

No. 26-370

In the
Supreme Court of the United States

THE NIELSEN COMPANY (US), LLC,
Petitioner,

v.

CUMULUS MEDIA NEW HOLDINGS INC.,
Respondent.

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

**BRIEF OF WASHINGTON LEGAL FOUNDATION AS
AMICUS CURIAE SUPPORTING PETITIONER**

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QUESTION PRESENTED

Whether a seller who offers its products separately and in a bundle, at prices never alleged to be below cost, may be held liable under Section 2 of the Sherman Act for a “constructive tie” because a court deems a standalone price too high relative to a discounted bundle.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. To those ends, WLF often appears as amicus curiae to urge this Court to rigorously apply the consumer welfare standard. *Apple Inc. v. Pepper*, 587 U.S. 273 (2019); *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013). And when a similar question presented was last before this Court on a petition for the writ, WLF filed as amicus urging review. *3M Co. v. LePage's Inc.*, 542 U.S. 953 (2004) (denying certiorari).

INTRODUCTION AND SUMMARY OF ARGUMENT

While writing a law review article about bundled discounts, Professor Daniel Crane “received an e-mail message from the Antitrust Section of the American Bar Association,” hawking “two new publications, *Market Power Handbook* and *Econometrics*, for a ‘package’ price.” Daniel A. Crane, *Mixed Bundling, Profit Sacrifice, and Consumer Welfare*, 55 Emory L.J. 423, 431 (2006). “The stand-alone price for *Market Power* was \$134 and the stand-alone price for *Econometrics* \$149, but the two could be had together for a package price of \$249.” *Id.* “Buy

* No party’s counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief’s preparation or submission. Counsel for all parties received timely notice of WLF’s intent to file this brief.

both and save,’ said the advertisement.” *Id.* (ellipses omitted).

The ABA’s Antitrust Section is hardly a Sherman Act scofflaw or a roguish outlier. Look around and you’ll find bundled discounts everywhere. The pizza chain offers a pair of two-topping medium pies and a soft drink for a lower cost than a large cheese. A discount for insurers from hospitals selected as the preferred provider for multiple categories of healthcare services. *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008). Discounts on printer parts “for customers who bought [the printer company’s] ink.” Pet. 14 (citing *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 267–69 (6th Cir. 2015)).

The Second Circuit, joining its sister tribunal in the Third, *LePage’s Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc), has ruled that such package discounts are vulnerable under the federal antitrust laws. That way courts madness. This Court has just recently unstuck its tying caselaw out of the morass caused by decades of undeserved judicial hostility to the practice. *Ill. Tool Works v. Indep. Ink, Inc.*, 547 U.S. 28, 45 (2006) (“Many tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market.”). Even so, vestigial overhang from that misbegotten era still controls. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984) (finding it “far too late in the history of our antitrust jurisprudence” to wholly eliminate per se liability for certain ties). The damage to innovation from that too-recent past can never be calculated. No spreadsheet reveals the consumer

welfare lost by deals the law made unthinkable to offer.

There's no need to tread that moribund path of condemnation-to-acceptance once again. We've learned (at some cost) that "[t]he great majority of ties are beneficial or at least benign." Erik Hovenkamp & Herbert Hovenkamp, *Tying Arrangements and Antitrust Harm*, 52 Ariz. L. Rev. 925, 927 (2010). But we already know package discounts (which, definitionally, offer *lower* prices) are even more so. See Crane, *Mixed Bundling*, 55 Emory L.J. at 430–43 (recounting pro-competitive and non-exclusionary explanations for bundled discounts).

That makes sense. Ties, rather famously, don't offer customers even the shadow of a choice. One *must* buy the machine and the punch cards. *IBM v. United States*, 298 U.S. 131, 134 (1936). One *must* buy the salt to get the rock-salt-to-brine machine. *Int'l Salt Co. v. United States*, 332 U.S. 392, 394 (1947). Bundled discounts don't really do that. A purchaser may "feel" like they can't afford not to take the combo deal (and for good reason: it's a lower price!), but there's no actual take-two-or-leave on the table.

Agency especially matters in this antitrust context, because sans a real forcing factor, a plea against so-called constructive tying swiftly collapses into the kind of unfair price-squeeze claim this Court's precedent forecloses. *Pac. Bell. Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 455 (2009). That's the case here. There's no allegation of predatory below-cost pricing in either of Nielsen's offers, just Cumulus's complaint that the standalone price is too high vis-à-vis the bundled offer. Yet the

lower court emphasized the price-tag of Nielsen’s standalone pitch in comparison to that of the bundle, all the while downplaying that Nielsen and Cumulus were locked in the rough-and-tumble of high-stakes contract negotiations—with Nielsen open to counteroffers on the standalone price. Pet. App. 29a–37a. Cumulus’s agency was brusquely set aside so a doctrine of “constructive tying” could be announced.

The Court should grant the writ so it may draw a firm line. A bundled discount, which offers buyers a choice between two competing offers, is condemnable under the Sherman Act only where the discount is infected by predatory below-cost pricing, *Collins Inkjet*, 781 F.3d at 270–72; Pet. 14–15, that would concretely cause output restriction in the relevant market. That’s a policeable, administrable rule that accords with the advancement of consumer welfare.

ARGUMENT

I. CERTIORARI IS WARRANTED BECAUSE BUNDLED DISCOUNTS AREN’T LIKE ANTI-COMPETITIVE TIES.

This isn’t a tying case.

Nielsen “sells two different types of products: local radio data, which reflects listenership in specific geographic areas, and national radio data, which consists of all local data assembled into a comprehensive nationwide report.” Pet. App. 4a. Cumulus used to buy both reports. Pet. 6. Today, it wants to buy nationwide data from Nielsen and local data from one of Nielsen’s competitors. *Id.*

That was on offer. Nielsen would undoubtedly prefer to sell nationwide *and* local data to Cumulus. But it also was willing to merely sell the nationwide report—and there’s no evidence of predatory below-cost pricing in either offer. Pet. 7; Pet. App. 32a–33a (Cumulus never contended any price was below cost). Cumulus doesn’t like the dollar figure that Nielsen posted for the standalone national data; it contends that Nielsen’s quoted price was simply too high. But rather than counter, Cumulus made a federal antitrust case of it. Pet. 6.

The Second Circuit obligingly went along. In doing so, it took the tying doctrine outside the realm of tie-in sales and into something downright metaphysical, determining that—notwithstanding the lack of any evidence of below-cost, predatory pricing—“*constructive* tying is a valid theory of Sherman Act liability.” Pet. App. 25a (emphasis added). In holding so, the Second Circuit expanded on the errors of the Third Circuit, *LePage’s Inc.*, 324 F.3d at 169, while splitting from its sisters elsewhere. Pet. 12–18 (discussing circuit split).

There’s more than a bit of through-the-looking-glass in all of this. “Tying exists when a seller of product *A* requires his purchasers to take product *B* as well.” Robert H. Bork, *The Antitrust Paradox* 381 (Bork Publ’g 2021). But nobody’s forcing Cumulus to buy both products. Cumulus can buy either Nielsen’s national data or (at a substantially steep discount) both national and local data. With no condition, all that’s left is Cumulus’s complaint that the standalone price is unfairly elevated relative to the bundled offer.

That leaves Cumulus pleading a dressed-up price-squeeze claim. But this Court has already rejected the proposition that there’s likely to be “any independent competitive harm caused by price squeezes above and beyond the harm that would result” from another, chargeable antitrust claim (like predatory pricing). *linkLine*, 555 U.S. at 455. Despite that caselaw, the Second Circuit decided that the offer was a sham, best explicable as raw coercion. Pet. App. 29a–44a.

For a long time, that’s how this Court viewed actual tie-ins, seeing in those proffered bargains “nothing but the suppression of competition.” Bork, *Antitrust Paradox* 381. Over time, this “longstanding judicial . . . hostility towards tying” evaporated in the face of conclusive economic evidence that tying is “presumptively pro-competitive for firms,” even those “with market power or monopoly power.” David S. Evans, *Untying the Knot: The Case for Overruling Jefferson Parish*, U.S. Dep’t of Justice (July 2006), <https://perma.cc/D72V-LQAJ>; Hovenkamp & Hovenkamp, *Tying Arrangements*, 52 Ariz. L. Rev. at 927 (“The great majority of ties are beneficial or at least benign.”). That realization was six decades in the making, *Ill. Tool Works*, 547 U.S. at 45 (tying consistent with a competitive free-market), and is still incomplete. *Jefferson Parish*, 466 U.S. at 9 (despite evidence that tying is often pro-competitive, ties may still incur per se liability).

The decision below is evocative of that older caselaw, which was informed by the unfair “feel” of a specific transaction to non-expert jurists. That’s not speculation. The Second Circuit’s citations tell the tale. Pet. App. 25a–29a (relying on *United States v.*

Loew's, Inc., 371 U.S. 38 (1962) and *Am. Mfrs. Mut. Ins. Co. v. Am. Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272 (2d Cir. 1967)). As the petition ably recounts, those cases do not apply to the deal here, not least because this Court's post-1960s turnabout on tying controls. Pet. 21–22. The Court should grant review so it can reaffirm that abject hostility to a bundled sale is a product of the Court's past, not the caselaw's future.

This is especially vital because bundled discounts are a commonplace business practice. The firms that do so range from “the world's largest corporations” to “a street-corner vendor with a food cart . . . offer[ing] a discount to a customer who buys a drink and potato chips to complement a hot dog.” *Cascade Health*, 515 F.3d at 895. As you'd expect from the tactic's widespread adoption, far from being the functional equivalent of anti-competitive conduct, package discounts regularly maximize consumer welfare.

“After all, bundled discounts are, first and foremost, discounts. They always benefit consumers in the short term.” Thomas A. Lambert, *Evaluating Bundled Discounts*, 89 Minn. L. Rev. 1688, 1698 (2005). And that's not all. There's no shortage of pro-competitive or competition-neutral explanations for discount bundling. Crane, *Mixed Bundling*, at 431–43 (listing, among others, cost efficiencies, building customer loyalty, eliminating double marginalization, pro-competitive price discrimination); David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 Yale J. on Reg. 37, 70–71 (2005) (certain bundled discounts are designed to reduce

transaction costs). Bundled discounts fall naturally into that “great majority of discounting practices [which] are procompetitive’ and ‘reflect hard bargaining.” *Cascade Health*, 515 F.3d at 895 (quoting 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 749b, at 324 (Supp. 2006)).

And unlike tying, “a bundled discount gives the consumer an option of accepting the cost savings by buying both products or buying only a single product and not realizing cost savings.” Crane, *Mixed Bundling*, 55 Emory L.J. at 433. Ties are take-it-or-leave-it. Since consumers definitionally have more agency to reject a bundled discount than a straight tie, a package discount should always be treated as “more pro-consumer than tying.” *Id.* (hyphen added). This Court’s tying precedents, even as recently modified, should be wholly separated from the treatment of bundled discounts—even those offers a reviewing court might find personally objectionable or difficult to understand. Frank H. Easterbrook, *Comparative Advantage and Antitrust Law*, 75 Cal. L. Rev. 983, 986 (1987) (“Often it takes a decade or more to determine what a business practice really does.”). The lower courts aren’t universally doing so, and only certiorari can set them straight.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT BUNDLED DISCOUNTS POSE AN ANTITRUST PROBLEM ONLY IF THEY RESTRICT OUTPUT.

Once packaged discounts are unwound from tie-in sales, the Court should lay down an administrable rule for the lower courts to follow when a bundled-discount case comes to the door.

Most package discounts are plainly beneficial to consumers. *Supra* at 7–8. And even where they aren’t, during multiyear, high-cost litigation, markets will be doing their work over the long run—eroding baleful monopolies, filleting inefficiencies. So the Court should supply a standard that largely precludes the possibility of endless enforcement litigation, where markets slay any actual anticompetitive conduct long before a case goes to verdict. Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 33 (1984) (“Anticompetitive business practices customarily predecease the litigation they spawn.”). As Judge Easterbrook reminds us, “[t]he central purpose of antitrust is to speed up the arrival of the long run.” *Id.* at 2. A standard that can’t accomplish that mission isn’t worth adopting.

The Court’s own caselaw points the way. Pet. 12–13. When it comes to bundled discounts, without proof of predatory pricing, *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993), objections to a high price collapse into precisely the sort of price-squeeze claim that cannot pose “independent competitive harm.” *linkLine*, 555 U.S. at 455. No below-cost pricing in the bundle, no antitrust injury—full stop.

That cost-based test lends itself to a broader, overarching standard that should govern review of all package discounts: do they cause output restriction? At core, it’s fear of output cutback that drives the rule against below-cost, predatory pricing. And *Brooke Group* tells us that even below-cost pricing doesn’t injure consumer welfare absent a “dangerous probability” that the predatory firm will “recoup its investment in below-cost prices.” 509 U.S. at 224

(tense altered). In turn, the best way of measuring risk of predatory recoupment is to look to whether an offer causes measurable output restriction in the relevant market. That concrete signifier cleanly distinguishes harmful exclusion from laudatory efficiency.

Best of all, an output-restriction rule is a policeable line, one that the lower courts can faithfully and rigorously apply. That's far preferable than resorting to looking for coercive implications from the tea leaves left by an unfinished negotiation between two sophisticated actors. Pet. App. 29a–37a (mining Nielsen-Cumulus back-and-forth for evidence of “coercion”). Keying antitrust liability to measurable output in the relevant market will give courts a tangible metric for reviewing bundled discounts—one far less likely to cause lengthy trials that consume time and money that both market competitors and the courts could be (efficiently) applying elsewhere.

CONCLUSION

Bundled discounts aren't ties. Single-sale discounts should be presumptively legal, absent concrete evidence of below-cost pricing that causes output restriction. Given the division in the lower courts, only this Court can make that happen. The petition should be granted.

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