No. 05-381

In The
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER, CO.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, OREGON, ARIZONA, IOWA, LOUISIANA, MONTANA, WEST VIRGINIA AND WISCONSIN IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

1. Whether a plaintiff alleging that a defendant's "predatory bidding" for input supplies constitutes exclusionary conduct for purposes of a Section 2 Sherman Act claim must satisfy the bright-line *Brooke Group* test this Court constructed for analyzing the specific conduct of "predatory pricing."

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INTEREST OF AMICUS CURIAE

Because amici States are responsible for enforcing state and federal antitrust laws, amici States are interested in the development of workable standards for fostering healthy business competition. Amici States also have an equal interest in protecting consumers and the marketplace from those who adopt abusive tactics in seeking to manipulate the market and suppress competition. As procurers of a vast array of products and services, amici States have found that encouraging competitive bidding from multiple sources enables them to obtain at the best price for goods and services, including inputs and final products, required by their agencies, municipalities, and educational institutions. It is the stated goal, for example, of the State of California to foster small businesses and multiple bids in its procurement processes precisely in order to encourage competition. See Cal. Gov. Code § 14836(a), (b) (2006); Cal. Pub. Contract Code § 10340(a) & (b) (2006); see also Or. Rev. Stat., § 279B.055-.060 (2005) (regarding competitive purchasing). It is also a goal of Section 2 of the Sherman Act to protect small businesses. *United States v. Aluminum Co. of America*, 148 F.2d 416, 428-429 (2d Cir. 1945). As amici States will explain, predatory bidding can be the vehicle to eliminate small business competitors, reduce competitive bidding, and require taxpayers to pay more than they should for goods and services. Additionally, amici States are owners and sellers of a variety of agricultural and/or natural resource inputs (such as timber and mineral rights) at risk of predatory bidding. As a seller into such markets, it is in the interest of amici States to avoid the creation of local markets where power buyers can drive down the price of such resources below market levels.

STATEMENT

1. The forests west of the Cascade Mountains in Oregon and Washington contain sufficient hardwood to support the only concentration of hardwood sawmills in the Western United States. The predominant hardwood species in that region is alder, accounting for 95% of the annual hardwood production. The three principal players in the alder portion of the hardwood lumber industry are: (1) timberland owners and loggers who supply alder sawlogs; (2) production facilities, including sawmills, that buy sawlogs and process them into finished lumber; and (3) purchasers who buy hardwood lumber from production facilities. Pet. App. 2a-3a. Because alder sawlogs degrade quickly and are expensive to transport, alder sawmills typically obtain their sawlogs from no farther than 100 miles away. J.A. 152a, 153a, 169a.

2. Petitioner and respondent operated sawmills in the Pacific Northwest. Petitioner and respondent purchased alder sawlogs from landowners or loggers and processed them into hardwood lumber, which is used in consumer goods such as furniture, guitar blanks, paint brush handles, hangers, and cabinetry. Petitioner owned substantive timber holdings and supplied as much as 50% of its Longview, Washington mill's needs. J.A. 152a, 153a, 169a, 207a; Pet. App. 3a.

3. Respondent was a pioneer in the alder business, starting in 1962. It operated a mill in Longview, Washington continuously until it went out of business in 2001. From 1990 to 1997, Respondent experienced modest prosperity. From 1998 to 2001, its production declined. During that latter time period, sawlog prices increased whereas finished lumber prices decreased. This was unusual: historically, the price of alder sawlogs fluctuated with the price of finished lumber. Because its material costs went up and its production went down, respondent

incurred losses and was forced to shut down in 2001. Pet. App. 3a.

4. Petitioner now owns six hardwood mills in the Pacific Northwest and is one of the largest manufacturers of hardwood lumber in the world. From 1998 to 2001, the period during which Respondent's profits dropped, petitioner's share of the Pacific Northwest market for alder sawlogs rose from 65% to 75%. J.A. 663a-664a, 700; Pet. App. 3a. Petitioner listed its market share for finished alder lumber at 75% in 2000. J.A. 753a.

5. The advent of expensive new machines and product-grading, which did not exist when petitioner entered the market, has raised the costs for entry into the market for processing alder logs to $20-25 million per mill. J.A. 370a; Pet. App. 24a. Petitioner's market share of 70% created an additional barrier to entry into the market due to limited log supplies. J.A. 369a.

6. Respondent brought an action against petitioner under Section 2 of the Sherman Act, alleging that petitioner monopolized and attempted to monopolize the Pacific Northwest input market for alder sawlogs through its purchase of sawlogs. At trial, respondent offered testimony and other evidence to prove that petitioner attempted to eliminate competing buyers of alder by driving up sawlog prices and restricting access to sawlogs through: (1) predatory overbidding (*i.e.,* paying a higher price for sawlogs than necessary); (2) overbuying (*i.e.*, buying more sawlogs than needed); (3) entering restrictive or exclusive agreements with sawlog suppliers; and (4) making misrepresentations to Oregon state officials in order to obtain sawlogs from state forests. Respondent provided evidence that petitioner deliberately raised sawlog prices even as it suffered declining profits due to the high prices it was paying for those logs. Petitioner tracked its rivals' profit margins and estimated the potential effect of targeted increases in sawlog costs on the ability of low-margin competitors to survive. Petitioner

also used exclusive supply agreements to restrict competitors' access to sawlogs. Petitioner planned to lower the prices it paid for sawlogs after acquiring a greater market share due to decreased competition, envisioning itself to be the great "consolidator" in the Pacific Northwest. Petitioner responded to this evidence by attributing respondent's failure to substandard equipment, inefficient operation, poor management, and inadequate capital investment. Respondent prevailed after a jury trial. J.A. 260a-261a, 354a, 745a; Pet. App. 3a-4a, 17a-19a. The district court noted that sufficient evidence existed to support the determination by the jury that Respondent's losses were not the result of vigorous competition by a more efficient competitor. Pet. App. 34a n.4.

7. As petitioner satisfied a substantial portion of its log needs from its own timberlands, respondent offered evidence showing Petitioner's internal log transfer price for logs supplied to its Longview, Washington mill. (This was the mill which competed with respondent.) Petitioner supplied logs it owned to its Longview, Washington mill at a 32% discount to the average cost of logs purchased from third parties. J.A. 831a. The district court found this evidence to be relevant, noting "[a]mong other things, the jury could have found that [petitioner] was internally transferring lumber to its Longview mill, at below cost, to conceal or compensate for the fact that [petitioner]'s Longview log buyers were paying excessive prices for logs purchased on the open market in order to keep [respondent] from obtaining those logs." Pet. App. 33a. The district court further observed that "[a]lternatively, the jury could find that the price discrepancy illustrates the difference between what [petitioner] believed those logs were actually worth versus what it was paying for equivalent logs on the open market in order to prevent [respondent] from obtaining an adequate supply of quality alder saw logs at reasonable prices." *Id*.

8. The jury received a number of instructions including that "anti-competitive conduct is conduct that has the effect of wrongly preventing or excluding competition, or frustrating or impairing the efforts of firms to compete for customers within the relevant market, making it difficult or impossible for firms to engage in fair competition." The jury was further instructed that "in deciding whether conduct is anti-competitive, you must consider whether the conduct lacks a valid business purpose, or unreasonably or unnecessarily impedes the efforts of other firms to compete for raw materials or customers,. . . ." Finally, the jury was instructed that the conduct to be judged included "one of the [respondent's] contentions is that the Defendant purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the [respondent] from obtaining the logs [it] needed at a fair price. If you find this to be true, you may regard it as an anti-competitive act." Pet. App. 14a n.30; J.A. 973a, 977a-979a.

9. The State of Oregon, one of the targets of Petitioner's bidding activities, is the owner and supplier of timber. See*, e.g.,* State of Oregon, Oregon Department of Forestry, State Forests Management, *available at* http://www.oregon.gov/ODF/State_Forests/state_forest_management.shtml. The Oregon Department of Forestry manages the state forest, and its mission is to "serve the people of Oregon by protecting, managing, and promoting stewardship of Oregon's forests to enhance environmental, *economic*, and community sustainability." See State of Oregon Department of Forestry, About Us, *available at* http://www.oregon.gov/ODF/about_us.shtml (emphasis added) Over 200 million board feet of timber valued at approximately $100 million was harvested from state forest lands in

2000, producing revenues for schools, counties, and local taxing districts.[1]

10. State law requires the State Forester first to appraise such forest products and then to sell them through competitive bidding. Or. Rev. Stat. § 530.059(1) (2005). The State Forester reserves the right to accept or reject all bids. *Id.*, § 530.059(2) (2005); see also *id.*, § 273.522-.531 (2005).

11. The importance of state timber sales, both for the economy of Oregon and for petitioner, is demonstrated in a letter admitted into evidence in this case, dated September 23rd 1999, from petitioner to the Board of Forestry. J.A. 782a (Trial Exh. 446). As that letter states, hardwoods such as alder "compromise a portion of most state timber sales." *Id*. "Hardwood management could be an economically and environmentally attractive alternative on . . . state lands if *markets for hardwoods remain strong and competitive*." *Id*. (emphasis added).

12. In that same letter, petitioner represented to the State of Oregon that it estimated hardwood logs from government lands supplied 50 percent of the timber for

[1] The Oregon Department of Forestry manages two types of forest lands. The first is the Common School Forest Lands (CSFLs). See Oregon Department of Forestry, Status of Common School Forest Land Management, *available at* http://www.oregon.gov/ODF/STATE_FORESTS/docs/management/annual_reports/2005/AnnualReportCSL.pdf. CSFLs are trust lands that were granted to the State of Oregon upon admission to the union for the use of schools. *Ibid*. The Oregon Department of Forestry distributes the money from CSFLs timber sales to the Department of State Lands, which then distributes it to the Common School Fund. *Ibid.* The Oregon Department of Forestry also manages Board of Forestry lands (County Forest Trust Lands). See *ibid.* From July 1, 2004 through June 30, 2005, the Oregon Department of Forestry conducted timber sales from CSFLs that brought in $20.1 million, and Board of Forestry lands that brought in $89.5 million. See *id.* (Table 1, p. 4); see also J.A. 317a-320a (testimony concerning harvest plans of the State of Oregon).

two of its mills. J.A. 784a. In advocating for a rule change to permit it to export softwood logs while remaining eligible to purchase hardwood logs in government sales, petitioner represented to the State that independent companies would remain competitive in hardwoods. Petitioner also stated that, while hardwoods represent a minor portion of the total timber harvest, the component value of hardwoods affects the market value of state timber sales. J.A. 785a.

13. While this case involves timber, amici States also provide inputs and access to natural resources through the competitive bidding process in a number of other markets such as mining and drilling leases,[2] mineral and geothermal rights such as oil and gas,[3] grazing rights,[4] and use of materials such as gravel from submersible and submerged lands.[5]

SUMMARY OF ARGUMENT

Monopsony pricing—or the possession of sufficient market power by a buyer that it can dictate the price to the seller—is quite similar in its anti-competitive effects on the market with monopoly pricing—or the possession of sufficient market power by a seller that it can dictate the price to a buyer. However, it does not follow from this truism that predatory bidding on the monopsony side should be treated the same as predatory pricing on the monopoly side.

[2] Or. Rev. Stat. § 273.551 (2005).

[3] Or. Rev. Stat. § 273.775-.790 (2005); Cal. Pub. Res. Code § 6815.1 (West 2001); *id.,* § 6913(f) (West 2001).

[4] Or. Rev. Stat. § 273.805-.825 (2005).

[5] Or. Rev. Stat. § 274.525-.590 (2005); see Cal. Pub. Res. Code § 6871 (West 2001).

Predatory pricing—the pricing of an *end-product* below cost by a monopolist or a would-be monopolist so as to drive rivals out of the market—carries the short-term pro-competitive benefit of low prices with a very minimal risk that such a predation strategy would succeed in the long run. Accordingly, in order to avoid chilling what is quintessential pro-competitive conduct, lower prices, this Court concluded in *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209 (1993) that predatory pricing violated Section 2 only if (a) prices were below-cost in the short term and (b) the seller had a dangerous probability of recovering its losses in the long term.

Predatory bidding or overbuying can be defined as the bidding or purchasing of inputs at such elevated levels that rival buyers cannot survive (or compete vigorously). At first blush, predatory bidding is more akin to other forms of monopsonistic exclusionary conduct, such as exclusive supply contracts, than it is to predatory pricing. But, in any event, the intricacies of predatory bidding—and its differences from predatory pricing—do not lend themselves to *Brooke Group*'s bright-line test.

Predatory bidding may, in the short term, benefit existing input suppliers who receive an increased price for their inputs. However, consumers do not necessarily realize any savings in the short-term from such a strategy. If input supply is relatively inelastic, *e.g.*, new entry of suppliers is not possible, then the increased bidding price for input supplies will not result in an increased supply of inputs (that could potentially lower output prices) even in the short term. And predatory bidding in the medium to long term leads to depressed prices and the lowered production of inputs as the predatory buyer succeeds in securing a monopsony position in the input market. This harms the long-term welfare of both the suppliers and the public. Predatory bidding in an upstream market can also result in price increases and reductions in output in the downstream market, harming consumer welfare, even if the upstream buyer lacks market power (or the dangerous probability of acquiring it) in the downstream market. Indeed, the predator buyer need not pass on any savings from lower input prices to consumers. As witnessed by Petitioner's plans in this case for the Pacific Northwest alder lumber market, the predator buyer's end game can be the pocketing of the monopsony profits. Economists and commentators have expounded on these anti-competitive effects.[6] And, as sellers of natural resources (or natural resource rights) in often local geographic markets, as well as procurers of often specialized goods and services, Amici States have grave concerns about the adoption of a bright-line rule that fails to recognize and to deter conduct with such a direct anti-competitive effect on them.

The import of the *Brooke Group* test into the predatory bidding context encounters other application problems as well. In the predatory pricing context, there are objective, valid cost benchmarks for determining when sales are below cost such as average variable cost. However, the literal adoption of a *Brooke Group*-type price/cost test in the predatory bidding context (*e.g.*, comparing the cost of the one input as elevated by the higher bids to the price of the complete end-product to determine if the predator's conduct is profitable) has severe administrative problems that render such a test unworkable in the predatory bidding context and raise the substantial prospect of "false negatives." Compare S. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 Antitrust L.J. 311, 343 (2006) (rationale for *per se* rule which eliminated requirement that plaintiff prove anti-competitive harm to consumers is the fear of a "false negative").

[6] See Transcript, United States Senate Judiciary Committee, 1st Session, *Hearing on Monopsony Issues in Agriculture*, October 20, 2003, at 84-115 (Report of Professor Cotterill discussing monopsony profits in the intermediate level of New England fluid milk industry).

Under the *Brooke Group* standard, a firm engaging in predatory pricing must later increase that same price to monopoly levels to recoup the profits lost during the predatory pricing period. Such straight-line recoupment on the sell-side is not necessary where predatory bidding is concerned: a firm can, for example, use cost savings from other inputs to cover the lost profits from its predatory bids.

Amici States recognize that some aggressive input bidding behavior that seems to be predatory can be pro-competitive, such as implementing a plan to expand output of a final product. Application of the "rule-of-reason" analysis applicable to Section 2 cases of exclusionary conduct such as predatory bidding provides a recognized framework for avoiding chilling of such pro-competitive behavior. In the example given, if a defendant with sufficient market power to have a monopsony, or a dangerous probability of acquiring one, possesses plausible pro-competitive justifications, and evidence of exclusionary intent is lacking, then that defendant is not liable under Section 2 for any predatory-like bidding behavior. Similarly, if barriers to entry into the input market are absent, summary judgment would be appropriate on a predatory bidding claim. See *Brooke Group*, 509 U.S. at 226.

Amici States agree the Court of Appeals properly rejected application of *Brooke Group* to this case. Amici States also submit that importation of *Brooke Group*'s test into future predatory bidding cases would be inappropriate.

ARGUMENT

I. THE BRIGHT-LINE *BROOKE GROUP* TEST FOR PREDATORY PRICING IS AN INAPPROPRIATE ONE FOR THE DIFFERENT, AND MORE VARIABLE, SETTING OF PREDATORY BIDDING

As Justice Scalia noted:

> Our § 2 monopolization doctrines are directed to discrete situations in which a defendant's possession of market power, combined with his exclusionary or anti-competitive behavior, threatens to defeat or forestall the corrective forces of competition and thereby sustain or extend the defendant's agglomeration of power. [Citation.] Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might not otherwise be of concern to the antitrust laws—or that might even be viewed as being pro-competitive—can take on exclusionary [or predatory] connotations when practiced by a monopolist. [Citation.]

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 488 (1992) (Scalia, J., dissenting, joined by O'Connor, Thomas, J.J.). While monopolies involved the exercise of market power by a seller to increase the price (and lower the demand) for a product, monopsony is the exercise of market power by a buyer to depress the price paid to (and lower the supply offered by) sellers of a product to below market levels. Although it has been correctly remarked that "monopsony pricing . . . is analytically the same as monopoly or cartel pricing and so treated by the law," *State Oil Co. v. Khan*, 93 F.3d 1358, 1361 (7th Cir. 1996) (Posner, C.J.), *rev'd on other grounds*, 522 U.S. 3 (1997), this is not the equivalent of stating that monopsony and monopoly pricing have all the same features. Cf. *Verizon Commc'ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2004) ("Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue.").

The "default" standard for assessing the conduct of a monopolist is the rule announced in *Aspen Skiing* in which this Court will first look to whether the conduct of the monopolist can be characterized as anti-competitive, that is exclusionary or predatory, based on intent evidence and other factors. *Aspen Skiing Co. v. Aspen Highland Co.*, 472 U.S. 585, 595-596, 602, 605 (1985). If claims of efficiency exist, the Court will take them into account in determining whether the conduct as a whole is anti-competitive. *Id.*, at 605, 610-611; *United States v. Microsoft*, 253 F.3d 64, 68-69 (D.C. Cir. 2001) (en banc). No reason exists to distinguish a monopsony from a monopoly in applying *Aspen Skiing*.

However, *Brooke Group* deviated from *Aspen Skiing*'s framework as to predatory pricing by a monopolist. In creating an exception for analyzing predatory pricing cases, the Court operated against the backdrop of a wealth of studies and commentaries that concluded: predatory pricing schemes were not only rarely tried, and even more rarely successful, but the application of a rule of reason analysis would chill quintessential pro-competitive conduct, lowering prices for consumers. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 226 (1993), citing *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 589 (1986).

The question in this case is whether the features of predatory bidding by a monopsony warrant a similar application of *Brooke Group,* and thus a similar deviation from the standard Section 2 framework. Amici States respectfully request that this Court answer this question in the negative by looking to market realities rather than the formulaic syllogisms petitioner offers, *e.g.,* if the economic effects of predatory pricing is quintessentially pro-competitive in the short run and if *Brooke Group* sets out a workable test for assessing the legality of predatory pricing, the same must be true of predatory bidding—Pet. Brief, at

26-28. Cf. *Eastman Kodak*, 504 U.S. at 465-466 (Blackmun, J., writing for the Court) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law."). Insofar as petitioner and its amici complain about the chilling of pro-competitive bidding by large companies, see*, e.g.,* Brief of the United States in Support of Petitioner at 20-21, 24, the application of traditional antitrust principles as set out in *Aspen Skiing* can protect such activities. Consequently, amici States first turn to a comparison of predatory bidding and predatory pricing, in the context of economic and market realities, through the lens of *Brooke Group*.

A. The Application Of The *Brooke Group* Test To Predatory Pricing Has An Economic Basis

Predatory pricing is aggressive price-cutting by the seller of a product below its costs with the objective of driving its rivals out of the market and subsequently recouping its costs. In *Brooke Group*, this Court found that a plaintiff cannot allege a valid claim of anti-competitive predatory pricing unless it could show (a) the defendant engaged in below-cost pricing in the short-term and (b) that the defendant had a "dangerous probability" of recouping his losses in the long-term. *Id*., at 222, 224. The creation of the test formulated in *Brooke Group* made economic sense.

This Court has recognized low prices are the essence of competition and directly benefit the consumer. *Brooke Group*, 509 U.S. at 223. The first element of *Brooke Group*, a price/cost comparison, serves to protect pro-competitive pricing above costs. Regarding this price/cost comparison, it is well-understood that, economically speaking, a product is priced below-cost when it is priced below its marginal cost. But, because marginal costs is an abstract, economic concept that cannot be practically determined by forensic accountants, almost all federal circuits now accept pricing below average variable costs as the yardstick for measuring when a product is being priced below-cost. See, *e.g., Spirit Airlines v. Northwest Airlines*, 431 F.3d 917, 937-938 (6th Cir. 2005); *United States v. AMR Corp.*, 335 F.3d 1109, 1115-1116 & n.7 (10th Cir. 2003). The second element of *Brooke Group*, recoupment, serves to ensure that supposed anti-competitive effects of a below-cost pricing strategy are likely to be achieved before liability is imposed. This requirement originated in a case where this Court was skeptical of plaintiff's assertion that recoupment was not required because the alleged below-cost sales strategy was subsidized *over a twenty-year period* by profits from other product lines. *Matsushita*, 475 U.S. at 592 & n.18 (possibility of supra-competitive profits in Japanese market does not answer question of why Japanese corporations would sustain losses for two decades in the United States market in alleged conspiracy to engage in predatory pricing with no apparent success).

Consequently, the *Brooke Group* test prevents false positives while fostering competition. See *Brooke Group*, 509 U.S. at 223, 226.

B. The Application Of *Brooke Group* To Predatory Bidding Is Not Appropriate As Predatory Bidding Shares None Of The Characteristics Of Predatory Pricing

Predatory bidding has been described as the bidding or purchase of inputs for a product or service at such "elevated levels that rival buyers cannot survive (or compete as vigorously) and, as a result, the predating buyer acquires (or maintains or increases its) monopsony power—the power to lower the price of the input profitably below the competitive level." J. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding* [hereinafter "Kirkwood"], 72 Antitrust L.J. 625, 651 (2005); see also, *e.g.,* S. Salop, *Anticompetitive*

Overbuying By Power Buyers, 72 Antitrust L.J. 669 (2005) [hereinafter "Salop"]; R. Noll, *Buyer Power and Economic Policy*, 72 Antitrust L.J. 589, 590 (2005) [hereinafter "Noll"]. While predatory pricing involves nothing more than the setting of a price for a final product, predatory bidding involves potentially differing pay-outs (*e.g.*, differing offers and purchases at various elevated prices and bids) to various sellers to lock up input capacity and deny that capacity to a buyer's rivals. When viewed through this buy-side prism, the use of predatory bidding closely resembles the use of exclusionary contracts to lock up supply and, as evinced by this case, can be used in tandem with exclusionary contracts to gain control of an input market. *Aspen Skiing* stands for the proposition that a monopsonist cannot use exclusionary conduct, such as a sudden, unprofitable refusal to deal with a rival, so as to squelch competition. See *Aspen Skiing*, 472 U.S. at 605-610. Amici States therefore believe *Brooke Group* is inapplicable as a threshold matter on the ground it did not purport to regulate exclusionary conduct even if that conduct involved buyer payouts instead of buyer contracts.

Because predatory bidding can directly change the price charged by sellers in a way that individual exclusionary supply contracts may not, a more in-depth comparison of predatory bidding and predatory pricing may be appropriate in this Court's determination of whether *Brooke Group* should apply to predatory bidding. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940) (price is "the central nervous system of the economy"). Based on the record in this case and on economic analyses, however, amici States respectfully assert that, in fact, predatory bidding shares none of the characteristics of predatory pricing that would justify such an extension of *Brooke Group*. In particular, predatory bidding in upstream input markets does not necessarily decrease prices to consumers in short term. Further, sellers and consumers can experience anti-competitive effects in the medium and long term, effects that are more pronounced the more inelastic the upstream input market.

1. Predatory Bidding Often Has Anti-Competitive Effects In The Short Run As Well As The Long Run In Upstream Input And Downstream Output Markets

Predatory pricing is pro-competitive insofar as it involves the sale of products to consumers below cost in the short-term as a cornerstone of the strategy to drive rivals out of the market. Predatory bidding is a different story.

In the short term, predatory bidding is based on the strategy of a power buyer's increasing the market price paid to sellers for their goods, *e.g.*, inputs, beyond the optimal level dictated by the market so as to drive any rivals out of the market. See, *e.g.,* Kirkwood, *supra*, 72 Antitrust L.J. at 653. Although that increase in price provides an unlooked-for windfall to sellers of that input, it increases the buyer's costs beyond what would be the optimal level in a competitive market. Thus, consumers do not receive the benefit of a buyer's competitive optimization of its resources, *e.g.,* either through the use of funds to improve products and services in lieu of paying for the increased bids or a reduction in prices. And, if the power buyer also has sufficient power in the downstream market that it can pass on the increased costs arising from its bidding strategy, consumers can actually suffer a short-term price increase as well. Predatory bidding thus can do a disservice to consumer welfare even in the short run. See Pet. App. 2a; see generally*, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), quoting R. Bork, *The Antitrust Paradox* 66 (1978) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'"); Noll, *supra*, 72 Antitrust L.J. at 591 (finding the exercise of monopsony power to be likely anti-competitive under a "harm to consumers" or a "deadweight loss" standard).

In the medium to long run, after the power buyer's predatory strategy succeeds, the power buyer can decrease the price paid to sellers below competitively optimum levels without fear of competition from its rivals. This can cause sellers not to make the investments that a competitive market would dictate, translating into a market facing input supply shortages, lack of input quality and services, and/or lack of input improvements. Furthermore, the predator buyer need not pass on any savings from these lower prices to consumers: as shown by Petitioner's plans for the Pacific Northwest alder lumber market, the predator buyer can pocket the monopsony profits. Predatory bidding thus can do a disservice to public welfare in the medium to long term as well due to these effects. See Kirkwood, *supra*, 72 Antitrust L.J. at 653; Noll*, supra*, 72 Antitrust L.J. at 594-595; see also Pet. App. 10a-11a.

Also, it bears mentioning that predatory bidding can have second order anti-competitive effects in the medium to long term in downstream product markets. If the power buyer had a substantial prospect of acquiring market power in a downstream product market even before it carried out a predatory bidding scheme in the upstream input market, the power buyer could use its acquired power over the upstream input market to tip the scales in favor of its acquisition of market power in the downstream market. It can then use that market power to increase the prices paid by consumers for the end product. Accord Brief of the United States in Support of Petitioner at 19-20 (denoting this strategy as a price-cost squeeze strategy); Kirkwood, *supra*, 72 Antitrust L.J. at 649-650 & n.72 (same).

Amici for petitioner stress the fact that petitioner supposedly lacked market power in the downstream nationwide market for finished lumber products as a point that would allow this Court to reserve for another day the impact of such downstream effects on the adoption of *Brooke Group* in predatory bidding cases. See, *e.g.,* Brief of the United States in Support of Petitioner, at 18-20.

However, negative downstream effects on consumer welfare are entirely possible even in the absence of market power in the downstream market, *e.g.*, a reduction in output of the end product by the power buyer could occur as a corollary to its reduction of inputs following its acquisition of monopsony power in the upstream market. Tr. of United States Department of Justice and Federal Trade Commission, Sherman 2 Act Joint Hearing, Predatory Pricing (June 22, 2006) [hereinafter "Section 2 Transcript"] at 110, lns:2-19 *available at* http://ftc.gov/os/sectiontwohearings/docs/60622FTC.pdf (remarks of Professor Kirkwood); see Noll, *supra*, 72 Antitrust L.J. at 599-600 (explaining that downstream, end-product market prices could also increase if downstream rivals of the buyer have to use more marginal suppliers at a higher input cost because of the predatory bids).

The aforesaid argument by amici for petitioner as to petitioner's lack of market power in a nationwide market begs the question of whether petitioner (or indeed that any power buyer)'s newly-acquired monopsony position in the upstream input market could grant it market power in a local geographic market or in a relevant sub-market such as the one that is often present for products and services destined for government use. See *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962) (Court can examine competitive impact of alleged illegal conduct on product or service sub-markets); accord, *e.g., Spirit Airlines*, 431 F.3d at 933; see also *Reid Bros. v. Ketchikan Pulp Co.*, 699 F.2d, 1292, 1296-1298 & n.5 (9th Cir. 1983) (analyzing competitive effects of predatory bidding conduct by defendants in Tongass National Forest in Alaska to eliminate rivals and bar new entrants); Noll, *supra*, 72 Antitrust L.J. at 598-599 (noting that a buyer can obtain a monopsony in a local geographic market). In these sub-markets, first- and second-order anti-competitive effects can become more pronounced because these markets can be quite inelastic. See Salop, *supra*, 72 Antitrust L.J. at 671; Kirkwood, *supra*, 72 Antitrust L.J. at 653; Noll, *supra*, 72 Antitrust L.J. at 607-608. Often, new expansion or entry is difficult, and reasonable substitutes are absent, to serve as countervailing forces to a power buyer's bidding strategy to secure the sources of input supplies and drive out rival buyers. See Noll, *supra*, 72 Antitrust L.J. at 597-598 (discussing natural resources and agricultural markets); *id.*, at 610-611 (discussing markets created due to product differentiation). Amici States therefore respectfully submit that this Court should not disregard these second-order downstream effects, especially in local or specialized markets, in determining whether to extend *Brooke Group*. Cf. Brief of the United States in Support of Petitioner at 20 n.8 (implicitly arguing that *Brooke Group* should apply even if downstream market effects were considered).

Speaking more generally, the more inelastic an upstream input market may be, the more pronounced can be the anti-competitive effects of predatory bidding in the short run as well as the long run. For example, in relatively inelastic markets, a power buyer can increase its bids for inputs, and stockpile or destroy any excess inputs so purchased above its needs, without fear of inviting any new entry or expansion by sellers or would-be sellers of that input. Kirkwood, *supra*, 72 Antitrust L.J. at 653-654; see Noll, *supra*, 72 Antitrust L.J. at 606, 610-611. In such inelastic markets, a power buyer could prevent any conceivable short-term benefit to consumers that might otherwise occur as sellers produce more inputs and rivals of the power buyer take advantage to lower downstream prices for end-products. See Pet. App. 11a (discussing alder sawlogs market). That is an important distinction between predatory bidding and predatory pricing to the extent that the short-term benefit to consumers of predatory pricing—low prices—does not disappear if a market is inelastic.

2. These Anti-Competitive Effects Of Predatory Bidding, Absent In Predatory Pricing Cases, Greatly Concern Amici States

The anti-competitive effects occasioned by such predatory bidding strategies, especially in inelastic markets, greatly concern amici States in their roles as sellers of natural resources, or natural resource rights, and in their roles as procurers of products and services made for, or adapted to, government use. For example, the State of Oregon owns timberlands and sells timber. Predatory bidding can leave a State such as Oregon in the position where its taxpayers would receive less for the sale of such timber rights than would occur in a competitive market. This is a particular disadvantage to the public welfare. See Noll, *supra*, 72 Antitrust L.J. at 594-595, 597-598.

As a further example, the State of California has set out a set of bidding policies for the procurement of products and services to encourage bids by qualified small businesses on government procurement contracts. See*, e.g.,* Cal. Gov. Code §§ 14836-14839, 14845-14847(b) (2006). As Judge Learned Hand recognized, Congress' desire, in enacting Section 2, was to strengthen small business concerns and to "put an end to great aggregations of capital because of the helplessness of the individual before them." *United States v. Aluminum Co. of America*, 148 F.2d 416, 428-429 (2d Cir. 1945). Small businesses not only can nimbly adapt to and service in cost-effective ways, the specialized needs of government agencies; they also can inject healthy competition into a procurement process. However, predatory bidding by multi-product or vertically integrated conglomerates in upstream input markets is well suited for eliminating competition from small businesses in downstream markets for supplying goods and services to the government, as small businesses often lack the deep capital pockets to withstand a bidding war in an upstream input market. Cf. Cal. Gov. Code § 14837(d) (2006) (small businesses are defined generally as having 100 or fewer employees and average yearly gross receipts of $10,000,000 or less over the past three years). Consequently, such predatory tactics can leave the State with no choice but to go with the conglomerate as the single-source supplier, requiring its taxpayers to pay more and thereby disserving the antitrust laws and the public policy of the State. See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 973 P.2d 527, 544 (Cal. 1999), quoting *Cargill v. Monfort of Colorado*, 479 U.S. 104, 116 (1988) (antitrust laws do protect small businesses "against the loss of profits from practices forbidden by the antitrust laws"); Cal. Pub. Contract Code § 10340(a) & (b) (2006) ("Except as provided by subdivision (b), state agencies shall secure at least three competitive bids or proposals for each contract.").[7]

3. There Is No Objective Or Valid Cost Benchmark In Predatory Bidding Cases As There Is In Predatory Pricing Cases

A consensus exists in predatory pricing cases as to the objective benchmark to be used for cost-price comparisons: the average variable costs of a single final product versus its price. The landscape is quite different as to predatory bidding.

[7] Indeed, in situations in which such predatory strategies are carried out by the acquisitions of rivals, in lieu of bid increases targeting them, the European Union has set out the existence of similar anticompetitive effects as a reason for potentially rejecting a proposed merger. See *Commission Guidelines on the Assessment of Horizontal Mergers*, 2004 O.J. (C31) 5 at ¶¶ 61-63 (merger that creates or strengthens the market power of a buyer may allow it to obtain lower prices by reducing its inputs, in turn leading it to lower its level of output in the final product market and/or to foreclose rivals, and hurt consumer welfare). The acquisition of rival buyers, like the successful use of bidding to raise input prices and drive rival buyers out of the market, is evidence of market power under Section 2. See *Eastman Kodak*, 504 U.S. at 488 (Scalia, J., dissenting) (citing *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 75 (1911)).

A couple of economists seem to suggest that a relevant comparison could be the price of the end product to the increased costs arising from the higher bids on the inputs. Under this analytical framework, as long as a would-be monopsonist could make a profit on the end product, it would not matter if it were running substantial losses on an input due to its bidding strategy. See H. Hovenkamp, *The Law of Exclusionary Pricing*, 2 Competition Policy Int'l 21, 38 (Spring 2006) [hereinafter "Hovenkamp"] ("In such a situation [where the cost of the timber is 75% of the cost of finished lumber], it should be easy to conclude that an input price is not 'too high' unless a firm is unable to make a profit on its sales."); Salop, *supra*, 72 Antitrust L.J. at 701-702 & n.96 (focusing on a comparison of marginal input costs to the end product's price).

However, both economists forthrightly note substantial drawbacks with this analytical framework that, in the opinion of Amici States, make it unworkable. Professor Hovenkamp begins with the observation that such a price/cost comparison works *if* the defendant has no market power in the downstream end-product market (allowing it to raise prices to cover the increased cost). Hovenkamp, *supra*, 2 Competition Policy Int'l at 38. He then notes that "[o]n administrative grounds, a price/cost test is more difficult to defend if the input in question constitutes only a small percentage of the cost of the finished product." *Id.* Professor Salop admits that a monopsonist can manipulate marginal costs on inputs. See Salop, *supra*, 72 Antitrust L.J. at 701-702 & n.96.[8] (In other words, a power buyer could subsidize the overage for one input arising from its higher bids with cost savings from another input.) He further states "[t]o be sure, requiring the plaintiff to satisfy the below-cost pricing test

[8] Professor Salop's focus on marginal costs raises additional "administrative" issues as marginal costs are an economic abstraction that cannot readily be determined by forensic accountants. See*, e.g., AMR Corp.*, 335 F.3d at 1115-1116.

also could lead to 'false negatives.' [Footnote.] An alternative approach to reducing false positives would be to apply the full rule of reason solely with a rigorously applied consumer welfare harm standard." Salop, *supra*, 72 Antitrust L.J. at 704 & n.98.[9]

Other problems also arise with a downstream price/cost test. As part of this process, a forensic accountant (or a court) would need to wrestle with questions such as the following: What if the would-be predator can and did absorb the cost increased involved in predatory bids by reducing costs on other inputs such that no cost increase appears on the books under a price/cost test? See *id.*, at 703 n.96. What happens if the would-be predator has multiple product lines across the country, or is vertically integrated, such that it can run losses involving increased bidding on inputs in a narrow geographic market or on a specialty product even as its input costs on a division-wide or nation-wide basis may hold firm? See, *e.g.,* Pet. App. 33-34a. What if the input in question actually ends up going into a variety of different final products that sell at different prices? See*, e.g.,* J.A. 152a, 153a (noting multitude of different products that can be made from alder timber). What if the input cost increase involved is small because the specific input involved is a small percentage of the total input costs but is essential to the manufacture of the final product? Compare, *e.g.,* Brief of the United States in Support of Petitioner at 22-23 (suggesting that such a small cost increase should not matter) with Hovenkamp, *supra*, 2 Competition Policy Int'l at 38 (noting that even a small cost increase can reflect anticompetitive predatory bidding).

Indeed, amici for petitioner studiously avoid suggesting to this Court any sort of objective or valid cost benchmark

[9] Other economists have echoed the point that importing *Brooke Group*'s price-cost "safe-harbor" into the predatory bidding context will create "a high rate of false negatives." Section 2 Transcript, *supra*, at 151 lns. 21-25 – 152 lns. 1-3, 13-22 (Testimony of Dr. Rick Warren-Boulton).

to be applied in predatory bidding cases. The United States, with prior experience in undertaking complex calculations on cost, see *AMR Corp.*, 335 F.3d 1109, avoids suggesting such a benchmark. See Brief of United States in Support of Petitioner at 22-23. The United States disclaims any need to do so because this Court in *Brooke Group* did not provide such an objective benchmark in the predatory pricing context. See *id*. However, the Court did not address this issue there because the parties had already agreed on the relevant measurement of costs as being average variable costs. *Brooke Group*, 509 U.S. at 223 n.1 Similarly, amici economists supporting petitioner also avoid suggesting any sort of objective or valid cost benchmark for applying *Brooke Group*. See Brief of Amici Economists at 2-3.

Consequently, no objective or valid, workable cost benchmark exists on which *Brooke Group* could be imported from predatory pricing cases to predatory bidding cases.

4. The Need For Recoupment Is Not A Given With Predatory Bidding The Way It May Be With Predatory Pricing

Those economists who support the notion that recoupment is required to establish predatory bidding appear to do so based on assumptions without any empirical foundation. *E.g.,* Hovenkamp, *supra*, 2 Competition Policy Int'l at 38 ("Third, recoupment seems essential in all cases of predatory spending. Whether or not the defendant's costs are pushed higher than its prices, an anticompetitive strategy of overbuying will not be profitable unless its payoff is greater than the investment."). However, the determination of the necessity of recoupment can be so complex in a predatory bidding scenario that forcing this scenario into *Brooke Group*'s recoupment test would destroy its bright-line nature.

In the predatory pricing context, the sale at a price below cost of a final product creates a straightforward, absolute loss that must be made up by the company somehow. Unless a firm is willing to cross-subsidize that loss with profits from other product lines (raising questions of motive similar to those raised by this Court in *Matsushita*, 472 U.S. at 592 & n.18), a firm willing to embark on such a strategy must recoup those losses by raising prices (if its rivals have been successfully driven out of the market).

However, in the predatory bidding context, the purchase of an input at an extra cost may or may not cause a loss that would need to be recouped as witnessed by the various scenarios discussed in the previous section on the cost prong of *Brooke Group*. If the input is a small percentage of the total cost, the loss may be too insignificant to warrant recoupment. If the input is a more sizeable percentage of the total cost, the loss may be made up by squeezing more efficiencies out of other inputs so that recoupment would not be warranted. If the input goes into a variety of downstream products, then whether a loss (that would need to be recouped) is suffered could depend on the price of those final products. And, of course, if the downstream price of the final product rose due to predatory bidding in the upstream market, then any losses might be made up in a manner that does not fit the *Brooke Group* standard.

Consequently, predatory bidding is far more akin to the kind of exclusionary conduct condemned in *Aspen Skiing* than to predatory pricing.[10]

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[10] There are very few cases and relatively little commentary or studies addressing predatory overbidding. See Brief of the United States in Support of Petitioners at 25-26. Amici States respectfully note that the absence of predatory buying cases could be a "false negative" in the sense that predatory bidding is most readily tried by power buyers in industries such as agriculture against small, atomistic suppliers who

(Continued on following page)

II. THE *ASPEN SKIING* STANDARD ENABLES THE COURTS TO ADDRESS THE ANTI-COMPETITIVE EFFECTS OF PREDATORY BIDDING WHILE AVOIDING THE CHILLING OF PRO-COMPETITIVE BIDDING CONDUCT

Aspen Skiing sets out a type of rule-of-reason test for Section 2 cases in which this Court looks first to determine whether complained-of conduct is exclusionary and, hence, anti-competitive (including the analysis of "intent" evidence). Next, the Court determines whether the conduct in question has pro-competitive effects. *Aspen Skiing*, 472 U.S. at 605, 610-611; *Microsoft*, 253 F.3d at 59. That analysis requires, in the Section 2 context, that the asserted pro-competitive effects at least be plausible based on the facts in the record. See *Kodak*, 504 U.S. at 472-473 (majority op.); *Microsoft*, 253 F.3d at 59, 71-72.

Amici States believe that *Aspen Skiing*'s rule-of-reason analysis supplies the proper mode of analysis for predatory bidding cases as predatory bidding can be viewed as a species of exclusionary conduct. Accord, Kirkwood, *supra*, 72 Antitrust L.J. at 661. In the predatory bidding context, a defendant cannot be liable unless it has monopsony power (or a dangerous probability of acquiring it), there are barriers to entry, there are no pro-competitive justifications, and there is an anti-competitive effect.

Thus, *Aspen Skiing* itself should not be applied unless the defendant either enjoys monopsony power or possesses buying strength that approaches a monopsony such that it has a "dangerous probability" of acquiring it, see *Spectrum*

lack the capital resources to fight or to sue. See Transcript, United States Senate Judiciary Committee, 1st Session, *Hearing on Monopsony Issues in Agriculture*, October 20, 2003, at 23 (Testimony of Professor Cotterill discussing milk industry); *id.*, at 61-65 (Report of Professor Carstensen discussing various agricultural industries such as beef, milk, and grain).

Sports v. McQuillan, 506 U.S. 447, 456, 459 (1993). While that market power conceivably may be proved directly from the buyer's evidenced ability to directly set input prices and output without regard for the market,[11] it may also be demonstrated inferentially from market conditions such as the vertical integration of the buyer,[12] or, more commonly, from the buyer's market share.[13] As a general rule, market shares of 70% or more are normally required to trigger a finding of monopsony power with at least a 55% market share, combined with other market factors, required for a "dangerous probability" finding in attempted monopsony cases.[14] And, the existence of one or more powerful rival buyers, *e.g.*, at least one buyer with sufficient capital resources of its own that it could match or exceed the defendant's bids, should, all things being equal, militate against any finding that a would-be predator is a monopsonist or has a "dangerous probability" of becoming one. See, *e.g., Indiana Grocery Co., Inc. v. Super-Valu Stores, Inc.,* 684 F.Supp. 561, 579 (S.D. Ind. 1988).

[11] See, *e.g., Heerwagen v. Clear Channel Communications*, 435 F.3d 219, 227 (2d Cir. 2006).

[12] See*, e.g., Eastman Kodak*, 504 U.S. at 488 (Scalia, J., dissenting) (citing Areeda & Turner). Another important market condition in inferring the buyer's market power to carry through a predatory bidding scheme is the supply elasticity of the upstream input market. See, *e.g.,* Section 2 Hearing Transcript at 148, 151-152 (remarks of Dr. Warren-Boulton); Salop, *supra*, 72 Antitrust L.J. at 671; Kirkwood, *supra*, 72 Antitrust L.J. at 653; Noll, *supra*, 72 Antitrust L.J. at 607-608.

[13] See*, e.g., Heerwagen*, 435 F.3d at 227, citing and quoting 2A P. Areeda, H. Hovenkamp, and J. Solow, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 515, at 114 (2d ed. 2002).

[14] See, *e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966); *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America et al.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989); *Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vermont, Inc.*, 845 F.2d 404, 409 (2d Cir. 1988); *Aluminum Co. of America*, 148 F.2d at 424.

Furthermore, liability under *Aspen Skiing* cannot be triggered unless there are barriers to entry that prevent existing sellers from expanding their input capacity or new sellers from entering the input market. See*, e.g., Microsoft*, 253 F.3d at 54-56. The existence of barriers to entry of input supplies is a key prerequisite for the success of a predatory bidding scheme. *E.g.,* Kirkwood, *supra*, 72 Antitrust L.J. at 661; cf. *Matsushita*, 475 U.S. at 591 n.15 (discussing alleged predatory pricing conspiracy). Absent barriers to entry, overbidding by a would-be predator will merely serve to stimulate additional input production by existing and new businesses alike.

Absent these pre-conditions (*e.g.*, monopsony or the "dangerous probability" of achieving monopsony, and barriers to entry), a firm resultantly can engage in aggressive bidding behavior without fear of liability under Section 2. "Where the market is highly diffuse and competitive, or where new entry is easy, or the defendant lacks the adequate excess capacity [or capital to outbid] his rivals and cannot quickly create or purchase new capacity [or acquire sufficient additional capacity], summary judgment is appropriate." *Brooke Group*, 509 U.S. at 226.

Additionally, the rule-of-reason standard allows courts to consider whether pro-competitive reasons exist for a firm to engage in aggressive input-bidding behavior resembling predatory conduct. Pro-competitive justifications could include: a firm might need to meet increased downstream demand for that final product; it might need to introduce a new version of a final product requiring greater levels of input; it might anticipate a future shortage based on market forecasting; or it might need to introduce a new, more efficient mode of producing that final product requiring a greater amount of inputs. See, *e.g.,* Brief of the United States in Support of Petitioner at 16; Kirkwood, *supra*, 72 Antitrust L.J. at 655 & n.109; Salop, *supra*, 72 Antitrust L.J. at 682-683; Hovenkamp, *supra,* 2 Competition Policy Int'l at 38. As long as these efficiencies are plausible on the facts and are not counterbalanced by evidence that the firm's intent was exclusionary (*e.g.,* to squeeze out rivals and reap monopsony profits), then summary judgment would be appropriate. See*, e.g., Microsoft*, 253 F.3d at 59.

Only if the evidence were ambiguous, for example, in that contrary inferences of plausible pro-competitive efficiencies and a predatory intent exist, then a balancing of pro- and anti-competitive effects arising would be appropriate. Kirkwood, *supra*, 72 Antitrust L.J. at 661; see *Microsoft*, 253 F.3d at 59. And, conversely, if there were evidence of a predatory intent, unaccompanied by evidence of plausible efficiencies on the facts of a case, then the courts can and should hold the would-be monopsonist liable under Section 2 for predatory bidding. See *Aspen Skiing*, 472 U.S. at 605, 610-611. This is "facially anti-competitive and exactly the harm that antitrust laws aim to prevent." *Eastman Kodak*, 504 U.S. at 478.

III. THE *ASPEN SKIING* REQUIREMENT OF ANTI-COMPETITIVE EFFECT CAN BE APPLIED IN THE PREDATORY BIDDING CONTEXT

Aspen Skiing requires a showing that the exclusionary conduct, here predatory bidding, had an actual anti-competitive effect. See *Aspen Skiing*, 472 U.S. at 605-608. The question then arises as to how a plaintiff may prove such an anti-competitive effect without making any input price increase caused by a monopsonist, no matter how minor, potentially actionable. Amici States propose that the correct test under *Aspen Skiing* for determining when predatory bidding causes an anti-competitive effect be if the conduct (a) raised the price that the buyer's rivals had to pay for the input beyond a level that could be justified or explained by other market or exogenous factors, and (b) substantially affected the ability of the buyer's rivals to compete for the input. Accord, Kirkwood, *supra*, 72 Antitrust L.J. at

661; see also, *e.g., Aspen Skiing*, 472 U.S. at 607-608 (examining impact on rival of exclusionary conduct). If a plaintiff alleging that a defendant engaged in predatory pricing could not provide evidence of such an anti-competitive effect, then summary judgment for the defendant would be appropriate. See *Aspen Skiing*, 472 U.S. at 605. In this manner, *Aspen Skiing* would continue to remain a supple instrument for addressing the varied anti-competitive circumstances and effects of predatory bidding, consistent with other forms of exclusionary conduct.

CONCLUSION

For the foregoing reasons, amici States respectfully request that this Court affirm the judgment of the Court of Appeals, and reject the application of *Brooke Group* to predatory bidding cases.

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