No. 92-466

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LIGGETT GROUP INC.,
Petitioner,
v.
BROWN & WILLIAMSON TOBACCO CORPORATION,
Respondent.

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

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RESPONDENT'S BRIEF IN OPPOSITION

GRIFFIN B. BELL
Counsel of Record
ABBOTT B. LIPSKY, JR.
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303
(404) 572-4600
Counsel for Respondent

Of Counsel:
NORWOOD ROBINSON
MICHAEL L. ROBINSON
ROBINSON MAREADY LAWING & COMERFORD
380 Knollwood Street, Suite 300
Winston-Salem, North Carolina 27103
(919) 681-8500

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QUESTION PRESENTED

In this primary-line price discrimination case under Section 2(a) of the Robinson-Patman Act, Petitioner Liggett challenged the uniform nationwide volume discounts offered by Respondent B&W on its low-price black-and-white generic cigarettes. Liggett charged that B&W used "predatory" volume discounts to drive up generic cigarette prices, thereby "slowing the rate of growth" of generics. Since Liggett conceded that B&W could not control prices by itself, Liggett proposed a theory of oligopoly recoupment to explain how B&W could recover its alleged "predatory investment" and thereby injure primary-line competition. According to Liggett's theory, although B&W and Liggett competed "tooth and nail" in the generic segment, all other competitors would "simply stand by and refrain from also selling generics or other low-cost products."

The district court granted judgment n.o.v. for B&W because the record evidence disproved Liggett's oligopoly recoupment theory and therefore Liggett did not demonstrate a reasonable possibility of competitive injury, as required by the statute. A unanimous Fourth Circuit panel affirmed. Accordingly, the sole question presented is:

> Whether the Fourth Circuit correctly affirmed the district court's determination that Liggett failed to demonstrate factually the elements of its oligopoly recoupment theory of competitive injury.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Brown & Williamson Tobacco Corporation ("B&W") respectfully requests this Court to deny the Petition for writ of certiorari to the Fourth Circuit.[1]

The unanimous panel decision of the Fourth Circuit, affirming j.n.o.v., holds that Petitioner Liggett failed to provide adequate factual support for its claim. Both courts confined their holding to Liggett's unique claim and the facts of this specific and "unusual" case, as Liggett's counsel has described it.[2] The panel decision does not support any of the sweeping legal propositions attributed to it by Liggett, nor does it conflict with any ruling of this Court or of any other court.

Liggett's predatory pricing claim, based on its novel theory of oligopoly recoupment, is unprecedented under the Robinson-Patman Act. Because there are no similar cases pending or likely to arise in the future, review of this unique case would have no precedential value. Liggett's Petition merely requests a third *de novo* review of the fact-bound determination made by both lower courts that Liggett did not adequately substantiate its claim.

For all of these reasons the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

Factual Background

This is a primary-line price discrimination case under the Robinson-Patman Act brought by one competitor (Liggett) to challenge the uniform nationwide volume discounts offered unilaterally by another competitor, B&W. The suit concerns a volume-discount war triggered by

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[1] Pursuant to Rule 29.1, B&W states that it is an indirect wholly owned subsidiary of B.A.T. Industries, p.l.c. Between B.A.T. Industries, p.l.c. and B&W are South Western Nominees Ltd. (U.K.), BATUS Holdings, Inc. and BATUS Tobacco Services, Inc. B&W has only wholly owned subsidiaries.

[2] P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 711.2, at 617 (Supp. 1991).

B&W's announcement of its first "black-and-white" generic cigarettes.[3] The parties agree that the relevant market includes all cigarettes manufactured and distributed in the United States. B&W's share of this market never exceeded 12% at any relevant time.

There are six major U.S. cigarette producers: Philip Morris ("PM"), R.J. Reynolds ("RJR"), Lorillard, American, Liggett and B&W. Each company, including Liggett, sells branded cigarettes. PM and RJR are the largest firms in the industry with 41.9% and 28.5% shares respectively at time of trial. It is undisputed that B&W's U.S. cigarette business has been profitable at all times. At all times Liggett has been a profitable full-line competitor offering a variety of generic and branded cigarettes throughout the relevant market.

In 1980 Liggett began to produce generics in response to repeated requests from a major customer (Topco) for its own private-label cigarette. Petitioner's Appendix ("Pet. App.") 21a. Liggett soon began to produce private-label generics for other distributors and eventually offered its own black-and-white cigarettes, which it sold at volume discounts. *Id.* at 21a; JA5463-64.[4]

In July, 1983, RJR responded to the growth of black-and-white generics by introducing a "Value-25" brand, "Century"; B&W followed with its own Value-25, "Richland." Pet. App. 3a. By 1984 generics held almost 4% of the U.S. cigarette market, of which 97% were sold by Liggett. JA3035; JA4832-33.

In April, 1984, RJR repositioned "Doral"—a full-price brand—as a generic, offering volume discounts to make it directly price-competitive with Liggett's generics.

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[3] "Generic cigarettes" (or more simply "generics") include: (1) black-and-white generics—sold in nondistinctive packaging (including private labels) at a low price; (2) branded generics—cigarettes with some name-brand identity (*e.g.*, "Doral"), but sold at low prices equal to those of black-and-white generics; and (3) "Value-25's"—cigarettes sold in packs containing twenty-five cigarettes at the same price as twenty-cigarette packs.

[4] "JA" refers to the Joint Appendix filed in the Fourth Circuit.

JA2071-72. Liggett immediately responded by increasing the volume discounts on its own generics. JA2902-03.

B&W had begun to investigate the possibility of manufacturing black-and-white, private label and branded generics in late 1983. JA7255-56. After RJR's aggressive discounting of Doral in April, 1984, B&W concluded that offering new generic items would be critical to stopping the decline in its market share. JA1691 at ¶ 11.

In May, 1984, B&W's internal planning process culminated in a final proposal, in the form of a formal written document, sent by B&W to its then-corporate parent, BATUS. JA5957-58. B&W proposed to introduce a black-and-white generic cigarette and requested that, if required by future competitive necessity, it should have discretion to price the new black-and-whites at "break-even" levels. This final proposal summarized the competitive situation as follows:

> "B&W believes that branded generics will enhance the growth of the economy segment and will draw volume from popular priced brands.
>
> . . . .
>
> *The earlier concern of expanding the economy segment is no longer tenable, given RJR's recent action. It is clear that the economy segment is significant, and growing.* Accordingly, recognizing the importance of minimizing increased cannibalization and concomitant share erosion, as well as maintaining trading profit targets, it is imperative that B&W enter this segment."

Pet. App. 5a (emphasis supplied). Indeed, this final proposal was based on the projection that generic cigarette sales would grow to 10% of the market by 1988—more than doubling the segment's share in less than five years. The final proposal also projected that generic prices would remain at a 35% discount from branded cigarettes throughout this five-year period. JA1422; JA1434.[6]

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[6] Accordingly, the final B&W proposal was not based on "manag[ing] the price of generic cigarettes upward," Pet. 9, or "slowing the rate of growth of the generic segment," *id.* at 11, as Liggett

BATUS accepted B&W's proposal to introduce a black-and-white generic, but only subject to the condition that it be priced to return at least $1.00 per thousand cigarettes in trading profit. JA6054. BATUS rejected the proposal to consider break-even pricing in the future. JA6016; JA6054. B&W moved quickly to introduce generics priced within BATUS' trading profit constraint. JA4765. In light of the volume discounts already provided by both RJR and Liggett on their generics, B&W believed that volume discounts were essential to the success of its new generics. JA1731-32; JA2903; JA8158-60. The RJR executive responsible for repositioning Doral testified that B&W's belief was accurate. JA7864.

On May 31, 1984, B&W announced the introduction of its new generics. JA50. Simultaneously, B&W announced a list price and discount schedule for these generics, including volume discounts up to thirty cents per carton. JA60. B&W's announcement triggered an immediate increase in volume discounts and other promotional spending by Liggett. JA2905; JA4804-09; JA7332. When B&W responded, Liggett again increased its volume discounts. This cycle was repeated a total of five times. JA4804-09. B&W never increased its volume discounts except in response to an increase by Liggett. JA4286-87.

With each successive volume discount increase, B&W confirmed internal projections showing that it would make a profit on its new generics at the announced price and discount level.[6] JA2082-83; JA7573-81; JA7583-91. At no

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alleges. To the contrary, the final proposal was based on expectations of continued substantial discounts, intensifying low-price competition and sustained and rapid expansion of the generic segment.

[6] B&W did not concede that it set below-cost prices for its generics, as Liggett insinuates. Pet. 8 n.12. Although Liggett also asserts that the jury found below-cost pricing by B&W, *id.* at 11, this too is incorrect: despite B&W's request for a jury instruction requiring such a finding, no such instruction was given, and the general verdict did not contain a finding of below-cost pricing. JA667-68; JA7944-45.

time did B&W ever expect, intend, or reasonably anticipate that its black-and-white generics would be unprofitable.[7] Indeed, Liggett concedes that the price and volume discount schedule initially announced by B&W was above cost. JA6901-02; JA7582. Liggett also concedes that B&W's full line of cigarettes has been profitable at all relevant times.

From then on, as Liggett's president confirmed, " 'competition . . . substantially increased in the total cigarette market,' " and the cigarette manufacturers fought " 'tooth and nail.' " Pet. App. 6a. Other Liggett witnesses confirmed that after B&W's introduction of black-and-whites the market " 'got very competitive,' " *id.*, that Liggett "had some competition for a change," JA6193, and that competition among Liggett, B&W and RJR resulted in increased price competition and lower prices, JA5934; JA7826-27. Liggett's economic theory witness admitted that generic competition exerted downward pressure on branded cigarette prices. JA6814.

At the time of B&W's 1984 announcement Liggett accounted for 97% of all U.S. sales of black-and-white generics. Although by 1990 four of the six U.S. cigarette firms were offering black-and-white generics, Liggett still held the largest share of black-and-white sales. JA5411; JA5414; JA5418; JA5420; JA5426. Throughout the alleged "period of predation" identified by Liggett, Liggett held no less than 80-85% of all black-and-white generic sales. JA4834-37; JA6270-71; JA7360-61; JA7363-64.

The Fourth Circuit summarized the subsequent explosion of discount cigarette competition, noting that "[w]hile the United States market for cigarettes has been generally declining, *the growth of discounted cigarettes has been dramatic.*" Pet. App. 6a (emphasis supplied). This "dramatic" industry-wide growth included Liggett, whose

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[7] "[I]t is the [defendant's] projections which are legally relevant, since those projections would have formed the basis for [its] business decisions at the time." *Hoyt Heater Co. v. American Appliance Mfg. Co.*, 502 F. Supp. 1383, 1388 (N.D. Cal. 1980).

generic cigarette sales more than tripled from 1981 (2.8 billion) to 1988 (9 billion). *Id.* Every cigarette manufacturer introduced a generic cigarette. Total industry sales of generics went from 2.8 billion in 1981 to 61.6 billion in 1988 and then to nearly 80 billion (15% of the total cigarette market) at the time of trial—more than a twenty-eight-fold increase. *Id.* The most recent available industry data show that from the 4% level in 1984, when B&W introduced its black-and-whites, the discount segment now occupies *28% of the entire U.S. cigarette market.*[8] While Liggett claims that black-and-whites held only 2.7% of the market in 1989, Pet. 11, *black-and-white generics alone now account for 12.2% of the entire U.S. cigarette market.*[9]

At the time of trial five cigarette producers offered discounts of at least 50% off the price of nationally advertised brands, far exceeding the 35.7% discount offered by Liggett at the time B&W announced its new generics. JA4277; JA5303; JA7406-11; JA7905. Liggett's director of national sales confirmed that consumer savings attributable to cigarette discounting had risen nearly ten-fold following B&W's introduction of its black-and-whites, from $375 million in 1980-84 to almost $3.5 billion in the period 1984-89. Trial transcript, day forty-four at 116-118.

The District Court Proceedings

Just weeks after B&W's announcement of its generics —before the last round of volume discount increases and before the first B&W black-and-whites were actually shipped—Liggett had already filed this lawsuit as a trademark infringement and unfair competition claim (both eventually lost and not appealed by Liggett). Liggett's original complaint, filed to "thwart" B&W's introduction of generics, JA4768; JA5017, did not contain an antitrust count. Two weeks later Liggett added a

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[8] *Maxwell Consumer Report* at 4 (July 30, 1992) ("Price-Value Category Shares by Type: Second Quarter-1992") (hereinafter "*Maxwell Consumer Report*").

[9] *Id.*

treble-damage claim under Section 4 of the Clayton Act, 15 U.S.C. § 15, based on alleged price discrimination by B&W in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a).

Liggett's first antitrust claim asserted that B&W discriminated in price between its higher-priced, nationally advertised branded cigarettes on one hand and its lower-priced black-and-whites on the other. When B&W moved for summary judgment on this claim Liggett again amended its complaint, this time alleging that the discrimination arose from the volume discounts granted on B&W's black-and-whites alone.

Before trial the district court granted partial summary judgment for B&W on the first antitrust allegation (discrimination between branded and generic cigarette prices), and Liggett did not appeal. Accordingly, B&W's volume discounts on black-and-white generics are the only specific B&W conduct relied upon by Liggett in order to support its remaining antitrust claim.[10]

Liggett's remaining claims were tried; a jury returned a verdict for Liggett on its antitrust claim and for B&W on Liggett's remaining claims. Pet. App. 18a-19a. B&W filed motions for j.n.o.v. or new trial on Liggett's antitrust claim. The district court granted B&W's motion for j.n.o.v. and denied the new trial motion. *Id.* at 19a.

The district court set aside the antitrust verdict for Liggett based on Liggett's failure to establish each of three distinct elements essential to its Robinson-Patman claim: (1) primary-line competitive injury, required by Section 2(a); (2) a causal link between alleged price

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[10] Liggett incorrectly asserts that B&W "admitted" price discrimination. Pet. Questions Presented. As the district court specifically noted, "[*e*]*xcept for the issue of price discrimination*, the jurisdictional elements [of Liggett's Robinson-Patman claim] are undisputed." Pet. App. 23a-24a (emphasis supplied; footnote omitted). B&W did not "discriminate" within the meaning of Robinson-Patman because the same discounts were available to all of its generic cigarette customers.

discrimination and any competitive injury, also required by Section 2(a); and (3) antitrust injury, required by Section 4 of the Clayton Act.

Liggett charges that the lower courts "did not credit the jury verdict." Pet. 12. According to Liggett, the jury found that B&W had engaged in " 'loss creating price cutting,' " with a " 'real possibility' " of " 'recoup-[ing] such losses' " from " 'prices higher than competitive levels,' " thus creating a " 'reasonable possibility of injuring competition in the cigarette market as a whole.' " *Id.* at 11 (quoting JA7940-42). These assertions are incorrect.

The court's instructions permitted a finding of competitive injury based on an inference of "predatory intent," derived exclusively from statements contained in some B&W internal documents. JA7944-45. The Petition asserts that Liggett "does not contend that B&W's anti-competitive motive in itself violates the statute." Pet. 7 n.11. It therefore appears that Liggett now accepts the view of the district court in its j.n.o.v. ruling: "An avowed predator with no prospect of controlling prices is a paper tiger unable to harm consumer welfare." Pet. App. 33a.[11]

"[B]ased on interpretations of the applicable law," the district court's j.n.o.v. ruling repudiated instructions that were "generally consistent with the legal position and theory espoused by Liggett." *Id.* at 18a n.4, 19a n.6. Since the jury's general verdict was based on these legally defective instructions, it was untenable in any event. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 30 (1962) (general verdict of antitrust liability which rested on one legally defective ground among several others "cannot be upheld"). With a com-

[11] The district court also realized in granting j.n.o.v. that the instructions given regarding a possible generic cigarette "submarket" were not only contrary to the parties' agreement on relevant market but also unsupported by "substantial economic evidence." Pet. App. 46a & n.43. *See also* n.6, *supra*, regarding the court's failure to give instructions that would have required the jury to find below-cost pricing.

plete view of the law and the record, the district court recognized that the case should not have been submitted to a jury in the first place, for the following reasons:

No Competitive Injury: Liggett's claim of primary-line injury under the Robinson-Patman Act rested entirely on one expert witness' unprecedented and unique theory of oligopoly recoupment. Liggett claimed that B&W used predatory volume discounts to drive up black-and-white prices and that B&W would "recoup" its "predatory investment" because "thereafter no other member of the oligopoly offered or pushed such a deeply discounted product . . . ."[12] As the district court recognized, if "any of the other major cigarette manufacturers were interested in promoting the sale of generic cigarettes, even Burnett [Liggett's economic theory witness] admitted that successful predation by B&W would be *impossible*." Pet. App. 36a (emphasis supplied).

The district court described Liggett's oligopoly recoupment theory as "dubious." *Id.* at 33a. While noting there was "little legal precedent" to support it, the district court stated that "in rejecting it the court need not rule that this theory is insufficient as a matter of law." *Id.* at 34a. Rather, there was "[n]o substantial record evidence" to support the theory. To the contrary:

> Even before B&W began selling black and white cigarettes, RJR had entered the generic segment by repositioning Doral at generic prices. . . . Furthermore, there is no evidence that any of the other major cigarette companies had an interest in slowing the growth of generic cigarettes.

Id. at 36a. Faced with this competition, B&W could not and did not control generic cigarette prices. The district court noted the undisputed fact that B&W's *only* attempt to lead a generic price increase (in December, 1985) was

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[12] Brief of Plaintiff-Appellant and Cross-Appellee [Liggett] at 3-4 (filed in the Fourth Circuit) (hereinafter "LB").

a complete failure because no other manufacturer followed. *Id.* at 36a, 38a n.36.[13]

Liggett asserts that the result of B&W's use of volume discounts was to "slow[] the rate of growth" of black-and-whites and reduce the percentage differential between the price of black-and-whites and branded cigarettes. Liggett complains that the market share held by black-and-whites declined to 2.7% by 1989. As the district court recognized, however, Liggett's focus on black-and-whites is meaningless because of "steady growth" in the overall generic segment, including other generics "sold at the same price as black and white cigarettes." *Id.* at 38a n.36. The market share of all generics reached 15% by the close of trial and today it stands at 28%.[14]

Similarly, Liggett asserts that the differential between branded and black-and-white cigarette prices declined to 26.8% in 1989. Pet. 10. This, too, is a pointless and misleading calculation. First, like Liggett's "growth" figures, it is limited only to black-and-white generics. Second, Liggett considers only *its own* black-and-white cigarettes, ignoring that by time of trial B&W and

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[13] At trial it was uncontroverted that "the *only* time Brown & Williamson *ever* tried to *lead* a price increase" on generics was in December, 1985. JA6017 (emphasis supplied). The district court recognized this, referring to the abortive attempt as the "only" such incident. It was not until Liggett filed its Reply Brief in the Fourth Circuit that Liggett first accused B&W of "successful *leading* of generic cigarette price increases . . . in June 1986, in December 1987, and in June 1988 . . . ." Reply Brief of Plaintiff-Appellant and Cross-Appellee [Liggett] at 20 (filed in the Fourth Circuit) (hereinafter "LRB") (emphasis supplied). This unsupported allegation is repeated in Liggett's Petition. Pet. 10.

The record shows at most that B&W preceded Liggett in a sequence of price changes, but the record does not support any assertion that *B&W*, as opposed to PM, RJR or another manufacturer, initiated any such change.

[14] Even accepting Liggett's narrow focus, the current market share of black-and-white generics alone now stands at 12.2%—more than triple the share they held when Liggett was virtually the only competitor offering that item. *Maxwell Consumer Report* at 4.

RJR offered black-and-whites at a discount of 50%. JA7407; JA7905. In 1988 Liggett itself introduced a subgeneric, "Pyramid," at discounts of more than 50% off branded. JA4957; JA5303. By the end of trial five of the six major competitors offered cigarettes at discounts of at least 50% off branded prices.[16] JA5303; JA7406-11; JA7905.

The district court also recognized that Liggett's oligopoly recoupment theory "was contradicted by witnesses from the Liggett boardroom" in the form of "unequivocal . . . trial testimony from the senior executives at Liggett who made the pricing decisions." Pet. App. 34a-35a. Although Liggett's theory assumed "tacit collusion" among cigarette manufacturers, Liggett's senior executives denied any suggestion of "tacit collusion," Pet. App. 6a; JA5801; JA7185-87; and affirmed that "[t]he public has not been denied the benefits of free and open competition in the cigarette industry." JA5670.

Liggett seeks to explain this fundamental contradiction by claiming that its senior executives simply did not understand economic concepts like "competition." Pet. 5 n.9. The district court rejected this explanation for Liggett's "obvious problem":

> [T]hese executives gave basically the same testimony at their depositions. The court allowed the case to go to trial in part because of affidavits from the Liggett executives stating that they were confused . . . . However, at trial, despite having consulted extensively with Burnett [Liggett's economic theory witness] and having had adequate time to familiarize themselves with concepts such as tacit collusion, oligopoly, and monopoly profits, these Liggett executives again contradicted Burnett's theory.

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[16] Again, Liggett's assertions are meaningless even within their intended frame of reference. Even if the differential between Liggett's own branded and generic cigarettes had been only 26.8%, this would have been within the 25-30% range considered necessary for generics to be "successful" according to Liggetts' own executives. JA5621; Trial transcript, day forty-four at 108.

Pet. App. 35a. As the district court correctly ruled, the problem was not "confusion"; the problem was that Liggett's senior executives with direct responsibility for pricing—including Liggett's president and its senior vice president for sales and marketing, among others—emphatically denied the central contention underlying Liggett's oligopoly recoupment theory. *See id.* at 35a.

In sum, the district court recognized that both the objective market evidence and the testimony of Liggett's senior executives contradicted the oligopoly recoupment theory. The district court therefore held correctly that Liggett had failed to substantiate its unprecedented economic theory of primary-line injury through oligopoly recoupment.

No Causation: The district court also held that, as a matter of law, Liggett failed to establish that any alleged competitive effects were "the effect of" B&W's alleged price *discrimination*, an explicit requirement of Section 2(a), as distinct from the mere low *level* of B&W's generic cigarette prices. Pet. App. 38a-42a. Liggett alleged that B&W's generic prices were below its own, regardless of volume. Thus, according to Liggett's own theory, any alleged impact on competition could have arisen only from

> the low prices that B&W offered to its customers and not from the fact that these low prices varied depending on volume. . . . Liggett was not disadvantaged any more by B&W's volume rebates than it would have been by one uniform low price.

Id. at 40a. Thus, Liggett failed to demonstrate any causal connection between the alleged effects and the price *differences* contained in B&W's volume discount schedule.

No Antitrust Injury: Finally, following *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), the district court held that Liggett's failure to substantiate its claim of predatory pricing undercut any assertion that B&W's volume discounts had caused antitrust

injury.[16] Liggett and B&W "were both profitable, full product line competitors with access to the same customers and markets." Pet. App. 48a. Moreover, "B&W made money on its overall cigarette sales—branded and generic —during the alleged predatory period." *Id.* at 46a. "'[R]ivals generally can hardly be ruined so long as prices for the product line as a whole are compensatory.'" *Id.* at 47a (quoting P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 715.1a, at 592 (Supp. 1989)). Thus, the district court correctly rejected Liggett's attempt to show predatory pricing by focusing on only one isolated item in the full product line offered by Liggett, B&W and other U.S. cigarette producers.[17]

The Fourth Circuit's Affirmance

Affirming the district court ruling, the Court of Appeals exposed the fatal flaw in Liggett's competitive injury showing. The court concluded that Liggett was unable to demonstrate an essential element of its primary-line Robinson-Patman case because it could not factually substantiate its theory of oligopoly recoupment. Pet. App. 14a.

As presented by its economic theory witness, Liggett's theory conjectured that B&W, after raising prices on generics, Pet. Questions Presented, could "recoup" its "predatory investment" by relying on predictions about the cigarette "oligopoly." Critical to Liggett's theory, however, was an asserted B&W "expectation" that "the other members of the oligopoly would not intercede" but

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[16] Because antitrust injury is an element of standing, *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 539-41 (1983), the district court held that Liggett's failure to show antitrust injury also deprived it of standing to seek treble damages under Section 4 of the Clayton Act. Pet. App. at 42a-48a.

[17] Liggett sought to avoid the force of this ruling by arguing that it "relied heavily" on black-and-whites. LB 30. But in 1983, 75% of Liggett's profits were attributable to branded cigarettes. JA5177; JA7431-32. Indeed, Liggett itself described full-price cigarettes as its "life blood." JA4955.

would "simply stand by and refrain from also selling generics or other low-cost products . . . ." Pet. App. 11a.[18]

Any such expectation of inaction by oligopolists facing a price war would not only have been "irrational," but was also contradicted by the "actual experience in this case"—*i.e.*, the discount war that broke out in May, 1984. *Id.* Indeed, that actual experience began with market developments, including a major initiative in the generic segment by industry giant RJR, that led B&W to conclude that its " 'earlier concern of expanding the economy segment is no longer tenable,' " and to "predict similar actions as occurred," namely, "dramatic" generic growth. *Id.* at 5a, 6a, 12a. Those B&W expectations were realized when "most cigarette manufacturers were offering various types of low-priced cigarettes, including generics," and as sales jumped from 2.8 billion units (0.4% market share) in 1981 to 80 billion (15% share) in 1989. *Id.* at 12a-13a.

In sum, Liggett's theory, which *assumed* that members of the oligopoly would "simply stand by and refrain" from offering generics and thus "act uncompetitively" in the face of "a competitive move" by others was unsubstantiated and indeed contradicted by the "actual experience in this case." *Id.* at 11a, 13a. Accordingly, Liggett failed to establish its theory of oligopoly recoupment, the linchpin for the essential element of competitive injury in this primary-line price discrimination case.[19]

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[18] Throughout the Petition, Liggett confuses its own theory, as developed by its economic theory witness (and as deemed unsubstantiated by both courts below), with the Court of Appeals' asserted "economic theory"—and then assails the court's reasoning as "theoretical speculation." Pet. 12, 14, 15. But the issue in this case is whether *Liggett's* theory was in accord with the record. Both courts correctly held that it was not.

[19] In view of its holding, the Fourth Circuit did not reach any of the alternative independent grounds for affirmance, including (1) absence of causation under Section 2(a), (2) absence of antitrust injury, and (3) legally inadequate proof of damages.

Similarly, the court had no reason to consider either B&W's conditional cross-appeal (from the district court's rejection of its

REASONS TO DENY THE WRIT

I. THE FOURTH CIRCUIT DECISION MADE NONE OF THE SWEEPING LEGAL RULINGS ATTRIBUTED TO IT BY LIGGETT: LIGGETT'S "QUESTIONS PRESENTED" ARE PURELY HYPOTHETICAL AND ARE NOT PRESENTED BY THIS CASE

The Fourth Circuit's decision is based on a proper understanding of the law and a thorough evaluation of the entire record. The court made none of the sweeping legal rulings attributed to it by Liggett. It held only that Liggett's unique theory of oligopoly recoupment was decisively contradicted by the critical undisputed facts. Thus, Liggett's alleged "questions presented" are academic issues without significance to this case.

Liggett asserts that the Court of Appeals (1) granted "[*p*]*er se* immunity for disciplinary price discrimination"; (2) "held that, absent a conspiracy, an oligopolist could never . . . threaten competition," and (3) "limited liability under the Robinson-Patman Act for predatory price discrimination to instances where the defendant is a monopolist or a conspirator." Pet. 2, 14. Liggett also asserts that these and other equally sweeping legal determinations were contrary to the "language and purpose," *id.* at 14, of the "statutory provision at issue here [which] was part of the 1914 Clayton Act . . . ." *Id.* at 2. Based on these and other mischaracterizations of the Fourth Circuit opinion, Liggett goes on to find "misunderstandings" of and "conflicts" with various rulings of this Court and the courts of appeals.

Each of Liggett's assertions is incorrect. None of the broad legal propositions attacked by Liggett can be found in the language or implications of the Fourth Circuit's opinion. The Court of Appeals, like the district court, correctly ruled that Liggett simply did not substantiate

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new trial motion and its omission of any substantive discussion of several of the alternative independent grounds) or B&W's supplemental appeal. B&W has not cross-petitioned before this Court but would reassert such matters if appropriate in any further proceedings.

factually its unique claim of oligopoly recoupment. Neither court addressed any broad issues of antitrust doctrine because there was no need to do so.

Liggett also accuses the Fourth Circuit of "judicial theorizing," Pet. 19, and of harboring "an idiosyncratic and illogical view of economic theory . . . ." *Id.* at 2. Liggett quotes out of context a reference to "economic logic" and converts it into an asserted holding that "only a monopolist . . . or a member of an organized cartel" could engage in predation. *Id.* at 12. But the court's full statement is that "economic logic *as well as actual experience in this case*" are inconsistent with Liggett's unique claim. Pet. App. 11a (emphasis supplied).[20] Because Liggett's claim is inconsistent with the facts of this case, any comments the court may have made about the logic of Liggett's unique economic theory are immaterial to its holding. This Court "reviews judgments, not statements in opinions." *Black v. Cutter Laboratories Corp.*, 351 U.S. 292, 297 (1956).

B&W respectfully submits that this Court should not exercise its certiorari jurisdiction merely to confirm for yet a third time that the oligopoly recoupment theory advanced by Liggett fails to square with the critical undisputed facts in this specific record.

A. The Fourth Circuit Did Not Require Monopoly or Conspiracy as a Basis for Proof of Primary-Line Injury

Liggett asserts that the Court of Appeals "limited liability under the Robinson-Patman Act for predatory price discrimination to instances where the defendant is

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[20] Similarly, Liggett asserts that the Fourth Circuit required predation claims to be supported by evidence that the prospect of recoupment is "certain." Pet. 12. The Court of Appeals' statement refers, however, to the "oligopolists on the sidelines"—*i.e.*, the bystanders in the price war, as distinct from the alleged predator. Pet. App. 11a. With respect to the alleged *predator*, by contrast, the court clearly stated that only a "rational expectation" of recoupment need be shown. *Id.* at 9a.

a monopolist or conspirator." Pet. 2. This assertion is unsupported by any language in the court's opinion. Indeed, the opinion is clearly inconsistent with Liggett's assertion. The court held only that the undisputed record evidence fatally contradicts Liggett's oligopoly recoupment theory.[21]

Like the district court, the Fourth Circuit found the undisputed record evidence inconsistent with Liggett's claim that B&W could recoup by relying on all other competitors to "simply stand by and refrain from selling generics . . . ." Pet. App. 11a. In view of the three-firm generic competition already underway when B&W introduced its black-and-whites, "[a]ny rational observer would have known that sales of Richland, Century, and Doral would most likely further erode the sales of full-priced branded cigarettes, regardless of Brown & Williamson's success in disciplining Liggett . . . ." *Id.* at 12a. But the Court of Appeals had no need to "impute rationality" to B&W, *id.*, since B&W's final, formal written proposal to its parent, which requested permission to introduce a low-price black-and-white generic, clearly and specifically adopted this perspective:

> The very memoranda upon which Liggett relies so heavily as evidence of Brown and Williamson's predatory intent not only predict similar actions as occurred, but conclude after the introduction of Doral that "[t]he earlier concern of expanding the economy segment is no longer tenable . . . ."

Id. Thus, "[t]he facts in this case remove any doubt" regarding B&W's expectations of further generic competition and discount growth. *Id.* B&W's final proposal was not based on projections of the demise of black-and-whites, or a declining price differential between generics

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[21] In this respect the Fourth Circuit was simply approaching the case as the district court had done:

> Although there is little legal precedent supporting Burnett's shared market power theory, in rejecting it the court need not rule that this theory is insufficient as a matter of law.

Pet. App. 34a.

and branded, as Liggett asserted. To the contrary, the projections envisioned intensifying competitive reactions and growth of the segment to 10% of the market within five years, based on a persistent 35% discount. JA1422; JA1434.

Finally, the Fourth Circuit recognized, as did the district court, that the undisputed evidence showed that B&W's rational prediction of expanded discount competition was amply fulfilled:

> Soon after the events of 1984, most cigarette manufacturers were offering various types of low-priced cigarettes, including generics, and by trial all were vigorously competing with differing devices and approaches. Sales of low-priced cigarettes increased from 2.8 billion cigarettes in 1981 to nearly 80 billion in 1989. Their proportional share of the overall cigarette market in the United States grew from .4% to 15%.

Pet. App. 12a-13a.

Thus, Liggett's assertion that the Fourth Circuit required monopoly or conspiracy as a matter of law is incorrect. The court simply found that Liggett's oligopoly recoupment theory was fatally contradicted by key undisputed facts.

B. The Fourth Circuit Did Not Rule Oligopoly Either *Per Se* Legal or Immune from Antitrust Liability

Petitioner Liggett asserts that the Fourth Circuit "immunized" oligopoly behavior, Pet. Questions Presented, "created a rule of *per se* legality," Pet. 12, and held that "[a]n oligopolist's below-cost investment . . . could never pay off . . . ." *Id.* Again, these contentions are contradicted by what the Fourth Circuit actually said.

The Fourth Circuit simply compared the assertions of "*Liggett's* theory," Pet. App. 10a, 11a (emphasis supplied), with the undisputed facts of record. While Liggett's oligopoly recoupment theory pictured Liggett as a lone "maverick," sales of Richland, Century and the

repositioned Doral were already underway by May of 1984. The repositioning of Doral caused B&W to conclude that "'[t]he earlier concern of expanding the economy segment is no longer tenable . . . .'" Pet. App. 12a. Moreover, while Liggett's oligopoly recoupment theory envisioned that "neither Brown & Williamson nor any of the other manufacturers would expand its own sales of low-priced cigarettes," in fact "[s]oon after the events of 1984, most cigarette manufacturers were offering various types of low-priced cigarettes . . . and by trial all were vigorously competing with differing devices and approaches." *Id.*

The Fourth Circuit's holding rests entirely on the factual insufficiency of Liggett's support for its oligopoly recoupment theory. It does not rely on any principle of oligopoly "immunity" or alleged rule of "*per se* legality."

C. The Fourth Circuit Did Not Rest Its Decision on "An Idiosyncratic and Illogical View of Economic Theory"

Liggett also accuses the Court of Appeals of adopting "an idiosyncratic and illogical view of economic theory," Pet. 2, of "denying the factual basis" for Liggett's claim in favor of "theoretical speculation," *id.* at 12, and of using "judicial theorizing" to "trump clear evidence," *id.* at 19. Liggett has simply reversed reality: it is Liggett that attempts to substitute its economist's unprecedented theory of oligopoly recoupment for the undisputed facts regarding market developments.

This Court recently warned against the use of economic theory to trump record evidence, as Liggett proposes here. In *Eastman Kodak Co. v. Image Technical Services, Inc.*, —— U.S. ——, 112 S. Ct. 2072 (1992), the Court noted its long-standing preference "to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record[,]'" and to "examine[] closely the economic reality of the market at issue." 112 S. Ct. at 2082 (footnote, citations omitted).

The Court of Appeals acted in full accord with this continuing historic practice.

This case presents an even more compelling basis to prefer facts and reality over theory than did *Eastman Kodak*: both courts below had the benefit of a full trial record, whereas *Eastman Kodak* involved a summary judgment rendered after only "truncated discovery." *Id.* at 2076. Moreover, *Eastman Kodak* involved exclusionary and "facially anticompetitive conduct"—"exactly the harm that antitrust laws aim to prevent." *Id.* at 2088. By contrast, this case involves "just the opposite" type of conduct—unilateral price cutting.

> Because cutting prices to increase business is "the very essence of competition," the Court was concerned that mistaken inferences would be "especially costly," and would "chill the very conduct the antitrust laws are designed to protect."

Id. (quoting *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (citations omitted)).

Liggett suggests that the Fourth Circuit's ruling conflicts with *Eastman Kodak*, and Liggett even requests a "remand for reconsideration in the light of *Kodak*." Pet. 19 & n.24; *cf.* Pet. Questions Presented. But the Fourth Circuit *did* consider *Eastman Kodak*, because Liggett summarized and circulated the opinion to every Fourth Circuit judge while Liggett's petition for rehearing *en banc* was pending. (Letter dated June 9, 1992 from P. Areeda to Clerk, Ct. of App. for the 4th Cir.) Apparently unimpressed by Liggett's assertions that the panel had abused economic theory to adopt rules of "*per se* legality," no member of the Fourth Circuit requested a poll on the suggestion for rehearing *en banc*. Pet. App. 15a.

Because the Fourth Circuit properly relied on the undisputed record evidence to reject Liggett's novel oligopoly recoupment theory, its ruling accords with *Eastman Kodak*. Furthermore, its doubts about Liggett's oligopoly recoupment theory were hardly "idiosyncratic" or "illogi-

cal." The very economic authorities relied upon by Liggett observe that oligopoly is inherently "uncertain" in light of the "traditional theory that 'anything can happen' in oligopoly." F. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* 220 (3d ed. 1990). *See also* II P. Areeda & D. Turner, *Antitrust Law* ¶ 404b2, at 276 (1978) ("effective price coordination among oligopolists . . . will not be possible when any significant firm chooses, for any reason, to 'go it alone.'"); *id.*, ¶ 404b3, at 277 (oligopoly stability "will quickly evaporate if rivals misread a price change or make disparate responses, as they are likely to do").

The volume-discount war that erupted when B&W announced a major new discount item was therefore entirely in accord with the predictions of the "traditional theory." *Liggett's* theory, by contrast, rested on the conjecture that B&W offered its black-and-whites expecting "that all the other oligopolists . . . would simply stand by and refrain from also selling generics" despite the ongoing price war. It was this conjecture that caused the court to observe:

> Such confidence must be rare, indeed, when the form that the discipline takes is a price-war, which must strike fear in the heart of any oligopolist hoping to protect market share and high prices.

Pet. App. 12a.

Unlike the plaintiff in *Eastman Kodak*, Liggett had an opportunity to test its theory against facts developed through full discovery. Liggett's theory simply failed that test. As the Fourth Circuit recognized, it was Liggett's theory—not "traditional theory"—that was contradicted by the three-way competition that already existed in 1984, by "the very memoranda" of May, 1984 that demonstrated B&W's expectation of intensifying generic competition, and by the "dramatic" growth of discounted cigarettes from 1984 onward.

In sum, Liggett's accusation that the Fourth Circuit used "theoretical speculation" to "trump evidence" has no substance. The court clearly rested its holding on Liggett's failure to substantiate factually *its own* theory of oligopoly recoupment.

D. The Fourth Circuit's Decision Does Not Conflict With Any Decision of This or Any Other Court

No conflict can arise from the Fourth Circuit's fact-bound determination that Liggett failed to substantiate its claim. Both courts engaged in a thorough review of the record based on a clear appreciation of controlling law. Liggett's attempt to suggest "conflict" is again based on a mistaken view of the panel decision.

1. *The Fourth Circuit correctly distinguished Utah Pie*

Liggett insists that the Fourth Circuit is alone, Pet. 20, in its interpretation of this Court's ruling in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967). The assertion is incorrect: the Fourth Circuit carefully differentiated Liggett's unusual primary-line, non-geographic Robinson-Patman Act claim from the typical primary-line Robinson-Patman case exemplified by *Utah Pie*. Pet. App. 8a. According to the appellate court, "[i]n *Utah Pie*, national competitors, using economic muscle from sales in markets other than Salt Lake City, had subsidized below-cost pricing in the Salt Lake City area," *id.*—*i.e.*, the prototypical primary-line case involving "a large national manufacturer using predatory pricing tactics to displace a local competitor." *Id.* at 26a.

Liggett's challenge to B&W's nationwide quantity discounts, following the introduction of such discounts by Liggett and RJR (two competitors with "staying power" in parity with B&W), cannot give rise to either the subsidization or recoupment characteristic of Robinson-Patman primary-line cases involving geographic predation.[22]

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[22] Liggett's insinuation that *Utah Pie* reflects more "modest" facts than this case, Pet. 20 n.26, only highlights Liggett's inability to

Similarly, no conflict exists with other Robinson-Patman primary-line injury decisions.[23] Liggett cites no case —under the 1914 or 1936 versions of the Clayton and Robinson-Patman Acts—in which liability was imposed in a competitor's primary-line case based on geographically uniform volume discounts, the only type of discount at issue here.

2. *Other assertions of "conflict" are unsupportable*

Entirely academic is Liggett's request for "this Court to resolve the conflict among the circuits as to the need for the prospect of recoupment under the Robinson-Patman Act . . . ." Pet. 21. Whatever the courts' final word on the "need for the prospect of recoupment" under Robinson-Patman, the issue is moot as to Liggett in *this* case, for Liggett adopted a theory of oligopoly recoupment but simply failed to support it.

Both Liggett's antitrust counsel and its economic theory witness agreed that without recoupment, Liggett's case "doesn't make sense," "because rational predatory behavior that makes sense" requires "recoupment" by "getting that money back plus a little more." JA6295-96.

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overcome the factual deficiencies in its own efforts to substantiate the predation/recoupment claim against its competitor B&W.

Since *Utah Pie* has no implications for *this case*, review by this Court is hardly warranted simply because "*Utah Pie* has not fared well in the lower courts," Pet. 20, or among academic critics. III P. Areeda & D. Turner, *Antitrust Law* ¶ 720c, at 189-90 (1978) (*Utah Pie* "failed to focus on the important issues").

[23] Liggett's attempt to fabricate a conflict with *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990), Pet. 20-21, is ineffective. Whatever the merits of Judge Easterbrook's extended *dictum* on lower court interpretations of *Utah Pie*, the court's holding on the primary-line Robinson-Patman claim rests squarely on the determination that plaintiff failed to adduce sufficient evidence of price differences on comparable sales, a fundamental jurisdictional requirement of the Act. 881 F.2d at 1408. Liggett concedes that the case was "lost for other reasons . . . ." Pet. 21.

Indeed,

> predation in any meaningful sense cannot exist unless there is a temporary sacrifice of net revenues in the expectation of greater future gains. . . . Thus, predatory pricing would make little economic sense to a potential predator unless he had (1) greater financial staying power than his rivals, and (2) a very substantial prospect that the losses he incurs in the predatory campaign will be exceeded by the profits to be earned after his rivals have been destroyed.

III P. Areeda & D. Turner, *Antitrust Law* ¶ 711b, at 151 (1978).

Liggett's entire presentation before the Fourth Circuit—in briefs and oral argument—urged the *factual* sufficiency of its proof of recoupment, nowhere challenging the need for recoupment as a matter of law.[24] Conspicuously, Liggett's detailed and extensive Statement of Issues, LB1-2, raised *solely* factual matters. Liggett's "primary issue presented in [its] appeal" to the Fourth Circuit was "whether the evidence suffices to support the jury verdict" as to competitive injury. LB3. By contrast, Liggett nowhere contested the "need for recoupment" that was part of Liggett's own case from the start. As Liggett's counsel stated at oral argument, "predation is unlikely in the absence of recoupment." Transcript of Feb. 3, 1992 Oral Argument Before the U.S. Court of Appeals for the Fourth Circuit at 16.

After years spent building a case of competitive injury on its own expert's theory of oligopoly recoupment, this Court should not permit Liggett to go back and question this requirement, hoping to create a conflict arising from Liggett's own inability to prove recoupment in *this case*. Especially in view of Liggett's representations to the Fourth Circuit, where it asserted the need for recoupment, Liggett should not be permitted to "have its cake and eat it too" by basing its case on recoupment and then challenging that requirement before this Court.

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[24] *See generally* LRB.

Liggett's effort to create a conflict from the Fourth Circuit's citation of *Matsushita* is equally ineffective. The court quoted and relied upon *Matsushita* for the proposition that predation requires proof of a "reasonable expectation" of recoupment. Pet. App. 9a. Liggett concedes that this is the proper legal standard. Any "conflict" regarding the proper application of *Matsushita* is therefore academic.

E. The Fourth Circuit Did Not Require Proof of Actual Injury to Competition

Liggett's suggestion that the Fourth Circuit imposed a "requirement of actual effects" or "actual injury to consumers" is also specious. Pet. Question Presented No. 3; Pet. 22-23. No such "requirement" appears in the text of the opinions below. Of course both courts recognized that proof of competitive injury under Robinson-Patman is satisfied by a showing "that the effect of [discriminatory] pricing 'may be substantially to lessen competition.'" Pet. App. 7a; *accord id.* at 24a. And both courts examined the real impact on the marketplace of B&W's challenged volume discounts, which intensified competition and dramatically broadened the discount segment. But neither court *required* proof of "actual injury to consumers."

The assessment of the procompetitive impact of B&W's volume discounts was appropriate in a 1989-90 trial of Liggett's treble-damage action based on volume discounts introduced in 1984. It responded directly to Liggett's oligopoly recoupment theory which *assumed* that B&W's larger competitors would not react, but would remain inert while B&W pursued its allegedly predatory price discrimination campaign to "manage" generic prices, thus "slowing" generics' "rate of growth." Pet. 11.

Especially in view of *Eastman Kodak's* requirement that economic theory must conform to "market reality," no basis exists for Liggett's assertion that its theory of oligopoly recoupment, founded on the assumed passivity of all other industry "oligopolists," must be credited "regardless of its accuracy in reflecting the actual market,"

Eastman Kodak, 112 S. Ct. at 2083, and even though that "theory does not explain the actual market behavior revealed in the record." *Id.* at 2085.

It is therefore obvious that no conflict exists between the ruling of the Fourth Circuit, which imposed no "requirement of actual effects" in Robinson-Patman Act cases, with either of the Sherman Act decisions cited by Liggett or with *Henry v. Chloride, Inc.*, 809 F.2d 1334 (8th Cir. 1987), which adopted the same "reasonable possibility" formulation of the primary-line injury requirement.

Moreover, according to *Henry*, even though "predatory intentions need not be accomplished," "economically plausible" predatory pricing presupposes a "reasonable expectation on the part of the alleged predator that it will succeed in dominating, if not controlling, the market"—the very proposition that Liggett failed to establish here. 809 F.2d at 1345 n.9.

Finally, refuting Liggett's assertion that the actual "market reality" *after* a challenged price discrimination should be ignored, Pet. 22-23, primary-line Robinson-Patman cases have been dismissed precisely because the "reality" of increased competition *afterwards* negated any "reasonable possibility" of competitive injury at the time.[25]

F. The Fourth Circuit Did Not Eliminate the "Independent Force" of the Robinson-Patman Act

According to Liggett the Fourth Circuit ruled out liability for oligopoly recoupment under the Robinson-Patman Act, thus rendering the Robinson-Patman provision "redundant of the Sherman Act." Pet. 13. Liggett claims that this contravenes Congressional intent that the 1914 Clayton Act should extend beyond the Sherman Act, thus

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[25] *E.g., Dean Milk Co. v. Federal Trade Commission*, 395 F.2d 696, 714 (7th Cir. 1968); *Anheuser-Busch, Inc. v. Federal Trade Commission*, 289 F.2d 835, 842 (7th Cir. 1961); *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, 191 F.2d 786, 790 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952); *Yale & Towne Mfg. Co.*, 52 F.T.C. 1580, 1595, 1602 (1956).

(according to Liggett) creating conflict with decisions that do not require monopoly or conspiracy in primary-line Robinson-Patman cases.

Liggett hardly benefits from invoking the Clayton Act of 1914, *id.* at 2, to distance itself from what it calls the "much criticized 1936 amendment." *Id.* at 3 n.2. First, the 1914 Act was aimed at monopoly recoupment of predatory losses, which was neither present nor established here:

> In its report of the Clayton Bill to the House of Representatives, the House Judiciary Committee made it clear that its primary purpose was to reach the practice of destroying competition in certain sections by lowering prices below cost and thereafter *recouping such losses* at the expense of the general public *when monopoly had been achieved.*

Goodyear Tire & Rubber Co. v. Federal Trade Commission, 101 F.2d 620, 623 (6th Cir.), *cert. denied*, 308 U.S. 557 (1939) (emphasis supplied).

Second, Clayton Act Section 2 of 1914 expressly exempted and immunized *quantity* discounts from its coverage. *E.g., Goodyear*, 101 F.2d at 622-23; P. Areeda & L. Kaplow, *Antitrust Analysis* ¶ 602(b), at 933-34 (4th ed. 1988). Thus Liggett's price discrimination claim, based solely on B&W's quantity discounts, would have been *dismissed* under the very Clayton Act provision on which Liggett now relies.

As for the "independent force of the Robinson-Patman Act," Pet. Questions Presented,

> [t]he basic substantive issues raised by the Robinson-Patman Act's concern with primary-line injury to competition and by the Sherman Act's concern with predatory pricing are identical . . . . [W]e see nothing that compels a more restrictive substantive interpretation of the Robinson-Patman Act.
>
> . . . .
>
> Nor does the intent of Congress in passing the Clayton Act to go beyond the Sherman Act have any great

> significance, given that no one knew what the Sherman Act rule on predatory pricing was or would come to be and that Congress may well have been operating on pessimistic assumptions.

III P. Areeda & D. Turner, *Antitrust Law* ¶ 720c, at 190 (1978).

In any event, since the decision in this case rests on the factual insufficiency of Liggett's assertions of oligopolistic recoupment, the decision here cannot threaten the "independent force" of the Robinson-Patman Act, Pet. Questions Presented, or "invite a complete coalescence" of that Act and the Sherman Act. Pet. 21-22.

II. THIS CASE IS UNIQUE: REVIEW BY THIS COURT WOULD HAVE NO PRECEDENTIAL VALUE

Liggett does not contest the Fourth Circuit's statement that no case of predatory pricing has ever been based on the theory that oligopolists would "simply stand by and refrain" from competing. Pet. App. 11a. Indeed, Liggett's counsel describes Liggett's oligopoly recoupment approach as "unusual." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 711.2, at 617 (Supp. 1991). Because both the facts of this case and the nature of Liggett's claim are unique, this case provides a particularly unsuitable vehicle for review by this Court.

The claim presented here is unprecedented under the Robinson-Patman Act, and there is no evident reason why similar claims should arise in the future. Liggett's bare assertion that oligopoly predation is "*more* likely to occur than monopoly predation," Pet. 15 (emphasis in original), is little short of bizarre. If this is so, why is there no reported instance of it in more than a half-century of Robinson-Patman jurisprudence?

The failure of oligopoly recoupment to appear previously in the vast body of Robinson-Patman commentary is compelling evidence of its status as an academic curiosity, spun out by talented scholars to give plausibility to

Liggett's "unusual" claim.[26] There are no similar cases pending in the federal courts, thus there is no evidence of either confusion or conflict on any issue related to oligopoly recoupment. Accordingly, there is no need for review of such a claim in this Court.

Liggett's strained Robinson-Patman theories are clearly awkward for Liggett itself. Liggett launched this case as a trademark infringement claim to "thwart" B&W's competitive introduction of an item in the black-and-white segment where Liggett held a 97% share. The oligopoly theories came only later, when, according to Liggett's economic theory witness, Liggett's counsel needed a plausible economic theory to "at least withstand summary judgment." SJA79.[27] When first approached by counsel, that witness considered that a claim of predation made against a firm with no more than 12% of the relevant market ". . . makes no bloody sense. It makes no sense at all." *Id.*

Liggett's Robinson-Patman claim of "predation" by B&W is especially unusual in that Liggett accounted for almost all black-and-white sales when B&W first announced its own generics. Moreover, Liggett seems a strange choice as a target for predatory attack. Throughout the period in dispute Liggett was wholly owned by Grand Metropolitan plc, a multinational conglomerate with sales exceeding six billion dollars. JA5733-34. Liggett received wholehearted financial support throughout the volume discount war. Grand Met supplied money to

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[26] A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. . . . "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955) (citations omitted).

[27] "SJA" refers to the Supplemental Joint Appendix filed in the Fourth Circuit.

Liggett each time it was requested. JA5468; JA7913-15.[28]

Finally, perhaps the most remarkable feature of this record is the denial by Liggett's most senior executives of the very foundation of the theory of oligopoly predation advanced by Liggett's counsel and its economic theory witness. *See supra* pp. 11-12. This expert witness insisted that the industry was rife with "tacit collusion," giving rise to "supracompetitive profits" due to "oligopoly." But Liggett's president and other senior officers flatly denied all of it: as far as they were concerned the public had enjoyed "free and open competition" and "competitive" prices and profits. It will be a rare case, indeed, in which the plaintiff's fundamental theory of competitive injury based on pricing conduct is directly contradicted by the *plaintiff's own president and senior officers* with responsibility for pricing.

Should other Robinson-Patman cases involving oligopoly recoupment ever arise, there will be time enough for this Court to correct any errors that may occur in the analyses made by lower courts. Efficiency of judicial administration would seem to require that the lower courts be permitted to reach more settled positions before a need for this Court's guidance would appear.

In sum, oligopoly recoupment, far from being a greater danger than "monopoly predation," as Liggett contends, is an isolated phenomenon if it exists at all. The district court and the Court of Appeals correctly analyzed Liggett's Robinson-Patman claim and ruled only that Liggett's proof was factually insufficient to show competitive injury in this case. No precedential value can attach to yet a third review of the voluminous record compiled here.

CONCLUSION

The Petition for a writ of certiorari should be DENIED.

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[28] *See supra* p. 24 ("predatory pricing would make little economic sense to a potential predator unless he had (1) greater financial staying power than his rivals . . . .").

Respectfully submitted,

GRIFFIN B. BELL
Counsel of Record
ABBOTT B. LIPSKY, JR.
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303
(404) 572-4600
Counsel for Respondent

Of Counsel:
NORWOOD ROBINSON
MICHAEL L. ROBINSON
ROBINSON MAREADY LAWING
& COMERFORD
380 Knollwood Street, Suite 300
Winston-Salem, North Carolina 27103
(919) 631-8500

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