No. 12-1045

In the Supreme Court of the United States

EATON CORPORATION,

Petitioner,

v.

ZF MERITOR LLC AND
MERITOR TRANSMISSION CORPORATION,

Respondents.

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

BRIEF OF THE HEALTHCARE SUPPLY CHAIN ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This Court has made clear that, "regardless of the type of antitrust claim involved," there can be no antitrust liability by virtue of a defendant's "pricing practices" when the defendant did not price below cost, because liability for above-cost discounts or rebates would chill competition. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-40 (1990). The Court has reiterated that price-cost test and applied it to a variety of antitrust claims. *See, e.g.*, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Here, the court of appeals imposed antitrust liability on petitioner Eaton Corporation based on purchase agreements that incentivized additional sales by giving customers above-cost rebates if they purchased specified percentages of their requirements from Eaton. The court of appeals refused to apply the price-cost test to uphold Eaton's facially non-mandatory above-cost conditional rebate agreements, instead deeming them unlawful "*de facto* partial exclusive dealing" arrangements. The First, Second, Sixth, Eighth, and Ninth Circuits, by contrast, have applied the price-cost test to reject antitrust challenges to comparable conditional-rebate agreements. The question presented is:

Whether the court of appeals erred in holding that conditional-rebate agreements can give rise to antitrust liability in the absence of any showing of below-cost pricing.

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INTEREST OF *AMICUS CURIAE*

The Healthcare Supply Chain Association (HSCA) is a trade association for group purchasing organizations (GPOs) in the healthcare industry. Through GPOs, healthcare providers such as hospitals, clinics, and physicians' offices voluntarily join together to buy supplies (everything from specialized surgical equipment to bandages) at prices that they typically cannot get on their own. Nearly every hospital in the United States belongs to at least one GPO.[1]

To reduce their members' supply costs, healthcare GPOs routinely negotiate contracts that base discounts on volume, participation levels, or the purchase of a particular product or products. For many small healthcare providers around the country, access to those discounts is vitally important to their mission (and to their bottom line). Indeed, it is why they join a GPO.

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[1] In accordance with Rule 37, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel have made any monetary contributions for preparing or submitting this brief. At least 10 days before the due date of this brief, counsel of record for all parties received notice of our intention to file the brief; the Clerk has counsels' written consents to our filing.

The Third Circuit's decision threatens to unravel those discounts and other similar forms of price competition by raising the specter of antitrust liability for suppliers that offer deep (but non-predatory) participation or volume discounts *and* for the healthcare providers that seek them. The resulting uncertainty will chill price competition—the very conduct that the antitrust laws are designed to encourage—and could result in potentially devastating consequences for GPOs and for the many healthcare providers that already face vanishing profit margins, a sputtering economy, and mounting regulatory burdens.

SUMMARY OF ARGUMENT

This Court has repeatedly held that above-cost discounts cannot lead to antitrust liability. *See Brooke Grp.*, 509 U.S. at 209; *linkLine*, 555 U.S. at 438; *Weyerhaeuser*, 549 U.S. at 312; *Atl. Richfield*, 495 U.S. at 328. The First, Second, Sixth, Eighth, and Ninth Circuits have assiduously applied that price-cost test to reject antitrust challenges to above-cost price reductions similar to Eaton's here.

Breaking with this Court's and those other circuits' decisions, the court below imposed antitrust liability on Eaton based on sales agreements that offered above-cost rebates to customers if they purchased specified percentages of their requirements from Eaton—rebates that are ubiquitous in many industries. To get to that result, the Third Circuit jettisoned the price-cost test and instead credited the plaintiffs' post-hoc concerns about the "non-price" terms of Eaton's contracts (which are not really "non-price" terms at all).

That decision jeopardizes the volume, participation, and market-share discounts that are commonplace in many industries, including in the healthcare industry. GPOs have negotiated for—and suppliers have been willing to offer—aggressive but non-predatory volume and market-share discounts precisely because *Brooke Group* and its progeny make clear that those price-reducing strategies alone cannot lead to antitrust liability. Under the Third Circuit's new regime, however—one where a plaintiff's post-hoc re-characterization of above-cost discounts as "non-price" terms can expose companies to treble damages—the clear guidance that the price-cost test has provided businesses will give way to uncertainty about the legality of a wide swath of common price-reducing strategies. That uncertainty will chill vigorous price competition. Prices will go up—forcing healthcare providers to pay more for necessary supplies and consumers to pay more for healthcare at a time when neither group can afford even an incremental rise in costs. And the burden will fall disproportionately on smaller providers because they rely most heavily on market-share discounts.

ARGUMENT

I. The Third Circuit's Decision Eviscerates the Price-Cost Test and Will Chill Vigorous Price Competition.

"[C]utting prices in order to increase business is the very essence of competition." *Brooke Grp.*, 509 U.S. at 226 (quoting *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 122 n.17 (1986)). In keeping with that bedrock principle, this Court has made clear that above-cost discounts or price reductions cannot lead to antitrust liability. *See Brooke Grp.*, 509 U.S. at 209; *linkLine*, 555 U.S. at 438; *Weyerhaeuser*, 549 U.S. at 312; *Atl. Richfield*, 495 U.S. at 339.

Before the decision below, five other circuits had applied that price-cost test to hold that above-cost price reductions similar to Eaton's here do not violate the antitrust laws—even in the presence of what the majority below deemed "non-price" terms (share-penetration targets, long-term agreements, and the like). *See Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442 (6th Cir. 2007) (en banc); *Virgin Atl. Airways Ltd. v. British Airways PLC,* 257 F.3d 256 (2d Cir. 2001); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983).

In a clean break from those decisions, the majority below upended the price-cost test and replaced it with an unwieldy framework under which the legality of pricing decisions doesn't turn on whether prices are predatory but on whether the "plaintiff is clever enough to claim that the non-price aspects of the defendant's pricing practices, not the prices themselves, were anticompetitive." *See* App. 124a (Greenberg, J., dissenting). With the lower court's roadmap in hand, a plaintiff doesn't need to be clever to avoid the price-cost test.

On the other hand, even the cleverest corporate counsel or business could not discern a clear rule from the decision below. In the Third Circuit's newly-created world—one where a plaintiff's speculative or feigned concerns about "non-price" harms are enough to saddle a defendant with costly antitrust litigation and potential treble damages—the clear guidance that the price-cost test has provided businesses will give way to uncertainty about the legality of many common (indeed, ubiquitous) forms of price competition. That uncertainty will chill vigorous price competition. Prices will go up, not down—a sure sign that the Third Circuit turned antitrust law on its head. *See Cargill,* 479 U.S. at 116 ("To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result. . . ."); *see also* App. 185a (Greenberg, J., dissenting) ("courts' erroneous judgments in cases such as this one do not come without a cost to the economy as a whole").

The resulting uncertainty could have crippling effects in the healthcare industry. Many healthcare providers are struggling to stay afloat (let alone to provide quality care) and depend on access to group discounts to continue offering healthcare services. Healthcare GPOs have solicited competitive bids and negotiated vigorously for non-predatory volume and participation discounts precisely because the price-cost test establishes that those price-cutting strategies are procompetitive and legal. The Third Circuit's decision will cause suppliers to think twice about (or even shrink back from) offering deep conditional discounts or rebates. Higher supply prices will produce cascading effects throughout the industry: Healthcare providers that *pay* more for supplies will *charge* more for goods and services, further driving up already skyrocketing healthcare costs for consumers. If this Court has made anything clear, it is that antitrust decisions should not sacrifice consumers' interests in this way. *See, e.g.*, *linkLine*, 555 U.S. at 451; *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 902-03 (2007).

A. Healthcare providers depend on the volume and participation discounts that GPOs secure.

Today, many healthcare providers in the United States operate on shrinking revenues and razor-thin margins. *See* Lisa Girion, *Half of hospitals in the red, study finds,* L.A. TIMES, Mar. 2, 2009, at C1 (reporting that 50 percent of hospitals lose money); *see also* Robert Weisman, *Hospitals strained in a changing landscape*, BOS. GLOBE, Sept. 8, 2012, at A1 (reporting that two dozen Massachusetts hospitals—more than a third of those in the State—lost money in 2011); Anemona Hartocollis, *Troubled New York Hospitals Forgo Coverage for Malpractice*, N. Y. TIMES, July 15, 2012, at A14 (explaining that many New York hospitals cannot afford to pay for malpractice insurance). GPOs help those and other providers pool their buying power to purchase supplies at lower prices than they normally can get on their own. This enables the providers to compete more effectively in providing healthcare services—which in turn is a boon to healthcare consumers. *See Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 610-11 (8th Cir. 2011) (describing GPO contracts in the healthcare industry); *White & White, Inc. v. Am. Hosp. Supply Corp.*, 723 F.2d 495, 508 (6th Cir. 1983) (explaining that, as part of their demand for "new, more cost-effective products and services," hospitals have joined together "to purchase supplies in volume as a member of a group").[2]

Generally speaking, GPOs do not purchase supplies; they negotiate contracts with suppliers and then offer their members access to those contracts. Once a GPO contracts with a supplier, the GPO's members can sign letters of commitment accepting the contract's terms. GPOs typically can terminate their contracts with suppliers at any time, and in all events, GPO members are not required to purchase supplies through GPO contracts. They can purchase some or all of their supplies outside GPO-negotiated contracts, negotiating with suppliers on their own. *See Se. Mo. Hosp.*, 642 F.3d at 610. GPO membership is voluntary; providers can and do switch from one GPO to another, and many belong to multiple competing GPOs. *Id.* Over 70 percent of healthcare supply purchases come through GPO-negotiated contracts—an estimated $260 billion in sales each year. *See* David E. Goldenberg & Roland "Guy" King, *A 2008 Update of Cost Savings and a*

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[2] GPO members also benefit from reduced administrative and contracting costs because (among other reasons) they no longer need to employ as many people to negotiate supply contracts. *See, e.g.*, *St. Francis Med. Ctr. v. C.R. Bard, Inc.*, 657 F. Supp. 2d 1069, 1079-1105 (E.D. Mo. 2009) (noting that hospitals join GPOs in part to "lower expenses associated with having to negotiate and administer purchasing contracts"), *aff'd*, 642 F.3d 608 (8th Cir. 2011)*;* Qiaohai (Joice) Hu, *et al.*, *The Impact of Group Purchasing Organizations on Healthcare-Product Supply Chains*, 14 MFG. & SERV. OPERATIONS MGMT. 17-23 (Dec. 2011) (same).

Marketplace Analysis of the Health Care Group Purchasing Industry, at ii (July 2009).[3]

GPO-negotiated contracts commonly offer a variety of discounts similar to Eaton's here. Some offer discounts based on purchase volume. Others offer discounts based on member participation or commitment levels. *See Se. Mo. Hosp.*, 642 F.3d at 610. GPOs also obtain lower prices by offering suppliers the opportunity to bid for sole- or dual-source contracts. Under a sole-source contract, a GPO contracts with one supplier for a particular product or products. With a dual-source contract, a GPO contracts with more than one supplier for a particular product or products. Although the majority below apparently would characterize those arrangements as "non-price" terms, sole- and dual-source contracts entice suppliers to offer substantially reduced pricing.

This Court has recognized that GPOs benefit consumers. *See Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 286-87 (1985) ("The cooperative arrangement thus permits the participating retailers to achieve economies of scale in purchasing and warehousing that would otherwise be unavailable to them."). So have federal antitrust regulators: The Department of Justice and Federal Trade Commission have concluded that GPO-negotiated contracts can produce significant procompetitive effects in the healthcare industry—lower prices chief among them. *See, e.g.*,

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[3] http://www.supplychainassociation.org/resource/resmgr/research/goldenberg_king/pdf.

Statement 7, U.S. Dep't of Justice & Fed. Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care* (1996) (recognizing that GPOs "typically allow the participants to achieve efficiencies that will benefit consumers" and establishing safe harbors for GPO activities that are unlikely to draw enforcement interest).[4] Indeed, a hospital purchasing supplies under a GPO-negotiated contract typically pays lower prices for supplies than a hospital purchasing on its own. *See, e.g.*, *Se. Mo. Hosp.*, 642 F.3d at 610-11 ("On average, hospitals save between 10 and 15 percent on their medical device purchases by buying under GPO contracts."); Lawton R. Burns & J. Andrew Lee, *Hospital Purchasing Alliances: Utilization, Services, and Performance*, 33 HEALTH CARE MGMT. REV. 203, 213 (2008) (national study found "that strategic alliances between hospitals and purchasing groups serve to contain rising health care costs by reducing product prices").

In his dissent below, Judge Greenberg recognized that market-share and similar discounts result in lower prices for a broader range of customers because they extend to smaller purchasers the discounts typically reserved for bigger companies. App. 185a (Greenberg, J., dissenting). That is certainly true in the healthcare industry: Many small and mid-size hospitals and clinics depend on access to GPO-negotiated discounts.

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[4] *See also* Fed. Trade Comm'n & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* 14 (2000) (recognizing that many "buying collaborations" "do not raise antitrust concerns and indeed may be procompetitive").

The price-cost test provides the antitrust clarity needed to negotiate aggressively for those discounts.

B. The price-cost test is clear and encourages vigorous price competition.

Time and again, this Court has "emphasized the importance of clear rules in antitrust law," particularly in the context of price competition. *linkLine,* 555 U.S. at 452. Without them, "firms that seek to avoid . . . liability will have no safe harbor for their pricing practices." *Id.* at 453. *See also Barry Wright Corp.*, 724 F.2d at 234 (Breyer, J.) ("[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.").

Whatever the lingering questions about its precise contours, the price-cost test provides businesses with a clear framework for deciding what forms of price competition are permissible under the antitrust laws and what forms are not. The test is "clear enough for lawyers to explain [it] to [their] clients." *Town of Concord, Mass. v. Bos. Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.).

Indeed, GPOs have negotiated vigorously for non-predatory volume and participation discounts—and suppliers have been willing to offer them—precisely because *Brooke Group* and its progeny have established a safe harbor from antitrust liability for those price-cutting strategies. With their legality assured, market-share and other similar discounts have become commonplace in our economy.

C. The Third Circuit's decision is enigmatic and will chill aggressive price competition.

If the price-cost test is clear enough for lawyers to explain it to their clients, then the decision below will leave both lawyers and their clients confused. It even left a dissenting Judge Greenberg scratching his head:

> [T]he Supreme Court has 'repeatedly emphasized the importance of clear rules in antitrust law.' I confess I can glean no such clear rule from the majority's opinion. I do not know how corporate counsel presented with a firm's business plan at least if it is a dominant supplier that seeks to expand sales through a discount program that might be challenged by competitors as providing for a de facto exclusive dealing program and asked if the plan is lawful under the Sherman and Clayton Acts will be able to advise the management. The sad truth is that the counsel only will be able to tell management that it will have to take a chance in the courtroom casino at some then uncertain future date to find out.

App. 186a (Greenberg, J., dissenting) (citations omitted).

That kind of uncertainty is bad enough in the mine run of antitrust cases—one recalls Justice Taft's "sea of doubt" (*United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898) (Taft, J.))—but it is particularly pernicious when it touches price competition. Mistaken inferences about price competition "are especially costly" because they "chill the very conduct the antitrust laws are designed to protect" and make "antitrust suits themselves . . . a tool for keeping prices high." *Brooke Grp.*, 509 U.S. at 226-27 (internal quotation marks omitted). The decision below will do both by hanging the threat of antitrust liability over companies' heads for *successfully* using non-predatory discounts and rebates to increase business and reduce buyers' costs. It is no exaggeration to say that, under the Third Circuit's decision, any supplier entering into a contract with tiered volume or participation discounts could potentially face antitrust liability based on after-the-fact speculation about the contract's "non-price" terms and effects. That makes vigorous price competition dangerous business—a perverse result given that the "great majority of discounting practices are pro-competitive." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 749b at 324 (Supp. 2006).

And it's not just dangerous business for the allegedly monopolizing supplier: Antitrust plaintiffs often sue GPOs, too. *See, e.g.*, *Genico, Inc. v. Ethicon, Inc.*, No. 5:04-cv-229, 2006 U.S. Dist. LEXIS 96909, at *12-15 (E.D. Tex. Mar. 23, 2006). Increasingly, GPOs—even ones with low market share (as low as 5 percent)—have found themselves roped into antitrust suits. *See id.*; *Daniels Sharpsmart, Inc. v. Tyco Int'l (US), Inc.*, No. 5:05-cv-169, 2006 U.S. Dist. LEXIS 100158 (E.D. Tex. Oct. 18, 2006); *Applied Med. Res. Corp. v. Johnson & Johnson*, No. SACV 03-1329-JVS, 2004 U.S. Dist. LEXIS 29409, at *12 (C.D. Cal. Feb. 23, 2004). Some creative plaintiffs even try to define GPO-only relevant markets. *See, e.g.*, *C.R. Bard*, 642 F.3d at 61. Even if the GPO stays to the periphery of the litigation and escapes at summary judgment, it will have spent hundreds of thousands (and potentially millions) of dollars in litigation costs. Antitrust litigation is expensive. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007).

Suppliers know that well. They want certainty in their contractual relationships and will not give their best prices to GPOs if doing so will trigger potentially ruinous antitrust litigation. Worse still, suppliers may decide in light of the decision below that it is safer to maintain relationships with fewer GPOs—perhaps only the largest or the one with whom the supplier has enjoyed the longest relationship—than to engage in aggressive price competition across the industry. The upshot? Competition will diminish and prices will go up, with no identifiable benefit to anyone. That is bad for everyone.

CONCLUSION

The decision below flouts this Court's clear teaching that above-cost price reductions cannot support antitrust liability—a teaching that five other circuits have faithfully applied to reject challenges to discounts similar to Eaton's here. The Court should grant Eaton's petition for a writ of certiorari and should reverse the Third Circuit's decision.

Respectfully submitted,

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