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' PETITION FOR RE-HEARING AND SUGGESTION FOR REHEARING EN BANC

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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:

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(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.

Attorney's Signature: /s/ Steffen N. Johnson Date: 03/30/2018

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus the Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 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 its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases of concern to the nation's business community.

This is such a case, as the panel's decision could have a major impact on businesses' ability to choose the parties with whom they deal. Under U.S. antitrust law, firms should be free to refuse to deal with others whenever doing so is supported by a rational, procompetitive purpose.

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[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, or its counsel made a contribution intended to fund the brief's preparation or submission.

STATEMENT PURSUANT TO RULE 35(B)(1)

This case presents an exceptionally important question—whether a refusal to deal supported by a procompetitive business justification is subject to challenge under Section 2 of the Sherman Act. The panel's resolution of that question conflicts with decisions of both the Supreme Court and the Ninth, Tenth, and Eleventh Circuits. Further, it threatens to deprive businesses of the certainty needed to adapt in competitive markets, while subjecting them to costly discovery that deters innovation and procompetitive behavior—all to the detriment of consumers.

ARGUMENT

I. En banc review is needed to confirm that refusal-to-deal claims may not survive the pleading stage where the complaint itself reveals that the defendant's conduct serves a rational procompetitive purpose.

Under Supreme Court precedent, businesses have broad freedom not to deal with competitors, and antitrust liability for refusing to do so is limited to a sliver of conduct "at or near the outer boundary" of Section 2. *Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004). Yet the panel held that "[v]alid business justifications are relevant only to the rebuttal of a prima facie case of monopolization," and that "balancing anticompetitive effects against hypothesized

justifications depends on evidence and is not amenable to resolution on the pleadings." Op. 55–56. That ruling conflicts with the refusal-to-deal decisions of the Supreme Court and three other circuits.

A. Under Supreme Court precedent, a firm's unilateral refusal to deal with another firm supports antitrust liability only in exceedingly narrow circumstances.

The right to choose those with whom one will deal is an essential aspect of American freedom. Supreme Court decisions spanning a century confirm that U.S. law generally "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); *accord Pac. Bell Tel. Co. v. linkLine Commc'ns*, 555 U.S. 438, 448 (2009).

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." *Schor v. Abbott Labs.*, 457 F.3d 608, 610 (7th Cir. 2006). And for good reason. "Forcing a firm to share its monopoly is inconsistent with antitrust['s] basic goals," as "consumers are no better off," "ordinarily price and output are the same," and doing so "discourages firms from developing their own alternative inputs." Phillip E. Areeda &

Herbert Hovenkamp, ANTITRUST LAW ¶ 771b (4th ed. 2018) (Areeda & Hovenkamp). Thus, citing "the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm," the Supreme Court "ha[s] been very cautious in recognizing [any] exceptions" to businesses' fundamental freedom to refuse to deal with others. *Trinko*, 540 U.S. at 408.

The panel invoked *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), but stretched it beyond the breaking point. There, the defendant had "no valid business reasons" for its conduct; refusing to deal made economic sense *only* as a means of "harming its smaller competitor" and "reducing competition." *Id.* at 605, 608. Only because the defendant "fail[ed] to offer any efficiency justification whatever for its pattern of conduct" was refusal-to-deal liability viable. *Id.* at 608. As later decisions confirm, only in those "limited circumstances" can "a firm's unilateral refusal to deal with its rivals … give rise to antitrust liability." *linkLine*, 555 U.S. at 448; *accord Trinko*, 540 U.S. at 409.

The Government and leading scholars agree. The Government here states "that a refusal to deal is not actionable under Section 2 unless it would make no economic sense for the defendant but for its tendency to

eliminate or lessen competition." U.S. Amicus Br. 7. Likewise, Professor Areeda rejected any "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. In short, *Aspen Skiing* was "the last gasp of the old school of antitrust," which "demand[ed] that holders of market power cooperate with rivals"—that approach "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. The panel ruling conflicts with Ninth, Tenth, and Eleventh Circuit decisions rejecting refusal-to-deal claims whenever the defendant's conduct serves a rational procompetitive purpose.

Consistent with the narrow confines of refusal-to-deal liability, the district court properly held that unilateral refusals-to-deal support antitrust liability only when the defendant's conduct is "irrational but for its anticompetitive effect." SA69. Plaintiffs "must show that the defendant's actions serve no rational procompetitive purpose." SA66.

The panel's contrary decision conflicts with Ninth, Tenth, and Eleventh Circuit precedent. The conflict with *Christy Sports, LLC v. Deer*

Valley Resort Co., 555 F.3d 1188 (10th Cir. 2009), is especially stark. The court there upheld a Rule 12(b)(6) dismissal of a refusal-to-deal case precisely because the refusal was supported by the same legitimate business justification present here—a desire to eliminate a middleman and serve customers directly. "[A]llowing resorts to decide for themselves what blend of vertical integration and third-party competition will produce the highest return," the court explained, "may well increase competition in the ski resort business as a whole, and thus benefit consumers." *Id.* at 1195; *accord Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (Gorsuch, J.) ("the monopolist's conduct must be irrational but for its anticompetitive effect"); *It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 689 (4th Cir. 2016) ("[a] single firm incorporating separate but closely related production processes can often be far more efficient than various independent entities transacting to produce the same good").

The panel's decision also conflicts with *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004), and *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir. 1988). *Morris* rejected refusal-to-deal liability because "seek[ing] to prevent [the plaintiff] from 'free-riding' on [the defendant's] technology" was a "valid business

justification" regardless of the defendant's past practices. 364 F.3d at 1295. *Oahu Gas* held that "the desire to maintain market power—even a monopolist's market power—cannot create antitrust liability if there was a legitimate business justification for" the challenged practice. 838 F.2d at 368–69; *see also Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 126 (2d Cir. 2007) (granting Rule 12(b)(6) dismissal where there was "an apparent legitimate business reason for [defendant's] refusal to deal").

The panel distinguished Comcast's cases on two bases: several were decided on a full record, while others involved customers that competed with the defendant. Op. 57–67. Neither distinction matters. Although *Morris* and *Oahu* were decided on a full record, both cases confirm that a legitimate business justification is dispositive. Likewise, *Christy Sports* holds that where, as here, the business justification is apparent from the complaint, that is the end of the matter. 555 F.3d at 1195. *Port Dock* is to the same effect.

Further, case after case deems it irrelevant that the defendant competes in some respects with its customers. *E.g., Port Dock*, 507 F.3d at 126–27; *see also PSKS, Inc. v. Leegin Creative Leather Prods.*, 615 F.3d

412, 420–21 & n.8 (5th Cir. 2010) (agreement between supplier and distributor treated as vertical notwithstanding some customer competition between them); *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods.*, 129 F.3d 240, 243 (2d Cir. 1997) (same). That is especially so where refusing to deal—cutting out the middleman—lowers costs throughout the distribution chain. Where "there are cost savings from bringing into the firm a function formerly performed outside it, the firm will be made a more effective competitor." *Jack Walters & Sons Corp. v. Morton Bldg.*, 737 F.2d 698, 710 (7th Cir. 1984).

II. Limiting refusal-to-deal liability to cases where a defendant has no rational procompetitive purpose for its conduct gives businesses needed certainty and encourages innovation.

The Supreme Court "ha[s] repeatedly emphasized the importance of clear rules in antitrust law." *linkLine*, 555 U.S. at 452. As Professor Melamed observes, "selection of antitrust rules depends critically on their administrability," including "the ability of businesses to know what conduct is permitted and what is prohibited." A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 BERKELEY TECH. L.J. 1247, 1252 (2005).

Nor is this simply a matter of predictability for business, as vital as that is. Uncertainty in antitrust law threatens legitimate conduct. The statutory text provides only "open-ended" and "generalized definitions" of proscribed conduct—which "is often difficult to distinguish from … economically justifiable business conduct"—and the penalties for violations are severe, including treble damages and even criminal penalties. *United States v. United States Gypsum Co.*, 438 U.S. 422, 438, 440–41 (1978); Areeda & Hovenkamp ¶¶ 1628, 1630, 2123 (noting the importance of safe harbors for this reason).

Courts, therefore, "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). When, as in refusal-to-deal cases, "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." *Id.* 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.*

The panel's balancing approach fails to provide businesses with the requisite clarity. The justification for Comcast's conduct is plain: It seeks to "eliminate the middleman" and serve customers directly—choosing those with whom it will deal, rather than having the choice forced upon it. As with price cutting, *see Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the law recognizes the high value of this freedom by applying a strict test to demonstrate illegality. Just as price cutting is unlawful only if economically irrational (i.e., below cost), refusing to deal with particular businesses is unlawful only where unsupported by any legitimate business purpose. Only that clear rule provides the certainty that businesses need.

The district court's approach rightly permits disposing of refusal-to-deal cases under Rule 12. It is unwarranted to skip past the motion-to-dismiss stage and jump into the ocean of antitrust discovery for this narrow doctrine when, as here, the complaint itself reveals a legitimate procompetitive justification for the defendant's conduct. *Novell*, 731 F.3d at 1074. As this Court observed 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, with the advent of electronic discovery, antitrust litigation costs have only skyrocketed.

An antitrust case prompted the Supreme Court's observation 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.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (citation omitted). As *Twombly* explained, "the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." *Id.* at 559. Indeed, it is this precise context—a narrow doctrine at the outer bounds of liability, with the potential for massive discovery that could compel the settlement of meritless claims—that demands strong enforcement of the "practical significance" of Rule 8's pleading requirement. *Id.* at 557.

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. Yet the panel

held that refusal-to-deal claims categorically call for "balancing anticompetitive effects against hypothesized justifications," which "depends on evidence and is not amenable to resolution on the pleadings." Op. 55–56. If allowed to stand, that approach threatens not only to create uncertainty for business, but to deter beneficial investment.

If there are never any valid pleadings-stage resolutions of refusal-to-deal claims—which, again, challenge conduct that is typically lawful—businesses will have less incentive to innovate. As then-Judge Gorsuch observed, "[t]he monopolist might be deterred from investing, innovating, or expanding (or even entering a market in the first place) with the knowledge anything it creates it could be forced to share." *Novell*, 731 F.3d at 1073. Likewise, a monopolist's smaller competitors might see no need to innovate on their own if they could free-ride on their rival's ingenuity. In sum, "[c]ompelling" firms 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." *Trinko*, 540 U.S. at 407–08.

The problem is exacerbated by the panel majority's emphasis on the change from prior conduct. If businesses are discouraged from altering

their business models, they will hesitate to try new things or enter into new relationships, for fear of being locked in forever. As the Tenth Circuit has explained, "we do not see why an initial decision to adopt one business model would lock the resort into that approach and preclude adoption of the other at a later time." *Christy Sports*, 555 F.3d at 1196; *see also Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986) ("If a monopolist does extend a helping hand, though not required to do so, and later withdraws it as happened in this case, does he incur antitrust liability? We think not.").

Refusals to deal, whether by monopolists or others, are almost invariably lawful. The panel's balancing approach, however, all but precludes Rule 12 dismissals and sentences the parties to lengthy and costly discovery for no sound reason. The panel's adoption of that approach should be reviewed by the full Court and rejected.

CONCLUSION

En banc review should be granted.

Respectfully submitted,

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MARCH 30, 2020

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 2600 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: MARCH 30, 2020

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CERTIFICATE OF SERVICE

I, Steffen N. Johnson, certify that on March 30, 2020, 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.

Dated: March 30, 2020 /s/ Steffen N. Johnson