

No. 02-1865

In the Supreme Court of the United States

3M COMPANY,

Petitioner,

v.

LEPAGE'S INCORPORATED, ET AL.,

Respondents.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected petitioner “3M’s legal theory that after *Brooke Group [Ltd. v. Brown & Williamson Tobacco Corp.]*, 509 U.S. 209 (1993), no conduct by a monopolist who sells its product above cost — no matter how exclusionary the conduct — can constitute monopolization in violation of § 2 of the Sherman Act.” Pet. App. 8a.

2. Whether certiorari review is foreclosed by 3M’s failure, in its question presented, to address the court of appeals’ holding that 3M’s exclusive dealing practices independently support the jury verdict in this case.

RULE 29.6 STATEMENT

Prudential PLC, a publicly owned British corporation, is a parent of respondents LePage's Incorporated and LePage's Management Company, LLC. JZ Equity Partners, PLC, also a publicly owned British corporation, owns more than 10% of respondent LePage's Management Company. Like 3M, we refer to both respondents collectively as "LePage's."

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

In its analysis of the en banc decision in this case, the leading treatise on antitrust law observes: “[t]he gravamen of LePage’s complaint was not pricing, but foreclosure.” AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 749, at 133 (Supp. 2003). The court below made a similar observation. Pet. App. 23a, 31a.

3M’s effort to depict this case differently — as an attack by LePage’s on “low prices” and “discount[s]” for “volume purchases” (Pet. i) — is an untenable distortion of the Third Circuit’s analysis and the facts of record.¹ In truth, this case concerns “unique” (Pet. App. 31a) rebate programs that enabled a conceded monopolist to foreclose competition from critical distribution channels. Those rebate programs and a program of exclusive dealing arrangements with the largest distributors made it impossible for 3M’s only two competitors to reach large numbers of U.S. consumers with alternatives to 3M’s highpriced Scotch® tape. As 3M succeeded in driving one competitor (Tesa) from the market entirely and severely crippling the other (LePage’s), it assiduously went about restricting the supply of lower priced tape to distributors and coordinating efforts with mass merchants to raise consumer prices. Its goal was *not* just to “kill” competitors, a goal that sometimes reflects hard competition on the merits. Rather, its goal was to “kill” the entire private-label segment of the market (Pet. App. 39a, 71a, 101a-102a), the very segment that was chipping away at the edges of the monopoly 3M enjoyed.

3M’s lone argument in this Court is that its anti-consumer campaign was *per se* legal because its prices were above its costs. For that proposition, 3M relies on predatory-pricing law set forth in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). But no court of appeals has ever

¹ The court below held that “3M’s interest in *raising* prices is well-documented in the record” (Pet. App. 37a (emphasis added)) and that “volume discounts * * * are concededly legal.” *Id.* at 21a.

read *Brooke Group* as applying to a multi-product rebate/exclusive dealing case that did not involve allegations of predatory pricing. The en banc Third Circuit properly rejected 3M's argument that *Brooke Group* "overturned decades of Supreme Court precedent" (Pet. App. 16a) and immunized all above-cost practices of monopolists from antitrust scrutiny. The leading antitrust treatise agrees that "the court seems quite correct" in having done so. ANTITRUST LAW ¶ 749, at 133 (Supp. 2003).

STATEMENT

A. Emerging Competition In Transparent Tape

3M's longstanding control of the transparent tape market is one of the legendary monopolies of American economic history. 3M's Scotch brand has achieved such dominance that casual speech confuses the brand with the product, and 3M has for decades enjoyed a market share exceeding 90%. Household penetration of the Scotch brand is virtually 100%, and all sizable distributors of home and office supply products believe that they must dedicate large portions of their tape purchases to 3M. Foreign-made tape has no real foothold in the United States. Barriers to entry in the form of high distribution costs, retailers' "just-in-time" delivery requirements, and Scotch brand name recognition have made it impossible for foreign or domestic competitors to do much more than nibble at the edges of 3M's monopoly. Pet. App. 36a. Notwithstanding the extraordinary profits 3M reaps from Scotch tape, see 8SJA1521, new entry in the market has been "negligible." Pet. App. 150a.

None of this, of course, is unlawful. The illegality at issue arises from 3M's response to pro-competitive marketplace developments that began in the late 1980s and early 1990s. First, consumers increasingly perceived transparent tape as a commodity product for which many were unwilling to pay monopoly prices. Second, just as more and more consumers were willing to try "second-brand" or "private-label" tape,

office supply superstores such as Staples and Office Depot were growing explosively, as were mass merchants such as WalMart and Kmart. These distributors could offer widespread exposure of competing products at a fraction of the cost of distributing tape via thousands of smaller retailers scattered throughout the country. As 3M assessed the situation, “[d]istribution has consolidated and there now remains relatively few, but very powerful distributors.” 14SJA2377.

Robust competition, declining prices, and an erosion of its monopoly share to below 90% were anathema to 3M. A 3M consultant warned that LePage’s had a “[s]ignificant foothold in superstore channels” with “considerable strength as a second brand tape.” 22SJA3716. 3M observed that a “superior [*i.e.*, lower] price point,” high-quality tape, reliable service, and “aggressive private labeling” made LePage’s “the foremost competitor * * * in the transparent tape business.” 5SJA796. At Staples, for example, LePage’s sales grew 440% from 1990 to 1993. Pet. App. 34a. 3M executives worried that “3M market share is threatened as LePage’s * * * private label brands gain superstore exposure resulting in greater consumer awareness and acceptance.” 21SJA3559. Worst of all from 3M’s perspective, “[c]onsumers are now aware they have a choice” to purchase “high quality private label or second brand,” which 3M saw as a “Growing Illness” of the Scotch brand. 21SJA3554.

B. 3M’s Anticompetitive Response

To protect its monopoly profits, 3M set out to keep critical distributors from stocking their shelves with appreciable quantities of lower priced tape. 3M targeted the distributors that were critical for LePage’s survival, then implemented a variety of programs to choke off LePage’s access to those distributors. Once 3M had exclusive access, it reduced the supply of lower priced tape to those accounts. The common feature of

3M's programs was the imposition of a substantial differential between the price it charged to distributors willing to purchase tape exclusively from 3M and the price it charged to distributors who continued to purchase tape from LePage's. Implicitly comparing the *exclusive* and *non-exclusive* prices, 3M misleadingly characterizes the former price as a "discount"; the record, however, shows that 3M was not discounting in any traditional sense — and certainly not in the sense relevant in predatory-pricing cases — but rather *raising* its overall prices even while increasing its market share. Payments to achieve exclusivity, not "low prices" (Pet. i), explained 3M's success.

First, 3M made outright payments to distributors — or offered special prices on Scotch tape — in exchange for exclusivity. For example, 3M paid Kmart \$1,000,000 to drop LePage's as a supplier. 7SJA1239-46; 11SJA2011. 3M paid \$1,500,000 to Staples (20SJA3395; 17JA3507-11), and customized a program providing for an "extra 1% bonus rebate on Scotch tape sales if LePage's business is given to 3M." Pet. App. 153a (internal quotes omitted). 3M conditioned a special Scotch price on "keep[ing] LePage out of Sam's [Club] even as a test." 10SJA1831. 3M's strategy at Office Max was to make a payment "if current LePage SKUs are converted to private label from 3M." 20SJA3408. 3M's contracts with two other distributors, Venture and Pamida, were expressly conditioned on their dropping private label. Pet. App. 26a.

Second, 3M created a series of "bundled-rebate" programs. The two most significant programs, the Executive Growth Fund ("EGF") and Partnership Growth Fund ("PGF"), conditioned rebates on eliminating or drastically reducing purchases from competitors. Under EGF/PGF, 3M set "growth targets" in several unrelated product lines, ranging from transparent tape to repositionable notes to auto parts. A distributor's failure to meet its growth target in any *one* product line caused it to pay a higher price on *many* products it purchased from 3M, usually re-

sulting in the forfeiture of hundreds of thousands of dollars in rebates. Although 3M and the dissenters below have suggested (Pet. 3 n.2) that the rebates did not motivate distributors' tape-purchasing behavior, the jury permissibly found to the contrary. See Pet. App. 31a-33a.

3M set the growth targets individually for each of the distributors that were essential to LePage's and calculated the targets to make it impractical for the distributor to meet while retaining LePage's as a supplier. To make sure the point of the programs was not overlooked, 3M repeatedly pointed out to individual distributors that they could achieve their growth targets by replacing LePage's. Pet. App. 152a.

Distributors had *not* requested 3M's complex programs, and some objected that the programs were obviously designed to preclude them from allocating any tape purchases to LePage's. One distributor understood that its growth target had been calculated "based on the conversion of private label from LePage" and was "reluctant to make this change" because "LePage has been an excellent supplier." 7SJA1293. 3M designed what it called a "penalty clause" to foreclose LePage's from distributing its products through the "buying groups" of smaller office supply retailers and distributors that band together to negotiate with manufacturers. Buying groups complained and unsuccessfully asked 3M to remove the clause. 9JA1491.

Third, 3M conducted a sham entry into private label with the intention of destroying the segment and the threat it posed to monopoly profits on the Scotch brand. 3M's internal deliberations made clear that manufacturing private-label tape provided "absolutely no value to 3M branded products" and in fact involved a short-term sacrifice for 3M because "[b]rand recognition, brand loyalty, and brand value are lost." 5SJA808. As 3M perceived it, the *only* benefit of offering private label was foreclosing its competitors from manufacturing opportunities

that would provide an efficient scale of production, explaining that “[w]e prevent someone else’s equipment from being used — but that’s it.” *Ibid.*

All ten judges on the court of appeals agreed that the record supports a finding that 3M entered the private-label segment intending only to destroy it. See Pet. App. 39a, 71a; see also *infra* p. 28.² Because this was part of 3M’s strategy to limit consumer choice, a top executive summed up the company’s philosophy as follows: “I don’t want private label of 3M products to be successful in the office supply business, its distribution or our consumers/end users. * * * [L]et’s make sure it is not!” 5SJA809. 3M’s plan was not to ensure that consumers had access to an adequate supply of lower cost product but to “control the amount of private label [distributors] sell.” 5SJA806.

Fourth, 3M took several actions to raise the retail price of its tape products. Despite “a lot of pressure” from distributors wanting rebates paid “on a quarterly basis” so they could be passed on to consumers in the form of a lower retail price, 3M delayed payments until the end of the year because “the closer we pay to the time the money is earned the greater the chance the rebate will be reflected in lower prices.” 15SJA2558. 3M also surveyed the retail prices of its large distributors, provided the price data to competing distributors, and coordinated efforts by those selling “below the market price” to get their retail prices up. *E.g.*, 14JA3061-65. 3M worked “extremely hard encouraging distribution to increase average retails” (17SJA-2790), and its hard work ultimately bore fruit in the form of

² 3M says that it entered the private-label segment in good faith after “seeing the market demand for private-label tape” because it would “help[] fill its excess capacity.” Pet. 2. As is repeatedly the case, 3M’s Statement does not construe the record favorably to LePage’s. See, *e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696-697 (1962).

higher prices: 3M explained that “[w]e have been very successful nationally in getting the [Scotch] price up,” and exulted that its price-raising efforts “had good success at both Max and Staples.” Supp.SJA30. 3M also took other unambiguously anti-consumer measures to preserve its monopoly. For example, concerned that consumers were switching from Scotch tape to second brand because tape is essentially a commodity product, 3M “hop[ed] to slow this trend by downgrading the quality” of its second-brand tape. 15SJA2563.

C. The Marketplace Effects Of 3M’s Conduct

3M’s goal was not, as it suggests in this Court, to engage LePage’s on the competitive merits of the companies’ respective products, but rather to prevent critical distributors from entertaining offers from LePage’s. 3M executives boasted, for example, that the penalty clause had “worked well in keeping out competitive-made, Private-label tape * * * offers over the last 2 years.” Supp.SJA15. Kmart’s buyer (LePage’s largest customer for years) bluntly told LePage’s “don’t bring me anything 3M makes” and “I can’t talk to you about tape products for the next three years.” Pet. App. 27a-28a. Other buyers “were afraid of repercussions from 3M if they decided to go into a private label program with LePage’s.” 11JA1924-25.

With 3M offering the largest distributors bundled rebates that were effectively conditioned on exclusivity, LePage’s and Tesa found themselves losing each account that offered access to large numbers of U.S. consumers. Manufacturing and distribution efficiencies, along with millions of dollars of sales, were lost. In 1997, unable to maintain access to critical customers, Tesa (whose parent is one of the world’s largest tape manufacturers) exited the U.S. transparent tape market. Pet. App. 34a-35a. At the time of trial, LePage’s was barely surviving as a going concern. From 1992 operating income of \$5.9 million, it suffered large operating losses in every year from 1996 to 1999.

Id. at 3a. In March of 1997, LePage's was forced to close one of its two manufacturing plants. *Id.* at 34a.

In the absence of any constraint on 3M's monopoly power, consumers were predictably the ultimate loser. Sales of lower priced alternatives to the more expensive Scotch declined dramatically after 3M obtained exclusive control of major distributors. See 13JA2763-69; 33JA7045, 7059. The price of Scotch tape also increased every year. 14JA2896-97; 15JA3246-47.

3M's assertion (Pet. 4 & n.3) that its prices went down fails to view the record in LePage's favor. During the period it depicts as a price war, 3M was *raising* its prices for Scotch tape. Its monopoly afforded it such control over price that an internal memo rejected the notion of a slight price increase in favor of a larger one: "We might as well go for it with a meaningful price increase because it's just as much work." 15SJA2585. Although "many manufacturers roll over out of fear and back down," 3M understood that, "[i]n our case, they have no choice. Either they take the increase * * * or we hold orders." *Ibid.* The court of appeals concluded that "the price of Scotch-brand tape increased since 1994, after 3M instituted its rebate program." Pet. App. 37a. The court also observed that "3M's interest in raising prices" is "well-documented in the record." *Ibid.*

D. Proceedings Below

1. LePage's sued 3M, asserting claims for monopolization and attempted monopolization under Section 2 of the Sherman Act, unlawful agreements in restraint of trade under Section 1 of the Sherman Act, and exclusive dealing under Section 3 of the Clayton Act. The jury heard evidence for nine weeks, including a former Antitrust Division economist's expert testimony concerning market definition, barriers to entry, market structure, 3M's monopoly power, its anticompetitive practices, and the effect of those practices on LePage's. 15JA3132-17JA3640. The economist explained that 3M's practices were anticompeti-

tive because, on a basis other than efficiency, they foreclosed competing suppliers from gaining access to critical distributors. 17JA3633-35; see also *infra* pp. 14-15.

The jury found for LePage's on its Section 2 claims and for 3M on the Section 1 and Section 3 claims. Having heard evidence that LePage's had incurred damages of \$36.6 million, the jury awarded (pre-trebling) \$22.8 million.

2. The district court denied judgment as a matter of law on the Section 2 monopolization claim, finding that "this case presents a unique bundled rebate program that the jury found had an anti-competitive effect." Pet. App. 152a.

The court held that there was ample evidence that 3M had engaged in anticompetitive conduct. LePage's "introduced evidence of customized rebate programs that * * * caused distributors to forego purchasing from LePage's if they wished to obtain rebates on 3M's products." Pet. App. 153a. 3M used its bundled-rebate programs as a method of purchasing exclusivity by setting the targets at which payments would be made individually for each distributor and, "[i]n the distributors' view, 3M set these targets in a manner which forced the distributor to either drop any non-Scotch products, or lose the maximum rebate." *Id.* at 152a. "[I]n order to qualify for the maximum rebate under the EGF/PGF programs, the record shows that most customers diverted private label business to 3M at 3M's suggestion." *Ibid.*

3. A divided panel of the Third Circuit reversed. Pet. App. 73a-143a. The Third Circuit accepted the case for en banc review and vacated the panel opinion. On rehearing, the court affirmed the verdict in LePage's favor by a 7-3 vote. *Id.* at 1a-72a. The majority consisted of Chief Judge Becker and Judges Sloviter, Nygaard, McKee, Ambro, Fuentes, and Smith.

The en banc majority established at the outset that 3M had staked its argument for judgment as a matter of law on a single legal principle: “it contends that a plaintiff cannot succeed in a § 2 monopolization case unless it shows that the conceded monopolist sold its product below cost.” Pet. App. 1a-2a. The court therefore devoted its analysis to “whether we must accept 3M’s legal theory that after *Brooke Group*, no conduct by a monopolist who sells its product above cost — no matter how exclusionary the conduct — can constitute monopolization in violation of § 2 of the Sherman Act.” *Id.* at 8a. The majority conducted an extensive review of “[t]he history of the interpretation of § 2 of the Sherman Act,” which “demonstrate[d] the lack of foundation for 3M’s premise.” *Ibid.*; see *id.* at 8a-14a.

Noting that “the jury had before it evidence of the full panoply of 3M’s exclusionary conduct” (*id.* at 20a), the court specifically determined that at least two separate aspects of 3M’s anti-competitive campaign — its bundled rebates and its exclusive dealing — supported the jury’s verdict. *Id.* at 20a-30a.

The court observed that 3M’s bundled-rebate program was “substantially identical” (Pet. App. 23a) to the bundled-rebate program declared illegal in *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir. 1978). Thus, the court held that “the reasoning” in *SmithKline* “regarding the practice of bundled rebates is equally applicable here.” Pet. App. 23a.

The court also determined that the exclusive dealing evidence independently justified the jury’s verdict. Pet. App. 26a-30a. The court rejected 3M’s contention that only two expressly exclusive contracts were at issue, pointing to “powerful evidence” that 3M’s programs directed at numerous other customers were conditioned on exclusivity. *Id.* at 27a.

Because “the long-term effects of 3M’s conduct were anticompetitive” (Pet. App. 37a), the court proceeded to “consider whether defendant’s actions were carried out for ‘valid

business reasons.” *Id.* at 38a. Observing that “3M cites to no testimony or evidence in the 55 volume appendix that would support any actual economic efficiencies,” the court concluded that 3M “had no legitimate business justification” for its exclusionary conduct. *Id.* at 39a.

REASONS FOR DENYING THE PETITION

A. The Court Of Appeals’ Decision Applies Settled Law And Does Not Conflict With Decisions Of This Or Any Other Court

1. The court of appeals applied settled law in condemning 3M’s bundled-rebate programs.

In determining whether conduct is anticompetitive under Section 2 of the Sherman Act, a proper inquiry focuses on “whether the monopolist’s actions represent competition on the merits, or instead sever the link between efficiency and marketplace success.” Thus, exclusionary conduct “not only * * * tends to impair the opportunities of rivals, but also * * * does not further competition on the merits.” 3 AREEDA & TURNER, ANTITRUST LAW ¶ 626b, at 78 (1978), quoted in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985). A monopolist’s conduct is predatory if it tries “to exclude rivals on some basis other than efficiency,” BORK, THE ANTITRUST PARADOX 138 (1978), quoted in *Aspen*, 472 U.S. at 605; “improper exclusion” is simply “exclusion” that is “not the result of superior efficiency.” *Aspen*, 472 U.S. at 603.

There is no established checklist of practices forbidden by Section 2. “‘Anticompetitive conduct’ can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties.” *Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998) (D.H. Ginsburg, J.). For that reason, Section 2 litigation often involves highly fact-based

inquiries into the effect of particular conduct in particular markets. Any other approach, such as the *per se* immunity 3M seeks from this Court, would open gaping loopholes in Section 2, to the undoubted detriment of competition and consumers.

Foreclosing critical distribution channels and linking sales of a dominant product with another product are both well-understood techniques for unlawfully maintaining monopoly power. See, e.g., *United States v. Griffith*, 334 U.S. 100, 108-109 (1948) (bundling monopoly outlets with competitive outlets “stifled” competition by “denying competitors * * * access to the market”); *United States v. Microsoft Corp.*, 253 F.3d 34, 64-76 (D.C. Cir. 2001) (en banc) (condemning a monopolist’s product linkages and exclusive deals that foreclosed critical distribution channels); Melamed, *Exclusionary Vertical Agreements* (Apr. 2, 1998), <http://www.usdoj.gov/atr/public/speeches/1623.htm>. Sometimes the monopolist’s goal is to destroy competition in a related product (here, lower price tape) in order to preserve the stream of profits from the product that gives it monopoly power (here, Scotch tape). See *Brooke Group*, 509 U.S. at 231 (destruction of a low-cost market segment is anticompetitive); see also *infra* pp. 28-29 n.13. Antitrust scholars refer to certain types of these schemes as “defensive leveraging.” See Feldman, *Defensive Leveraging In Antitrust*, 87 GEO. L.J. 2079, 2096-2105 & n.118 (1999) (describing how defensive leveraging was successfully employed in *Microsoft* and *SmithKline*, not to extend a monopoly into another market but to protect the monopoly from being eroded by an alternative product within the same or a different relevant market; citing *LePage’s* as another example).

These concerns resulted in the condemnation of the attempt in *SmithKline* to link multiple products within a monopolized market. Lilly had a monopoly in the market for cephalosporins,

a form of antibiotics. 575 F.2d at 1065. Lilly had no competition in two of the three major segments of the market but faced competition from SmithKline in the third. *Id.* at 1061, 1065. Lilly provided a percentage rebate on *all* cephalosporin purchases to customers purchasing minimum quantities of at least three different cephalosporins (which for practical purposes meant the two segments in which Lilly faced no competition and the segment in which SmithKline competed). *Id.* at 1060-1062. To match the effect of Lilly's 3% rebate across all cephalosporins, SmithKline would have had to "compete 'three-on-one.'" *Id.* at 1062. The Third Circuit held that Lilly's bundled-rebate program violated Section 2, explaining that "the act of willful acquisition and maintenance of monopoly power was brought about by linking products on which Lilly faced no competition * * * with a competitive product." *Id.* at 1065.

Against that legal background, 3M created its EGF and PGF bundled-rebate programs. Like Lilly's program, 3M's programs linked a product that gave 3M monopoly power (Scotch tape) with a competitive product (private label) that threatened to erode the monopoly. Like Lilly, 3M individually negotiated the target volumes to assure that each customer could obtain the bundled discount as a practical matter only by dropping other suppliers. 3M's programs, like Lilly's, excluded competition on grounds other than efficiency, so they would drive an equally efficient competitor out of the market. And, like Lilly, 3M designed the rebates to benefit the monopolist but not the consumer. Unsurprisingly, the court below found 3M's conduct "substantially identical" to that in *SmithKline*. Pet. App. 23a.

3M's programs differed from Lilly's only insofar as 3M drastically increased the leverage on the targeted private-label market segment. 3M understood that, as a practical matter, every retailer in the country had to carry Scotch-brand tape and that linking the price of Scotch with the purchase volume of private label would therefore have an exceedingly powerful manipulative effect. But 3M further linked the prices of a wide

variety of *other* products (including repositionable notes, in which its Post-It® brand enjoyed a 90%+ market share, see 16SJA2692) to the purchase volume of tape. As the Third Circuit explained, “[t]he principal anticompetitive effect of bundled rebates as offered by 3M is that when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer.” Pet. App. 23a.³ Indeed, “[t]he effect of 3M’s rebates were even more powerfully magnified than those in *SmithKline* because 3M’s rebates required purchases bridging 3M’s extensive product lines.” Pet. App. 25a. In its discussion of this case, the Areeda treatise agrees that “[m]ulti-product discounts aggregated over a prolonged period of time can in fact be used strategically with anticompetitive results.” ANTITRUST LAW ¶ 749, at 141 (Supp. 2003).

3M claims that the court of appeals “impose[d] liability for discount programs * * * [that] could be matched by an equally efficient rival.” Pet. 13. That is simply untrue; LePage’s case has always been based on the fact that 3M’s programs were capable of driving an equally efficient competitor from the mar

³ 3M is wrong in repeatedly insisting (*e.g.*, Pet. 19, 29) that this case is a single-product case because private label and Scotch are both tape products. 3M’s error lies in its assumption that distinct segments within one relevant market can never be different “products” for purposes of antitrust analysis. See Feldman, 87 GEO. L.J. at 2090-2092 & n.58 (explaining how an entrant can splinter a market into two segments by offering a limited complementary product); *SmithKline*, 575 F.2d at 1065 (condemning multi-product rebate scheme when all products were in the same relevant market). 3M’s theoretical argument is irrelevant here for the additional reason that 3M linked the price of Post-Its, auto parts, and numerous other unrelated products to its distributors’ purchase volume of tape.

ket. LePage’s economic expert specifically testified that 3M’s programs were anticompetitive because they “could exclude an efficient competitor and an inefficient competitor * * *. The programs lever against single-line companies whether [their] costs for that line are the same as 3M’s or not.” 17JA3634. The court of appeals plainly held that 3M’s programs could drive “even an equally efficient rival” out of business. Pet. App. 22a (internal quotes omitted). The Areeda treatise agrees that 3M’s programs “were capable of excluding an equally efficient rival.” ANTITRUST LAW ¶ 749, at 139 (Supp. 2003).⁴

2. The court of appeals’ decision does not conflict with *Brooke Group*.

3M’s attack on the jury’s verdict turns entirely on its “legal theory that after *Brooke Group*, no conduct by a monopolist who sells its product above cost — no matter how exclusionary the conduct — can constitute monopolization in violation of § 2 of the Sherman Act.” Pet. App. 8a. No court has read *Brooke Group* so expansively.

In *Brooke Group*, the plaintiff (Liggett) sued under Section 2(a) of the Robinson-Patman Act. 509 U.S. at 216. Unlike Section 2 of the Sherman Act, which prohibits abuse of monopoly power in many forms, Section 2(a) of the Robinson-Patman Act regulates only the level at which the defendant sets its prices. Liggett’s theory of liability was “a scheme of predatory

⁴ Because of ubiquitous economies of scale, rarely will the competitive fringe produce as efficiently as the monopolist. Indeed, one of 3M’s principal goals was to deny LePage’s access to the large distributors that would create economies of scale. See *supra* pp. 5-6. That is why “[t]he relevant question is not necessarily whether a particular plaintiff was equally efficient, but whether the challenged bundling practices would have excluded an equally efficient rival, without reasonable justification.” ANTITRUST LAW ¶ 749, at 140 (Supp. 2003).

pricing, in which Brown & Williamson reduced its net prices for generic cigarettes below average variable costs.” *Id.* at 217.

This Court affirmed judgment for defendant B&W because Liggett failed to prove necessary elements of its predatory-pricing theory. *Id.* at 243. The Court confirmed that “a plaintiff seeking to establish competitive injury resulting from a rival’s low prices must prove that the prices complained of are below an appropriate measure of its rival’s costs.” *Id.* at 222. That analysis applies “whether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act.” *Ibid.*

Brooke Group soundly relied on principles of predatory-pricing law that, as the Third Circuit saw, have no application to this case. This Court’s observation in *Brooke Group* that below-cost pricing and recoupment are required elements when a plaintiff “alleges predatory pricing under § 2 of the Sherman Act” reflected principles widely accepted in the lower courts and the academic literature before *Brooke Group*, and has been universally followed since *Brooke Group*. 509 U.S. at 222.⁵ But “LePage’s, unlike the plaintiff in *Brooke Group*, does not make a predatory pricing claim.” Pet. App. 16a.

Brooke Group’s theoretical underpinnings also make clear that the rule cannot apply here. In a predatory-pricing case, an

⁵ 3M tries (Pet. 23-24) to transform the court of appeals’ observation that “nothing in the decision suggests that its discussion of the [below-cost] issue is applicable to a monopolist with its unconstrained market power” (Pet. App. 16a) into a declaration that the court would not apply *Brooke Group* in an appropriate case. That is a fanciful interpretation of the comment, which in context was noting only that *Brooke Group* was a Robinson-Patman case involving an oligopoly. The Third Circuit is faithful to *Brooke Group* in Section 2 predatory-pricing cases. See *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1195 n.3 (3d Cir. 1995).

equally efficient competitor cannot be driven out of the market unless prices are below the appropriate measure of cost. The competitor could simply lower its prices to meet the monopolist's. An unconditional price cut in the single-product context is therefore quintessential competition on the merits: it is unambiguously beneficial to consumers except in the narrow circumstances developed in decades of commentary and case law and summed up in *Brooke Group*. See Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 593-594 (1986), aff'g 513 F. Supp. 1100 (E.D. Pa. 1981) (Becker, J.).

By contrast, when a monopolist links the prices of two or more products, entirely different competitive concerns are presented. If purchases of a dominant product determine rebates earned on both that product and its substitutes, the fringe competitor — lacking access to the very brand that has allowed the monopolist to achieve its monopoly — may have no way to respond.⁶ When used with other devices, such as individualized growth targets, monopoly bundles will leave some markets susceptible to anticompetitive manipulation. 3M's position, if adopted as law, would prevent any antitrust court from examining the competitive effect of any above-cost bundle in any market.

3M's conduct in this case demonstrates why there can be no rule of *per se* immunity here. "If loyalty rebates were never illegal unless the resulting price were below cost, then any firm could immunize its exclusive dealing agreements from antitrust scrutiny by the simple expedient of inflating the price and then

⁶ 3M argues (Pet. 19-20) that "the plaintiff can join forces with those non-monopoly market rivals to offer multiproduct packages like the defendant," but it is precisely the existence of Scotch that makes the bundle impossible to replicate.

offering a rebate conditioned on exclusivity.” Elhaug, *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory — And The Implications For Defining Costs And Market Power*, 112 YALE L.J. 681, 827 n.53 (2003).⁷ The path would be especially clear for a monopolist whose ability to raise prices already lacks normal competitive constraints. That is why “a monopolist does not receive immunity merely because it has priced the product in issue above its average cost. For that immunity is lost when it uses a pricing structure linking the monopolistic products * * * with another competitive product.” *SmithKline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089, 1128 (E.D. Pa. 1976), *aff’d*, 575 F.2d 1056 (3d Cir. 1978).

As the Areeda treatise sums up, the Third Circuit’s analysis “seems quite correct. Its decision is not foreclosed by *Brooke Group*, which does not require a cost-based test for every exclusionary practice in which pricing or discounting is an element.” ANTITRUST LAW ¶ 749, at 133 (Supp. 2003).⁸

⁷ Professor Elhaug’s article is an aggressive defense of cost-cutting practices in general — as its title implies — and an attack on the government’s Section 2 case against American Airlines in particular. See *United States v. AMR Corp.*, No. 01-3202, 2003 WL 21513205 (10th Cir. July 3, 2003). Even while championing the very principles 3M cites in its certiorari petition, however, Professor Elhaug has no trouble seeing the inapplicability of those principles to this case.

⁸ 3M quotes (Pet. 19 n.15) a statement from the treatise that the majority opinion “did not set forth facts sufficient to establish” a *different* standard proposed by the *dissent*. But the treatise reads the two approaches as “roughly consistent.” ANTITRUST LAW ¶ 749, at 139 (Supp. 2003). Thus 3M’s only point appears to be that the majority misapplied “a properly stated rule of law,” which exemplifies when certiorari should *not* be granted. S. Ct. R. 10.

3. The court of appeals' decision does not conflict with decisions of other courts of appeals.

3M claims (Pet. 13) that “[t]he Third Circuit’s ruling * * * conflicts with the decisions of other circuits,” including *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000), and *Virgin Atlantic Airways, Ltd. v. British Airways PLC*, 257 F.3d 256 (2d Cir. 2001). A conflict arises for purposes of certiorari decisions when “two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts.” STERN ET AL., SUPREME COURT PRACTICE 226 (8th ed. 2002). That has not happened here; indeed *both* of these cases *expressly distinguish this case*.

a. The allegedly anticompetitive conduct in *Concord Boat* concerned programs limited to the market for a type of boat engine. See 207 F.3d at 1044. Brunswick implemented a series of “market share” discounts, in which customers who purchased more than a threshold figure (which ranged from 70 to 80%) of their requirements received the most favorable price. *Id.* at 1044-1045. Because the programs were specifically designed to leave at least 20-30% of the market in which customers received no price incentive to deal with Brunswick, the court determined that “none of the programs restricted the ability of buyers and dealers to purchase engines from other engine manufacturers.” *Id.* at 1045.

In its Section 2 analysis, the court granted Brunswick judgment as a matter of law based on the rule in *Brooke Group* (see 207 F.3d at 1060-1062), but it carefully pointed out that “only one product, stern drive engines, is at issue here and there are no allegations of tying or bundling with another product.” *Id.* at 1062. The court distinguished Brunswick’s practices from cases that “involve bundling or tying.” *Ibid.* As examples of multi-product cases that were properly subject to a different

antitrust analysis, the *Concord Boat* court cited the Third Circuit's decision in *SmithKline* and the district court's summary judgment opinion in this very case. See *ibid.*⁹

b. In *Virgin Atlantic Airways, Ltd. v. British Airways PLC*, 69 F. Supp. 2d 571 (S.D.N.Y. 1999), the plaintiff alleged (among other theories) that a rival airline violated Section 2 by using "incentive agreements" with travel agents and corporate customers in which it bundled various airline routes. *Id.* at 572-574. The district court granted the defendant summary judgment because of a failure of proof: "Virgin has failed to show a factual basis for * * * its product bundling theory." *Id.* at 581.

The Second Circuit affirmed, "not only agreeing that Virgin submitted insufficient proof to permit a factfinder to render a verdict in its favor, but also concluding that Virgin failed to show how British Airways' competition harmed consumers." 257 F.3d at 259. The court explicitly distinguished this case, noting that Virgin's proof was "unlike" the record here, because Virgin lacked evidence similar to what LePage's had offered showing that "specific customers felt compelled to purchase products under the defendant's bundling program." *Id.* at 270.

c. More generally, 3M claims (Pet. 25-27) that the court of appeals' decision conflicts with numerous cases in which a defendant has obtained judgment as a matter of law in Section 2 litigation. 3M concedes that these decisions arise "in different contexts" (*id.* at 25), but believes that they "rest on principles incompatible with the Third Circuit's analysis here." *Ibid.* In

⁹ The court also emphasized that "Brunswick's discount programs were not exclusive dealing contracts and its customers were not required either to purchase 100% from Brunswick or to refrain from purchasing from competitors in order to receive the discount." 207 F.3d at 1062-1063. That fact renders the case entirely unlike this one, in which the court of appeals held (Pet. App. 20a) that the individual growth targets 3M set for key distributors made its bundled rebates indistinguishable from exclusive dealing contracts.

other words, these “conflicts” indicate nothing more than 3M’s disagreement with the result reached by the court of appeals. See SUPREME COURT PRACTICE 226 (“viewing a conflict in principle as a real conflict is almost invariably futile”). Each of the cases 3M cites is factually and legally different from this case, and none involves the practice of bundled rebates. See, e.g., *Midwest Gas Servs., Inc. v. Indiana Gas Co.*, 317 F.3d 703, 713 (7th Cir. 2003) (permitting defendant to grant discounts based on “high sales volumes”); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 524 (5th Cir. 1999) (permitting defendant to engage in “[a]cts which are ordinary business practices typical of those used in a competitive market”); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 237 (1st Cir. 1983) (affirming finding of insufficient market foreclosure when purchaser was left with flexibility to purchase from other sellers).

B. This Case Is An Inappropriate Vehicle For 3M’s Question Presented Because 3M’s Exclusive Dealing Practices Independently Support The Judgment

1. The legality of 3M’s exclusive dealing practices is not “fairly included” within 3M’s question presented. S. Ct. R. 14.1(a). 3M’s question focuses *only* on its prices, asking “[w]hether a dominant firm’s discounted but above-cost prices for volume purchases * * * may be condemned as unlawful under * * * the Sherman Act.” Pet. i. But 3M’s prices are wholly irrelevant to its exclusive dealing practices — as 3M’s counsel conceded before the Third Circuit (Arg. Tr. 21-22 (emphasis added)):

I do want to clarify one thing. ***This is a price case in everything but exclusives.*** And I absolutely accept the proposition, if there is evidence of an agreed exclusive, that is a different kind of antitrust problem. But there was a complete failure of proof within any of the traditional standards.

The Third Circuit disagreed, finding more than adequate proof under traditional standards of exclusive dealing (see Pet.

App. 26a-30a) and concluding that 3M's exclusive dealing practices independently supported the jury's verdict. *Id.* at 30a. "[T]his Court reviews judgments, not opinions." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842 (1984). Because the judgment would be affirmed however 3M's question presented is answered, its petition for certiorari should be denied.

2. 3M advances two misconceptions about its exclusive dealing. First, 3M claims (Pet. 20) that the *de facto* exclusive dealing underlying the verdict was nothing more than "the offering of low but above-cost prices that, once accepted, left little or no room for a small rival at particular customers in particular years." That statement bears no relation to the evidence. The exclusive dealing of which LePage's complained consisted of practices by 3M that conditioned direct payments and preferential prices on dominant and substitute products on a distributor's willingness to displace LePage's as a supplier. It is well settled that "[a] discount conditioned on exclusivity should generally be treated as no different than an orthodox exclusive dealing arrangement." 11 HOVENKAMP, ANTITRUST LAW ¶ 1807b, at 116 (1998). The record abounds with examples of these arrangements: 3M paid Kmart \$1,000,000 for dropping LePage's as a supplier; it paid \$1,500,000 to Staples and conditioned a lower Scotch price on Staples' giving LePage's business to 3M; and it provided a lower Scotch price to Sam's Club only if it refused to buy from LePage's. See *supra* p. 4.

Second, 3M asserts (Pet. 10 n.9) that the only exclusive dealing evidence concerned the two distributors (Pamida and Venture) entering into express agreements for exclusivity. This Court has repeatedly eschewed such a formalistic approach and looked instead to whether the agreement has the "practical effect" of inducing exclusivity. See, e.g., *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 326-327 (1961); *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 457 (1922). Under that standard, which the court of appeals applied (see Pet. App. 27a), substantial evidence supports the judgment below.

“LePage’s introduced powerful evidence that could have led the jury to believe that rebates and discounts to Kmart, Staples, Sam’s Club, National Office Buyers and ‘UDI’ were designed to induce them to award business to 3M to the exclusion of LePage’s.” *Ibid.*

3. The court of appeals was unquestionably correct that 3M’s exclusive dealing practices independently support the jury’s verdict under Section 2. Indeed, exclusive deals are especially pernicious when employed by a monopolist that has already effectively foreclosed most of the market by virtue of its monopoly power. See, e.g., *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 597 (1st Cir. 1993). 3M is hard pressed to dispute this point. As a Section 2 *plaintiff* elsewhere, 3M complained that a monopolist was unlawfully “creating and enforcing sole-sourcing agreements having the effect of closing distribution channels to its rivals” and “paying merchants not to deal with competitors.” *3M v. Appleton Papers, Inc.*, 35 F. Supp. 2d 1138, 1145-1146 (D. Minn. 1999).

The D.C. Circuit’s unanimous en banc decision in *Microsoft* illustrates this point. In assessing whether Microsoft violated Section 2 by means of exclusive dealing, the court asked whether the deals had “a significant effect in preserving its monopoly.” 253 F.3d at 71. The *Microsoft* court concluded that exclusive contracts that have “a substantial effect in restricting distribution of rival” products and serve to protect the monopoly are anticompetitive. See *id.* at 73-74. The court accordingly held Microsoft’s exclusive arrangements to violate Section 2. See, e.g., *id.* at 72 (holding exclusive contracts to be *prima facie* anticompetitive because “the deals have a substantial effect in preserving Microsoft’s monopoly”); *id.* at 76 (holding an exclusive anticompetitive when it “foreclosed a substantial portion of the field”).

Because the court of appeals’ decision is well grounded in precedent that is not implicated by the question presented, 3M’s petition for certiorari should be denied.

**C. There Is No Reason For The Court To Hold 3M's
Petition Pending Its Decision In *Trinko***

3M suggests (Pet. 22) that this Court should hold the petition pending its decision in *Verizon Communications Inc. v. Curtis V. Trinko, LLP*, No. 02-682 (to be argued Oct. 14, 2003). There is no reason for the Court to do so, as there is no conceivable result in *Trinko* that could affect the outcome in this case.

1. As the United States describes *Trinko* in its merits-stage amicus brief, the case “concerns the relationship between the Nation’s antitrust laws and the Telecommunications Act of 1996.” U.S. Br. 1. Specifically, the dispute involves the duties that Section 2, in light of the Telecommunications Act, imposes on regional Bell operating companies to cooperate with their competitors. There is no federal law comparable to the Telecommunications Act at issue in this case, nor does LePage’s assert that 3M has a duty under Section 2 to cooperate with it. And *Trinko* does not present issues of exclusive dealing or the strategic, anticompetitive use of bundled rebates by monopolists.

All that *Trinko* and this case have in common is whether the defendant violated Section 2. But *Trinko* concerns *only* Section 2 cases proceeding under a theory (like *Aspen*) in which the monopolist has an affirmative duty to cooperate with or assist its rivals.¹⁰ As the United States explains in its amicus brief: “*Where, as here, the plaintiff asserts that the defendant was under a duty to assist a rival*, the inquiry into whether conduct is ‘exclusionary’ or ‘predatory’ requires a sharper focus. *In that context*, conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.” U.S. Br. 15 (emphasis added); see also 02-682 Pet. Br. 21 (“A necessary requirement of illegality, *at least in this setting*, is that the conduct make no business sense except for its enabling monopoly returns.”)

¹⁰ *Trinko* also presents monopoly leveraging and antitrust standing issues, but 3M does not contend those issues overlap with this case.

(emphasis added). The government is not suggesting a change in the standard for exclusionary conduct outside *Trinko*'s particular setting. See U.S. Br. 14-15 & n.4; U.S. Cert.-Stage Br. 11 n.2. Its statement of the **general** test (U.S. Br. 14) is the very standard that the Areeda treatise endorses. That treatise, in turn, specifically discusses *this* case and says that “the majority’s treatment seems consistent with our definition of exclusionary conduct.” ANTITRUST LAW ¶ 749, at 141 (Supp. 2003).¹¹

3M cannot seriously suggest that any result in *Trinko* would confer *per se* immunity on monopolists to use exclusive dealing contracts (or other means) to foreclose competitors from all efficient distribution channels. Because no disposition in *Trinko* could affect the disposition here, there is no reason to delay this case any further by holding 3M’s petition.

2. Holding 3M’s petition would be pointless for additional reasons. 3M never raised below — and therefore forfeited any argument based on — the economic irrationality formulation of the Section 2 standard. In any event, 3M’s internal documents suggest that entering the private-label segment **did** entail a short-

¹¹ 3M cannot establish a conflict for certiorari purposes (Pet. 22-23) by contrasting the Third Circuit opinion with two public discussions by an Antitrust Division attorney. Moreover, and uncomfortably for 3M, the very same attorney — while still employed by the government — delivered **subsequent** remarks that are perfectly consistent with LePage’s theory of this case:

We would agree that there may be some narrow circumstances in which fidelity rebates may be anticompetitive, at least **when they involve bundling products as to which a firm has a monopoly with other products for which it faces competition**. By foreclosing the market share rivals need to reach minimum efficient scale, bundled discounts may, in some narrow circumstances, serve to exclude equally efficient rivals from the market.

Kolasky, *What Is Competition?* (Oct. 28, 2002) (emphasis added), <http://www.usdoj.gov/atr/public/speeches/200440.htm>.

term sacrifice to the Scotch brand (see *supra* pp. 5-6), and 3M conceded in the district court that it could recoup lost profits by converting private-label sales to Scotch sales after driving Le-Page's from the market. See Pet. App. 15a n.7.¹²

D. The Court Of Appeals' Decision Will Not Inhibit Price Cuts Or Other Pro-Competitive Conduct

3M's doomsday predictions are utterly without basis. In its 1978 *SmithKline* decision, the Third Circuit held that a monopolist's use of a bundled-rebate program violated Section 2 when it linked dominant and substitute products in a manner capable of driving an equally efficient rival from the market. In this case, the Third Circuit affirmed the judgment based on conduct it found to be "substantially identical" (Pet. App. 23a) to that condemned in *SmithKline*. 3M's hyperbolic claims (Pet. 27) that the court of appeals' opinion will result in "widespread economic harm" are irreconcilable with the fact that this case involved nothing more than the routine application of pre-existing precedent. *SmithKline* has been the law for 25 years, and the sky has not fallen on businesses operating or incorporated in the Third Circuit (including the many incorporated in Delaware).

Moreover, several aspects of this case demonstrate that the scope of the holding is exceptionally narrow. *First*, and most obviously, the decision applies only to businesses with monopoly power which take steps to maintain that power. Because

¹² 3M derides the district court's recoupment discussion as "flat-out false." Pet. 11. 3M explicitly argued below, however, that it "would not be able to recoup the profits" it had invested in its predatory conduct "[u]nless there were such high entry barriers in the private label tape segment that there could be no * * * competition" after it had driven existing competitors from the market. Pet. App. 170a. The trial established that such barriers do exist (see *id.* at 36a, 156a), a conclusion reinforced by 3M's acknowledgment of its monopoly power. 3M's sharp attack on the trial court is therefore unwarranted.

monopolists “maintain[] substantial market power,” their “activities are examined through a special lens.” *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting). True monopolists are rare, and the decision below has no applicability outside that context. See also Jacobson, *Exclusive Dealing, “Foreclosure,” and Consumer Harm*, 70 ANTITRUST L.J. 311, 312 (2002) (“The last few years, starting in 1997, have given us a new wave of exclusive dealing decisions * * * reflect[ing] the beginnings of another evolutionary change in the law. Increasingly, the courts are focusing on the effect of the challenged arrangement on the defendant’s market power, rather than foreclosure as such, as the source of potential exclusive dealing liability.”); *id.* at 347.

Second, while 3M claims that “[b]undled pricing * * * is a pervasive practice throughout the economy” (Pet. 29) and that “[t]he Third Circuit has now put these commonplace practices at risk” (*id.* at 30), 3M cites no authority for the proposition that the specific conduct at issue here — bundling monopoly and non-monopoly products and setting exclusionary “growth” targets for critical distributors — is commonplace at all. More benign forms of price bundling (such as volume rebates) by monopolists and non-monopolists alike are indeed commonplace (as reflected in the business journals 3M cites) but are completely unaffected by the result here. Pet. App. 21a. Both the district court (Pet. App. 152a) and the en banc Third Circuit (*id.* at 31a) agreed that 3M’s bundled-rebate programs were “unique.”

Third, this case is unusual because of the breadth and depth of the evidence of 3M’s *anti-consumer* (as opposed to anti-competitor) intent. In addition to 3M’s efforts to raise the price and degrade the quality of its products, the majority below emphasized the “considerable evidence in the record that 3M entered the private-label [segment] only to ‘kill it.’” Pet. App. 39a. Even the dissent acknowledged that “the record supports

a finding that [3M] had th[e] intent” to “eliminate the private label category of transparent tape.” *Id.* at 71a.¹³

Fourth, 3M’s nakedly anti-consumer intent compelled the court of appeals to conclude that 3M’s conduct “had no legitimate business justification.” Pet. App. 39a. These were not programs desired by 3M’s customers; rather, distributors chafed at the anticompetitive restrictions. Nor was 3M able to point to any efficiencies resulting from its programs. 3M claimed only that its actions were justified because it was “rational” for 3M to want consumers to be deprived of alternatives and be forced to purchase its high-priced Scotch tape. *E.g.*, Pet. App. 71a. The court of appeals properly rejected that claim. *Id.* at 38a; see also *Microsoft*, 253 F.3d at 71 (preserving monopoly power “is not an unlawful end, but neither is it a procompetitive justification for * * * exclusive dealing contracts”).

Finally, the court of appeals made clear that 3M’s actions were anticompetitive *only* because they foreclosed competitors from the distribution channels necessary to reach consumers. See Pet. App. 31a (“3M’s exclusionary conduct cut LePage’s off from key retail pipelines necessary to permit it to compete”). Thus, the court of appeals’ decision could not plausibly inhibit any product bundle offered directly to consumers, who could then make their own choice on the merits. Nor could the decision affect industries where critical distributors either do not

¹³ In *Brooke Group*, this Court held that B&W’s intent to destroy a low-price market segment was anticompetitive (509 U.S. at 231), ultimately declining to impose liability only because the evidence showed that B&W had not pursued its plan (*id.* at 240-241); the growth rate of the segment doubled over the relevant time period (*id.* at 233-234). In this case, 3M’s plan to limit the overall growth of private label actually worked. 3M admitted in its main brief in the court of appeals (at 8) that its efforts to strangle the second-brand/private-label segment of the transparent tape market were successful, in that the segment — which had been growing rapidly — actually *shrank* in the face of 3M’s onslaught.

exist or are too numerous to be effectively foreclosed. See *id.* at 31a n.14 (“3M foreclosed LePage’s from that critical bridge to consumers that superstores provide”).

By contrast, adopting the rule of law advocated by 3M would pose true dangers to competition and consumers. Monopolists would be free to pursue any number of exclusionary campaigns — including many yet to be devised — against

nascent competitors without fear of *any* antitrust scrutiny. Such immunity would “weaken § 2 of the Sherman Act to the point of impotence.” Pet. App. 108a. Neither this Court in *Brooke Group*, nor any other antitrust court, has ever suggested such a course.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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