No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the Court recognized a "limited exception" to the rule that unilateral refusals to deal with a rival are not actionable under § 2 of the Sherman Act. *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004). That exception is not available, and a refusal-to-deal claim fails, when there is "any efficiency justification" for the refusal. *Aspen*, 472 U.S. at 608. Moreover, an antitrust plaintiff may not circumvent the "reasoning of *Trinko*" by bringing an alternative § 2 claim that is premised on a lawful refusal to deal. *Pac. Bell Tel. Co.* v. *Linkline Commc'ns, Inc.*, 555 U.S. 438, 450 (2009). The questions presented are:

(1) whether the Seventh Circuit erred in holding that a refusal-to-deal claim under § 2 of the Sherman Act may proceed despite the presence of valid business justifications for the refusal, in direct conflict with *Trinko* and decisions of the Second, Ninth, Tenth, and Eleventh Circuits; and

(2) whether the Seventh Circuit erred in allowing a plaintiff to avoid the limitations on a § 2 refusal-to-deal claim by reframing it as some other form of anti-competitive conduct, such as tying, in direct conflict with *Linkline* and decisions of the Fourth, Ninth, and Tenth Circuits.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Comcast Corporation was a defendant-appellee below. Petitioner Comcast Cable Communications Management, LLC is the successor in interest to defendant-appellee Comcast Spotlight, LP, and was substituted as a defendant-appellee below. Respondent Viamedia, Inc. was the plaintiff-appellant below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Comcast Cable Communications Management, LLC is wholly owned by Comcast Cable Communications, LLC, which is wholly owned by Comcast Holdings Corporation. Comcast Holdings Corporation, in turn, is wholly owned by petitioner Comcast Corporation. Comcast Corporation is a publicly held company with no parent corporations, and no publicly held company owns 10% or more of its stock.

RULE 14.1(b)(iii) STATEMENT

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are directly related to this case:

- *Viamedia, Inc.* v. *Comcast Corp. et al.*, No. 1:16-cv-5486 (N.D. Ill.) (judgment entered Aug. 16, 2018).

- *Viamedia, Inc.* v. *Comcast Corp. et al.*, No. 18-2852 (7th Cir.) (judgment entered Feb. 24, 2020; petition for rehearing en banc denied Apr. 7, 2020).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Comcast Corporation and Comcast Cable Communications Management, LLC ("Comcast") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-144a, is reported at 951 F.3d 429. The court's order denying rehearing, Pet. App. 278a-79a, is unreported. Pertinent district court opinions, Pet. App. 145a-91a, 207a-75a, are reported at 335 F. Supp. 3d 1036 and 218 F. Supp. 3d 674. The district court's other pertinent opinion, Pet. App. 192a-206a, is unreported, but available at 2017 WL 698681.

JURISDICTION

The court of appeals entered judgment on February 24, 2020. Pet. App. 1a. Petitioners' timely petition for rehearing was denied on April 7, 2020. Pet. App. 278a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Sherman Act, 15 U.S.C. §§ 1-2, are reproduced at Pet. App. 280a.

STATEMENT

It is well established that firms, even alleged monopolists, are generally free to refuse to deal with their competitors without incurring antitrust liability under § 2 of the Sherman Act. While this Court recognized a narrow exception to this rule in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), for a limited class of refusals to deal that lack "any efficiency justification whatever," *id.* at 608, the Court has since held that *Aspen* is "at or near the outer boundary of § 2 liability" for unilateral refusals to deal, *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004). As *Trinko* explained—and *Pacific Bell Telephone Co.* v. *Linkline Communications, Inc.*, 555 U.S. 438 (2009), reaffirmed—compelled cooperation between rivals contradicts antitrust law's goal of encouraging competition, and courts are ill-suited to policing the rare exceptions to the general rule. 540 U.S. at 407-08, 414. The majority of circuits thus understand *Trinko* and *Linkline* to preclude liability as a matter of law if there is *any* valid business reason for refusing to deal with a rival. *See*, *e.g.*, *Aerotec Int'l, Inc.* v. *Honeywell Int'l, Inc.*, 836 F.3d 1171 (9th Cir. 2016); *Novell, Inc.* v. *Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013) (Gorsuch, J.); *Port Dock & Stone Corp.* v. *Oldcastle Ne., Inc.*, 507 F.3d 117 (2d Cir. 2007); *Morris Commc'ns Corp.* v. *PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004). The Department of Justice agrees.

The Seventh Circuit cast this framework aside, treating *Aspen* as generative authority rather than limited by *Trinko*. Purporting to rely on decisions from the D.C. Circuit that did not uphold claims based upon refusals to deal with rivals, *see Covad Commc'ns Co.* v. *Bell Atl. Corp.*, 398 F.3d 666 (D.C. Cir. 2005); *United States* v. *Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc), the Seventh Circuit expanded *Aspen* to announce a new multi-factor "balancing" test for unilateral refusals to deal similar to the "rule of reason" that prevails in some other areas of antitrust law. Under the Seventh Circuit's unique approach to balancing, procompetitive justifications for a refusal to deal—rather than disposing of a case as a matter of law—create "factual issue[s] properly resolved by the jury," ensuring that even a refusal based on an *acknowledged* business purpose gives rise to a claim that almost always "need[s] to be tried." Pet. App. 39a, 53a. The panel's open-ended balancing test conflicts with *Trinko* and creates a circuit conflict. Over Judge Brennan's dissent, the majority created a further conflict with *Linkline* and circuit authorities, including *Novell*, *Aerotec*, and *Service & Training, Inc.* v. *Data General Corp.*, 963 F.2d 680 (4th Cir. 1992), by holding that a plaintiff may sidestep the limits on any antitrust duty to deal simply by repackaging a justified refusal to deal as illegal tying. Pet. App. 81a. Both conflicts warrant this Court's review.

1. "While § 1 of the Sherman Act forbids contracts or conspiracies in restraint of trade or commerce, § 2 addresses the actions of single firms that monopolize." *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 454 (1993). Because the Act's goal is to "foster" competition, not "destroy" it, *id*. at 458, the Act judges "[c]oncerted activity subject to § 1 … more sternly than unilateral activity under § 2," *Copperweld Corp.* v. *Indep. Tube Corp.*, 467 U.S. 752, 768 (1984). Thus, whereas this Court has divided claims alleging collusion between rivals under § 1 into acts that are per se illegal and those subject to judicial balancing "under a rule of reason" to determine whether they ultimately benefit competition more than they hurt it, *ibid*., this Court has limited the circumstances in which unilateral conduct is subject to *any* risk of liability under § 2.

Recognizing that "[c]ourts are ill suited 'to act as central planners'"—and that "mistaken inferences" about economic consequences can "chill" legitimate competition—the Court has "repeatedly emphasized the importance of clear rules" in policing § 2's boundaries. *Linkline*, 555 U.S. at 451-52. "'[M]ere possession of monopoly power'" is not unlawful, and courts recognize "antitrust liability for purely unilateral conduct" only in "rare instances." *Id.* at 448, 454. As a result, many common business activities that may increase a dominant firm's market share—such as ordinary price cuts (where "retail prices" remain "above cost"), *id.* at 453, or "innovation," Pet. App. 43a, to create "superior product[s]," *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966)—simply are not actionable, without any need for balancing.

Section 2 generally "does not restrict" companies' right to "freely … exercise [their] own independent discretion as to parties with whom [they] will deal." *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919). Forcing rivals to cooperate is antithetical to "the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest," and "may facilitate the supreme evil of antitrust: collusion." *Trinko*, 540 U.S. at 407-08.

Four decades ago, this Court recognized a "limited exception" to this general rule in *Aspen*, upholding a jury verdict against a monopolist ski mountain owner for withdrawing from a "voluntary (*and thus presumably profitable*)" joint lift-ticket venture with a rival, thereby "forsak[ing] short-term profits." *Trinko*, 540 U.S. at 409. The monopolist in *Aspen* was unable to offer "any efficiency justification whatever" for this refusal to deal. 472 U.S. at 608. In *Trinko*, this Court drew "the outer boundary" for refusal-to-deal claims at *Aspen*'s unique facts. 540 U.S. at 408-09. And in *Linkline*, this Court reaffirmed that boundary, holding that an antitrust plaintiff may not circumvent the "reasoning of *Trinko*" by recasting a lawful refusal to deal as some other form of monopolistic conduct, such as "price squeezing." 555 U.S. at 450.

2. Multichannel video programming distributors ("MVPDs") like Comcast, WOW!, and RCN acquire cable network programming (like ESPN and CNN) to distribute to consumers. Pet. App. 11a. As part of those distribution arrangements, they acquire two to three minutes per hour of advertising inventory (called "ad spots" or "ad avails") that they can sell to advertisers. *Ibid.* Multiple MVPDs in a "Designated Market Area" ("DMA")—a geographical unit "meant to capture regional audiences that are likely to view the same programming," *id.* at 10a—pool their inventory through an arrangement called an "interconnect," which provides a "single point of contact" for regional advertisers to buy ads on a pooled basis and run them simultaneously across multiple MVPDs. *Id.* at 12a.

The largest MVPD in each DMA typically operates the interconnect in exchange for a share of advertising revenue from participating MVPDs. Pet. App. 150a. Comcast is the largest MVPD in the DMAs at issue here—Chicago and Detroit—and operates the interconnects in those markets. *Id*. at 24a.

As part of running the interconnect, Comcast also offers other participating MVPDs "ad representation" services. Pet. App. 21a-22a. Those services include marketing and selling the ad spots to advertisers; maintaining the software and hardware needed to run, insert, traffic, monitor, and advertise the ad spots; organizing inventory into schedules and ensuring each ad runs correctly during its allotted time; and performing financial services, like accounting, billing, and collections. *Id*. at 22a, 212a. Like many of its peer MVPDs in other DMAs—including Charter, Cox, Altice, and Mediacom—Comcast offers these services through a vertically integrated subsidiary, originally Comcast Spotlight, and now Comcast Cable Communications Management, LLC (doing business as Effectv). *Id.* at 23a n.6.

Respondent Viamedia is not an MVPD, but it does offer ad representation services in competition against Comcast (and others), including in Chicago and Detroit. Pet. App. 21a-22a. Viamedia is "the only ad rep services firm" of any significance that is "not owned by an MVPD." *Id*. at 23a.

With one exception, Comcast has consistently declined to deal with Viamedia. Pet. App. 110a (Brennan, J.). In 2003, Comcast agreed to purchase from Viamedia, and then resell on the Chicago-area and Detroit-area interconnects, certain advertising inventory that Viamedia had acquired from WOW! and RCN. *Id.* at 109a. As that contract neared its 2012 expiration, Comcast informed Viamedia that it would not renew, and instead sought to obtain direct deals with WOW! and RCN without Viamedia as an intermediary. *Id.* at 110a. The agreement with Viamedia expired by its own terms in June 2012. In 2014, Comcast and Viamedia negotiated for a new agreement, but they "failed to reach terms," *id.* at 219a, with Viamedia calling Comcast's proposed terms "onerous," *id.* at 317a, 325a. In 2015, once "their contracts with Viamedia expired," WOW! and RCN "contracted with Comcast to be their ad representative in Chicago and Detroit." *Id.* at 110a (Brennan, J.).

3. Viamedia sued Comcast under § 2 of the Sherman Act, alleging that Comcast monopolized the ad representation markets in Chicago and Detroit by refusing to deal with Viamedia. Pet. App. 36a-37a.

Viamedia's own allegations revealed legitimate business reasons for Comcast's decision not to renew Viamedia's contract or expand its dealings with Viamedia: "replac[ing] Viamedia as WOW's and RCN's Spot Cable Advertising Representative," Pet. App. 309a, and thus cutting out the middleman so Comcast could deal directly with MVPD customers. Because dealing with a middleman is costly and less efficient, "disintermediation" saves customers money and makes business sense independent of its effect on market share. *Id.* at 65a-66a. Here, "Comcast ultimately offered superior terms" to WOW! and RCN. *Id.* at 220a. As an RCN executive "testified, Viamedia's offers were 'nowhere near equal'" to Comcast's, and choosing Comcast was "not [a] very difficult decision" for RCN to make. *Id.* at 260a. The same was true for WOW!. *See id.* at 221a-22a.

Viamedia also sought to cast Comcast's refusal to deal with it as tying. "Tying is conduct in which a firm will 'sell one product [the tying product] but only on the condition that the buyer also purchases a different (or tied) product.'" Pet. App. 72a-73a (alteration in original). Viamedia alleged that by refusing to permit Viamedia to participate in Comcast's interconnects, Comcast coerced MVPDs that wanted to participate in Comcast's interconnects to use Comcast as their ad representative. *Id.* at 37a.

4. The district court (St. Eve, J.) dismissed the refusal-to-deal-claim, ruling that *Trinko*, *Linkline*, and leading circuit decisions—including *Port Dock* and then-Judge Gorsuch's decision in *Novell*—confined refusal-to-deal liability to actions that "serve no rational procompetitive purpose." Pet. App. 202a-03a. And here, Comcast's "'prototypical valid business pur-

pose'"—"'improv[ing] efficiency'" by "replac[ing] an intermediary with a direct relationship"— was evident from the face of the complaint. *Id*. at 188a, 203a.

After discovery, the court granted Comcast summary judgment on Viamedia's tying claim because Viamedia had merely repackaged the refusal-to-deal claim: the "real rub" of the claim is that "Comcast withheld [interconnect access] *from … Viamedia*"; Viamedia's alleged injuries were "fully attributable" to that "legal refusal to deal," and the remedy Viamedia sought was not unbundling of interconnect and ad representation services, but instead forced dealing. Pet. App. 243a, 266a, 273a-74a. The district court held that "'refusal to deal doctrine is not so easily evaded.'" *Id.* at 263a (quoting *Novell*).

5. A divided Seventh Circuit reversed.

a. The majority held that Viamedia stated a claim for unlawful refusal to deal by alleging that Comcast's dealings with Viamedia shared certain "factors"—at a high level of generality—with the unique facts of *Aspen*: "a prior course of voluntary conduct, sacrifice of short-term profits, and refusal to sell to rivals on the same terms as other potential buyers." Pet. App. 53a, 62a-63a. The majority further held that Comcast's business justification for refusing to deal with Viamedia was "not amenable to resolution on the pleadings," or even summary judgment, because a *jury* would have to "balanc[e]" that justification against any "anticompetitive effects" of not dealing with Viamedia. *Id.* at 57a.

The majority acknowledged that the tying claim was "based on the same course of conduct, resulted in the same anticompetitive harms, and would be subject to the same procompetitive justifications or defenses" as Viamedia's refusal-to-deal claim. Pet. App. 39a. It concluded, however, that Viamedia had "alleged a *prima facie* refusal-to-deal claim," that "[s]uch potentially illegal conduct cannot justify Comcast's related tying of Interconnect services to ad rep services," and regardless, that "a tying claim does not fail as a matter of law simply because it was implemented by refusing to deal with an intermediary." *Id*. at 81a.

b. Judge Brennan concurred as to the refusal to deal. Unlike the majority, however, he recognized that this case is "[d]ifferent" from *Aspen*, Pet. App. 116a, including because "Viamedia admitted … in its allegations" that Comcast had a "rational business purpose" of "vertical integration and disintermediation," *id*. at 119a. But he agreed with the majority's new rule that Comcast would have to show "procompetitive benefits *net* of anticompetitive harms," which "does not easily lend itself to a *pleading* standard." *Id.* at 115a (quoting *id.* at 61a (majority op.)) (first emphasis added).

As to tying, Judge Brennan dissented, finding "no evidence of tying conduct separate from Viamedia's refusal-to-deal claim." Pet. App. 142a. Judge Brennan emphasized that other circuits had rejected similar attempts to treat refusal to deal with an intermediary as tying relative to downstream customers. *See id.* at 131a-33a, 142a (citing *Aerotec*, *Data General*, and *Novell*).

REASONS FOR GRANTING THE PETITION

Refusal-to-deal claims largely "bit the dust" when this Court decided, *in 2004*, that efficiency justifications are sufficient to defeat such claims. Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 Harv. J.L. & Pub. Pol'y 439, 442 (2008). The Seventh Circuit's decision to send a refusal-to-deal claim to trial notwithstanding undisputed efficiency justifications warrants this Court's review because it cannot be reconciled with this Court's decisions, and conflicts with multiple decisions of other circuits.

I. THE DECISION ALLOWING THE REFUSAL-TO-DEAL CLAIM TO PROCEED WARRANTS REVIEW

In upholding Viamedia's refusal-to-deal claim, the Seventh Circuit held that a fact finder must balance a firm's legitimate business reasons for refusing to deal with competitors against any anticompetitive effects. That holding expands refusal-to-deal liability under *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), beyond the narrow limits this Court recognized in *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), and *Pacific Bell Telephone Co.* v. *Linkline Communications, Inc.*, 555 U.S. 438 (2009), undermining the Sherman Act's promotion of competition by forcing firms to cooperate with their competitors. The decision creates a circuit conflict and breaks with the United States' longstanding position, consistent with *Trinko*, that a legitimate business purpose for a refusal to deal with a rival precludes liability *as a matter of law*. This Court's intervention is necessary to resolve these conflicts and restore this Court's limits on refusal-to-deal claims.

A. This Court's Precedents Preclude the Refusal-to-Deal Claim

The Seventh Circuit's expansive approach to refusal-to-deal liability upends this Court's intentional limits on such claims and, if not reversed, would revive an antitrust theory that this Court put to rest in *Trinko*.

1. The antitrust laws are properly hostile to claims premised on a unilateral refusal to deal with a rival because firms are almost always free to choose with whom they do business (or not). *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919).

Forcing rivals to cooperate is antithetical to "the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest," and in fact "may facilitate the supreme evil of antitrust: collusion." *Trinko*, 540 U.S. at 407-08. Moreover, policing firms' decisions *not* to do business with their rivals "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." *Id*. at 408. "Judges are no better than the rest of us" at determining which "exclusionary" conduct is "efficient," and which is not. Easterbrook, *supra*, at 443. And "false condemnation" of efficient conduct may "chill" "legitimate competition." *Trinko*, 540 U.S. at 414.

In *Trinko*, this Court drew "the outer boundary" for refusal-to-deal claims at the unique facts of *Aspen*, 540 U.S. at 408-09, where the monopolist ski mountain owner "fail[ed] to offer *any* efficiency justification *whatever*," 472 U.S. at 608 (emphases added), for unilaterally withdrawing from a "voluntary (*and thus presumably profitable*)" joint lift-ticket venture with a rival, *Trinko*, 540 U.S. at 409. *Trinko* made clear that *Aspen* was an extraordinary departure from the general rule that refusals to deal are lawful, and that any refusal-to-deal claim must "fit within th[is] limited exception." *Ibid*. This Court has since reaffirmed that framework. *Linkline*, 555 U.S. at 450 (affirming the dismissal of a § 2 price-squeezing claim because "the reasoning of *Trinko* applies with equal force").

2. Rather than requiring Viamedia to "fit within" *Aspen*'s "limited exception," the majority treated *Aspen*'s unique circumstances as generating a set of "factors to consider" in assessing "case-by-case" whether a challenged refusal to deal is indeed anticompetitive—with "no factor … always decisive by itself." Pet. App. 48a, 53a. The panel proceeded to hold that refusal-to-deal claims are subject to an open-ended "balancing approach" that is a "similar" analysis to the "rule of reason" applicable in some other areas of antitrust law. *Id.* at 58a, 64a n.14. The panel based this holding upon inapposite D.C. Circuit authorities—one decision that did not involve a unilateral refusal to deal with a rival, *see United States* v. *Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc), and another decision that *upheld* the dismissal of a claim for refusal to deal with a rival without mentioning the rule of reason or balancing, *see Covad Commc'ns Co.* v. *Bell Atl. Corp.*, 398 F.3d 666, 673 (D.C. Cir. 2005).

Applying that approach, the panel held that Comcast's acknowledged "business justifications"—while "relevant" to rebutting Viamedia's claims—are "not amenable to resolution on the pleadings." Pet. App. 57a-58a. Viamedia's complaint pleaded facts showing that cutting out Viamedia as a middleman allowed Comcast to provide WOW! and RCN with interconnect access and ad representation services through a single, vertically integrated entity. *Id.* at 203a-04a (citing *id.* at 285a-86a, 319a, 323a, 325a-26a, 328a ¶¶ 14, 155, 165-66, 174, 181). And Judge Brennan noted that "Viamedia admitted" there was "an efficiency justification in its allegations." *Id*. at 119a. "[I]mprov[ing] efficiency" by "replac[ing] an intermediary with a direct relationship" is a "'prototypical valid business purpose,'" which is why the district court had dismissed Viamedia's refusal-to-deal claim. *Id.* at 203a. Even the majority recognized that such disintermediation allows a company "to achieve cost-savings by 'elimination of double marginalization'"—the extra margin charged by the intermediary. *Id.* at 65a.

Under *Trinko* and *Aspen*, this admitted business justification should have compelled affirmance of the dismissal. Instead, the majority held that the claim would "need to be tried" so that a jury could "balanc[e] [any] anticompetitive effects" against Comcast's "procompetitive justification." Pet. App. 39a, 57a. On this view, even claims challenging a refusal to deal based on acknowledged, legitimate business justifications—here, disintermediation and vertical integration—can survive dismissal so long as the plaintiff alleges in conclusory form that the defendant forfeited short-term profits by discontinuing a prior course of conduct, and that the defendant had "no procompetitive justifications" for doing so. *See id*. at 63a (citing *id.* at 319a-24a ¶¶ 154-68).

By treating the import of the procompetitive justifications pleaded in Viamedia's complaint as grist for a jury's mill, the majority allowed Viamedia's refusal-to-deal claim to survive dismissal despite this Court's clear warnings about too readily permitting "massive" and "expensive" antitrust litigation to advance beyond the pleadings, *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 558 (2007), and despite critical differences from *Aspen* identified by Judge Brennan, *see* Pet. App. 116a-19a, and the district court, *id.* at 200a-01a. According to the majority, even "[i]f Viamedia cannot rebut … Comcast's procompetitive justifications," Viamedia can try to prove at trial "that the anticompetitive harm of [Comcast's] conduct outweighs the procompetitive benefit." *Id.* at 64a.

Contrary to the panel's decision, *Aspen* "did not call for any balancing of the social gains from refusing to deal … against the losses resulting from the refusal." 3B Areeda & Hovenkamp, *Antitrust Law* ¶ 772c2, at 222 (4th ed. 2015). Instead, noting that the defendant "fail[ed] to offer any efficiency justification whatever for its pattern of conduct," the Court recognized a narrow exception that applies only in the absence of "legitimate business reasons." *Aspen*, 472 U.S. at 597, 608.

Trinko likewise recognized that a refusal to deal is not actionable if it was "prompted" by "competitive zeal," dismissing the § 2 refusal-to-deal claim presented in that case on the pleadings. 540 U.S. at 409. *Trinko*'s limitation of *Aspen* to its facts leaves no room for a new framework which balances procompetitive and anticompetitive effects when there are legitimate business reasons for refusing to deal with a competitor.

3. *Aspen* also fails to "ma[p] onto Comcast's conduct" in other ways. Pet. App. 116a (Brennan, J.). Unlike the ski mountain operator in *Aspen*, which stopped offering multi-mountain passes altogether, Comcast continued offering the same interconnect and ad representation services to MVPDs, and even

"encouraged additional MVPD participation"; it merely sought to "contrac[t] with [MVPDs] directly." *Id.* at 118a. Nor does Viamedia claim, as in *Aspen*, 472 U.S. at 603, that Comcast behaved differently in other markets. To the contrary, it alleges that Comcast engaged in the same conduct "in each of the markets where it controls the Interconnect," Pet. App. 329a, ¶ 183, contradicting the majority's unexplained (and incorrect) assertion that this case tracks *Aspen* in this respect, *id.* at 55a.

Moreover, as the majority acknowledged, *Aspen* involved "[s]ki [m]ountain [p]asses," Pet. App. 55a, whereas this case involves a highly complex, evolving industry characterized by "changes in technology," and "a new array of competitors," *id.* at 18a-19a. It is precisely in such "highly technical" and "constantly changing" industries that this Court has been most wary of allowing courts to assume the mantle of "central planners." *Trinko*, 540 U.S. at 408, 414. Courts should be "*especially*" cautious of § 2 claims "in technology markets" and areas where "innovation" "is essential to economic growth." *FTC* v. *Qualcomm Inc.*, 2020 WL 4591476, at *9 (9th Cir. Aug. 11, 2020). Yet the panel forged ahead undeterred, confident that judicial experience in, for instance, monitoring the "supervised release" of convicted criminals, Pet. App. 98a, justified licensing juries to weigh the merits of business decisions in complex industries and courts to assume the "characteristic[s] of a regulatory agency," *Linkline*, 555 U.S. at 452-53.

Trinko and *Linkline* should have led the Seventh Circuit to affirm the district court's dismissal. The court of appeals' decision to send the case to trial instead cannot be squared with this Court's precedents and represents a marked and unjustified expansion of

§ 2 refusal-to-deal liability. The Court should grant certiorari to reverse the Seventh Circuit's judgment.

B. The Decision Below Creates a Circuit Conflict

The Seventh Circuit stands alone in holding that a jury must balance a defendant's acknowledged procompetitive justification for a unilateral refusal to deal against its anticompetitive effects. That holding is irreconcilable with the decisions of numerous circuits, warranting this Court's review.

1. The Seventh Circuit's approach directly conflicts with decisions of the Second, Ninth, Tenth, and Eleventh Circuits.

Then-Judge Gorsuch's opinion in *Novell, Inc.* v. *Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013), illustrates the dominant (and correct) approach in refusal-to-deal cases. When Microsoft rolled out early versions of Windows 95, it initially shared intellectual property with rival application developers "to spur them into writing software" for the new operating system. *Id.* at 1074. Before releasing Windows 95 to the public, it "reversed course," keeping the information to itself. *Ibid*.

The Tenth Circuit analyzed Microsoft's refusal to deal with rival developers under *Aspen*, *Trinko*, and *Linkline*. The starting principle, it explained, is that "'businesses are free to choose' whether or not to do business with others." *Novell*, 731 F.3d at 1072 (quoting *Linkline*, 555 U.S. at 448). *Aspen* recognized a "limited exception" where "a monopolist … first voluntarily agreed to a sales and marketing joint venture with a rival … and then later discontinued the venture even when the evidence suggested the arrangement remained a profitable one" and offered no procompetitive justification whatever. *Id.* at 1074. But *Aspen* represents "[r]efusal to deal doctrine's high water mark," and this Court "has refused to extend [refusal-to-deal] liability" beyond that "'outer boundary.'" *Ibid.* (quoting *Trinko*, 540 U.S. at 409, and citing *Linkine*, 555 U.S. at 448). "To invoke *Aspen*'s limited exception," therefore, *Novell* holds that the key "features present in *Aspen* must be present." *Ibid*. The defendant must abandon a "preexisting voluntary and presumably profitable course of dealing" with its rival and "'forsake short-term profits to achieve an anticompetitive end.'" *Id.* at 1074-75 (quoting *Trinko*, 540 U.S. at 407). And even then, "a refusal to deal with a competitor doesn't violate [§] 2 if 'valid business reasons exist for that refusal.'" *Id.* at 1075 (quoting *Aspen*, 472 U.S. at 597).

Since "firms routinely sacrifice short-term profits for lots of legitimate reasons that enhance consumer welfare," *Novell* allowed liability only where, as in *Aspen*, a monopolist's refusal to deal is "irrational but for its anticompetitive effect"—*i.e.*, it has "*no* economic justification *except* its tendency to exclude a rival." 731 F.3d at 1075, 1077. The "critical" requirement is that there be "*no* valid business reasons for the refusal to deal." *Christy Sports, LLC* v. *Deer Valley Resort Co.*, 555 F.3d 1188, 1197 (10th Cir. 2009) (emphasis added).

In *Novell*, the plaintiff presented "no evidence" at trial that Microsoft's challenged conduct had any other purpose than to "maximize the company's immediate and overall profits." 731 F.3d at 1076. Microsoft profited from selling more software itself. *Ibid*. The Tenth Circuit held that this legitimate business justification entitled Microsoft to judgment even if its strategy *had* hurt short-term profits from sales of its operating system. *Id.* at 1076-77.

Rather than allowing a jury to weigh Microsoft's justifications against the acknowledged harm to rival developers from "handicapp[ing] [their] ability" to "write for Windows 95," 731 F.3d at 1076, the district court held that Microsoft's justifications sufficed as a matter of law, and the Tenth Circuit affirmed without any discussion of balancing. The Tenth Circuit has applied the same reasoning to affirm dismissal on the pleadings, *Christy*, 555 F.3d at 1197, and summary judgment based on a defendant's "presumptively rational business justification," *SOLIDFX, LLC* v. *Jeppesen Sanderson, Inc.*, 841 F.3d 827, 843 (10th Cir. 2016).

These Tenth Circuit decisions cannot be squared with the Seventh Circuit's open-ended balancing test. Wary of "false positives," the Tenth Circuit's approach is "underinclusive" by design. *Novell*, 731 F.3d at 1072, 1076. *Novell* directs courts to "err on the side of firm independence"—and fashion "general rules" that "permi[t] reliance by all market participants"—lest courts risk assuming the role of "central plann[ers]" and "inducing" rather than prohibiting "collusion." *Id.* at 1073, 1076. Rather than impose liability whenever a jury determines that the "anticompetitive harm of the conduct outweighs the procompetitive benefit," as the Seventh Circuit did here, Pet. App. 64a, *Novell* limits liability to conduct that "has little or no value beyond the capacity to protect the monopolist's market power," 731 F.3d at 1072. A "'valid business reaso[n]'" precludes liability, *id.* at 1075, so balancing—whether by a judge or a jury—is neither required nor relevant.

The Second Circuit followed the same approach in *Port Dock & Stone Corp.* v. *Oldcastle Northeast, Inc.*, 507 F.3d 117 (2d Cir. 2007). It held that a refusal to deal is actionable only in the "absence of a legitimate business purpose"—and indeed, such a claim must fail if "[t]he facts pleaded" even "sugges[t] … in some way" a "purpose of increasing efficiency." *Id.* at 124-25. The Second Circuit thus affirmed dismissal of an intermediary distributor's claim against its longstanding former supplier. *Id.* at 119. The supplier "expanded vertically" into the distribution market, cut off sales to the distributor, and solicited the distributor's customers, but the supplier's "valid business purpose" of "vertical integration"—the same purpose Viamedia admits here—compelled dismissal, without the need for any judicial balancing, in direct conflict with the panel here. *Id.* at 119-20, 124-25. Nor did the supplier need to *prove* its business purpose at trial. The supplier's "vertical integration" was "alleged" in the complaint, *id.* at 122, as it is here. And whatever the supplier's actual goal, the "prototypical" purpose of vertical integration—which "*ordinarily*" is to "increas[e] … efficiency"—was enough to preclude further judicial scrutiny. *Id.* at 124 (emphasis added).

Other circuits are in accord. In the Ninth Circuit, a refusal-to-deal claim is actionable solely "where the only conceivable rationale or purpose [for refusing to deal] is … 'the exclusion of competition." *Aerotec Int'l, Inc.* v. *Honeywell Int'l, Inc.*, 836 F.3d 1171, 1184 (9th Cir. 2016). Even a "desire to maintain market power … cannot create antitrust liability if there was a legitimate business justification" for the refusal. *Oahu Gas Serv., Inc.* v. *Pac. Res., Inc.*, 838 F.2d 360, 368-69 (9th Cir. 1988). For that reason, the FTC recently "concede[d] error" regarding the application of *Aspen* where the defendant had a legitimate business justification for its practices. *See Qualcomm*, 2020 WL 4591476, at *12-13. The Ninth Circuit, in reversing the district court, was clear that *Aspen* applies when "the only conceivable rationale or purpose" is anticompetitive, noting that the "desire to maximize profits both in the short-term *and* the long-term" is a procompetitive purpose, not "anticompetitive conduct under § 2." *Id.* at *11, *12 n.15. And in the Eleventh Circuit, an unlawful refusal to deal requires "conduct without a legitimate business purpose that makes sense only because it eliminates competition," and a "refusal to deal that is designed to protect or further the legitimate business purposes of a defendant does not violate the antitrust laws, even if that refusal injures competition." *Morris Commc'ns Corp.* v. *PGA Tour, Inc.*, 364 F.3d 1288, 1295 (11th Cir. 2004).

Although Viamedia's refusal-to-deal claim came to the Seventh Circuit at the pleading stage, remarkably, it left with a remand "for trial," Pet. App. 8a, with the majority holding that Viamedia's allegations were "sufficient" not only to "state," but to "support claims that should be presented to a jury," *id.* at 5a. And the majority's reasoning—that only a jury can weigh procompetitive and anticompetitive effects—ensures that refusal-to-deal claims almost always "need to be tried." *Id.* at 39a.

By contrast, *Port Dock* affirmed dismissal "on the pleadings," 507 F.3d at 119, as did *Christy*, 555 F.3d at 1197, because a plaintiff cannot state an antitrust claim by alleging conduct that is equally "consistent with" anticompetitive activity as with a "rational and competitive business strategy," *Twombly*, 550 U.S. at 554. Viamedia's allegations that dealing with it would have been profitable, Pet. App. 319a-22a, ¶¶ 154-61, do not suffice because a company might "withdraw from a prior course of dealing and suffer a short-term profit loss in order to pursue perfectly procompetitive ends," *Novell*, 731 F.3d at 1075. And "conclusory statements" supporting "[t]hreadbare recitals of the elements of a cause of action"—like Viamedia's allegation that Comcast had "no procompetitive justifications," Pet. App. 323a, ¶ 165—are never credited at the pleading stage, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009).

Likewise, the decisions in *Aerotec*, 836 F.3d at 1184, *SOLIDFX*, 841 F.3d at 843, and *Morris*, 364 F.3d at 1295-96, each affirmed summary judgment, and *Novell* affirmed judgment as a matter of law, 731 F.3d at 1076, because conduct "as consistent with permissible competition as with [antitrust misconduct]" cannot "support an inference of [illegality]," *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

None of these decisions involved a jury verdict. Instead, once a valid business justification was established—whether on the face of the pleadings or on the undisputed facts—the refusal-to-deal claim was at an end, no matter the posture. The panel's observation that *Novell* was "based on an eight-week trial," Pet. App. 57a, thus falls flat. The claim was decided as a matter of law when the jury failed to reach a verdict. By suggesting that Viamedia's claim must proceed to trial, the Seventh Circuit broke with all these decisions.

2. The Seventh Circuit purported to find support for its balancing test in the D.C. Circuit's decisions in *Covad* and *Microsoft*. *See* Pet. App. 58a, 64a & n.14. Neither case offers any support.

Covad did not apply balancing to a refusal to deal with *competitors*. The D.C. Circuit *affirmed dismissal*, without balancing, of claims that the defendant "unlawfully refused to cooperate with [its competitor]" and engaged in price squeezing similar to the claim in *Linkline*. *Covad*, 398 F.3d at 672-73. The claim it allowed to survive dismissal—under pre-*Twombly* pleading standards—involved a refusal to deal with potential *customers*. The plaintiff alleged that the defendant refused "to sell … DSL service … to would-be customers who had orders pending for [a competitor's] service," *ibid.*—conduct more closely resembling exclusive dealing, as in *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 152 (1951), than the refusal to deal with a rival in *Aspen*. The court allowed fact development but did not purport to apply a balancing test, let alone in the context of a refusal to deal *with a competitor*. Thus, *Covad* offers no support for the panel's decision.

The panel here also sought to justify its balancing test by reference to a "traditional analysis followed in rule of reason cases" under § 1. Pet. App. 64a & n.14. To apply a "similar balancing approach" to a § 2 claim, the panel elevated dicta from the D.C. Circuit's decision in *Microsoft*. *Ibid.* *Microsoft* involved a wide "variety of exclusionary acts" under § 2, but not a refusal to deal with a competitor. 253 F.3d at 58-59. Whatever the validity of *Microsoft*'s approach, applying it in refusal-to-deal cases cannot be squared with *Aspen* and *Trinko*. And *even* in the broader § 2 context, it reflects an acknowledged conflict over the role of balancing procompetitive justifications and anticompetitive harms.

The D.C. Circuit characterized this "balancing approach" as the "general rule" in § 2 cases. *Microsoft*, 253 F.3d at 58-59. The Seventh Circuit likewise assumed that this "'balancing approach'" applies generally "under § 1 or § 2." Pet. App. 64a n.14. And the Fifth Circuit has suggested that § 2 may call for the equivalent of a "rule of reason" analysis. *Mid-Texas Commc'ns* v. *Am. Tel. & Tel. Co.*, 615 F.2d 1372, 1389 n.13 (5th Cir. 1980).

Yet other circuits reject that approach to § 2. "[T]he Ninth Circuit," for example, "has rejected resorting to such balancing tests" in a § 2 case involving a disfavored product-improvement claim, *Power Analytics Corp.* v. *Operation Tech., Inc.*, 2020 WL 3957196, at *10 (Fed. Cir. July 13, 2020), concluding that weighing "as-yet-unknown benefits against current competitive injuries" would be both "unwise" and "unadministrable," *Allied Orthopedic Appliances Inc.* v. *Tyco Health Care Grp. LP*, 592 F.3d 991, 1000 (9th Cir. 2010). "'[C]ourts are properly very skeptical about'" product-improvement claims, which, like refusal-to-deal claims, challenge conduct that ordinarily "'foster[s] and ensure[s] competition on the merits.'" *Id.* at 998, 1000.

The Federal Circuit acknowledged and followed the Ninth Circuit's approach in *Power Analytics*, rejecting the plaintiff's proposed balancing test that turned on whether "[t]he anticompetitive effects [of the defendant's] conduct outweighs any possible procompetitive justifications for its actions," 2020 WL 3957196, at *5, 10 (first alteration in original). Instead, the Federal Circuit cited *Novell* and *Morris* in holding that § 2 applies only when "the defendant's actions … make no economic sense other than for the elimination of competition." *Id.* at *8. The test that the Federal Circuit rejected tracks the Seventh Circuit's holding nearly verbatim. Pet. App. 64a.

Thus, even in seeking to anchor its decision outside of the precedents that actually control § 2 refusal-to-deal claims, the Seventh Circuit invoked a line of cases on which the circuits are also divided, merely reinforcing the need for this Court's review here.

C. The Decision Below Disregards the Views of the United States

The decision below also conflicts with the United States' longstanding position. The Solicitor General articulated that position in *Trinko*, and the United States reiterated it in this case: "If a refusal to deal serves a legitimate business purpose, Section 2 makes no further inquiry into its effects on competition." Br. for United States as *Amicus Curiae* 15, No. 18-2852, Dkt. 33 (7th Cir. Nov. 8, 2018) ("U.S. Panel Br.").

1. In *Trinko*, the Solicitor General explained the United States' considered position to this Court. The Solicitor General recognized that "the Sherman Act does not impose a generalized duty to assist rivals." Br. for United States and FTC as *Amici Curiae* 10, No. 02-682 (May 23, 2003). The narrow exception to this rule is *Aspen*, which involved the limited circumstances where "a refusal [to deal] involves a sacrifice of profits or business advantage that makes economic sense only because it eliminates or lessens competition." *Id.* at 19. "When, on the other hand, a monopolist's refusal to deal … does make business sense apart from exclusionary consequences," antitrust law does not "interfer[e] with such business choices." *Id.* at 20. And the Solicitor General could not have been clearer that this test "does not entail open ended 'balancing of social gains against competitive harms.'" *Id.* at 14 (quoting 3 Areeda & Hovenkamp, *Antitrust Law*, ¶¶ 651a, 658f, at 72, 131-32, 135 (2d ed. 2002)). Ra-

ther, the test asks only whether there is any legitimate business justification for the refusal to deal. *See id.* at 20 (if the refusal "make[s] business sense apart" from exclusion, it is lawful).

2. Here, the United States appeared as an *amicus* before the panel to urge its "longstanding" position that § 2 "permits refusals to deal that are supported by valid business justifications." U.S. Panel Br. 6. The United States urged the Seventh Circuit to "follow the Tenth Circuit's decision by then Judge Gorsuch in *Novell* … and hold that a refusal to deal does not violate Section 2 unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition." *Ibid.* Under that test, "[i]f a refusal to deal serves a legitimate business purpose, Section 2 *makes no further inquiry into its effects on competition*." *Id.* at 15 (emphasis added).

The panel rejected the position of the United States, minting a new "balancing" test instead. Pet. App. 59a. The panel asserted that this balancing test had been endorsed "by the government at oral argument." *Ibid.* But that is not so. When asked whether the United States' test can "be applied meaningfully at the pleading stage," government counsel answered consistently with *Trinko* that it could, citing *Christy*—a dismissal on the pleadings—as an example. Argument Audio at 27:28–29:10 (Feb. 7, 2019), http://media.ca7.uscourts.gov/sound/2019/dl.18-2852.18-2852_02_07_2019.mp3. That is the opposite of the majority's balancing approach, which is "*not* amenable to resolution on the pleadings," Pet. App. 57a (emphasis added).

The Seventh Circuit's decision—which clearly conflicts with this Court's decisions and the decisions of numerous circuits—calls out for this Court's plenary review and reversal. At minimum, if the Court does not grant certiorari outright, it should call for the views of the United States.

II. THE DECISION ALLOWING THE TYING CLAIM TO PROCEED WARRANTS REVIEW

Viamedia's tying claim is "based on the same course of conduct, resulted in the same anticompetitive harms, and would be subject to the same procompetitive justifications or defenses" as Viamedia's refusal-to-deal claim. Pet. App. 39a. By allowing the tying claim to proceed, the majority licensed plaintiffs to evade the appropriately strict limitations on refusal-to-deal claims, creating further conflicts with this Court's decisions and circuit precedent.

A. This Court's Precedents Preclude the Tying Claim

This Court's precedents squarely foreclose the Seventh Circuit's end-run around *Trinko*. The basic principle that firms may refuse to deal with their rivals—and that courts are ill-equipped to police the exceptions without chilling legitimate competition—does not depend on labels. It cannot be defeated by repackaging the same conduct under a different heading—as *Linkline* holds. Yet, that is precisely what the panel majority permitted here.

1. Judge Brennan's dissent explains why Viamedia's tying claim is "derivative of Comcast's refusal to deal" and why summary judgment should have been affirmed. Pet. App. 127a. To start, there is "no evidence of tying conduct separate from Viamedia's refusal-to-deal claim." *Id.* at 142a. At most, "the relevant evidence shows Comcast's desire to solicit RCN's and WOW!'s business directly," "consistent

with" its lawful goal of "increas[ing] efficiency by internalizing services." *Id.* at 138a. Challenging this conduct is "nothing other than a disguised attack on [Comcast's] vertical integration, which is almost always procompetitive" and should be evaluated under the "nuanced antitrust doctrine about compulsory dealing"—not as a tying claim. Areeda & Hovenkamp, *supra*, ¶ 1748b, at 247.

"Viamedia has conceded," moreover, "that any injury it suffered is derivative of Comcast's refusal to deal, not the alleged tie." Pet. App. 127a. Viamedia's expert admitted that there are no damages to Viamedia flowing from anything other than "Comcast's refusal to deal." *Id.* at 126a-27a. Indeed, while Seventh Circuit precedent holds that the "proper remedy" for tying is to "enjoin the tie, not to create a duty to deal," *Authenticom, Inc.* v. *CDK Glob., LLC*, 874 F.3d 1019, 1026 (7th Cir. 2017), Viamedia does not seek to enjoin any condition on Comcast's sales to its MVPD customers. Instead, Viamedia seeks to "force … Comcast to provide it access to the interconnects on favorable terms" so it can purchase interconnect access, package it with ad representation, and sell customers the same bundle it claims is unlawful. Pet. App. 274a.

The majority nonetheless allowed Viamedia's tying claim to proceed on the mistaken premise that Comcast's underlying refusal to deal was "potentially illegal," and therefore such "conduct c[ould] not justify … tying." Pet. App. 81a. That error is the subject of Comcast's first question presented. But the majority also went further, holding in the alternative that "a tying claim does not fail as a matter of law simply because it was implemented by refusing to deal with an intermediary." *Ibid*. That ruling independently warrants this Court's review.

2. This Court rejected Viamedia's precise tactic in *Linkline*. The "price squeeze" that this Court found lawful there comprised two lawful acts: a refusal to deal and a nonpredatory price cut. The plaintiffs alleged that AT&T "refused to deal" with rival internet services providers by charging them "high" prices to access AT&T's infrastructure for transporting internet access to consumers. 555 U.S. at 442. AT&T then "squeez[ed]" rival providers' "profit margins" by charging consumers "low" prices for AT&T's own internet services, leaving those providers unable to offer competitive prices at a profit. *Ibid*.

This Court looked past the "price squeeze" label and upheld the underlying conduct. Because AT&T had no "antitrust duty to deal with its rivals" under *Trinko*—and could have "simply stopped providing DSL transport service" to rival service providers altogether—it "was not required to offer this service at the wholesale prices the plaintiffs would have preferred." 555 U.S. at 450-51. And because AT&T's retail prices remained "'above predatory levels,'" its price cuts were also lawful. *Id.* at 451. This Court thus dismissed the price squeeze claim as "an amalgamation of a meritless [predatory-pricing] claim at the retail level and a meritless [refusal-to-deal] claim at the wholesale level." *Id.* at 452.

Linkline's teaching is clear and directly applicable here: If a firm can lawfully "bankrupt" its rivals—or exclude them from the market—"by refusing to deal altogether," it can also lawfully "pu[t] them out of business" by other means. 555 U.S. at 456-57. Whatever the label, a refusal to deal that "does not fit with" *Aspen*'s "limited exception" is lawful. *Trinko*, 540 U.S. at 409.

3. The majority's novel approach finds no precedent in this Court's decisions on tying. The typical tying claim does not involve *any* dealing (or refusal to deal) between the defendant and its competitors. Consumers are forced to buy two products directly from the defendant—*e.g.*, salt processing machines and unprocessed salt, *see Int'l Salt Co.* v. *United States*, 332 U.S. 392, 394 (1947)—instead of buying one product from the defendant and another from a competitor. Either way, the competitor never has to deal with the defendant, so the defendant's right to refrain from such dealing is not implicated. Here, by contrast, the ad representation services that Viamedia offered involved interposing itself as an intermediary in Comcast's dealings with MVPDs (*i.e.*, Comcast's customers). Once Comcast lawfully refused to deal with Viamedia, therefore, Viamedia had no stake in how Comcast dealt with those MVPDs directly, and therefore no independent tying injury of which to complain. Pet. App. 126a-28a (Brennan, J.).

By allowing Viamedia to proceed on a tying theory in addition to a refusal-to-deal theory, where both are based on the same conduct, the Seventh Circuit doubled down on its disregard for this Court's precedents.

B. The Decision Below Creates a Circuit Split

By allowing Viamedia's so-called "tying" claim to proceed, the majority split with the Fourth, Ninth, and Tenth Circuits.

1. As Judge Brennan recognized, the majority's alternate holding conflicts with *Service & Training, Inc.* v. *Data General Corp.*, 963 F.2d 680 (4th Cir. 1992), *Aerotec*, and *Novell*. Pet. App. 131a-33a, 142a.

Data General and *Aerotec* each rejected similar claims that a defendant "forced" customers to buy from it directly when it refused to deal with a rival intermediary. In *Data General*, a seller of large-scale computer systems "selectively licensed" its proprietary diagnostic software program to customers for use in maintaining the computer systems, but the seller "refus[ed] to sell or license" the software to a rival maintenance company. 963 F.2d at 682-83, 686. The Fourth Circuit rejected the rival's tying claim as "nothing more" than a refusal-to-deal claim. *Id.* at 686. Because businesses generally "'ha[ve] the right to deal or not with whomever [they] lik[e],'" *ibid*. (citing *Colgate*, 250 U.S. at 307), the seller could "lawfully license [its software] to whomever it chooses," and its decision to cut out the middleman and deal with its customers directly was lawful and not actionable as tying, *ibid.*

Likewise, in *Aerotec*, the Ninth Circuit rejected refusal-to-deal and tying claims by a third-party maintenance company against a competitor who also manufactured replacement parts in addition to providing maintenance services. 836 F.3d at 1178-80, 1183-84. The court invoked the defendant's "'right'" under *Trinko* to choose the "'parties with whom he will deal,'" *id.* at 1184, and rejected the plaintiff's assertion "that a refusal to deal with competitors may form the basis of a tying claim," *id.* at 1180. Instead, the court "decline[d] to stretch … tying" to encompass claims that refusal to deal with "third party servicers … acts as an effective, or 'de facto,' condition on sale" to end customers. *Id.* at 1178. That is precisely what the Seventh Circuit did here.

Novell, too, broadly rejects such efforts to get around "the hard road of refusal to deal doctrine." 731

F.3d at 1077-78. It held that "recast[ing] [a firm's] conduct as an 'affirmative' act of interference with a rival"—"rather than a 'unilateral' refusal to deal"—is not "an escape route" around the limits of *Trinko* and *Linkline*. *Id.* at 1078. Otherwise "almost *any* case where a monopolist first" deals with a rival and "then withdraws"—including *Aspen* and *Trinko*—could be "recast" as an affirmative act of monopolization. *Id.* at 1079. "Traditional refusal to deal doctrine is not so easily evaded." *Ibid*. The Tenth Circuit thus affirmed judgment for Microsoft not only on the refusal-to-deal claim, but also on "affirmativ[e]" claims that Microsoft "rais[ed] [software developers'] cost of doing business" by first "induc[ing] [their] reliance" on access to certain aspects of Windows 95's code and then "pull[ing] the rug out from underneath" them. *Id.* at 1078-79. While Viamedia's precise theory is different, the principle applies equally here: "Whether one chooses to call a monopolist's refusal to deal with a rival an act or omission, interference or withdrawal of assistance, the substance is the same and it must be analyzed under the traditional test" for a refusal to deal. *Id*. at 1079.

By exempting tying from that traditional test, the Seventh Circuit split with *Data General*, *Aerotec*, and *Novell*. This Court should resolve that conflict.

III. THIS CASE IS AN IDEAL VEHICLE

The questions presented are important and squarely presented in this case. The Court should take this opportunity to bring economic clarity and uniformity to § 2—something that will greatly benefit businesses and courts across the country.

"The antitrust laws were enacted for 'the protection of *competition,* not *competitors*.'" *Atl. Richfield*

Co. v. *USA Petroleum Co.*, 495 U.S. 328, 338 (1990). Accordingly, for more than forty years this Court has systematically brought economic rationality to antitrust law, including to the mode of judicial analysis, in the context of both § 1 and § 2. *See*, *e.g.*, *Linkline*, 555 U.S. at 451; *Trinko*, 540 U.S. at 408; *Leegin Creative Leather Prod., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 882 (2007) (overturning century-old precedent on per se illegality of vertical price-fixing); *Ill. Tool Works Inc.* v. *Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006) (overturning sixty-year-old precedent on presumption of market power over patented products in tying claims); *Cont'l T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977) (vertical non-price restraints not per se illegal).

Aspen represents "the old school of antitrust" that this Court abandoned decades ago. Easterbrook, *supra*, at 441-42. Today, "antitrust evinces a belief that independent, profit-maximizing firms and competition between them are generally good things for consumers." *Novell*, 731 F.3d at 1073. That is why *Trinko* limited duties to deal with competitors to *Aspen*'s unique facts and held that "[c]ompelling" rivals to work with one another undermines the very "purpose of antitrust law," harming consumers while propping up stagnant businesses. 540 U.S. at 407-08. *Linkline*, for the same reasons, rejected artful attempts to escape "the reasoning of *Trinko*" by repackaging refusal-to-deal claims under some other label. 555 U.S. at 450. *Aspen* is, at best, a museum curio, not a model for finding ever-expanding scenarios of liability.

The Seventh Circuit's decision is thus a dangerous lurch in the wrong direction; it allows businesses that fail to compete to use the antitrust laws to their advantage at the expense of competition and consumers.

The panel here contemplated forcing Comcast to do business with Viamedia on the terms of their prior agreement—seemingly in perpetuity. Pet. App. 99a. Yet the testimony of WOW! and RCN executives was that Comcast offered far "superior terms" to them than Viamedia. *Id.* at 158a-60a. The Seventh Circuit's decision thus forces successful firms to choose between inefficient arrangements that prop up less competitive rivals, on the one hand, and risking burdensome litigation and the threat that unconstrained juries will issue all-things-considered verdicts with treble damages, on the other. Promoting such an outcome chills legitimate *competition* by protecting an outmoded *competitor*.

Moreover, this case involves an evolving industry, characterized by "changes in technology" and "a new array of competitors." Pet. App. 18a-19a. *Trinko* explained that courts should not assume the mantle of "central planners," particularly in a "highly technical" and "constantly changing" industry. 540 U.S. at 408, 414. This Court expressly warned that "undue expansion of § 2 liability" would reduce "incentive[s]" for companies to "invest" and operate in today's ever-changing economy. *Ibid.* The panel's suggested remedy—imposing contractual "terms" from 2003 that expired in 2012 on two companies in 2020, Pet. App. 99a—is illustrative of the Court's concern: Rather than promote innovation, the panel's decision risks ossification.

In refusing to follow this Court's decisions, and departing from the decisions of other circuits, the decision below also upsets the important value of "predictability," which is itself "goo[d] for … the competitive process," *Novell*, 731 F.3d at 1073, and the value of national uniformity. The circuit conflicts here are clear. Outside of the Seventh Circuit, Viamedia's refusal-to-deal claim would not have survived a motion to dismiss, nor would its tying claim have survived summary judgment. Companies that operate nationwide need clear and uniform rules, *particularly* as to when they may face "the potentially enormous expense of discovery" and litigation, *Twombly*, 550 U.S. at 559-60, for doing what businesses do routinely: refusing to deal with and competing with rivals. Granting certiorari in this case would restore national uniformity on these issues and bring clarity and predictability to § 2.

Finally, the questions presented are perfectly teed up for this Court's resolution. The issues were preserved and fully litigated by excellent counsel, with participation by the United States. The lower courts exhaustively addressed the issues, and the questions presented are outcome-dispositive. The Court should seize this opportunity to resolve them and advance the coherence of § 2 of the Sherman Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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