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 AMICUS CURIAE COMPTEL
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE* [1]

COMPTEL is the oldest and largest industry association representing competitive communications service providers and their supplier partners. COMPTEL members are entrepreneurial companies driving technological innovation and creating economic growth through competitive voice, video, and data offerings and the development and deployment of next-generation, IP-based networks and services. COMPTEL advances its members' interests through trade shows, networking, education, and policy advocacy before Congress, the Federal Communications Commission and the courts. COMPTEL works to ensure that competitive communications providers can continue to offer lower prices, better service, and greater innovation to consumers. As such, COMPTEL is acutely interested in how the antitrust laws apply in the communications industry. COMPTEL is also well-situated to supply this Court with information relevant to this case's resolution.

SUMMARY OF ARGUMENT

In the judgment under review, the court of appeals held that, even after this Court's decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), a

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners' blanket consent to the filing of amicus briefs is on file with the Clerk, and respondents' separate letter of consent is being filed together with this brief.

plaintiff states a claim under § 2 of the Sherman Act by alleging that the defendant engaged in a price squeeze – and did not require such a plaintiff to satisfy the predatory pricing standards of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Petitioners attack that holding, arguing that price squeezing should not be recognized as an independent tort under § 2. Respondents now agree with that position, stating that "it is clear respondents' pricing squeeze claim survives *Trinko* only if it satisfies the requirements of a predatory retail pricing claim under *Brooke Group*." Resp. Br. 13. Not only do respondents not seek to defend the judgment of the Ninth Circuit, but they embrace the *dissent* in that court. *Id.* at 18. Thus, with respect to the question presented – and the holding of the court of appeals – there remains no adversity between the parties, and this case has become moot. Any decision by this Court would be purely advisory, for regardless of how this Court resolves the question presented, respondents will not be proceeding on the legal theory it encompasses. Rather than issuing a precedential opinion on an important point of antitrust law, therefore, this Court should decline to address the merits of this case.

That course of action is what Article III of the Constitution requires. But it is also what prudence dictates, for the position that a price squeeze claim is viable as an independent antitrust tort – which respondents do not attempt to defend – in fact has ample support in law and policy. Federal courts have recognized price squeeze claims for more than sixty years, with no sign of the parade of horribles that petitioners foretell. On the contrary, a firm's ability to bring a price squeeze claim prevents, deters, and can remedy multiple forms of anticompetitive harm – not to mention preventing circumvention of this Court's predatory pricing standards.

Nor is elimination of price squeeze claims justified by arguments that some price squeezes may not be anti-competitive or may be difficult for courts to adjudicate. Even if these arguments have merit in some instances, petitioners have not come close to justifying the complete abolishment of price squeeze claims. For instance, where upstream prices actually *exceed* downstream prices, or where the claim involves the juxtaposition of a weakly regulated upstream market with an unregulated downstream market, price squeezes can be both anti-competitive and amenable to straightforward judicial administration.

There is also no reason to conclude that this Court's decision in *Trinko* forecloses an independent price squeeze cause of action. *Trinko* addressed only the scope of a firm's antitrust duty to deal with rivals, and did not address the validity of price squeeze claims at all. Although the right not to deal with downstream competitors arguably encompasses a right not to deal with them at specific upstream prices, it logically cannot encompass a right to engage in *any* particular conduct in the downstream market – a necessary element of a price squeeze claim.

While respondents are content to pursue their price squeeze claim as a predatory pricing claim under *Brooke Group*, this Court should not require all price squeeze plaintiffs to satisfy that case's standards. The *Brooke Group* requirements, while not impossible for price squeeze victims to satisfy – indeed, the district court found they had been satisfied in this case – were designed for situations where the defendant's conduct consists entirely of price-cutting in the market in which the plaintiff seeks to compete. In a price squeeze, in contrast, the defendant's conduct *also* includes price increases in an upstream market in which the defendant possesses market power. In that context, it makes no sense to require a showing that the defendant's downstream prices were below its costs: The defendant can effectuate a price squeeze just as easily (and earn more profit without any corresponding benefit to consumers) by raising its upstream prices while keeping its downstream prices above cost. Nor does it make sense to require a showing of a dangerous probability of recoupment, since a price squeeze places less at risk for its perpetrator than does an ordinary predatory pricing scheme. In short, while some price squeeze victims may be able to satisfy *Brooke Group*, there would be no warrant for this Court to require *all* such victims to do the same.

Thus, there are strong reasons to preserve price squeeze claims as an independent cause of action under § 2 – yet as a result of respondents' concession and waiver, no concretely interested party is advancing these arguments. Both Article III and prudence dictate that this Court should not rule on the merits of the question presented in the absence of adversarial presentation by a party with a concrete stake in the case.

ARGUMENT

I. BECAUSE THE PARTIES ARE NO LONGER ADVERSE AS TO THE QUESTION PRESENTED, THIS COURT SHOULD NOT ADDRESS THAT QUESTION'S MERITS

The court of appeals held that an antitrust plaintiff can state a § 2 claim by alleging that the defendant (an upstream monopolist) left insufficient margin between its upstream and downstream prices for the plaintiff to compete at the downstream level. In so holding, the court of appeals did not require such a plaintiff to satisfy the predatory pricing standards of *Brooke Group*. Petitioners challenge the court of appeals' holding, arguing that an allegation of a price squeeze is insufficient to state a claim under § 2. Respondents now agree on this important question of antitrust law: "it is clear," they state, that a price squeeze claim failing to meet the *Brooke Group* standards is not viable. Resp. Br. 13.[2] In fact, rather than defend the judgment of the court of appeals, respondents now agree with the approach

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[2] Petitioners appear to agree that a price squeeze claim that *does* satisfy the *Brooke Group* standards is viable. *See* Pet'rs' Br. 28 & n.17. And while the parties disagree on whether *respondents'* claim in fact satisfies *Brooke Group*, the court of appeals did not even address that question. In any event, neither of these interrelated questions is encompassed by the question presented.

advocated by the dissenting judge on the panel. *See id.* at 18.

Thus, petitioners and respondents agree that a plaintiff does not state a § 2 claim by alleging that the defendant "engaged in a 'price squeeze' by leaving insufficient margin between wholesale and retail prices to allow the plaintiff to compete" – *i.e.*, that independent price squeeze causes of action do not survive *Trinko*. Pet'rs' Br. i (question presented). With both petitioners and respondents now aligned on that side of the question presented, *no party* with a concrete stake in this case's outcome is advocating for the contrary position. Yet the question presented involves an important and substantial point of antitrust law, one whose resolution would be imprudent in the absence of a genuinely adversarial airing of the issues.

In view of respondents' waiver and concession, therefore, the appropriate course is for this Court to refrain from deciding the question presented in a precedential manner. As this Court explained in *Deakins v. Monaghan*, 484 U.S. 193 (1988): "It is not enough that a controversy existed at the time the complaint was filed, and continued to exist when review was obtained in the Court of Appeals." *Id.* at 199. Rather, because respondents no longer disagree with petitioners on the question presented, that question has become moot. *See id.* ("first question on which certiorari was granted is moot" because "there no longer is a live controversy between the parties over" that question's resolution); *cf. Webster v. Reproductive Health Servs.*, 492 U.S. 490, 512-13

(1989) (controversy over particular statutory provision moot because of appellees' decision, on appeal, not to seek declaratory judgment with respect to that provision); *Williams v. Zbaraz*, 448 U.S. 358, 367-68 (1980) (vacating district court's decision of legal question that neither party raised, on ground that district court lacked jurisdiction to decide that question). No matter how this Court resolves the question presented, respondents will not litigate this case on the legal theory it encompasses. The lack of adversarial presentation by a concretely interested party makes it inappropriate for this Court to resolve the question presented. *See generally Flast v. Cohen*, 392 U.S. 83, 96-97 (1968) (discussing advisory opinions).

II. DECIDING THE QUESTION PRESENTED WOULD BE ILL ADVISED BECAUSE THERE ARE STRONG ARGUMENTS IN SUPPORT OF THE COURT OF APPEALS' DECISION

As explained above, the parties to this case now agree with each other that, after this Court's decision in *Trinko*, there is no basis for an independent price squeeze cause of action under § 2 of the Sherman Act. For that reason, this Court should not address the merits of the question presented. That approach is only reinforced by the fact that there are strong arguments – which respondents do not advance – in support of the viability of an independent price squeeze claim under § 2.

A. INDEPENDENT PRICE SQUEEZE CLAIMS UNDER § 2 ARE CONSISTENT WITH ANTITRUST LAW AND POLICY

1. Price Squeeze Claims Are Deeply Rooted In Antitrust Law

For more than half a century, federal courts have recognized price squeeze claims as a legitimate basis for recovery under § 2 of the Sherman Act. These courts have not found such claims difficult to administer or somehow inconsistent with general antitrust law principles. Nor, despite the lengthy pedigree of price squeeze liability, have petitioners pointed to instances where legitimate retail price cutting has been deterred by the prospect of price squeeze liability.

The price squeeze theory of recovery was first embraced by Judge Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"). In that case, the government charged Alcoa – the nation's only producer of aluminum ingot, from which aluminum sheet is made – with selling ingot at so high a price, and sheet at so low a price, that other sellers of sheet could not charge the same retail price and still make a profit. *Id.* at 437. Writing for the panel, Judge Hand explained that this conduct violated § 2 of the Sherman Act: "That it was unlawful to set the price of 'sheet' so low and hold the price of ingot so high, seems to us unquestionable, provided, as we have held, that on this record the price of ingot must be regarded as higher than a 'fair price.'" *Id.* at 438. As such, the price squeeze was "an unlawful exercise of

'Alcoa's' power after it had been put on notice by the 'sheet rollers' complaints." *Id.*; *see also George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 553 (2d Cir. 1977).

Since *Alcoa*, a long line of cases has confirmed that price squeeze claims provide a valid basis for antitrust recovery. Thus, for instance, in *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984), the Third Circuit held that the defendant's deliberate manipulation of the relative prices of raw aluminum coil (the upstream product) and aluminum drainage pipe (the downstream product) gave rise to liability under § 2 on a price squeeze theory. *See id.* at 808-11. Likewise, in *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1982), the Eighth Circuit ruled that the district court should have considered the plaintiff's claim that the defendant's "wholesale rate increases . . . in conjunction with its smaller and deferred increases in retail rates [had] created a 'price squeeze.'" *Id.* at 1176; *see also id.* at 1176 n.4. In *City of Mishawaka v. American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1980), the Seventh Circuit upheld the district court's imposition of price squeeze liability. *See id.* at 982-85.[3] And in *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373 (9th Cir. 1992), while holding that there was no antitrust liability on the facts before the court, the Ninth Circuit explained that "[t]he vice that a price squeeze has is

[3] *But cf. City of Mishawaka*, 616 F.2d at 984 (acknowledging that "the 'price squeeze' is only a part of the utility's conduct which as a whole was found to violate the Sherman Act").

that it can be used to cause severe damage to competitors by unjustifiably raising their costs of doing business." *Id.* at 1376. Indeed, a number of courts have recognized price squeeze claims even in regulated markets. *See City of Kirkwood*, 671 F.2d at 1179 (noting that neither the federal agency regulating wholesale rates nor the state agency regulating retail rates had "plenary authority over the interaction of wholesale and retail rates"); *City of Mishawaka*, 616 F.2d at 982-85.

Even *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990) – on which petitioners heavily rely – did not categorically rule out antitrust liability for price squeezes. Far from it: in rejecting the claim before the court, then-Chief Judge Breyer emphasized that the court's reasoning "applies with full force only when the monopolist who engages in the squeeze is regulated at both industry levels," *id.* at 29, and then limited the court's holding to a subset of those circumstances. *Id.*; *see id.* at 28 (reasoning that "a price squeeze in a fully regulated industry . . . will not *normally* constitute 'exclusionary conduct' under Sherman Act § 2" (emphasis added)). Elaborating on the holding's limitation to monopolists "regulated at both industry levels," the court explained that "a special problem is posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregulated level, in order to earn at that second level the very profits that regulation forbids at the first." *Id.* at 29. And, despite noting the benefits that a vertically integrated monopolist could potentially provide to consumers, the court also detailed the economic harms that can flow from a price squeeze. *See id.* at 23-24; *id.* at 25 (describing the harms and benefits of a price squeeze as "closely balanced").

2. Price Squeeze Claims Prevent Anti-Competitive Harm To Consumers

It is no wonder that courts of appeals have looked favorably on price-squeeze claims: vertically integrated monopolists can cause tangible and serious economic harms, especially when one of the markets in which they operate is unregulated. This threat to competition – not just to competitors, as petitioners maintain, Pet'rs' Br. 23 – counsels against eliminating an independent price squeeze cause of action under § 2.

First, price squeezes cause harm similar to that resulting from predatory pricing – a form of conduct that this Court has held is prohibited by § 2 of the Sherman Act. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court recognized the dangers that arise when "[a] business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." *Id.* at 222. *Brooke Group* imposed stringent requirements for a plaintiff to establish predatory pricing, however. Not only must the plaintiff show that the defendant's prices are below costs, but it also must show a "dangerous probability" that, in the long run, the defendant will be able to recoup these short-term losses by charging supracompetitive prices. *Id.* at 224. These stringent requirements reflect, in part, this Court's assessment that "predatory pricing schemes are rarely tried, and even more rarely successful." *Id.* at 226 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986)). That is doubtless because predatory pricing schemes are highly speculative, posing the very real risk that low retail prices will result only in gains to consumers, not long-term benefit to the would-be monopolist. *See Matsushita*, 475 U.S. at 588-90.

Like a predatory pricing scheme, a price squeeze can squelch competition by effectively eliminating competitors' profit margins. But a price squeeze gives the monopolist a far greater possibility of financial reward than does predatory pricing. That is because, in a price squeeze, the upstream monopolist can reduce downstream competitors' profit margins not only by effectively reducing competitors' revenues (*i.e.*, lowering retail prices), but also by increasing their costs (*i.e.*, raising wholesale prices). And while the former tactic requires that the monopolist temporarily reduce its *own* revenues, the latter tactic may actually increase those revenues – or, at the very least, will reduce them less than would a retail-level price cut, because the monopolist can compensate for lost wholesale volume by selling the same products at the retail level. *See* IIIB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 767c5, at 141 & n.15 (3d ed. 2008). Thus, an upstream monopolist seeking to engineer a price squeeze may risk less than a downstream monopolist seeking to implement a predatory pricing scheme. It stands to reason that price squeezes will therefore be attempted more often than predatory pricing schemes, and will succeed more often.

At the same time, the cost of "false positives" in the price squeeze context is substantially less than it is for predatory pricing schemes. In *Brooke Group*, this Court stressed that low pricing might simply enhance consumer welfare, rather than reducing competition. *See* 509 U.S. at 223-24. But the same cannot be said of the wholesale side of a price squeeze, which entails *high* pricing. All other things remaining equal, increased wholesale prices will tend to reduce output at the upstream level (unless the current price is below the equilibrium price), and will tend to increase prices at the retail level. Neither of these is a consequence that courts should be anxious to preserve.

Second, and relatedly, price squeeze claims are necessary to prevent circumvention of *Brooke Group* by a downstream rival that has a monopoly on an upstream market. If a firm participates only in the downstream market, it can engage in exclusionary pricing only by lowering the downstream price. Eventually, that approach will run afoul of *Brooke Group*, as prices fall below costs. But if that same firm also has an upstream monopoly, it can stop short of lowering retail prices below costs, and raise upstream prices instead. That price-squeeze approach achieves the same result – anticompetitive reduction of rivals' profit margins – but does not risk liability under *Brooke Group*. Price squeeze liability under § 2 is therefore necessary to ensure that upstream monopolists are not able to execute an end-run around *Brooke Group*'s safeguards against predatory pricing.

Third, price squeezes can create barriers to entry into the upstream and downstream markets. As then-Chief Judge Breyer recognized in *Town of Concord*, an upstream monopolist that uses a price squeeze to extend its monopoly power to a downstream market may thus deter new entrants in *both* markets. At the wholesale level, prospective entrants will fear that, having entrenched its power in the retail market, the monopolist will simply refuse to buy from them. Conversely, at the retail level, prospective entrants will fear that the vertically integrated monopolist will not allow them to purchase needed inputs (or will offer those inputs only on impracticable terms). Only reinforcing these fears is the fact that antitrust law ordinarily imposes no duty upon a monopolist to deal with competitors. *See Trinko*, 540 U.S. at 407-08. As such, "[t]he new firm might conclude that the only prudent way to challenge [the monopolist] would be to enter the industry at *both* levels at once. Insofar as it is more difficult for a firm to enter an industry at two levels than at one, the monopolist, by expanding its monopoly power, has made entry by new firms more difficult." *Town of Concord*, 915 F.2d at 23-24. And while petitioners argue (Pet'rs' Br. 24 n.13) that there was no allegation *in this case* that respondents intended to challenge petitioners' wholesale monopoly, that has no bearing on the validity of price squeeze claims as a general matter.

Fourth, allowing a vertically integrated monopolist to squeeze out competition in the downstream market can eradicate non-price competition. In the absence of downstream competition, that is, the monopolist has little incentive to improve its service or product. The result, of course, is harm to consumers. *See Town of Concord*, 915 F.2d at 24.

Petitioners nonetheless maintain that a price squeeze can have salutary effects, such as forcing less efficient competitors from the marketplace. *See* Pet'rs Br. 25-26. But the theoretical possibility of such effects in some circumstances does not counsel the blunderbuss approach of barring price squeeze claims altogether. It is, at most, merely a reason to scrutinize individual price squeeze claims, at later stages of litigation, to see if the practices at issue in fact give rise to the benefits that petitioners assert. And while petitioners and their amici make much of the prospect that potential price squeeze liability will chill legitimate retail price cutting, these predictions simply fail to grapple with the fact that price squeeze liability has been recognized for six decades without dire effects.

3. Price Squeeze Claims Are Particularly Meritorious In Certain Circumstances

Petitioners ask this Court to hold, categorically, that price squeezes are never independently actionable under § 2 of the Sherman Act. The harms outlined above amply demonstrate that this course of action would be ill-advised. But that is not all: as this case itself suggests, the facts of particular price squeeze claims may bear on their viability and their consistency with antitrust law. Indeed, as discussed below, some price squeezes are particularly anticompetitive and reasonably easy for courts to address. That price squeeze claims can arise in a variety of factual contexts only confirms that this Court should not address the question presented, much less issue a broad ruling of any sort.

a. Price Squeeze Claims Can Be Especially Meritorious Where The Defendant's Upstream Price Exceeds Its Downstream Price

Petitioners argue that, because of the difficulty of determining an appropriate spread between a monopolist's upstream and downstream prices, price squeeze claims are unadministrable. *See, e.g.*, Pet'rs' Br. 30-33. But even assuming that *some* price squeeze claims are difficult to adjudicate for this reason, that is not the case where, as here, the monopolist's upstream price is actually *higher* than its downstream price – *i.e.*, where there is no spread at all.[4]

This Court's holding in *Brooke Group* provides a useful analogy. The *Brooke Group* Court was hesitant to give predatory pricing claims a broad

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[4] *See* J.A. 33. While there is some question whether the district court's order addressing the Amended Complaint was properly certified, even petitioners recognize that the Amended Complaint's "more detailed allegations can supply one version of facts that plaintiffs may posit in defending their claim by illustrating what they think they could have proved under the initial complaint." See Pet'rs' Br. 9 n.6.

reach because of a concern that predatory pricing may be "beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Brooke Group*, 509 U.S. at 223. But the Court held that such claims *are* valid where a monopolist charges retail prices that are lower than its costs (assuming a dangerous probability of recoupment of the monopolist's short-term losses). *Id.* at 222-23. Similarly, it is conceivable that courts may have some difficulty adjudicating certain price squeeze claims. Yet where the monopolist's retail price is lower than the price it charges for the wholesale input, that pricing behavior is simply illogical, and its condemnation at the pleading stage requires no subjective assessment of whether the spread between the monopolist's retail and wholesale prices is somehow "too small."[5]

Indeed, determining whether the wholesale price exceeds the retail price is even easier than the inquiry that *Brooke Group* counsels for predatory pricing claims. For such claims, "[t]he difficulties of measuring costs are notorious." IIIA Areeda &

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[5] Opposing price-squeeze liability even in these circumstances, petitioners argue that "by providing Internet-access service, AT&T may acquire sources of revenue that supplement the retail service fee." Pet'rs' Br. 33 n.21. But while the potential for other sources of revenue might conceivably help the defendant prevail on the merits, it is far too speculative to require the plaintiff to negate this at the pleading stage. In any event, petitioners' argument about other sources of revenue proves too much: it implies that even below-cost retail pricing should not violate § 2 under *Brooke Group*, for the below-cost pricer "may acquire sources of revenue that supplement" the retail price.

Hovenkamp, *supra*, ¶ 740d, at 198; *see Brooke Group*, 509 U.S. at 222 n.1 (declining to resolve circuit court conflict over the appropriate measure of cost). In price squeeze claims, by contrast, the wholesale price the monopolist charges can easily be determined and "does not require judicial estimation of free-market forces." *Trinko*, 540 U.S. at 410 n.3; *see Town of Concord*, 915 F.2d at 28. For that reason, recognizing price squeeze claims where the wholesale price exceeds the retail price would be especially unlikely to deter legitimate retail price-cutting.

In fact, requiring that the wholesale price actually be lower than the retail price in order for a price squeeze claim to proceed is, if anything, too conservative: the wholesale price does not include the costs of any additional inputs added before a product is sold in the downstream market. In this case, for instance, the upstream input that petitioners sold to respondents was DSL transport, while the downstream product it sold to consumers comprised not only DSL transport, but also Internet access and certain additional amenities. Respondents have alleged that the wholesale price for DSL transport exceeded the price petitioners charged for the *entirety* of their retail product. J.A. 33. While this behavior surely demonstrates an "anti-competitive bent," *Trinko*, 540 U.S. at 409, the same would be true even if petitioners raised prices for their retail product – or lowered prices for wholesale DSL transport – to the point where the retail price equaled the sum of the wholesale DSL transport price *and* the costs of the additional inputs included in the retail product.

b. Price Squeeze Claims Can Be Especially Meritorious Where They Involve Markets Regulated Only At The Upstream Level

As explained in greater detail below, *Trinko* heavily emphasized the pervasiveness of regulation in the relevant telephone markets, reasoning that antitrust enforcement would therefore have only minimal benefit. 540 U.S. at 412-13. Similar reasoning might conceivably apply to price squeeze claims: arguably, if both the upstream and the downstream markets are regulated, then in neither market will the monopolist have the incentive or ability to illegally acquire or maintain a monopoly. *See, e.g.*, *Town of Concord*, 915 F.2d at 25-26.

In other cases, however, regulation may be limited to the upstream level. That distinction can be crucial. For where – as here – only the upstream market is regulated, the above logic does not hold. In such a scenario, an upstream monopolist may use a price squeeze to extend its monopoly into the unregulated retail market, where it can enjoy benefits of monopoly that would not be available if the retail market were regulated. The high rewards of executing a price squeeze in such a situation make it both particularly likely to occur (because of the monopolist's incentive to undertake the scheme) and particularly likely to cause anti-competitive harm.

In fact, where only the wholesale market is regulated, price squeezes arguably are more attractive to the upstream monopolist – and more likely to cause anti-competitive harm – than where there is no regulation at all. If neither the upstream nor the downstream market is regulated, then an upstream monopolist operating at the profit-maximizing level will not be able to gain any additional monopoly profit by obtaining market power downstream. *See, e.g.*, *Town of Concord*, 915 F.2d at 23. But when the upstream market is regulated, it is unlikely that the monopolist is gaining the entire monopoly profit, so it has an incentive to seek any uncaptured monopoly profit through other means.[6] One such means is monopolization of the unregulated downstream market. *See* IIIB Areeda & Hovenkamp, *supra*, ¶ 787b, at 354 (recognizing that where a regulated monopolist is "prevented by law from charging its profit-maximizing price in its primary market," vertical integration provides a means to "transfer . . . monopoly profits away from the regulated [upstream market], where the regulatory agency forbids the firm from charging its profit-maximizing price," to

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[6] While petitioners seek to rebut this possibility by noting that "respondents alleged that AT&T intends to make up for a reduction in margins *at the unregulated retail level* by charging more at the *regulated* wholesale level," Pet'rs' Br. 37; *see id.* at 28 n.17, that simply misapprehends the nature of the argument: it is only in the short term that a price-squeezing monopolist may seek to recoup lost retail profits at the wholesale level, while it is in the long term that the monopolist will seek to capture additional monopoly profits at the retail level.

the unregulated downstream market). While § 2 of the Sherman Act surely does not prohibit capturing monopoly profits as such, the opportunity to do so here makes it more likely that the monopolist will use anti-competitive behavior to seek a downstream monopoly.

Thus, the possibility of claims (such as respondents') arising from conduct in a market regulated only at the upstream level only confirms that this Court should not eliminate an independent price squeeze cause of action under § 2. *See Town of Concord*, 915 F.2d at 29 (noting "special problem" arising when monopolist regulated at one level seeks market power in a second, unregulated level).

c. Price Squeeze Claims Can Be Especially Meritorious Where Upstream Regulation Is Not Robust

Even in industries where one or both of the relevant markets is regulated, the relevant regulation may be lax, imperfect, or unable to prevent a predatory price squeeze. As this Court observed in *Trinko*, when "'[t]here is nothing built into the regulatory scheme which performs the antitrust function,' . . . the benefits of antitrust are worth its sometimes considerable disadvantages." *Trinko*, 540 U.S. at 412 (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 358 (1963)) (first alteration in original).

Here, for instance, the regulation to which AT&T was subject was not – and is not – robust. Where ILECs provide DSL transport as a common carrier service, as they were required to do at the time this case was initially brought, the Communications Act mandates that rates that be "just and reasonable," 47 U.S.C. § 201(b), and not "unreasonabl[y] discriminat[ory]," *id.* § 202(a). Neither the statute nor the FCC's interpretation thereof (as it stood at the time of the events underlying linkLine's Amended Complaint, *see infra* pp. 24-25 (discussing subsequent regulatory changes)) called for a comparison between the proposed upstream rate for DSL transport and the rate the ILEC charges for DSL-based Internet access.[7] Thus, regulation in this case would not have stopped an ILEC that was charging the maximum price for stand-alone DSL transport from lowering its retail price to that same level, erasing margins in that market and driving out its competitors while continuing to enjoy "a reasonable profit" on the wholesale side. And as long as the retail price was not below the ILEC's own costs, *Brooke Group* would prove no obstacle either.

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[7] It is far too speculative to say, as petitioners do, that "it has always been open to respondents to argue that AT&T's wholesale prices are unlawful in light of AT&T's retail prices." Pet'rs' Br. 36. *Federal Power Commission v. Conway Corp.*, which petitioners cite in support of this proposition, addressed only the jurisdiction of the Federal *Power* Commission to consider retail prices in its determination of whether wholesale prices were discriminatory – and, in reaching this conclusion, relied on specific provisions of the Federal Power Act. 426 U.S. 271, 277-79 (1976). In addition, that case made clear that the Commission lacked "power to remedy an alleged discriminatory or anticompetitive relationship between wholesale and retail rates by ordering the company to increase its retail rates." *Id.* at 276-77.

More generally, where regulation exists, "one must not leap from the premise of price regulation to the conclusion that the government is the effective price maker. Often the regulatory regime simply 'rubber stamps' the regulated firm's rate requests or inadequately supervises the rate determination process in other ways." IIIB Areeda & Hovenkamp, *supra*, ¶ 786, at 351 (footnote omitted). For instance, the measures of cost used by regulators "may give the public utility defendant too much leeway." *Id.*; s*ee City of Anaheim*, 955 F.2d at 1377 ("[B]ecause the regulatory systems do not work in perfect harmony, it is possibly for a utility to manipulate its filings and requests in a manner that causes a, at least temporary, squeeze which might be just as effective as one perpetrated by an unregulated actor."). These kinds of imperfections in the regulatory process can enable price squeezes to succeed in spite of regulation.

Indeed, a monopolist can use subtle means to increase its upstream prices without running afoul of regulators. For example, an ILEC can "account for costs so as to attribute some of them away from" the retail market and shift them towards the wholesale market. IIIB Areeda & Hovenkamp, *supra*, ¶ 787b, at 355. Doing so can artificially increase the ILEC's measure of "cost" for upstream rate-setting, thus facilitating one end of a price squeeze while simultaneously concealing the fact that downstream prices are artificially low.[8]

d. Price Squeeze Claims Can Be Especially Meritorious Where Price Regulation Is Largely Absent

Beyond the possibility that price regulation may be lax, it may be essentially absent. That is, in fact, the current state of affairs for DSL. At the time of the events at issue in this lawsuit, ILECs providing DSL-based Internet service were required to offer DSL transport, on a nondiscriminatory basis, to non-facilities-based ISPs seeking to provide DSL-based Internet service. The rates at which ILECs provided DSL transport were closely supervised pursuant to the FCC's tariffing regime. See Pet'rs' Br. 3-4. But that regulatory landscape has since changed dramatically. Specifically, in the wake of this Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), the FCC ruled that, subject to a one-year transition period, "all wireline broadband Internet access service providers are no

[8] In addition, even where an upstream monopolist is required to use a separate subsidiary to provide the downstream product, nondiscrimination requirements may pose little impediment to a price squeeze. To be sure, high upstream prices, coupled with low downstream ones, may mean that the subsidiary will not itself turn a profit. But the subsidiary's bottom line will be deceiving, because per-unit losses attributable to high upstream prices will, by definition, be offset by gains to the upstream parent. Thus, prohibitions on price discrimination may not prevent a price squeeze from occurring.

longer subject to the . . . requirement to separate out the underlying transmission from wireline broadband Internet access service and offer it on a common carrier basis." Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14,853, ¶ 41 (2005) ("*2005 Broadband Order*"), *petition for review denied*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007). Instead, wireline broadband Internet access service providers may "choose to offer the transmission component of wireline broadband Internet access services to both affiliated and unaffiliated ISPs or others on a non-common carrier basis or a common carrier basis." *Id.* ¶ 86. And, "to the extent they choose to offer that transmission as common carriage, they may do so either under tariff or on a non-tariffed basis." *Id.* ¶ 94. While minimal regulation does remain, it does not impose an obligation to sell DSL transport to ISPs, nor does it place significant restrictions on the price that can be charged for such service.[9] *See, e.g.*, *id.* ¶ 6.

In the absence of substantial regulation even at the upstream level, there simply is no basis on which

[9] Although AT&T itself, as a condition of a recent merger, is currently obligated to offer DSL transport at a price no higher than the rate it charges for retail DSL-based Internet service, *see* Pet'rs' Br. 4-5 n.4, that obligation does not extend to the industry as a whole – and, moreover, is itself a "voluntary commitment[]" offered by AT&T and its partner in the merger. *See* Memorandum Opinion and Order, *AT&T Inc. & BellSouth Corp. Application for Transfer of Control*, 22 FCC Rcd 5662, 5807, 5814, *on partial reconsideration on other grounds*, 22 FCC Rcd 6285 (2007).

to conclude that suits by private plaintiffs under § 2 are unnecessary or superfluous. Not only will a monopolist face no impediment to charging high upstream prices in the course of executing a price squeeze, but it also will face no impediment to charging high downstream prices after forcing out competition.[10] The lack of regulation thus counsels strongly against the abolition of price squeeze claims. Moreover, as the DSL example demonstrates, a regulated industry may not remain so – a fact that may spur even a regulated monopolist to undertake a price squeeze in anticipation of future deregulation.

Thus, there are strong arguments in support of the viability of an independent price squeeze claim under § 2, which are not advanced (much less fully briefed on a developed record) by any party to this case. This provides a further reason for this Court not to address the merits of the question presented.

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[10] As with the FCC's longstanding practice of not regulating retail prices of DSL-based Internet access, it cannot be argued that the lack of current upstream regulation represents an exercise of regulatory authority with which the antitrust laws should not interfere. *See* Amicus Br. of Verizon Commc'ns 30-31. That is because the FCC's 2005 order rested principally on its determination that facilities-based wireline broadband Internet access service is not (and does not include) a "telecommunications service," and thus is outside the FCC's Title II jurisdiction. *2005 Broadband Order* ¶¶ 5, 12-17, 102-107. Moreover, aside from rare instances where a carrier *chooses* to offer DSL transport as a "telecommunications service" on a common-carrier basis, *see id.* ¶¶ 86, 89-90, any upstream regulatory authority that the FCC continues to assert is grounded only in the FCC's so-called Title I "ancillary jurisdiction," *see id.* ¶¶ 108-110 – a concept whose breadth is not entirely settled.

B. NEITHER *TRINKO* NOR *BROOKE GROUP* WOULD CONTROL THE RESOLUTION OF THE QUESTION PRESENTED

To bolster their sweeping attack on all price squeeze claims, petitioners and their amici rely heavily on two of this Court's decisions: *Trinko* and *Brooke Group*. Specifically, they contend that *Trinko* eliminates the possibility of an independent price squeeze cause of action. And, having reached that conclusion, they maintain that victims of a price squeeze should simply have their claims tested against the predatory pricing standards articulated by *Brooke Group*. *See, e.g.*, Gov't Br. 15-18; *see also* Pet'rs' Br. 28 & n.17. Respondents now agree with these contentions – but this Court should not embrace them, for the arguments to the contrary are strong indeed.

1. Trinko *Does Not Compel A Ruling For Petitioners*

Petitioners assert that a result in their favor follows ineluctably from this Court's decision in *Trinko*. Likewise, respondents believe that *Trinko* forecloses price squeeze claims under § 2 that do not satisfy the *Brooke Group* standards. Resp. Br. 13. Both petitioners and respondents are mistaken. *Trinko* does not say anything about the viability of price squeeze claims, and it certainly does not say anything about the viability of the price squeeze claim in *this* case.

In *Trinko*, this Court considered whether an incumbent local exchange carrier (ILEC) had violated § 2 of the Sherman Act by "den[ying] interconnection services to rivals" seeking to compete in the local telephone market, where the 1996 Telecommunications Act had required the ILEC to provide rivals with those services. *Trinko*, 540 U.S. at 407. Interpreting this allegation as a claim of "refusal to deal," the Court first reaffirmed that such a claim generally is not viable under § 2. *See id.* at 408-09. It then reasoned that the particular refusal-to-deal claim before it did not pass muster. *See, e.g.*, *id.* at 410 ("We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents.").

Trinko thus limited itself to the viability of a claim of refusal to deal. It plainly did not address the viability of a price squeeze claim – nor could it have done so, because the respondent pressed no such claim. *See Covad Commc'ns Co. v. BellSouth Corp.*, 374 F.3d 1044, 1050 (11th Cir. 2004) (noting that "[t]he plaintiffs' amended complaint in *Trinko* did not state any price squeezing claims"); *compare* Pet'rs' Br. 17 (maintaining that "[t]he factual allegations of respondents' complaint and the complaint in *Trinko* are indistinguishable"). And a reluctance to recognize refusal-to-deal claims certainly does not imply a corresponding reluctance to recognize price squeeze claims. In fact, this Court cited nearly century-old precedent in support of its conclusion that there is generally no duty to deal, creating a glaring contrast with the fact that, as discussed above, courts have long considered price squeeze claims viable under § 2. *See Trinko*, 540

U.S. at 408 (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). If price squeeze claims truly were inconsistent with "the long recognized right of [a] trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal," *id.* (quoting *Colgate*, 250 U.S. at 307) (first alteration in original), courts would have long since rejected *Alcoa*.

Nonetheless, petitioners vigorously argue that the absence of a duty to deal with rivals implies the absence of a duty not to effect a price squeeze. Pet'rs' Br. 15-16. Yet that reasoning reflects a misreading of *Trinko*. In *Trinko*, this Court treated Verizon's "deni[al of] interconnection services to rivals" as a "refusal to deal," arguably implying that without an antitrust duty to deal with its rivals in the first place, a firm generally can deal with them on whatever terms it wishes. *See* 540 U.S. at 407-09. In arguing that price squeezes therefore are permissible under *Trinko*, petitioners essentially contend that a price squeeze claim – like the claim at issue in *Trinko* – rests on an asserted duty to deal with rivals on particular terms. That is incorrect. The nub of a price squeeze claim is not just that the monopolist has charged high upstream prices to its rivals, but that it has made it impossible for rivals to compete by choosing a particular combination of upstream *and downstream* prices, the latter charged not to downstream *rivals* but to downstream *customers*. A price squeeze thus is not a species of refusal to deal with rivals on particular terms and, accordingly, does not fall within *Trinko*'s scope.[11]

Further, petitioners' argument ultimately rests on the notion that the greater must include the lesser. Setting aside the fact that a price squeeze simply is not "lesser" than a refusal to deal with rivals (as set forth above), we note that this Court has not hesitated to reject "greater includes the lesser" arguments in the past. *See, e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510-11 (1996); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836-37 (1987); *see also* Richard A. Givens, *Antitrust: An Economic Approach*, § 13.01, at 13-7 (2008) ("The concept that the greater includes the lesser . . . does not necessarily follow in antitrust law, any more than similar arguments are always accepted in the constitutional field." (footnote omitted)).[12]

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[11] Moreover, in light of the FCC's 2005 order, it is clear that, as a general matter, ILECs currently selling DSL transport to non-facilities-based ISPs are dealing with them voluntarily. *But cf.* note 9 supra. And, as *Trinko* made clear, a course of prior voluntary dealing is a reason for permitting some refusal-to-deal claims. 540 U.S. at 409. To the extent that *Trinko*'s "no duty to deal" reasoning provides a basis for rejecting some price squeeze claims (which it does not), that reasoning has no application to price squeeze claims arising out of conduct taking place after the 2005 order became effective.

[12] As to this particular case, moreover, *Trinko* would be distinguishable because of respondents' allegations that petitioners' upstream prices exceeded their downstream prices. In reaffirming that there generally is no antitrust duty to deal with competitors, *Trinko* noted that the ILEC in question had

2. A Successful Price Squeeze Claim Need Not Allege The Elements Of A Predatory Pricing Claim Under Brooke Group

In urging this Court to reject all independent price-squeeze claims, petitioners and their amici advocate a regime (as do respondents) under which, for victims of a price squeeze, *Brooke Group* is the only game in town. *See, e.g.*, Gov't Br. 15-18; Resp. Br. 13; *see also* Pet'rs' Br. 28 & n.17. This Court held in *Brooke Group* that a successful predatory pricing claim must allege (a) below-cost retail pricing; and (b) a "dangerous probability" that the defendant will recoup short-run losses by later charging supracompetitive prices. 509 U.S. at 224. As respondents amply explain, a price squeeze claim that satisfies these standards surely should survive. But contrary to petitioners' contentions, it would be inappropriate to *require* a price-squeeze victim to allege (or prove) the elements set forth by *Brooke Group*.

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refused to deal with competitors "at the cost-based rate of compensation available under [the 1996 Telecommunications Act]." 540 U.S. at 409. It thus distinguished *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), an earlier case finding a duty to deal, on the ground that the *Aspen Skiing* defendant had "revealed a distinctly anticompetitive bent" by refusing to sell to a competitor "*even if compensated at retail price*." *Trinko*, 540 U.S. at 409 (emphasis in original); *see id.* (noting that these facts "suggest[ed] a calculation that its future monopoly retail price would be higher"). *Id.* In this case, petitioners' upstream prices in excess of their downstream prices necessarily imply a refusal – as in *Aspen Skiing*, and in contrast with *Trinko* – to deal with respondents at retail price.

First, it would make little sense to require a price-squeeze victim to allege that the defendant priced its retail products below cost. In imposing that requirement on a predatory-pricing plaintiff, *Brooke Group* stressed that "[l]ow prices benefit consumers regardless of how those prices are set." *Id.* at 223 (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990)). Yet a price squeeze consists not only of low downstream pricing, but also of high upstream pricing – and the latter simply cannot be said to benefit consumers or otherwise promote competition. Indeed, as explained above, one danger of a price squeeze is that it can enable an upstream monopolist to circumvent *Brooke Group* by stopping short of below-cost downstream pricing, and increasing its upstream pricing instead. In short, requiring a price squeeze victim to allege below-cost pricing would improperly ignore the other side of the price squeeze vise.

Second, it would make equally little sense to require a price squeeze victim to show a dangerous probability of recoupment. *Brooke Group* imposed this requirement because "[w]ithout [recoupment], predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced," 509 U.S. at 224; *see id.* (explaining that "unsuccessful predation is in general a boon to consumers"). But a price squeeze, unlike a predatory pricing scheme, does not necessarily "produce[] lower aggregate prices in the market" in the short term. *Id.* That is because the upstream side of a price squeeze consists of *increased* prices (and potentially reduced output). Indeed, while a predatory pricing scheme necessarily requires the perpetrator to sacrifice short-term profits – with no guarantee of offsetting returns in the long run – a price squeeze may entail no short-term sacrifice of profits at all, depending on the effect of increased upstream prices on upstream revenues. At a minimum, as explained above, a price squeeze is likely to place less at risk for the upstream monopolist than is an ordinary predatory pricing scheme. It therefore would be improper to require a price squeeze victim to make the *Brooke Group* showing of a dangerous probability of recoupment.

* * *

None of this is to suggest that this case is a proper vehicle for this Court to affirm the validity of price squeeze claims under § 2 of the Sherman Act, or otherwise to issue any ruling on the question presented. Rather, it is only to show that there are strong arguments in support of the Ninth Circuit's decision – arguments that could be fully aired only if respondents, not just an amicus curiae, sought to defend that decision. But respondents now concede that decision was wrong, and they will not proceed with an independent price squeeze claim regardless of the answer to the question presented. As a result of that concession, no party with a concrete stake in this case stands ready to defend the validity of independent price squeeze claims under § 2. As to the important point of antitrust law on which this Court granted certiorari, this case is now moot, and resolution of the question presented should therefore be left for another day.

CONCLUSION

This Court should not reach the merits of the question presented.

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