rebates on the customer's purchasing of a specified volume or a specified percentage of its requirements from the seller" is subject to a price-cost test (App. 28a), it transformed the *conditions* attached to the discount into nonprice conduct that eviscerates the rule, even where, as here, the attractiveness of the defendant's prices is the incentive for agreeing to the purchase targets and other conditions expressed in the agreements.

This Court has at least twice previously rejected plaintiffs' attempts to create such exceptions to the price-cost test by recharacterizing pricing conduct in the manner in which the Third Circuit did here.

Most recently, in *Weyerhaeuser*, the plaintiff attempted to avoid application of the *Brooke Group* price-cost test by characterizing the case as involving "a multi-pronged plan" whose "primary components were competitor acquisitions, exclusive supply agreements and exclusionary bidding practices." Brief for Respondent, *Weyerhaeuser*, 549 U.S. 312 (No. 05-381), 2006 WL 2950594, at *1. According to the plaintiff in that case, "Purchasing Conduct Was Only Part of a Complex Monopolization Scheme." *Id.* at *7. The plaintiff sought to distinguish "*Brooke Group* [as] involv[ing] only a pricing claim," in contrast to their case, which supposedly presented a "combination of pricing and non-pricing conduct." *Id.* at *44. But in a unanimous opinion, this Court held that the price-cost test nevertheless governed. 549 U.S. at 326.

In *linkLine*, the plaintiff sought to characterize the pricing conduct at issue as an attempt to "raise competitors' costs" (555 U.S. at 449), and *amici* claimed that the defendant's conduct "impair[ed] nonprice competition and innovation in the downstream market" (*id.* at 455). The Court rejected the asserted "need to endorse a new theory of liability to prevent [competitive] harm," however, and instead applied the price-cost test (*id.*).

Many price-cost decisions of this Court and the courts of appeals would have been decided differently under the Third Circuit's approach, because the price-cost test would have been deemed inapposite. For example, the price-cost test would not have applied in *Weyerhaeuser* because the plaintiff was challenging the allegedly non-pricing aspects that it relied upon in this Court. The price-cost test would not have applied in *NicSand* because the plaintiff was challenging the defendant's conduct in entering into exclusive arrangements that completely foreclosed the plaintiff's access to retailer's shelves. 507 F.3d at 451, 453. The price-cost test would not have applied in *Concord Boat* because the case involved high purchase targets, multi-year agreements, and a defendant with "75% market share." 207 F.3d at 1044.

Certiorari is therefore necessary to prevent the Third Circuit's amorphous exception from swallowing the *Brooke Group* rule.

III. THIS CASE RAISES IMPORTANT AND RECURRING ISSUES THAT REQUIRE RESOLUTION BY THIS COURT

This case raises recurring issues of substantial importance to the Nation's economy. As this Court's opinions demonstrate, price-cutting is the "'very conduct the antitrust laws are designed to protect.'" *linkLine*, 555 U.S. at 451 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). And as the breadth and variety of the price-cost cases discussed above illustrate, conditional-rebate agreements are prevalent in many major industries. As Judge Greenberg recognized in dissent, "[d]iscounts of all varieties, whether tied to the purchase of multiple products, exclusivity, volume, or market-share, are ubiquitous in our society." App. 185a.

Every sale by a supplier entails the implicit condition that the purchaser will not satisfy that portion of its needs by buying from the supplier's rivals. "Discounts are the age-old way that merchants induce customers to purchase from them and not from someone else or to purchase more than they otherwise would." Hovenkamp, *Discounts and Exclusion*, 2006 Utah L. Rev. at 843. And the decisions of this Court and other courts show the ubiquity of conditional price-cutting. In *Brooke Group* itself, the plaintiff, defendant, and other market participants used both low "list price[s]" and "volume rebates" as "an incentive to spur orders"; the defendant, in particular, offered "special rebates for orders of very substantial size." 509 U.S. at 214-15. In *NicSand*, the defendant gave up-front cash payments in exchange for retailers' agreements to carry only the defendant's products. 507 F.3d at 448. And in *PeaceHealth*, the defendant offered discounts to customers who made the defendant the sole provider of a bundle of services. 515 F.3d at 892.

Antitrust decisions in the price-cutting area are particularly important because of the signals they send to the economy as a whole. In *linkLine*, this Court explained that the price-cost test was designed "[t]o avoid chilling aggressive price competition." 555 U.S. at 451. In *Brooke Group* this Court stated that any alternative to the price-cost test "court[s] intolerable risks of chilling legitimate price cutting." 509 U.S. at 223. The First Circuit in *Barry Wright* similarly recognized that, absent a price-cost test, there would be no "lack [of] plaintiffs willing to make the effort" to challenge their rivals' price cuts, and as a consequence other firms would "hesitate" when "considering procompetitive price-cutting tactics." 724 F.2d at 235.

For these reasons, the majority opinion in this case will impose a "cost to the economy as a whole." App. 185a (Greenberg, J., dissenting). The majority's holding creates no "clear rule" to govern the "ubiquitous" practice of conditional-rebate agreements. App. 185a-186a. Under the majority's approach, "corporate counsel presented with a firm's business plan" that involves "a dominant supplier that seeks to expand sales through a discount program" will be unable to advise management whether "the plan is lawful under the Sherman and Clayton Acts." *Id.* at 186a. "The sad truth is that the counsel only will be able to tell management that it will have to take a chance in the courtroom casino at some then uncertain future date to find out." *Id.* Thus, even aside from the numerous circuit conflicts created by the Third Circuit's decision, certiorari is warranted to clarify the legal standards governing antitrust liability for the ubiquitous practice of conditional rebates.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

February 25, 2013

JAMES F. RILL
JOSEPH A. OSTOYICH
ERIK T. KOONS
BAKER BOTTS LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 639-7000

THEODORE B. OLSON
Counsel of Record
THOMAS G. HUNGAR
GEOFFREY C. WEIEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Petitioner