No. 07-512

In The
# Supreme Court of the United States

PACIFIC BELL TELEPHONE COMPANY
d/b/a 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 OF THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF DISMISSAL OF THE WRIT OR AFFIRMANCE**

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## INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute ("AAI") is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. The Advisory Board of AAI, which serves in a consultative capacity, consists of more than 90 prominent antitrust lawyers, law professors, economists, and business leaders. AAI recently published a major report on the status of U.S. antitrust enforcement, with recommendations for policy on a wide range of topics. *See The Next Antitrust Agenda: The American Antitrust Institute's Transition Report on Competition Policy to the 44th President* (Albert A. Foer ed., 2008), available at http://www.antitrustinstitute.org.[1] AAI submits this brief primarily to urge the Court not to abolish "price squeeze" as an independent basis for antitrust liability, and to demonstrate that this

[1] The written consent of the petitioners to the filing of this brief is on file with the Clerk. The respondents' consent letter is being filed herewith. No counsel for a party has authored this brief in whole or in part, and no person or entity other than AAI or its counsel has made a monetary contribution to the preparation or submission of this brief. The AAI is managed by its Board of Directors, which alone has approved this filing. The individual views of members of the Advisory Board may differ from the positions taken by AAI. Counsel for respondents, Mr. Blecher, is a member of the Advisory Board but played no role in the Directors' deliberations or the preparation or submission of the brief.

long-established theory remains sound under the Court's modern antitrust jurisprudence.

## SUMMARY OF ARGUMENT

1. The writ of certiorari should be dismissed because respondents are no longer asserting a price-squeeze claim, and hence the question presented is merely hypothetical. Further, the absence of real facts makes this case a poor vehicle for making sweeping changes to the existing law on price squeezes.

2. If the Court does not dismiss the writ, the Court should decline the Solicitor General's invitation to decide whether a price squeeze should ever be an independent basis for a violation of Section 2. The question presented does not raise that issue; it is only addressed to the viability of a price-squeeze claim when a determination has been made that a regulated firm has no "antitrust duty to deal." In any event, the well-established rule that a price squeeze may constitute exclusionary conduct under Section 2 is fully consistent with modern antitrust policy and the protection of "competition, not competitors." *Alcoa* and its progeny are best understood as establishing an as-efficient-competitor test that bars a monopolist that operates at two stages of production from foreclosing equally efficient single-stage rivals. The potential anticompetitive effects of a price squeeze by a vertically integrated monopolist, like other forms of vertical foreclosure, are significant and well known.

While a monopolist's extension of its monopoly to adjacent markets could be procompetitive in certain circumstances, there is no reason to think that a rule of reason analysis cannot adequately assess the efficiencies of vertical integration. Moreover, fears of possible overdeterrence do not warrant a rule of per se legality, particularly when the case law generally requires that a plaintiff show not only a price squeeze, but also that the squeeze was deliberate and specifically intended to foreclose competition.

3. Whether the freedom of a monopolist to refuse to deal under the antitrust laws precludes a price-squeeze claim cannot be resolved by pointing out that the latter is no more harmful to competition. The exclusion of a rival by predatory pricing also is no more harmful, yet all parties agree that a *Brooke Group* predatory pricing claim would remain viable. In any event, there are reasons that the "greater" may not include the "lesser" in the unregulated context. Moreover, in a regulated industry where a monopolist is *not* free to refuse to deal, *Trinko*'s rationales for finding no *antitrust* duty to deal do not necessarily apply to a price squeeze of the kind alleged here. The institutional considerations cut differently – the regulatory role of the court is diminished, and the ability and willingness of the FCC to be a good steward of the antitrust function cannot be assumed. Moreover, the inference of predation from the conduct at issue, and the effect on investment in preventing it, are different here than in *Trinko*.

## ARGUMENT

## I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED

### A. The Question Presented Is Moot in Light of Respondents' Abandonment of Their Price-Squeeze Claim

Respondents' brief indicates that they now agree with petitioners and the dissent below that their "pricing squeeze claim survives *Trinko* only if it satisfies the requirements of a predatory retail pricing claim under *Brooke Group*." Resp. Br. 13. Accordingly, they have abandoned their margin-based price-squeeze claim and would have the Court vacate the judgment below. The only claim that they now press is one for conventional predatory pricing under *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). However, given that the issue of whether the complaint states a claim for predatory pricing under *Brooke Group* is not properly before the Court, the writ of certiorari should be dismissed as moot. The question presented at this point is merely hypothetical. *See Deakins v. Monaghan*, 484 U.S. 193, 199 (1988) (where respondents no longer sought certain relief permitted by the court of appeals' decision, question on which certiorari was granted was moot).

### B. The Court Should Not Decide a Sweeping Question of Antitrust Policy Without an Adequate Factual Record

The writ should be dismissed for another reason. Petitioners and their *amici* emphasize that the FCC has completely deregulated DSL broadband transport, having found sufficient "intermodal competition" in broadband Internet access among DSL, cable modem, satellite and wireless broadband. *See* Pet. Br. 4 n.4, 25 n.14. Hence, petitioners suggest that respondents will be unable to prove that petitioners could monopolize high-speed Internet access service. *See id*. at 25 n.14. The dissent made a similar point. *See* Pet. App. 19a-20a. Whether, despite intermodal broadband competition, DSL broadband Internet access is a relevant market in general, as alleged in the complaint, or perhaps in certain geographic markets where cable companies do not operate, is obviously a matter that cannot be determined on the pleadings. However, it would not be prudent for the Court to reach out on an interlocutory appeal to resolve the viability of all or most price-squeeze claims in a case with such a scanty record on this central issue. It is not a good idea to establish antitrust policy (or here, perhaps change decades of accepted antitrust policy) based on abstract theorizing, without being informed by actual facts. *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 467 (1992) ("This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record.") (internal quotes omitted).[2]

If the writ of certiorari is not dismissed, the judgment of the court of appeals should be affirmed for the reasons set forth below.

## II. THE VENERABLE RULE THAT A PRICE SQUEEZE BY A VERTICALLY INTEGRATED MONOPOLIST MAY VIOLATE THE SHERMAN ACT IS CONSISTENT WITH MODERN ANTITRUST POLICY

The Solicitor General argues that a price squeeze by a vertically integrated monopolist should *never* be a basis for liability under Section 2, regardless of whether the industry is fully regulated, partially regulated, or unregulated, and regardless of its effect on competition. *See* U.S. Br. 15, 27. He maintains that victims of a price squeeze may assert a predatory-pricing claim that satisfies the requirement of *Brooke Group*, or a refusal-to-deal claim that satisfies *Trinko*, but a price squeeze should not be an independent basis of liability. *See, e.g.,* U.S. Br. 14 n.8, 25, 29; *see also* Pet. Br. 21 ("Recognition of price squeeze as an independent antitrust tort conflicts with this Court's precedent"). This extreme proposition should be rejected by the Court. While abolishing price-squeeze

[2] A third reason for dismissing the writ is that the premise of the question presented – that there is no antitrust duty to deal – is hardly free from doubt. *See infra* note 18.

liability is consistent with the Justice Department's "blueprint for radically weakened enforcement of Section 2 of the Sherman Act,"[3] it is beyond the question presented here, as petitioners themselves recognize. *See* Pet. Br. 34. More significantly, it is inconsistent with precedent and sound antitrust policy.

### A. *Alcoa* Establishes An Equally-Efficient-Competitor Test

A price squeeze is a form of exclusionary conduct by which a monopolist that operates at two stages of production may foreclose competition from single-stage rivals that purchase an essential input from the monopolist. As the FTC and the appeals court recognized, "Price-squeeze claims have long been part of the Section 2 doctrine . . . ." FTC Statement at 3-4; Pet. App. 14a ("a price squeeze theory formed part of the fabric of traditional antitrust law prior to

[3] Statement of FTC Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice 1 (Sept. 8, 2008), at http://www.ftc.gov/os/2008/09/080908section2stmt.pdf. Notably, the FTC did not join the Solicitor General's briefs in this case, and issued an unusual statement explaining why it disagreed with the Department of Justice's position on the merits and the advisability of certiorari. *See* Statement of the Federal Trade Commission: Petition for a Writ of Certiorari in *Pacific Tel. Co. d/b/a AT&T California v. linkLine Comms., Inc.* (No. 07-512) at 3 (May 23, 2008) (FTC Statement) ("The holding of the Ninth Circuit is unquestionably correct . . . ."); *id.* at 6 ("we do not believe this case is ripe for review").

*Trinko*"). Judge Hand's landmark *Alcoa* decision,[4] which has been taught to generations of antitrust students, is the leading case on price squeezes, although it was not the first one to conclude that a price squeeze by a vertically integrated monopolist may be unlawful.[5] In the 63 years since *Alcoa,* numerous courts of appeals in addition to the Second Circuit have recognized the viability of price-squeeze claims.[6] The Solicitor General seeks to minimize the force of this well-muscled body of precedent, noting that "the price-squeeze theory of antitrust liability has never been recognized by this Court." U.S. Br. 18. But this Court itself has noted the "add[ed] . . . weight" given to *Alcoa* due to the unique circumstances in which it was decided, *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946), and has never questioned the existence of price-squeeze claims. Surely, when Congress enacted the Telecommunications Act of 1996, it would have considered price-squeeze claims to be ones "that satisfy established

[4] *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

[5] *See, e.g., United States v. Corn Products Refining Co.,* 234 F. 964 (S.D.N.Y. 1916).

[6] *See Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990); *Bonjorno v. Kaiser Alum. & Chem. Corp.*, 752 F.2d 802 (3rd Cir. 1984), *cert. denied*, 477 U.S. 908 (1986); *City of Mishawaka v. American Elec. Power Co., Inc.*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373 (9th Cir. 1992).

antitrust standards" that it intended to preserve under the Act's saving clause. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004).[7]

The Solicitor General also denigrates *Alcoa* because Judge Hand spoke of a "fair price" and "living profit," which supposedly indicates a focus on protecting competitors rather than competition. *See* U.S. Br. 24; *id.* at 21 ("*Alcoa* reflects an improper (and, under this Court's decisions, outmoded) focus on the economic well-being of particular competitors"); Pet. Br. 23. But, if the margin available to downstream competitors is insufficient to enable them to compete, then it follows that downstream *competition* will not exist. In any event, as Professor Hovenkamp explains:

> While Judge Hand spoke of the independent fabricator's legal entitlement to a "fair price" from Alcoa, he in fact employed a cost-based test. The test was that the margin between

[7] The notion that a legal doctrine is not "established law" unless it is endorsed by the Supreme Court is not one that the Court has followed in other areas. *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 732-33 (1975) (longstanding acceptance by the lower courts of securities law rule established by a decision of Judge Hand, along with Congress' failure to reject the rule, "argues significantly in favor of acceptance of the . . . rule by this Court."); *cf. United States v. Lanier*, 520 U.S. 259, 268-69 (1997) (rejecting position that only a decision of the Supreme Court could satisfy the requirement of fair warning or "clearly established law" for purposes of qualified immunity).

> the price at which Alcoa sold sheet to the independent rollers and its own resale price for rolled aluminum must be at least sufficient to cover the costs that Alcoa itself incurred for the same set of processes. In other words, Judge Hand applied a somewhat primitive version of an "equally efficient rival" test, such as the one that Judge Posner has advocated for unlawful exclusionary conduct assessed under §2 of the Sherman Act.[8]

Other courts have followed this interpretation of *Alcoa* and adopted a "transfer price test" under which a price squeeze is presumed to exist if the monopolist could not have made a profit by selling at its retail rates if it had purchased at its own wholesale rates. *See, e.g., Ray v. Indiana & Michigan Elec. Co.*, 606 F. Supp. 757, 776-77 (D. Ind. 1984); *Illinois Cities of Bethany v. F.E.R.C.*, 670 F.2d 187, 189 (D.C. Cir. 1981); *see also* John Vickers, *Abuse of Market Power*, 115 Econ. J. F244, F251 (2005) (stating that "in principle, if the dominant firm's downstream unit would be loss-making if it paid the wholesale prices charged to rivals, there is a margin squeeze" which prevents "rivals from winning business that they would serve more efficiently than the dominant firm,"

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[8] Herbert J. Hovenkamp & Erik N. Hovenkamp, *The Viability of Antitrust Price Squeeze Claims*, Univ. of Iowa Legal Stud. Res. Paper No. 08-33, at 2-3 (October 2008); *see also* FTC Statement at 4 ("[W]e understand Judge Hand's reference to 'living profit' to be a profit sufficient for participants in the second market to compete.").

and noting that this has been recognized in European case law).

### B. The Anticompetitive Effects of a Price Squeeze Are Well Recognized

Petitioners argue that "[t]he fact that 'a one-level monopolist engaged in a prolonged price squeeze may drive independent competitors out of business and thereby extend its monopoly power to a second industry level . . . does not mean that a price squeeze is anticompetitive." Pet. Br 23-24 (quoting *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 23 (1st Cir. 1990)). They refer to the "single monopoly profit" theory popularized by Chicago School scholars, which suggests that "where the wholesale input and the downstream product are in fixed proportion, an upstream monopolist generally cannot earn any greater profits by eliminating an efficient competitor in the downstream market." *Id.* at 24. Petitioners and their *amici* ignore the fact that the assumptions required for the "single monopoly profit" theory are quite restrictive. *See* Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 513, 517 (1995). In any event, even when the theory is applicable, "the anticompetitive effects of a price-squeeze scheme can still be significant." FTC Statement at 4.

In *Town of Concord* then-Judge Breyer explained that the principal harms from a monopolist at one level ("upstream") extending its monopoly to a second industry level ("downstream") are: (1) entry barriers are raised and the upstream monopoly is thereby fortified (leading potentially to higher prices); and (2) non-price competition in the downstream market is eliminated. *See* 915 F.2d at 23-24. The Solicitor General recognizes these harms but seeks to minimize them. *See* U.S. Br. 26-27.

**1. Monopoly preservation.** As to the entry barriers point, the Solicitor General argues, "Absent formidable preexisting entry barriers upstream, . . . there would be no upstream monopoly." *Id.* at 27. This counterintuitive argument – that additional entry barriers shouldn't matter when the monopoly is entrenched – cannot be taken seriously, for to do so would obliterate the large swath of monopolization law that seeks to prevent monopolists from raising entry barriers. *See Kodak,* 504 U.S. at 485 ("[O]ne of the evils proscribed by the antitrust laws is the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously.").

Moreover, the entrenchment, or monopoly preservation, concern has been developed beyond the simple "two level entry" problem identified by Areeda & Turner under which a potential entrant in the upstream market would have to enter both the upstream and downstream markets simultaneously because it fears that it otherwise would have no downstream outlets. *See* 3 Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 725h, at 204 (1978). More recent authorities emphasize the possibility that downstream firms themselves may be likely potential entrants in the upstream market[9] or could facilitate entry into the upstream market by increasing the availability of complements to actual or potential competitors.[10]

**2. Impairing non-price competition and innovation.** The Solicitor General offers that "interfering with the pricing in the marketplace in order to preserve the benefits of non-price competition is not sound antitrust policy, particularly because the second-level firms may not be especially innovative." U.S. Br. 27. He fails to offer any support for this assertion, which seems to reflect no more than the Justice Department's apparent belief in the "Schumpeterian hypothesis" that monopoly is more conducive to innovation than competitive markets. However, the Schumpeterian view is not only contrary to the overwhelming tenor of current economic thinking[11] and is

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[9] *See* Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 Harv. J. Law & Tech. 85, 111-12 (2003); *see also Town of Concord*, 915 F.2d at 24 ("a 'second-level' independent firm that develops better products or more efficient production methods may thereby obtain the strength needed to challenge the monopolist at the 'primary level.' ").

[10] *See* Farrell & Weiser at 109-11.

[11] *See generally* F.M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* 660 (3d ed. 1990) (concluding that "[t]echnological progress thrives best in an environment that nurtures a diversity of sizes and, perhaps, especially, that keeps barriers to entry by technologically

(Continued on following page)

belied by the enormous innovation unleashed by the divestiture of AT&T and its single-stage rivals,[12] it is at odds with the long-held antitrust assumption that "possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone." *Alcoa*, 148 F.2d at 427; *see also American Tobacco*, 328 U.S. at 813 (quoting and endorsing this proposition). Indeed, the problem of innovation in the secondary market is particularly acute in a price-squeeze situation because innovation can be undermined not only by the elimination of rivals but by a squeeze that leaves rivals in business but appropriates their productivity gains. *See* Hovenkamp & Hovenkamp at 17 ("there will be no incentive [by the rival] to reduce costs if the dominant firm can immediately capture the difference by squeezing the smaller firm's margins").

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innovative newcomers low."); William W. Lewis, *The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability* (2004) (survey of studies showing that greater product market competition increases productivity).

[12] *See United States v. W. Elec. Co., Inc.*, 890 F. Supp. 1, 9 (D.D.C. 1995) (decade after breakup "witnessed an unprecedented flowering of innovation"), *vacated as moot*, 84 F.3d 1452 (D.C. Cir. 1996); Farrell & Weiser at 94-95 & n.41 (noting that MCI and Sprint introduced fiber optics, which spurred AT&T to follow).

The elimination of consumer choice in the downstream market is also an antitrust harm. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605-07, 610 (1985) (noting harm from unavailability of all-Aspen ticket, which deprived consumers of ability to "make their own choice on these matters of quality"); *see generally* Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 Antitrust L.J. 175 (2007). This loss of choice may be particularly harmful in the broadband Internet context, where ISPs have the ability to discriminate against certain types of content otherwise available on the Internet. *See Network Access, Regulation and Antitrust* 151, 159-60 (Diana L. Moss ed., 2005).

**3. Facilitation of price discrimination**. The monopolist's extension of its monopoly to the secondary market may also be harmful insofar as it facilitates price discrimination, which is itself an exception to the single monopoly profit theory. While some scholars maintain that price discrimination can be procompetitive or at least has indeterminate welfare effects, the Court has treated it as an anticompetitive consequence of exclusionary conduct by a monopolist. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14-15 & n.23 (1984) ("impairment of competition" from tying includes "increas[ing] the social costs of market power by facilitating price discrimination, thereby increasing monopoly profits over what they would be absent the tie"); *see also* Barry Nalebuff, *Unfit to be Tied, An Analysis of* Trident v.

Independent Ink, *in The Antitrust Revolution* (John E. Kwoka, Jr. & Lawrence J. White eds., 5th ed. 2008) (price discrimination typically will lead to reductions in consumer welfare). At the least, there is no reason to assume that a price squeeze designed to facilitate price discrimination is procompetitive.

**4. Fixed-proportions assumption is generally not realistic.** A fundamental assumption of the single monopoly profit theory is that the monopoly product and the secondary product are used in fixed proportions. However, "[v]ariable proportions cases are quite common . . . ." Robert H. Bork, *The Antitrust Paradox* 229 (1978). And in variable proportions cases, "under plausible circumstances, vertical integration downstream by an input monopolist *can* lead to enhanced monopoly power and price increases." Scherer & Ross at 525. Relatedly, the single monopoly profit theory does not apply when the complementary product in the secondary market is not a complete complement; that is, some consumers may consume the rival's product without the primary product (or, at least, the primary product sold by the monopolist). If that is the case, and there are economies of scale in the production or consumption of the secondary product, then vertical foreclosure may prevent the rival from reaching efficient scale, and consumers of the "standalone" secondary product may be harmed.

*See* Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 Am. Econ. Rev. 837 (1990).[13]

**5. Regulation "exception" to single monopoly profit theory**. Another well-recognized "exception" to the single monopoly profit theory is when there is price regulation at the primary level. *See Town of Concord*, 915 F.2d at 29 ("We recognize that a special problem is posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregulated level, in order to earn at that second level the very profits that regulation forbids at the first."); 3A Phillip E. Areeda & Herbert Hovenkamp, *Antirust Law* ¶ 787b, at 298 (2d ed. 2002) ("[F]ull monopoly profit can usually be obtained by monopoly at one stage, and the monopolist would have no reason further to restrict output by raising

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[13] Petitioners baldly assert that this case involves fixed proportions, *see* Pet. Br. 24, but this assertion seems belied by the suggestion that ISPs can reach customers over other platforms, such as cable and satellite. *See* Pet. Br. 4 n.4. *Cf. Kodak*, 504 U.S. at 463 (explaining that functionally linked products that may not be used without one another may constitute separate product markets). In any event, while an ISP may depend on a particular DSL broadband transport provider to reach customers in one local market, it does not necessarily depend on the same provider in each local market. Moreover, ISPs offer ancillary services (*e.g.,* e-mail, content, portals, and applications) that are not used in fixed proportions with DSL transport service. *See* Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 J. on Telecomm. & High Tech. L. 329, 350-52, 356 (2007) (suggesting that ancillary services may be available on a standalone basis and subject to economies scale).

the price at the stage into which it integrated. Regulation changes the picture in that significant respect.”).

The Solicitor General acknowledges that petitioners’ wholesale rates for DSL transport were subject to regulation by the FCC, but misses the potential import of this regulation when he contends that “if . . . there is no sound basis to treat margin-based price squeezes as antitrust violations even in unregulated markets, there is surely no reason to do so in wholly or partly regulated markets.” U.S. Br. 28. Such a proposition would surely have startled Professor Baxter and other classical Chicago School adherents. *See* Farrell & Weiser at 105-07 (describing regulated monopoly exception to single monopoly profit theory as “Baxter’s Law” because it was at the heart of the government’s antitrust case against AT&T). Similarly, the Solicitor General errs in asserting that the prospect of earning monopoly profits at the second level “is essentially a problem of regulatory evasion, not of antitrust law” and that the FCC can police a price squeeze even though it does not regulate retail rates. *Id.; see also* Pet. Br. 37. “[T]he relevance of rate regulation avoidance is not that antitrust appropriately supervises rates, but that avoiding rate regulation is the profit motive that might induce the price-regulated firm to engage in conduct that excludes others from an adjacent market otherwise open to competition.” 3A Areeda & Hovenkamp ¶ 787b, at 301. Whether antitrust should stay its hand because regulators can appropriately police a price squeeze in a partially regulated industry is a separate question.

**6. Complete exclusion unnecessary.** It is worth emphasizing that the harms from vertical foreclosure strategies such as a price squeeze do not necessarily require that the monopolist completely exclude the rival from the downstream market. Rather, simply raising the rival's costs and thereby marginalizing it may have effects similar to complete exclusion. *See generally* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price*, 96 Yale L.J. 209 (1986). Furthermore, at least one important anticompetitive situation depends on the rival firm's *not* exiting the market, namely when the monopolist misappropriates the rival's fixed-cost investments by squeezing it just enough to keep it in business.[14]

[14] Professor Hovenkamp, while noting the effect of such a squeeze in reducing the incentives of rivals to innovate and reduce costs, has questioned whether this should constitute anticompetitive behavior "despite the somewhat malicious nature of this sort of price squeeze." Hovenkamp & Hovenkamp at 17. *But see* Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich. L. Rev. 213, 267-68 (1985) ("[T]he antitrust laws can encourage efficient investment by protecting firms from strategic, inefficient advantage-taking by others."); *id.* at 269 ("price squeeze may often be a mechanism by which a monopolist takes advantage of a vertically related firm's sunk investment in order to force an infracompetitive rate of return on the firm").

**7. Procompetitive justifications.** The monopolist's extension of its monopoly could be procompetitive in certain circumstances. *See Town of Concord*, 915 F.2d at 24-25 (citing avoidance of double marginalization in particular). Moreover, a price squeeze that excludes an as-efficient downstream competitor could be the result of efficiencies of vertical integration (*e.g.*, if it is more costly for the monopolist to serve its rivals than itself). But any rule of reason analysis would take procompetitive justifications into account. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (articulating a structured rule of reason for Section 2). Petitioners assert that it "would always be difficult for an adjudicator to distinguish a price squeeze resulting from [superior] efficiency from a price squeeze resulting from supposedly excessive wholesale prices," Pet. Br. 27, but the *Alcoa* test screens out efficiencies at the secondary level, and petitioners offer no evidence to believe that the assessment of other efficiencies is more difficult for price squeezes than other types of exclusionary conduct. *See, e.g., Energex Lighting Industries, Inc. v. N. American Philips Lighting Corp.*, 765 F. Supp. 93, 105 (S.D.N.Y. 1991) (dismissing price-squeeze claim where the squeeze "resulted from Philips being a more efficient company").

## B. Fear of Possible "Overdeterrence" Should Not Bar Price-Squeeze Claims

**1. Innocent price squeezes are not illegal.** Petitioners and their *amici* maintain that recognition of price-squeeze claims would deter procompetitive conduct by discouraging aggressive retail pricing or efficient vertical integration by the monopolist. *See* Pet. Br. 27-28; *see also* U.S. Br. 24. For example, the argument goes, a monopolist may wish to reduce retail prices because of changing demand conditions in the retail market, yet may refrain from doing so because it would feel compelled to lower wholesale prices as well, lest it be sued for having engaged in an unlawful price squeeze. Neither the petitioners nor any of the *amici* have cited any empirical or even anecdotal evidence that vertically integrated monopolists have been deterred from legitimate price cutting because of a fear of price-squeeze liability. And for good reason. Courts have held that a mere price squeeze by a monopolist does not violate Section 2. *See Antitrust Law Developments* 287 (6th ed. 2007). For example, the Third Circuit has required proof that the squeeze was deliberate and "not the result of natural market forces such as supply and demand or legitimate competition." *Bonjorno*, 752 F.2d at 809. Other courts have required a showing that the monopolist had a specific anticompetitive intent or lacked a legitimate business justification. *See City of Anaheim,* 955 F.2d at 1378-79; *City of Mishawaka*, 616 F.2d at 985.[15] To be sure, any rule other than per

[15] Petitioners themselves suggest another reason that low retail pricing is unlikely to be deterred by potential price-squeeze liability: the risk that raising retail prices will be construed as collusion with the downstream rival. *See* Pet. Br. 27 n.16.

se legality runs the risk of some "false positives." However, concerns about overdeterrence will be minimized by placing the burden on plaintiffs to allege and prove not only that the integrated monopolist's price squeeze does not permit an equally efficient rival to survive but also that the price squeeze was specifically intended to foreclose competition from unintegrated rivals.

**2. *Alcoa* test is consistent with *Brooke Group*.** *Brooke Group* does not require a different result. The Solicitor General correctly points out that *Brooke Group* rejected above-cost predatory pricing claims, even though the Court acknowledged that such conduct could be anticompetitive, because "the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator . . . or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Brooke Group,* 509 U.S. at 223. Neither rationale supports eliminating price squeeze liability. The first rationale is wholly inapplicable because the *Alcoa* test for liability focuses precisely on whether an equally efficient competitor would be excluded (notwithstanding that the elimination of a less efficient competitor could also be anticompetitive). The second rationale is also inapt because *Alcoa*'s cost-based safe harbor, along with the specific intent requirement, provides sufficiently clear guidance to monopolists and courts so as not to unduly chill legitimate price cutting. *See* FTC Statement at 4 (*Alcoa* test "is at least as clear as the undefined 'below-cost' standard in *Brooke Group*").

The mere fact that the exclusionary conduct in a price squeeze involves prices does not mean that an orthodox *Brooke Group* standard should apply. The treatment of bundled discounts provides a good analogy. A bundled discount involves situations in which a monopolist sells a monopolized product and a competitive product, and offers a discount to customers that buy both products instead of the monopolized product separately, which single-product rivals may not be able to match. Some commentators have argued that such discounts should only be actionable when the price of the product bundle is less than the incremental cost of producing the two products under *Brooke Group*, because otherwise discounting will be chilled. Yet a number of courts (including the Ninth Circuit in a decision written by Judge Gould),[16] the Antitrust Modernization Commission, and even the Justice Department have rejected the *Brooke Group* test for bundled discounts in favor of a "discount attribution rule," which would potentially allow for liability when the "imputed" price of the competitive product (after allocating all discounts to the competitive product) is below the monopolist's incremental costs of producing that product, even if the price of

[16] *See Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008).

the bundle exceeds the incremental costs of the two products.[17]

The rationale for the discount-attribution rule for bundled discounts is that pricing that does not satisfy this test would exclude an equally efficient single-product competitor, and the rule provides sufficient clarity to businesses and courts so as not to unduly chill procompetitive discounting. Likewise, the *Alcoa* rule, which potentially allows for liability when the price of the competitive product minus its "imputed" wholesale cost is below the monopolist's incremental retail (or downstream) costs, would permit as-efficient retail competitors to compete, and provide sufficient clarity.

*   *   *

Ultimately, the Solicitor General's arguments for abolishing price-squeeze liability reflect a deep skepticism about the harmfulness of vertical foreclosure strategies by monopolists, and an unwarranted fear of "false positives." And while this policy predilection has been a part of the antitrust debate for decades, the Court has quite properly never accepted it as a basis for immunizing vertical foreclosure from antitrust scrutiny, and should not do so here.

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[17] *See* U.S. Dept. of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* 91-102 (2008) (describing alternative rules).

## III. THE DISTRICT COURT'S DETERMINATION THAT PETITIONERS HAD NO "ANTITRUST DUTY TO DEAL" DOES NOT BAR RESPONDENTS' PRICE-SQUEEZE CLAIM

Petitioners maintain that where, as here, the district court determined that there was no "antitrust duty to deal" under *Trinko*,[18] it follows that a price-squeeze claim cannot be maintained because a price squeeze cannot be any more anticompetitive than an

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[18] Whether petitioners had a duty to deal under *Aspen* and *Trinko was* disputed on appeal, *see* Brief of Appellees 21-23, contrary to petitioners' assertion. *See* Pet. Br. 19. What was not disputed was that petitioners were required by law to offer DSL transport facilities as long as they provided DSL Internet service at retail. *See* Pet. App. 5a n.6, 85a. Petitioners assert that there was no basis for any argument that they "'would ever have [provided DSL transport facilities to respondents] absent statutory compulsion,'" Pet. Br. 19 (quoting *Trinko*), but they (and other incumbent local exchange carriers) made precisely the opposite contention to the FCC in seeking to have the regulatory requirements lifted. *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14893, ¶ 74 n.223 (2005) (*Wireline Broadband Framework Order*) ("SBC will continue to enter into ISP broadband access arrangements as a way of increasing subscriber growth and utilization of its broadband network *regardless of any regulatory compulsion to do so*.") (quoting SBC July 31, 2003 *Ex Parte* Letter at 8) (emphasis added). Indeed, the FCC found these arguments to be a persuasive reason to lift regulation. *See id.* at 14892-94, ¶¶ 74-75. Neither the district court nor the appeals court considered respondents arguments that "charging rivals higher prices than otherwise available to consumers, falls within the exception to the general 'no duty to deal' rule carved out by *Aspen Skiing* and *Otter Tail*." Brief of Appellees 22.

outright refusal to deal. *See* Pet. Br. 34; *see also* U.S. Br. 14 ("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."); *Covad Communications Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 673 (D.C. Cir. 2005) ("it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal") (quoting 3A Areeda & Hovenkamp ¶ 767c5, at 129-30). This argument fails for a number of reasons.

### A. The Fact That a Price Squeeze May Be No More Harmful to Competition Than a Refusal to Deal is Not Dispositive

As an initial matter, the equal-harm-to-competition argument proves too much because it would bar a *Brooke Group* predatory pricing claim as well – exclusion of a downstream rival from the market using predatory pricing or a refusal to deal (or any other foreclosure technique for that matter) has the same effect on competition.[19] And under the "single monopoly profit" theory relied upon by petitioners, recoupment would be impossible because the monopolist can earn no greater profits by integrating downstream. Moreover, as Professor Hovenkamp

[19] Indeed, consumer harm from vertical foreclosure due to predatory pricing should be less than from a refusal to deal because at least with predatory pricing consumers get to enjoy a period of below-cost pricing before the rival is eliminated.

asks, "Why would the dominant firm undergo a costly period of predatory pricing when it could destroy the rival simply by refusing to deal?" Hovenkamp & Hovenkamp at 13. Yet, petitioners and the Solicitor General maintain that a *Brooke Group* predatory pricing claim would be viable, if properly alleged. *See* Pet. Br. 8; U.S. Br. 15-17.

Second, it is important to distinguish between antitrust duties to deal in the regulated and unregulated contexts. The district court's determination of "no antitrust duty to deal" was premised on the existence of regulation. The Court need not and should not decide the extent to which the hypothetical absence of an antitrust duty to deal would preclude a price-squeeze claim in the unregulated context. Indeed, even in the refusal to deal context, as in *Aspen Skiing*, the Court does not ask whether there is some abstract "antitrust duty to deal," but rather asks whether a refusal to deal by a monopolist in given circumstances gives rise to antitrust liability. In any event, as a matter of logic and policy it does not follow that if a monopolist may lawfully refuse to deal with a downstream rival, it should be free to harm the rival in other, perhaps less drastic ways, such as a price squeeze. The lesser-within-the-greater argument is unsound in many areas of the law,[20] including antitrust. For example, the *Colgate* doctrine

[20] *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510-11 (1996) (Stevens, J.) (commercial speech).

permits a manufacturer to refuse to deal with a retailer that fails to adhere to the manufacturer's suggested retail prices, but does not necessarily permit less drastic measures such as suspending the retailer for a short period. *See* Brian R. Henry & Eugene F. Zelek, Jr., *Establishing and Maintaining an Effective Minimum Resale Price Policy: A* Colgate *How-To*, Antitrust, Summer 2003, at 8, 10; *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). The *Colgate* doctrine and *Trinko* are founded upon "'the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" *Trinko*, 540 U.S. at 408 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). But the same solicitude does not necessarily apply to a monopolist's determination to eliminate or neuter an existing customer/rival through a price squeeze. And, a rational antitrust policy might consider that a monopolist bluntly cutting off a rival would be problematic but relatively unlikely to occur because it requires the monopolist to forego wholesale revenues, or because it is too drastic an option, or because it would raise contractual, regulatory, or reputational risks, whereas a price squeeze might be more likely to be used (perhaps because it is less obvious) and therefore warrant greater antitrust scrutiny. *See, e.g.,* Riordan & Salop at 535 n.55 (noting that refusing to deal may be less effective than raising rivals' costs).

### B. *Trinko*'s Rationale Does Not Apply to the Price Squeeze Alleged Here

Petitioners, of course, were not "free to refuse to deal" with respondents. As in *Trinko*, such a refusal to deal would have violated telecommunications law. However, the factors in *Trinko* that led the Court to conclude that defendant's refusal to deal did not also violate Section 2 do not apply to a price squeeze of the type alleged here. The Court was reluctant to impose an antitrust duty to deal not because a refusal to deal by a monopolist in one market controlling an essential input for rivals to compete in an adjacent market is competitively harmless. (Indeed, *Trinko* was not a classic vertical-foreclosure or monopoly-leveraging case at all.) Rather, institutional concerns were paramount. The Court was concerned that "[a]n antitrust court is unlikely to be an effective day-to-day enforcer of . . . detailed sharing obligations." *Trinko*, 540 U.S. at 415; *see id.* at 408 ("Enforced sharing . . . requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill suited."). At the same time, the regulatory "regime was an effective steward of the antitrust function." *Id.* at 413; *see id* at 412 ("One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm."). Indeed, the "enforcement scheme set up by the 1996 Act [was] a good candidate for implication of antitrust immunity. . . ." *Id.* at 406. These institutional factors cut differently in the case of a price squeeze.

**1. The role of the court.** The "regulatory" role of the court in a price squeeze is significantly lessened because the retail price offered by the monopolist provides a benchmark for determining the wholesale price. Indeed, in the case of a discriminatory price squeeze like the one alleged here, where the wholesale price allegedly exceeded the retail price, *see* J.A. 35, the court does not have to determine the price of access at all; it can provide an adequate remedy merely by ordering the monopolist not to discriminate in its treatment of rivals and other customers, *e.g.*, charge no more for wholesale DSL transport than for retail DSL Internet service.[21] *See Town of Concord,* 915 F.2d at 28 (noting that in cases where price squeeze allegations involve wholesale prices that exceed retail prices "some of the 'administrative' problems we have found surrounding a jury's efforts to determine the reasonableness of the price 'gap' " are eliminated); *Trinko*, 540 U.S. at 410 n.3 (distinguishing concerted refusals to deal in part because they are "amenable to a remedy that does not require judicial estimation of free market forces: simply requiring that the outsider be granted nondiscriminatory access to the club"). As counsel for Verizon has elsewhere suggested, the "institutional task for courts is much more manageable" in a discrimination situation because "[t]he voluntary sales to others furnish a standard of conduct – equality – that the

[21] Other remedies, such as damages or divestiture, do not require any supervision of rates at all.

courts do not have to define on their own." John Thorne, *A Categorical Rule Limiting Section 2 of the Sherman Act:* Verizon v. Trinko, 72 U. Chi. L. Rev. 289, 299 (2005).[22]

**2. The effectiveness of regulatory remedies.** It is not clear, at least on this record, that the FCC is an adequate steward of the antitrust function. Broadband Internet service has long been considered an "information service" not subject to common carrier regulation by the FCC; hence the FCC did not regulate retail DSL rates.[23] To be sure, the FCC presumably had the authority to address a price-squeeze complaint pursuant to its jurisdiction to determine whether a carrier's wholesale rates are "just and reasonable."[24] However, *Trinko* did not hold

[22] Petitioners and their amici suggest that the wholesale-greater-than retail situation is not as straightforward as it appears because the retail service may involve ancillary revenues from advertising or from increased sales of bundled offerings. *See* Pet. Br. 32-33 n.21. However, the same complications arise in the predatory pricing context when "below cost" sales of the predatory product may be offset by increased revenues from advertising or sales of complementary products.

[23] *See Wireline Broadband Framework Order*, 20 FCC Rcd at 14927, ¶ 136.

[24] *See Application by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services Inc., for Authorization To Provide In-Region, InterLATA Services in California*, 17 FCC Rcd 25650, 25736-37, ¶ 156 & n.562 (2002) (rejecting price-squeeze complaint regarding DSL transport service as inappropriate in § 271 proceeding, and noting that the appropriate venue for such allegations is a complaint under § 208 of the Act). Notably, in *Town of Concord*,

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that the mere possibility of regulatory action was sufficient to deter and remedy anticompetitive harm. On the contrary, in *Trinko* the FCC (and state regulators) had *in fact* remedied Verizon's breach of its network-sharing duties with a consent decree, fines, and other penalties. *See* 540 U.S. at 412-13; *see also Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2396 (2007) (finding implied immunity where "the SEC actively enforces the rules and regulations that forbid the conduct in question" and private litigants had obtained damages under securities laws for the type of conduct at issue); *cf. Town of Norwood v. New England Power Co.,* 202 F.3d 408, 419 (1st Cir. 2000) (holding price-squeeze claim barred by filed rate doctrine where FERC had addressed plaintiff's competitive concerns). And in *Otter Tail*, the Court concluded that antitrust remedies were appropriate even where the regulatory agency had provided at least partial relief. *See Otter Tail Power Co. v. United*

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then-Judge Breyer recognized the authority of the FERC to remedy a price squeeze under *FPC v. Conway*, but nonetheless would not foreclose the possibility of price-squeeze liability when the second level is unregulated. *See Town of Concord*, 915 F.2d at 28, 29. The reason that "full" regulation barred price-squeeze claims in *Town of Concord* was not merely the existence of an administrative remedy, but the pervasive regulation of rates, entry, and change of control that "significantly diminish[ed] the likelihood of major antitrust harm," and the potential conflict between antitrust liability and the regulatory scheme. *See id.* at 25-28; *see also id.* at 22 ("in light of regulatory rules, constraints, and practices, the price squeeze at issue here is not ordinarily exclusionary").

*States*, 410 U.S. 366, 372 (1973) (Federal Power Commission had ordered utility to interconnect and sell power at wholesale to rival, but lacked the authority to order wheeling; noting that "[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws."); *see also United States v. AT&T*, 552 F. Supp. 131, 168 (D.D.C. 1982) (ordering breakup of Bell System where FCC regulation had been ineffective). Indeed, the Solicitor General asserts, "Regulatory enforcement should not displace antitrust enforcement unless the criteria for implied immunity are satisfied." U.S. Br. 15.

Here, the Commission's practical ability and willingness to remedy a price squeeze are open to question. The Commission itself has noted that its ability to police a price squeeze involving wholesale tariffed rates is limited when, as here, rates are not reviewed in advance. *See Unbundled Access to Network Elements*, 20 FCC Rcd 2533, 2569-70, ¶ 62 (2005) (expressing concern that possible post hoc relief "would not be sufficient to prevent harm in the first instance to competitors relying on a wholesale input priced to effect a price squeeze").[25] Moreover,

[25] In theory, DSL transport rates were required to be offered pursuant to tariff until rates were completely deregulated in 2005. However, even before 2005 the regulation of rates was limited. From 2000 to 2001, SBC offered DSL transport as a non-dominant carrier "under contract," and not under tariff. *See Regulatory Review of Requirements for Incumbent LEC Broadband Telecommunications Services,* 17 FCC Rcd 27000,
(Continued on following page)

the Commission's zest to deregulate broadband markets suggests that a price squeeze claim may have little traction. *See, e.g.,* Harvey Reiter, *The Contrasting Policies of the FCC and FERC Regarding the Importance of Open Transmission Networks in Downstream Competitive Markets*, 57 Fed. Comm. L.J. 243, 318-19 & n.389, 321 (2005) (maintaining that FCC has been indifferent to ISP complaints about exclusionary practices and that its "obliviousness to downstream competition issues has led it to ignore alternatives to the deregulatory course it has chosen"). In all events, the adequacy of the regulatory stewardship of the antitrust function should not be presumed. *See* Philip J. Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era*, 50 Antitrust Bull. 549, 558 (2005).

**3. Incentives for investment, and inferences of predatory intent.** The Court in *Trinko* was also concerned about the disincentives for investment that it believed may result from "enforced sharing." *Trinko*, 540 U.S. at 407-08 ("Compelling [monopolists] to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentives for the monopolist, the rival, or both to invest in these economically

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27002-03, ¶¶ 3-5 (2002). Beginning in September 2001, it filed tariffs, but cost support and notice requirements were waived. *See id.* at 27003 n.18. Subsequently, the FCC granted SBC's petition for forbearance from tariffing requirements. *See id.* at 27008, ¶ 13.

beneficial facilities.").[26] Petitioners reprise that argument here. *See* Pet. Br. 29-30. But prohibiting a monopolist from squeezing a rival is unlikely to undermine incentives as long as the retail price chosen by the monopolist is otherwise profitable. *See* Thorne at 298-99 (noting that "there is much less reason to worry about deterring long-run and short-run investments by requiring the results to be shared" on terms the monopolist voluntarily offers to others); Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 310 (2003) (arguing that barring monopolist from discriminating on the basis of rivalry does not undermine *ex ante* incentives).

Relatedly, the Court in *Trinko* found it significant that "the services allegedly withheld are not otherwise marketed or otherwise available to the public" and "exist only deep within the bowels of Verizon," in contrast to *Aspen* "where the defendant refused to provide to its competitor . . . a product that it already sold at retail" and to *Otter Tail* where Otter Tail

[26] This concern has been questioned by commentators who note among other things that: (1) the monopolist's incentives depend upon the provenance of the monopoly facility and the price of access; (2) providing access to the rival may make it more likely that it will invest in beneficial facilities in the monopoly market in the future; and (3) access may increase the incentives of the rival (and the monopolist) to invest in the adjacent or complementary market. *See, e.g.,* Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 Antitrust L.J. 1, 32-36 (2008).

refused to provide the same service to its rival that it provided to "certain other customers." *Trinko*, 540 U.S. at 410. The Court said that "Verizon's reluctance to interconnect at the cost-based rate of compensation available under § 251(c)(3) tells us nothing about dreams of monopoly," while Aspen Skiing's discriminatory treatment of its rival "revealed a distinctly anticompetitive bent." *Id.* at 409. *See* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner 23 n.8, *Trinko*, 540 U.S. 398 (2004) (No. 02-682) ("The monopolist's willingness to offer non-competitors particular terms is evidence that those terms are profitable to it, and that the refusal to offer the same terms to competitors represents a sacrifice of immediate profits that would not make sense but for the tendency to impair competition."); Thorne at 298 ("[I]f you are selling this to others at a price that is profitable and lets you recoup your investment, what reason is there for not selling the same thing at the same price to a rival?").

Unlike the defendant in *Trinko*, but like *Aspen* and *Otter Tail*, petitioners offered DSL transport service not merely to rivals (and certainly not at any mandated low-cost rates), but to the public as well and refused to provide it to its competitors on the same terms. Petitioners argue that what they supplied to the public was not DSL transport, but "something different – DSL-based Internet-access service . . . ." Pet. Br. 20 n.11; *see also* U.S. Br. 14 n.7 ("the complaint contains no suggestion that respondents ever sought, or desired, to purchase from petitioners the bundled Internet access service (incorporating DSL transport) that petitioners sold at retail"). However, the fact that petitioners offered consumers *more* than just DSL transport, while charging less for the bundle than they charged rivals for just DSL transport, only makes the discrimination more apparent and thus the inference of predatory intent only stronger.

In sum, the institutional considerations and inferences of predatory intent that arise in connection with refusals to deal do not apply in the same fashion to price squeezes of the kind alleged here. Hence the district court's finding of "no antitrust duty to deal" should not preclude respondents' price-squeeze claim.

**CONCLUSION**

For the foregoing reasons, the writ of certiorari should be dismissed or the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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