No. 20-319

IN THE
Supreme Court of the United States

COMCAST CORPORATION AND
COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC,
Petitioners,

v.

VIAMEDIA, INC.,
Respondent.

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

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly reversed dismissal of plaintiff's federal antitrust claim on the ground that the district court erroneously resolved, at the pleading stage, factual disputes regarding the existence of an asserted justification for defendant's refusal to deal, when defendant otherwise did not contest that the complaint stated a claim under Section 2 of the Sherman Act pursuant to this Court's governing precedents.

2. Whether the Seventh Circuit correctly concluded that plaintiff presented sufficient evidence of unlawful tying in violation of Section 2 of the Sherman Act to survive summary judgment under unchallenged legal standards.

RULE 29.6 DISCLOSURE STATEMENT

Viamedia, Inc. is a privately held company. Its parent corporation is Viamedia Conduit LLC, which is also a privately held company.

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INTRODUCTION

In 2012, upending decades of industry practice, Comcast abruptly kicked cable companies represented by Viamedia out of the joint-selling arrangements known as advertising "interconnects" in the hope, soon realized, of driving Viamedia out of the market for Ad Rep Services, securing Comcast's monopoly. Only companies doing business with Viamedia suffered this treatment. The court below applied settled motion-to-dismiss and summary-judgment standards in concluding that Viamedia had pleaded a viable refusal-to-deal claim and marshalled sufficient evidence for trial on its separate tying claim. The appeals court adhered rigorously to this Court's precedents, decided no issue in conflict with any other circuit, and broke no new antitrust ground. With discovery nearing completion in the district court, the interlocutory posture of the decision further militates against review.

As to the first question presented, it is settled law that, "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate [Sherman Act] § 2." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). This Court has set out those circumstances in cases like *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985), *Trinko*, and *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438 (2009). The Seventh Circuit applied that precedent to Viamedia's complaint, which alleged that all of the circumstances that made refusal-to-deal liability in *Aspen Skiing* appropriate – termination of a profitable course of dealing, scuttling of a business arrangement embraced in competitive markets and demanded by consumers, and sacrifice of profitable transactions solely to harm

a rival – were present here. As the court below observed, in every relevant respect, Viamedia's claims are "well within th[e] bounds [of] and appear[] stronger than *Aspen Skiing*." App. 54a.

Comcast does not challenge the court of appeals' determination that Viamedia pleaded the existence of all of the *Aspen/Trinko* factors. Instead, it argues that the Seventh Circuit erred by refusing to treat as dispositive, at the pleading stage, Comcast's assertion that its desire to pursue "vertical integration" and to "cut out the middleman" was a legitimate justification for its facially anticompetitive refusal to deal. Pet. 13, 30. But the Seventh Circuit held that Viamedia's complaint did *not* allege that Comcast had any such justification; on the contrary, it alleged that there was *no* legitimate justification. The Seventh Circuit was correct – and broke no new ground – in determining that "a factual dispute regarding the existence of pro-competitive justifications" for a potentially unlawful refusal to deal is not "appropriate for resolution on the pleadings." App. 57a; *see Jones v. Bock*, 549 U.S. 199, 215-16 (2007). Comcast does not and cannot claim that this case-specific holding is in tension with any decision of this Court, is in conflict with the decision of any court of appeals, or has any importance beyond this case.

Comcast's petition instead challenges the Seventh Circuit's statements that, in evaluating *evidence* of legitimate business justification for a defendant's facially unlawful refusal to deal, there must be some balancing of proven benefits against proven harms. But those statements are not worthy of review. The court's holding addressed the sufficiency of the pleadings; how the district court should evaluate any evidence of legitimate justification is an issue that

may never arise. And, at any rate, the Seventh Circuit's statements create no conflict with this Court's precedent or with any decision from another circuit.

The second question presented – which challenges the court of appeals' determination that Viamedia had proffered sufficient evidence to warrant a trial on its tying claim – further undercuts the petition. The Seventh Circuit held, under unchallenged summary-judgment standards, that the record established disputed issues of fact on Viamedia's tying claim regardless of whether Comcast's conduct could be condemned as an unlawful refusal to deal. That case- and fact-specific determination does not warrant review. Furthermore, that holding provides an additional reason to deny review of the court of appeals' interlocutory refusal-to-deal ruling, because the case should proceed to trial in any event. The petition should be denied in its entirety.

STATEMENT

A. Factual Background

1. Incumbent cable companies like Comcast, cable "over-builders" like RCN and WOW!, direct broadcast satellite companies like DISH, and phone companies like Verizon and Frontier – collectively known as multichannel video programming distributors or "MVPDs" – compete to deliver video programming and broadband services to consumer and business subscribers. A191 (¶ 15). As part of their contractual arrangements with cable networks, MVPDs have the right to sell two or three minutes of advertising per hour (the rest of the advertising is sold by the cable network to national advertisers). Each advertising slot is known as a "spot" or an "avail." A193 (¶ 18).

Over-the-air TV broadcasters can sell ads that reach every household in their broadcast area, but an MVPD

can deliver ads only to its own subscribers. *Id.* (¶ 19). To compete more effectively, MVPDs have, for more than 25 years, formed "interconnects," metropolitan-area-wide selling cooperatives – often managed by an incumbent cable company, *i.e.*, one that inherited a government-granted cable monopoly – that allow an advertiser to reach every household served by any participating MVPD. App. 291a-292a (¶¶ 35-36). Broader MVPD participation in an interconnect makes the ads purchased through that interconnect more valuable, because they reach more households. App. 293a (¶ 39); *see* NCTA Br. 7 (explaining benefits of "collaborative approach"). By the same token, excluding MVPDs from an interconnect degrades the quality of its advertising, to the detriment of all participants (and advertisers). App. 309a-310a (¶ 116); A202, A247-48 (¶¶ 38, 118).

2. Despite the introduction of cable competition in the 1990s, Comcast remains the dominant provider in many markets (including Chicago and Detroit), serving half or more of all subscribers. A213-14 (¶¶ 59-60). In such markets, competing MVPDs (lacking scale in that market) often outsource the job of managing and selling their advertising avails to a third-party "ad rep." A194-95 (¶¶ 22-23). In a typical arrangement, an MVPD transfers control over its avails to its ad rep, which manages and sells them on the MVPD's behalf, keeping a percentage of the revenue. A195-96 (¶ 24).

Respondent Viamedia has been providing Ad Rep Services for decades. A23 (¶ 103); A562 (¶ 31). The services it provides include marketing, pricing, and selling avails; managing the MVPD's promotional advertising; technical services, such as encoding video files and inserting ads on the client MVPD's system in

the right place at the right time;[1] and allocating avails across sales channels and cable networks. A194-95 (¶ 22). As a business partner that does not compete with its clients, Viamedia also assists MVPDs with marketing their residential and business services. A701-02 (¶ 3).

Viamedia's principal competitors are in-house advertising sales divisions of large cable incumbents, including Comcast's "Spotlight" division.[2] App. 23a. Spotlight not only handles Comcast's avails but also represents other MVPDs, including MVPDs that compete against Comcast for subscribers and advertising revenue. A203-04 (¶ 43). "Comcast's MVPD competitors d[o] not want to buy ad rep services from Comcast," because Spotlight has an incentive to advantage Comcast's business objectives and because that relationship gives Comcast access to "competitively sensitive information" about competitors' operations. App. 32a-34a. Given the choice between Comcast and Viamedia, many MVPDs prefer to be represented by Viamedia to avoid the risks of handing over part of their operations to their largest competitor. A236-37 (¶ 96).

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[1] Contrary to Comcast's suggestion, when Viamedia is an MVPD's ad rep, Viamedia – not the interconnect manager – is responsible for "maintaining the software and hardware needed to run, insert, traffic, [and] monitor . . . ad spots" and for "ensuring each ad runs correctly during its allotted time," Pet. 5, including ads sold through the interconnect. A103 (¶ 23); A201 (¶ 37).

[2] Comcast's claim that it provides Ad Rep Services "[a]s part of running the interconnect," Pet. 5, is incorrect; the provision of Interconnect Services and Ad Rep Services are separate, App. 76a-77a; A205-10 (¶¶ 45-54); NCTA Br. 10-11 (interconnects are functionally the same "whether . . . operated by an MVPD participant or an elected board composed of multiple MVPD representatives").

3. By early 2003, Viamedia had contracted with WOW! and RCN to provide Ad Rep Services in several cities, including Chicago and Detroit, where WOW! and RCN competed with Comcast. A430; A541. At that time, as today, Comcast managed the interconnects in Chicago and Detroit. Comcast recognized that it would benefit if RCN and WOW! – which then served 300,000 households in those markets – participated in the interconnects. A430, A441. Comcast therefore negotiated an agreement with Viamedia, as WOW!'s and RCN's representative, to include those companies' avails in the Chicago and Detroit interconnects. A430-43.

Under the terms of the agreement, 35% of the MVPDs' avails were made available for sale through the interconnects. A432. In exchange, Viamedia paid Comcast a fee of at least 25% of net revenues (*i.e.*, revenues less Comcast's costs, for which Comcast was reimbursed) generated from selling those avails. A431, A443. Comcast received tens of millions of dollars in fees under the agreement without incurring additional costs. App. 308a, 320a (¶¶ 110, 157-158).

4. Viamedia's clients have participated in interconnects all over the country, and, before 2012, no MVPD had ever been excluded from one. App. 309a (¶ 116). Indeed, it would make no economic sense to exclude an MVPD from an interconnect because, as noted above, all interconnect participants, especially the interconnect manager, benefit from broader participation. App. 309a, 319a-320a (¶¶ 116, 154-158). In December 2011, however, Comcast notified Viamedia that, after their existing agreement expired in May 2012, RCN and WOW! would no longer be permitted to participate in the Chicago and Detroit

interconnects so long as they continued to be represented by Viamedia. A546.

Before making its decision, Comcast conducted an analysis of the anticipated "Revenue Impact" of excluding RCN and WOW! from the Chicago and Detroit interconnects, finding that Comcast would lose $10.6 million in revenue in the first six months after termination. A838; A787-88 (160:8-162:16). Furthermore, Comcast knew that RCN and WOW! were under contract with Viamedia (and would remain so through 2015). A553 (¶ 14). It therefore knew that the effect of its decision would be to exclude RCN and WOW! from the interconnects (and lose associated revenues and profits) for years.

Comcast nevertheless anticipated that, by making an MVPD's participation in the interconnect conditional on not dealing with Viamedia for Ad Rep Services, it would – in later years – be able to force those MVPDs into a business relationship with Comcast they otherwise would have shunned. A841, A844. Indeed, when WOW! repeatedly tried to persuade Comcast to reconsider, Comcast made clear that it would not allow WOW! to participate in the interconnects unless WOW! agreed to employ Comcast, rather than Viamedia, as its ad rep. A556-57 (¶ 19).

As a result of Comcast's conduct, RCN and WOW! lost $27 million in advertising revenue, Viamedia lost corresponding ad rep revenue, and Comcast gave up millions in fees alone. App. 29a. Furthermore, RCN's and WOW!'s subscribers were cut off from advertisements sold through the interconnect, further harming those consumers and advertisers.

5. In 2015, WOW! and RCN solicited Ad Rep Services proposals from Viamedia and Comcast for Chicago and Detroit, among other markets. A116,

A118 (¶¶ 90, 99). Comcast offered to let RCN and WOW! back into its interconnects if they would hire Comcast, rather than Viamedia, as their ad rep. A232-33 (¶ 88); A555-57 (¶¶ 18-19).

WOW! considered Viamedia to be "by far the best ad partner . . . to work with" and had renewed its contracts with Viamedia repeatedly between 2001 and 2015. A560 (¶¶ 25-26). Nevertheless, the financial advantage of regaining access to the interconnects in Chicago and Detroit led WOW! to sign with Comcast. (WOW! continued to use Viamedia as its ad rep in non-Comcast metropolitan areas.) A560-62 (¶¶ 28-29). Though RCN had intended in 2014 to renew its contract with Viamedia and had publicly commented that it was "not comfortable" hiring Comcast, A886, it switched to Comcast in 2015 to regain access to the interconnects. A563-64 (¶¶ 34-36).

Following the loss of WOW!'s and RCN's business, Viamedia was forced to exit the market for Ad Rep Services in Chicago and Detroit, leaving Comcast as an unchallenged Ad Rep Services monopolist in those markets. A552 (¶12).[3]

6. Although Comcast refuses to allow MVPDs represented by Viamedia to participate in its interconnects, it elsewhere permits MVPDs *not* represented by Viamedia to participate in Comcast-controlled interconnects on an interconnect-only basis – that is, it allows MVPDs to contribute avails to the interconnect even though Comcast does *not* provide them Ad Rep

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[3] A similar course of events played out in Hartford, where, in 2014, Frontier acquired AT&T's telephone network, over which AT&T and then Frontier provided video service. Comcast had been AT&T's ad rep, but Frontier signed with Viamedia. As a consequence, Comcast excluded Frontier from the interconnect. App. 26a-27a.

Services. A210 (¶ 53); A325 (tbl. 1), A351-59. Those interconnect-only agreements contain financial terms like those of the 2003 Viamedia-Comcast agreement, namely, a fee to Comcast averaging approximately 25% of revenue. A325 (tbl. 1).

B. Procedural Background

1. Viamedia sued, alleging that Comcast violated Section 2 of the Sherman Act by monopolizing the market for Ad Rep Services in various geographic markets. A37 (¶ 168). Viamedia's complaint alleged (as relevant here) that Comcast's conduct constituted an unlawful refusal to deal and tying (of Ad Rep Services to "access to the Interconnects," *i.e.*, Interconnect Services – in which Comcast also had a monopoly in the relevant geographic markets) and was thus unlawfully exclusionary.

Comcast moved to dismiss. The district court mostly denied Comcast's motion, allowing Viamedia's tying theory (among others) to proceed, but it ruled that Viamedia's refusal-to-deal theory failed as a matter of law. The court credited Comcast's argument that its conduct "offers potentially improved efficiency" because requiring MVPDs to "deal with Comcast directly" to secure interconnect access – rather than allowing MVPDs the option of dealing with the interconnect manager through an intermediary – is a "prototypical valid business purpose." App. 188a-189a.

Viamedia amended its complaint to allege additional facts explaining why Comcast's refusal to deal was "irrational but for its anticompetitive effects." *See*, *e.g.*, App. 320a-322a, 324a (¶¶ 158-161, 168). Comcast again moved to dismiss, and the district court again granted the motion on the same rationale, reiterating its conclusion that Comcast's conduct "*potentially*

serves a procompetitive purpose." App. 205a (emphasis added).

2. After discovery on Viamedia's remaining claims, the district court granted Comcast's motion for summary judgment, holding (as relevant here) that there was no triable issue as to Viamedia's tying theory. App. 207a-275a. The court assumed that Interconnect Services and Ad Rep Services are separate products, App. 240a n.10, but ruled that Viamedia could not "show that Comcast ever withheld [Interconnect Services] *from customers* unless they also purchase [Ad Rep Services]" because "[t]he real rub of Viamedia's tying claim is, instead, that Comcast withheld the tying product *from its rival Viamedia*," App. 243a.

3. The Seventh Circuit reversed. Judge Hamilton wrote the Court's opinion on behalf of himself and Judge Bauer. Judge Brennan wrote a separate opinion concurring in part and dissenting in part, in which he agreed that "Viamedia has plausibly alleged an antitrust violation and is entitled to reversal and remand on its refusal-to-deal claim." App. 109a.

a. The court of appeals noted that "the parties do not dispute several often-contentious issues in antitrust cases: the relevant geographic and product markets, and market power." App. 41a. It further noted that there was no dispute about the anticompetitive impact of Comcast's conduct: it "force[d] its smaller [MVPD] competitors to stop doing business with Viamedia," and thereby "force[d] out its only competitor in th[e] market [for Ad Rep Services] to gain monopoly power." App. 6a, 41a-42a.

Turning to Viamedia's refusal-to-deal claim, the court of appeals noted that, as a general matter, "even monopolists are free to choose the parties with

whom they will deal, as well as the prices, terms, and conditions of that dealing." App. 46a. "Yet there are limited circumstances under which a monopolist's refusal to deal with another party will be illegal anticompetitive conduct." App. 47a. The court first analogized Comcast's conduct to *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), in which the defendant newspaper had refused to sell ads to anyone who advertised with the town's new radio station, thus violating Section 2. "With the newspaper's clear expectation that it would outlast the new competition and regain its complete monopoly, and with no apparent efficiency justification for its conduct, *Lorain Journal* has been described as entirely correct." App. 47a (citing Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* 344-45 (2d ed. 1993)).

The court of appeals then discussed at length this Court's decision in *Aspen* and the analysis of that case in *Trinko* and *Linkline*. *See* App. 48a ("In addition to reiterating *Aspen Skiing*'s continued, albeit narrow, validity, the Court has also provided useful guidance on primary factors to consider when determining whether potentially anticompetitive conduct falls within *Aspen Skiing*'s bounds."). The court of appeals noted that this Court "has described *Aspen Skiing* as at or near the outer boundary of § 2 liability." App. 54a. Nevertheless, given the allegations in the complaint, "Viamedia has presented a case that is well within those bounds and appears stronger than *Aspen Skiing*." *Id.*

Comcast defended the district court's order on the basis that *Aspen* did not apply because Comcast's conduct "was not irrational but for its anticompetitive effect" in that it "offers *potentially* improved efficiency." App. 56a. The court of appeals rejected that

argument, holding that whether Comcast's conduct was in fact "'a reasonable business decision'" or instead "'reflected its willingness to sacrifice immediate profits . . . in the hope of driving [Viamedia] out of the market and recovering monopoly profits in the long-run'" required "'resolving questions of fact.'" App. 58a (quoting *Covad Commc'ns Co. v. Bell Atl. Corp.*, 398 F.3d 666, 676 (D.C. Cir. 2005) (D. Ginsburg, J.)) (brackets in original). Because "Viamedia has alleged and offered evidence of enough harm to competition from Comcast's refusal-to-deal and tying conduct" to state a claim, "[c]onsideration of pro-competitive justifications must wait." *Id.*; *see also* App. 63a (Viamedia plausibly alleged that Comcast's "conduct was irrational but for its anticompetitive effect").

b. The court of appeals also reversed summary judgment on the tying theory, finding that Viamedia had presented evidence that "Comcast illegally tied purchase of its ad rep services to the Interconnect access it already controlled." App. 72a. Comcast did not question Viamedia's evidence that Comcast has market power in the tying-product market for Interconnect Services and has foreclosed all competition in the tied-product market for Ad Rep Services. *Id.* The court held that Viamedia had proffered sufficient evidence to show that these are separate products for tying purposes and "that Comcast forced its competitor MVPDs to become its customers for ad rep services if they also wanted to keep their access to the Interconnects." *Id.*

The district court's contrary determination depended entirely on its view that "Viamedia failed to offer evidence of forcing," App. 81a, but the court of appeals rejected each of the three assumptions on which that

ruling was based. First, the district court believed that, because Comcast had no duty to deal with Viamedia, its conduct could be explained "by Comcast's legal refusal to deal rather than an illegal tying." *Id.* But – leaving aside whether Comcast's refusal to deal with Viamedia was lawful – "a tying claim does not fail as a matter of law simply because it was implemented by refusing to deal with an intermediary." *Id.* Second, the district court thought the evidence left no dispute that MVPDs wanted to obtain Ad Rep Services and Interconnect Services only as a bundle. But, the court of appeals held, there was at least a factual dispute as to whether MVPDs wished to obtain Interconnect Services separately from Ad Rep Services. App. 82a. Third, the district court found the evidence left no dispute that "RCN's and WOW!'s purchases of Interconnect services and ad rep services from Comcast were not forced." App. 83a. But that finding violated the summary-judgment standard by drawing "inferences in favor of Comcast" and disregarding evidence supporting Viamedia's claims. *Id.*

c. Judge Brennan dissented in part solely with respect to the disposition of the tying claim. He reasoned that, given that "14 percent of Comcast's agreements with MVPDs across all [metropolitan areas] since December 2011 were Interconnect-only agreements," Viamedia could not prove that Comcast "has ever declined an MVPD's request for Interconnect-only services." App. 120a. The majority, however, concluded that Comcast's Interconnect-only agreements, which were all in geographic markets where Viamedia did not do business, "actually support[] Viamedia's case" because they show independent demand for the two products and a willingness by Comcast to allow them to be purchased separately when it does not face an Ad Rep Services competitor. App. 84a-85a.

4. Comcast's petition for rehearing en banc was denied on the panel's unanimous vote and without any active judge requesting a vote on the petition. App. 278a-279a. Following remand, the parties have been conducting the discovery "necessary" to prepare the case for trial, App. 8a; that fact discovery will conclude in early January 2021.

REASONS FOR DENYING THE PETITION

I. The Seventh Circuit's Decision Does Not Conflict With This Court's Precedents

A. The Seventh Circuit Expressly Applied the *Aspen/Trinko* Factors

Comcast's primary grounds for seeking review – a conflict between the decision below and this Court's precedents – cannot be squared with the court of appeals' decision. As the Seventh Circuit explained, in *Trinko* and *Linkline*, "the Court has . . . provided useful guidance on primary factors to consider when determining whether potentially anticompetitive conduct falls within *Aspen Skiing*'s bounds." App. 48a. The court of appeals applied those factors to the allegations in Viamedia's complaint, holding that there was "no sound basis to distinguish Viamedia's case as a matter of law." App. 56a. That fact-bound application of settled law is not worthy of review. And, in any case, the appeals court was correct: because Viamedia's complaint alleged that *all* of the *Aspen* factors are present, "this case is [relatively] eas[y]." App. 63a.

First, Comcast, like the defendant in *Aspen*, abruptly withdrew from a pre-existing, voluntary course of dealing with its sole, smaller rival. In *Aspen*, the defendant refused to renew the four-area lift ticket, *see Trinko*, 540 U.S. at 408; here, Comcast refused to renew its agreement with Viamedia and

thereby excluded from its interconnects MVPDs represented by Viamedia, despite the alleged (and undisputed) profitability for Comcast of that pre-existing arrangement. Viamedia alleged that including MVPDs represented by Viamedia in the interconnects enhanced the interconnects' value by increasing their reach; Comcast, as interconnect manager, earned additional fees (from the additional revenues attributable to those MVPDs) without incurring additional costs. App. 308a, 319a-320a (¶¶ 110, 154-158).

Second, Comcast, like the defendant in *Aspen*, continued to participate, where the competitive dynamics were different, in the type of venture it refused to participate in where it was dominant and where it had the ability to destroy a competitor. *See* App. 52a, 55a. In *Aspen*, the defendant participated in all-area lift tickets in multi-mountain ski areas where it "lacked . . . dominance." App. 52a. Comcast, where it faced no competition from independent ad reps, allowed MVPDs to participate in the interconnects without purchasing Ad Rep Services from Comcast – the very thing that Comcast refused to permit for MVPDs represented by Viamedia. App. 28a, 55a.[4] Likewise, in metropolitan areas where Comcast was not dominant and did not control the interconnect, it participated in interconnects without purchasing Ad Rep Services from the interconnect operator. A206-07 (¶ 48).

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[4] Although Comcast takes issue with the court of appeals' determination that "this case tracks *Aspen* in this respect," Pet. 15, the basis for that determination is clear, *see* App. 14a-15a, 24a-25a, 28a, 55a, and, in any event, Comcast does not claim that the opinion merits review to reconsider the court of appeals' case-specific evaluation of alleged facts.

Third, Comcast, like the defendant in *Aspen*, "decided to forgo profitable transactions . . . for the sake of harming" its rival. App. 52a. In *Aspen*, the defendant refused to sell lift tickets to the plaintiff, even at full retail price, "reveal[ing] a distinctly anti-competitive bent." *Trinko*, 540 U.S. at 409. For years, Comcast threw away millions, if not tens of millions, in fees that it could have earned had it simply permitted WOW! and RCN to continue to contribute their avails to the interconnects (through Viamedia) on the same terms that had prevailed under its prior agreement (and that continue to prevail elsewhere), pending the expiration of their existing contracts with Viamedia. App. 29a. Doing so would have done nothing to limit Comcast from competing to oust Viamedia as ad rep at the conclusion of Viamedia's contracts with WOW! and RCN. The difference is that Viamedia, its sole rival, would not have been harmed – and thus weakened as a competitor. App. 29a, 55a.[5]

As the Seventh Circuit explained, the factual similarities between *Aspen* and the unusual allegations of Viamedia's complaint run deep – both cases involved a sudden departure from a long-term, profitable joint selling arrangement created without any regulatory obligation; both involved conduct that alienated customers; and both involved efforts to discourage customers from doing business with a competitor. *See* App. 54a-55a, 56a ("unless the Court meant to limit

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[5] Viamedia thus alleges exactly the type of refusal to deal that Comcast's *amici* economists assert *should* give rise to potential liability. *See* Scholars of Economic & Antitrust Br. 15 (arguing that a refusal to deal should give rise to liability only "where . . . a defendant gave up a *more profitable* cooperative arrangement with a competitor in favor of a less profitable exclusion strategy that recouped its losses through the plaintiff's resultant inability to compete").

Aspen Skiing to ski resorts, we see no sound basis to distinguish Viamedia's case"). Contrary to Comcast's assertion, the decision below meticulously followed this Court's precedents; there is no conflict with them.[6]

B. The Seventh Circuit Properly Refused To Credit Comcast's Asserted Justification at the Pleading Stage

1. Rather than dispute that the Seventh Circuit followed and applied the *Aspen/Trinko* factors, Comcast argues for a reading of *Aspen* that would limit it to circumstances where a defendant is "unable to offer 'any efficiency justification whatever'" for a refusal to deal. Pet. 4 (quoting *Aspen*, 472 U.S. at 608). On that reading, Comcast argues, the Seventh Circuit erred in allowing the complaint to proceed because Viamedia supposedly "admitted" that Comcast had a valid "business justification." Pet. 13; *see also* Pet. i (assuming "the presence of valid business justifications"). But the question that Comcast seeks to present is not presented at all because the Seventh Circuit held that, just as in *Aspen*, there is no such "admitted" justification. App. 53a. On the contrary, the Seventh Circuit found that the facts pleaded in the complaint supported Viamedia's allegation that "[t]here are no procompetitive justifications to be achieved by the conduct given that there were no material administrability problems" in dealing with Viamedia. App. 63a.

In light of its reading of the complaint, the Seventh Circuit's reversal of the district court's judgment raises no legal issue. When a plaintiff has pleaded

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[6] Comcast's suggestion (at 15) that *Aspen* can be distinguished on the (questionable) basis that the cable industry involves greater technical complexity than the ski industry, *see* Pet. 15, provides no basis for any principled distinction of this case, let alone on a motion to dismiss.

facially anticompetitive conduct, as Viamedia has undisputedly done here, and a defendant asserts a procompetitive justification, the defendant bears the burden of proving it (not merely asserting it), and resolution of the case on the pleadings is usually, for that reason, inappropriate. *See* App. 57a ("Valid business justifications are relevant only to the rebuttal of a *prima facie* case of monopolization."); *see also id.* (rejecting Comcast's argument "that a factual dispute regarding the existence of procompetitive justifications is appropriate for resolution on the pleadings").

Any suggestion that merely *asserting* a *disputed* justification for an otherwise anticompetitive refusal to deal is enough to defeat a claim would be flatly inconsistent with *Aspen*, as the Seventh Circuit recognized. In that case, the defendant *asserted* that it had ended its participation in the joint lift ticket to avoid administrative burdens and free-riding by an inferior competitor. The jury found that those asserted justifications were pretexts not supported by the evidence. *See id.* (citing *Aspen*, 472 U.S. at 599, 605). The same analysis applies in this case: a court cannot resolve a dispute at the pleading stage over whether Comcast's post-hoc rationalizations for its conduct – which, as discussed below, make no economic sense in any event – were genuine or were pretexts for unlawful exclusion.

The court of appeals' ruling that a disputed justification for anticompetitive conduct cannot be the basis for judgment on the pleadings is consistent not only with *Aspen* but also with the myriad cases of this Court and all of the courts of appeals holding that, where a defendant bears the burden, as with an affirmative defense, dismissal on the pleadings is

inappropriate "unless all facts necessary to the affirmative defense clearly appear *on the face of the complaint*." *Waugh Chapel South, LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354, 360 (4th Cir. 2013) (brackets omitted); *see also Jones*, 549 U.S. at 215. Having determined that no justification for Comcast's conduct appeared on the face of Viamedia's complaint, the Seventh Circuit applied established law in determining that it was wrong for the district court to dismiss it.

Comcast does not take issue with this aspect of the legal *framework* the Seventh Circuit applied – that is, it does not dispute that, if the complaint did not admit a procompetitive justification for its conduct, the Seventh Circuit correctly reversed the district court's judgment. But that concession should lead this Court to deny the petition, as the Seventh Circuit did *not* accept that any such justification was established by the pleaded facts. This eliminates the basis for Comcast's question presented, and it means that Comcast's only argument is that the Seventh Circuit erred in determining, based on its reading of Viamedia's complaint, that the existence of any procompetitive justification raised a dispute of fact. That is a case-specific determination that implicates no disputed legal issue and that accordingly does not merit review.

2. Furthermore, the Seventh Circuit's determination that Comcast had failed even to posit a legitimate justification for its conduct in light of the complaint's allegations was correct. *See* App. 56a (faulting the district court for "accept[ing] . . . Comcast's thinly supported assertion that it had a valid business purpose"). Comcast asserts that its conduct was motivated by a desire to "disintermediat[e]" Viamedia," Pet. 7, 13, but this is inconsistent with the complaint's

allegations and makes no sense. The only transaction as to which Viamedia was an intermediary was adding its MVPD clients' avails to the interconnects. Comcast does not explain how *Comcast* (in its role as interconnect manager) incurs any additional costs or surrenders any efficiency by obtaining avails from an MVPD's representative rather than from the MVPD itself. To be sure, when an MVPD employs Viamedia as an "intermediary" to ensure that the MVPD receives its fair share (among other reasons), the MVPD compensates Viamedia for its services. But the fact that an MVPD is represented by an ad rep does not diminish the value of the avails, and Viamedia is being compensated *by the MVPD* for the services Viamedia provides – and that the MVPD therefore does not have to self-provide. As RCN stated, smaller MVPDs "do[] not have the luxury of building [their] own spot advertising business and must rely on third parties," A887, but are "not comfortable having [their] largest and most formidable rival [Comcast] as [their] representative," A886.

The Seventh Circuit likewise properly rejected Comcast's argument that its refusal to deal with Viamedia allowed it to achieve vertical integration. "Vertical integration occurs when a firm provides to itself some input that it might otherwise purchase on the market." IIIB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 755a (4th ed. 2015) ("Areeda & Hovenkamp"). Comcast does not explain what relevant vertical integration was at issue – it already self-provided Ad Rep Services (*see* Pet. 5-6); it likewise offered MVPDs Ad Rep Services and Interconnect Services on a vertically integrated basis. Thus, "Comcast *is* vertically integrated and has been at all relevant times." App. 68a. To the extent Comcast gains efficiencies from such vertical integration,

it may be able to offer terms superior to those offered by unintegrated competitors. But Comcast does not and cannot explain how dealing with Viamedia impeded any such integration. Comcast was always free to compete on the merits regardless of whether it dealt with Viamedia. Accordingly, refusing to deal with Viamedia cannot be justified as a means to achieve new efficiencies. *Id.*

Because Comcast's proffered justifications for its refusal to deal with Viamedia make no economic sense, Comcast's conduct appears to be precisely the type of profit-sacrifice – irrational but for its monopoly-reinforcing impact – that Comcast concedes can be the basis for refusal-to-deal liability under this Court's unchallenged precedents.

II. The Seventh Circuit's Decision Creates No Circuit Conflict

Comcast's claim of circuit conflict provides no justification for review because there is no such conflict. None of the court of appeals cases it cites involved the circumstances comparable to those that gave rise to liability in *Aspen*, as the Seventh Circuit found is true here. And none accepted, at the pleading stage, a defendant's contested justification for facially anticompetitive conduct.

Comcast's claimed circuit conflict instead focuses on the standards to apply in evaluating procompetitive justifications that are supported by evidence. But any difference in the articulation of these standards cannot justify review because they have yet to be applied in this case and – in the absence of some evidence of procompetitive justification that Comcast has yet to present – may never be. As this Court has noted, "it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the

ground on which the judgment rests." *Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956). Furthermore, the court of appeals' various formulations describing exclusionary conduct are generally consistent and unlikely to lead to different outcomes in particular cases and would not in this one. Any supposed tension – given the entire absence of any inconsistency in the holdings of cases involving comparable conduct – is illusory.

A. Comcast Identifies No Circuit Conflict with Respect to the Holding Below

1. Far from creating any split with *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013) (Gorsuch, J.), the Seventh Circuit cited that case extensively as persuasive authority (as did both parties and the United States). *See*, *e.g.*, App. 42a-43a, 53a-54a, 61a, 99a. *Novell* did not involve the evaluation of a complaint – it was decided after trial – and the decision in that case turned not on the adequacy of asserted procompetitive justification for facially anticompetitive conduct, but on the failure of the plaintiff to prove that the defendant's refusal to deal was *prima facie* unlawful.

Novell involved a challenge to Microsoft's decision to withdraw software developers' access to programming interfaces ("APIs") that made it easier for them to create applications for Microsoft's new operating system. 731 F.3d at 1067-68. Relying on *Aspen*, the plaintiff argued that Microsoft's refusal to share the APIs was unlawful.

The Tenth Circuit noted that the plaintiff "can satisfy the first essential component of refusal to deal doctrine" – that is, a "voluntary and profitable relationship" terminated by the defendant. *Id.* at 1076. But the Court held that another critical element

of the *Aspen* standard was not satisfied: plaintiff "presented *no evidence* from which a reasonable jury could infer that Microsoft's discontinuation of th[e] arrangement suggested a willingness to sacrifice short-term profits." *Id.* (emphasis added).

By contrast, Viamedia *has* alleged this circumstance. *See* App. 52a. By refusing to allow MVPDs represented by Viamedia to participate in the interconnects, Comcast threw away millions if not tens of millions of dollars. And, although *Novell* did not present such a circumstance, because it involved no profit sacrifice, this is not a case where Comcast has established that it chose to "suffer a short-term profit loss in order to pursue perfectly procompetitive ends." *See* App. 53a-54a (citing *Novell*, 731 F.3d at 1075). On the contrary, the MVPDs represented by Viamedia were under contract (and therefore Comcast could not contract with them directly until those contracts expired) and Comcast was free to compete for their business (at the expiration of their existing contract) whether or not the contract with Viamedia was renewed. The inference that Comcast refused Viamedia's clients interconnect access to degrade Viamedia's Ad Rep Services offering and punish MVPDs that had chosen that offering over Comcast's is, if not inescapable, more than sufficient to satisfy Viamedia's pleading burden.[7]

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[7] Although Comcast cites *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1197 (10th Cir. 2009), it does not elaborate on any claimed conflict with the decision below: the plaintiff there failed to plead any facts indicating that the defendant was "terminating a profitable business relationship," *id.*, which Viamedia did allege in this case.

SOLIDFX, LLC v. Jeppesen Sanderson, Inc., 841 F.3d 827 (10th Cir. 2016), likewise adds nothing: in that case, the court

2. There is also no conflict with *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117 (2d Cir. 2007). In that case, following a challenged acquisition, the defendant (which had a monopoly in the production of crushed stone) began distributing on its own, stopping sales to the distributor plaintiff. *See id.* at 119-20. The Second Circuit held that a monopoly producer generally brings a distribution function in-house – rather than dealing with third-party distributors – "for the purpose of increasing its efficiency." *Id.* at 124. And there were no "special circumstances" indicating otherwise. *Id.* at 125.

As the Seventh Circuit explained, "[t]he facts of *Port Dock* do not map onto the conduct of Comcast, which was already vertically integrated." App. 66a; *see supra* pp. 20-21. A critical difference between *Port Dock* and this case is that there was no allegation that the defendant actually lost *any* sales as a result of its decision to bring the distribution function in-house, whereas, here, Comcast sacrificed profitable sales as a result of its refusal to deal with Viamedia. For *Port Dock* to offer even a distant analogy, the plaintiff there would have had to allege that certain *end user customers* were deprived of crushed stone altogether because they could only be served by the plaintiff. There was no such allegation. And, more generally, *Port Dock* did not involve the sort of cooperative, joint-selling arrangement at issue in *Aspen* and in this case. For all of these reasons, the Second Circuit found *Aspen* easily distinguished. *See Port Dock*, 507 F.3d at 126.

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affirmed partial summary judgment on the basis that a copyright owner's invocation of its right to exclude – and refusal to grant a license – is "presumptively rational." *Id.* at 843. Intellectual property law grants rights to exclude precisely so that a creator can reap the rewards of innovation either by licensing or by declining to do so. There is no such interest implicated here.

3. Although Comcast asserts a conflict with refusal-to-deal decisions from the Ninth and Eleventh Circuits as well, it cites no case that dismissed a claim on the basis that the pleadings revealed a procompetitive purpose for a facially anticompetitive refusal to deal. In *Aerotec International, Inc. v. Honeywell International, Inc.*, 836 F.3d 1171 (9th Cir. 2016), at summary judgment, the court quickly distinguished *Aspen* on the ground that the defendant did not refuse to deal, but simply imposed business terms that the plaintiff "did not like." *Id.* at 1184.[8] In *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir. 1988), the plaintiff alleged that the defendant had engaged in exclusionary conduct by refusing to expand a refinery; the court, after trial, found that the proposed expansion "would have resulted in a negative return." *Id.* at 368. And in *Morris Communications Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004), the court held – at summary judgment and without even considering whether the plaintiff had established other elements of its claim – that the defendant had established that its refusal to deal with the plaintiff would prevent free-riding; the plaintiff had presented no evidence to undermine this rationale. *Id.* at 1295-96. Comcast does not argue that Viamedia was free-riding – for one thing, any ride was never free – and a similar dispute over any procompetitive justification that Comcast does manage to support with evidence lies in the future.

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[8] Although Comcast makes brief reference to its supposed willingness to enter into an agreement with Viamedia in 2014, not only would that fail to justify its prior categorical refusal, but Viamedia alleged that Comcast made no genuine offer to deal at all, *see* App. 311a (¶¶ 122-123), an allegation that Viamedia later supported with evidence, *see* App. 27a-28a. The undisputed evidence on summary judgment in *Aerotec* foreclosed such a claim.

B. Supposed Inconsistencies in Standards Governing Evaluation of Proffered Legitimate Business Justifications Do Not Merit Review

Because Comcast did not contest that its conduct was facially anticompetitive, the court of appeals devoted substantial attention to the question of what showing Comcast would be required to make to avoid liability at trial. Comcast's petition focuses on that issue – that is, the analysis that may apply at a later stage of this case. And it argues that the Seventh Circuit's articulation of those standards is inconsistent with the articulation by other courts of appeals.

1. Any tension that exists on this score would not justify review. The only refusal-to-deal holding at issue at this stage of the case is that Viamedia's complaint stated a claim under *Aspen*/*Trinko*, in part because the complaint did not establish *any* legitimate justification for Comcast's refusal to deal. The Seventh Circuit's additional guidance – while binding on the district court – is not the basis for its holding. Granting review to delve into statements that are not the basis for the judgment would run afoul of the bedrock principle that this Court "'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Cutter Labs.*, 351 U.S. at 297); *accord Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 & n.8 (1984) ("this Court reviews judgments, not opinions").

Adherence to that principle makes especially good sense here. The guidance that the Seventh Circuit provided with respect to evaluation of potential justifications for Comcast's conduct may never become relevant in this case, as Comcast has yet to proffer any

evidence of (or even identify) a legitimate justification for its conduct, as the Seventh Circuit correctly determined. As this case comes to this Court, Comcast proposes two justifications – disintermediation and "vertical integration" – that make no sense, *see supra* pp. 19-21, and for which no evidence was proffered at summary judgment as to Viamedia's related tying claim. Perhaps something will turn up, but it has not so far and may well never. ("'Facts are stubborn things.'" *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 939 (D.C. Cir. 2012) (quoting David McCullough, *John Adams* 68 (2001)).)

The parties are currently engaged in litigation in district court, with Comcast aggressively pursuing what little discovery remains. In two months, fact discovery will be done, and the case will soon be ready for trial. This Court generally disfavors interlocutory review, especially when, as here, an issue will be potentially mooted by later proceedings. *See*, *e.g.*, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) ("The justification for immediate appeal must . . . be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes."); *FEC v. Akins*, 524 U.S. 11, 28-29 (1998) (declining to review question where events on remand could moot the issue); *National Football League v. Ninth Inning, Inc.*, No. 19-1098 (U.S. Nov. 2, 2020) (Kavanaugh, J., respecting the denial of certiorari). The inappropriateness of this case as a vehicle to decide the issue that Comcast purports to present is reason enough to deny the petition.

2. Furthermore, Comcast's claim of conflict is illusory. Comcast argues that any business justification – no matter how attenuated or unpersuasive – can justify any anticompetitive refusal to deal, no

matter how destructive of competition and harmful to consumers. *See* App. 59a ("Comcast proposes that if a defendant merely postulates a valid business purpose – apparently including any business purpose a defendant could dream up, regardless of feasibility or value – that ends the inquiry."). But no case articulates such a standard, and the United States (whose support Comcast claims based on a brief filed in support of *neither* party) expressly disavowed it in the court below. *See id.*

Once a plaintiff establishes a *prima facie* case that a defendant's conduct is exclusionary – something that the plaintiff failed to do in *Novell*, for example – the burden shifts to the defendant to justify that conduct. App. 64a. That is true whether the conduct is a refusal to deal, exclusive dealing, or affirmative conduct that interferes with a rival's ability to compete on its own. *See United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (en banc) (per curiam); *cf. Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018). No disagreement there. Nor can there be any dispute, in light of *Aspen* and common sense, that a purely pretextual justification will not suffice. *See also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483-85 (1992). Again, Comcast cites no case to the contrary. And, once the defendant meets that burden, the plaintiff bears the burden of rebutting the justification. *See Microsoft Corp.*, 253 F.3d at 59.

Comcast argues that, in the case of a potentially unlawful refusal to deal, no balancing is ever required. But the Seventh Circuit correctly recognized the fallacy of that assertion – one cannot determine whether conduct provides a *legitimate* justification for facially unlawful conduct without considering the scope of the

harm. App. 58a. *See*, *e.g.*, IIIB Areeda & Hovenkamp ¶ 772c2 ("Condemnation would be appropriate" for unilateral refusal to deal that "clearly injures an actual or prospective rival . . . with a business justification that is poorly fitted to the result or wholly disproportionate to the harm that is inflicted.")

This is not to question the importance of categorical rules in defining the types of unilateral conduct that should be subject to scrutiny; the *Aspen* factors – as clarified in *Trinko* – provide such guidance, without the need to consider and balance the potentially harmful effects of a refusal to deal on a case-by-case basis. *See Linkline*, 555 U.S. at 454-55; *Novell*, 731 F.3d at 1076; *cf.* App. 63a. No antitrust lawyer would have advised Comcast that its decision to exclude Viamedia's clients from the interconnects was free of liability risk based on the facts alleged here. Having ignored the guardrails established in *Trinko*, Comcast cannot complain if it now faces some burden to prove why its decision to do so was justified. And it cites no authority that, on similar facts, adopted a different rule.

III. The Determination That Disputed Issue Of Fact Precluded Summary Judgment On Viamedia's Tying Claim Does Not Warrant Review

A. Comcast's second question – whether the decision to permit Viamedia's tying claim to proceed "avoid[ed] the limitations on a § 2 refusal-to-deal claim," Pet. i – requires assuming that Comcast "lawfully refused to deal with Viamedia," Pet. 29, and therefore that Viamedia's tying claim should have failed on the ground that it was an "end-run around *Trinko*," Pet. 26. If the Court denies review on the first question, that is sufficient reason to deny the second question as well.

B. The second question is not worthy of review for additional, independent reasons. All agree that the Seventh Circuit applied the correct legal standard by evaluating, under established summary-judgment principles, whether Viamedia had proffered evidence of the elements of an unlawful tying arrangement: (1) separate products, (2) market power over the tying product, and (3) conduct by the defendant that "exploit[ed] . . . its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984). Comcast's second question asks whether the Seventh Circuit correctly concluded that there is a genuine fact dispute about the third element. That fact-bound determination does not warrant review.

Comcast contends (and the district court agreed) that the record shows only a refusal to deal with Viamedia, and therefore Viamedia's Section 2 claim rises or falls on whether that refusal was lawful. *See*, *e.g.*, Pet. 26; App. 250a. The Seventh Circuit, by contrast, held that a jury "could easily find that Comcast improperly forced the smaller MVPDs to buy its ad rep services using its monopoly in the Interconnect services market." App. 78a. That conclusion was based on "unusually explicit pieces of evidence" of forcing directed at MVPDs, which the district court had ignored or interpreted in Comcast's favor, such as the admission of a Comcast executive "that Comcast had a business practice that 'if an MVPD wants to get access to a Comcast [Spotlight] controlled Interconnect, it has to hire Comcast [Spotlight] as its ad sales representative.'" App. 77a (emphasis added; alterations in original) (quoting A215 (¶ 64)). Comcast's case-specific contention that this evidence should have

been interpreted in its favor is not worthy of this Court's review.

Moreover, that Comcast's refusal to deal with Viamedia was part of "the same course of conduct" as tying, App. 39a, does not make the refusal and the tie co-extensive. As one of Viamedia's experts explained, that refusal was "an integral *part* of Comcast's tying conduct," A218-19 (¶ 70) (emphasis added), but not all of it.[9] The record shows that Comcast directly communicated to MVPDs the condition that they could not contribute their avails to Comcast's interconnects unless they hired Comcast as their ad rep. *See*, *e.g.*, A556-57 (¶ 19); A749-50 (89:24-90:4); A811 (234:2-7, 235:5-11); A844; A887. Even if Comcast were privileged to refuse to deal with Viamedia, that would not immunize Comcast from liability for coercive conduct directed at its own prospective customers.

Linkline provides no support for Comcast's argument. There, the plaintiff claimed the defendant was increasing the plaintiff's costs by selling too high in the wholesale market and reducing the plaintiff's revenue by selling too low in the retail market. 555 U.S. at 449. This Court held that each pricing decision was "independently lawful," *id.* at 455, and thus plaintiff's "price squeeze" theory was "nothing more than an amalgamation of" two "meritless claim[s]," *id.* at 452. Viamedia's tying claim is based on Comcast's

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[9] Indeed, Comcast agrees. In the district court, it currently seeks wide-ranging discovery on Viamedia's refusal-to-deal claim, contending that, "even though *some facts* are relevant to both claims, *the claims are fundamentally distinct*," and "the relationship between Viamedia's two claims does *not* mean . . . that there was a total overlap between the . . . factual bases of those claims." Comcast's Opp. to Viamedia's Mot. for Protective Order 7-8, *Viamedia, Inc. v. Comcast Corp.*, No. 16-cv-5486 (N.D. Ill. Sept. 30, 2020) (emphases added), ECF No. 406.

strategy of unlawfully requiring MVPDs to buy Ad Rep Services from it instead of Viamedia if they wanted their avails sold through Comcast's Interconnects, *see* App. 77a-78a, not an "amalgamation" of two lawful strategies. This Court has long recognized that such a "condition[]" on the sale of a monopoly product is "unreasonable in and of [itself]." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 (1958).

C. There is, moreover, no circuit split. In *Aerotec*, the tying claim failed because, unlike here, the plaintiff proffered no evidence of "a tying condition." 836 F.3d at 1180. The Ninth Circuit did not, as Comcast claims, "reject[] the plaintiff's assertion 'that a refusal to deal with competitors may form the basis of a tying claim.'" Pet. 30 (quoting *Aerotec*, 836 F.3d at 1180). Instead, the Ninth Circuit rejected the idea that "tactics imposed on a third-party competitor are *sufficient by themselves* to create a tie." *Aerotec*, 836 F.3d at 1180 (emphasis added). This case involves economic pressure imposed directly on customers as well as on a third-party competitor representing those customers, *see supra* p. 30, so the reasoning of *Aerotec* does not apply.

In *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680 (4th Cir. 1992), customers who purchased computer repair services (the tied product) from the defendant did not purchase the tying product (a diagnostic tool), and customers who serviced their own computers were permitted to license the diagnostic tool without purchasing repair services from the defendant. *Id.* at 685-87. Therefore, the defendant in *Data General*, like the defendant in *Aerotec* but unlike Comcast, did not deny customers the opportunity to obtain separate products from different sources by

conditioning the provision of a tying product on the purchase of a tied product.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[10] *Novell* likewise does not address the type of customer-directed conduct at issue here.