No. 07-512

In The
Supreme Court of the United States

PACIFIC BELL TELEPHONE COMPANY
d/b/a AT&T CALIFORNIA, ET AL.,

Petitioners,

v.

lINKLINE COMMUNICATIONS, INC., ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND EIGHT OTHER STATES AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICI

The interests of the States are twofold. First, because the States are among the leading enforcers of antitrust law, they have a compelling interest in ensuring the soundness and uniformity of antitrust jurisprudence. The lower court created a conflict among the Circuits and announced an exception to *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398 (2004). The States need resolution of this conflict and also want an interpretation that is rational and predictable—a price-squeeze claim may not be brought against a firm that has no antitrust duty to deal. Such a bright-line rule will encourage and support competition, innovation, and growth in the marketplace, for the ultimate benefit of consumers.

Second, the States have a critical interest in preserving the efficiency and the integrity of their marketplace by reducing costs associated with unfounded lawsuits. Businesses in the United States face the highest legal costs in the industrialized world.[1] Antitrust litigation imposes significant

[1] According to the Office of Management and Budget, "[t]he costs of litigation per person in the United States are far higher than in any other major industrialized nation in the world. Lawsuit costs have risen substantially over the past several decades, and a significant part of the costs go to paying lawyers' fees and transaction costs—not to compensating the injured parties." *Promoting Economic Opportunity and Ownership,* OFF. OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2006 (2005),

(Continued on following page)

burdens on businesses, the courts, and our economy. *Trinko*, 540 U.S. at 414-15. If, as the Ninth Circuit held, an antitrust plaintiff can state a price-squeeze claim even though the defendant has no duty to deal, then businesses will face more litigation. Businesses will be prompted to settle these cases, even at a high cost, to avoid extraordinarily high discovery costs and the uncertainties of litigation. These expenses will ultimately be passed on to consumers.

SUMMARY OF ARGUMENT

The decision below should be reversed for three reasons. First, the Ninth Circuit's decision is contrary to the interest of consumers. The decision below, by protecting competitors rather than competition, would have undesirable effects for consumers. To avoid costly antitrust litigation, companies may avoid price-cutting or refuse to enter a downstream market. This would deprive consumers of choice and competition. Second, determining a wholesale price that is fair relative to retail pricing is an exercise for which courts are ill-suited. Setting a wholesale price depends on the characteristics of a specific market and therefore, defining a rule would be arbitrary and

available at http://www.whitehouse.gov/omb/budget/fy2006/promoting.html.

difficult to administer. Finally, the reasoning in *Trinko* is incompatible with the ruling below.

I. THE NINTH CIRCUIT'S DECISION UNDERMINES THE INTERESTS OF CONSUMERS.

Regarded as "the Magna Carta of free enterprise," *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972), the Sherman Act[2] seeks to prohibit the acquisition or maintenance of monopoly power—the power to control prices or exclude competition—by means other than growth or development as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Because a monopolist may have less incentive to reduce prices, improve quality, or offer greater selection, this rule reflects the general principle that the antitrust laws "were enacted for the protection of *competition* not *competitors*." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis original, internal quotations omitted). Competition ultimately benefits consumers in the form of lower prices, higher quality, and larger selection.

The Ninth Circuit's decision undermines these principles in two ways. First, it protects competitors

[2] 15 U.S.C § 2.

rather than competition. Second, it penalizes companies for cutting prices.

A. The Decision Below Protects Competitors Rather Than Competition.

The decision below protects competitors—the downstream rivals who are upset by the firm's pricing policies—rather than the competition of the marketplace. If a business faces potential liability for a "price squeeze," even though it has no antitrust obligation to deal with its downstream competitors, then it will be reluctant to engage in pro-competitive behavior that might prompt a lawsuit by its downstream competitors. *See* William J. Baumol & Janusz A. Ordover, *Use of Antitrust To Subvert Competition,* 28 J.L. & ECON. 247, 254 (1985). Most obviously, it may shy away from vertical integration by refusing to enter the downstream market. For businesses that are vertically integrated, one way to avoid a price-squeeze lawsuit would be to charge higher downstream prices.[3] Alternatively, it might refuse to sell at the wholesale level or at the retail level to avoid an easily alleged complaint of a price

[3] A lower downstream price most often reflects competition rather than a sinister attempt at a price squeeze. In this particular market, consumers can gain access to the internet via DSL, cable, satellite and a wireless connection. Thus, maintaining low downstream prices simply reflects price pressure from these DSL alternatives.

squeeze. All of these actions would reduce competition and, in the long run, harm consumers.

Similarly, because there is a "long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal," *United States v. Colgate & Co.,* 250 U.S. 300, 307 (1919), a vertically integrated firm simply may refuse to sell its upstream products to its downstream competitors. Such a development would remove any economic efficiency that might result from such sales. *See* 3A Phillip Areeda & Harold Hovenkamp, ANTITRUST LAW § 767 c.3 (2nd ed. 2002). Production costs for downstream firms then would be higher. Those higher production costs inevitably would be passed on to consumers in the form of higher prices.

Vigorous competition is good for consumers, but bad for those companies that are the weakest in the marketplace. William J. Baumol & Alan S. Blinder, ECONOMICS: PRINCIPLES & POLICY 275 (10th ed. 2006). Indeed, "it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal." *Covad Commc'ns Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 673 (D.C. Cir. 2005) (quoting 3A Phillip Areeda & Harold Hovenkamp, ANTITRUST LAW § 767 c.5).

The Ninth Circuit's decision allows the weak companies to chill the behavior of stronger ones to the detriment of consumers. *See Trinko*, 540 U.S. at 414.

The Magna Carta of free enterprise does not mandate such a result.

B. The Lower Court Decision Penalizes Businesses For Above-Cost Price Cutting.

The lower court decision penalizes companies for above-cost price cutting. This Court has been "particularly wary of allowing recovery for above-cost price cutting because allowing such claims could, perversely, 'chill legitimate price cutting, which directly benefits consumers.'" *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.,* 127 S. Ct. 1069, 1074 (2007) (citation omitted). Consumers benefit from lower prices "regardless of how these prices are set, and so long as they are above predatory levels, they do not threaten competition." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990). Condemning practices resulting in lower prices to consumers is thus "especially costly" because "cutting prices in order to increase business often is the very essence of competition." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). As this Court observed:

> the purpose of the [Sherman Act] is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.

> It does so not out of solicitude for private concerns but out of concern for the public interest.

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

II. THE COURT OF APPEALS' DECISION WILL PROVE DIFFICULT TO ADMINISTER.

Even if the court of appeals' price-squeeze theory were sound, it still should be rejected in light of the difficulty courts would have administering the test the theory requires. As then Judge, now Justice Breyer, explains:

> [H]ow is a judge or jury to determine a "fair price?" Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition "would have set" were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price "gap?" Must it be large enough for all independent competing firms to make a "living profit," no matter how inefficient they may be? If not, how does one identify the "inefficient" firms? And how should the court respond when costs or demands change over time, as they inevitably will?

Town of Concord v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, J.). These difficulties explain "why antitrust courts normally avoid direct price administration." *Id.*[4] The assumption of "day-to-day controls characteristic of a regulatory agency"[5] that the court of appeals' rationale requires, would promote needless litigation and uncertainty.

III. THE NINTH CIRCUIT'S DECISION CONTRADICTS *TRINKO.*

The lower court's decision conflicts with *Trinko.* In *Trinko*, this Court held that when a monopolist has no antitrust duty to deal, there is no antitrust liability if the monopolist fails to provide "assistance in provision of service to rivals." *Trinko*, 540 U.S. at 410. As this Court explained:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the purpose of antitrust law,

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[4] *See also United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) ("[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow"); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir. 1898) (stating that to inquire into the reasonableness of prices is to "set sail on a sea of doubt"), *aff'd* 175 U.S. 211 (1899).

[5] Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1989).

> since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also 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. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.

Id. at 407-08. In the absence of an antitrust duty to deal, businesses need not provide favorable services or prices to their rivals.

There was no antitrust duty to deal here. The only reason the parties were transacting business at the upstream level was because of statutory compulsion. Federal law required the defendants to offer their DSL transport facilities to the plaintiffs. Therefore, the complaint here is predicated on a legal backdrop that is similar in one critical respect to that found in *Trinko*: parties that are dealing with each other under government compelled cooperation. *Id.* at 402. All that is left, post-*Trinko*, of the plaintiffs' price squeeze is a claim that the defendant's prices are too low in the downstream market. Absent predatory pricing, however, charging consumers low prices is of no concern to the antitrust laws.

Nor is this a case that falls within the "limited exception recognized in *Aspen Skiing*." *Trinko*, 540 U.S. at 409 (discussing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 601 (1985)).

There is no allegation, required for recovery under an *Aspen Skiing* theory, that the defendant "voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion." *Trinko*, 540 U.S. at 409.

Moreover, as this Court has noted, "[a]ny claim for excessive rates can be couched as a claim for inadequate services and vice versa," *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998). Thus, the *Trinko* claim—inadequate service to rivals—logically can be characterized as a claim that excessive rates are being charged to rivals. Indeed, the D.C. Circuit recognized that the claims were the same. *Covad*, 398 F.3d at 673. Put another way, the *Trinko* claim is logically the same as a price-squeeze claim in this case. In both cases, a company that has no antitrust obligation to deal is being sued for an antitrust violation because it refuses to give favorable terms to a rival. Since the *Trinko* claim was invalid, then it logically follows that a price-squeeze claim also is invalid. *Covad*, 398 F.3d at 673-74.

The Ninth Circuit ignored this logic. Because *Trinko* did not specifically involve a price-squeeze claim, the court of appeals found that price claims "remain viable notwithstanding either the telecommunications statutes or *Trinko*." *Pet. App.* at 14. Under the Ninth Circuit's reasoning, a company that has no duty to deal cannot be sued for failing to assist its downstream competitors, *Trinko*, 540 U.S. at 410-11, but that same firm can be sued for failing to give favorable prices to its downstream competitors. Such a distinction makes no sense. This Court should reaffirm *Trinko* and apply its holding to a price-squeeze claim.

CONCLUSION

For the reasons stated above, in the Brief of the Petitioners, and in the other amici briefs supporting the Petitioners, the decision of the Ninth Circuit should be **REVERSED**.

Respectfully submitted,

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