No. 05-381

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

Respondent

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN FOREST AND PAPER ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

STEPHEN A. BOKAT
ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ROY T. ENGLERT, JR.*
DONALD J. RUSSELL
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

RICHARD S. WASSERSTROM
American Forest & Paper Association
1111 19th Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 463-2582

**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

<u>Cases</u>:

TABLE OF AUTHORITIES—Continued

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN FOREST AND PAPER ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the Chamber), a nonprofit corporation organized under the laws of the District of Columbia, is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The American Forest and Paper Association (AF&PA) is the national trade association of the forest, paper and wood products industry. AF&PA represents more than 200 companies and related associations that engage in or represent the manufacture of pulp, paper, paperboard, and wood products. The forest products industry accounts for approximately seven percent of total U.S. manufacturing output, employs 1.1 million people, and ranks among the top ten manufacturing employers in 42 states. AF&PA member companies represent approximately 84 percent of the domestic paper, paperboard, and market pulp production capacity, and account for more than half of the solid wood manufacturing capacity. They own a significant portion

---

[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

of the nation's commercial forests and annually plant nearly half of all tree seedlings in the United States.

In this case, the Ninth Circuit affirmed a $78 million antitrust judgment against Weyerhaeuser based on a claim of "predatory bidding." In doing so, the court applied a liability standard that fails to provide any objective basis to distinguish a manufacturer's legitimate and desirable competition to acquire the raw materials that it uses to make its products from buying behavior that is truly predatory and anticompetitive. The amorphous liability standard that was used provides virtually no guidance to businesses and gives juries no meaningful basis to separate competitive from anticompetitive conduct. That unfortunate reality will cause many businesses to compete less vigorously in order to avoid the risk of treble-damage antitrust liability. The effects of the Ninth Circuit's decision reach far beyond the lumber industry in which Weyerhaeuser conducts its business. Manufacturers, suppliers of raw materials to manufacturers, and consumers of manufactured products of all kinds will be affected by this decision.

The *amici* are well situated to explain the practical effects that the Ninth Circuit decision will have on these disparate groups. AF&PA members include businesses that are substantial producers of forest products that are used as inputs to produce wood and paper products, as well as businesses that buy such inputs to produce wood and paper products. The Chamber's membership, likewise, includes many businesses that produce raw materials and other inputs used by manufacturers, as well as manufacturers that purchase such inputs.[2] The Chamber's membership also includes businesses that purchase

---

[2] Although petitioner Weyerhaeuser is a member of both the AF&PA and the Chamber, this brief is filed on behalf of each *amicus* as a whole, not merely on behalf of a member. The Chamber as a matter of policy ordinarily does not publicly disclose the identity of its members, but counsel for respondent specifically requested that this brief disclose whether Weyerhaeuser is a member of each organization, and Weyerhaeuser has authorized that disclosure.

billions of dollars of manufactured products of all kinds. The Ninth Circuit's decision, by deterring vigorous competition among manufacturers to acquire raw materials, will adversely affect all of these groups, for the reasons explained below.

STATEMENT

Weyerhaeuser owns and operates six hardwood sawmills in the Pacific Northwest. It purchases alder timber from timberland owners and loggers and uses those sawlogs to produce finished alder lumber. From 1998 to 2001, alder sawlog prices increased, while the price of finished alder lumber decreased. Weyerhaeuser's profits declined, but it continued to operate profitably. Ross-Simmons Hardwood Lumber Company, one of Weyerhaeuser's competitors, lost money during this period and shut down in 2001. It sued Weyerhaeuser, claiming that Weyerhaeuser violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by engaging in predatory "overbidding" and "overbuying" of alder sawlogs in order to eliminate Ross-Simmons and others as competitors in the market for the purchase of sawlogs. The case was tried to a jury, which found for Ross-Simmons on this claim[3] and awarded damages of $26 million (automatically trebled to $78 million). Pet. App. 2a-4a; Pet. 3-5.

The Ninth Circuit affirmed. It observed that Section 2 of the Sherman Act prohibits monopolization of markets for the purchase of products, as well as of markets for the sale of products. Pet. App. 6a. It described Ross-Simmons's claim as one in which "the price level itself is the anticompetitive weapon." *Id*. at 8a. It recognized that, "[i]n the long run, to carry out a predatory bidding scheme successfully, a firm would have to recoup the higher costs it had paid for its materials" during the period of the so-called overbidding. *Id*. at 10a. "[T]he recoupment phase of a predatory bidding scheme mirrors the recoupment phase of a predatory pricing scheme." *Id*. at 11a n.19.

---

[3] The jury returned a verdict for Weyerhaeuser on a separate claim that it had monopolized the market for the sale of finished alder lumber. See Pet. 4 n.2.

The court of appeals held, nonetheless, that the plaintiffs did not need to prove the prerequisites for predatory pricing liability established by *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). There was no "need to instruct the jury that overbidding for sawlogs could be anticompetitive conduct only if Weyerhaeuser operated at a loss and a dangerous probability of Weyerhaeuser's recoupment of its losses existed." Pet. App. 13a. "*Brooke Group* does not control in the buy-side predatory bidding context." *Id*. at 5a. The jury was properly instructed, according to the court of appeals, when it was told that it could be an anticompetitive act if Weyerhaeuser "purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price." *Id*. at 14a n.30.

SUMMARY OF ARGUMENT

This Court has held that claims of predatory pricing by a seller must be evaluated under strict, objective standards. Otherwise, lawful and desirable competitive behavior might be mistaken for unlawful and predatory behavior, and the risk of a mistaken inference of predation by an antitrust jury could deter the kind of vigorous competition that the antitrust laws were meant to promote. The court of appeals rejected the use of such standards here because this case involved claims that a buyer, rather than a seller, engaged in predation. But the standard it endorsed – whether Weyerhaeuser paid more than a "fair" price for the logs it purchased to produce lumber, and whether it purchased more logs than it "needed" – poses a serious risk of false positives. The standards that govern predatory selling claims – Are the defendant's prices unprofitable in the short term, and is it likely that those losses will be recovered by non-competitive pricing in the long term, after rivals have been eliminated? – are needed to protect against that risk.

The Ninth Circuit's decision therefore threatens to deter vigorous competition by buyers to acquire the inputs that are used to make their products, and to produce exactly the result that the antitrust laws are meant to protect against in this context

– artificially reduced prices for sellers. That threat is compounded by the court of appeals' misguided concept of market power. The court should have asked whether Weyerhaeuser had the ability to cause the relevant antitrust injury, *i.e.*, a sustained reduction in the prices paid to sellers. Only firms with very large market shares have that ability. Instead, the court asked whether Weyerhaeuser was able to cause a short-term increase in the price paid to sellers. Firms with much smaller market shares have the ability to do that. Because such firms would be incorrectly deemed to have market power under the Ninth Circuit's approach, those firms, too, will be deterred from competing vigorously to buy raw materials for their manufacturing operation.

The court of appeals rejected a more rigorous standard for predatory bidding because of its belief that buying competition produces fewer benefits than selling competition. That view grossly underestimates the value of buying competition. An antitrust liability standard that discourages such competition harms sellers and reduces their incentives to expand output of their products. It also harms competition among buyers, because a buyer that buys a smaller quantity of raw materials (which is what Weyerhaeuser should have done, according to the plaintiff and the court of appeals) will necessarily reduce its output of the finished products made with those raw materials. The result will be to reduce the total output of the finished products, or to shift production of those products from more efficient to less efficient manufacturers, both of which are inconsistent with the objectives of the antitrust laws. The consumers of finished products will also suffer, because output of finished products will decline or will be more costly, and because output of raw materials will eventually be suppressed by the reduction of buying competition. A decision that will deter competition on such a broad scale merits review by this Court.

ARGUMENT

In *Brooke Group*, this Court held that claims of predatory pricing under the Sherman Act must satisfy two prerequisites.

First, a plaintiff must prove that the defendant's low prices were unprofitable in the short term, *i.e.*, that "the prices complained of are below an appropriate measure of [defendant's] costs." 509 U.S. at 222. Second, a plaintiff must show a "dangerous probability" that the defendant would recover its short-term losses (from charging below-cost prices) by charging monopoly prices in the long run, after its rivals had been driven from the market. *Id*. at 224. The Court required such proof because the mechanism by which a seller engages in predatory pricing – lowering prices – is the same mechanism by which a seller stimulates competition. Without those two prerequisites for liability, there would be too great a risk that a jury would mistakenly infer predation from conduct that was, in fact, lawful and procompetitive. "It would be ironic indeed if the standards for predatory pricing were so low that antitrust suits themselves became a tool for keeping prices high." *Id*. at 226-227. See also *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnation 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (quoting *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp*., 475 U.S. 574, 594 (1986)).

This case, like *Brooke Group*, presents the same risk of an antitrust liability standard that is so low that antitrust suits will become a tool for achieving precisely the result the antitrust laws were meant to prevent. This case, like *Brooke Group*, involves a claim of predatory pricing, but here the claim is against a buyer, rather than a seller. Section 2 of the Sherman Act prohibits monopolization of markets for the *purchase* of products – "monopsonization" – just as it prohibits monopolization of markets for the sale of products. See, *e.g.*, *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (Sherman Act protects sellers from anticompetitive conduct by buyers). A seller's monopoly causes harm because a seller with market power can restrict the output of its product and raise its price *above* competitive levels. A buyer's monopsony causes harm because a buyer with market power can restrict its purchases of a product and cause the price to fall *below* competitive levels. But, just as the liability standard for predatory selling should not discourage firms from lowering the prices at which they sell, the liability standard for predatory buying should not discourage firms from raising the price at which they buy. Otherwise, the risk of false positives will deter legitimate and desirable competition among buyers.

The Ninth Circuit disregarded that fundamental teaching of *Brooke Group*. It held that the plaintiff did not have to prove that Weyerhaeuser suffered short-term losses because of its "predatory bidding" for timber, or that there was a dangerous probability that Weyerhaeuser would recover the short-term costs of its alleged buying strategy by paying less-than-competitive prices in the long term. The Ninth Circuit, instead, endorsed a jury instruction that permitted liability if the jury found that Weyerhaeuser "purchased more logs than it *needed* or paid a higher price for logs than *necessary*, in order to prevent the Plaintiffs from obtaining the logs they needed at a *fair price*." Pet. App. 14a n.30 (emphasis added).

The Ninth Circuit's decision is legally wrong, for reasons that are explained in the petition and that we will not belabor here. But that decision is not merely wrong; it will have severe practical consequences. The liability standard endorsed by the court of appeals provides no objective benchmark to help a jury decide whether a buyer paid too dearly or bought too much; a jury can render judgment based only on its notions of a price that would be "fair." Because that standard fails to provide a transparent and objective dividing line between lawful and unlawful purchasing behavior, and thus leaves treble-damage liability to the unpredictable whim of a jury, its practical effect on business behavior (if the decision is allowed to stand) is entirely predictable. Purchasers inevitably will adjust their behavior to avoid the risk of unfounded liability for predatory bidding. They will compete less vigorously to acquire inputs for their manufacturing operations, by paying less and buying less. That response to an amorphous liability standard will produce exactly the economic harm that monopsony, itself, causes. And that harm, as we explain below, extends to the sellers of inputs, to the manufacturers that buy the inputs, and ultimately to the consumers who buy the manufacturers' products.

I. The Ninth Circuit's Liability Standard Will Deter Lawful And Desirable Competition To Purchase Scarce Inputs

1. The liability standard endorsed by the court of appeals articulates no meaningful boundary between vigorous competitive behavior by a purchaser – bidding to secure the raw materials it will use to sustain or expand its production of finished products, and paying the price that the *market* demands for those raw materials – and behavior that is truly predatory. Every manufacturer must purchase the raw materials from which its products are made and, in a market economy, the prices of those materials will fluctuate in response to the forces of supply and demand. When supplies are scarce, prices will rise. A manufacturer must either pay those higher prices or reduce its use of the material.

There is nothing the slightest bit pernicious about the former response. Buying raw materials or other inputs at market prices is something that every manufacturer does every day, and *must* do to maintain its business. But the liability standard applied in this case will inevitably push manufacturers toward the latter response. That liability standard invites juries to award treble damages to unsuccessful businesses if the jury believes that the defendant bought too much of the scarce material – more than it "needed" – and, in doing so, bid up prices to levels that were not "fair" to the unsuccessful rival.

As a matter of principle, that standard is wrong. Market economies do not and should not allocate scarce resources to each producer in accordance with its "needs." Competitive markets (which the antitrust laws are designed to protect) are valued because they tend to allocate resources *efficiently*, to those who can put those resources to their most valuable use, by allowing the forces of supply and demand to set prices (whether those prices are "fair" or "unfair"). Antitrust courts are supposed to protect the competitive process against artificial restraints, not pass judgment whether competition produces results that are fair. See *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978) ("[T]he statutory policy precludes inquiry into the question whether competition is good or bad.").

The practical shortcomings of the Ninth Circuit's standard are at least as troublesome as its theoretical defects. A standard based on "need" and "fairness" provides no meaningful guidance to juries – or to businesses seeking to comply with the law – that would help them distinguish between desirable competitive behavior and predatory behavior. See Pet. 22-24. Business executives must make very concrete decisions, and must make them in real time: How much should we buy? How much should we offer to pay? Courts should not "mak[e] the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable – a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies." *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 398 (1927).[4]

This Court in *Brooke Group* appreciated that more specific guidance was essential for predatory pricing claims against sellers because, without such objective standards, the risk of misguided antitrust liability would deter the very behavior that the antitrust laws were meant to encourage. Here, the court of appeals refused to apply any form of the two standards that *Brooke Group* deemed critical to distinguish between competition on the merits and anticompetitive predation. The court of

---

[4] This Court in *Trenton Potteries* referred to a survey of pricing as necessary to determine whether a particular price is "reasonable." Such a survey is an unacceptable prerequisite to determining the legality of conduct not only for the reasons the Court gave in that case, but also because the exchange of information about prices between competitors can itself be anticompetitive. See *Great Atl. & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80-81 (1979); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 456-459 (1978).

appeals did not think that *Brooke Group*'s standards required adaptation to be applied in the buying context, but rather that they had no bearing at all in this context and that a standard of an utterly different character should be applied here. The court of appeals did not require proof that Weyerhaeuser paid prices so high that it could not operate profitably in the short term; indeed, it affirmed liability even though it was undisputed that Weyerhaeuser *did* operate profitably, even during the period when it paid "high" prices for sawlogs. Nor did it require proof of a dangerous probability that Weyerhaeuser would recover any profits it may have sacrificed in the short term (by paying more than was "necessary" for sawlogs) through a sustained reduction in sawlog prices over the long term.

For any manufacturer whose purchases represent a significant share of the market demand for an input, the Ninth Circuit's standard creates a very real threat that treble-damage liability will arise from vigorous competition. If such manufacturers bid vigorously to acquire the materials with which their products are made, their bidding necessarily will tend to drive up the price of those materials. That effect, if a jury concludes that the price is not "fair," may produce liability for "predatory bidding."

The Ninth Circuit's decision will create powerful incentives for unsuccessful businesses to file such lawsuits. Because of the liberal jurisdiction and venue provisions of the antitrust laws, any business with nationwide operations can be sued in the Ninth Circuit by a forum-shopping plaintiff. See 15 U.S.C. § 15(a). If liability ultimately rests on an amorphous standard such as "fairness," and if *Brooke Group*'s objective prerequisites for predatory pricing liability do not constrain the inquiry in any way, there will be no easy way to use summary judgment procedures to weed out claims that lack merit. Defendants will be forced to settle unmeritorious claims or roll the dice and hope for a favorable jury verdict, but many will lose that gamble and face ruinous treble-damage liability merely for competing vigorously. Prudent antitrust counsel will surely tell their clients about these risks. See *Barry Wright Corp.* v. *ITT*

Grinnell Corp., 724 F.2d 227, 235 (1st Cir. 1983) (Breyer, J.) ("[W]e ask ourselves what advice a lawyer * * * would have to give a client firm considering procompetitive price-cutting tactics in a concentrated industry. Would he not have to point out the risks of suit – whether ultimately successful or not – by an injured competitor?").

Confronting those realities, any sensible manufacturer will think twice before competing hard to buy scarce inputs, when doing so would disadvantage a less efficient rival; many will rationally conclude that the better choice will be to restrict their purchases in order to protect less efficient competitors from the full brunt of hard-nosed competition, and to protect themselves from a lawsuit. It is bad enough that the court of appeals' decision, if allowed to stand, would lead to unwarranted treble-damage judgments against defendants who have merely been zealous in their profitable efforts to compete by being aggressive in their buying behavior. An even more substantial harm would come from the chilling effect on competition that would be invisible to the courts, and uncorrectable by the courts, because that anticompetitive effect will stem from, rather than lead to, a lawsuit. See Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 596 (1991); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985).

2. This deterrent to vigorous competition is compounded by the court of appeals' upside-down conception of "market power." The court of appeals correctly recognized that a plaintiff alleging monopolization (whether of a buy-side or a sell-side market) must prove market power, either by showing that the defendant has a dominant share of a market with significant barriers to entry, or by direct evidence that defendant has exercised market power. Pet. App. 20a-22a.

In sell-side markets, market power is usually defined as a seller's "ability profitably to maintain prices *above* competitive levels for a significant period of time." U.S. Department of

Justice & Federal Trade Commission, 1992 Horizontal Merger Guidelines (with 1997 revisions) § 0.1, http://www.ftc.gov/bc/docs/horizmer.htm (emphasis added). In a market with substantial entry barriers, a large market share – say, 65% – is required to support an inference of market power. See Pet. App. 21a-22a. That requirement is based on the insight that, if a putative monopolist unilaterally attempts to raise price above competitive levels, its effort will be unprofitable if the other firms in the market have a collective market share of more than 35%, because those other firms will have sufficient capacity to serve additional customers who turn to smaller suppliers to avoid the price increase. If the smaller firms can serve enough of those customers, the "monopolist's" effort to increase prices will be unprofitable, and it will be forced to lower prices to competitive levels. A presumption that a firm must have a market share of 65% or more to *raise* selling prices, therefore, can also be expressed as a presumption that a firm with a market share of more than 35% can *lower* selling prices in the market. For buy-side markets, the analysis is the same, except that market power is defined as the ability "to *depress* the price paid for a product to a level that is below the competitive price and thereby depress output." 1992 Horizontal Merger Guidelines, *supra*, § 0.1 (emphasis added).[5]

---

[5] As this quotation suggests, the antitrust authorities understand – as do economists – that "[t]he core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem. A high price is not itself a violation of the Sherman Act." *Chicago Prof. Sports Ltd. Partnership* v. *National Basketball Ass'n*, 95 F.3d 593, 597 (7th Cir. 1996) (Easterbrook, J.). The antitrust laws are concerned with buyer as well as seller power because either power can be used in such a way that ultimately output is reduced. To translate its concern about paying excessive prices for alder sawlogs into a legitimate concern of the antitrust laws, however, the Ninth Circuit would have had to identify some way in which Weyerhaeuser's allegedly excessive payments could have led ultimately to a reduction in output – such as by eliminating a competitor, creating additional monopsony power during a "recoupment" period, leading to use of that power to pay low prices at which the sale of alder logs would decline, and creating an

In this case, the court of appeals relied on so-called direct evidence that Weyerhaeuser had exercised market power (Pet. App. 21a), but its analysis was exactly backwards. It did not ask whether Weyerhaeuser had the power to *lower* the price of sawlogs below competitive levels – the definition of monopsony; it asked whether Weyerhaeuser had "used its power to *raise* the price of sawlogs." Pet. App. 21a (emphasis added). That is a fundamental mistake. While a buyer must have a very large share of the market to be able to force sellers to accept low prices (which sellers, of course, will try to avoid), a buyer with a much smaller share of the market will be able to cause a price increase (which sellers will enthusiastically welcome). Market power, in other words, is not required to *lose* money by paying more than a competitive price for raw materials – many firms have that capability – it is required to *make* money, on a sustained basis, while paying less than a competitive price for raw materials.

The court of appeals' fundamental error in defining market power means that the risk of misguided liability findings for "predatory" bidding is not confined to those buyers who account for a very large share of the total demand for an input. That risk extends also to much smaller buyers, with market shares well below the threshold usually required to support an inference of market power, and even below the threshold at which courts might find a plausible attempt to monopolize. See Pet. App. 21a. Those smaller buyers may have the power to cause an increase in market prices, even if they lack the power to cause a decrease. And, because the risk of unjustified liability extends to any firm that has the power to raise prices, smaller buyers too

---

artificial shortage in the supply of products made from alder logs. But the Ninth Circuit eschewed any inquiry into whether such an output-reducing scenario was plausible on the record of this case, instead opting to describe the question in terms of "fair price[s]" and "necessary" prices and quantities and leave those determinations to a jury. Its opinion, like the opinion the Seventh Circuit reversed in *Chicago Prof. Sports*, "reads like the ruling of an agency exercising a power to regulate rates," *ibid.*, which is the antithesis of proper antitrust analysis.

will be deterred from vigorous competition to acquire scarce inputs for their manufacturing operations.

II. Sellers Of Inputs, Buyers Of Inputs, And Consumers Of Finished Products Will Be Harmed Because The Ninth Circuit's Decision Will Deter Vigorous Competition

There is only one way for substantial buyers of inputs to reduce the risk of liability for "predatory bidding" under the Ninth Circuit's misguided standard: They must pull their punches when they participate in the purchasing market, by offering lower prices and purchasing less. This is, of course, precisely the course of conduct that Ross-Simmons says Weyerhaeuser should have followed. And the result of such behavior will be exactly the result that the antitrust laws seek to prevent by outlawing monopsonization: prices for the purchased input will be reduced.

The court of appeals seemingly recognized this risk, but it refused to follow *Brooke Group* because it believed that the "benefit to consumers and stimulation of competition" were less significant in buying markets than in selling markets. Pet. App. 9a. That conclusion grossly underestimates the benefits of competition among buyers, as well as the economic cost of overly broad and amorphous liability standards that deter competition among buyers.

Three groups are harmed when such competition is suppressed: the sellers of inputs, the buyers of inputs, and consumers of the finished products made with those inputs.

1. When buying competition is artificially suppressed by the threat of misguided antitrust liability, the direct and immediate victims are sellers. If major purchasers choose to offer lower prices and to buy less in order to avoid unfounded charges of predatory behavior, the inevitable result will be lower prices for sellers.

Artificial restraints on competition to buy are condemned by the antitrust laws to the same degree that restraints on competition to sell are condemned:

> The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. * * * The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Mandeville Island Farms, 334 U.S. at 236.

The reason for that even-handed approach is straightforward. Restraints on market forces lead to inefficiencies that ultimately cause harm to all participants in the market. Artificial restraints on prices – whether those restraints cause prices that are above competitive levels or below competitive levels – are especially pernicious, because "[p]rice is the 'central nervous system of the economy.'" *Prof'l Eng'rs*, 435 U.S. at 692 (quoting *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940)). Prices convey essential information to producers and consumers and provide incentives for them to act efficiently. High prices are a signal to producers that society will benefit if they expand production. Cf. *Trinko*, 540 U.S. at 407 ("The opportunity to charge monopoly prices * * * induces risk taking that produces innovation and economic growth."). They also tell consumers to look for substitute products that are less costly or to seek efficiencies that will reduce their consumption of the high-priced product.

Free competition among buyers that bids up the price of inputs serves an important purpose. As the court of appeals recognized, "rising input prices might encourage new companies to enter the supply side of the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements." Pet. App. 11a. Unfortunately, the court of appeals dismissed those benefits because of its belief that the supply of alder sawlogs was inelastic, *i.e.*, that supply would not increase rapidly in response to higher prices.

That response is unpersuasive for two reasons. First, as a practical matter, it would be unworkable to apply *Brooke Group* to predatory bidding claims in some markets (where supply is elastic) but not in others (where supply is inelastic). The court of appeals expressed no intent to do so. Second, the court of appeals' reasoning is backwards. If it takes a long time for supply to increase in response to higher prices (*e.g.*, because newly planted seedlings require many years to mature into harvestable timber), it is all the more important to ensure that misapplication of the antitrust laws does not artificially depress prices. The economic harm that will be caused by such non-competitive pricing will endure for many years, because of the lag between higher prices and an increase in supply.[6]

2. By deterring competition among manufacturers to acquire scarce inputs, the Ninth Circuit's decision also inflicts harm to competition in the production and sale of those manufacturers' finished products. The reason is readily apparent. If a large producer restricts its purchases of raw materials for fear of incurring liability for "predatory bidding," it must also restrict its production of finished goods made from those raw materials. Conversely, a manufacturer that wishes to lower its price and expand its production of finished goods cannot do so

[6] The court of appeals also opined that, "at least in this case, predatory bidding is less likely than predatory pricing to result in a benefit to consumers or the stimulation of competition." Pet. App. 11a. That statement reflects profound confusion. Truly *predatory* behavior – be it buying ("bidding") or selling ("pricing") – necessarily results in a net loss to consumers and to competition. To label the conduct at issue in this case "predatory bidding" was to assume the conclusion of the very question the court was supposed to be answering. The task before a court is not to decide which categories of predation do and do not benefit consumers, but to determine which categories of conduct should be *labeled* predatory *because* they *do not* benefit consumers and competition on balance. One who starts with the assumption that competition is "predatory" is naturally going to be as skeptical of its benefits as the Ninth Circuit was here, but rules of law are supposed to be designed to distinguish the rare case of true predation from the common case of aggressive competition that inconveniences rivals but is a positive virtue under the antitrust laws.

unless it also increases its purchases of the inputs from which those finished goods are made. See 2A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 575, at 363-364 (2d ed. 2000) ("The important and often overlooked consequence of monopsony power is reduced output on the monopsonist's selling side – that is, because the monopsonist reduces its buying price by purchasing less, it must ordinarily sell less."). The Ninth Circuit's description of this case illustrates the point. During the period of Weyerhaeuser's so-called predatory bidding, the price of finished lumber declined and Weyerhaeuser's share of the market increased. Pet. App. 3a, 23a. Concerns about treble-damage liability under the Ninth Circuit's erroneous holding will discourage manufacturers from doing that which the antitrust laws should encourage: increasing output and lowering prices of the products they sell.

Of course, if the largest manufacturer in a market chooses to restrict its output of finished products and its purchases of inputs in order to reduce the risk of wrongful antitrust liability, its smaller rivals may pick up some of the slack. But that, too, is a result that is inimical to the purposes of the antitrust laws if those smaller rivals are less efficient. In this respect, too, the record in this case illustrates the point. Ross-Simmons suffered losses from 1998 to 2001, a period when the price of sawlogs increased and the price of finished lumber declined. In the same period, Weyerhaeuser continued to operate profitably – a fact that reflects its indisputable ability to manufacture and sell finished lumber more efficiently than Ross-Simmons. Had Weyerhaeuser restricted its purchases of sawlogs, as Ross-Simmons would have liked, the plain effect would have been that less efficient sawmills such as Ross-Simmons would have processed a larger portion of the alder timber, while more efficient sawmills such as Weyerhaeuser processed less.

Some juries, of course, might believe that larger and more efficient producers should not exploit their advantages, because that is "unfair" to their smaller and less efficient rivals. They might believe that Weyerhaeuser did not "need" to acquire 65% of the sawlogs and could have maintained a profitable business even it acquired less. Such notions of "fairness," though, are not a proper basis for antitrust liability. See 1 AREEDA & HOVENKAMP, *supra*, ¶ 111d, at 103 ("[R]ivals may think * * * competition from a more efficient firm to be unfair, especially when the latter firm is larger than the complainant and particularly when the larger firm has lower costs. * * * [T]his conception of fairness is, of course, antithetical to both competition and economic efficiency."). Objective requirements of liability, most notably the requirement of proof that an alleged predator suffered short-term losses because of its pricing policy and had a realistic prospect of recouping those losses after driving a competitor from the market, provide critical protection for legitimate competition. A price that permits the defendant (but not the plaintiff) to operate *profitably* usually reflects "the lower cost structure of the alleged predator, and so represents competition on the merits." *Brooke Group*, 509 U.S. at 223. And, even if prices result in short-term losses for the defendant, there can be no harm to *competition* unless recovery of those losses through long-term non-competitive pricing is likely; whether pricing "may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured." *Id*. at 224.

3. Consumers of finished products will also be harmed if competition to acquire scarce inputs is artificially constrained. That consumer injury is a direct consequence of the harms described above. In the short term, expanded output by the manufacturers of finished products depends on those manufacturers' ability to compete effectively to acquire the raw materials from which finished products are made. If that competition is not constrained, the increased demand may well place upward pressure on the price of raw materials, but consumers nonetheless benefit from the expanded output of finished products – just as they benefited from the lower prices of alder lumber in this case, even as alder sawlog prices increased.

Over the longer term, the competition that bids up the price of raw materials encourages the producers of those materials to expand their own output, which will place downward pressure on the price of those materials. If price competition among buyers is artificially suppressed because of a plausible fear that competition will lead to antitrust liability, producers' incentives to invest to expand their output will also be suppressed. This is the exact opposite of sound antitrust policy. See note 5, *supra*.

4. There is no reason to incur the economic costs described above by adopting, as the Ninth Circuit did, a lax standard for predatory pricing liability. The only conceivable benefit of such a standard is increased deterrence of predatory pricing on the buying side, but there is no reason to think that truly predatory pricing schemes (unlike false positives) will be common or that they will pose a special threat to competition. Rather, "'predatory pricing schemes are rarely tried, and even more rarely successful.'" *Brooke Group*, 509 U.S. at 226 (quoting *Matsushita*, 475 U.S. at 589). Predatory pricing is a costly means of exclusion. It requires an initial period of sustained losses, sufficient in duration and magnitude to drive rivals from the market. There is considerable risk for the predator that its efforts will not succeed at all and, if they do, there is still more risk that the payback, through sustained non-competitive pricing after rivals are gone, will be insufficient to cover the up-front costs. See *Matsushita*, 475 U.S. at 588 (discussing risks of predatory pricing strategies); *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 119-120 n.15 (1986) (discussing factors that make successful predation extremely difficult); *id*. at 121 n.17 ("it is plain that the obstacles to successful execution of a strategy of predation are manifold, and that the disincentives to engage in such a strategy are accordingly numerous"). Because predatory pricing is such a costly and risky strategy, it is unlikely to be employed very often. See Susan Creighton, D. Bruce Hoffman, Thomas Krattenmaker & Ernest Nagata, *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 977 (2005) ("cheap exclusion" will be relatively more common than "expensive" predation, of which predatory pricing is the "archetypal example").

Legitimate and economically beneficial competition among buyers, by contrast, is a pervasive phenomenon. *Every* manufacturer must secure the raw materials or other inputs needed to make its products and must compete with other manufacturers that seek the same raw materials or other inputs. In a dynamic economy, the forces of supply and demand for those inputs change frequently and sometimes dramatically, causing market prices to rise or fall. Every manufacturer must respond to those changing market conditions by adjusting the price it pays to secure inputs.

A rule of law that threatens antitrust liability whenever a large buyer chooses to pay more to maintain or increase the volume of its purchases will therefore cut a wide swath in the economy. It will affect competition to buy inputs in every market in which purchases are concentrated among a small number of buyers. A rule that deters competition so broadly merits review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEPHEN A. BOKAT
ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ROY T. ENGLERT, JR.*
DONALD J. RUSSELL
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

RICHARD S. WASSERSTROM
American Forest & Paper Association
1111 19th Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 463-2582

* *Counsel of Record*

OCTOBER 2005