No. 07-512

IN THE

Supreme Court of the United States

PACIFIC BELL TELEPHONE COMPANY,
DBA AT&T CALIFORNIA, *et al.*,
Petitioners,

v.

LINKLINE COMMUNICATIONS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR VERIZON COMMUNICATIONS INC. AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

The businesses owned by Verizon Communications Inc. (Verizon), like those of AT&T, provide wireless and wireline communications services directly to retail customers and, on a wholesale basis, to other communications service providers that compete with Verizon at the retail level. In particular, Verizon is competing at both retail and wholesale for broadband services that provide high-speed connections to the Internet.

The truly important advances on the landline side of the telecommunications world in the past decade are the advances in broadband (with all the new uses thereby made possible), not the sharing of old infrastructure. The advances in broadband have taken place in a vigorously competitive world – cable technology versus, first, DSL technology and, now, fiber optic and wireless technology.[2] The facilities-driven competition has been so vigorous that the FCC, in 2005 (after the period at issue in this case), concluded that market freedom by the incumbents was the proper substantive choice of how to exercise its regulatory authority over provision of DSL transport service to dependent

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[1] Rule 37 statement: All parties have consented to the filing of this brief. Petitioners' letter consenting to all amicus briefs is on file with the Clerk. Respondents' letter is being filed with this brief.

No counsel for a party has written this brief in whole or in part, and no person or entity other than the *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g.*, FCC, Wireline Competition Bureau, Indus. Analysis & Tech. Div., *High-Speed Services for Internet Access* (Mar. 2008), at hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280906A1.pdf.

DSL retail providers. *See Time Warner Telecom, Inc. v. FCC,* 507 F.3d 205 (3d Cir. 2007) (upholding FCC's removal of common carrier regulations from telephone company broadband services), *aff'g*, *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* 20 FCC Rcd 14,853 (2005).

Starting in the late 1990s, firms that did little if any investing in competitive facilities, but sought instead to piggyback on the old infrastructure, commenced costly antitrust litigation against Verizon and other incumbent telephone providers. That litigation, which asserted claims under Section 2 of the Sherman Act that the incumbents had to provide their upstream (wholesale) services and facilities to downstream (retail) rivals so as to enable the latter to compete, was a drain on Verizon and others seeking to focus on broadband progress. This Court in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004), rightly brought that litigation to an end, recognizing that the litigation powerfully undermined, rather than served, the goals of antitrust law. The Ninth Circuit, in conflict with four other circuits, has resurrected a means to create the harm that this Court had stopped in *Trinko.*

With respect to high-speed services like the one at issue here, following the Court's decision in *Trinko* and the FCC's decision to stop requiring telephone companies to share their broadband networks, Verizon has been investing vast sums to deploy a fiber optic network to consumers.[3] Verizon has a strong interest

[3] Verizon is investing $23 billion to offer fiber optic connections to 18 million households by 2010. *See* Devona Walker, *Verizon builds fiber-optic battlefield*, Herald Tribune, Apr. 15, 2007; Verizon press release (June 18, 2008), investor.verizon.

in the development of sound antitrust principles, which should protect unilateral decision-making from the costs and risks of antitrust litigation unless a clear rule of conduct has been both formulated and justified based on analysis of its systemic effects. Such rules must also avoid both capping prices on services deriving from beneficial, risky investments and penalizing retail price reductions that benefit consumers by intensifying competition against rivals (like cable). For those reasons, Verizon urges this Court to reject categorically respondents' (linkLine's) Sherman Act § 2 "price squeeze" claim.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

SUMMARY OF ARGUMENT

This Court should reverse the Ninth Circuit's decision allowing linkLine to proceed on its price squeeze claim. *First*, the specific result in *Trinko* precludes the claim. The Ninth Circuit accepted that, under

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com/news/view.aspx?NewsID=925 (Verizon's fiber-to-the-premises network currently reaches 10 million premises). Verizon is the first major telecom company to deploy gigabit passive optical network (G-PON) technology to customers in the United States, which dramatically increases Internet access speeds. Verizon press release (Mar. 27, 2007), *see* investor.verizon.com/news/view.aspx?NewsID=825.

Trinko, petitioners (AT&T) had no antitrust duty to deal with linkLine at all – no antitrust duty to sell the upstream service (DSL transport) to linkLine. Under that correct premise, linkLine cannot have a cognizable claim alleging a price squeeze, which asserts a duty to sell at a price that allows linkLine to compete. "A defendant that has no duty to deal with rivals by definition has no duty to deal with them on particular terms that would permit them to compete." U.S. Invitation Br. 10.

Second, even aside from what is implied by the result of *Trinko*, the analytic methodology of *Trinko* precludes linkLine's price squeeze claim. Here, as in *Trinko*, the claim asserted goes beyond anything this Court has ever recognized. Here, as in *Trinko* (and other precedents of this Court), the antitrust analysis required for adopting duties toward rivals that curtail unilateral firm decision-making – an analysis that at its core requires consideration of systemic effects and institutional suitability – argues compellingly against newly recognizing the claim. And here, as in *Trinko*, the case against newly recognizing linkLine's claim is confirmed by the fact that there already is a regulator, with considerably greater expertise and flexibility than judges and juries in antitrust cases, that can address any legitimate aspect of the rival's grievance.

ARGUMENT

I. The Result in *Trinko* Bars linkLine's Price Squeeze Claim

The Ninth Circuit accepted the district court's holding, which is not before this Court, that under this Court's decision in *Trinko* AT&T had no duty to deal with linkLine at all. Pet. App. 1a, 5a & n.6, 77a-85a.

That premise, moreover, is correct: it follows directly from *Trinko*'s explanation of the outer limits of any antitrust duty to deal. AT&T did not voluntarily sell DSL transport (which is different from the retail service of DSL access) to outsiders or bar linkLine from buying AT&T's retail service at retail prices. *See* Pet. Br. 20. Under *Trinko*, linkLine could not establish a duty to deal.

Without a duty to deal, linkLine cannot sustain a price squeeze claim. If AT&T may simply refuse DSL transport to linkLine, as far as Section 2 is concerned, there can be no Section 2 duty governing the price AT&T charges. The United States so explained at the petition stage, as already quoted. Page 4, *supra*. The leading treatise agrees: "it makes no sense to prohibit a predatory price squeeze [what linkLine claims here] in circumstances where the integrated monopolist is free to refuse to deal." IIIA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 767c5, at 129-30 (2d ed. 2002).

Indeed, in *Trinko*, because it was undisputed and indisputable that dealing was in fact under way, the duty to deal asserted, and rejected, was a duty to deal on terms that would enable at least some rivals to compete in the retail market. Any lesser duty, moreover, would have been immaterial to antitrust policy. Yet linkLine makes the same claim, as it must in order to invoke *competition* benefits – a necessary precondition to any antitrust claim. The focus on prices specifically does not take linkLine's claim outside the scope of *Trinko*'s rejection of a duty to deal. *Trinko* is not limited to claims to better *non-price* terms; nor could it sensibly be so limited, for price and service terms are intimately related. *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998). *Trinko* thus expressly noted that it was rejecting the claim to judicially determined prices for the service Trinko demanded. 540 U.S. at 408. *Trinko*'s result thus bars linkLine's claim.

II. Proper Section 2 Analysis, Reflected in the Reasoning of *Trinko* and Other Precedents of This Court, Bars linkLine's Price Squeeze Claim

Because substance must determine whether there is a Section 2 duty, by any name, it is important to explain directly why a proper Section 2 analysis bars linkLine's claim. That claim asserts that a monopolist has a duty not just to avoid predatory pricing but, further, to avoid some *relation* between its wholesale and retail prices – one that squeezes the retail rival that also buys the wholesale input. A proper Section 2 analysis, however, as reflected in *Trinko*'s reasoning and other decisions of this Court, should lead to a categorical rejection of this claim.

This Court's reasoning in *Trinko* contained three major components. *First*, this Court had never recognized a duty to deal as expansive as Trinko asserted (whether called a duty to deal or "essential facilities" or something else). 540 U.S. at 408-12. *Second*, fundamental antitrust policies, both substantive and institutional, would be undermined by recognizing the newly expanded asserted duty to deal. *Id.* at 407-08, 414-15 (stressing investment incentives, administrability, deterrence of desirable conduct, *e.g.*). *Third*, the availability of regulatory authority to address any valid concerns confirmed that new recognition of Trinko's claim was improper. *Id.* at 411-13. This logic precludes linkLine's claim as well.

A. This Court's Precedents Do Not Recognize a Price Squeeze Claim

In *Trinko*, this Court recognized that it had some precedents involving a duty to deal. It then explained why Trinko's claim fell outside those precedents. And it therefore recognized that, to permit Trinko's claim to go forward, it would have to recognize a Section 2 duty it had never before recognized. 540 U.S. at 408-12.

The conclusion that a new Section 2 duty is being sought follows even more directly here. This Court has never recognized a price squeeze claim at all. U.S. Invitation Br.10-11. Only a few appellate court decisions, not any decision of this Court, have recognized price squeeze claims. linkLine asks the Court to do so for the first time, and in the face of strong judicial, government, and scholarly criticism of the appellate price squeeze cases generally and outright rejection of price squeeze claims in the present setting by circuits outside the Ninth. *See* Pet. 11-14, 18-22.

The decision that undergirded the smattering of pre-*Trinko* price squeeze decisions in the circuits is the Second Circuit's decision, written by Judge Learned Hand, in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (*Alcoa*). But, even aside from whether linkLine's allegation of a monopolized downstream market fits under *Alcoa*'s reasoning (*but see* Economists' *Amicus* Pet. Br. 9), the core logic of *Alcoa* should not be approved by this Court. The essential premises of *Alcoa* were that (a) "exercise" of market power by itself is condemned by Section 2 (148 F.2d at 438) and (b) Section 2 protects small rivals as such, even "in spite of possible cost" to consumers (*id.* at 429). But *Trinko* confirms that the former premise is incorrect, as the "charging of monopoly prices[ ] is not only not unlawful; it is an important element of the free-market system." 540 U.S. at 407. And, as the United States explained (U.S. Invitation Br. 13), the focus on protecting competitors has long since been rejected by this Court in favor of a systemic focus on consumer welfare as it is enhanced by the overall process of competition, which sometimes results in monopolies as firms vie, through innovation and low pricing and other means, to get all the sales they can. As Judge Posner wrote, in describing the outmoded character of the *Alcoa* premises, "now that the *Alcoa* doctrine is defunct, it is understood that a monopolist is free to compete." R. Posner, *Antitrust Law* 250 (2d ed. 2001).

B. The Analysis Required for Consideration of Section 2 Duties Applicable to Unilateral Conduct Requires Rejection of linkLine's Price Squeeze Claim

Harm to a competitor is not, in itself, a harm against which antitrust law protects. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (antitrust law protects "*competition*, not *competitors*") (internal quotation marks omitted); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 U.S. 209, 224 (1993). That is equally true when a monopolist's conduct is at issue. U.S. Invitation Br. 11. A firm has no antitrust duty to rein in its efforts to capture every available sale in order to protect the health or survival of competitors. Stifling of vigorous competitive and innovative efforts to best rivals, and encouraging pricing or margin-preserving accommodations that protect rivals, are anathema to antitrust policy. *See Trinko*, 540 U.S. at 408 ("the supreme evil of antitrust [is] collusion").

These fundamental principles recognize that the most legitimate kinds of competition – the kinds of conduct that antitrust law most wants to encourage, such as innovations that offer what rivals do not or prices lower than those of rivals – are harmful to rivals in fact and in intent. What is crucial, therefore, is distinguishing the types of conduct that should be condemned as improper from entirely proper conduct, where the effect and intent may be the very same. *Trinko*, 540 U.S. at 407. The conclusion of an analysis identifying when the line has been crossed is to say that the conduct is "anticompetitive," "exclusionary," or "predatory," but such terms better express the conclusion (indeed, can easily be misunderstood to cover legitimately anti-rival conduct) than the analysis needed to arrive there.

1. Clear Formulation and Affirmative Justification Based on Systemic Effects and Institutional Suitability Are Preconditions To Recognizing Any Section 2 Restriction on Unilateral Conduct

The conduct at issue here is classic unilateral firm conduct, which the Sherman Act treats differently from concerted action. In particular, an especially strong presumption against antitrust intervention applies to unilateral conduct, as distinguished from concerted action that takes the form of promises about how the parties will make future choices about what they buy or sell. *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 767-69 (1984); *see* Areeda & Hovenkamp, ¶ 772d, at 192-93; *Trinko*, 540 U.S. at 410 n.3 (distinguishing concerted from unilateral refusals to deal). The dichotomy reflects an elementary truth: unilateral action that harms rivals is inherent in competition, and so restricting it through antitrust law carries distinctive risks of harming competition itself. *Copperweld*, 467 U.S. at 767-68 (harm to rivals inherent in competition; unilateral conduct governed by standards that seek to "reduce[] the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur").

At least two related premises support the demand for special justification before antitrust law intervenes to restrict unilateral conduct. *First*, antitrust policy is disserved by rules of law that discourage any firm, including a monopolist, from adopting efficient practices and vigorously competing to the detriment of rivals. Consumers suffer from such self-restraint. Not only do they miss the direct benefits (*e.g.*, of lower prices enabled by the efficiencies), but they are harmed indirectly, as actual and potential rivals can afford to be lazy under the monopolist's "umbrella" – rivals need not do as much, whether through innovative leap-frogging or otherwise, to match or to improve upon the monopolist's offerings if the monopolist is "pulling its competitive punches." *Olympia Equip. Leasing Co. v. W. Union Tel. Co.,* 797 F.2d 370, 375 (7th Cir. 1986) (per Posner, J.)

Second, it is hard to distinguish legitimate rival-harming unilateral conduct from conduct that should be condemned through antitrust law. *See Trinko*, 540 U.S. at 408 (relying on "the difficulty of identifying and remedying anticompetitive conduct by a single firm"); *id.* at 414 ("[U]nder the best of circumstances, applying the requirements of § 2 'can be difficult' . . . ."); *Copperweld*, 467 U.S. at 767-68 ("it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects"); *Town of Concord v. Boston Edison Co.,* 915 F.2d 17, 21 (1st

Cir. 1990) (per Breyer, C.J.) ("almost all business activity, desirable and undesirable alike, seeks to advance a firm's fortunes at the expense of its competitors"); *id.* at 23 ("Merely eliminating competitors is not necessarily anticompetitive, for, as we explained earlier, even legitimate business activity that succeeds in helping a firm will likely disadvantage the firm's competitors."); Evans & Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. Chi. L. Rev. 73, 73, 75 (2005) ("the welfare effects of unilateral practices are inherently difficult to assess").

For those reasons, Section 2 law must guard against multiple dangers in restricting unilateral conduct and, moreover, must do so by requiring formulation and justification in a rule assessed for its systemic effects. To begin with, Section 2 grounds for intervention must try to minimize case-specific social costs. Thus, they must seek to avert false positives (antitrust condemnation of conduct that should be allowed) – which "'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Trinko*, 540 U.S. at 414 (quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 594 (1986)); *see id.* ("The cost of false positives counsels against an undue expansion of § 2 liability."). And the applicable antitrust rules must seek to keep the sheer costs of the antitrust litigation as low as possible. Case-specific error and administration costs are reason enough to demand clear screening mechanisms for meritless claims.

Lowering *systemic* costs is at least as important in framing sound standards for antitrust intervention. Antitrust doctrines have their principal effects in deterred conduct that never makes its way into litigation – yet whose very deterrence may be harmful to antitrust policy. And systemic costs are inherently dependent on the suitability for judges and juries of the tasks an asserted duty would impose on them. This kind of analysis must be central to sound Section 2 law, not an afterthought to an analysis driven by case-specific considerations.

A business's decision whether to adopt a legitimate, but rival-harming, practice will inevitably be influenced by its prediction of how likely it is that the practice will be erroneously condemned in antitrust litigation, which may well be initiated by the harmed rival or take the form of a customer class action, generating treble damages and attorneys' fees. Such decisions will also be influenced by the expected high costs of defending the practice. *See South Austin Coalition Community Council v. SBC Communications Inc.,* 191 F.3d 842, 845 (7th Cir. 1999) ("[a]ntitrust litigation can be very costly"); *Virgin Atlantic Airways Ltd. v. British Airways PLC,* 257 F.3d 256, 263 (2d Cir. 2001) ("Wasteful trials and prolonged litigation that 'may have a chilling effect on procompetitive market forces' should be avoided."). Not only substantively overbroad rules, but rules that are difficult, vague, or otherwise unpredictable in application, and rules that simply require costly litigation, will deter businesses from engaging in legitimate competition, Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 14-15 (1984), and encourage use of litigation as a tool to dampen vigorous rivalry.[4]

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[4] *See* Baumol & Ordover, *Use of Antitrust To Subvert Competition*, 28 J. L. & Econ. 247, 254 (1985) ("[O]bscurity and ambiguity are convenient tools for those enterprises on the prowl for opportunities to hobble competition. As we know, it is not always necessary to win cases in order to blunt a rival's

Any articulated basis for antitrust intervention, at least for unilateral conduct, cannot be justified without careful consideration of these real-world costs and a consequent effort to define workable threshold requirements that protect against such systemic chilling of investment and vigorous competition.

Serious attention to these considerations is essential in order to prevent antitrust doctrine from turning the Sherman Act into a weapon for undermining the very policies the Act is supposed to promote. This Court relied on just such considerations in carefully limiting the grounds of antitrust intervention in *Trinko*, 540 U.S. at 407-08. Then-Judge Breyer explained the centrality of similar considerations in two First Circuit opinions, one of which rejected a price squeeze claim in a regulatory context but elaborated on some reasons for skepticism about such claims generally.[5] Judge Easterbrook, for the Seventh Circuit,

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competitive weapons. Harassment by lawsuit or even the threat of harassment can be a marvelous stimulus to timidity on the part of competitors. The potential defendant who cannot judge in advance with any reasonable degree of certainty whether its behavior will afterward be deemed illegal is particularly vulnerable to guerrilla warfare and intimidation into the sort of gentlemanly competitive behavior that is the antithesis of true competition."); *id.* at 264 ("Mere accusation and trial subjects the defendant firm to enormous expenses and even greater ex ante risks of an expensive adverse decision, even if it transpires ex post on the basis of convincing evidence that it is completely innocent.").

[5] Judge Breyer explained that, "while technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists' (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every

explained that the mere theoretical possibility of competitive harm is not enough to justify recognition of claims.[6] And a similar theme informs the Antitrust Modernization Commission's recommended approach

economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve." *Barry Wright Corp. v. ITT Grinnell Corp.,* 724 F.2d 227, 234 (1st Cir. 1983). He later elaborated that antitrust rules "must be clear enough for lawyers to explain them to clients," "administratively workable," and "designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings." *Town of Concord,* 915 F.2d at 22. *See also* D'Amato, *Legal Uncertainty*, 71 Cal. L. Rev. 1 (1983) (describing costs of legal uncertainty).

[6] In *Schor v. Abbott Labs.*, 457 F.3d 608 (7th Cir. 2006), Judge Easterbrook wrote: "We appreciate the potential reply that it is impossible to say that a given practice 'never' could injure consumers. A creative economist could imagine unusual combinations of costs, elasticities, and barriers to entry that would cause injury in the rare situation. [Citing articles]. But just as rules of *per se* illegality condemn practices that almost always injure consumers, so antitrust law applies rules of *per se* legality to practices that almost never injure consumers." *Id.* at 612-13. "Rules for predatory pricing are good examples," resting on the premise that "[s]ubjecting all low prices to litigation, and the inevitable risk of error in a search for the rare instances in which consumers could be made worse off in the long run by low prices today, would make it more risky for firms to reduce prices, and they would be less inclined to do so – to consumers' considerable detriment." *Id.* at 613. Citing the Evans & Padilla article on the proper analytic framework, Judge Easterbrook explained that an antitrust claim requiring "a search for the rare situation" where antitrust harm might exist should be rejected as "not worth the candle," at least when "[t]he search itself (and the risk of error in the judicial process) has much more chance of condemning a beneficial practice than of catching a detrimental one." *Id.*

to Section 2 standards, though in the less clearcut manner that characterizes such across-the-spectrum consensus reports. *See* Antitrust Modernization Comm'n, *Report and Recommendations*, at 88-92 (2007) (at 88, *e.g.*: "In general, standards for applying Section 2 of the Sherman Act's broad proscription against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize overdeterrence and underdeterrence, both of which impair consumer welfare."), govinfo.library.unt.edu/amc/report_recommendation/chapter1.pdf.

Antitrust policy thus must demand that several steps be taken before a court accepts as sound any asserted ground of Section 2 condemnation of unilateral conduct. The ground of condemnation must be formulated to make apparent the bases for condemnation. Once so formulated, the rule must be assessed – based on the difficulty or ease of making the judgments required by the rule, and an empirical sense of the relative frequency of legitimate versus illegitimate uses of the practice at issue – to predict how many false positives such a rule directed to a particular practice are likely to generate, and how many false negatives. That assessment will, in turn, depend centrally on the likely costs of the processes for making the crucial distinctions required by the rule, the reliability and accuracy of the processes for making the distinctions, and as a result the systemic costs for private businesses that have to live with the rule. It is likewise critical to consider, as between courts and the marketplace, which is more likely to correct errors, and after how long, and at what cost (erroneous judicial condemnations have to be corrected by later changes in law, erroneous judicial vindications have to be corrected by market displacement). *See* Evans & Padilla, at 80-88; Hylton & Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 Antitrust L.J. 469, 498-502 (2001).

In the abstract, these inquiries can be challenging. Partly for that reason, minimizing the challenge in practice requires proper assignment of the burden of proof. For unilateral conduct, the default rule must be non-intervention where the burden of formulation and justification in systemic terms is not met. The alternative is worse.

This framework accords with the sensible presumption that "[t]he costs of false convictions in antitrust decisions involving unilateral practices are likely to be significantly larger than those of false acquittals." Evans & Padilla, at 83. Moreover, at least in general, the presumption of skepticism about antitrust intervention for unilateral conduct sensibly reflects a presumption that the marketplace is a better corrective mechanism than the courts (or Congress). Expunging antitrust decisions that unsoundly restrict competitive conduct takes considerable time and effort, whereas allowing a practice that builds or reinforces monopoly power, if that power is exploited, invites entry. *Id.; see* Easterbrook, at 15. Our economic system is built on the general judgment that the incentive for profit (by those developing innovations and otherwise seeking entry when markets are monopolized) is a powerful force for undoing monopoly, just as the presumptively protected opportunity to charge monopoly prices "is what attracts 'business acumen' in the first place." *Trinko*, 540 U.S. at 407.

These considerations apply in particular to any antitrust limitations on unilateral firm pricing decisions. *Brooke Group* adopted an objective and demanding set of necessary requirements for a claim that prices are too low, because of the institutional limits of courts and the strong dangers of over-deterrence from any less demanding standard, even though some potentially bad conduct might therefore fall outside antitrust proscription. 509 U.S. at 223-26. More recently, *Weyerhaeuser* affirmed those principles and borrowed the predatory-pricing standard to set a comparably limiting standard for any claim of predatory purchasing. 127 S. Ct at 1076-77. Where unilateral pricing is at issue, the strong presumption must be that the strict standards for predatory pricing (or bidding) are the only standards.

2. Recognizing a Price Squeeze Claim Would Undermine Fundamental Antitrust Policy

A price squeeze theory of Section 2 liability should be rejected categorically because the potential competitive gain from recognizing a price squeeze inquiry is hard to identify even theoretically and at best slim, the separation of wheat from chaff is unreliable and costly, courts would have to take on an unsuitable role, and, worse, any price squeeze duty would present grave risks of deterring conduct *encouraged* by the antitrust laws. Even aside from the background role of regulation to catch any legitimate complaints, there is no substantial possibility of reliably identifiable harm that can justify the countervailing risks to desirable conduct and imposition on courts of inappropriate regulatory tasks that recognizing a price squeeze claim would entail. And a categorical rejection is required, because a murky or case-by-case approach, with uncertainty as to result and high costs of application, would produce many if not all of the same adverse substantive and institutional consequences as outright embracing of a price squeeze theory. Accordingly, this Court should refuse to add to Section 2's recognition of a duty to avoid predatory pricing a new duty to avoid a combination of wholesale and retail prices that together produce a squeeze on retail rivals.

a. It is hard to identify even theoretically, let alone practically, what if any price squeezes are bad from the Section 2 perspective. A concern about harm to competitors *per se* is contrary to modern antitrust policy. Nor is "leveraging" of advantages derived from a monopoly from one level to another itself contrary to antitrust policy. Desirable conduct, such as exploiting efficiencies of vertical integration, can have that effect. Moreover, the effect itself may be beneficial even in the short run (if, *e.g.*, the result is to eliminate double marginalization that raises current prices), let alone in the longer term (by promoting innovative and other efforts to unseat a validly earned second monopoly). *See Town of Concord,* 915 F.2d at 24-25; Areeda & Hovenkamp ¶¶ 756b3 at 14-15, 767c2 at 128.

Leveraging of efficiencies that makes rivals' entry into the upstream business more difficult could not for that reason be condemned. Genuine efficiencies of vertical integration might make single-level entry more difficult, and scale resulting from efficiencies might make dual-level entry more difficult. Thus, even if the focus were on a particular alleged price squeeze, without yet turning to the necessary systemic-effects analysis, the result of making challenges to a wholesale monopoly more difficult is no reason for condemnation. In any event, there is no suggestion in this case that linkLine is a potential rival in supplying DSL transport (the wholesale product). Indeed, as this case illustrates, imposing duties to protect retail rivals can easily harm investment and competition at the wholesale level (here, with rival providers of broadband transport).

Although *Trinko* confirms that there is nothing impermissible about seeking a monopoly profit, it is also the case that, in one ordinary situation, there is not even the genuine possibility of greater monopoly profits from acquiring a second monopoly. At least where the wholesale input and retail product are used in fixed proportions, as here, all the available monopoly profits can be earned simply by charging the monopoly price upstream. *Town of Concord*, 915 F.2d at 23; Pet. Br. 24. Even if AT&T had wholesale monopoly power, seeking greater monopoly profits cannot be the reason for pricing that effects a squeeze.

Moreover, price squeezes can result from conduct that is readily understood to be entirely innocuous, even positively desirable. *See* Areeda & Hovenkamp ¶ 767c, at 126-30. Market conditions, especially when multiple downstream products require an upstream input, can change the costs of or demand for the upstream product so as naturally to squeeze the margin of downstream rivals in at least some of the downstream products. ¶ 767c1, at 127. A price squeeze may result from price discrimination among different users of the upstream product, which can be output enhancing (allowing those who value the product less to obtain it when a uniform price might cut off such purchasers). ¶ 767c4, at 129. Most generally, perhaps, rival downstream firms may be less efficient than the defendant firm, whose very integration into both levels may be a source of greater efficiency. ¶ 767c3, at 128.

In short, there is no readily available, sound definition of what if any price squeezes should be condemned – even putting aside the uncertainties and difficulties of identifying them reliably in practice and the systemic effects of rules that allow for the search. But those aspects of a proper Section 2 analysis clinch the case against a price squeeze claim.

b. As *Brooke Group*, *Trinko*, and *Weyerhaeuser* all make clear, a central aspect of any Section 2 analysis is "the institutional fact that antitrust rules are court administered rules." *Town of Concord*, 915 F.2d at 22. Here, entertaining the price squeeze theory promoted by linkLine and the Ninth Circuit would entail complex and inherently uncertain inquiries. *Id.* at 25 ("it is not easy for courts to administer Judge Hand's [*Alcoa*] price squeeze test"). The sifting out of cases involving the innocuous explanations just noted is itself a difficult and uncertain enterprise, especially but not only in the absence of some positive formulation identifying which price squeezes were to be condemned. *See* pages 10-11, *supra*. And even a direct focus on prices presents intractable problems.

The essential basis for promoting recognition of a price squeeze claim – over and above the available predatory pricing claim – is the notion that the *relation between wholesale and retail prices* should allow room for efficient retail competition. Yet:

> Identifying the "appropriate" price is an extraordinarily complex regulatory exercise. Presumably, the tribunal would have to determine the amount that an efficient rival would require as a distribution between the defendant's wholesale price to the rival and its own downstream price to consumers. But this raises problems of a different order of magnitude than those encountered in a predatory pricing case. The tribunal would have to identify the markup required by a

> hypothetical "efficient" rival in a market with high fixed costs and numerous joint costs. Even then, it is difficult to see any consumer benefit in a rule that requires a firm to share its inputs with rivals so that they can sell together in the downstream market.

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 787c, at 237 (Supp. 2008) (footnote, which cites economic literature on required complex inquiry, omitted).

The situation is particularly complex when multiple "products" are produced using shared inputs. This phenomenon is commonplace in the telecommunications industry, where multiple services (which may or may not be different antitrust "products") are provided using common network and switching facilities and common provisioning, billing, and other systems and personnel. linkLine's claim presents intractable problems in this context:

> Adjudicating this claim will require a court first to discern and second to guess how a firm allocates fixed costs through its pricing of diverse products that use the fixed-cost base. That task is well nigh impossible . . . . [T]here is no single correct way for a multi-product firm to allocate fixed costs through the pricing of its diverse products, and once a fixed-cost structure is in place any price above the incremental cost of serving a particular customer is "rational" in the sense that it contributes more to covering the fixed costs than not serving that customer at all.

Id. at 236.

And the problems are still worse given the prevalence of "bundling" throughout the economy – the offering of several "products" together at a single price different from the sum of the prices of each "product" offered alone. In the telecommunications world, the efficiency reasons that drive bundling generally, including shared costs and transactional savings, have produced familiar bundles of services: *e.g.*, voice (landline or wireless); Internet access; video. In this common situation, there is uncertainty even about determining at the threshold what the effective prices of the defendant are, on a product-specific basis, let alone what they "should" be on some price squeeze theory.

These problems cannot be made to disappear by asking only whether the upstream price is actually lower than the defendant's downstream price. As a substantive matter, such a disparity cannot simply be condemned. The defendant's low retail price is lawful as long as it is not predatory under the demanding standards of *Brooke Group*; indeed, such a low price is an antitrust good even when rivals dependent on the defendant cannot compete as a result. (As a practical matter, the retail price can easily be driven down by retail competition that does not depend on the wholesale input from the defendant: *e.g.*, DSL Internet access competes directly with cable.) And this antitrust consequence does not change just because the defendant may also choose to use any upstream market power it may have to charge higher prices to outsiders for the input – as it is perfectly entitled to do. *See Trinko*, 540 U.S. at 407-08.

In any event, identifying a wholesale-higher-than-retail situation is not straightforward. The problems of identifying the relevant prices remain, and not just in the common situation of bundling, at either the wholesale or retail level. For example, offering DSL Internet access may produce multiple sources of revenue: not just any retail price for access, but advertising fees paid by firms other than the access user (as is increasingly common on the Internet today). A focus on just one retail price would be unsound. More generally, in a fast-changing business, like telecommunications, a particular "retail service" may be an essential element of a strategy to compete in a marketplace moving toward bundled offerings (*e.g.*, voice or video revenues may be enhanced by offering Internet access, whose price therefore cannot be viewed in isolation).

c. The regulatory inquiries required by recognition of a price squeeze claim are plainly not suitable for decision by judges and juries in antitrust cases. Then-Judge Breyer, speaking for the First Circuit, explained how foreign to antitrust courts are the needed inquiries. *Town of Concord*, 915 F.2d at 25. And this Court in *Trinko* expressly endorsed the principle that such institutional unsuitability was an important reason to refuse to recognize a claimed Section 2 duty: when the tasks required cannot be reliably performed, any claim of harm – at least if otherwise uncertain – "should be deemed irremedia[ble] by antitrust law." *Trinko*, 540 U.S. at 415 (internal quotation marks omitted).

The price squeeze claim at issue here fits that description for multiple reasons. The inquiries that would be required are particularly technical, requiring an expertise – including continuing familiarity with the industry – that is difficult for generalist judges or juries, having only episodic involvement with the topic and generally lacking specialist training, to acquire within the time limits of cases, conducted through formal adversarial processes. Perhaps as important as the comparative expertise of regulators is their flexibility. Even within regulatory agencies, price, cost, and competition inquiries are inherently uncertain, and therefore the determinations made are intrinsically experimental and subject to change when errors are discovered or circumstances change. That kind of flexibility as to substantive prescriptions, coupled with remedial flexibility, is not matched in antitrust cases. *See Trinko*, 540 U.S. at 415 (courts should impose no antitrust duty that "'requires the court to assume the day-to-day controls characteristic of a regulatory agency'"); *see* Antitrust Modernization Commission, *supra*, at 102 ("Moreover, forced sharing requires courts to determine the price at which such sharing must take place, thereby transforming antitrust courts into price regulators, a role to which they are ill-suited.") (footnote omitted).

d. As already noted, *Trinko*, *Brooke Group*, and *Weyerhaeuser* all confirm the essential need to avoid overkill in antitrust law, especially for unilateral conduct. In the present context, the harms from false positives – indeed, of the *risk* of false positives or, even the costs of litigating about the issue – are clear and severe. Most specifically, an error in an individual case produces case-specific harm of the most obvious type. If the tribunal judging prices makes "any error whatsoever, giving the rival a higher markup than necessary to insure minimum efficient operation, the impact of the ruling would be *higher* prices for consumers." Areeda & Hovenkamp ¶ 787, at 238.

More systemically, firms faced with the prospect of price squeeze liability or litigation have incentives to do one or more of four things: raise their downstream prices to protect their rival; lower their upstream prices; abandon selling to the downstream rival altogether; or abandon their own downstream sales. The incentives are powerful, and the consequences are harmful. *See* Areeda & Hovenkamp ¶ 767d2, at 133 (criticing *Alcoa* approach as "confront[ing] a monopolist with two choices: to forgo monopoly profits or to avoid or abandon partial vertical integration. It is thus inconsistent with either of two other basic legal propositions: that a lawful monopolist is entitled to charge a monopoly price, and that partial vertical integration by a monopolist is presumptively lawful because it is economically beneficial.").

Raising the downstream price works perhaps the most direct harm in antitrust terms. This Court has based its strict preconditions for predatory pricing on the value placed on low end-user prices. *Brooke Group*, 509 U.S. at 224; *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990); *see Weyerhaeuser*, 127 S. Ct. at 1074 ("We were particularly wary [in *Brooke Group*] of allowing recovery for above-cost price cutting because allowing such claims could, perversely, 'chill legitimate price cutting,' which directly benefits consumers."); *see also Town of Concord*, 915 F.2d at 27.[7] And the adverse effects of raising downstream prices extend beyond the immediate harm to consumers: the downstream rivals

[7] *See* Thomas O. Barnett, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Opening Remarks at the Antitrust Division and FTC Hearings Regarding Section 2 of the Sherman Act: The Gales of Creative Destruction: The Need for Clear and Objective Standards for Enforcing Section 2 of the Sherman Act (June 20, 2006) ("In *Brooke Group*, the Court recognized the possibility that above-cost pricing might hurt competition but nonetheless insulated above-cost pricing from liability to avoid the greater harm of a legal regime that would cause firms to hesitate before lowering their prices or not to lower prices at all.") (footnote omitted).

themselves face diminished incentives to find better ways to compete when an umbrella is held over their heads to protect them.

Lowering the upstream price, for fear of litigation costs or liability, is an antitrust harm as well. The compelled curtailment of monopoly prices is not just outside what Section 2 requires. As *Trinko* explains, it undermines Section 2's policy, because the prospect of above-cost prices is an important driver of risky investments and innovation on which the competitive system overall depends. 540 U.S. at 407-08.[8] Recognizing linkLine's price squeeze claim would impair incentives to invest, both by putative monopolists (the reward would be less) and by rival firms (there will be less need).

The price squeeze scenario requires partial vertical integration, and that structure can be avoided in either of two ways. As far as antitrust law is concerned, the defendant may simply stop selling to the plaintiff rival – in the absence, as here, of a Section 2 duty to deal. Among other problems, the rival cannot possibly have standing to encourage that consequence, for the rival's claim of price squeeze depends on the assertion that it positively needs to buy from the defendant. Alternatively, the defendant can remove itself from the downstream market.

[8] *See* Thomas O. Barnett, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Presented at the Fordham Competition Law Institute, 34th Annual Conference on International Antitrust Law & Policy: Section 2 Remedies: A Necessary Challenge (Sept. 28, 2007) (prescribing the "advice of Hippocrates" for Section 2 – "help, or at least . . . do no harm" and noting that "imposing a duty on a defendant to provide competitors access to its assets . . . can undermine the incentive of those other competitors to develop their own assets as well as undermine the incentive for the defendant competitor to develop the assets in the first instance").

Both results – or movements in either direction – are generally harmful. Partial vertical integration is, quite broadly, "economically beneficial." Areeda & Hovenkamp ¶ 767d2, at 133. Indeed, as Judge Posner noted long ago, partial vertical integration – both supplying and competing against a firm – is commonplace in our economy. *General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 593 (7th Cir. 1984). The prevalence of a practice among competitive firms powerfully indicates efficiency, because competition from rivals otherwise would force abandonment of the practice. *See* Evans & Padilla, at 81 ("Consider a practice in which firms in both competitive and uncompetitive markets engage. We would expect that the practice cuts costs or enhances value to customers – after all, competitive firms cannot survive indefinitely if they do not use the most efficient methods of producing, designing, and distributing products."); Hylton & Salinger, at 497-98. That conclusion applies when a monopolist engages in the practice as well: "There is no economic reason to believe that these efficiencies become less important as firms acquire market power." Evans & Padilla, at 81; *id.* at 91 (the "sources of efficiency remain, regardless of the degree of market power of the firm engaging in the practice"). It is therefore harmful to proscribe or deter such conduct on the part of firms with market power, which also have an incentive to pass on at least some of the benefits of efficiencies to their customers. Hylton & Salinger, at 504. Judge Posner summarized the point:

> If the practice is one employed widely in industries that resemble the monopolist's but are competitive, there should be a presumption that the monopolist is entitled to use it as well. For its widespread use implies that it has significant

> economizing properties, which implies in turn that to forbid the monopolist to use it will drive up his costs and so his optimum monopoly price.

R. Posner, *supra*, at 253; *see* Epstein, *Monopoly Dominance or Level Playing Field? The New Antitrust Paradox*, 72 U. Chi. L. Rev. 49, 60 (2005).

Deterring partial vertical integration would undermine this efficiency-enhancing practice. Rivals may be more efficient at certain downstream functions than the defendant, so that an incentive to refuse to deal altogether would be harmful not just to the rival but to overall competition. By the same token, the defendant may be more efficient in the downstream market than rivals, so that an incentive to withdraw from that market would remove both an efficient competitor and a spur to other firms in that market to improve their own performance.

All of these are grave risks presented by anything less than a categorical rejection of price squeeze claims as unjustified. As already explained, unilateral firm conduct is driven by an assessment of the high costs and risks of antitrust adjudication. Firms will avoid conduct that can trigger the launching of litigation, which can drain treasuries and be profoundly distracting to officers and employees that must remain focused on the business. They will even more readily be driven to damaging conduct-avoidance behavior by the inherent uncertainty of the outcome of price squeeze litigation. The complexity of the inquiries demanded means that there is an ineradicably high risk in seeing litigation to its conclusion, no matter how seemingly clear the lack of merit in the claim.

It is not a sound answer that an ability to exercise market power in the sale of the upstream product is a prerequisite. The foregoing analysis of harmful deterrence squarely applies to firms with market power. In any event, firms without market power would be harmed as well. Market definition and power, in practice, are often not decided (even on summary judgment) until the parties have incurred considerable costs for discovery and expert analysis directed to potentially complex facts about market structure and firm behavior. The burden of a price squeeze rule will therefore be felt by successful firms that ultimately would not be held to have market power – as should be apparent in the context of broadband services, where the strength (often the lead) of cable companies must ultimately preclude a claim that the local telephone companies have market power here.

C. Expanding Section 2 To Recognize Price Squeeze Claims Is Especially Inadvisable in the Presence of Regulatory Authority Over the Conduct

All of the foregoing provides compelling reasons to reject a price squeeze claim. This Court recognized in *Trinko*, moreover, that a final reason for rejecting a Section 2 duty is present when regulatory authority in fact exists to address any legitimate aspects of the grievance asserted. That conclusive reason against expanding Section 2 duties is present in this case as well.

During the period at issue in this case, AT&T's wholesale DSL prices (for its transport service) were actually subjected to FCC common-carrier regulation under an approach that forced incumbent telephone companies, if they provided DSL-based Internet access (retail) services to end-users, to offer the incorporated transport on a nondiscriminatory common- carrier basis to rival providers of the end-user retail access service. *See* Pet. 4 n.1. Subsequently, this Court concluded that the statute, as amended in the 1996 Telecommunications Act, provided room for discretion about the separation of an underlying transport component from the end-user access service. *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). Exercising the authority thus recognized, the FCC then made a substantive determination that competition and related policies would be promoted by *not* compelling this wholesale common-carrier offering. *See Time Warner Telecom*, 507 F.3d at 214, 220-23.

The FCC has thus exercised its regulatory authority to determine what forms of substantive regulation, if any, should apply to the upstream input at issue here. That authority readily encompassed consideration of the competition issues on which linkLine premises its Section 2 claim. Indeed, in another context (approval of an application for permission to enter the long distance business under 47 U.S.C. § 271), the D.C. Circuit required the FCC to address these very considerations under its Section 271 mandate, *Sprint v. FCC*, 274 F.3d 549, 554-55 (D.C. Cir. 2001), and the FCC did so, *see*, *e.g.*, *Order on Remand*, 18 FCC Rcd 24,474 (2003); *Order on Remand*, 19 FCC Rcd 2839 (2004).

This regulatory backdrop cements the reasons this Court should not recognize a price squeeze claim for the first time. Even without regulation at the retail level, regulatory authority at the upstream-input level can readily address any true competition issues:

among other things, the upstream-input price can be analyzed in light of the retail price (what it actually is or what it may be), even if the latter is not directly controlled. And, as already explained, regulators are plainly better positioned than judges or juries in antitrust cases to make the inherently uncertain, experimental, and transitory determinations about pricing, and the effects on investment and innovation, that are necessary components of a price squeeze analysis.

The FCC's 2005 deregulation of wholesale DSL service does not change the conclusion. The FCC concluded that, with the reality and importance of broadband rivalry between the telephone and cable companies, the best policy for competition is freedom as to the upstream input. That was an exercise, not an abdication, of the FCC's regulatory authority. And the substance of that determination is diametrically opposed to linkLine's price squeeze claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

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