No. 18-2852

In the United States Court of Appeals for the Seventh Circuit

VIAMEDIA, INC., PLAINTIFF-APPELLANT

v.

COMCAST CORPORATION AND COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC, DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIV., NO. 1:16-CV-05486, HON. AMY J. ST. EVE

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2852

Short Caption: Viamedia, Inc. v. Comcast Corp., et al.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Winston & Strawn LLP

(3) If the party or amicus is a corporation:

(i) Identify all its parent corporations, if any; and

None. The Chamber of Commerce of the United States of America has no parent corporations.

(ii) List any publicly held company that own 10% or more of the party's or amicus' stock:

None. No publicly held company has any ownership interest in the Chamber of Commerce of the United States of America.

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*[1]

Amicus the Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. One important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

This is such a case because the Court's decision could have a substantial practical impact on businesses' ability to refuse to deal with other businesses. Under the U.S. antitrust laws, firms should be free to refuse to deal with other firms wherever that approach is supported by a rational, procompetitive purpose. Any other result would deprive busi-

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No one other than the *amicus*, its members, and its counsel made a contribution intended to fund the preparation or submission of this brief.

nesses of the certainty needed to adapt and innovate in competitive markets, while subjecting them to costly antitrust discovery that threatens to deter procompetitive behavior—all to the detriment of consumers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Viamedia asserts claims under Section 2 of the Sherman Act for monopolization in markets for the spot cable television advertising business. To support the anticompetitive conduct element of these claims, Viamedia—an advertising representative that cable service providers hire to help them sell spot cable ads—alleges that Comcast, a cable service provider, engaged in exclusionary conduct including an unlawful refusal to deal. According to Viamedia, Comcast used its control over certain "interconnects"—central marketplaces in which all spot cable advertising time in a given region is sold—to exclude Viamedia from accessing the interconnect infrastructure, and from participating in ad sales in certain regions. Among other theories, Viamedia says that Comcast, as manager of certain regions' interconnects, unilaterally ended Viamedia's access to these interconnects so it could take over as advertising representative. Viamedia claims that this conduct constitutes an unlawful refusal to deal.

The district court properly rejected that view, holding that a plaintiff alleging an unlawful refusal to deal must show that the defendant's actions serve no rational procompetitive purpose. In dismissing Viamedia's claim pursuant to Rule 12(b)(6), the court properly held that, as alleged, Comcast's conduct replaced a middleman with a direct relationship—a prototypical valid business purpose that promotes efficiency. This Court should affirm.

I. As the Supreme Court, this Court, and other federal circuits have recognized, businesses generally have broad freedom to choose whether to deal with other businesses. A "limited exception" to this general rule allows claims challenging refusals to deal, but that exception sits "at or near the outer boundary" of Sherman Act liability. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 409 (2004). This "narrowly written" exception has been applied only to "unusual facts." *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986). Specifically, plaintiffs may pursue a refusal-to-deal theory only where the defendant's actions serve no rational procompetitive purpose—a position endorsed by the Tenth and Eleventh Circuits, the U.S. Government, and leading antitrust scholars.

As these authorities have recognized, forcing a business to deal with competitors clashes with "the underlying purpose of antitrust law." *Trinko*, 540 U.S. at 407-08. "Compelling" businesses like Comcast that control an infrastructure such as an interconnect "to share the source of their advantage . . . may lessen the incentive for the monopolist, the rival, or both to invest in . . . economically beneficial facilities." *Id.* Such "[e]nforced 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." *Id.* at 408.

Here, it would be counter-productive for a court to impose terms of dealing because the result of Comcast's refusal to deal is that "Comcast may be able to offer [cable service providers] a better price than Viamedia" (Viamedia Br. 35)—a better result for consumers. Even if unique cases call for regulated sharing between competitors, legislatures—not courts—are generally far better situated to enact tailored solutions that "make[] it unnecessary to impose a judicial doctrine of forced access." *Trinko*, 540 U.S. at 411.

Such a rule not only limits Section 2 claims to their proper scope, but saves businesses from the costs and burdens of lengthy antitrust discovery when they validly choose not to deal with competitors. That in turn gives businesses the certainty and predictability needed to adapt and innovate in the marketplace. As *Trinko* explained, "the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm" compels courts to be "very cautious in recognizing . . . exceptions" to the rule that businesses are generally free to refuse to deal with other businesses. 540 U.S. at 408. Viamedia only confirms that point by proposing a vague and malleable standard that would replace certainty and predictability with costly discovery and unpredictable litigation results.

II. To further ensure that courts avoid drawing any inaccurate inferences about a monopolist's legitimate business conduct, thus chilling procompetitive behavior, the Court should use the *Matsushita* standard to evaluate Viamedia's other claims that reached the summary judgment stage. Under that standard, an antitrust plaintiff must present evidence that "tends to exclude the possibility" that the defendant's conduct was as consistent with competition as with illegal conduct. *Matsushita Elec.*

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986). The same concern that motivated the result in *Matsushita*—the need for a standard to ensure that courts would not deter procompetitive behavior—is present here. In *Matsushita*, the plaintiffs complained about parallel low prices by competitors—conduct that was potentially procompetitive and beneficial to consumers. A business's unilateral refusal to deal, such as Comcast's conduct here, may be similarly procompetitive. Thus, this Court should employ a standard that accounts for the risks of false positives and gives business confidence that the courts will not be overly hasty to infer anticompetitive conduct from legitimate behavior.

ARGUMENT

I. A plaintiff should not be permitted to advance a refusal-to-deal claim past the pleading stage where its own allegations reveal that the defendant's conduct has a rational procompetitive purpose.

The Supreme Court has long held that businesses generally have broad freedom not to deal with competitors, and has limited their potential antitrust liability for refusing to do so to a narrow sliver of conduct "at or near the outer boundary" of Section 2 liability. *Trinko*, 540 U.S. at 409. Moreover, this Court has faithfully applied the Supreme Court's instructions in recognizing this "narrowly written" exception. *Olympia Equip.*, 797 F.2d at 379.

Viamedia and its *amici* nonetheless seek to shoehorn Viamedia's refusal-to-deal allegations into precedents where they do not fit. Rather than articulate any concrete test, Viamedia sets forth a murky and unsupportable standard: that a defendant "can violate § 2 when the monopolist's refusal to deal has seriously hampered competition and when the concerns militating against imposition of a duty to deal are absent or significantly attenuated." Viamedia Br. 26.

Viamedia and its *amici* are wrong. A plaintiff should not be permitted to proceed past the pleading stage on a refusal-to-deal claim where, as here, its own allegations reveal the defendant's rational procompetitive justification for its conduct. As discussed below, given businesses' need for certainty in running their enterprises and the high costs of antitrust discovery, the Court should affirm the district court's holding that "plaintiffs seeking to establish an unlawful refusal to deal must show that the defendant's actions serve no rational procompetitive purpose." Mem. Op. & Order, Feb. 22, 2017, at 9 ("MTD Op. II").

A. A business's unilateral refusal to deal with another business may constitute a basis for antitrust liability only in exceedingly narrow circumstances.

1. In numerous decisions spanning a century, the Supreme Court has established a strong baseline rule that the Sherman "[A]ct does not restrict the long recognized right of 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). As the Court recently explained, the general rule of the antitrust law is that "businesses are free to choose" whether to deal with other businesses. *Pac. Bell. Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 448 (2009).

Businesses with monopoly power are generally no different. As this Court has recognized, "it is clear that a firm with lawful monopoly power has no general duty to help its competitors" (*Olympia Equip.*, 797 F.2d at 375), and "the *Colgate* right has received consistent support from the Supreme Court even for large firms." *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000); *see also id.* at 398 ("[E]ven a firm with significant market power has no duty to deal with certain suppliers or dis-

tributors."). Indeed, the antitrust law is principally concerned with preventing improper agreements among competitors, so in most cases "[c]ooperation is a *problem* in antitrust, not one of its obligations." *Schor v. Abbott Labs.*, 457 F.3d 608, 610 (7th Cir. 2006).

It is thus well settled that "antitrust law does not require monopolists to cooperate with rivals by selling them products that would help the rivals to compete." *Id.* And for good reason. "Forcing a firm to share its monopoly is inconsistent with antitrust['s] basic goals . . . [because] consumers are no better off when a monopoly is shared; ordinarily price and output are the same as they were . . . [and] the right to share a monopoly discourages firms from developing their own alternative inputs." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 771b (3d and 4th ed. 2018, online version) (Areeda & Hovenkamp).

2. Against this backdrop, a business's unilateral refusal to deal with a competitor may serve as a basis for Sherman Act liability only in extremely limited circumstances. The Supreme Court "ha[s] been very cautious in recognizing such exceptions" to businesses' general freedom to refuse to deal with other businesses, "because of the uncertain virtue

of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." *Trinko*, 540 U.S. at 408 (endorsing a narrow doctrine where "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2"). As then-Judge Gorsuch once put it, "the general rule is firm independence and refusal to deal doctrine exists only to address one of the most obvious exceptions to that general rule." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1076 (10th Cir. 2013).

That doctrine traces to *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, which carved out the narrow refusal-to-deal exception. 472 U.S. 585 (1985). The defendant there—which owned three of the four ski resorts in Aspen, Colorado—cooperated for years with the plaintiff, which owned the fourth, to sell a joint ski ticket that allowed skiers to access all four mountains. *Id.* at 593-94. The defendant ultimately canceled the joint ticket, however, refusing to sell tickets to the plaintiff—even when the plaintiff offered to pay retail price. *Id.* Under these unique circumstances, the Court held that a refusal-to-deal theory may be viable.

The Supreme Court in *Trinko* clarified the significant and distinguishing features of *Aspen Skiing*: The "unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end," and "the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent." *Trinko*, 540 U.S at 409. Indeed, the Supreme Court—with the support of other courts and leading antitrust scholars—has cabined the doctrine of antitrust liability for a unilateral refusal to deal to *Aspen Skiing*'s facts, explaining that the particular (and rare) fact pattern of that decision represents the "limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability." *Linkline*, 555 U.S. at 448. As the Court put it in *Trinko*, the "limited exception" to a business's freedom to deal recognized in *Aspen Skiing* lies "at or near the outer boundary of § 2 liability" (540 U.S. at 409)—and the Court has steadfastly declined to extend refusal-to-deal liability to other fact patterns. *See id.*; *Linkline*, 555 U.S. at 448. In short, the refusal-to-deal doctrine is a "narrow-eyed needle" of Section 2 liability. *Novell*, 731 F.3d at 1074.

3. Leading antitrust scholars agree. As Professor Areeda once observed, "[t]here is no general duty to share. Compulsory access, if it exists at all, is and should be very exceptional." Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 852 (1990); *accord* Areeda & Hovenkamp ¶ 770e ("[U]sing § 2 against arbitrary refusals to deal . . . has a superficial appeal . . . [y]et we are largely unpersuaded that § 2 should be applied here."). The Supreme Court's decision in *Aspen Skiing* was "the last gasp of the old school of antitrust," which "demand[ed] that holders of market power cooperate with rivals"—an approach that "bit the dust in *Verizon v. Trinko*." Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 Harv. J. L. & Pub. Pol'y 439, 441-42 (2008).

B. Refusals to deal are often procompetitive.

The foregoing authorities are unified in endorsing such a narrow refusal-to-deal doctrine for reasons illustrated by this case. Forcing a business to deal with another would deter investment and innovation. As the Supreme Court stated in *Trinko*, "[f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers." 540 U.S. at 407.

Here, Comcast controls interconnects—the technical and business infrastructure used to sell spot cable ads—in certain regions, so Comcast is well-positioned to provide efficient ad representation services in those regions. But "the right to share a monopoly discourages firms from developing their own alternative inputs." Areeda & Hovenkamp ¶ 771b. Specifically, "[c]ompelling such firms" like Comcast that are uniquely situated by controlling an infrastructure "to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Trinko*, at 407-08.

In addition, Comcast's alleged refusal to deal was actually vertical integration, which "usually is procompetitive." *Jack Walter & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 710 (7th Cir. 1984); *see also, e.g.*, Areeda & Hovenkamp ¶ 1000. Comcast ended its relationship as interconnect manager with Viamedia to replace Viamedia as ad representative, thus replacing an intermediary with a direct relationship. As the district court explained, "[t]his type of vertical integration or elimination of a middleman" is a "prototypical valid business purpose." MTD Op. II at 10. And Viamedia's own complaint concedes that efficiencies may be

"realized by consolidating management of an Interconnect with Comcast's provision of Spot Cable Advertising Representation services." Am. Compl. ¶ 166, Doc. 30-1 at 89, A 84.

The Supreme Court has further explained that "[e]nforced 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." *Trinko*, 540 U.S. at 408. Indeed, the "main problem" with imposing liability for refusals to deal is "that forcing a dominant firm to share an input with a rival does not benefit consumers unless a court is also willing to regulate the price at which sharing occurs." Erik N. Hovenkamp & Herbert Hovenkamp, *The Viability of Antitrust Price Squeeze Claims*, 51 Arizona L. Rev. 273, 277 (2009). Here, it would be especially inefficient for a court to try to identify and impose the proper terms of dealing, as the result of Comcast's refusal to deal is already better for consumers. Viamedia admits that "Comcast may be able to offer [cable service providers] a better price than Viamedia." Viamedia Br. 35.

C. A claim of antitrust liability based on a unilateral refusal to deal should be dismissed where the defendant's alleged conduct has a rational procompetitive purpose.

Consistent with the narrow confines of refusal-to-deal doctrine under Supreme Court and Circuit precedent, the district court set out the proper test for refusal-to-deal liability. As the court recognized, the narrow exception to the general rule barring antitrust liability for unilateral refusals to deal is available only when a defendant's conduct is "irrational but for its anticompetitive effect." Mem. Op. & Order, Nov. 4, 2016 at 37 ("MTD Op."); MTD Op. II at 8. "Accordingly, plaintiffs seeking to establish an unlawful refusal to deal must show that the defendant's actions serve no rational procompetitive purpose." *Id.* at 9.

The district court's test is correct. In fact, the seed for that test comes straight from *Aspen Skiing* itself—which called it "[p]erhaps most significant" that, on "the evidence relating to Ski Co. itself," the company "did not persuade the jury that its conduct was justified by any normal business purpose." 472 U.S. at 608. As Professors Areeda and Hovenkamp have explained, it is "fundamental" that "*Aspen* leaves monopolists free to refuse to deal or cooperate with rivals for legitimate business reasons." Areeda & Hovenkamp ¶ 772c2. And Professor Areeda has

further elaborated that "denial of access is never per se unlawful; legitimate business purpose always saves the defendant." Areeda, *supra*, 58 Antitrust L. J. at 852.

Not surprisingly, the federal courts of appeals have routinely rejected antitrust claims based on a refusal-to-deal theory where it is evident that the defendant has a legitimate business justification for its conduct.[2] The district court properly followed the Tenth Circuit's well-reasoned decision in *Novell*, which analyzed the refusal-to-deal precedents and articulated the same test: "Put simply, the monopolist's conduct must be irrational but for its anticompetitive effect." 731 F.3d at 1075.

The Government likewise articulates a proper test in asking this Court to "hold that a refusal to deal is not actionable under Section 2

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[2] *E.g.*, *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1295-96 (11th Cir. 2004) (rejecting refusal-to-deal claim because preventing other businesses from free riding on defendant's efforts was legitimate business purpose regardless of its past practices); *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1197 (10th Cir. 2009) (no antitrust liability where plaintiff did not allege that defendant's restrictive covenant was motivated by anything other than a legitimate profit motive); *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1481-82 (7th Cir. 1991) ("[T]he presence of a legitimate business justification reduces the likelihood that the conduct will produce undesirable effects on the competitive process.").

unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition." U.S. Amicus Br. (Doc. 33) 7. As the Government acknowledges, "[its] position permits refusals to deal that are supported by valid business justifications." *Id.* at 6. Whether the test is characterized as a "no economic sense" test (*id.*) or a "legitimate business justification" test is a matter of labels, not substance, as the "no economic sense" test "asks whether challenged conduct would have been expected to be profitable apart from any gains that conduct may produce through eliminating competition." Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L.J. 413, 414 (2006) (Werden). In other words, once a defendant's conduct makes economic sense or has a legitimate business purpose, there can be no refusal-to-deal liability.[3]

Citing various scholars, Viamedia's *amici* attempt to suggest that the district court's "restrictive" approach is "controversial." *Amicus* Br.

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[3] The Justice Department "has consistently advocated the no economic sense test." Werden, *supra*, 73 Antitrust L.J. at 413. And the Justice Department and the Federal Trade Commission endorsed the same test in their joint brief in *Trinko*. *See* Br. for the United States and the Federal Trade Comm'n as *Amici Curiae* Supporting Petitioner, 540 U.S. 398 (2004) (No. 02-682).

for American Antitrust Institute, et al. (AAI Br.) (Doc. 20) 9-10. But *amici*'s reliance on these scholars is misleading. In particular, Areeda and Hovenkamp criticize the "no economic sense" test as a one-size-fits-all approach for evaluating the many variations of single-firm conduct—such as tying or exclusive dealing—that might violate Section 2. When it comes specifically to the scope of liability under refusal-to-deal theory, however, Areeda and Hovenkamp side firmly with the district court's view that plaintiffs "must show that the defendant's actions serve no rational procompetitive purpose." MTD Op. II at 9. But rather than characterize the conduct needed to support liability as conduct having no "rational procompetitive purpose," they use the equivalent phrase "legitimate business purposes." Specifically, they interpret *Aspen Skiing* as "classif[ying] conduct or intention as either lawful or not on the basis of the presence or absence of legitimate business purposes." Areeda & Hovenkamp ¶ 772c2.

D. A test that requires that a defendant have no rational procompetitive purpose for its alleged refusal-to-deal conduct gives businesses needed certainty.

Affirming the district court's test—that a plaintiff may pursue a refusal-to-deal claim only where the defendant's actions serve no rational

procompetitive purpose—would serve the additional purpose of giving businesses valuable certainty. Such "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Businesses have a strong interest in complying with the law, not only because of the intrinsic value of doing so, but also because it is extremely costly—in both monetary and reputational terms—to violate it. To comply with the law, however, businesses must know what it is.

Certainty is especially important in the antitrust context, where the law is complex and poses a threat "to legitimate enterprise," the statutory text "does not go into detail[]," and the consequences for violating it are severe, due in part to treble damages and criminal penalties. *See Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933). The Supreme Court "ha[s] repeatedly emphasized the importance of clear rules in antitrust law." *Linkline*, 555 U.S. at 452. As Professor Melamed has observed, "selection of antitrust rules depends critically on their administrability," which includes "the ability of businesses to know what conduct is permitted and what is prohibited." *See* A. Douglas Melamed, *Exclusionary Conduct under the Antitrust Laws: Balancing, Sacrifice,*

and Refusals to Deal, 20 Berkeley Tech. L.J. 1247, 1252 (2005) (Melamed).

"Prospective defendants cannot be expected to know in real time, ex ante, whether their efficiency-generating conduct will cause disproportionate harm to their rivals or consumers because, in order to know that, the defendants would have to know more than they can be expected to know about consumer demand, their rivals' costs and prospects for innovation and for mitigation of harm, future entry conditions, and the like." *Id.* at 1254. In the antitrust context, therefore, courts "should adopt some simple presumptions that structure antitrust inquiry. Strong presumptions would guide businesses in planning their affairs by making it possible for counsel to state that some things do not create risks of liability." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 14 (1984) (Easterbrook, *Limits*). As the Tenth Circuit has explained, "a general rule gives a degree of predictability to judicial outcomes and permits reliance by all market participants, themselves good for both the competitive process and the goal of equal treatment under the law." *Novell*, 731 F.3d at 1073.

When, as in the refusal-to-deal context, "most examples of a category of conduct are competitive, the rules of litigation should be 'stacked'" so that "errors on the side of excusing questionable practices are preferable." Easterbrook, *Limits*, *supra*, 63 Tex. L. Rev. at 15. That way, such rules "do not ensnare many of these practices just to make sure that the few anticompetitive ones are caught." *Id.*

Viamedia's *amici* criticize the district court's refusal-to-deal test as "overly demanding" (AAI Br. 7), but they fail to offer any workable alternative. To be sure, they attempt to shoehorn Viamedia's conduct into the *Aspen Skiing* framework. But apart from the rare situation in which the facts parallel those of *Aspen Skiing*—which represents the outer bound of Section 2 liability—it is anyone's guess under that "framework" whether particular allegations might state a claim for refusal to deal. And given the settled precedent holding that refusal-to-deal liability is narrow (*supra* at 8-11), the district court's test provides a sensible solution that clearly delimits when a monopolist's refusal to deal is unlawful.

The district court's test facilitates resolution, when appropriate, at the pleadings stage. Viamedia's *amici* suggest that having a valid business justification is a factual issue that cannot be resolved on a motion to

dismiss. AAI Br. 12. By their lights, Viamedia has plausibly alleged an unlawful refusal to deal because it pleads that Comcast's refusal to deal has an "anticompetitive effect," and that Comcast sacrificed short-term profits and discriminated against Viamedia because it competed against Comcast. *Id.* at 13-14. Not so.

Viamedia's *amici* ignore the full circumstances alleged—including the rational procompetitive purpose for Comcast's conduct. The district court correctly considered the whole of that alleged conduct, properly dismissing Viamedia's claim because, "based on [Viamedia]'s allegations," it is evident that "Comcast has engaged in a business practice that has a rational procompetitive purpose: it has become 'a one-stop shop' in certain DMAs for MVPDs wishing to sell advertisements on a regional basis." MTD Op. II at 12. By ignoring Comcast's rational procompetitive purpose, Viamedia's *amici* neglect the principle that courts should not "credit a complaint's conclusory allegations without reference to its factual context" (*Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009)), and should consider the "more likely explanations" that a complaint's allegations "plausibly establish." *Id.* at 681; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (stating a claim "requires a complaint with enough

factual matter (taken as true) to suggest" that unlawful conduct occurred). An antitrust plaintiff should not be permitted to ask the court to rely on its pleading of certain facts to the exclusion of its other allegations acknowledging the defendant's rational business purpose.

If there were never any valid pleadings-stage resolution of refusal-to-deal claims—which, again, challenge conduct that is typically lawful—the uncertainty would reduce businesses' incentive and ability to innovate. "The monopolist might be deterred from investing, innovating, or expanding (or even entering the market in the first place) with the knowledge anything it creates it could be forced to share." *Novell*, 731 F.3d at 1073. And the monopolist's smaller competitors may see no need to innovate on their own—they could free-ride on their rival's ingenuity.

As Professors Areeda and Hovenkamp explain, "[f]orcing a firm to share its monopoly is inconsistent with antitrust['s] basic goals . . . [because] consumers are no better off . . . and [forced sharing] discourages firms from developing their own alternative inputs." Areeda & Hovenkamp ¶ 771b. Similarly, Professor Melamed explains that "if the determination over whether a defendant's conduct is anticompetitive depends in large part on the impact of the conduct on the defendant's rivals

and their customers, the incentive of the rivals to respond to suspected exclusionary conduct by aggressive and creative marketplace conduct of their own will be diminished." Melamed, *supra*, Berkeley Tech L.J. at 1254. Why? "[B]ecause effective marketplace responses might weaken the rivals' antitrust claims." *Id.* And of course, where there is a reduced incentive for "an efficient firm [to] capture unsatisfied customers from an inefficient rival," that works to the detriment of consumers and fails to "promote[] the consumer interests that the Sherman Act aims to foster." *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984).

To be sure, there may be contexts where some regulated sharing between competitors is appropriate. But such scenarios should typically be addressed by Congress, as opposed to the courts. As the Supreme Court observed in *Trinko*, for example, "[t]he 1996 [Telecommunications] Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access." 540 U.S. at 411. Other statutes illustrate the same principle. *E.g.*, Agricultural Fair Practices Act of 1968, 7 U.S.C. § 2303 (prohibiting food processors and others from refusing to deal with farmers who join or belong to agricultural associations).

Indeed, "[s]tate and federal legislatures have been demonstrably able and willing to pass regulatory statutes in situations deemed important and at times to create administrative machinery to carry them out." Areeda & Hovenkamp ¶ 770e. Accordingly, relief for arbitrary refusals to deal should be "left to the legislature." *Id.* This leaves courts "free to reject interpretations imposing upon them a role for which they are ill-suited or ill-equipped." *Id.*

E. The district court's test avoids voluminous and cost-prohibitive discovery for lawsuits challenging typical, lawful refusals to deal.

Viamedia and its *amici* call for an approach that invites invasive, expensive, years-long discovery. For example, Viamedia would require a court to decide a monopolist's refusal-to-deal claim by "demanding a procompetitive justification for the refusal and resolving the adequacy of that justification *as a matter of fact*." Viamedia Br. 27 (emphasis added). But it is unwarranted to skip past the motion-to-dismiss phase and jump into the ocean of antitrust discovery for this narrow doctrine—where a plaintiff must thread a "narrow-eyed needle" to have a claim—when, as here, the plaintiff's own allegations reveal a legitimate procompetitive justification for the defendant's conduct. *Novell*, 731 F.3d at 1074.

In *Twombly*, for example, the Supreme Court directed that "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" 550 U.S. at 558 (quoting 5 Wright & Miller, *Federal Practice & Procedure* § 1216, at 233–234). Once a case proceeds past a motion to dismiss to the discovery phase, it is too late. Indeed, *Twombly* expressly recognized "the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." 550 U.S. at 559; *see also* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638 (1989) ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves."). And "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" summary judgment or trial. *Twombly*, 550 U.S. at 559.

The courts' powerlessness to rein in discovery is magnified in antitrust cases. As this Court noted more than three decades ago, "the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when

there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984). Since then, costs and burdens of litigating already-expensive antitrust cases have skyrocketed, particularly with the advent of electronic discovery.

Indeed, it is this precise context—a narrow doctrine at the outer bounds of liability, with the potential for massive discovery that could influence a business's decision to settle a meritless claim—that calls out for the Court to enforce the "practical significance" of Rule 8's pleading requirement. *Twombly*, 550 U.S. at 557. And while Viamedia brought this lawsuit individually, a refusal-to-deal claim may be brought as a class action, further multiplying the burdens of discovery. *See*, *e.g.*, *Trinko*, 540 U.S. at 404 (involving a class action in which a class of local exchange companies and their customers sued Verizon, the local monopolist telephone company).

In sum, adopting the district court's sensible test would enable businesses to avoid the burdens of unjustified antitrust discovery while exercising their lawful freedom to choose those with whom to deal.

II. To prevent chilling procompetitive business conduct, the *Matsushita* standard should govern monopolization claims that reach the summary judgment stage.

In ruling on Viamedia's other monopolization claims such as tying, this Court should also reaffirm that the standard set forth in *Matsushita* governs monopolization claims at summary judgment where, as here, there is a potential to punish procompetitive behavior and "chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. According to Viamedia's *amici*, the district court applied an "overly restrictive standard" in granting summary judgment on Viamedia's remaining claims. AAI Br. 19. Specifically, they say the district court was wrong to evaluate the undisputed facts under the standard set out in the Supreme Court's landmark decision in *Matsushita*. As explained below, that view is foreclosed by this Court's repeated holdings and the antitrust principles set forth in *Matsushita*. *E.g.*, *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 856 (7th Cir. 2011); *Ind. Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1412-13 (7th Cir. 1989); *see also Matsushita*, 475 U.S. at 588.

To survive summary judgment under the *Matsushita* standard, an antitrust plaintiff must present evidence "that tends to exclude the possibility" that the defendant's conduct was as consistent with competition as with illegal conduct. *Matsushita*, 475 U.S. at 588; *see also Mercatus*, 641 F.3d at 856 (applying *Matsushita* standard to affirm summary judgment for defendant on monopolization claim). Claiming that this standard only operates in conspiracy cases, Viamedia's *amici*—without offering any alternative standard—request that the Court reject the *Matsushita* standard here. That position should be rejected.

The Court in *Matsushita* was concerned about the risk that courts would inappropriately infer anticompetitive conduct from legitimate behavior. The plaintiffs there complained of conduct that was potentially procompetitive and beneficial to consumers. Specifically, the plaintiffs claimed that the defendants "conspired over a period of many years to charge below-market prices in order to stifle competition." *Matsushita*, 475 U.S. at 590. They maintained that defendants planned to "restrict[] output and rais[e] prices above the level that fair competition would produce" after driving their competitors out of business. *Id.* at 584. But this never happened. Instead, plaintiffs could show only that the defendants

were "still artificially depressing the market price" (*id.* at 591)—conduct that was actually procompetitive, since lower prices benefit consumers and "cutting prices in order to increase business often is the very essence of competition." *Id.* at 594.

As the Court explained, "mistaken inferences" about a defendant's legitimate conduct "are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* The Court thus recognized that it was vital to have a summary judgment standard that would not discourage such procompetitive conduct. Accordingly, it held that, for the plaintiff to survive summary judgment, there must be evidence that "tends to exclude the possibility" that the defendants' conduct is as consistent with competition as with anticompetitive behavior. *Id.* at 588.

Here, Comcast's refusal to deal with another business, like the parallel low pricing behavior in *Matsushita*, is potentially procompetitive conduct that benefits consumers. As noted, Comcast eliminated a middleman and became a one-stop-shop in certain regions for cable service providers wishing to sell regional ads. And since the rationale for the *Matsushita* standard is likewise present here, the standard should apply.

Indeed, *Matsushita*'s precursor, *Monsanto Co. v. Spray-Rite Service Corp.* —the case from which *Matsushita* took the "tends to exclude the possibility" language and applied it to summary judgment—expressed the same concern in the refusal to deal context. 465 U.S. 752 (1984). In *Monsanto*, a supplier terminated its relationship with a distributor. *Id.* at 757. Recognizing that a business's unilateral refusal to deal is lawful, the Court was careful not to infer that several businesses had entered into an agreement to refuse to deal—which is evaluated much differently than a single business's refusal to deal—without sufficient evidence. *Id.* at 763. Why? Because the Court did not want to "deter or penalize perfectly legitimate conduct"—a unilateral refusal to deal. *Id.* The same rationale applies with full force here, where Comcast's unilateral refusal to deal with Viamedia created procompetitive vertical integration.

This Court too has repeatedly emphasized the Court's "warning" in *Matsushita* "about the possible anticompetitive consequences of allowing a jury to infer monopolization from behavior that in most cases is competitive" (*Olympia Equip.*, 797 F.2d at 378)—and for that reason has applied the *Matsushita* standard in other monopolization cases. In *Merca-*

tus Group, for example, this Court reasoned that "[b]ecause of the potential chill that antitrust litigation can have on legitimate pro-competitive practices . . . [defendant] was obliged, in opposing the [plaintiff's] motion for summary judgment, to present evidence that tends to exclude the possibility that the [plaintiff's] conduct was as consistent with competition as with illegal conduct." 641 F.3d at 856. Applying this standard, it found that a hospital's efforts to convince physicians not to move to a competitor was an "example of the very type of competition the antitrust laws were designed to protect." *Id.* at 856-57. And in *Nelson v. Monroe Regional Medical Center*, the Court rejected an antitrust claim based on a health care provider's denial of treatment to certain patients because "plaintiffs failed to present to the district court any evidence that the conduct alleged was anything but consistent with a competitive market." 925 F.2d 1555, 1578 (7th Cir. 1991).

This case thus warrants a summary judgment standard that reflects the realities that businesses face in this context. Businesses that have market power should be allowed to have confidence that the courts will not be overly quick to infer anticompetitive conduct from their legitimate behavior. *See Trinko*, 540 U.S. at 407 (the rewards of monopoly

create incentives to invest and "induce[] risk taking that produced innovation and economic growth").

CONCLUSION

Far from properly delineating the scope of antitrust liability for unilateral refusals to deal, Viamedia's vague theory of refusal-to-deal liability would expand a purposefully limited doctrine in a manner that makes businesses, and ultimately consumers, worse off. The Chamber urges this Court to affirm the district court's decisions dismissing Viamedia's refusal-to-deal claim, and to hold that plaintiffs seeking to establish an unlawful refusal to deal under Section 2 of the Sherman Act must show that the defendant's actions serve no rational procompetitive purpose.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I, Steffen N. Johnson, certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit R. 32(c), as it contains 6,441 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that his brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as qualified by Circuit Rule 32(b), as it has been prepared in a 14-point, proportionally spaced typeface, Century Schoolbook, by using Microsoft Word 2016, with footnotes in 14-point type.

Dated: December 17, 2018

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CERTIFICATE OF SERVICE

I, Steffen N. Johnson, certify that on December 17, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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