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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first in case 05-381 Weyerhaeuser Company versus
5 Ross-Simmons Hardwood Lumber Company.

6 Mr. Pincus.

7 ORAL ARGUMENT OF ANDREW J. PINCUS

8 ON BEHALF OF THE PETITIONER

9 MR. PINCUS: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 The question in this case is whether the
12 standards this Court adopted in Brooke Group to
13 determine whether a seller's prices violate the
14 antitrust laws because they are too low also should
15 apply in assessing the claim that the buyer's purchase
16 prices are illegally high. We submit that the Brooke
17 Group test applies because the four key underpinnings of
18 the Court's ruling apply fully here.

19 First, there's a high risk of mistaking
20 aggressive competition for anticompetitive behavior.
21 Increasing the prices that are paid for inputs like
22 lowering sales prices is a mechanism by which a firm
23 competes. It's the result that we would expect from a
24 buyer's ordinary competitive instincts. So the conduct
25 targeted here is on its face identical to core

1 procompetitive conduct. It's also very hard to
2 distinguish losses suffered by a more inefficient
3 competitor from hard -- to anticompetitive behavior, but
4 the antitrust laws --

5 JUSTICE STEVENS: Can I ask you a
6 preliminary question before you get too far into your
7 argument? Is it your understanding that the
8 instructions to the jury were that finding that
9 predatory price cutting was in itself sufficient to
10 establish a Section 2 violation? I know the Court of
11 Appeals opinion reads that way but is it, do you think
12 the jury was so instructed?

13 MR. PINCUS: Yes. Our position is that that
14 is what the jury was instructed, because the predatory
15 pricing instruction said one of plaintiff's contentions
16 is that defendant purchased more logs than needed or
17 paid a higher price for logs than necessary in order to
18 prevent the plaintiffs from obtaining the logs they
19 needed at a fair price. I'm reading from page 14(a) of
20 the appendix to the petition. And then it concluded, if
21 you find this to be true, you may regard it as an
22 anticompetitive act.

23 JUSTICE STEVENS: You may consider it as an
24 anticompetitive act, but it does not say you may regard
25 it as a violation of Section 2.

1 MR. PINCUS: No.

2 JUSTICE STEVENS: And as I read the
3 instructions, it did require there be three elements of
4 the violation of Section 2 which, two of which were not
5 discussed by the Court of Appeals.

6 MR. PINCUS: Well, Your Honor, there is no,
7 there is no contention here about monopoly power. The
8 focus here is on the conduct element of Section 2.

9 JUSTICE STEVENS: Do you concede there is
10 monopoly power?

11 MR. PINCUS: We are not disputing it before
12 this Court.

13 JUSTICE STEVENS: But is that relevant to
14 the question whether, if there is monopoly power plus an
15 attempt to preserve that power or require that power,
16 plus an anticompetitive act, is that a violation of
17 section 2.

18 MR. PINCUS: Well, Your Honor, our view is
19 what the Court has said in cases like Trinko, is that
20 the test is monopoly power and anticompetitive conduct.
21 Those are the two elements. We are not contesting the
22 monopoly power element. We are looking at whether there
23 was anticompetitive conduct here.

24 JUSTICE STEVENS: But you do agree that the
25 conduct in itself is not sufficient to establish a

1 violation, the question of whether the conduct plus the
2 monopoly power --

3 MR. PINCUS: Yes. Because this is a claim
4 under Section 2, there would have to be either monopoly
5 power or a danger of probability to the monopoly power.
6 It's single firm conduct so there would have to be --

7 JUSTICE STEVENS: And so you're arguing not
8 only that the pricing conduct was not itself sufficient
9 to prove a violation, but it also was not even an
10 anticompetitive act that may give rise to damages?

11 MR. PINCUS: Yes, Your Honor. We are
12 arguing both things. I think, I'm not sure that there
13 is much space between the two, but to the extent there
14 is, we are arguing both.

15 JUSTICE STEVENS: Obviously, if there's just
16 an anticompetitive act without a violation of the
17 statute, then there would be no basis for damages.

18 MR. PINCUS: I think that's right, but I
19 guess the way I think the Court has approached
20 determining anticompetitive act, anticompetitive
21 conduct, is it's the kind of conduct when engaged in by
22 a monopolist or an entity that has a dangerous
23 probability of cheating it, it is a violation of this
24 statute.

25 JUSTICE STEVENS: Of course in the Brooke

1 case, it may not have even been a monopolist.

2 MR. PINCUS: Well, because Brooke involved a
3 claim under the Patent Act. But this Court in the
4 Trinko case has certainly interpreted the Brooke
5 Standard as also applying to claims under Section 2.
6 And in fact the Court explicitly said that in Brooke
7 Group.

8 As I said, the first critical underpinning
9 is the risk of mistaking aggressive competition for
10 anticompetitive behavior. Second, this case involves --

11 CHIEF JUSTICE ROBERTS: Well, it's a little
12 different here in that in the Brooke Group cases, of
13 course, the alleged anticompetitive conduct was pricing
14 too low, which has at least a direct benefit to
15 consumers either in the short term, certainly in the
16 short term, and arguably in the long-term as well, while
17 here that is not the form in which the anticompetitive
18 conduct, that's not the form the anticompetitive conduct
19 takes. So isn't that a reason not to think that we
20 should apply the Brooke Group test to this situation?

21 MR. PINCUS: Your Honor, we don't, we don't
22 think that that difference is a distinction that
23 warrants a different test, for several reasons. First
24 of all, we are dealing here with single firm pricing
25 conduct and it's recognized that that's key to the

1 proper functioning of the markets. As the court said in
2 Professional Engineers, fixed pricing is the central
3 nervous system of the economy. It allocates goods and
4 ensures that, that they are allocated to the most
5 efficient use.

6 Here, although there's no immediate benefit
7 to consumers, there is an immediate benefit to the
8 sellers of the logs, who certainly benefit when
9 competition drives up the prices that they achieve. And
10 we think that the Sherman Act protects them and gives
11 them the benefit of full competition just as much as it
12 does consumers. Over the course --

13 CHIEF JUSTICE ROBERTS: Have we ever
14 identified that as a benefit that the antitrust laws try
15 to achieve, people get higher prices for what they sell?

16 MR. PINCUS: Yes. In Mandeville Farms,
17 which was a Section 1 case, the Court did talk about the
18 fact that the antitrust laws protect sellers as well as
19 buyers, and that was a case in which there was allegedly
20 a Section 1 conspiracy to price too low, and the Court
21 said that's per se unlawful.

22 CHIEF JUSTICE ROBERTS: So in Brooke Group,
23 we said it's a benefit when prices are low to consumers,
24 and in this other case we said it's a benefit when
25 prices are high to suppliers.

1 MR. PINCUS: Because the benefit that I
2 think the Court is looking at in both cases is not the
3 particular price levels, but in achieving and ensuring
4 free price competition because of the central role that
5 price plays in the economy. That's what the Court is
6 trying to protect in Professional Real Estate -- in
7 Professional Engineers --

8 JUSTICE SCALIA: I assume it's a benefit to
9 consumers if the supply of the needed goods is increased
10 because of higher prices being paid for those needed
11 goods, and I assume when a higher price is paid, more of
12 those goods will be forthcoming, which will benefit
13 consumers who want those goods.

14 MR. PINCUS: That is our second argument,
15 Justice Scalia.

16 JUSTICE SOUTER: Well, you don't have that
17 in this case, do you, because I thought the, I thought
18 one of the arguments on the other side was the
19 inelasticity of the supplies, so that no matter what
20 they were paying, basically the same amount of wood was
21 ultimately going to get processed; is that correct?

22 MR. PINCUS: No, Your Honor. The claim is
23 that the supply was relatively inelastic, not that it's
24 perfectly inelastic, and as long as the supply market is
25 not perfectly inelastic, an increase in price may lead

1 to more supplies, maybe not as much as if there were
2 higher elasticity, but more. But there's another
3 benefit to consumers here, which is that if one would
4 expect that a buyer bidding more can make a more
5 efficient use of the product and therefore generate more
6 output, and that output expansion which doesn't depend
7 on supply expansion is also beneficial to consumers
8 because that means there will be more output in the
9 downstream market and a corresponding decrease in price.

10 So we have those two benefits to consumers
11 and we also have the fact that as the Court said in
12 Professional Engineers, the Sherman Act reflects a
13 judgment that price competition generally, a free and
14 open price competition will produce lower prices and
15 better goods and services, and the Court has not
16 required that that be traced to consumer welfare in
17 every particular case.

18 JUSTICE SCALIA: I presume it could lead to
19 lower consumer prices too. If you have a firm that has
20 developed a new, a new technique for processing the
21 logs, and it can process them cheaper and faster, and
22 sell them for a lower price but in greater volume, and
23 thereby make even more profit, that firm would be
24 willing to pay more for those logs, even though it would
25 sell them for less than competitors might sell them.

1 MR. PINCUS: That's exactly right, Justice
2 Scalia, and that's what the record reflects here, that
3 Weyerhaeuser invested in its lumber mills and created a
4 process that got more value out of a log. The record
5 reflects that plaintiffs, for example, did not do that.
6 And there is testimony that plaintiff's mill was quite,
7 relatively inefficient compared to Weyerhaeuser.
8 Weyerhaeuser invested new processes that had less waste,
9 produced more output as Justice Scalia suggested, and
10 therefore it was able to sell, sell that output at a
11 lower price and still make a profit, because it was
12 getting more output for log and therefore could pay more
13 for the log.

14 JUSTICE KENNEDY: Was there any argument in
15 the trial court or in the briefs of the Court of Appeals
16 as to how to calculate cost? You basically have two
17 markets. You don't usually think of cost when you buy
18 something. But was there any argument as to how to
19 determine whether or not this was below cost in the
20 Brooke Group sense?

21 MR. PINCUS: Well, our view, Justice
22 Kennedy, there really wasn't, because the district judge
23 had made clear his view in the pretrial motions that
24 there wasn't a need to prove prices, and that --

25 JUSTICE KENNEDY: But that was the end of it

1 at the trial court.

2 MR. PINCUS: But our position is, and there
3 has certainly been some writing on this in the
4 literature, is that what one does is take the cost of
5 producing the output which includes the allegedly
6 predatory price of the log, and here logs are 75 percent
7 of the cost so it's a very big cost. Compare those
8 costs to the revenues that are received in the
9 downstream market and if those revenues exceed costs,
10 then you're in a position where the defendant is
11 behaving perfectly economically rationally. If they're
12 less, then you go on to recoup it.

13 JUSTICE GINSBURG: Mr. Pincus, how do you
14 determine the price of the logs? Because we, the
15 charges that some logs were purchased at an excessive
16 price, and if we were dealing with only those logs to
17 determine cost, that's one thing. But we are, also in
18 this picture is that some of the logs came from
19 Weyerhaeuser's own land and some came from long-term
20 contracts that it had, and those, the price was not
21 inflated on those. So if you take those into account
22 you may get one figure, but if you take only the high
23 bid logs you might get a different picture. So how,
24 what is it? How do you determine costs? Do you look at
25 all the logs that were purchased or only the ones that

1 were allegedly bid out?

2 MR. PINCUS: No. You would look, you would
3 look, Your Honor, at all of the, at all of the logs,
4 just as in the downstream market if you have a sell side
5 case, you look at, you look at prices of all sales.
6 Here it's interesting that the record reflects that
7 plaintiff received more than, between 30 and 50 percent
8 of its logs from the same kind of long-term sources that
9 it argues that Weyerhaeuser received it from. So in
10 this case there really isn't the kind of disparity, but
11 our position would be that you add all of those up and
12 compare them to revenues.

13 JUSTICE KENNEDY: It's not clear to me that
14 we have to get into this but if we do, I'm not sure
15 about your answer to Justice Ginsburg's question. If
16 you have your own logs that you own already and if you
17 have logs on a long-term contract, the only relevant
18 logs are the logs that both people are competing for.
19 That's the only relevant market that we are talking
20 about insofar as the purchaser is concerned.

21 MR. PINCUS: And it might be --

22 JUSTICE KENNEDY: And if Weyerhaeuser wanted
23 to drive somebody out of the market, then they go after
24 the logs which are open to both parties.

25 MR. PINCUS: And Your Honor, as the Court

1 observed in Brooke Group, there really wasn't a need
2 there to get into how the test works and we think there
3 isn't here. We think the issue is symmetrical and it
4 might be that the focus is on the incremental costs that
5 are associated with the alleged predatory volume, and
6 therefore that might focus on those incremental costs.
7 But in this case there's no dispute that, whatever the
8 measure of costs, there has been no challenge to the
9 position that Weyerhaeuser's prices were above those
10 costs.

11 Let me just turn back to, to the other two
12 reasons why we think Brooke Group applies because I
13 think they're important. The third is it's much more
14 likely that the high bids here were going to, were a
15 result of legitimate competition than of anticompetitive
16 effort. As this Court has observed both in Brooke Group
17 and Matsushita, predatory conduct is self-detering. To
18 engage in it, the defendant has to be willing to incur a
19 near-term loss against the hope of higher returns later.
20 And as the Court explained in those cases, the loss is
21 definite but the gain depends on a number of
22 imponderables. So there is some self-detering.

23 And finally, a test that provides no
24 guidance threatens false positives that will deter the
25 very competition that our economy requires and that

1 helps our economy reach its most efficient state. As
2 Justice Breyer put it for the First Circuit in *Town of*
3 *Comfort*, antitrust rules must be clear enough for
4 lawyers to explain them to their clients, especially in
5 a sensitive area like pricing. And certainly the rule
6 that the Ninth Circuit adopted here has none of that
7 clarity and we think that the Court's *Brooke Group*
8 decision and that test does.

9 JUSTICE STEVENS: May I ask this question?
10 Supposing the evidence was perfectly clear that the
11 company did engage in a plan to get a total monopoly and
12 there were minutes of the board of directors says that
13 in order to do this we've got to drive company X out of
14 business and so you, we want you to compete in every
15 transaction with company X that you can and buy the logs
16 at a higher price. Would that be an anticompetitive act
17 even if it did not result in loss to the defendant?

18 MR. PINCUS: And the only anticompetitive
19 conduct alleged was pricing conduct, Your Honor?

20 JUSTICE STEVENS: No. The
21 anticompetitive -- the plan is to drive the company out
22 of business. And the only anticompetitive conduct other
23 than proving the whole objective is that you pick on
24 this one competitor and outbid him every time you can.
25 Could that possibly give rise to a damage claim?

1 MR. PINCUS: No, it wouldn't, Your Honor.

2 JUSTICE STEVENS: Even if the whole purpose
3 was to drive it out of business?

4 MR. PINCUS: Even if that was the whole
5 purpose.

6 JUSTICE STEVENS: Pursuant to a plan to
7 acquire a monopoly.

8 MR. PINCUS: And the reason for that,
9 Justice Stevens, is it's very hard to distinguish,
10 especially for the judicial system to distinguish,
11 between hard-fought competition and anticompetitive
12 intent if all we're looking at is what's in people's
13 mind set. As judge Easterbrook wrote in his AA Poultry
14 decision --

15 JUSTICE KENNEDY: Why is it so hard if you
16 take Justice Stevens' premise that there's an agreement
17 and we take that as a given, as a given premise?

18 MR. PINCUS: Well, because there won't be a
19 given premise in every case, Your Honor, and the problem
20 is the Court has to write rules that will, that will
21 govern conduct, primary conduct of business people in
22 the market, and a rule that says if you can prove intent
23 then you don't have to worry about prices and costs is a
24 rule that opens the door to second-guess, judicial
25 second-guessing of prices --

1 JUSTICE STEVENS: No, but only intent plus
2 monopoly power. You have to be able to prove monopoly
3 power, too.

4 MR. PINCUS: You do, Your Honor.

5 JUSTICE STEVENS: There aren't too many
6 cases that fit this.

7 MR. PINCUS: As the Court has recognized in
8 the section 2 context, the problem of deterring
9 procompetitive conduct is even more serious because you
10 don't have the threshold environment of proof of
11 conspiracy, as one does in section 1. We're dealing
12 with unilateral conduct, and so --

13 JUSTICE STEVENS: No, but unilateral conduct
14 where you have monopoly power. There aren't too many of
15 these cases, as you know.

16 MR. PINCUS: Well, Your Honor, market
17 definition is a complicated issue and it may be hard for
18 businesses --

19 JUSTICE STEVENS: It was an issue that was
20 resolved by the jury in this case and I don't understand
21 you to be disputing the resolution of that issue.

22 JUSTICE SCALIA: What do we do in the
23 correlative situation where there is an allegation of
24 predatory selling rather than predatory buying if you
25 had the same situation posed by Justice Stevens? Namely

1 evidence that you're trying to drive the competitor out
2 of business, wouldn't that establish a violation?

3 MR. PINCUS: It would not establish a
4 violation, Your Honor. In fact, the Brooke Group Court
5 dealt with that very case because the dissent in Brooke
6 Group pointed out that the district court in that case
7 had held that the intent evidence was amongst the most
8 powerful that had ever been, been presented in any case,
9 and it still said, even though there was a clear
10 evidence of intent --

11 JUSTICE STEVENS: But that did not involve a
12 monopoly. That did not involve monopoly power.

13 MR. PINCUS: But it involved the test for
14 predatory pricing, Your Honor, under Robinson-Patman.
15 But the Court said its test was perfectly applicable to
16 section 2. And the lower courts have certainly applied
17 that test in just that way in section 2 cases. And if
18 the rule would be that even in the predatory selling
19 situation intent can override the price-cost and the
20 recoupment requirements, then you're in a situation
21 where there's no ability for business people to know in
22 advance when low prices are justified. All we think is
23 that there should be symmetry.

24 If the Court has no further questions I'll
25 reserve the balance of my time.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Pincus.

3 Mr. Shanmugam.

4 ORAL ARGUMENT OF KANNON K. SHANMUGAM

5 ON BEHALF OF UNITED STATES,

6 AS AMICUS CURIAE, SUPPORTING PETITIONER

7 MR. SHANMUGAM: Thank you, Mr. Chief
8 Justice, and may it please the Court.

9 Aggressive bidding by the buyer of an input,
10 no less than aggressive pricecutting by the seller of a
11 finished product, is usually procompetitive. Because a
12 claim of predatory bidding is simply the flip side of a
13 claim of predatory pricing, the Brooke Group standard
14 for predatory pricing claims should apply to predatory
15 bidding claims as well. And in our view the court of
16 appeals erred in this case by sanctioning a broader and
17 more subjective standard of liability. In Brooke Group,
18 this Court adopted its now familiar two-pronged standard
19 for predatory pricing claims despite recognizing that
20 each prong of that standard might permit some
21 anticompetitive pricecutting. The court was willing to
22 tolerate that modest degree of underinclusion because,
23 in the Court's own words, "The mechanism by which a firm
24 engages in predatory pricing is the same mechanism by
25 which a firm stimulates competition, namely by lowering

1 its prices. And the Court explained that a broader or a
2 less precise standard of liability would run the risk of
3 prohibiting or chilling some procompetitive price
4 cutting. In our view the same analysis can apply to a
5 claim of predatory bidding. Because aggressive bidding
6 is usually procompetitive, application of the Brooke
7 Group standard is warranted in order to avoid
8 prohibiting or chilling procompetitive conduct with
9 regard to price in that context as well.

10 The court of appeals in this case held that
11 Brooke Group was inapplicable to respondent's claim of
12 predatory bidding by --

13 CHIEF JUSTICE ROBERTS: Would you describe
14 the hypothetical Justice Stevens posed to your, your
15 brother, would you describe that as just aggressive
16 bidding? Aggressive is, you know, it's kind of a good
17 term when you're talking about competition. But what if
18 it's purposely bidding higher than you know your rival
19 can afford?

20 MR. SHANMUGAM: Well, Mr. Chief Justice, I
21 understood Justice Stevens' hypothetical, and he can
22 correct me if I'm wrong, to posit a case in which there
23 was dynamite evidence that the defendant had a
24 monopolistic or exclusionary intent. But in our view
25 that is insufficient to state a section 2 claim. One

1 has to have exclusionary conduct as well.

2 JUSTICE STEVENS: No, you have to have the
3 monopoly power as well.

4 MR. SHANMUGAM: Well, that is also true, and
5 with regard to a claim of attempted --

6 JUSTICE STEVENS: In your view, if as the
7 jury was instructed in this case there was proof of
8 monopoly power and intent to maintain or preserve that
9 power, plus anticompetitive acts, does the
10 anticompetitive act have to be in and of itself a
11 violation of the Sherman Act?

12 MR. SHANMUGAM: Well, I think you need to
13 have all three of those elements in order to state a
14 claim of attempted monopolization --

15 JUSTICE STEVENS: And if you do have all
16 three, is that enough to prove a violation?

17 MR. SHANMUGAM: That would be enough to
18 state a claim for attempted monopolization under this
19 Court's decision in *Separate Forks*.

20 JUSTICE STEVENS: And isn't that how the
21 jury was instructed in this case?

22 MR. SHANMUGAM: In our view the jury was
23 instructed that it would be sufficient to establish an
24 anticompetitive act to find that petitioner priced its
25 logs --

1 JUSTICE STEVENS: Yes, but if it was not
2 instructed it would be sufficient to find a violation of
3 section 2 by those, by that accounting, is that not
4 correct?

5 MR. SHANMUGAM: That is correct, Justice
6 Stevens, and the jury was also instructed and in our
7 view the jury was properly instructed with regard to the
8 other two elements, namely a dangerous probability of
9 monopolization and a specific intent to monopolize. The
10 sole question before this Court is what constitutes
11 exclusionary conduct for purposes of section 2, what
12 constitutes it regardless of whether it's a claim of
13 attempted monopolization or actual monopolization.

14 JUSTICE STEVENS: Go back to my
15 hypothetical. Supposing you have the first two elements
16 and you say in order to drive this company out of
17 business we want you to compete with them and get the
18 logs at whatever cost it takes. Would that be an
19 anticompetitive act?

20 MR. SHANMUGAM: No, Justice Stevens. That
21 would solely be --

22 JUSTICE STEVENS: Even if it was for the
23 sole purpose of driving the company out of business in
24 order to accomplish the goal of getting a monopoly?

25 MR. SHANMUGAM: That would be evidence, and

1 it may be powerful evidence, of a monopolistic intent,
2 though courts have noted that even with regard to that
3 requirement it's famously difficult to distinguish
4 between a legitimate competitive attempt on the one hand
5 and an illegitimate monopolistic intent.

6 JUSTICE STEVENS: No, no. I'm assuming this
7 is not evidence of intent. There's independent evidence
8 of both intent and monopoly power. With those two
9 elements established, would this, the kind of evidence I
10 described, be evidence of an injury to the plaintiff
11 that could be actual in damages?

12 MR. SHANMUGAM: No, Justice Stevens. You
13 would need to have objective evidence that the defendant
14 met both of the prongs of the Brooke Group requirement.

15 JUSTICE STEVENS: Will you need to meet the
16 prongs of the Brooker test even if you otherwise prove a
17 violation of section 2?

18 MR. SHANMUGAM: Well, I'm not quite sure
19 what it means to say that you otherwise prove a
20 violation in that example.

21 JUSTICE STEVENS: You prove monopoly power
22 plus an intent to maintain or acquire it.

23 MR. SHANMUGAM: That is insufficient. You
24 have to have some action --

25 JUSTICE STEVENS: That's insufficient to

1 prove a violation of Section 2?

2 MR. SHANMUGAM: It is insufficient to prove
3 a violation of section 2 because you have to have some
4 conduct that is classed as exclusionary, and in our view
5 that is the content that the Brooke Group standard
6 supplies. It specifies the conduct that you need to
7 have and that conduct is the defendant suffering a loss
8 in the short term and having a dangerous probability of
9 recouping that loss in the long term.

10 JUSTICE SCALIA: I assume you could have a
11 company that has a dynamite evidence of seeking to
12 monopolize and the means that they choose is just
13 idiotic. For example, they say, we're going to try to
14 get a monopoly by buying these logs at a lower price as,
15 at as low a price as possible. You would have the two
16 elements, monopoly power, intent to monopolize, but you
17 wouldn't have an act that constitutes anticompetitive
18 conduct.

19 MR. SHANMUGAM: Justice Scalia --

20 JUSTICE SCALIA: And that's what you're
21 asserting is the case here.

22 MR. SHANMUGAM: You could have an
23 incompetent monopolist more generally or an incompetent
24 predator in this specific context. And I think that the
25 only other thing I would say with regard to this

1 colloquy is that the Court really did confront this
2 issue in Brooke Group. There was fairly strong evidence
3 of monopolistic intent and the majority opinion --

4 JUSTICE STEVENS: But there is no evidence
5 of monopoly power and it isn't even remotely at issue in
6 that case.

7 MR. SHANMUGAM: That's right, and it wasn't
8 an issue simply because it was a Robinson-Patman Act
9 case and all that is required under the Robinson-Patman
10 Act is the possibility of harm to competition and there
11 was some disagreement about whether a showing had been
12 made of that requisite possibility between the majority
13 opinion and your dissenting opinion. But I don't think
14 that there was any disagreement in Brooke Group with
15 regard to the relevant standard for exclusionary
16 conduct. Even the dissenting opinion recognized that
17 recoupment would be necessary in order to state the
18 predatory pricing claim in the Robinson-Patman Act
19 context.

20 JUSTICE ALITO: Would your answer be the
21 same if you added to Justice Stevens' hypothetical very
22 high barriers of entry that would prevent other
23 competitors from entering the market after the target
24 was driven out?

25 MR. SHANMUGAM: High barriers to entry,

1 Justice Alito, would be very relevant to the inquiry
2 under the second prong of the Brooke Group standard,
3 namely whether the defendant had a dangerous probability
4 of recoupment in the long term. And indeed in many
5 predation cases, many predatory pricing cases in the 13
6 years since Brooke Group, barriers to entry have been
7 absolutely vital in resolving predatory pricing claims
8 at the summary judgment stage, because typically
9 defendants will make the argument that the absence of
10 barriers to entry make the possibility of recoupment
11 unlikely. But that is a consideration that is built
12 into the Brooke Group standard and it certainly would be
13 part of the Brooke Group analysis in the predatory
14 bidding context as well.

15 I want to say just one thing in response to
16 Justice Ginsburg and Justice Kennedy's questions to my
17 friend Mr. Pincus about the question of the appropriate
18 measure of cost if Brooke Group were to apply to
19 predatory bidding claims. As in Brooke Group itself, we
20 believe that it is unnecessary for this Court to specify
21 the exact method of calculating costs in this case. But
22 the position of the United States more generally both in
23 the predatory pricing context and in the predatory
24 bidding context is that a Court should look to a
25 defendant's incremental costs, and in this context that

1 would mean looking to the amount of the input that was
2 the subject of the alleged predation. So in this case
3 the amount of logs that petitioner allegedly predatorily
4 purchased on the open market. And such an incremental
5 approach to be sure is not within its difficulties in
6 application and for that reason a number of lower courts
7 in the predatory pricing context have instead looked to
8 average variable costs or other measures as a proxy for
9 incremental costs. But we believe that in a case such
10 as this one, looking to incremental costs may be useful
11 because it effectively excludes from the analysis any
12 potential cross-subsidization, whether by virtue of the
13 fact that in this case, for example, petitioner may have
14 harvested logs from its own lands. There are claims in
15 this case that petitioner entered into various exclusive
16 dealing arrangements as well, obtained logs at a lower
17 price on that basis. And an incremental approach has
18 the virtue of focusing only on that portion of the
19 market that is the subject of the alleged predation
20 claims.

21 JUSTICE SOUTER: You also, I take it, have
22 to have an equally limited approach on the recoupment
23 analysis, then. I mean, your recoupment analysis would
24 have to be symmetrical with your cost analysis.

25 MR. SHANMUGAM: Yes. That's absolutely

1 true, Justice Souter, and again this is an issue that
2 the lower courts have been grappling with in the
3 predatory pricing context, and I by no means want to
4 suggest that it is always an easy analysis in the
5 predatory pricing context. Professor Arita's treatise
6 has hundreds of pages on the appropriate calculation of
7 cost, but I think that the important thing to remember
8 with regard to the below cost pricing prong of the
9 Brooke Group analysis is that it does provide an
10 objective yardstick by which a defendant's loss can be
11 measured.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Shanmugam.

15 Mr. Haglund.

16 ORAL ARGUMENT OF MICHAEL E. HAGLUND

17 ON BEHALF OF RESPONDENT

18 MR. HAGLUND: Mr. Chief Justice, and may it
19 please The Court.

20 In this Court's antitrust jurisprudence over
21 the last 25 years, market realities have consistently
22 trumped per se rules. The same approach should apply
23 here. Brooke Group's per se rule which carved out a
24 special exception to the standard rule of reason
25 balancing test in Section 2 cases should not be extended

1 to the buy side. No safe harbor per se rule is
2 justified here because raising input prices, unlike
3 cutting output prices, is moving prices in the wrong
4 direction for consumers.

5 JUSTICE BREYER: But even it does hurt the
6 suppliers and the antitrust laws are just as, I don't
7 know just as, but they are just as concerned about a
8 group of small farmers or a group of small growers or a
9 group of small fishermen faced with a monopsony buyer as
10 they are with a group of consumers having to fight off a
11 monopoly seller.

12 MR. HAGLUND: Justice Breyer --

13 JUSTICE BREYER: I mean that's pretty well
14 established, isn't it?

15 MR. HAGLUND: Well I'd like to point out
16 that the Mandeville Farms case that Mr. Pincus cited
17 does not stand for the same --

18 JUSTICE BREYER: No, no, Congress has
19 actually passed special legislation that the Mandeville
20 Farms is consistent with the Farmers Cooperative and so
21 -- you want me to write the proposition that the
22 antitrust laws are not concerned --

23 MR. HAGLUND: Oh, absolutely --

24 JUSTICE BREYER: -- with the monopoly buyer
25 who would in fact exploit a group of small suppliers,

1 farmers?

2 MR. HAGLUND: Absolutely not.

3 JUSTICE BREYER: Okay.

4 MR. HAGLUND: But in this particular context
5 which the Ninth Circuit repeatedly emphasized, in an
6 inelastic market like this one raising input prices is
7 not going to increase supply and --

8 JUSTICE BREYER: That can't possibly be
9 right, can it? I mean if in fact the object here is to
10 strike, is -- suppose their object is what you say.
11 Their object is in fact to try to get a monopoly on the
12 buying side over a group of small woodsmen. And they
13 might do that if they drove out all the buying
14 competitors, and now what are they going to try to do?
15 What they will try to do if they get that terrible
16 monopoly, which would be bad --

17 MR. HAGLUND: Drive prices down.

18 JUSTICE BREYER: Right. Drive prices way
19 down, below what the woodsmen could get for them. And
20 if that's going to have any effect aside from an income
21 effect, it will leave some of them to go to the bread
22 line or go to other places where they have other jobs at
23 lesser revenue than they would get by staying in the
24 woods business and selling at a reasonable price. That
25 would be an antitrust concern.

1 MR. HAGLUND: Absolutely, and that is
2 exactly what Weyerhaeuser's plan was here, as shown by
3 their own materials, that their plan was and in fact
4 they did foresee and project that log prices would go
5 down in 2001 --

6 JUSTICE BREYER: So where we are is at the
7 problem. The problem is the same as at the buying side.
8 What we have is possibly a very bad motive and very bad
9 effects. On the other hand, low prices are good for the
10 consumer.

11 MR. HAGLUND: But you're not --

12 JUSTICE BREYER: Here we have bad effects,
13 bad possibilities. On the other hand, higher prices are
14 good for the woodsmen. So we need rules to separate the
15 sheep from the goats. And the other side is proposing a
16 rule, and the rule simply is don't count this as bad
17 conduct, unless the person who pays the money for the
18 goods is in fact buying so many goods that later on when
19 he tries to sell them he will incur a loss.

20 Now I would have thought for 40 years that
21 was a traditional idea. If you're trying to decide
22 whether people are hogging goods unnecessarily for bad
23 purposes, or rather storing up nuts for winter for good
24 purposes, then a very good key to that is do these
25 people expect in the long run to make money out of this

1 without driving those victims out? If the answer is
2 yes; they can make money on the market, they are storing
3 up nuts for winter. It's good. And if the answer is no
4 it's bad. That's called the recoupment test. I don't
5 think that's new. I think it's old. And I'm not sure
6 what your view of it is.

7 MR. HAGLUND: Well, as to Brooke Group and
8 what the Court's being asked to do here, Justice Breyer,
9 is to go down the same path that it did in Albrecht
10 versus Harold Company in '68 when it agreed to treat
11 completely symmetrically minimum and maximum vertical
12 resale price restraints.

13 Later on, in State Oil Company vs. Kahn the
14 Court abandoned and accepted Justice Harlan's dissent
15 that it was wrong to equate those two.

16 JUSTICE BREYER: -- I agree with you. But I
17 don't still think you can defend this retail versus
18 maximum price restraint. That's a whole another kettle
19 of fish. And what I'm interested -- I guess my
20 question particularly is, I propose one test not two,
21 but it might be that my test encompasses the dollar test
22 and incremental costs and so forth. What do you think
23 of my one test?

24 MR. HAGLUND: Well --

25 JUSTICE BREYER: One test is if they are not

1 going to make money legitimately out of this in the long
2 run, it's bad, unless they can explain it away. But if
3 they are, it's okay.

4 MR. HAGLUND: The problem with granting a
5 safe harbor for above cost input purchases is that it
6 does not work well in this context, especially in an
7 inelastic market. The suggestion that you can simply
8 use incremental cost is not a workable approach here if
9 you look at the facts in this case.

10 CHIEF JUSTICE ROBERTS: What about the fact
11 that the woodsmen in Justice Breyer's story are rational
12 actors as well, and they don't have to be geniuses to
13 realize that they are in a better shape having two
14 buyers rather than just one. So maybe they forego the
15 extra 50 cents a log, or whatever -- tree, it is in the
16 short term and sell enough to keep the other company in
17 business? I mean they can make that decision
18 themselves. Or they can make the decision as rational
19 actors that they are better off having more money that
20 they can then use to buy more alder saplings that they
21 can plant for the future. And either way it benefits
22 the consumers.

23 MR. HAGLUND: Well not, that's not quite
24 correct, because the signals that the higher input
25 prices show, yes, they do generally incent more

1 production in a, in a typical market. Here, however,
2 where you have a product that takes 30 to 50 years time
3 and production, the price, higher price signals when
4 they are sent by a monopsonist, like Weyerhaeuser in
5 this case, actually send a very powerful message to tree
6 farmers not to replant alder, despite those high prices.
7 And there was evidence in the follow-on cases that
8 reference that.

9 It was alleged in our complaint in this case
10 but not actually backed up by any testimony at trial,
11 that tree farmers in Oregon and Washington were actually
12 electing not to replant alder and as Professor Noel
13 notes in his law review article in the issue of the
14 Antitrust Law Journal, which by the way is the only area
15 -- half of this issue is devoted to this subject. It's
16 the sum total of literature devoted to predatory
17 overbidding in this area. And what Professor Noel notes
18 is that where you have localized monopsony, the result
19 is when the monopsony is in full flower a misallocation
20 of resources between regions. The highly productive
21 forest lands of the Pacific Northwest won't have as much
22 alder in the future because of the significant signals
23 sent by a monopsonist, even when they are engaged in
24 that scheme.

25 The seller is happy if he has mature alder

1 to sell at that time to get the good price, but he is
2 not going to replant, because he sees that 30 years down
3 the road he will not have a competitive marketplace
4 within which to sell his timber, and that was the
5 reality in this case.

6 CHIEF JUSTICE ROBERTS: Well if he is, if he
7 is that rational and foresighted, why isn't he rational
8 and foresighted enough to know that he ought to be
9 selling some to the other, the other processor even if
10 that processor is not bidding as much?

11 MR. HAGLUND: Well we did actually have some
12 record evidence in this case that at least a few people
13 were doing that. One of the major suppliers of the
14 respondent here, Ross-Simmons, was a company called
15 Longview Fiber which made it -- a very sophisticated
16 publicly held company -- made it a practice to sell most
17 of its volume to Ross-Simmons on a market basis because
18 it did not want the eventuality of not having
19 Ross-Simmons in that competitive circle with
20 Weyerhaeuser.

21 Most small woodland owners, however, who may
22 only be in the market once every five years because
23 that's the nature of their rotation, of the age classes
24 of the timber that they have got, are not in that kind
25 of sophisticated position because they are in the market

1 so infrequently to make that kind of a judgment. It's
2 been --

3 JUSTICE ALITO: If we don't take the Brooke
4 Group approach, is the alternative to ask the jury to do
5 what the instructions in this case ask them to do.

6 MR. HAGLUND: No, it's not.

7 JUSTICE ALITO: To decide whether
8 Weyerhaeuser bought more logs than it needed in order to
9 prevent its rivals from obtaining the logs that they
10 needed at a fair price? How is a jury to, a lay jury,
11 to decide whether a company like Weyerhaeuser bought
12 more logs than it needed, or what is the fair price?

13 MR. HAGLUND: We don't contend that the
14 instruction was perfect here, but if one looks at the
15 instruction as a whole and --

16 JUSTICE ALITO: But you think it was
17 sufficient.

18 MR. HAGLUND: Pardon me?

19 JUSTICE ALITO: You think it was sufficient
20 enough.

21 MR. HAGLUND: In this case it was legally
22 sufficient and I point out that this Court very recently
23 has issued a decision in the first case of the term,
24 Ayers vs. Belmontes, where you looked at the question of
25 the catch-all mitigation factor in California in the

1 penalty phase of a capital murder case. And you looked
2 at the instruction and interpreted it in terms of the
3 closing arguments, the evidence and the other
4 instructions as a whole.

5 JUSTICE GINSBURG: Who proposed the
6 instruction in this case?

7 MR. HAGLUND: The instruction, the paragraph
8 that is subject to the great criticism on the other
9 side, was a paragraph that was drafted by the district
10 judge and handed out near the end of the trial and then
11 commented on by the lawyers in, prior to --

12 JUSTICE GINSBURG: There was no requested
13 charge on this point by the plaintiff?

14 MR. HAGLUND: That's -- as to the issue of
15 predatory pricing, plaintiffs, as we make clear in our
16 brief, actually submitted a predatory pricing
17 instruction three weeks before the trial. You tend to
18 be overinclusive pretrial. Defendant on the other hand
19 surprisingly submitted no such instruction on predatory
20 pricing. The judge submitted a paragraph that had
21 something more than what the current, or the ultimate
22 paragraph contained. There was a debate over whether it
23 needed to be, whether it was consistent with Brooke
24 Group. I agreed with the other side that it did not
25 have both components of the Brooke Group test. Judge

1 Panner and I had a colloquy where ultimately he was
2 going to turn one paragraph into two, include a Brooke
3 Group test. We then withdrew our request for that
4 instruction, Weyerhaeuser objected to the, the thinned
5 down version of the ultimate paragraph.

6 But the interesting thing about
7 Weyerhaeuser's relationship to this instruction is that
8 they really invited the linguistic framework of this,
9 "bought more than they needed" or --

10 JUSTICE ALITO: What does that mean? What
11 does a fair price in this, in this context mean? Does
12 it mean the price that's necessary in order to keep an
13 inefficient competitor in business?

14 MR. HAGLUND: Well, what it meant in this
15 case, Justice Alito, is that it meant what, how much did
16 Weyerhaeuser artificially increase the log market above
17 where it otherwise would have been? We had several
18 experts and a number of both industry and forest
19 economists testify that for 20-plus years log prices had
20 been following lumber. There was an equilibrium in the
21 market. Then you get to --

22 JUSTICE SOUTER: Why is that the standard of
23 fairness? I mean that, you know, that may be fine. But
24 how does, how does a jury, A, what's the authority for
25 saying that is the standard of fairness and B, how does

1 a jury know that?

2 MR. HAGLUND: The -- if you look at the
3 Ninth Circuit opinion, the Ninth Circuit made it clear
4 that the instructions as a whole provided sufficient
5 guidance. Nowhere in the case as we tried it did we
6 attempt to exploit the instruction in the way that
7 Weyerhaeuser suggests happened.

8 JUSTICE SOUTER: Maybe you didn't, but that
9 basically left the jury on a, on a free float, didn't
10 it?

11 MR. HAGLUND: Well, I don't think so if you
12 look at the evidence. The evidence that we presented
13 included a forest economist who presented three
14 different scenarios where he identified how much
15 Weyerhaeuser had artificially increased log prices above
16 where they would have been but for their anticompetitive
17 behavior. We in no way went to the jury in closing,
18 saying award what you think is fair. We relied
19 completely on that evidence, and in fact the jury, which
20 included a Ph.D. in physics in a high-tech industry, an
21 accountant, the head of a chain store, and a banker and
22 a retired farmer, they looked at the evidence and they
23 actually to the dollar picked one of those market -based
24 scenarios for how much was the market elevated.

25 JUSTICE SOUTER: Okay. Let's assume I

1 accept your sort of Delmonte's analysis here. If we
2 were to approve of that instruction in effect, as you
3 want us to do, and we also believe that on its face
4 something more has got to be said than merely the word
5 fair, what proposition would we say must be included in
6 that instruction to make the so-called fairness
7 instruction a sensible one that can be consistently
8 applied?

9 MR. HAGLUND: And we don't contend that it
10 was a perfect instruction. We think it would be
11 perfectly appropriate if --

12 JUSTICE SOUTER: No, I realize that.

13 MR. HAGLUND: Okay.

14 JUSTICE SOUTER: And I'm saying if we follow
15 your lead, we're going to try to take that and make it a
16 closer to perfect instruction, and what should we say
17 must be added to it?

18 MR. HAGLUND: It's quite simple. If you
19 look at that paragraph, there are two pieces of it. One
20 of them, one portion says that you can regard it as an
21 anticompetitive act if defendant purchased more logs
22 than it needed. We don't think that needs to be
23 improved because that's easy to figure out, and here we
24 had evidence that they continued --

25 JUSTICE GINSBURG: Why? Why is it easy to

1 figure out? As Justice Breyer brought up the
2 stockpiling, how do you know whether they are storing
3 it, or a time when the supply is short, or they are just
4 letting it go to rack and moon in order to put this
5 company out of business?

6 MR. HAGLUND: Justice Ginsburg, you will
7 know because of the evidence in the case. If the
8 plaintiff, the defendant is able to show that they were
9 storing up this extra input against a prospect of a
10 price hike in the future or because they were out trying
11 to get enough volume for some promotion for a customer
12 that was going to significantly increase their
13 purchases, then you'd have a different kind of case. We
14 have a situation where they warehoused large,
15 unprecedentedly high volumes of lumber because they --

16 JUSTICE BREYER: Why did they say they
17 needed it? I mean, why do you need all this Ph.D. guy
18 up there? Why don't you just prove what you just said?

19 MR. HAGLUND: We did.

20 JUSTICE BREYER: Fine. Then why do you need
21 all these other instructions about pricing? I suppose
22 the only reason you'd need them is if there's a dispute
23 as to whether it was in their economic interest in the
24 absence of any intent to monopolize these people to buy
25 all these logs or not. And so it would be very

1 interesting if you have a way of proving that they did
2 not need these for any legitimate purpose, a matter
3 which is likely to be disputed. So, I think the hard
4 thing in these cases is to prove that. And if you can
5 tell me how you prove that without giving the jury an
6 instruction something like, look to see whether they can
7 sell them reasonably at a profit. Or, look to see even
8 if they can't sell them at a profit, whether they could
9 recoup whatever they are losing later. Or, or, and you
10 fill in some blanks, and now I'll have some candidates
11 for testing.

12 MR. HAGLUND: Well, as to the paid a higher
13 price than necessary, the language we would suggest
14 could be used in another case and passed on by this
15 Court, is the following: Paid a higher price than
16 necessary to move the log market to higher levels than
17 otherwise would have prevailed in order to injure
18 competition.

19 JUSTICE BREYER: Oh. But of course, I want
20 to injure competition always when I in fact sell at a
21 lower price that I very much hope my competitor can't
22 possibly meet, indeed would go out of business. I
23 cheer. I would love to get a monopoly. I would love to
24 make a better product, lower prices, et cetera. Do you
25 see the problem? And so what you've told the jury there

1 on that instruction --

2 MR. HAGLUND: But here --

3 JUSTICE BREYER: -- is that they can find
4 this person guilty even if all he wants to do is so
5 second-guess that market that he gets the logs and will
6 sell them at a huge profit later on in a competitive
7 selling market.

8 MR. HAGLUND: We don't have a situation
9 here, Justice Breyer, where Weyerhaeuser presented
10 evidence that they were the most efficient and able to
11 pay higher prices. Weyerhaeuser presented no
12 quantitative evidence that it was the lowest cost
13 producer in terms of costs --

14 JUSTICE BREYER: What if it were the highest
15 cost producer? Suppose still, they think that by buying
16 these logs we later can make a profit when we resell
17 them on the competitive market. You see, the reason
18 they're coming up with this test is they don't think you
19 can give, the reasoning of it is that they don't think
20 that you can produce a better one. So I'm listening.

21 MR. HAGLUND: Well, one of the reasons that
22 one can't go in this direction here, Brooke Group was a
23 pricing only case. As the briefs make clear and the
24 decision made clear, if that had been a standard
25 monopolization case it would have been out the door on

1 summary judgment because the defendant was a 12 percent
2 player. They had no prospect of, of attempted or
3 monopolization, a viable monopolization claim. Here we
4 have a situation where Weyerhaeuser's pricing conduct,
5 deliberately and artificially pushing the market up
6 through a variety of mechanisms, was also interconnected
7 and linked to complementary other conduct that we think
8 set the table for the effectiveness of their strategy in
9 elevating the log market that our client was
10 participating in.

11 Bear in mind that, that at JA 901 we have a
12 Weyerhaeuser document showing that very significant
13 foreclosure from their exclusive contracts in the, in
14 Oregon for example, this is a document that shows that
15 62 percent of the market was covered through either
16 exclusive purchase arrangements between Weyerhaeuser and
17 large landowners, or non-efficiency-based trades were
18 the, were linked to the exchange of the alder sawlogs
19 from that landowner. Only 33 percent according to JA
20 901 show, in Oregon, was projected to be open market
21 bidding. Weyerhaeuser acquired, when it was then at a
22 65 percent market share, acquired the dominant seller, a
23 built-in monopsony in British Columbia and it's five, 15
24 to 20-year exclusive forest licenses. That kind of
25 foreclosure, linked with the anticompetitive behavior

1 they engaged in that was a variety of bidding practices,
2 some of it was overbuying, some of it was manipulating
3 bidding back and forth, and then putting the last bid in
4 terms of that cost on the other side.

5 I think it's important, I'd like to shift to
6 the instruction again, and make the point that
7 Weyerhaeuser never gave either the plaintiff in this
8 case or the district judge the opportunity to consider a
9 different instruction than was given here. And the fact
10 that's demonstratively shown if one looks at page 43 of
11 their opening brief in the Ninth Circuit, in the Ninth
12 Circuit they only took the position in the bulk of their
13 brief that they were entitled to judgment as a matter of
14 law on the basis of Brooke Group. As to the ground or
15 the contention --

16 JUSTICE GINSBURG: Do you -- do you agree
17 that you couldn't have made it on Brooke Group because
18 they were selling these logs at a profit?

19 MR. HAGLUND: I didn't quite hear that,
20 Justice Ginsburg.

21 JUSTICE GINSBURG: Do you agree that you
22 could not have prevailed under the Brooke Group test
23 because Weyerhaeuser was, was making a profit on these
24 sales even though it had bid up the price of the logs?

25 MR. HAGLUND: We do not agree as to the

1 evidence in this case. We have evidence in this case
2 that we cited to in our brief that when you adjust, as
3 against the Longview mill which our client was literally
4 right next door to, when you adjust for the fact that
5 Weyerhaeuser supplied half of the raw material needs of
6 the Longview mill at way below market transfer prices,
7 when you adjust those to the average price they paid
8 other third parties for logs, the Longview mill ran at a
9 loss for a significant part of the, of the predation
10 period. We do have the evidence in this case to
11 contend --

12 JUSTICE SCALIA: It's ultimately a jury
13 question, I assume.

14 MR. HAGLUND: If Brooke Group is applied --

15 JUSTICE SCALIA: But that question was not
16 put to the jury, right?

17 MR. HAGLUND: That's correct. We withdrew
18 the request for a Brooke Group instruction.

19 But to finish my point about the fact that
20 this --

21 CHIEF JUSTICE ROBERTS: So then, would you
22 be entitled to a remand on that or not, given that you
23 withdrew that instruction?

24 MR. HAGLUND: If the Court concludes the
25 Brooke Group applies to this case, then the instruction

1 was incomplete, it was not correct, and we would be
2 entitled to a remand and a chance to retry the case.

3 JUSTICE ALITO: But what about the
4 recoupment prong, given that Weyerhaeuser doesn't have
5 market power in the selling market and that mills were
6 entering, new mills were coming on line during this
7 period. How would you satisfy the recoupment?

8 MR. HAGLUND: Well, the recoupment is not in
9 the output end of things. The recoupment is the
10 opportunity to drive log costs down to recoup the extra
11 costs you pay during the predatory period. And we had
12 evidence in the record that a former executive from
13 Weyerhaeuser testified that they had used this strategy
14 multiple times, that when it was questioned by some in
15 top management that the head of a division would always
16 say once we either acquire or get rid of a competitor,
17 we will recoup those costs many fold. That's at JA 260,
18 Cliff Chulos. We also had at JA 903 a planning document
19 in 2001 where Weyerhaeuser was showing in that
20 PowerPoint chart the expectation that log prices would
21 be going down in '01, '02, '03, and for every 2 percent
22 change downward it was an extra \$2 million in profits to
23 the bottom line. There was no plan to pass on the
24 benefits of those lower input prices to consumers.
25 Obvious consumer lack of benefit in that situation.

1 Also as to recoupment, if you look at JA 831
2 to 95, which are the year-end financials for the
3 Weyerhaeuser alder mills in Oregon, Washington and BC
4 during a roughly four-year period, you see a monu -- a
5 huge price differential between the prices in British
6 Columbia and those prevailing in Oregon and Washington.
7 We think there was every expectation on management's
8 part to drive the prices down to the levels that
9 prevailed in British Columbia, which works out to about
10 \$40 million a year, way way above the amount they were
11 spending in this predatory scheme predominantly in
12 Oregon and Washington, because there is no competition
13 in British Columbia.

14 But I would like to point out that they
15 never preserved the issue of whether or not the standard
16 that the Ninth Circuit in dictum stated was as a whole
17 sufficient to guide the jury as to a definition of
18 anticompetitive conduct. At page 43 of their brief
19 after quoting this paragraph they so criticize, they
20 note, although that statement of the law -- this is 43
21 of the Ninth Circuit brief, not the blue brief that you
22 have -- although that statement of the law may have been
23 acceptable when Reed Brothers was decided, it is not in
24 the wake of Brooke Group for reasons explained above.
25 The point here is that they never made any charge in the

1 Ninth Circuit that the instruction was flawed
2 independent of Brooke Group. Now we concede, if Brooke
3 Group applies, the instruction was -- was -- is wrong,
4 and the case should be reversed and remanded. But the
5 second point that they try to make in their briefing is
6 not properly preserved. And in fact, I'd like to point
7 out that they contributed to the linguistic framework of
8 this instruction in a very significant way. First --

9 JUSTICE SCALIA: I'm losing you. What's the
10 second point that they're trying to make besides the
11 fact that this didn't conform to Brooke Group?

12 MR. HAGLUND: Well, they have also asserted
13 in their briefing that as an independent ground for
14 reversal, the instruction was so standardless that the
15 verdict cannot stand.

16 JUSTICE SCALIA: Regardless of Brooke Group.

17 JUSTICE SOUTER: But isn't that something
18 that we've got to consider because if, if we disagree
19 with them on Brooke Group, we've got to do it in the
20 course of making a choice between a Brooke Group
21 instruction and something else, and the only something
22 else we've got right now is what we have in this case
23 and we ought to, we ought to decide whether in fact that
24 is good enough.

25 MR. HAGLUND: I agree with that.

1 JUSTICE SOUTER: And so I mean, I think,
2 they may not have made that an independent basis of
3 reversal but we've got to consider it.

4 MR. HAGLUND: I agree with that, but I would
5 like to point out these facts in terms of the way they
6 contributed to it. They submitted jury instructions
7 just like us based upon the ABA model instructions,
8 theirs are at JA 97 to 122, that used the words outside
9 of this paragraph that we are talking about, fair,
10 reasonable or necessary 18 times. They showed up 19
11 times in those instructions. In their opening and
12 closing --

13 JUSTICE SOUTER: I'll stipulate to that.

14 MR. HAGLUND: Right.

15 JUSTICE SOUTER: Assuming they don't have a
16 leg to stand on in complaint, we have still got to face
17 what the alternative to a Brooke Group kind of
18 instruction is. And -- and however they may have tried
19 their case, we've still got the same problem.

20 MR. HAGLUND: That's correct. And I suggest
21 that you look to the type of formulation I gave a little
22 earlier where you're looking at how much did the
23 defendant push the market to levels that are above where
24 it otherwise would have been. It's not too far from the
25 test that is proposed by the State at page 29 of their

1 brief where they suggest it's, that the conduct be
2 measured by whether it raised the price that the buyer's
3 rivals had to pay for the input beyond a level that
4 could be justified or explained by other market or
5 exogenous factors and substantially affected the ability
6 of the buyer's rivals to compete for the input. The
7 eight States, all of which have concerns both as sellers
8 into these vulnerable resource markets and for citizens
9 and companies in their own resource State, laden States,
10 whether it's mineral, whether it's agriculture, they
11 have that concern and they've offered that test that's
12 not too far from what I posited as a way to improve the
13 instruction that Weyerhaeuser invited.

14 I'd like to make one further point on
15 that subject and that is, if you look at the opening
16 statement of their counsel, the closing, he used that
17 very language. They were going to put on witnesses who
18 would all state that they never bought more than they
19 needed, they never paid more than necessary. That same
20 litany was put to 13 different witnesses.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 Mr. Haglund.

24 Mr. Pincus, you have two minutes remaining.

25 REBUTTAL ARGUMENT OF ANDREW J. PINCUS

1 ON BEHALF OF PETITIONER

2 MR. PINCUS: Thank you, Mr. Chief Justice.
3 Just a couple of points.

4 With respect to the story of how this
5 instruction came to be, in fact it closely resembles
6 some language that was requested by respondent that
7 appears on page 93A of the joint appendix which refers
8 to a test that paying a price for logs with higher than
9 market value unnecessarily to drive out or injure
10 competition. So I do think that this is an instruction
11 that comes from respondent.

12 It's true that we did not request a Brooke
13 Group instruction because the district court had ruled
14 that Brooke Group didn't apply at the summary judgment
15 phase. We did object to the instruction proposed by the
16 district judge on the grounds that it did not conform
17 with Brooke Group in order to preserve our argument here
18 and we believe that that objection gives the Court the
19 power to adopt an intermediate rule, but it isn't
20 exactly what we requested and there are decisions in the
21 court of appeals of to that effect.

22 With respect to the question about
23 purchasing more logs than they needed, as we say in our
24 briefs we think that that claim can't really be
25 separated from the predatory pricing claim here because

1 the argument is that by purchasing more logs the price
2 was driven up and it's the increased price, that's the
3 impact that respondent complains of. So creating a
4 separate overbuying claim that relies on price for
5 impact would be the same thing as saying on the sell
6 side you can have an overselling claim regardless of
7 whether you flunk the Brooke Group standard with respect
8 to prices, and that's just going to undercut the
9 certainty that this Court has prescribed.

10 With respect to the document that
11 Mr. Haglund cited, 901A about the inputs, that document
12 is described in testimony in the joint appendix at 571A
13 to 573A, and that's a hypothetical look at what the
14 market might would look like if current, past purchasing
15 patterns had continued. It's not a document that in any
16 way says that the various sources of log supply were
17 locked up and it doesn't indicate that, and in fact
18 there's nothing in the record to indicate what the
19 percentage of logs were that were available to
20 Weyerhaeuser by long-term contract, in contrast, as I
21 said, to the testimony in the record that indicates that
22 respondent got between 30 and 50 percent of its logs
23 through those long-term sources.

24 With respect to the proper disposition of
25 the case, in the Boyle case this Court made clear that

1 where there's no, not sufficient evidence in the
2 record -- I'm sorry, my time is up.

3 CHIEF JUSTICE ROBERTS: You can finish your
4 sentence.

5 MR. PINCUS: Where there's not sufficient
6 evidence in the record to go to the jury under the
7 proper jury instruction, the proper outcome is for the
8 claim to be dropped from the case.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Pincus. The case is submitted.

11 (Whereupon, at 11:03 a.m., the case in the
12 above-entitled matter was submitted.)

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