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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

EASTMAN KODAK CO.,

Petitioner,

—v.—

COLLINS INKJET CORPORATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court has made clear that “regardless of the type of antitrust claim involved,” there can be no antitrust liability, and a plaintiff does not have standing to complain about a defendant’s prices, if those prices are above cost. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339, 340 (1990). Here, the court of appeals, invoking *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), held that the price-cost test requires ignoring the plaintiff’s cost when determining whether the plaintiff has antitrust standing and whether the defendant engaged in unlawful non-explicit tying in violation of Section 1 of the Sherman Act. The court so held *even though* the plaintiff, the more-efficient competitor, could have *fully* protected its market share, and *fully* preserved competition, by cutting its price (without going below its own cost). So as not to chill competition, this Court has repeatedly stated that antitrust standing and liability cannot be imposed on a defendant for pricing above an appropriate measure of cost. But that would be the result if courts were to award injunctions and treble damages to more-efficient plaintiffs who choose court intervention over competition.

Thus, the question presented is: whether it constitutes unlawful tying, and whether the plaintiff has antitrust standing to claim unlawful tying, when the plaintiff cannot be excluded by defendant’s pricing and in fact can profitably retain its full market share and enhance competition by competing on price?

2. The court of appeals left in place a preliminary injunction, holding that there was a danger the plaintiff would lose market share despite the fact that it could have staved off any loss of market share by competing on price without going below its cost.

Thus, the question presented is: whether an antitrust plaintiff can suffer irreparable injury as a result of potential loss of market share when the plaintiff could retain its entire market share by lowering its prices without going below its own cost?

PARTIES TO THE PROCEEDING

Petitioner, who was Defendant-Appellant below, is Eastman Kodak Company ("Kodak"). Respondent, who was Plaintiff-Appellee below, is Collins Inkjet Corporation ("Collins").

RULE 29.6 STATEMENT

Kodak is a publicly traded company. The Blackstone Group L.P., a publicly traded corporation, owns more than 10% of Kodak's outstanding stock through Blackstone Holdings I L.P.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–35a) is reported at 781 F.3d 264. The opinion of the district court (Pet. App. 83a–129a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (2004), provides:

Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act, 15 U.S.C. § 15(a) (1982), provides:

Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

STATEMENT

This Court has consistently held that antitrust liability and antitrust standing cannot be premised on above-cost pricing. See, 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). The “price-cost” test is based on sound economic and antitrust principles. If a plaintiff is as efficient as the defendant with whom it competes, it can match the defendant’s above-cost pricing and cannot be foreclosed from competing. Because an equally efficient plaintiff cannot be driven from the market, the defendant’s prices are not predatory. In other words, above-cost pricing cannot “eliminat[e] competitors in the short run and reduc[e] competition in the long run.” *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117 (1986). Just the opposite: when the plaintiff matches the defendant’s price, consumers benefit from the intensified competition. Any other rule would chill vigorous price competition. See *Brooke Grp.*, 509 U.S. at 223, 226–27. The price-cost rule is so fundamental to the structure of the antitrust laws that it applies “regardless of the type of antitrust claim involved.” *Id.* at 223 (citation omitted).

Kodak manufactures Versamark™ inkjet printers. It created and unsuccessfully tried to implement a pricing policy that charged customers who purchased Kodak’s ink for their Versamark printers less to refurbish their Versamark printheads (a component of a Versamark printer) than it charged customers who did not purchase Kodak’s ink. Pet. App. 4a, 6a–7a. Collins, Kodak’s

only Versamark ink competitor, alleged that Kodak's pricing policy amounted to a non-explicit tying arrangement. Pet. App. 3a. According to Collins, Kodak would penalize Collins's ink customers with higher prices for refurbishment, thus forcing them to buy ink from Kodak rather than Collins. *Id.* The wrinkle here is that Collins could have discounted its ink prices and thereby fully offset the ink discount implicit in Kodak's pricing policy, but Collins chose not to.¹

Unlike the district court, the Sixth Circuit panel applied the price-cost test to Kodak's pricing conduct. Pet. App. 10a, 13a-15a. However, the court refused to consider Collins's ability to rebuff Kodak's competitive challenge by lowering its prices. Instead, it ruled that Collins had established the forcing element of tying and had standing so long as Kodak was pricing below its cost. Pet. App. 19a, 21a. Collins neither argued nor established in the district court that Kodak was pricing below its cost, but the panel found what it said was evidence of Kodak's below-cost pricing through its own analysis, even creating a formula to explain the result. Pet. App. 21a-23a & n.1.

Collins's complaint did allege, however, that Kodak's prices were below *Collins's* cost. Accordingly, Kodak adduced extensive, unrefuted record evidence demonstrating that Kodak's

¹ A second wrinkle is that Collins's prices were traditionally lower than Kodak's. When Kodak attempted to charge differential prices for printhead refurbishment, most of Collins's customers would continue to have a lower total cost buying ink from Collins and refurbishment from Kodak than buying at Kodak's bundled price (in the absence of even more aggressive price discounting by Kodak).

“attributed” price of ink was above Collins’s ink costs. Pet. App. 19a–20a. Nevertheless, relying on *Brooke Group*, the court of appeals held that defendant’s cost is the only appropriate cost for determining antitrust standing and the conditioning element of non-explicit tying. Pet. App. 20a (citing 509 U.S. at 222).

The court of appeals’s decision is facially consistent with language in *Brooke Group*, but is antithetical to the policy underlying *Brooke Group*’s price-cost test. That test is designed to prevent predation and its concomitant anticompetitive effects, whereby a dominant firm prices below cost to drive competitors from the market and then more than recoups its losses by raising prices to anticompetitive levels after competitors are eliminated. Kodak’s pricing could not be predatory or anticompetitive because Kodak could not drive the more-efficient Collins from the market with prices above Collins’s costs. With its lower cost structure, Collins could undercut Kodak’s attributed ink price while remaining profitable. Kodak could not even grab any of Collins’s market share so long as Collins competed on price (while remaining above its costs). The court of appeals’s construction of *Brooke Group* discourages similarly situated plaintiffs from discounting to retain market share: better to keep the price high, losing market share and obtaining treble damages for that lost market share, *or* obtain an order enjoining the defendant from competing so that the plaintiff can maintain its market share without lowering its price.

The failure to use the cost of the more-efficient firm is particularly anomalous in the case of non-explicit tying. Most lower courts agree that

bundling implemented through differential pricing does not amount to unlawful non-explicit tying unless customers are *forced* by the differential pricing of the tying good to buy the tied good from defendant. In this case, Kodak's pricing policy could not have forced customers to switch their ink purchases from Collins to Kodak because Kodak's price was above Collins's costs. In the absence of an injunction, Collins, as a rational competitor, would have reduced its price to match Kodak's offer and customers would have had no price-based reason to switch suppliers. The Sixth Circuit nevertheless found the evidence sufficient to support the claim of unlawful tying for purposes of a preliminary injunction, thus sending a message to would-be plaintiffs that they are better off seeking judicial protection rather than cutting their prices to maintain their market share. Pet. App. 25a.

The Sixth Circuit repeated the same anticompetitive message by conferring antitrust standing on a plaintiff who could not be competitively injured by defendant's pricing. In fact, according to the Sixth Circuit, a competitor plaintiff has standing "[w]hen the defendant effectively sells below its own costs [because] it puts pressure on its competitors to lower prices." Pet. App. 21a. But "cutting prices in order to increase business often is the very essence of competition." *Atl. Richfield*, 495 U.S. at 338 (quoting *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)); see also *Cargill*, 479 U.S. at 116. Cutting prices to maintain market share may be an injury of sorts, but it is not a cognizable competitive injury "since it is inimical to the antitrust laws to award damages

for losses stemming from continued competition.” *Atl. Richfield*, 495 U.S. at 334 (citing *Cargill*, 479 U.S. at 109–10). For decades, courts have denied antitrust standing to competitors that suffer injury only from increased competition because their injury does not flow from that which makes the conduct unlawful. *E.g.*, *Cargill*, 479 U.S. at 116; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). To provide antitrust standing where plaintiff’s injury flows from increased competition and lower prices is antithetical to these principles.

Certiorari is necessary to provide guidance to the lower courts concerning the correct legal standard regarding non-explicit tying, antitrust standing, and the application of the price-cost test where the plaintiff is the more-efficient firm. In the absence of certiorari, some courts will refuse to apply the price-cost test to non-explicit tying. Others, like the Sixth Circuit here, will mechanically apply the words of *Brooke Group* without considering its meaning and will use defendant’s cost even where the plaintiff is the more-efficient firm. This will undermine the competitive objectives this Court intended to promote in *Brooke Group* and its other recent predatory pricing decisions.

I. FACTUAL BACKGROUND

One of Kodak’s primary businesses is commercial printers that use a digital technology called continuous inkjet (“CIJ”) printing. Pet. App. 84a. Kodak has two lines of CIJ printers, Versamark™ and Prosper™. *Id.* Kodak sold its last Versamark printer in 2009, but continues to sell ink specially engineered for Versamark

printers and to “refurbish” (i.e., repair or replace) Versamark printheads, the printer component through which ink “jets.” Pet. App. 85a.

Versamark customers are currently replacing their Versamark printers with newer technology, Pet. App. 85a–86a, including Prosper printers, not because Versamark printers no longer function, but because newer printers allow a lower total cost of printing (“TCOP”), making switching to new technology cost-effective. The vast majority of Prosper purchasers are legacy Versamark customers. Kodak views Prosper as the future of its CIJ business, Pet. App. 85a, and believes that maintaining its reputation with Versamark customers is necessary to expand its Prosper business.

Kodak’s top 40 Versamark customers, accounting for about 80% of Kodak’s Versamark aftermarket business, are large sophisticated commercial printers who are highly focused on their TCOP. See Pet. App. 5a, 86a. TCOP includes the upfront investment in the printing system and the aftermarket “consumables” (e.g., ink and refurbishment) needed to produce each printed page. Pet. App. 86a. To obtain concessions on Versamark aftermarket consumables, customers use potential purchases of new equipment as bargaining leverage.

Collins manufactures ink for many printing systems, including Versamark printers. Pet. App. 85a–86a. Prior to 2001, Kodak’s predecessor and Collins were essentially the only competitors selling Versamark ink. In 2001, they entered into a contractual arrangement whereby Collins manufactured both Collins-brand Versamark ink

and Kodak-brand Versamark ink, which Kodak or its predecessor sold to customers. Pet. App. 87a–88a.

In May 2012, Collins terminated the contractual relationship, Pet. App. 90a, forcing Kodak to reconsider the pricing of Kodak-brand Versamark ink and printhead refurbishment. Kodak was concerned about the long-term effect of unapproved Collins-brand ink on Versamark systems. It also wanted sufficient revenues from its Versamark products to support the continued use of Versamark printers. Pet. App. 90a–91a. However, Kodak’s executive leadership repeatedly told its CIJ unit not to implement any policy that harmed Kodak’s ability to sell Prosper.

Kodak attempted to introduce a pricing policy to customers worldwide in May 2012 under which customers using third-party ink (unmatched) paid more for refurbishment than customers using Kodak ink (matched). Pet. App. 90a. But Kodak was unable to implement the policy because of customer resistance, Pet. App. 6a, 91a, and customers were never charged the higher, unmatched rates.

Kodak released a reformulated policy in July 2013 and tried to implement it in North America. Pet. App. 6a, 92a. The new policy continued to differentiate between matched and unmatched customers, but lowered the price of refurbishing generally and was less costly for unmatched customers relative to the earlier policy. Pet. App. 6a, 92a. In marketing the July 2013 policy, Kodak decided that, rather than try to leverage refurbishment to increase ink sales, it would tell customers they had a choice of inks, but using third-party inks would be at their own risk.

Versamark customers continued to push back, forcing Kodak to give rebates that totally negated Kodak's differential pricing to North American unmatched customers (representing the majority of Collins's ink revenue). Pet. App. 92a.

In September 2013, Collins filed a complaint and sought a preliminary injunction. Pet. App. 7a. As relevant here, the first claim alleged that Kodak committed tying in violation of Section 1 of the Sherman Act, and the fifth claim asserted that Kodak's tying had tortiously interfered with Collins's prospective contractual relations. *Id.* The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337 over Collins's claim under the Sherman Act, 15 U.S.C. § 1, and supplemental jurisdiction over the tortious interference claim pursuant to 28 U.S.C. § 1367.

Following expedited discovery, the district court held an evidentiary hearing. *Id.* The hearing demonstrated that there was virtually no switching by Versamark customers from Collins to Kodak. To the contrary, a year and a half after Kodak first announced its new policy, Collins's Versamark ink revenue and market share had grown.

Collins's complaint alleged that under Kodak's policy, Collins "would have to sell its ink at below cost . . . to keep a customer's total cost from increasing." At the evidentiary hearing, Kodak proved this was not the case. Under all scenarios, Kodak's attributed price of ink was above Collins's costs for almost all of Collins's customers. The analysis used average variable cost and average total cost. The scenarios included a variety of

assumptions about additional discounting on ink by Kodak and Collins. One scenario that deserves emphasis did not even need to use Collins's cost: even if Kodak had been able to implement its differential pricing on refurbishment, Collins's Versamark ink prices were so much lower than Kodak's that *about 80% of Collins's customers (in terms of volume of Collins's top twenty customers) had still lower ink and refurbishment prices if they purchased ink from Collins rather than Kodak.*

By competing on price, Collins could have matched Kodak's offer to even more of its customers—up to 100% in some scenarios, assuming that Kodak did not decrease its price further. But Collins did not lower its ink prices, preferring to litigate.

II. THE DISTRICT COURT OPINION

On March 6, 2014, the district court issued a preliminary injunction based on the antitrust and tortious interference claims. Pet. App. 7a–8a. The injunction prohibits Kodak from charging differential prices for Versamark refurbishing services without regard to either party's cost. Pet. App. 128a–129a.

To establish its tying claim, the district court held that Collins had to prove: (1) there are two separate products or services, (2) the sale of one product (refurbishment) is conditioned on the purchase of the other product (ink), (3) Kodak has appreciable economic power in the market for the tying product, and (4) the arrangement affects a substantial volume of commerce in the tied market. Only the second and third elements were in dispute. Pet. App. 94a–95a.

The district court acknowledged that Collins had not alleged a tie “explicitly imposed by agreement.” Pet. App. 96a. It held, however, that non-explicit tying arrangements can satisfy the conditioning element “when a deal induces ‘all rational buyers’ of the tying product to accept the tied product.” *Id.*

The district court concluded that the refurbishment price differential between Kodak and Collins ink customers was sufficient to establish the conditioning element. Pet. App. 98a. It held that the price-cost test was not relevant to a tying claim, and that even if it was, only Kodak’s costs mattered, and there was no evidence of Kodak’s costs in the record. Pet. App. 102a–103a.

It then turned to whether Kodak has market power, focusing on criteria identified in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). It concluded that those factors had been satisfied even though Kodak had been unable to implement its policy successfully for the past eighteen months. Pet. App. 104a–112a.

Having found that Collins was likely to succeed on the merits of its tying claim (and therefore the tortious interference claim), the district court found irreparable harm to Collins, Pet. App. 126a–127a, and concluded that an injunction served the public interest, Pet. App. 128a.

III. THE COURT OF APPEALS OPINION

Kodak appealed, arguing that there can be no antitrust issue arising from a defendant’s unilateral or exclusionary pricing practices if prices do not fall below an appropriate measure of

cost, that the appropriate measure of cost in this case was the plaintiff's costs, and that Collins had failed to carry its burden of proving below-cost pricing based on any measure of cost. Kodak further contended that it had no market power. Kodak also argued that the district court erred in concluding that the public interest and harm to Collins justified a preliminary injunction when Collins could have fully protected its market share by profitably discounting Collins-brand ink prices.

A panel of the Sixth Circuit affirmed the preliminary injunction with one judge delivering a separate concurring opinion. The majority held that the district court had applied a standard that was "unduly generous" to Collins, because "[a] tying arrangement enforced entirely through differential pricing of the tying product contravenes the Sherman Act only if the pricing policy is economically equivalent to selling the tied product below cost." Pet. App. 4a, 10a. It held, however, that the price-cost test must look to the defendant's cost. Pet. App. 20a.

The majority acknowledged that buyers are not forced to buy a tied good when they can purchase the tied good elsewhere at a price low enough to offset the forgone discount on the tying product. Pet. App. 14a. Nevertheless, it refused to consider that Kodak's conduct could not force buyers to purchase Kodak ink when Collins could have offset the refurbishment differential without pricing below its own costs.

To determine whether the defendant is pricing below cost, the court of appeals adopted the "discount attribution standard" used in *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883,

907 (9th Cir. 2008). Pet. App. 16a. Under this standard, the differential on the tying product between favored and disfavored customers must be allocated to the price of the tied product. This differential is not coercive and thus not tying unless the allocation results in a tied product price that is below defendant's cost, i.e., "unless the discounts have the potential to exclude a *hypothetical* equally efficient producer of the competitive product." Pet. App. 15a–16a (quoting *Cascade Health*, 515 F.3d at 906.).

The majority inferred, as a matter of "formal logic," that Kodak was pricing below cost based on the testimony of a Kodak employee that Kodak had no incentive to engage in tying under its pricing policy because Kodak made more money if Collins ink customers simply paid the higher price for refurbishment.² Pet. App. 21a. The majority acknowledged that its analysis could be contradicted by "salient features of the Versamark printer aftermarket (for example, the fact that different customers require different amounts and types of ink per refurbished printhead)." Pet. App. 21a–22a. If Kodak was pricing below its costs as the court surmised but was pricing above Collins's costs as the evidence showed, then the court's logic implied that Collins was the more-efficient supplier of ink.

The Sixth Circuit, nevertheless, used Kodak's costs to determine that Collins had antitrust

² Collins did not argue that Kodak priced below its costs until its brief on appeal, and even then did not make the argument adopted by the panel. The court did not address Kodak's argument that Collins had waived this issue.

standing. Pet. App. 21a–23a. It noted that for Collins to have standing, “it must have suffered the type of injury that ‘the antitrust laws were intended to prevent and that flows from that which makes which makes the defendants’ acts unlawful.” Pet. App. 18a (quoting *Brunswick*, 429 U.S. at 489). Collins would not have standing if Kodak’s “pricing policy is the equivalent of offering an above-cost discount on ink,” because “equally efficient competitors will not be forced out of the market,” Pet. App. 19a, and presumably can defend marketplace competition without court intervention. But because Kodak may have been pricing below cost, the panel concluded that Collins had standing because this fact meant Collins faced exclusionary pricing pressure and thus “suffer[ed] harm . . . ‘as a defender of marketplace competition.’” Pet. App. 18a (quoting *Indeck Energy Servs. v. Consumers Energy Co.*, 250 F.3d 972, 977 (6th Cir. 2000)).

Having found that Collins had standing and was likely to succeed in showing coercion, the majority concluded that the other factors for a preliminary injunction had been satisfied. While the primary market (printers) was competitive, the court concluded that Kodak had market power in the refurbishment aftermarket because Kodak had attempted to change its pricing policy (suggesting high information costs) and because switching to printer competitors in the primary market was difficult. Pet. App. 25a–30a.

The majority acknowledged but did not respond to Kodak’s contention that Collins would not suffer irreparable injury because it could retain its customers by acting as a profit-maximizing competitor and cutting price. Pet. App. 30a. Nor

did it address Kodak's argument that it would be in the public interest to encourage Collins to compete rather than seek court protection.

The concurring opinion agreed with the result, but disagreed with the broad sweep of the majority's opinion.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

The court of appeals correctly observed that tying occurs when it is prohibitively costly for customers to buy defendant's tying product (refurbishment) without buying its tied product (ink). Under such circumstances, the tie "forces" the customer to buy the tied product from the defendant and not from competitors. Pet. App. 14a. The court rightly concluded that such pricing only amounts to "forcing" and hence tying if customers could not purchase the tied good from the plaintiff "at a price low enough to offset the forgone discount for the tying product." *Id.*

This necessarily raised the issue of how to determine whether a customer could purchase the tied good from the plaintiff at a price low enough to offset the discount for the tying product. Prior to the court of appeals's decision, most courts used the rational-buyer standard or the only-economically-viable-option standard to determine whether there is forcing. Under these standards, a non-explicit tie exists when a bundled deal "induces all rational buyers" of the tying product to accept the tied product. *Virtual Maint., Inc. v. Prime Computer, Inc.*, 957 F.2d 1318, 1323 (6th Cir. 1992), *vacated on other grounds*, 506 U.S. 910

(1992); *see also* *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1161 (9th Cir. 2003); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1501 (8th Cir. 1992); *Shop & Save Food Mkts., Inc. v. Pneumo Corp.*, 683 F.2d 27, 30–31 (2d Cir. 1982).

Courts applying the “rational-buyer” standard have overlooked plaintiff’s competitive capabilities, using plaintiff’s actual prices for the conditioning analysis. *Id.* Under that standard, it could amount to forcing if defendant’s bundle of products costs customers less than buying one product from the defendant and the other from the plaintiff at plaintiff’s *current* price. Even when the court has implemented the price-cost test, plaintiff’s ability to lower its price has been ignored. *See, e.g., Cascade Health*, 515 F.3d at 906 (“If the resulting price of the competitive product or products is below the defendant’s incremental cost to produce them, the trier of fact may find that the bundled discount is exclusionary.”). Under this application of the price-cost test, if plaintiff’s actual price on the tied good (ink) was above defendant’s price of the tied good minus the discount on the tying good (refurbishment), it would amount to “forcing.”

These are incomplete standards because they do not consider the plaintiff’s ability to lower its price to thwart forcing. If courts do not consider the plaintiff’s ability to respond, a plaintiff that did nothing to respond and lost market share could seek court protection and treble damages, while a plaintiff who aggressively responded and maintained its market share would have no damages and no standing because no customer was forced to buy the defendant’s tied good.

The panel majority rightly split from other circuits and considered the effect of cost on tying

and standing. But it believed it was constrained to consider only the defendant's cost. As a result, it allowed Collins's tying claim to stand even though Collins indisputably had the ability to meet Kodak's competition without going below its own costs. Thus, the standard adopted by the court below telegraphs to putative plaintiffs that they are most likely to prevail if they do not compete at all—hardly an approach that fosters the objectives of the antitrust laws.

An approach that would promote those objectives is to ask whether customers would be forced if the plaintiff competed to its utmost before seeking court protection. To implement such a rule, the court would determine plaintiff's cost and ask whether customers would be coerced into buying defendant's tied good (Kodak ink) if the plaintiff (Collins) were to price the tied good (Collins ink) at its cost. This standard—the more-efficient competitor standard—has the advantage of encouraging competition and restricting the protection of the court to plaintiffs who cannot protect themselves. The standard clearly reveals whether there is unlawful conditioning for non-explicit tying claims. It also separates beneficial competition from pricing that is predatory and anticompetitive.

The problem of the more-efficient competitor presents a significant question of federal antitrust law. The decision below conflicts with the principles animating this Court's prior decisions on the paramount importance of price competition. Certiorari is needed to make clear that antitrust law does not allow putative antitrust plaintiffs to engage in self-restraint rather than robust price competition.

II. THE PRICE-COST TEST AS APPLIED BELOW UNDERMINES THE COMPETITIVE OBJECTIVES OF THE ANTITRUST LAWS

A. The Anticompetitive “Forcing” That Tying Law Seeks To Prevent Cannot Occur Unless The Defendant Prices Below The Plaintiff’s Cost

The Sixth Circuit recognized a traditional tying arrangement “is anticompetitive because it tends to force *more efficient* competitors out of the tied product market.” Pet. App. 12a (emphasis added). A competing seller is unable to attract customers for the tying product *even if* the competing seller is *superior* in price and quality. Pet. App. 13a. “With such a thumb on the scale, a competing seller may lose market share even if it can produce the tied product *more efficiently* than the defendant.” *Id.* (emphasis added). As with traditional tying arrangements, a non-explicit tying arrangement can only amount to unlawful tying when it “forces’ buyers to buy the tied product from the defendant.” Pet. App. 14a (citing *Amerinet*, 972 F.2d at 1500; *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1180 (1st Cir. 1994), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010)).

If the court had followed through with its focus on the more-efficient competitor, it would have recognized that Kodak cannot force customers to buy Kodak ink unless it prices the ink below Collins’s costs. Because its ink costs are lower than Kodak’s, Collins, as a rational competitor, would have responded to Kodak’s policy by lowering its

price. It is only by artificially assuming that Collins would not price below Kodak's costs that the court could create the legal fiction that customers would be forced to buy from Kodak.

In fact, the court's legal fiction supplanted reality. Because Collins's ink prices were below Kodak's to begin with, the evidence showed that Kodak's attributed ink price was above Collins's price for 80% of Collins's customers, in the absence of more aggressive pricing by Kodak. Thus, the court of appeals's decision has the perverse result that Kodak could be liable even if Kodak was pricing below its costs to meet the lower prices of its competition. As the Sixth Circuit previously recognized, "It is not anticompetitive for a company to reduce prices to meet lower prices already being charged by competitors. Indeed, 'To force a company to maintain non-competitive prices would be to turn the antitrust laws on their head.'" *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982); cf. *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 36-37 (1963) (in addressing a Robinson-Patman price discrimination claim, the Court stated, "sales are not condemned when made in furtherance of a legitimate commercial objective, such as . . . the need to meet a lawful, equally low price of a competitor. Sales below cost in these instances would neither be 'unreasonably low' nor made with predatory intent.") (emphasis added).

B. There Can Be No Anticompetitive Effect If Defendant's Attributed Price Is Above Plaintiff's Cost

As discussed above, the price-cost test was designed to identify predation. “[P]redatory pricing has as its aim the elimination of competition.” *Cargill*, 479 U.S. at 118. The predator “cuts its prices in order to force competitors out of the market.” *Matsushita*, 475 U.S. at 585 n.8. When a firm engages in predatory pricing, it “invests money in below-cost pricing today in order to benefit from the ‘recoupment’ of monopoly or oligopoly profits later, after the predatory pricing has destroyed or disciplined rivals.” IIIA Phillip E. Areeda & Herbert J. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (“Areeda & Hovenkamp”) ¶ 725a (3d ed. 2008). Thus, the price-cost test was designed, and has been employed, to protect competition that could otherwise be destroyed.

According to the panel majority, in the tying context differential pricing becomes predatory when the defendant lowers the price of the tied product below the seller's cost, using the monopoly profits in one market to create a monopoly in another market. Pet. App. 10a–11a. “When differential pricing satisfies this test, it is functionally equivalent to the coercion present in an unlawful tying arrangement.” Pet. App. 11a.

But this pronouncement ignores Collins's ability to prevent any loss of market share, which depends on Collins's costs, not Kodak's. Because Collins's supply costs are lower than Kodak's attributed prices, Collins would have undercut

Kodak's prices and retained its market share while making a profit. Because Collins would remain in the market, Collins would foil any attempt on Kodak's part to gain a second monopoly and would restrain future attempts by Kodak to raise prices. Under these circumstances, there is no coercion, no predation, and no adverse price effect.

Because Kodak's conduct does not tend to exclude competition at all, it is not anticompetitive. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (conduct is only predatory and thus anticompetitive when it tends to "exclude rivals on some basis other than efficiency"). Thus, in calibrating the price-cost test, the court of appeals should have taken into account that the only potential market effect of Kodak's policy is customers obtaining lower prices when Collins competes to thwart Kodak's policy.

C. The Use Of A Less Efficient Firm's Cost In The Price-Cost Test Is Antithetical To The Purpose Of The Antitrust Laws

The antitrust laws "rest[] on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). They were enacted for "the protection of *competition* not *competitors*," *Brunswick*, 429 U.S. at 488 (emphases added) (citation omitted), and serve "to protect the public from the failure of the market," *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). But

while the injunction at issue protects Collins from losing market share, it harms consumers. If the more-efficient Collins were forced by Kodak's policy to cut its price to retain its market share, consumers would benefit from the ensuing rivalry. Thus, the court of appeals's decision denies consumers the benefits of "the unrestrained interaction of competitive forces." *N. Pac. Ry. Co.*, 356 U.S. at 4.

This Court well understands the benefit of this rivalry, having repeatedly required antitrust plaintiffs to establish that prices were below cost before the defendant's conduct could be actionable. For instance, the Court rejected a Clayton Act challenge to a merger because the complaint did not allege that the combined company would engage in below-cost pricing, *see Cargill*, 479 U.S. at 114–15, 117–19; rejected a challenge to unlawful maximum vertical price setting because there was no proof of below-cost pricing, *see Atlantic Richfield*, 495 U.S. at 339–41; threw out a claim for predatory overbidding because the practice did not result in below-cost pricing, *see Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 325–26 (2007); and rejected a "price squeeze" theory because the complaint did not allege below-cost pricing, *see Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438, 451–52 (2009). And of course, in *Brooke Group*, a Robinson-Patman Act primary line price discrimination case, the Court applied the price-cost test, requiring plaintiffs to show below-cost pricing. *See* 509 U.S. at 222–23. In short, this Court has held repeatedly that "regardless of the type of antitrust claim involved," a defendant's "pricing practices" are not

unlawful unless prices fall below an appropriate measure of cost. *Atl. Richfield*, 495 U.S. at 339–40.

This begs the question of the appropriate measure of cost. The principle that answers this question was set forth in *Brooke Group*: “Low prices benefit consumers regardless of how those prices are set.” 509 U.S. at 223 (quoting *Atl. Richfield*, 495 U.S. at 340). The low prices that would be generated by competition between Kodak and Collins would benefit consumers irrespective of Kodak’s purpose in setting them. To prevent the chilling of competition and the loss of this benefit, *Brooke Group* suggests that the price-cost test ought to encourage an efficient and “aggressive rival” to “steal sales by matching” the defendant’s competitive offering. IIIB Areeda & Hovenkamp ¶ 768b4 (3d ed. 2008). The only reason to ever restrict the “[l]ow prices [that] benefit consumers” is that unduly low prices would eventually eliminate competitors and allow the dominant firm to raise prices later, by more than it lowered them to begin with—something that cannot happen here until Kodak’s attributed price is below *Collins*’s costs.

To be sure, in *Brooke Group*, this Court found that the defendant’s cost was an appropriate measure of cost. See 509 U.S. at 222–23. But the *Brooke Group* Court assumed that the defendant had a lower cost structure. *Id.* at 223 (“As a general rule, the exclusionary effect of prices above a relevant measure of costs either reflects the lower cost structure of the alleged predator, . . . or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.”)

(emphasis added). Here, where Collins has the lower cost structure, a rigid application of this test would “court[] intolerable risks of chilling legitimate price cutting.” *Id.* To follow the objective of *Brooke Group*, where the plaintiff is the more-efficient competitor, the price-cost test must account for the plaintiff’s lower cost structure. The court of appeals’s use of defendant’s higher costs is at odds with *Brooke Group*, undermining the very competition that this Court wished to preserve.

The *Brooke Group* Court recognized that its rule might permit price-cutting that could have an anticompetitive effect if the exclusion of a higher-cost rival could be used to “induce or reestablish supracompetitive pricing.” *Id.* at 224–25. Even though the point of the price-cost test was to prevent defendants from enacting anticompetitive price increases down the road, the Court concluded that this was an acceptable trade-off given the “intolerable risk[] of chilling legitimate price-cutting.” *Id.* at 223. This risk is completely absent where, as here, the plaintiff is the more-efficient competitor and cannot be driven from the market unless defendant’s pricing is below *plaintiff’s* cost. Encouraging competition where defendant’s price is above plaintiff’s cost can only benefit consumers by lowering the price of goods. And this benefit, given price’s role as “the central nervous system of the economy,” is critical to our market system. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (citation omitted).

“There is . . . a general agreement that the antitrust courts’ major task” in the context of pricing “is to set rules and precedents that can

segregate the economically harmful price-cutting goats from the more ordinary price-cutting sheep, in a manner precise enough to avoid discouraging desirable price-cutting activity." *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 231-32 (1st Cir. 1983) (Breyer, J.). Kodak's pricing strategy and responsive price cuts by Collins are surely within the flock of sheep and not the herd of goats. As then-Judge Breyer observed, it is not the goal of the antitrust laws to insulate inefficient competitors from the effects of hard competition. *See id.* It would be incongruous if the antitrust laws were applied to insulate efficient competitors from the effects of hard competition through injunctions that protect their market share and profits.

D. The Decision Below Creates Anti-competitive Incentives

In deciding how to price its products, a potential plaintiff will balance the rewards of competing against the rewards of litigating. By competing less and losing market share, the court of appeals's decision permits a putative plaintiff to create an antitrust claim for itself where none would otherwise exist. Because damage awards are trebled, *see* 15 U.S.C. § 15(a), the decision below creates a substantial incentive for potential plaintiffs to adopt that strategy. The putative plaintiff has similarly perverse incentives if it is seeking an injunction. Consistent with these incentives, Collins never attempted to cut its price to compete with Kodak, instead seeking and receiving court protection.

Returning to the hypothetical about the efficient plaintiff who competes to its utmost versus the

efficient plaintiff who does not, under the Sixth Circuit standard, the plaintiff who competes to its utmost will receive a negative reception in the courts, while the competitor who holds back will be given a more receptive audience.

None of the other reasons offered by the court of appeals better justify its result. Citing *Brooke Group*, the court held that it makes “no sense” to look at the more-efficient plaintiff’s costs when the object of a predatory pricing scheme is to recoup the defendant’s losses—if plaintiff’s costs were an acceptable measure, the defendant might have no loss to recoup. Pet. App. 19a (citing 509 U.S. at 222). However, a defendant still needs to recoup the profits forgone by pricing below *its* cost even if it prices above the more-efficient plaintiff’s cost. (And, of course, it will never be able to recoup its losses when it is pricing above the more-efficient plaintiff’s cost because it will never be able to raise prices.).

Next, citing *linkLine*, the court of appeals called the more-efficient-competitor standard “unclear,” noting that while a firm may know its own production cost, the competitor’s production cost is not clear. Pet. App. 20a (citing 555 U.S. at 453). But the court of appeals’s premise misses the point. Under an efficient-competitor standard, the defendant would understand that it is pricing in a safe harbor so long as it prices at or above its cost.³ So the proposed standard provides equally clear guidance unless the defendant wishes to take the risk of pricing below its cost—an event

³ There should be another safe harbor if defendant is only meeting plaintiff’s price even if it is pricing below defendant’s own cost.

that is likely to be extremely rare. *Cf. Matsushita*, 475 U.S. at 589 (“there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful”).

Defendants are not the only parties that need clarity, however. Plaintiff must attempt to mitigate its market share loss. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 556–57 (7th Cir. 1986); *Litton Sys., Inc. v. AT&T Co.*, 700 F.2d 785, 820 n.47 (2d Cir. 1983); Thomas A. Lambert, *The “Failure to Mitigate” Defense in Antitrust*, 51 Antitrust Bull. 569, 587 (2006) (“At a minimum, reasonable efforts would seem to include searching for alternative markets and *lowering one’s price to the level of marginal cost.*”) (emphasis added). So would-be plaintiffs need to know how far they must lower their prices to mitigate their damages. In answering that question, plaintiffs must look to their own cost structure, since, as the Sixth Circuit noted, they do not know their competitors’ cost structure. Thus, to achieve clear guidelines, plaintiffs receive more clarity from the efficient-competitor standard and defendants still have the clarity they need to navigate to a safe harbor.

The court of appeals also argued that the efficient-competitor standard ignores differences in the competitor’s product value to consumers. Pet. App. 20a–21a. Product differentiation, however, is a problem no matter whose cost is used in the standard. For example, where plaintiff and defendant are equally efficient but plaintiff’s product is of lower quality, plaintiff could not retain its market share by matching defendant’s price when defendant dropped its price to its cost. Or where the defendant’s product is of lower

quality than plaintiff's, the plaintiff may not lose any market share when the defendant cuts its price below its cost and plaintiff does not match that price. Yet, under the court of appeals's standard, the defendant may be liable under this second scenario. Ironically, that might be part of the story here, as Collins claims that some of its inks are superior. Pet. App. 117a.

Finally, the court of appeals stated that when a defendant sells below its own costs, it puts pressure on its competitors to lower prices "without actually lowering [defendant's] own costs." Pet. App. 21a. But that does not make the lower price anticompetitive. Competition that forces the more-efficient competitor to price nearer its cost unquestionably lowers market prices. As this Court has made clear, these "[l]ow prices benefit consumers regardless of how those prices are set." *Brooke Grp.*, 509 U.S. at 223 (quoting *Atl. Richfield*, 495 U.S. at 340). In fact, pushing producers to price closer to their costs is the essence of allocative efficiency, which is "the animating concern of the Sherman Act." *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1339 (11th Cir. 2010); IIB Areeda & Hovenkamp ¶402b & b2 (4th ed. 2015) ("Allocative efficiency entails that resources are so allocated among the production of various goods and services so that no reallocation of inputs and outputs could increase aggregate consumer welfare by making some consumers better off without making others worse off." At "optimal allocative efficiency," "price will equal marginal cost for all goods and services."). Further, in terms of productive efficiency, the more-efficient plaintiff has strong incentives to lower its cost because as prices

approach plaintiff's cost, lowering cost helps to maintain profits. Defendant also has strong incentives because when plaintiff lowers its price and foils defendant's plan to capture market share, defendant may want to reduce its cost to lower price further. *See* IIB Areeda & Hovenkamp at ¶ 402b1 (at optimal productive efficiency, firms are forced "to produce at the least possible cost permitted by known techniques").

E. Plaintiff Has No Antitrust Standing Where It Can Compete To Retain Its Market Share

For almost four decades, this Court has required an antitrust plaintiff to establish not only "injury causally linked to an illegal presence in the market," but also "antitrust injury," meaning "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. As a result, competitors—which stand to be harmed by increased competition—are routinely denied antitrust standing because their injury does not flow from that which makes the conduct unlawful. *See Cargill*, 479 U.S. at 115–16; *Brunswick*, 429 U.S. at 488–89. In contrast, the court of appeals presumed a competitor automatically has antitrust standing "[w]hen the defendant effectively sells below its own costs [because] it puts pressure on its competitors to lower prices without actually lowering its own costs or otherwise creating a market efficiency." Pet. App. 19a–21a. According to the court of appeals, this alone "is sufficient for the competitors to have antitrust standing." Pet. App. 21a.

This conclusion is fundamentally at odds with this Court's antitrust standing doctrine because the pressure to lower price is the lifeblood of competition: "cutting prices in order to increase business often is the very essence of competition," and thus "[t]o hold that the antitrust laws protect competitors from the loss of profits due to [nonpredatory] price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share." *Atl. Richfield*, 495 U.S. at 338 (quoting *Matsushita*, 475 U.S. at 594; *Cargill*, 479 U.S. at 116). The Sixth Circuit's holding that mere pressure to lower prices automatically confers antitrust standing directly conflicts with this Court's precedents. See *Atl. Richfield*, 495 U.S. at 337–38 (rejecting antitrust standing where plaintiff's injury was the low prices produced by the assumed violation).

Collins did not engage in "the very essence of competition." *Id.* at 338 (quoting *Matsushita*, 475 U.S. at 594). If it had to compete (rather than receiving the protection of the court), the only injury it would have suffered is the price reduction from protecting its market share. This is not an antitrust injury "since it is inimical to the antitrust laws to award damages for losses stemming from continued competition." *Id.* at 334.

In *Atlantic Richfield*, this Court held that a firm does not suffer an antitrust injury and lacks standing to challenge defendant's pricing conduct if the defendant is charging a nonpredatory price. See 495 U.S. at 337–40. A price is predatory only when it has the potential to force competitors out of the market. See *Matsushita*, 475 U.S. at 585 n.8; see also X Areeda & Hovenkamp ¶ 1767 (3d ed. 2011) ("The central purpose of anti-tying law is to

protect consumers by preventing undue foreclosure of rival sellers in the tied-product market.”). As discussed above, Kodak’s pricing cannot be predatory because it has no potential to force Collins from the market. And, because it cannot force Collins to exit, there is no danger that Kodak would raise prices at some later point. As a result, Collins’s injury cannot be “attributable to an anticompetitive aspect of the practice under scrutiny,” meaning Collins lacks antitrust standing. *Atl. Richfield*, 495 U.S. at 334, 340–41 (“When prices are not predatory, any losses flowing from them cannot be said to stem from an *anticompetitive* aspect of the defendant’s conduct.”).

Moreover, since Collins, as a rational competitor, would lower its price to retain its market share, there could be no unlawful conditioning and hence no unlawful tying. This means that Collins’s injury does not flow from anything that would render Kodak’s conduct unlawful. *Brunswick*, 429 U.S. at 488 (“it is quite clear that if respondents were injured, it was not by reason of anything forbidden in the antitrust laws: while respondents’ loss occurred by reason of the unlawful acquisitions, it did not occur by reason of that which made the acquisitions unlawful”).

The court of appeals correctly observed that an antitrust plaintiff has standing only if it “suffers harm not just ‘as a competitor in the marketplace’ but also ‘as a defender of marketplace competition.’” Pet. App. 18a (quoting *Indeck*, 250 F.3d at 977). It is extraordinary that the court of appeals found that Collins had antitrust standing even though it refused to defend marketplace competition. And it

is doctrinally indefensible for the court to hold that defendant's pricing above plaintiff's cost gives plaintiff antitrust standing, where (as here) the more-efficient plaintiff cannot be excluded from the market and competition cannot be harmed.

F. The Preliminary Injunction Is Inimical To The Antitrust Laws

The court of appeals did not disturb the preliminary injunction issued by the district court. That injunction prevents Kodak from offering Kodak ink customers lower refurbishment prices than Collins ink customers *even if* Kodak's prices to the particular customer are above Kodak's costs.

A preliminary injunction is "one of the most drastic tools in the arsenal of judicial remedies." *Bonnell v. Lorenzo*, 241 F.3d 800, 808 (6th Cir. 2001); *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008) ("A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right."). The movant bears the burden of proving, among other things, irreparable harm and that the injunction is in the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "[The Court's] frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.*

Irreparable injury is not likely if it is avoidable. *See, e.g., Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003) ("self-inflicted wounds are not irreparable injury"); *accord, Salt Lake Tribune Pub. Co., LLC v. AT&T*

Corp., 320 F.3d 1081, 1106 (10th Cir. 2003); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995). If Kodak's attributed price of ink is above Collins's costs, then Collins could have avoided any loss of market share by just cutting its price. The implication of the court's holding is that a competitor can obtain a preliminary injunction against another competitor even though it could prevent any loss of market share by competing.

The public interest must also be considered before the court issues an injunction. *Winter*, 555 U.S. at 22. Competition is unquestionably in the public interest. See *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692 (noting that Congress has made the decision that "a policy favoring competition is in the public interest"); *Spectrum Sports*, 506 U.S. at 458 ("The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.").

The court of appeals held that the injunction is in the public interest. Pet. App. 32a–33a. But the injunction is anticompetitive and incompatible with this Court's antitrust teachings: it suggests to plaintiffs that they are better off defending their market share in court than in the marketplace; it undermines the price competition that is the *raison d'être* of the antitrust laws; and it is exactly what this Court feared when it explained in *Brooke Group* how judicial interference with pricing behavior could chill the price competition the antitrust laws are meant to promote. See 509 U.S. at 223.

These are not the only anticompetitive results of the injunction. If Kodak really had the market power the court of appeals said it had, Kodak could replace its differential pricing structure for refurbishment with higher prices across the board. The district court recognized this potential harm, Pet. App. 127a–128a, and the panel majority actually seemed to invite Kodak to take this approach, Pet. App. 32a (“Kodak is free (as far as the injunction is concerned) to reap a monopoly profit from its refurbished printhead sales as well, by maintaining high prices across the board for refurbished printheads.”). Surely pushing Kodak to set higher prices is not in the public interest.

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

The decision below involves an issue of great practical and doctrinal importance. This Court’s review is necessary to address the court of appeals’s misapplication of the price-cost test. That misapplication undermines the objectives of the antitrust laws in fundamental respects.

There is simply no chance that the conduct at issue can result in any form of exclusion other than, perhaps, self-exclusion by a plaintiff that prefers a lawsuit to competing. As then-Judge Breyer put it, “if private plaintiffs are allowed to attack [above-cost prices], we are unlikely to lack for plaintiffs willing to make the effort.” *Barry Wright*, 724 F.2d at 235. On the other hand, if, contrary to the decision below, efficient plaintiffs do not have standing to complain about conduct they could redress on their own, they will redress it on their own. And, because they will do so, no

firm will be excluded, no customers will be “forced” to buy from the defendant, and no prices will increase.

Thus, while Kodak’s conduct cannot be anti-competitive, the holding itself is. It encourages similarly situated plaintiffs to seek court protection and treble damages rather than compete to their utmost. Competing to a firm’s full capacity—even if it means competing on price down to plaintiff’s cost (rather than filing lawsuits)—is the sort of competition envisioned by *Brooke Group*. See 509 U.S. at 233.

To implement these important antitrust goals, this Court should properly define the first element of non-explicit tying: conditioning. Most courts determine conditioning by considering the reaction of all rational buyers or whether those buyers have other economically viable options. See, e.g., Pet. App. 23a; *Marts v. Xerox, Inc.*, 77 F.3d 1109, 1113 (8th Cir. 1996). This standard is incomplete because it does not account for the ability of an efficient plaintiff to thwart the coercion that might otherwise force customers to buy the defendant’s tied product.

The Sixth Circuit correctly supplemented the rational-buyer standard with the attribution test. But the court of appeals’s decision is fundamentally flawed, and at odds with this Court’s precedents, because it uses defendant’s cost in its test even when the defendant is pricing above plaintiff’s cost.

The court of appeals found tying and granted a more-efficient plaintiff standing to sue even when it could have retained its market share by lowering prices. Such an outcome protects a competitor

from competition rather than protecting a competitor for the sake of competition. Absent this Court's intervention, lower courts are likely to follow the words rather than the meaning of *Brooke Group*. Or worse, some courts may continue to follow the unalloyed rational-buyer standard. Either result would chill competition and would encourage lawsuits when competition is the superior outcome.

CONCLUSION

“To avoid chilling aggressive price competition,” *linkLine*, 555 U.S. at 451 (quoting *Brooke Grp.*, 509 U.S. at 223), the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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