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 WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF LAW AND ECONOMICS SCHOLARS
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER

R. Benjamin Sperry
Counsel of Record
INTERNATIONAL CENTER FOR LAW AND ECONOMICS
1104 NW 15th Ave, Ste 300
Portland, OR 97209
(814) 724–5659
bsperry@laweconcenter.org

Attorney for Amici Curiae

OCTOBER MMXXVI

United States Commercial Printing Company • www.uscpc.us • (202) 866-8558

TABLE OF CONTENTS

Table of Authorities iii

Interest of *Amici Curiae* 1

Introduction and Summary of the Argument 1

Argument 5

I. The Panel's "Exorbitant Price" Criterion Is Not a Workable Pricing Standard for Either Sellers or Courts 5

A. Every Bundled Discount Creates a Gap Between Standalone and Bundle Prices, and the Panel Identified No Measure of When a Gap Becomes Coercion 6

B. When Products Share Costs, "Cost-Justified" Has No Determinate Value .. 9

C. The Courts Below Used Benchmarks That Measure Prices, Not Costs 10

II. The Question Cannot Await a Final Judgment Because a Theory That Requires No Cost Evidence Expedites Injunctions That Require Price Supervision Indefinitely 11

III. The Decision Makes District Courts Price Regulators and Hands Them a Cost-Allocation Choice That an Expert Agency Needed a National Rulemaking to Make ... 14

A. The Panel Made a District Court the Rate Regulator That *Trinko* and *linkLine* Reject 14

B. Allocating Shared Costs Is a Policy Choice, as This Court's Review of the FCC's Pricing Rules Shows 15

IV. The Decision Below Is Wrong Because It Misreads the Economics of Bundled Pricing 17

A. The Decision Below Deepens the Circuit Split Because a Bundled Discount, by Definition, Means That the Prices of the Products in the Bundle, Summed, Are Higher Than the Price of the Bundle . 18

B. The Circuits Are Divided Between Those That Require an Objective, Cost-Based Showing and Those That Impose No Price-Cost Condition 19

C. A Cost-Based Rule Makes the Tradeoff This Court Accepted in *Brooke Group*, and the Conditions the Government Identified in 2004 Have Been Met 21

Conclusion 23

Appendix A—List of *Amici Curiae* ..... App. 1

TABLE OF AUTHORITIES

Cases

3M Co. v. *LePage's Inc.*,
542 U. S. 953 (2004) 22

American Mfrs. Mut. Ins. Co. v. *American Broadcasting-Paramount Theatres, Inc.*,
388 F. 2d 272 (CA2 1967) 17

Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*,
509 U. S. 209 (1993) 2, 5, 17, 19, 21–23

Cascade Health Solutions v. *PeaceHealth*,
515 F. 3d 883 (CA9 2008) 2, 6, 19, 21

Collins Inkjet Corp. v. *Eastman Kodak Co.*,
781 F. 3d 264 (CA6 2015) 2, 8, 18–19

LePage's Inc. v. *3M*,
324 F. 3d 141 (CA3 2003) 20, 22–23

National Collegiate Athletic Assn. v. *Alston*,
594 U. S. 69 (2021) 15

Pacific Bell Telephone Co. v. *linkLine Communications, Inc.*,
555 U. S. 438 (2009) 2, 4, 14–15

Smyth v. *Ames*,
169 U. S. 466 (1898) 16

Town of Concord v. *Boston Edison Co.*,
915 F. 2d 17 (CA1 1990) 4

United States v. *Borden Co.*,
370 U. S. 460 (1962) 17

United States v. *Loew's Inc.*, 371 U. S. 38 (1962) 17

Verizon Communications Inc. v. *FCC*, 535 U. S. 467 (2002) 4, 16

Verizon Communications Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398 (2004) 2, 4, 14–15

Weyerhaeuser Co. v. *Ross-Simmons Hardwood Lumber Co.*, 549 U. S. 312 (2007) 21

ZF Meritor, LLC v. *Eaton Corp.*, 696 F. 3d 254 (CA3 2012) 22

Statutes and Regulations

Clayton Act § 4, 15 U. S. C. § 15(a) 12

Robinson-Patman Act 17

Sherman Act 14

Sherman Act § 1 19

Sherman Act § 2 13

Telecommunications Act of 1996 15

47 CFR § 51.505(a), (c)(1) 16

Other Authorities

Adams & Yellen, Commodity Bundling and the Burden of Monopoly, 90 Q. J. Econ. 475 (1976) 18

P. Belleflamme & M. Peitz, Industrial Organization: Markets and Strategies (2010) 6

Brief for the United States as Amicus Curiae, *3M Co.* v. *LePage's Inc.*, No. 02–1865 (2004) 22

D. Carlton & J. Perloff, Modern Industrial Organization (4th ed. 2005) 6–7, 18

Carlton & Waldman, The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries, 33 RAND J. Econ. 194 (2002) 8

Crane, Multiproduct Discounting: A Myth of Nonprice Predation, 72 U. Chi. L. Rev. 27 (2005) 20

Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1 (1984) 21

Elhauge, Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory, 123 Harv. L. Rev. 397 (2009) 22

Evans, The Antitrust Economics of Multi-Sided Platform Markets, 20 Yale J. Reg. 325 (2003) 9

Faulhaber, Cross-Subsidization: Pricing in Public Enterprises, 65 Am. Econ. Rev. 966 (1975) 9

Greenlee, Reitman, & Sibley, An Antitrust Analysis of Bundled Loyalty Discounts, 26 Int'l J. Indus. Org. 1132 (2008) 22

Lambert, Evaluating Bundled Discounts, 89 Minn. L. Rev. 1688 (2005) 20

Polinsky & Shavell, The Uneasy Case for Product Liability, 123 Harv. L. Rev. 1437 (2010) 13

Stigler, *United States* v. *Loew's Inc.*: A Note on Block-Booking, 1963 Sup. Ct. Rev. 152 17

Stremersch & Tellis, Strategic Bundling of Products and Prices: A New Synthesis for Marketing, 66 J. Mktg. 55 (2002) 6

Yang, Nested Bundling, 115 Am. Econ. Rev. 2970 (2025) 6–7

INTEREST OF AMICI CURIAE[1]

Amici are scholars of antitrust law and economics at leading universities and research institutions across the United States. Their names, titles, and academic affiliations are listed in the Appendix. All possess relevant expertise and experience in antitrust law and economics.

Amici share an interest in promoting the public interest through a body of antitrust law that remains grounded in sensible rules informed by sound economic analysis. That includes advising against standards that courts are ill-suited to apply and against decisions that fail to consider the procompetitive and proconsumer benefits of bundling and bundled discounts, as well as their potential costs, in context.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Nielsen did not appeal the District Court's ruling that its earlier policy of selling Nationwide only with local data was an unlawful express tie. App. to Pet. for Cert. 23a. This petition concerns the later standalone offer, which the panel treated as continued enforcement of that policy through a "constructive tie."

---

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Notification pursuant to and as required by this Court's Rule 37.2 has been given to all parties' counsel of record.

Id., at 29a–30a. The distinction matters. The ruling against that requirement does not tell a court when a price for Nationwide alone is high enough to impose the same requirement in effect. The panel relied on the fact that buying Nationwide from Nielsen and local data from Eastlan would have cost Cumulus $1.2 million more than Nielsen's bundle. *Id.*, at 32a. That comparison shows which offer was less expensive. By itself, it does not establish whether the discount excluded rivals through a mechanism other than competition on price. The question is what additional showing courts should require before treating that price difference as coercive.

Amici agree with petitioner that the decision below conflicts with the Ninth Circuit's decision in *Cascade Health Solutions* v. *PeaceHealth*, 515 F. 3d 883 (CA9 2008), and with the Sixth Circuit's decision in *Collins Inkjet Corp.* v. *Eastman Kodak Co.*, 781 F. 3d 264 (CA6 2015), and that it cannot be reconciled with this Court's decisions in *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398 (2004), *Pacific Bell Telephone Co.* v. *linkLine Communications, Inc.*, 555 U. S. 438 (2009), and *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U. S. 209 (1993).

The unchallenged ruling on Nielsen's earlier policy limits what this case can resolve. But the injunction also restricts the price of the later standalone offer, making the standard for evaluating that offer consequential. App. to Pet. for Cert. 100a–101a, 102a–103a. *Amici* write to explain, as a matter of economics, why the panel's pricing standard cannot

distinguish exclusion from price competition, why it turns district courts into price regulators, why its costs arrive long before any final judgment, and why the Court should require an objective showing based on the seller's costs.

The panel determined Nielsen's standalone price was "exorbitant" and "non-cost justified" relative to its bundle. App. to Pet. for Cert. 30a. Every bundled discount creates a gap between the standalone and bundle prices. Where a bundle is otherwise lawful, adding a standalone option does not make it unlawful merely because buyers prefer the bundle. But the availability of that option does not establish that the underlying bundle is lawful. Courts therefore need a standard that distinguishes a discount from a price condition that excludes rivals. Nielsen's national and local ratings share much of the cost of the same local surveys, and no economic principle yields a single correct division of the shared cost between the products. That makes "cost justification" for a price difference a different inquiry from whether the effective price of the tied product covers its incremental cost. The benchmarks the courts below used were other prices, not costs. And "exorbitant" supplies no measurable threshold for liability.

Because the panel's theory does not require the plaintiff to show costs, it can produce mandatory injunctions in short order while requiring court supervision of prices with no known end date. The case below illustrates the problem. Cumulus obtained an injunction ten weeks after filing suit, and the District Court has since rejected Nielsen's subsequent offers in an order now stayed pending appeal. State

enforcers and private plaintiffs began citing the decision within days. Pet. for Cert. 25–26. Sellers facing allegations of unlawful bundled discounts will have every reason to settle, so the question, and the circuit conflict, are not likely to reach this Court often, or to be presented as cleanly as they are here.

The decision below also assigns to district courts tasks that they are ill-suited to perform. To mandate a division of shared costs among products is a policy choice. When Congress required cost-based prices for telephone network elements, the Federal Communications Commission needed a national rulemaking to make that choice, and this Court reviewed the result in *Verizon Communications Inc.* v. *FCC*, 535 U. S. 467 (2002). The decision below leaves the same kind of choice to a single district court on an expedited record. This Court has, moreover, "repeatedly emphasized the importance of clear rules in antitrust law." *linkLine*, 555 U. S., at 452; see also *Town of Concord* v. *Boston Edison Co.*, 915 F. 2d 17, 22 (CA1 1990) (Breyer, C. J.) (antitrust rules "must be clear enough for lawyers to explain them to clients"). Indeed, courts are "ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'" *linkLine*, 555 U. S., at 452 (quoting *Trinko*, 540 U. S., at 408).

Finally, the panel's pricing standard does not distinguish a discount that attracts customers from a price condition that excludes rivals. The panel also upheld findings that Nielsen's Network Policy impeded Eastlan's access to large broadcasters. App. to Pet. for Cert. 37a–39a. It carried those effects

forward to the standalone offer because it treated that offer as continued enforcement of the policy. *Id.*, at 39a. That reasoning makes the standard for evaluating the later offer central. A price gap alone cannot supply the missing distinction. The Sixth and Ninth Circuits require a showing tied to the seller's costs in the pricing practices they addressed. The Court should require an objective, cost-based showing here. Such a rule may permit some exclusionary conduct to escape liability, but this Court accepted that tradeoff in *Brooke Group* because arbitrary condemnation of price cuts deters price competition.

ARGUMENT

The panel's pricing standard would govern bundled offers throughout the economy. Its standard gives sellers and courts nothing to measure. Its costs fall on sellers at the preliminary-injunction stage, before any court decides the case on the merits. And it gives district courts a price-setting role that this Court has refused to assign them. It also misreads the economics of bundled pricing and deepens a conflict among circuits. Each reason supports review.

I. The Panel's "Exorbitant Price" Criterion Is Not a Workable Pricing Standard for Either Sellers or Courts

The panel's test of coercion has two parts. A standalone price must be "exorbitant" relative to the bundle, and the difference between the two prices must be "non-cost justified." App. to Pet. for Cert. 30a, 33a–34a. The first part turns on the size of the gap between the standalone and bundle prices. The

second turns on the seller's costs. Economics gives a court no way to answer either question as the panel framed it, and the comparisons the courts below used in place of an answer do not measure what the test asks about.

A. Every Bundled Discount Creates a Gap Between Standalone and Bundle Prices, and the Panel Identified No Measure of When a Gap Becomes Coercion

Bundled pricing is among the most common pricing practices in the economy. A 2025 article in the *American Economic Review* describes tiered bundles, in which each more expensive package includes everything in the cheaper ones, as "widely adopted across various industries, including streaming services (e. g., Netflix), software companies (e. g., Slack), e-commerce platforms (e. g., Shopify), and most recently AI services (e. g., OpenAI)." Yang, Nested Bundling, 115 Am. Econ. Rev. 2970 (2025). Marketing scholars open their synthesis of the subject with the observation that "[b]undling is pervasive in today's markets." Stremersch & Tellis, Strategic Bundling of Products and Prices: A New Synthesis for Marketing, 66 J. Mktg. 55 (2002). Leading industrial-organization textbooks address it, and one devotes a full chapter to it. See*, e. g.*, D. Carlton & J. Perloff, Modern Industrial Organization 324–330 (4th ed. 2005); P. Belleflamme & M. Peitz, Industrial Organization: Markets and Strategies ch. 11 (2010). The Ninth Circuit adopted its cost-based test in part because of "the endemic nature of bundled discounts in many spheres of

normal economic activity." *Cascade Health*, 515 F. 3d, at 903.

Most of these sellers practice what economists call mixed bundling. They both offer each product separately *and* offer the products together at a lower combined price. Carlton and Perloff illustrate the practice with a restaurant that sells halibut and pie for $8 each, and a bundle of both for $12. Carlton & Perloff, Modern Industrial Organization, at 325. Each dish ordered as a separate course is priced at two-thirds the price of the pair. The restaurant sets those prices because its customers value the two dishes differently, not to drive a rival out of business—nothing in the example depends on a rival. *Ibid.* A large gap between standalone and bundle prices is the ordinary result of selling to customers with different tastes.

The economics literature also shows why no court can say how large a gap is too large. Yang reports that "relatively little is known" about how a multiproduct seller should price its bundles "because characterizations of optimal bundling are generally intractable." Yang, 115 Am. Econ. Rev., at 2970. Even for a seller of two goods whose values to customers are independent and additive, the profit-maximizing pricing scheme "remains unknown except for a few special cases." *Ibid.* The literature's "general lesson," Yang observes, "is that some form of bundling is generically profitable, but characterizing optimal bundling strategies turns out to be very difficult." *Id.*, at 2975. If economists who specialize in the question cannot specify the right gap between a standalone price and a bundle price, even from the firm's

perspective, a district court has no benchmark for declaring a particular gap "exorbitant."

The panel's main evidence of coercion was that standalone Nationwide from Nielsen plus local data from Eastlan would have cost Cumulus $1.2 million more than Nielsen's bundle. App. to Pet. for Cert. 32a. That figure shows that Nielsen's offer was the lower one. It does not show that a rival as efficient as Nielsen could not match it. The figure grows when Nielsen cuts its bundle price, when Eastlan raises its local ones, or when Nielsen raises its standalone price. By itself, the figure cannot distinguish a better offer from a penalty on buying separately. The Sixth Circuit rejected this inference. That a seller "appeared to be offering a better deal to customers" than its rival "does not in itself constitute an unlawful tying arrangement," and a standard resting "solely" on the rival's product being "significantly more expensive" is "a standard that could too easily treat fair price competition as *per se* illegal." *Collins Inkjet*, 781 F. 3d, at 270–271. Economists who study ties enforced through price ask instead whether the effective price of the tied product is so low that "alternative producers of the complementary product cannot operate profitably." Carlton & Waldman, The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries, 33 RAND J. Econ. 194, 197 (2002). The panel did not ask whether Nielsen's prices left Eastlan, or an equally efficient rival, unable to operate profitably. It relied instead on the effects of the Network Policy. App. to Pet. for Cert. 39a.

B. When Products Share Costs, "Cost-Justified" Has No Determinate Value

The second half of the panel's test asks whether the gap between Nielsen's prices was "cost justified." App. to Pet. for Cert. 30a, 33a–34a. That question has no single answer when two products are built from shared inputs. Nielsen's Nationwide report is compiled entirely from its surveys of listeners in more than 270 local markets. *Id.*, at 6a. The costs of both its Nationwide report and its local ones are incurred market by market, in the local surveys. Pet. for Cert. 5.

Two cost measures describe different production choices. The first is incremental cost, the additional cost of producing Nationwide once the local surveys have been conducted. That is roughly the cost of compiling and delivering the national report. The second is the standalone cost, the cost of producing Nationwide if Nielsen sold nothing else. That includes the full cost of surveying every local market. See Faulhaber, Cross-Subsidization: Pricing in Public Enterprises, 65 Am. Econ. Rev. 966 (1975). Neither measure determines how much of the shared survey cost should be reflected in Nationwide's price. Economists have long recognized that such allocations are arbitrary. As one leading antitrust economist put it, "the allocation of joint costs to a particular product is arbitrary and . . . there is no economic rationale behind any proposed formula for doing so." Evans, The Antitrust Economics of Multi-Sided Platform Markets, 20 Yale J. Reg. 325, 345 (2003). That difficulty concerns justifying a price difference by allocating shared

costs. Asking whether the effective price of the tied product covers its incremental cost is a different inquiry.

The courts below offered no allocation rule. The District Court faulted Nielsen for making "no effort to quantify" its costs or "correlate them with its price for standalone Nationwide," App. to Pet. for Cert. 92a, without saying what a correlated price would be. The resulting injunction forbids a "commercially unreasonable rate" and leaves the meaning of that phrase to later proceedings. *Id.*, at 51a, 102a–103a.

C. The Courts Below Used Benchmarks That Measure Prices, Not Costs

Lacking any cost measure, the courts below compared Nielsen's standalone offer with other prices. The District Court found the offer "ten times more than what Cumulus was paying for Nationwide under its existing contract." App. to Pet. for Cert. 33a. The earlier contract assigned part of a package price to Nationwide. That allocation did not establish a separately negotiated price for the report. Pet. for Cert. 8; App. to Pet. for Cert. 71a. The District Court itself found it "credible" that the prior contract "constituted a bundled rate for all included markets and services." App. to Pet. for Cert. 99a. Dividing a bundle price between its components is the same allocation problem in another form. The courts also found the offer "150% higher than the highest price Nielsen had ever previously charged for the product," App. to Pet. for Cert. 33a, but Nielsen states that no customer situated like Cumulus buys Nationwide alone. Pet. for Cert. 8.

Those differences between customers matter. The policy that gave rise to this dispute applied only to the 12 customers that operate both a national network and local stations. App. to Pet. for Cert. 8a, n. 1. Because Nationwide is assembled from the local surveys, a complete Nationwide report has value to such a customer partly as a substitute for the local data it would otherwise buy. See *id.*, at 8a. The value of standalone Nationwide to that customer is therefore different from its value to a network that owns no stations. Whether a price gap of a given size is "exorbitant" for that customer depends on how much of the local information it can draw from the national report. That is a question about demand that no court can answer from a preliminary-injunction record, and the panel's test requires courts to answer it every time.

II. The Question Cannot Await a Final Judgment Because a Theory That Requires No Cost Evidence Expedites Injunctions That Require Price Supervision Indefinitely

A cost-based rule screens out weak pricing claims early, because a plaintiff who cannot allege a below-cost price has no claim. The panel's rule has no such screen. A plaintiff need only point to a gap between a standalone price and a bundle price and call it too large. The seller must then defend its prices with cost evidence on whatever schedule the plaintiff's motion sets.

This case shows how quickly that sequence runs. Cumulus filed suit on October 16, 2025, and moved for a preliminary injunction the same day. App. to Pet.

for Cert. 57a. After limited discovery and a three-day hearing, the District Court entered a mandatory injunction on December 30. Pet. for Cert. 7. The injunction bars Nielsen from charging "a commercially unreasonable rate" for standalone Nationwide and treats as presumptively reasonable any rate at or below the highest 2026 rate Nielsen charges any broadcaster. App. to Pet. for Cert. 102a–103a.

The enforcement proceedings that followed show what such an injunction means in practice. Cumulus sought enforcement two weeks after the panel ruled, while issuance of the mandate was still pending. Pet. for Cert. 10. Nielsen's replacement offers priced standalone service at less than 50 percent of the amount the panel had condemned. *Ibid.* Cumulus disputed the prices and the proposed contract's term, pricing method, and commercial justification. *Ibid.* Following an evidentiary hearing, the District Court ruled for Cumulus. It required a revised offer by the next afternoon and imposed monetary sanctions for each day of noncompliance. *Ibid.* The Second Circuit has stayed that order pending an expedited appeal. *Id.*, at 11. Under the injunction, every price Nielsen quotes to Cumulus is subject to review by a federal court, and the injunction runs for the "pendency of this litigation." App. to Pet. for Cert. 103a–104a.

The theory will not stay confined to this case. Section 4 of the Clayton Act awards a prevailing plaintiff three times its damages plus attorney's fees. 15 U. S. C. §15(a). A liability rule that requires no showing of below-cost pricing and turns on a court's

view of whether a price gap is too large is attractive to any plaintiff that buys from a multiproduct seller. Within days of the decision, the District of Columbia and a coalition of 33 state attorneys general cited it in the United States' monopolization suit against Live Nation, and private plaintiffs invoked it in the Google advertising-technology litigation. Pet. for Cert. 25–26. Respondent's own counsel described the decision as "a landmark appellate victory." Pet. for Cert. 26.

The same features that make the theory attractive to plaintiffs make it unlikely to reach this Court again on a clean record. A seller enjoined from charging an "unreasonable" price, whose every new offer can be challenged on pain of contempt, has strong reasons to settle rather than litigate to final judgment. This case presents the question as one of law. The panel held "as a matter of law" that constructive tying through pricing can violate §2, App. to Pet. for Cert. 54a, and Cumulus has never contended that any price was below cost, Pet. for Cert. 2. Few future cases will separate the legal question from the facts so cleanly.

Delay has costs of its own. A liability rule affects transactions before any lawsuit is filed: sellers set prices that reflect the liability costs they expect to bear. See Polinsky & Shavell, The Uneasy Case for Product Liability, 123 Harv. L. Rev. 1437, 1459 (2010). Under the decision below, every multiproduct seller in the Second Circuit must now ask how a court might view the gap between its standalone and bundle prices. A seller with power over one product cannot avoid the rule by refusing to sell that product separately, because the refusal is itself deemed a tie. See App. to Pet. for Cert. 23a, 86a. What it can do is narrow the

gap, by raising the bundle price, lowering the standalone price, or ending the discount altogether. Each of these shrinks or removes the discount, and the buyers the discount attracted buy less. If the standalone markup helped pay for shared inputs, the seller must also raise other prices or spend less on those inputs. These effects will continue for as long as the question remains open.

III. The Decision Makes District Courts Price Regulators and Hands Them a Cost-Allocation Choice That an Expert Agency Needed a National Rulemaking to Make

This Court has declined to read the Sherman Act to make judges price regulators, because courts lack both the standards and the tools to set prices. The decision below requires district courts to set prices. It also requires them to do so by allocating shared costs among products, a task that even expert agencies with statutory mandates treat as a policy choice.

A. The Panel Made a District Court the Rate Regulator That *Trinko* and *linkLine* Reject

"The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system." *Trinko*, 540 U. S., at 407. Courts are "ill suited" to "act as central planners, identifying the proper price, quantity, and other terms of dealing." *Id.*, at 408. A pricing rule without objective content leaves firms with "no safe harbor for their pricing practices" and makes liability "a moving target."

linkLine, 555 U. S., at 453. The supervision of prices and terms is a role that federal judges "should never aspire to." *National Collegiate Athletic Assn.* v. *Alston*, 594 U. S. 69, 103 (2021).

The panel recited the first of those principles. App. to Pet. for Cert. 34a. It then held that Nielsen's price was unlawful because a court found it too high, and it affirmed an injunction that makes the District Court the arbiter of every future standalone price Nielsen offers to Cumulus. The panel's discussion of that injunction shows the problem in its own words. It did not decide whether a prohibition on "unreasonable" prices "may be too ambiguous on its own," relying on the safe harbor instead. *Id.*, at 52a. It also faulted Nielsen because it "failed to describe in its briefs or at oral argument what a more specific version of the district court's injunction would look like," treating that failure as evidence that the injunction was specific enough. *Id.*, at 52a–53a. The panel placed on the defendant the burden of supplying a pricing standard that the court itself could not articulate. A legal rule that cannot be articulated by the court applying it or the party bound by it is the kind of rule *Trinko* and *linkLine* foreclose.

B. Allocating Shared Costs Is a Policy Choice, as This Court's Review of the FCC's Pricing Rules Shows

The cost half of the panel's test requires a court to decide how much of Nielsen's shared survey costs the Nationwide report should bear. This Court has seen what that kind of decision requires. The Telecommunications Act of 1996 directed regulators to set cost-

based rates for incumbent carriers' network elements. The FCC defined the relevant cost as the long-run incremental cost of each element plus "a reasonable allocation of forward-looking common costs," which it defined as costs that "cannot be attributed directly to individual elements." *Verizon*, 535 U. S., at 496 (quoting 47 CFR § 51.505(a), (c)(1)).

Defining the costs to be shared did not settle how to share them. The FCC had to choose among allocation methods, and it barred one of them outright. It concluded that "an allocation methodology that relies exclusively on allocating common costs in inverse proportion to the sensitivity of demand for various network elements and services may not be used," because loading common costs onto the elements customers could least do without would raise the price of those bottleneck inputs and deter entry. *Id.*, at 516 (quoting FCC order). Economics supplied candidate methods, but the choice among allocation methods was a judgment about competitive effects, made by an expert agency acting under an express statutory mandate, on a national record, subject to court review.

The same opinion recounts how courts fared when they attempted cost-based rate review themselves. The "fair value" standard of *Smyth* v. *Ames*, 169 U. S. 466, 546 (1898), "proved to be a troublesome mandate," and ratemaking moved to specialized agencies as "this job became more complicated." *Verizon*, 535 U. S., at 477, 481. The decision below assigns the same kind of allocation to a single district court, on an expedited preliminary-injunction record, with no statute directing cost-based pricing and no rule for how the

allocation should be made.[2] The Second Circuit itself once recognized the difficulty. In the decision on which the panel relied, it found it "impossible on the record before us to determine whether ABC was justified in reverting to its higher . . . prices." *American Mfrs. Mut. Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 388 F. 2d 272, 283 (CA2 1967).[3]

IV. The Decision Below Is Wrong Because It Misreads the Economics of Bundled Pricing

Petitioner explains why the decision conflicts with this Court's pricing and tying precedents. Pet. for Cert. 18–22. Three points of economics reinforce that showing. The panel's "constructive tying" label does not change the pricing practice at issue. The Sixth and Ninth Circuits require an objective, cost-based showing before condemning the pricing practices they addressed, and the panel imposed no such condition. And a cost-based rule's errors are the kind this Court chose to accept in *Brooke Group*.

---

[2] The experience of courts with the cost-justification proviso of the Robinson-Patman Act, which requires a seller to justify price differences between customers by differences in cost, is to the same effect. See *United States* v. *Borden Co.*, 370 U. S. 460 (1962).

[3] The pricing practice at issue in *Loew's*, on which the panel relied, Pet. App. 25a–26a, has itself long been understood by economists as a form of price discrimination rather than an effort to extend market power from one product to another. See Stigler, *United States* v. *Loew's Inc.*: A Note on Block-Booking, 1963 Sup. Ct. Rev. 152.

A. The Decision Below Deepens the Circuit Split Because a Bundled Discount, by Definition, Means That the Prices of the Products in the Bundle, Summed, Are Higher Than the Price of the Bundle

A simple example shows why the label does not matter. Suppose a seller charges $100 for product A alone, $50 for product B alone, and $120 for both purchased together. A buyer of the bundle saves $30 compared with buying each product separately. One can label that a $30 discount on the bundle or a $30 premium on separate purchases. The prices are identical either way. Economists call the practice of offering, and pricing, both the bundle, as such, and its constituent products, "mixed bundling." Adams & Yellen, Commodity Bundling and the Burden of Monopoly, 90 Q. J. Econ. 475 (1976); Carlton & Perloff, Modern Industrial Organization, at 324–328. Calling the standalone price "exorbitant" and the arrangement a "constructive tie" describes the same three prices in different words.

The Sixth Circuit recognized as much. It treated a claim that price differences coerced customers into buying a bundle as "the special case of a tie enforced solely through differential pricing," and held that such a tie "is not unlawful unless the differential pricing is the economic equivalent of selling the tied product below the defendant's cost." *Collins Inkjet*, 781 F. 3d, at 272. Offering customers a better deal than a rival can match, the court explained, is price competition. *Id.*, at 270–271. Although *Collins Inkjet* arose under

§1, the coercion element it addressed is the same one the panel addressed here. Pet. for Cert. 14, n. 1. The Ninth Circuit left open whether its test governs a tying claim, *Cascade Health*, 515 F. 3d, at 916, n. 27, but the Sixth Circuit applied a cost-based test to precisely that claim. A price structure that is lawful in the Sixth Circuit unless it amounts to below-cost pricing can be unlawful in the Second Circuit whenever a court finds the gap too large. The tying label does not take this case outside the conflict.

B. The Circuits Are Divided Between Those That Require an Objective, Cost-Based Showing and Those That Impose No Price-Cost Condition

When a plaintiff's complaint is that a seller's prices are too attractive, this Court requires proof that the prices fall "below an appropriate measure" of the seller's costs. *Brooke Group*, 509 U. S., at 222. The Sixth and Ninth Circuits apply the same principle to bundled pricing. The Ninth Circuit counts the full bundle discount against the product on which the seller faces competition and asks whether the resulting price of that product is below the seller's incremental cost. *Cascade Health*, 515 F. 3d, at 906. The Sixth Circuit asks whether a price difference used to induce purchase of a bundle "is the economic equivalent of selling the tied product below the defendant's cost." *Collins Inkjet*, 781 F. 3d, at 272. In each case, a seller can tell before it sets its prices whether they are lawful, and a court can decide the question from evidence about cost rather than from its own view of whether a price gap is too large.

The Court can resolve the conflict among the Second, Third, Sixth, and Ninth Circuits in favor of a workable cost-based standard without endorsing every detail of the test applied by either the Sixth or the Ninth Circuit. The essential holding is that a court may not impose liability for bundled pricing without an objective showing based on the seller's costs. Two circuits require such a showing. The Third Circuit, under *LePage's*, and now the Second Circuit, impose no price-cost condition. Cf. *LePage's Inc.* v. *3M*, 324 F. 3d 141 (CA3 2003).

The decision below also goes further than the Third Circuit's condemnation of rebates payable only when customers purchase products from several lines. *LePage's*, 324 F. 3d, at 154–155. There, the Court of Appeals had at least found that the plaintiff could not "make a comparable offer." *Id.*, at 155. The panel here condemned a quoted price—a standing offer—for a standalone product and never asked whether a rival as efficient as Nielsen could match the bundled price. Pet. for Cert. 16. *LePage's* has been widely criticized for considering the breadth of the discounter's product line rather than the complaining rival's efficiency, which allows a less efficient rival to block discounts that benefit consumers. See*, e. g.*, Lambert, Evaluating Bundled Discounts, 89 Minn. L. Rev. 1688, 1722 (2005); Crane, Multiproduct Discounting: A Myth of Nonprice Predation, 72 U. Chi. L. Rev. 27, 29 (2005). The decision below has the same flaw without even *LePage's* limited inquiry into whether the rival could compete.

C. A Cost-Based Rule Makes the Tradeoff This Court Accepted in *Brooke Group*, and the Conditions the Government Identified in 2004 Have Been Met

A cost-based rule will not catch every bundled discount that harms competition. This Court accepted that limitation for single-product pricing in *Brooke Group*. Above-cost price cutting, the Court explained, either "reflects the lower cost structure of the alleged predator" or "is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting." 509 U. S., at 223. The Court has since repeated that "[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) (quoting *Brooke Group*, 509 U. S., at 226). The Ninth Circuit argued that *Brooke Group*'s safe harbor for above-cost discounts on a single product rests not on a theory "that above-cost pricing strategies can never be anticompetitive, but rather on a cost-benefit rejection of a more nuanced rule." *Cascade Health*, 515 F. 3d, at 904. The reasoning rests on a comparison of errors. A court that wrongly condemns a price cut deters other sellers from cutting prices, and that deterrence is difficult to reverse. A court that wrongly permits a discount leaves the market's own forces, including entry, to correct it. See Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1, 2–3 (1984). The panel's rule offers nothing to

weigh against those costs, because it supplies no measure of when a price gap becomes unlawful.

When 3M sought review of *LePage's*, the United States 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." Pet. for Cert. 16–17 (quoting Brief for the United States as *Amicus Curiae* 15–16, *3M Co.* v. *LePage's Inc.*, 542 U. S. 953 (2004) (No. 02–1865)). Both conditions have been met. Other Courts of Appeals have since addressed the question, see Pet. for Cert. 12–18, and the Third Circuit itself has said that "several of the bases on which [it] distinguished *Brooke Group*" in *LePage's* "have been undermined by intervening Supreme Court precedent, which counsels caution in extending *LePage's*." *ZF Meritor, LLC* v. *Eaton Corp.*, 696 F. 3d 254, 274, n. 11 (CA3 2012). Economic work since 2004 has identified when above-cost bundled discounts can exclude rivals and has proposed tests based on the seller's costs or the price it would charge without the challenged conduct. Greenlee, Reitman, & Sibley, An Antitrust Analysis of Bundled Loyalty Discounts, 26 Int'l J. Indus. Org. 1132, 1135, 1138 (2008); Elhauge, Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory, 123 Harv. L. Rev. 397, 468 (2009). None of these proposals measures coercion by the gap between standalone and bundled prices, as the panel did. Choosing among them requires the same comparison of errors that led this Court in *Brooke Group* to adopt a cost-based rule

despite the risk that some harmful above-cost pricing might go unremedied. 509 U. S., at 223. *LePage's* remains binding in the Third Circuit, and litigants continue to rely on it. The conflict will not resolve itself.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted.

R. Benjamin Sperry
Counsel of Record
INTERNATIONAL CENTER FOR LAW AND ECONOMICS
1104 NW 15th Ave., Ste. 300
Portland, OR 97209
(814) 724-5659
bsperry@laweconcenter.org

Attorney for Amici Curiae

OCTOBER 2026

Appendix A

List of *Amici Curiae*

Alden F. Abbott
Senior Research Fellow
Mercatus Center at George Mason University

Brian C. Albrecht
Chief Economist
International Center for Law & Economics

Daniel J. Gilman
Senior Scholar, Competition Policy
International Center for Law & Economics

Daniel A. Lyons
Professor of Law and Dean's Distinguished Scholar
Boston College Law School

Eric Fruits
Director of Economic Research,
International Center for Law & Economics
Adjunct Professor
Portland State University

Geoffrey A. Manne
President & Founder
International Center for Law & Economics
Visiting Professor of Law
IE University

Justin (Gus) Hurwitz
Senior Lecturer
University of Pennsylvania Carey Law School
Director of Law & Economics Programs
International Center for Law & Economics

Appendix A

Keith N. Hylton
William Fairfield Warren Distinguished Professor
Boston University
Professor of Law
Boston University School of Law

Michael Sykuta
Associate Professor of Economics
University of Missouri

Richard A. Epstein
Laurence A. Tisch Professor of Law
New York University

Thomas A. Lambert
Wall Chair in Corporate Law and Governance
University of Missouri, School of Law