No. _______

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Nielsen Company (US), LLC offered its radio-ratings products to Cumulus Media New Holdings Inc. both bundled at a discount and on a standalone basis, at prices no one contends were below cost. The Second Circuit nonetheless held that the standalone offer was likely an unlawful "constructive tie" under Section 2 of the Sherman Act because the price was so "exorbitant" that Cumulus had "no choice" but to take the bundle. The court then affirmed a preliminary injunction barring Nielsen from charging a "commercially unreasonable rate."

The question presented is:

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.

PARTIES TO THE PROCEEDING

Petitioner The Nielsen Company (US), LLC was defendant in the district court and appellant in the court of appeals.

Respondent Cumulus Media New Holdings Inc. was plaintiff in the district court and appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

The Nielsen Company (US), LLC is a subsidiary of ACNielsen Corporation, a privately held corporation. No publicly held corporation owns 10% or more of The Nielsen Company (US), LLC's stock.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Cumulus Media New Holdings Inc. v. The Nielsen Company (US), LLC, No. 1:25-cv-8581 (order granting preliminary injunction entered December 30, 2025; order on motion to enforce preliminary injunction entered September 9, 2026; injunction in effect; proceedings pending)

United States Court of Appeals (2d Cir.):

Cumulus Media New Holdings Inc. v. The Nielsen Company (US), LLC, No. 26-88 (opinion and judgment affirming issued July 13, 2026; petition for panel rehearing and rehearing en banc denied August 18, 2026)

Cumulus Media New Holdings Inc. v. The Nielsen Company (US), LLC, No. 26-2516 (appeal from district-court order of September 9, 2026, on motion to enforce the preliminary injunction; administrative stay entered September 10, 2026; proceedings pending)

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

RELATED PROCEEDINGS iv

TABLE OF APPENDICES vi

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

PROVISION INVOLVED 1

INTRODUCTION 2

STATEMENT 5

REASONS FOR GRANTING THE PETITION 11

- I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT 11
  - A. The courts of appeals are divided over whether an above-cost price can establish antitrust liability 12
  - B. The decision below is egregiously wrong and squarely conflicts with this Court's precedents 18
- II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT, AND THIS CASE IS AN IDEAL VEHICLE 23

CONCLUSION 27

TABLE OF APPENDICES

Page

APPENDIX A: Opinion of the United States Court of Appeals for the Second Circuit (July 13, 2026) 1a

APPENDIX B: Opinion and Order of the United States District Court for the Southern District of New York Granting a Preliminary Injunction (Dec. 30, 2025) 56a

APPENDIX C: Order of the United States District Court for the Southern District of New York Granting a Preliminary Injunction (Dec. 30, 2025) 102a

APPENDIX D: Order of the United States Court of Appeals for the Second Circuit Denying Panel Rehearing and Rehearing En Banc (Aug. 18, 2026) 105a

APPENDIX E: Opinion and Order of the United States District Court for the Southern District of New York Denying a Stay Pending Appeal (Jan. 12, 2026) 107a

APPENDIX F: Order of the United States Court of Appeals for the Second Circuit Granting a Stay Pending Appeal (Feb. 3, 2026) 117a

TABLE OF AUTHORITIES

Page(s)

CASES

3M Co. v. LePage's Inc.,
542 U.S. 953 (2004) 3, 17

Am. Mfrs. Mut. Ins. Co. v. Am. Broad.-Paramount Theatres, Inc.,
388 F.2d 272 (2d Cir. 1967) 22

Am. Mfrs. Mut. Ins. Co. v. Am. Broad.-Paramount Theatres, Inc.,
446 F.2d 1131 (2d Cir. 1971) 22

Atl. Richfield Co. v. USA Petroleum Co.,
495 U.S. 328 (1990) 23

Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993) 2, 13

California v. Am. Stores Co.,
495 U.S. 271 (1990) 27

Cascade Health Sols. v. PeaceHealth,
515 F.3d 883 (9th Cir. 2008) 3, 13, 14, 17, 23, 24

Collins Inkjet Corp. v. Eastman Kodak Co.,
781 F.3d 264 (6th Cir. 2015) 3, 14, 15, 17

Eisai, Inc. v. Sanofi Aventis U.S., LLC,
821 F.3d 394 (3d Cir. 2016) 15

In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.,
44 F.4th 959 (10th Cir. 2022) 17

FDA v. All. for Hippocratic Med.,
602 U.S. 367 (2024) 27

FTC v. Church & Dwight Co.,
665 F.3d 1312 (D.C. Cir. 2011) 17, 18

Ill. Tool Works Inc. v. Indep. Ink, Inc.,
547 U.S. 28 (2006) 20, 22

Inline Packaging, LLC v. Graphic Packaging Int'l, LLC,
962 F.3d 1015 (8th Cir. 2020) 17

Jefferson Parish Hosp. Dist. No. 2 v. Hyde,
466 U.S. 2 (1984) 14, 20, 23

LePage's Inc. v. 3M,
324 F.3d 141 (3d Cir. 2003)......................... 3, 15, 16

Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania,
591 U.S. 657 (2020) 27

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 23

N. Pac. Ry. Co. v. United States,
356 U.S. 1 (1958) 19

NCAA v. Alston,
594 U.S. 69 (2021) 25

Nken v. Holder,
556 U.S. 418 (2009) 9

Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.,
555 U.S. 438 (2009) 2, 12, 13, 18, 19, 25

State Oil Co. v. Khan,
522 U.S. 3 (1997) 24

Trump v. Hawaii,
585 U.S. 667 (2018) 27

United States v. Loew's Inc.,
371 U.S. 38 (1962) 21

Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP,
540 U.S. 398 (2004) 2, 12, 25

Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.,
549 U.S. 312 (2007) 24

ZF Meritor, LLC v. Eaton Corp.,
696 F.3d 254 (3d Cir. 2012) 3, 15

STATUTES

15 U.S.C. § 2 1

28 U.S.C. § 1254 1

OTHER AUTHORITIES

3B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (5th ed. 2022)... 17

Antitrust Modernization Comm'n, *Report and Recommendations* (2007)............................... 17

Press Release, Hogan Lovells Cadwalader, *Hogan Lovells Cadwalader Secures Landmark Second Circuit Antitrust Victory for Cumulus Media* (July 14, 2026) 26

PETITION FOR A WRIT OF CERTIORARI

Petitioner The Nielsen Company (US), LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's opinion is reported at 182 F.4th 108 and reproduced at Pet. App. 1a. The district court's opinion granting a preliminary injunction is available at 2026 WL 63294 and reproduced at Pet. App. 56a. The district court's order entering the preliminary injunction is unreported and reproduced at Pet. App. 102a. The Second Circuit's order denying rehearing is unreported and reproduced at Pet. App. 105a. The district court's opinion denying a stay pending appeal is available at 2026 WL 84004 and reproduced at Pet. App. 107a, and the Second Circuit's order granting a stay pending appeal is unreported and reproduced at Pet. App. 117a.

JURISDICTION

The Second Circuit entered judgment on July 13, 2026, and denied a timely petition for rehearing on August 18, 2026. Pet. App. 105a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISION INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in relevant part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."

INTRODUCTION

This Court has held that the "charging of monopoly prices[] is not only not unlawful; it is an important element of the free-market system." *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). When a plaintiff attacks a seller's prices, liability is reserved for prices that are too low—"below an appropriate measure" of the seller's costs. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993). And where two prices are each "independently lawful, there is no basis for imposing antitrust liability" on their combination. *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 455 (2009).

The Second Circuit held otherwise. Nielsen surveys radio audiences in local markets and sells the resulting data in two forms: local market reports and a national report that aggregates the local data. Nielsen offered Cumulus both products bundled at a discount. When Cumulus claimed that the arrangement was an unlawful tie, Nielsen removed the challenged condition and offered the national report on a standalone basis. Cumulus made no standalone counteroffer; it sued instead. Cumulus has never contended that any Nielsen price was below cost. The court of appeals nonetheless held that the standalone offer was itself likely an unlawful "constructive tie" because the price was so "exorbitant" that Cumulus had "no choice" but to take the discounted bundle. Pet. App. 29a–32a. The court did not ask whether any price fell below any measure of Nielsen's costs. Nielsen now operates under a preliminary injunction that forbids charging a "commercially unreasonable rate" for its standalone national report. *Id.* at 100a–101a.

That decision deepens a circuit conflict two decades in the making. This Court has confronted the underlying question before. In *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc), a divided Third Circuit sustained Section 2 liability for a multiproduct seller's bundled discounts without proof that any price fell below cost. 3M sought review. This Court called for the views of the Solicitor General, and the United States acknowledged the question's importance but urged the Court to "await further development of the case law." Brief for the United States as Amicus Curiae 15–16, *3M Co. v. LePage's Inc.*, 542 U.S. 953 (2004) (No. 02-1865). The Court denied certiorari. 542 U.S. 953 (2004).

The caselaw has since developed into a clear circuit divide. The Ninth Circuit adopted a cost-based test for the express purpose of rejecting *LePage's*, refusing to condemn bundled pricing unless it is the economic equivalent of selling below cost. *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 906–07 (9th Cir. 2008). The Sixth Circuit followed, holding that a tie "enforced solely through differential pricing" is "not unlawful unless the differential pricing is the economic equivalent of selling the tied product below the defendant's cost." *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 272 (6th Cir. 2015). The Third Circuit itself has acknowledged that *LePage's* has been "undermined by intervening Supreme Court precedent," *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 274 n.11 (3d Cir. 2012), but *LePage's* binds that court en banc.

The decision below places the Second Circuit on the *LePage's* side of the conflict, requiring no below-cost showing for liability. And it carries the *LePage's* approach even further, extending it from bundled rebates to *any* standalone offer a court deems too high. Had Cumulus filed this suit in the Sixth or Ninth Circuit, the lack of any below-cost allegation would have ended the case. The Second Circuit has denied rehearing en banc. More than twenty years of percolation has produced an entrenched conflict that only this Court can resolve.

The decision below also conflicts with this Court's precedents. The panel acknowledged that antitrust law permits monopoly prices, then created an exception that swallows the rule: a price becomes unlawful coercion whenever a court finds it too high. Pet. App. 30a, 34a. And a tying arrangement requires a condition. Where the buyer may take either product by itself, there is no tie. Here, Nielsen offered every product it sells on a standalone basis, foreclosing any possible tying claim.

The question presented is exceptionally important. Bundled discounts like Nielsen's are a staple of price competition throughout the economy, and no multiproduct seller can now be sure which of its discounts a court will call coercion. The decision also turns courts into rate regulators in all but name. A theory with no rule for what price is lawful leaves judges to set one, and the district court here has already begun, rejecting Nielsen's latest offer as commercially unreasonable and compelling another in less than twenty-four hours. And within days of the decision, government enforcers and private plaintiffs began invoking it in the Nation's most consequential antitrust cases. This case, moreover, presents the question cleanly. The panel resolved the viability of constructive tying as a matter of law, on undisputed facts, in a holding that binds every court in the Second

Circuit no matter what happens on remand. The Court should grant certiorari and confirm that an above-cost price—however high—is not a tie.

STATEMENT

1. Nielsen is the leading provider of radio audience-ratings data in the United States. Pet. App. 6a. Its surveys of listeners in hundreds of local markets yield two products. *Id.* at 6a–7a. Local-market reports tell stations and advertisers who is listening in a particular area and are used to price local advertising; the "Nationwide" report aggregates the local data into a single national dataset, which national networks use to price and sell advertising across the country. *Id.* at 2a, 6a–7a. Nationwide is compiled entirely from the local surveys, so the costs of both products are incurred market by market at the local level. *Id*. at 2a, 6a.

In 2024, Nielsen adopted a policy addressed to that cost structure. *Id.* at 7a. That "Network Policy" applies only to customers who operate both a national network and local stations—twelve customers in all, out of Nielsen's hundreds. *Id.* at 7a–8a & n.1. Under the Policy, if such a customer did not subscribe to Nielsen's local data in a market where the customer owned or controlled a station, Nielsen would exclude that market's data from the Nationwide report delivered to the customer. *Id.* at 7a–8a. The Policy addressed a free-riding concern. Without it, a network could cancel the local subscriptions that fund Nielsen's local surveys yet continue receiving a complete national report assembled from those local surveys, at the expense of the customers who pay for them. *Id.* at 8a.

2. Cumulus is one of the largest audio companies in the country. *Id.* at 2a, 6a. It operates hundreds of

local radio stations and the largest national network, Westwood One. *Id.* at 6a. Because Cumulus operates at both levels of the industry, it historically purchased both local data and Nationwide from Nielsen. *Id.* at 8a.

In 2025, as the parties' contract neared expiration, Cumulus sought to reduce its spending and signaled that it might discontinue certain local-market subscriptions. *Id.* at 8a–9a. Nielsen responded with a series of renewal proposals designed to accommodate the planned reductions while still accounting for the costs of collecting the local data that feed Nationwide. *Id.* at 9a–10a. Nielsen first proposed to continue the parties' longstanding arrangement—the complete Nationwide report together with local data in the markets Cumulus served. *Id.* at 9a, 31a–32a. When Cumulus responded that it wanted local data in only a subset of those markets, planning to buy the rest from Eastlan—a Nielsen competitor in certain markets—Nielsen agreed to sell that subset with a Nationwide report configured as the Policy provided. *Id.*

Cumulus then objected that the Network Policy was an unlawful tie. *Id.* at 10a. Nielsen responded by cutting the alleged tie: it exempted Cumulus from the Policy and offered to sell local data in the markets Cumulus wanted together with the complete Nationwide report. *Id.* at 10a, 32a, 72a. Nielsen also offered the complete Nationwide report on a standalone basis, conditioned on nothing at all. *Id.* at 10a, 32a. That was Nielsen's first offer for that configuration—a product Cumulus had never before purchased on its own. *Id.* at 10a, 34a. Cumulus did not respond with a standalone counteroffer. *Id*. On October 16, 2025, Cumulus walked away from negotiations, filed this suit, and moved for a preliminary injunction. *Id.* at 10a–11a.

3. The district court proceeded on an expedited schedule. After limited discovery, the court held a three-day evidentiary hearing featuring the parties' representatives and economics experts. *Id.* at 11a. Because Nielsen's standalone offer had severed the alleged tie, Cumulus's theory of harm rested on price. It argued that unless buying standalone Nationwide from Nielsen plus local data from Eastlan cost less than Nielsen's discounted bundle, Cumulus would buy everything from Nielsen, and Eastlan would be "effectively foreclosed from competing" in local markets. *Id.* at 38a–40a, 87a–89a. Cumulus did not contend that any Nielsen price, standalone or bundled, was below any measure of Nielsen's costs. *Id.* at 32a–33a.

Because Cumulus sought to alter the status quo, the court held it to the heightened standard governing mandatory injunctions—and on December 30, 2025, granted the injunction. *Id.* at 11a. The court concluded that the Network Policy itself was likely an unlawful tie of local data to Nationwide. *Id.* at 84a–85a. But Nielsen had exempted Cumulus from the Policy. The court therefore rested its holding as to Cumulus on a different theory: "constructive tying." *Id*. at 86a–87a. The court acknowledged that Nielsen had imposed no condition on the sale of Nationwide to Cumulus and that there was no "explicit tie." *Id.* at 86a. It nonetheless held that Nielsen's standalone Nationwide offer was "so exorbitant as to make it economically unfeasible" for Cumulus to buy the products separately and therefore functioned as a "constructive tie." *Id.* at 86a–87a.

In finding the price exorbitant, the court compared it only to other prices. The offer was "ten times more than what Cumulus was paying for Nationwide under its existing contract"—although that comparator was an accounting allocation within a bundled contract price, not a price anyone had negotiated for standalone Nationwide. *Id.* at 71a. The offer also exceeded what other customers pay, although no customer similarly situated to Cumulus purchases Nationwide standalone. *Id.* at 70a–71a. At no point did the court ask whether any Nielsen price fell below Nielsen's costs. To the contrary, the district court described the challenged conduct as producing "supracompetitive prices far above what the market would otherwise bear." *Id.* at 95a.

Costs entered the analysis only after the court had already deemed the standalone price too high, and then only as a demand that Nielsen justify it. The court proceeded to fault Nielsen for failing to precisely "quantify" its costs on the expedited record, *id.* at 92a–93a, even while acknowledging the local cost structure, *id.* at 59a–60a, and expressing "sympath[y]" for Nielsen's need to recover its costs, *id.* at 114a.

The injunction imposes two restraints. First, it enjoins Nielsen from "enforcing its Network Policy." *Id.* at 100a. Second, it prohibits Nielsen from "charging a commercially unreasonable rate" for standalone Nationwide. *Id*. at 100a–101a. The order does not say what rate is commercially reasonable. It provides only that a rate at or below "the highest annual 2026 rate Nielsen charges any broadcaster (whether network or local) for Nationwide is presumptively reasonable." *Id*. The injunction "remain[s] in effect during the pendency of this litigation." *Id.* at 101a.

4. Nielsen appealed. Because Nielsen had already exempted Cumulus from the Network Policy, its appeal did not contest the district court's conclusion about the Policy. *Id.* at 23a–25a & n.5. Nielsen challenged the constructive-tying theory and sought a stay pending appeal. *Id.* at 14a, 24a–25a & n.5. The district court denied a stay, granting only a brief administrative stay to allow Nielsen to seek relief in the court of appeals. *Id.* at 115a. The Second Circuit then administratively stayed the injunction and ordered expedited motion briefing and argument. C.A. Doc. 27. Hours after argument, a motions panel (Walker, Parker, and Bianco, JJ.) granted a stay pending appeal, concluding that Nielsen had "met the requisite standard," Pet. App. 118a (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009))—meaning Nielsen had made a "strong showing" that it was likely to "succeed on the merits," *Nken*, 556 U.S. at 434 (quotation marks omitted).

5. Five months later, after expedited merits briefing and argument, the merits panel (Pérez and Nathan, JJ., and Katzmann, J., of the Court of International Trade, sitting by designation) reached the opposite conclusion. The panel held that *Cumulus* had demonstrated a strong likelihood of success on the merits, affirmed the preliminary injunction, and vacated the stay, while acknowledging that the "appeal raises a number of complicated and novel issues." *Id.* at 54a. The panel announced that "[c]onstructive tying is a viable theory of Sherman Act liability," *id.* at 29a, and that a standalone offer priced "exorbitantly" can constitute the "coercion" a tie requires, *id.* at 25a, 29a–30a.

In the panel's view, the coercion arose from the interaction of three prices: the standalone price for Nationwide, the discounted price of the Nationwide-and-local bundle, and the price for local data from Eastlan. Because it would cost Cumulus $1.2 million more to buy standalone Nationwide from Nielsen plus local data from Eastlan than to buy Nielsen's bundle, the panel concluded, Cumulus had "no choice at all." *Id.* at 32a. The panel stated that "antitrust law does not prohibit lawfully obtained monopolies from charging monopoly prices," but held that Nielsen's price nonetheless crossed the line. *Id.* at 34a. Like the district court, the panel at no point asked whether any price fell below any measure of Nielsen's costs.

As for the injunction itself, the panel acknowledged that a "prohibition on charging an 'unreasonable' price may be too ambiguous on its own," but affirmed on the ground that the presumption proviso made the injunction "sufficient[ly]" clear. *Id.* at 52a.

6. Nielsen petitioned for panel rehearing and rehearing en banc, which the court denied on August 18, 2026. *Id.* at 105a. Two weeks after the panel's decision—before the mandate had even issued—Cumulus moved in the district court to enforce the injunction. D. Ct. Docs. 187, 188. Nielsen made new standalone offers at less than half the price the panel had condemned, and Cumulus challenged their price, term, pricing methodology, and commercial justification. D. Ct. Docs. 194, 199, 206.

After an evidentiary hearing, the district court on September 9, 2026, granted the motion, directed Nielsen to make a new offer by the following afternoon, and imposed daily monetary sanctions for noncompliance. D. Ct. Docs. 242, 243. Nielsen appealed, and the Second Circuit has administratively stayed that order pending further proceedings. C.A. Doc. 20 (No. 26-2516). That stay reaches only the September 9 order; the underlying preliminary injunction remains in effect. *See id.*

REASONS FOR GRANTING THE PETITION

The courts of appeals are divided over whether a multiproduct seller's above-cost pricing—one price for a product standing alone, a discounted price for the bundle—can establish liability under Section 2 of the Sherman Act. The Sixth and Ninth Circuits read this Court's precedents to require proof that the pricing is the economic equivalent of selling below cost; the Second Circuit, following the Third, requires none. That conflict is entrenched, it is outcome-determinative here, and the percolation the United States urged the Court to await in 2004 is complete. The decision below also conflicts with this Court's antitrust precedents twice over: it condemns an above-cost price as coercive, contrary to this Court's rule confining price-based liability to predation, and it finds a tie where the seller imposed no condition, contrary to this Court's tying cases.

The question presented is exceptionally important to every multiproduct business in the economy, and it is a pure question of law that can be resolved now. The Court should grant certiorari, reaffirm that antitrust scrutiny of prices is confined to predation, and reject a theory of tying that requires no tie.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT.

The courts of appeals have taken conflicting positions on when a multiproduct seller's standalone-plus-bundle pricing violates the Sherman Act. The division reflects a disagreement about the meaning of this Court's antitrust precedents. Those precedents independently foreclose the Second Circuit's decision.

A. The courts of appeals are divided over whether an above-cost price can establish antitrust liability.

1. This Court has twice rejected the notion that a seller's prices being too high can itself constitute an antitrust violation. In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), a monopolist was accused of dealing with rivals on unfavorable terms, *id.* at 407, 410. The Court held that sort of claim beyond the scope of Section 2, explaining that the "mere possession of monopoly power, and the concomitant charging of monopoly prices," is the very mechanism by which the free market "attracts 'business acumen'" and "induces risk taking that produces innovation and economic growth." *Id.* at 407. In any event, the Court added, courts are "ill suited" to "act as central planners, identifying the proper price, quantity, and other terms of dealing"—and an antitrust rule requiring them to do so would be beyond their competence to administer. *Id.* at 408.

In *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009), the Court applied the same reasoning to reject "price-squeeze" claims—allegations that the gap "between [a defendant's] wholesale price and the retail price" leaves rivals no room to compete, *id.* at 449. The Court held that where a defendant has no antitrust "duty to deal," then it may "charge whatever wholesale price it would like," no matter how high, and its retail prices are unchallengeable no matter how low unless "predatory." *Id.* at 450–54. That necessarily foreclosed a price-squeeze claim, which is "nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level." *Id.* at 452. Where two prices are each "independently lawful, there is no basis for imposing antitrust liability" on their combination. *Id.* at 455; *see id.* at 457 ("Two wrong claims do not make one that is right."). As in *Trinko*, the Court also stressed the institutional difficulties with price-based claims lacking objective rules—firms would have "no safe harbor for their pricing practices," and liability would become "a moving target" impossible for courts to "aim[] at." *Id.* at 453.

These cases confirm that price-based liability is confined to prices that are too low. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the Court held that pricing is unlawful only if the plaintiff proves both that the prices fall "below an appropriate measure" of the defendant's costs and that the defendant had a "dangerous probability" of recouping its losses through later supracompetitive pricing, *id.* at 222–24. Above-cost price cutting, the Court explained, either "reflects the lower cost structure of the alleged predator"—i.e., competition on the merits—or "is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting." *Id.* at 223.

2. Two circuits have applied these precedents to the exact pricing structure at issue here—a standalone price alongside a discounted bundle—and concluded that they require a cost-based test.

In *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008), a dominant hospital system offered insurers bundled discounts across its services, and a smaller rival who offered fewer services contended that the discounts excluded it from the market, *id.* at 891–94. Reading *Brooke Group* to shield "above-cost pricing," the Ninth Circuit refused to condemn the discounts without a "cost-based rule," "lest we end up with a rule that discourages legitimate price competition." *Id.* at 896, 901, 906. The court adopted a "discount attribution" test, which attributes the "full amount" of the bundled discount to the product for which the seller faces competition, then asks whether the resulting price falls below the defendant's "incremental cost" to produce the product. *Id.* at 906. Anything above that line is legal, because a discount that an equally efficient rival could profitably match necessarily cannot "exclude" that rival from the market. *Id.*

The Sixth Circuit then adopted the *Cascade Health* test and applied it to the same type of tying claim presented here. In *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264 (6th Cir. 2015), Kodak charged higher prices for printer parts to customers who bought ink from its rival, but offered a discount for customers who bought Kodak's ink, *id.* at 267–69.[1] The plaintiff alleged that this price differential coerced customers into taking Kodak's ink. *Id.* The Sixth Circuit treated the claim as "the special case of a tie enforced solely through differential pricing," and held that "the tie is not unlawful unless the differential pricing is the economic equivalent of selling the

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[1] *Collins Inkjet* arose under Section 1 of the Sherman Act, not Section 2, but nothing in its holding turns on that. The Sixth Circuit drew the coercion requirement from this Court's tying cases, *see* 781 F.3d at 270 (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11–12 (1984)), and the panel below did the same, Pet. App. 32a–33a. Tying claims share their elements under either section, and the cost-based test addresses the element—coercion—common to both. Cumulus itself relied on *Collins Inkjet* below. *See* C.A. Doc. 69.1 at 34.

tied product below the defendant's cost." *Id.* at 272. Short of that line, offering customers "a better deal" than a rival can match is not a tie, but merely "price competition." *Id.* at 270–71. In both the Ninth and Sixth Circuits, then, above-cost pricing is legal as a matter of law—however steep the differential between a product's standalone and bundled prices.

3. The Third Circuit has adopted the opposite approach. In *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc), a 7–3 court upheld a monopolization verdict based on bundled rebates without requiring proof that any of the defendant's prices fell below any measure of cost; it was enough that a single-product rival could not "make a comparable offer." *Id.* at 155. The court expressly rejected the view that *Brooke Group* stands for "the proposition that a monopolist does not violate § 2 unless it sells below cost." *Id.* at 152. The dissent warned that the majority's decision "risk[ed] curtailing price competition." *Id.* at 179 (Greenberg, J., dissenting).

Time has vindicated the dissent. *LePage's* "remains the law of th[e] Circuit," but a later panel of that court observed that it "has been the subject of much criticism," *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 405 n.35 (3d Cir. 2016), and another recognized that it has "been undermined by intervening Supreme Court precedent," including *linkLine*, and so should be "interpret[ed] . . . narrowly" and not "extend[ed]," *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 274 n.11 (3d Cir. 2012). But because *LePage's* was decided en banc, no panel of the Third Circuit can correct it.

4. The decision below places the Second Circuit on the *LePage's* side of that divide. At no step of its analysis did the panel identify a measure of Nielsen's

costs, find that any price fell below one, or require Cumulus to prove as much. It located the requisite coercion in the differential between Nationwide's standalone price and its effective price within the bundle, then demanded that Nielsen justify that differential, faulting the standalone offer as "non-cost justified" without saying what a cost-justified price would be. Pet. App. 29a–30a, 32a–34a. The only bundled-pricing decision from another circuit the panel invoked was *LePage's* itself. *Id.* at 42a.

Indeed, the panel's rule reaches conduct that even *LePage's* does not. The Third Circuit condemned a structured rebate program that conditioned payments on purchases across multiple product lines. 324 F.3d at 154–55. The panel here condemned a mere price quotation—an uncountered offer for a standalone product, unattached to any other product or condition. Pet. App. 10a. In *LePage's*, the court at least concluded that a competitor was unable to "make a comparable offer," 324 F.3d at 155; here, the panel never even asked whether Eastlan could have. In the Second Circuit, a differential a court deems too "steep," Pet. App. 29a, is now unlawful coercion. In the Sixth and Ninth Circuits, the identical differential is lawful price competition unless it is the economic equivalent of selling below cost.

5. The conflict is entrenched, and further percolation will not resolve it. When 3M sought review in *LePage's*, the Court called for the views of the United States, and the government, noting that the caselaw was immature, recommended that the Court "await further development of the case law, and further insights from academic commentary, before attempting to devise a standard to govern an important business practice of currently uncertain exclusionary effect."

Brief for the United States as Amicus Curiae 15–16, *3M Co. v. LePage's Inc.*, 542 U.S. 953 (2004) (No. 02-1865). The Court took that advice and denied review. 542 U.S. 953 (2004).

The issue is now ripe for this Court's review. The lower courts have developed a mature body of law in this area. In the two decades since *LePage's*, the courts of appeals have examined bundled pricing from every angle. The Ninth Circuit canvassed the caselaw, the economic literature, and the *LePage's* decision itself before adopting its cost-based standard. *Cascade Health*, 515 F.3d at 896–910. The Sixth Circuit weighed the competing approaches and extended the cost-based standard to tying claims. *Collins Inkjet*, 781 F.3d at 270–75. The D.C. Circuit has noted that *LePage's* "has been roundly criticized," *FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1316 (D.C. Cir. 2011), and the Eighth and Tenth Circuits have likewise acknowledged the division in "approach," *Inline Packaging, LLC v. Graphic Packaging Int'l, LLC*, 962 F.3d 1015, 1030 (8th Cir. 2020); *see In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, 44 F.4th 959, 1002 (10th Cir. 2022).

Academic commentary is in as well. The Antitrust Modernization Commission—the bipartisan body Congress created to recommend improvements to the antitrust laws—studied bundled discounting, recommended a below-cost test resembling the Ninth Circuit's, and faulted *LePage's* for "discourag[ing]" firms from "offering procompetitive" bundled "discount[s]" and providing "no clear standards by which firms can assess whether their bundled rebates are likely to pass antitrust muster." Antitrust Modernization Comm'n, *Report and Recommendations* 94, 99 (2007). The leading antitrust treatise likewise endorses a cost-based test and rejects the *LePage's* approach. 3B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 749 (5th ed. 2022). Law review articles on the topic have proliferated. *See Church & Dwight Co.*, 665 F.3d at 1316–17 (surveying academic literature).

Every argument bearing on the proper standard has thus been ventilated. But the intervening decades have produced no convergence. And no court of appeals is poised to end the division. Only this Court can restore a uniform rule.

B. The decision below is egregiously wrong and squarely conflicts with this Court's precedents.

Certiorari is independently warranted because the decision below cannot be reconciled with this Court's cases—either the pricing precedents that frame the circuit conflict or the tying precedents that govern the claim Cumulus brought.

1. Start with the pricing precedents. The panel's theory of coercion rests on a judicial determination that a price was too high: Nielsen's standalone offer was, in the panel's words, so "exorbitant" that Cumulus had "no choice at all" but to accept the discounted bundle. Pet. App. 29a–30a, 32a. This Court's decisions place that determination outside the judicial realm. "As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *linkLine*, 555 U.S. at 448. A plaintiff who objects to a seller's price may prevail only by proving the price too low, and only within the strict limits *Brooke Group* imposes. *See supra* pp. 12–13. The panel recited the rule that monopoly pricing is lawful, Pet. App. 34a–35a, and then condemned an alleged monopolist's

price because the court considered it too high. No decision of this Court permits that result.

The panel reached that result, moreover, by way of a theory this Court has already rejected. Cumulus's complaint, reduced to its essentials, was that Nielsen's standalone and bundled prices, taken together, left Eastlan no room to compete for Cumulus's local-data business. Pet. App. 37a–40a, 87a–89a. No one contends that either price was unlawful on its own. That is just a price-squeeze claim in new clothes, foreclosed by *linkLine*: if "there is no duty to deal" and "no predatory pricing," then "a firm is certainly not required to price *both* of [its products] in a manner that preserves its rivals' profit margins." 555 U.S. at 452.

Nielsen owed Cumulus no duty to deal on particular terms and engaged in no predatory pricing. It was therefore under no obligation to price its products so as to leave room for Eastlan. The panel nonetheless imposed precisely that obligation, and enforced it by requiring Nielsen to justify its price rather than requiring Cumulus to prove any price below cost. In doing so, the panel improperly reversed the allocation of proof *Brooke Group* prescribes and "alchemize[d]" two lawful prices "into a new form of antitrust liability never before recognized by this Court." *linkLine*, 555 U.S. at 457. And it assigned the court the price-setting function this Court has said judges are poorly placed to perform.

2. The panel's "constructive tying" label does not change the analysis, because tying liability requires an actual *condition*. A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5–6 (1958). The "essential characteristic"

of an unlawful tie is the seller's use of its control over the tying product "to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish*, 466 U.S. at 12. Where the buyer remains "free to take either product by itself there is no tying problem." *Id.* at 11–12 n.17 (quotation marks omitted). This Court has steadily narrowed tying liability over the years, as economic learning has revealed the "procompetitive" uses of package selling. *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 35–38 (2006). At every turn, the conditioning requirement has served as the threshold, because without a condition, there can be no tie.

The panel recited that requirement too, but then read it out of the law. Nielsen conditioned nothing. It offered its products on a standalone basis, and Cumulus was free to take any of them by itself. That should end the tying inquiry. Under this Court's cases, an unconditioned standalone offer *defeats* such a claim. *See Jefferson Parish*, 466 U.S. at 11–12 n.17. The panel's answer was that Nationwide's standalone price was so high relative to its price within the bundle that the differential itself was "coercive." Pet. App. 32a–33a. But every bundled discount generates a differential; that is what a discount is. The panel's own arithmetic makes the point. The $1.2 million it treated as decisive is the amount by which Nielsen's bundle beat the combination of standalone Nationwide and Eastlan's local data. *Id*. The figure measures the margin by which Nielsen made the better offer. Under the panel's rule, the better the offer, the stronger the "coercion."

A rule that finds coercion whenever a court deems the differential too steep converts every discounted bundle into a presumptive tie, and every disappointed purchaser into a tying plaintiff. It severs tying liability from the one element that distinguishes a tie from a complaint about price—conditioning—and so returns the analysis to the price complaint this Court's decisions foreclose.

3. The panel purported to find support for its constructive-tying liability holding in two decisions, each more than half a century old. Neither is apt.

The panel first cited *United States v. Loew's Inc.*, 371 U.S. 38 (1962), for the proposition that this Court "recognized the power of price to perpetuate an unlawful (yet constructive) tying arrangement." Pet. App. 25a. *Loew's* did no such thing. *Loew's* involved an undisputed *express tie*—the film distributors there had been held liable for flatly "condition[ing] the sale of films" to TV stations "on the purchase of an entire package." *Loew's*, 371 U.S. at 42–43. As a *remedy* for that adjudicated express tie, the Court approved a prohibition on "noncost-justified" price differentials having "the effect of conditioning" one license on another. *Id.* at 52–54. But the Court cautioned that the pricing "practices" that the injunction barred "are acts which may be entirely proper when viewed alone" for liability purposes. *Id.*

In short, a remedy against adjudicated violators does not define what the Sherman Act forbids at the outset. The *Loew's* distributors had been adjudicated liable for an express tie before any court scrutinized their pricing. Here, on the other hand, Nielsen exempted Cumulus from the Network Policy before this suit was filed, and the constructive-tie holding rests on the price of the standalone offer. Pet. App. 32a–33a. The panel thus converted a decision about the breadth of permissible relief against proven violators into a freestanding theory of liability. The Second Circuit itself had previously rejected exactly that move, warning against "misplaced reliance on the remedy granted" in *Loew's* and emphasizing this Court's "careful dissociation" between permissible remedies on the one hand and conduct "prohibited by the Sherman Act in the first instance" on the other. *Am. Mfrs. Mut. Ins. Co. v. Am. Broad.-Paramount Theatres, Inc.*, 446 F.2d 1131, 1136–37 (2d Cir. 1971). The Second Circuit had it right in 1971 and is wrong now.

The panel's only other authority adds nothing. That case simply cited *Loew's* remedial discussion, found no constructive tie, and deemed it "impossible to determine" what cost considerations might even be relevant. *Am. Mfrs. Mut. Ins. Co. v. Am. Broad.-Paramount Theatres, Inc.*, 388 F.2d 272, 283–84 (2d Cir. 1967).

Moreover, whatever force *Loew's* may once have had, this Court's later tying decisions have removed it. *Loew's* issued in an era when the Court believed ties "serve hardly any purpose beyond the suppression of competition"—a view the Court has since repeatedly "rejected," including by condemning the *Loew's* analysis in particular. *Ill. Tool Works*, 547 U.S. at 36, 42–43 (quotation marks omitted). And *Loew's* predates by more than three decades the pricing decisions—*Trinko*, *linkLine*, and *Brooke Group*—that now confine antitrust scrutiny of prices to predation. The panel's holding thus rests on a 1962 remedial ruling whose premises this Court has abandoned and whose extension this Court's antitrust precedents since 1993 forbid.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT, AND THIS CASE IS AN IDEAL VEHICLE.

The decision below reaches far beyond radio ratings. It casts a shadow over procompetitive pricing practices used throughout the economy; it makes federal courts the ongoing supervisors of commercial rates; and enforcers and plaintiffs are already invoking it in antitrust litigation of national consequence. This case is also the ideal vehicle to address those problems, because the panel definitively resolved the legal question presented.

1. The decision threatens commonplace pricing practices. Multiproduct firms throughout the economy sell products both separately and in packages, offer volume and bundle discounts, and negotiate different prices with different customers. *See Cascade Health*, 515 F.3d at 903 (noting the "endemic nature of bundled discounts in many spheres of normal economic activity"). Those practices often account for joint costs, economies of scope, customer size, expected usage, and ordinary price competition—and this Court has long protected them. There is "nothing inherently anticompetitive about packaged sales," *Jefferson Parish*, 466 U.S. at 25, and price cutting is "the very essence of competition," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990).

The decision below places all of those practices under a cloud. Every genuine bundled discount creates a spread between the package price and the components' standalone prices, yet the panel articulated no objective rule for when that spread becomes "steep" enough to be "coercive." Pet. App. 29a–34a. And because the panel measured coercion partly by the price Nielsen's *competitor* charges, *id.* at 32a–33a, a firm's own unchanged prices become more or less lawful as its rival changes prices—even when the competitor's price is invisible to the seller. Worse, the panel's rule protects rivals in proportion to their inefficiency. The higher a competitor's quote, the more "coercive" the seller's prices become. No firm can price around a rule like that.

A business facing such uncertainty has two safe responses: raise the package price to shrink the differential or stop offering standalone products altogether. Either response withdraws lower prices and greater choice from customers. This Court has warned that condemning practices that lower prices is "especially costly," *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) (quotation marks omitted), because "[t]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition," *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007) (quotation marks omitted). A liability rule with no cost-based test therefore "chill[s] the very conduct the antitrust laws are designed to protect." *Cascade Health*, 515 F.3d at 903 (quoting *Weyerhaeuser*, 549 U.S. at 320).

2. The decision also commits federal courts to continuing rate administration. Under the panel's theory, liability turns on whether the differential between a product's standalone price and its price

within a bundle is too steep—a question with no objective answer once untethered from cost. So any court applying it must decide, transaction by transaction, when a lawful discount becomes unlawful coercion. And given the absence of any objective standard, the most likely remedy is the same one entered here: an injunction forbidding "commercially unreasonable" pricing, with the meaning of that command left for later. A business under that regime cannot know its antitrust exposure until a court rules on its latest price.

This case shows what that looks like in practice. The enforcement proceedings below produced an evidentiary hearing on the price, term, and methodology of Nielsen's new offers, as well as an order—now administratively stayed—compelling Nielsen to make another offer by the next afternoon on pain of daily fines. *See supra* pp. 10–11. And because the injunction provides no rule for what the next offer must be, the next offer will result in another motion asking a federal court to scrutinize its substantive terms. Every price Nielsen quotes is now a litigation event. That is the supervisory role this Court has repeatedly concluded federal judges cannot competently perform and "should never aspire to." *NCAA v. Alston*, 594 U.S. 69, 103 (2021); *see Trinko*, 540 U.S. at 408; *linkLine*, 555 U.S. at 452–53.

3. The decision is already being invoked beyond this case. Within days of the ruling, a coalition of 34 state Attorneys General notified the court presiding over the United States' monopolization suit against Live Nation that the Second Circuit had held that demanding "an exorbitant price" for a product can "constitute[] an illegal tie." Letter re: Suppl. Auth. at 1, *United States v. Live Nation Ent., Inc.*, No. 24-cv-3973

(S.D.N.Y. July 22, 2026), ECF No. 1566. The same day, plaintiffs' counsel invoked the decision in opposing summary judgment in the Google advertising-technology litigation, arguing that it "underscores the breadth of conduct that may fulfill the coercion element of a tie." Notice of Suppl. Auth. at 1, *In re Google Digital Advert. Antitrust Litig.*, No. 21-md-3010 (S.D.N.Y. July 22, 2026), ECF No. 1910. Respondent's own counsel celebrates the decision as "a landmark appellate victory" that "recognized constructive tying as a viable theory of liability under Section 2 of the Sherman Act." Press Release, Hogan Lovells Cadwalader, *Hogan Lovells Cadwalader Secures Landmark Second Circuit Antitrust Victory for Cumulus Media* (July 14, 2026), https://www.hlc.com/en/news/hogan-lovells-cadwalader-secures-landmark-second-circuit-antitrust-victory-for-cumulus-media.

Enforcers and plaintiffs, in short, are reading the decision as establishing a freestanding rule that an "exorbitant" standalone price can itself supply a tie. If the theory reached ticketing and advertising technology within days, it will soon touch every multiproduct industry. However those cases are resolved, the question presented is recurring—and every multiproduct seller will now think twice before discounting deeply, knowing that an above-cost discount can become a tie whenever it beats a rival's price the seller never saw. And every court that entertains the theory will go through a rate-setting saga like the one unfolding below.

4. Finally, this case is the ideal vehicle. The panel resolved the question presented as a question of law. It held "as a matter of law" that constructive tying through pricing is cognizable under Section 2—a holding that no development on remand can unsettle and

that now binds every court in the Second Circuit. Pet. App. 54a. The question was pressed at every stage below, *id.* at 25a, and the choice of rule is dispositive. Cumulus made no below-cost allegation as to either the standalone price or the bundle, so under the Sixth and Ninth Circuits' test, judgment would enter for Nielsen. And the injunction remains in force. It runs for the "pendency of this litigation," *id.* at 101a, and governs every offer Nielsen makes to Cumulus—as the enforcement order now on appeal confirms. That second appeal concerns the enforcement order alone. Nothing decided there can disturb the panel's holding, which is now the law of the Circuit.

The preliminary posture is no obstacle. This Court has granted certiorari to resolve the legal questions underlying preliminary injunctions in antitrust cases, *see California v. Am. Stores Co.*, 495 U.S. 271, 275–76 (1990), and it regularly does so elsewhere, *see, e.g.*, *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 377–78 (2024); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 673–74 (2020); *Trump v. Hawaii*, 585 U.S. 667, 681–82 (2018). Nor should the Court await a final judgment, because there may never be one. A theory that requires no cost evidence can—as happened here—result in injunctions in weeks, and a defendant enjoined from "unreasonable" pricing will face enormous pressure to settle rather than litigate under judicial rate supervision backed by the threat of contempt. If the Court does not review this decision, it may not soon see another.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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