No. 16-1148

In The
Supreme Court of the United States

EVERGREEN PARTNERING GROUP, INC.,

Petitioner,

v.

PACTIV CORPORATION, A CORPORATION, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF *AMICUS CURIAE* FOR LAW PROFESSORS AND ANTITRUST/INDUSTRIAL ORGANIZATION SCHOLARS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici curiae address the first Question Presented:

1. "[W]hether *Kodak*'s Rule 56 standard or the more stringent 'tends to exclude the possibility of independent action' standard articulated in *Matsushita* applies where the alleged conduct, unlike in *Matsushita*, is not inherently procompetitive and is not economically or otherwise irrational."

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are law professors and antitrust/ industrial organization scholars at United States universities and research centers who specialize in antitrust law and policy.[2] The First Circuit decision below distorts antitrust law and concerns the *amici*, given their interest in, and knowledge of, this area of law.

SUMMARY OF THE ARGUMENT

This case raises an issue of exceptional importance to both the business community and purchasers of products tainted by antitrust violations. As the Petition documents, the circuit courts are mired in an abiding difference of opinion concerning the appropriate interpretation of the summary judgment paradigm in cases brought under Section 1 of the Sherman Act as applied to circumstantial evidence. Pet. at 12-31.

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[1] Under Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to this filing; letters of consent have been lodged with the Court. Counsel for *amici* timely provided counsel for Respondents with notice of his intent to file this brief.

[2] The names and affiliations of *amici* are listed in an addendum to this brief. This brief does not represent the institutional views of any organization with which *amici* are affiliated.

The Petition should be granted to clarify this important standard.

The Second, Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have interpreted this Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992) as limiting the burden of production and persuasion at summary judgment enunciated in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). These courts have narrowed the application of *Matsushita*'s "tends to exclude the possibility of independent conduct" test to situations where the plaintiff's theory: (1) is implausible; and (2) challenges procompetitive conduct.

The First, Fourth, Eighth, and Eleventh Circuits, however, do not interpret *Kodak* as a limitation on *Matsushita*'s "tends to exclude" test. These courts universally apply the test to all motions seeking entry of summary judgment on a conspiracy claim under Section 1, regardless of whether plaintiff's theory makes economic sense or there is little or no risk of chilling procompetitive behavior.

Commentators and judges alike have documented the gulf between the circuit courts over their reading of *Matsushita* and *Kodak*. *E.g.*, Nickolai G. Levin, *The Nomos and Narrative of* Matsushita, 73 FORDHAM L. REV. 1627, 1631 (2005) ("Nineteen years later, courts and commentators still struggle to decipher what the *Matsushita* standard requires and how to reconcile that with the Court's prior summary judgment

jurisprudence, which was generally plaintiff permissive."). Had the First Circuit applied the limiting principles in *Kodak* to the facts in *Evergreen Partnering Group, Inc. v. Pactiv Corp.*, 832 F.3d 1 (1st Cir. 2016), the case would have gone to a jury: Petitioner's group boycott theory was economically sound and supported by credible inferences stemming from the record evidence.

Amici write separately from the Petitioner to focus the Court on the several ways the federal courts of appeals have analyzed *Matsushita* and explain why the First Circuit's categorical view is the least supportable approach.

ARGUMENT

I. The First Circuit's interpretation of the *Matsushita* standard conflicts with the interpretation prevailing in the Second, Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits.

The circuit courts are deeply divided over whether *Kodak* narrowed the *Matsushita* "tends to exclude" summary judgment standard for evaluating circumstantial evidence of an antitrust claim. As this Court in *Kodak* explained,

> [t]he Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving

> party enunciates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Kodak, 504 U.S. at 468-69. Despite this straightforward description of *Matsushita*'s holding, several circuit courts – including the First Circuit below – explicitly impose that "special burden" on plaintiffs. And given the wide discrepancy of judicial interpretations of *Matsushita*, clarification and correction of the summary judgment standards governing claims of conspiracy in restraint of trade are overdue. We outline some of the divergent approaches below.

The Categorical Interpretation of Matsushita

The First Circuit below interpreted *Matsushita*'s "tends to exclude" standard as categorically applicable to all summary judgment motions in Section 1 antitrust claims. This reading requires judges to weigh the plausibility of competing inferences flowing from circumstantial evidence to determine if a jury can hear the case.

But this categorical approach backfires for several reasons:

First, the standard cannot be met in all but the most extraordinary circumstances as a practical matter. As Judge Posner has observed, the "tends to exclude" standard compels plaintiffs to disprove the defendants' case with a "sweeping negative." Richard Posner, *Antitrust Law*, 100 (2d ed. 2001). He has elsewhere observed that the need to exclude the possibility of independent action renders the burden higher than that required to convict an individual of a crime:

> That would imply that the plaintiff in an antitrust case must prove a violation of the antitrust laws not by a preponderance of the evidence, not even by proof beyond a reasonable doubt (as indeed is required in criminal antitrust cases), but to a 100 percent certainty, since any lesser degree of certitude would leave a possibility that the defendant was innocent.

In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 787 (7th Cir. 1999) (Posner, C.J.).

Second, *Matsushita* involved: (1) an alleged conspiracy that lacked a rational motive to collude; and (2) evidence of defendants' procompetitive (price-cutting) conduct during the alleged predatory pricing scheme. The high summary judgment bar in *Matsushita* was a reaction to those facts, and thus answered the call for a procedural device to prohibit the antitrust laws from deterring defendants from engaging in procompetitive conduct. But just as concerns of over-enforcement were present where the pleaded conspiracy facially is economically irrational and, at least

in part, procompetitive, there are mirror concerns of under-deterrence in imposing an elevated bar to claims lacking *Matsushita*'s atypical facts.[3]

[3] Though *Matsushita* intimated that the presence of a rational motive to collude, based on ambiguous evidence, did not necessarily create a triable issue of conspiracy, *Kodak* confined that message to *dictum*:

> We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co. v. Spray-Rite Service Corp.* [, 465 U.S. 752 (1984)] establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.

Matsushita, 475 U.S. at 597 n.21 (citations omitted). *Matsushita*'s cite to *Monsanto* suggests that *Monsanto* drew a false equivalence by stating, first: "Thus, something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 465 U.S. at 752. And second, in the next sentence: "As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Id.* (citations omitted). But these are not equivalents. *Kodak* settled any confusion and rejected the defendants' bid to analogize the case to *Matsushita*. Contrasting the implausibility of the conspiracy in *Matsushita* with evidence before it of "increased prices and excluded competition," *Kodak*, 504 U.S. at 469, the Court ruled that Kodak "must show that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable." *Id.* Despite that *Kodak* never used the *Matsushita* "tends to exclude" construct, courts have erroneously reverted to this standard, ignoring *Kodak*'s limiting language.

Third, *Kodak* provided factual context to *Matsushita*, and emphasized that the *Matsushita* standard did not apply where the conduct was rational and not evidently procompetitive. 504 U.S. at 468 ("In that context . . . ," the Court found the predatory pricing theory speculative and irrational, requiring "more persuasive evidence" to support the claim). The Court refused to accept a presumption that the defendant lacked aftermarket market power and explicitly stated that *Matsushita* did not require any limitation on such inferences. 504 U.S. at 478.

***The* Ex Ante *Effects Interpretation of* Matsushita**

A competing interpretation of *Matsushita* focuses on context: concern about chilling business behavior that can be reasonably expected to foster competition. This view limits *Matsushita*'s reach to situations where the antitrust laws would be disserved by a "false positive" verdict, *i.e.*, if a lower bar for plaintiffs results in inferences of illegality, despite evidence of procompetitive conduct and no rational motive to collude, companies might refrain from otherwise innocuous or even procompetitive conduct to avoid antitrust damages. *See* Mark Anderson & Max Huffman, Iqbal, Twombly, *and the Expected Cost of False Positive Error*, 20 CORN. J.L. & PUB. POL'Y 1, 21 (2010) ("Recognizing *ex ante* the danger of incurring discovery expenses and possible liability, defendants are motivated to keep well short of the line that separates legal from illegal conduct. . . . That, too, is a cost of false positive error.").

There is reason to believe that this concern of discouraging the law's *ex ante* effects on corporate behavior motivated the *Matsushita* "tends to exclude" taxonomy. In both *Matsushita* and *Monsanto*, plaintiffs' theories and the adduced evidence could have been interpreted as procompetitive, with direct evidence of conspiracy in *Monsanto*. The same was not true in *Kodak*. The Ninth and Third Circuits have recognized this distinction. *See*, *e.g.*, *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 906 F.2d 432, 439 (9th Cir. 1990) ("We think that the key to the proper interpretation of *Matsushita* lies in the Court's emphasis on the dangers of permitting inferences from certain types of ambiguous evidence . . . [and the] inference's possible anticompetitive ***side-effects***.") (emphasis added), and *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1232 (3d Cir. 1993) ("[T]wo important circumstances underlying the [Supreme] Court's decision in *Matsushita* were (1) that the plaintiffs' theory of conspiracy was implausible and (2) that permitting an inference of antitrust conspiracy in the circumstances '***would have the effect of deterring significant procompetitive conduct***.' ") (quoting *Petroleum Prods. Antitrust Litig.*, 906 F.2d at 439) (emphasis added).

The "Sliding Plausibility Scale" Interpretation of **Matsushita**

A third interpretation of *Matsushita* involves a sliding scale plausibility test: as the theory of liability

becomes more plausible, less evidence is required to survive summary judgment. Understanding that the circumstantial evidence could have resulted from either illegal or permissible behavior, the lack of believability of the alleged conspiracy makes inferences less likely to be true. Under this interpretation, *Matsushita* requires that the judge demand stronger evidence for the case to be submitted to the jury.

The language and structure of the *Matsushita* decision lend credence to the sliding plausibility scale interpretation. After first describing general summary judgment standards, the Court cited *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 280 (1968), for the proposition that "if the factual context renders [plaintiff's] claim implausible . . . [plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." 475 U.S. at 587. Elsewhere in the opinion, the Court considered the duration of the alleged predatory pricing conspiracy so extended that it suggested that "the conspiracy does not in fact exist." *Id.* at 592. Further reflecting the implied use of a sliding scale by the Court, it also discounted the probative value of plaintiff's expert opinion on the persistence of lower prices (*id.* at 594 n.19) and the record evidence that defendants worked closely together to form alliances in their Japanese and American business operations. *Id.*

II. Cataloguing the circuit court opinions shows a wide spectrum of treatment of *Matsushita*.

A survey of federal court of appeals opinions applying *Matsushita* reveals a hodge-podge of approaches in treatment of the summary judgment standard. In several instances, there are even intra-circuit divisions over the meaning of the *Matsushita* standard.

First Circuit. The First Circuit in this case and others has categorically applied the *Matsushita* standard regardless of whether the challenged conduct is procompetitive or economically irrational. *See*, *e.g.*, *White v. R.M. Packer Co.*, 635 F.3d 571, 577-78 (1st Cir. 2011) (holding the Supreme Court has "limit[ed] the range of permissible inferences from ambiguous evidence in a § 1 case," and that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy that allows plaintiffs' evidence to reach a jury.") (citing *Matsushita*) (internal quotations omitted). The *White* court considered these to be "special rules [that] apply to claims of horizontal conspiracies such as this claim of price-fixing." *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007) (stating that a § 1 plaintiff must meet the *Monsanto* and *Matsushita* requirements, and not distinguishing among types of § 1 claims)); *see also Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 19 (1st Cir. 2004) ("In Sherman Act cases, . . . the permissible inferences that can be drawn from ambiguous evidence are quite limited.

Matsushita Elec., 475 U.S. at 588. If the evidence shows conduct that is as consistent with lawful competition as it is with an illicit conspiracy, it cannot be said to support an inference of concerted action. *Id.*").

Second Circuit. The Second Circuit rejects the universality of the *Matsushita* standard, instead favoring consideration of the plausibility of plaintiff's theory of collusion. *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) ("[*Matsushita*] holds that the range of inferences that may be drawn from such evidence depends upon the plausibility of the plaintiff's theory.") (citations omitted). The Second Circuit understands that "[r]equiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiff. Rather, if a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from that evidence; it need not be the *sole* inference." *Id.* at 63 (citations omitted).

Third Circuit. In *Petruzzi's IGA Supermarkets, Inc.*, 998 F.3d at 1232, the Third Circuit adhered to the view that *Kodak* limits *Matsushita*'s "tends to exclude" summary judgment test. In *Petruzzi's*, the court recognized that plausible collusion coupled with challenged activities that are not procompetitive, justify "more liberal inferences . . . than in *Matsushita* because the attendant dangers from drawing inferences recognized in *Matsushita* are not present." *Id.* at 1232. The *Petruzzi's* court further echoed *Kodak*'s observation that *Matsushita* only requires that "the inferences drawn

from the proffered evidence must be reasonable." *Id.* at 1231 (citing *Kodak*, 540 U.S. at 468); *see also In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 396 (3d Cir. 2015) ("If the plaintiff's theory 'makes no economic sense' and if drawing inferences in its favor would deter procompetitive conduct, the plaintiff must produce 'more persuasive evidence' to support its claim.") (citations omitted).

Fourth Circuit. The Fourth Circuit in *Merck-Medco* held that *Kodak* did *not* circumscribe the summary judgment requirements explained in *Matsushita*. *Merck-Medco Managed Care, Inc. v. Rite Aid Corp.*, 22 F. Supp. 2d 447 (D. Md. 1998), *affirmance order sub nom. Merck-Medco Managed Care, Inc. v. Rite Aid Corp.*, 201 F.3d 436 (4th Cir. 1999). The court concluded that it would be "a mistake" to gainsay the more stringent test for plaintiff "due to the inherent dangers to the market and innocent parties associated with a conspiracy case." *Id*.

Fifth Circuit. The Fifth Circuit initially limited the *Matsushita* test to circumstances where defendants have "no rational economic motive to conspire." *Dillard v. Sec. Pac. Corp.*, 85 F.3d 621 (5th Cir. 1996); *Johnson v. Hosp. Corp. of Am.*, 95 F.3d 383, 393 (5th Cir. 1996) (same). But in a more recent case, the court did not evaluate motive, instead merely citing *Matsushita* for the proposition that equivalent inferences are not sufficient to defeat a summary judgment motion. *See Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 776 F.3d 321, 330 (5th Cir. 2015) ("any conduct that is 'as consistent with permissible competition

as with illegal conspiracy' cannot support a conspiracy inference") (citing *Matsushita*).

Sixth Circuit. The Sixth Circuit adheres to the sliding plausibility scale interpretation of *Matsushita* insofar as it adopts the Second Circuit's *Publication Paper* statement that "broader inferences of an agreement are permitted, and the 'tends to exclude' standard is more easily satisfied, when the conspiracy is economically sensible for the alleged conspirators to undertake and the challenged activities could not reasonably be perceived as procompetitive," and further adheres to the Seventh Circuit's explicit directive that "[m]ore evidence is required the less plausible the charge of collusive conduct." *Superior Prod. P'ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311, 319 (6th Cir. 2015) (citing *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 62-63 (2d Cir. 2012), and *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661 (7th Cir. 2002) (Posner, J.)).

Seventh Circuit. The Seventh Circuit applies *Matsushita* as limited by *Kodak*. *See Brand Name Prescription Drugs*, 186 F.3d at 787 ("As there is neither an a priori reason nor direct evidence to suppose this hypothesis more likely than the first, and as the plaintiffs bore the burden of persuasion, it was necessary for them to present economic evidence that would show that the hypothesis of collusive action was more plausible than that of individual action.") (citing, *inter alia*, *Matsushita*). Judge Posner, writing for another panel in 2002 in *High Fructose Corn Syrup*, 295 F.3d at 655-56, explained that the court falls into a "trap" at

summary judgment by weighing competing evidence or failing to consider evidence as a whole.

Eighth Circuit. The Eighth Circuit takes a universalist approach, concluding broadly that a plaintiff must present some evidence that tends "to exclude the possibility that the alleged coconspirators acted independently." *St. Louis Convention & Visitors Comm'n v. N.F.L.*, 154 F.3d 851, 861 (8th Cir. 1998) (quoting *Matsushita*, 475 U.S. at 585). This circuit also does not permit juries to review evidence where the inferences are in equipoise. *Lovett v. General Motors Corp.*, 998 F.2d 575, 578 (8th Cir. 1993) ("Conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.") (citing *Matsushita*, 475 U.S. at 588).

Ninth Circuit. The Ninth Circuit cabins *Matsushita* to situations where the alleged collusion is economically irrational and there is no concern about chilling procompetitive behavior. It "do[es not] think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct. *Such an approach would imply that circumstantial evidence alone would rarely be sufficient to withstand summary judgment in an antitrust conspiracy case.*" *Petroleum Prods. Antitrust Litig.*, 906 F.2d at 439 (emphasis added). The Ninth Circuit falls into the sliding plausibility scale camp as it "begin[s] by assessing the plausibility of

[plaintiffs'] claims in light of their factual context." *Stanislaus Food Prod. Co. v. USS-POSCO Indus.*, 803 F.3d 1084, 1089 (9th Cir. 2015) (citing *Matsushita*, 475 U.S. at 588). *But see In re Citric Acid Antitrust Litig.*, 191 F.3d 1090, 1096-97 (9th Cir. 1999) (rejecting *Petroleum Products*' standard as *dicta* because plaintiffs there had direct evidence of conspiracy and adopting a categorical approach to *Matsushita* in cases involving circumstantial evidence).

Tenth Circuit. The Tenth Circuit does not categorically apply *Matsushita*; rather it has distinguished the case factually from circumstances where a rational motive to collude exists and "the anticompetitive acts asserted . . . are not obviously economically costly to the conspirators as was the predatory pricing scheme alleged in *Matsushita*." *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 646 (10th Cir. 1987).

Eleventh Circuit. The Eleventh Circuit appears to apply the *Matsushita* test categorically. *See City of Tuscaloosa v. Harcros Chemicals, Inc*, 158 F.3d 548, 571-72 (11th Cir. 1998) ("antitrust law limits the range of permissible inferences in a § 1 case"); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1302-03 (11th Cir. 2003) ("The class argues that the district court's imposition of a 'tends to exclude the possibility that the alleged conspirators acted independently' standard contradicted *Kodak* because it imposed a 'special burden' on antitrust plaintiffs. However, this argument is unpersuasive. . . .").

III. The First Circuit's application of the universal approach resulted in the entry of summary judgment against Evergreen.

The record evidence in this case indicates that the defendants had a rational motive to collude[4] and the challenged conduct was not procompetitive. *Matsushita* was concerned that in denying summary judgment it would deter archetypal procompetitive conduct of systematic, long-running price-cutting and thus commit a "false positive" error. But there are no similar concerns in this case.

The court of appeals evaluated the evidence under *Matsushita*'s "tends to exclude" standard, without regard to the rational motive to collude and absence of procompetitive conduct, and found for the defendants. But under *Kodak*, the court likely would have determined that a reasonable jury could find Evergreen

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[4] The court expressly declined to accept the defendants' invitation to find that they had no rational motive to collude. *Evergreen*, 832 F.3d at 10 n.10. And for good reason. The record evidence established a rational motive: *First*, the defendants wished to maintain a status quo where each had a dominant share of the market in a certain type of polystyrene product (*e.g.*, cups, plates, etc.). *Id.* at 13. If one defendant broke from the group and dealt with Evergreen, that defendant might begin to intrude on another defendant's market. *Second*, they did not want to accept responsibility for the end life of their products. If any defendant dealt with Evergreen, thus lending credence to the viability of Evergreen's recycling program, critics would have urged that all the defendants participate. Pet. at 5. As long as they stood together and asserted there was no workable method for recycling polystyrene, they had a plausible excuse for not "going green."

established an antitrust violation based on reasonable inferences drawn from the evidence of defendants' concerted refusal to deal.

By mistakenly adopting the more stringent "universally applicable" *Matsushita* rule, the First Circuit changed the calculus, and likely the outcome, of the case.[5] Application of this heightened standard was virtually the only way the court could have concluded that summary judgment was appropriate. To take just one example: the record revealed the "potentially suspicious" fact that one of the defendants – Genpak – attempted to withdraw its bid to supply Gwinnett County schools with Evergreen's recycled trays in 2007 due to [Genpak's] reluctance to "battle against another competitor." *Evergreen*, 832 F.3d at 13-14. Instead of concluding that a jury could have drawn a reasonable inference from this evidence that Genpak and its competitors agreed not to bid on Evergreen's recycled products, the First Circuit speculated that Genpak "may have been reluctant to commit to supplying a

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[5] *Amici*'s support of the Petition centers on the misapplication of *Matsushita* in circumstances *Kodak* says it should not apply. The discussion below of the First Circuit's handling of certain evidence is included only to show how the use of the *Matsushita* standard was likely outcome determinative in this case. Thus, *amici* do not purport to assess the evidence closely themselves; but they do not need to, and the Court need not do so either for the purposes of review. The First Circuit itself, in several places, determined that there was evidence in the record supporting Evergreen's conspiracy allegations. *See Evergreen*, 832 F.3d at 10 n.10 (concluding that evidence of motive was in equipoise); *id*. at 13 (acknowledging that "Genpak's last minute attempt to withdraw its bid is potentially suspicious").

product when it had concerns about its quality." *Id.* at 14. But the opposite was just as, if not more, likely: the First Circuit did not consider that Evergreen also introduced evidence of Genpak's satisfaction with substantial purchases of Evergreen's recycled resin. The First Circuit fell into the "trap" of weighing competing inferences, devalued Evergreen's evidentiary submission and thus drew inferences against the nonmoving party. No interpretation and application of the *Matsushita* standard, as limited by *Kodak*, could lead a court to handle this evidence – to take just this one example – as it did.

In contrast, a sliding plausibility scale approach would have led to the conclusion that Evergreen's evidence supported its claim of a concerted refusal to deal. Unlike the improbability of a years-long conspiracy to lower prices to drive established U.S. manufacturers out of the market to later recapture lost profits present in *Matsushita*, here the court could reasonably infer an agreement to limit the terms on which to deal with Evergreen. As further detailed in the Petition and the record, Evergreen presented credible evidence of industry motive, animus toward recycling, collective pressure on Genpak to tow the party line, systematic inter-defendant communications and joint strategies, and pretextual operations of a defendant-sponsored sham recycling initiative. Some examples follow:

Economic motive. The defendant manufacturers had an economic motive to concertedly refuse to deal with Evergreen. The defendants viewed Evergreen's

new green model as more expensive and, as the court correctly recognized, "there may be a colorable argument that the defendants feared that local governments would instead mandate the use of recycled products." *Evergreen*, 832 F.3d at 10 n.10. This, the First Circuit opined, would have increased the defendants' manufacturing costs. And while the First Circuit questioned this motive by pointing to evidence that the defendants had reasons to doubt the quality of Evergreen's resin, other evidence undermined this explanation. Evergreen sold more than 600,000 pounds of recycled resin to defendants that they used to produce polystyrene food services products, whereas the defendants' choice of "recyclers," PDR, produced at most only 11,000 pounds. *Id*. at 15. A jury could have reasonably concluded that the defendants' purchase of so much Evergreen resin makes the "poor quality" rationale pretextual.

Industry animus. Evergreen introduced several pieces of evidence of industry animus toward recycling, including a business record produced by one of the defendants of minutes from a March 18, 2005 Plastics Group meeting among defendants "asking whether the industry could 'win out' against its critics without having to recycle" (*id.* at 12 n.14) and an industry position fostered in over 40 trade association meetings over the course of five years relative to recycling issues. Pet. at 8, 35-37.

Pressure on Genpak. As discussed above, Evergreen introduced evidence that one of the defendants – Genpak – was pressured by its much larger rival –

Pactiv – to refuse to deal with Evergreen. A Gwinnett County Schools official testified at deposition that he considered Reilly, Genpak's president, reluctant to bid with its Evergreen trays for Gwinnett's business due to his fear of potential retaliation from Pactiv. Although it acknowledged the "potentially suspicious" nature of this testimony, the First Circuit nonetheless devalued it, again, under *Matsushita*. *Evergreen*, 832 F.3d at 13-14. But under *Kodak*, it should have been the defendants' burden to show that despite this evidence, an inference of conspiracy was unreasonable.

Persistent inter-defendant communications over five years. Evergreen introduced uncontroverted evidence that defendants participated in some 40 meetings over a five-year period to discuss a collective strategy to deal with the environmental business risks and a recycling plan. The frequency of such meetings is an established "plus-factor," adding to the plausibility of Evergreen's antitrust theory.

Sham operations of a supposed alternative recycling approach. Evergreen adduced evidence supporting its theory that defendants agreed to promote a sham competitor named Packaging Development Resources of California, LLC (PDR). Although Evergreen introduced testimony from PDR's co-founder that the company never sold recycled polystyrene food products that met FDA requirements to customers, SA3187, the First Circuit held that the evidence Evergreen presented did not support a reasonable inference that PDR was not operational. *Evergreen*, 832 F.3d at 15. The testimony of PDR's co-founder

supports Evergreen's contention that PDR was a sham operation that did not actively work toward a viable recycling operation. The burden should have been placed on the defendants to show why, despite this evidence, a further inference of conspiracy was unreasonable.

It is long past dispute that evidence must be considered in the aggregate, and not singly. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). And of course no meaningful review of summary judgment can glean from the lower court's analysis whether it made material, conceptual errors without evaluating the evidence in some detail, as above. Considered either singly or holistically, however, the examples above show – concretely – a court improperly substituting itself for the factfinder. This is no exercise in judicial restraint. Rather, it is a vivid example of how courts, by misinterpreting and misapplying the *Matsushita* standard, effectively erode the preponderance burden in antitrust.

Finally, emblematic of the significant conceptual error explained herein, the Petition does not challenge the Court to disregard its traditional reluctance to "go behind" and second-guess the lower court's assessment of the evidence on its finer points. The review of the evidence we provide is intended only to show the consequences of the systematic, repeatable error, which plagues the lower courts.

IV. The Question Presented is both exceptionally important and overripe for the Court's consideration.

This Court has frequently emphasized the significance of the antitrust laws and the Sherman Act to the economic vitality of the nation. *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (citing the "fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws. . . ."); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise."); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 (2004) (same, citing *Topco*).

It has also often observed that Congress expressly encouraged private causes of action to supplement government enforcement of the law. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982) (noting "Congress' 'expansive remedial purpose' in enacting § 4 [of the Clayton Act]: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal action, and would provide ample compensation to victims of antitrust violations.") (citations omitted); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 511 (2008) ("We know, for example, that Congress devised the treble-damages remedy for private antitrust actions with an eye to supplementing official enforcement by

inducing private litigation. . . . ").[6] Thus, the standard of proof at summary judgment is an exceptionally important issue and one that frequently recurs. *See* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1357 (2010) (listing *Matsushita* as the third-most cited Supreme Court case by federal courts).

Coupled with the significance of private enforcement of the antitrust laws, the Petition presents a question that has long vexed the legal community. Commentators have decried *Matsushita*'s ambiguity. *E.g.*, Levin, *supra* at 1631 ("*Matsushita*'s broad language created many questions: Should judges limit inferences at the summary judgment stage in *all* antitrust cases or only a subset (and, if so, which subset)? When ascertaining whether the evidence 'tends to exclude' the possibility of independent action, should the judge weigh the evidence? How are deterrence concerns related to that standard?") (internal citations omitted); *see also* Luke Meier, *Probability, Confidence, and* Matsushita*: The Misunderstood Summary Judgment Revolution*, 23 J. L. & PUB. POL'Y 69, 75 (2014) ("A stalemate has developed regarding the appropriate understanding of *Matsushita*."). The Court's intervention to harmonize the "tends to exclude" standard with *Kodak*'s limitations would

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[6] Quantitative analysis has also confirmed that private enforcement likely deters more cartel behavior than the Department of Justice's anti-cartel efforts. *See* Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. REV. 315 (2011).

significantly sharpen antitrust law on an ostensible procedural question of major substantive consequence.

In sum, the decision below illustrates and intensifies confusion among the lower courts about the *Matsushita* standard for Section 1 antitrust claims at summary judgment. The question is critical; private enforcement is essential to maintaining the correct balance between under- and over-deterrence to foster healthy competition. But when it comes to *Matsushita*, inconsistency in its application is now the rule, rather than the exception. For these reasons, the Court should clarify the standard, resolve the circuit split, and emphasize that the correct interplay between *Matsushita* and *Kodak* properly limits the "tends to exclude" summary judgment standard to cases where the alleged conspiracy is economically irrational and the conduct is procompetitive.

CONCLUSION

Amici respectfully request that the Court grant the requested writ and reverse the decision below.

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