

No. 20-319

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**In the  
Supreme Court of the United States**

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COMCAST CORPORATION AND COMCAST CABLE  
COMMUNICATIONS MANAGEMENT, LLC,

*Petitioners,*

v.

VIAMEDIA, INC.,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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**BRIEF FOR NCTA – THE INTERNET &  
TELEVISION ASSOCIATION AS AMICUS CURIAE  
IN SUPPORT OF PETITIONERS**

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RICK C. CHESSEN  
NEAL M. GOLDBERG  
NCTA – THE INTERNET &  
TELEVISION ASSOCIATION  
25 Massachusetts Ave., NW  
Suite 100  
Washington, DC 20001

MATTHEW A. BRILL  
*Counsel of Record*  
MATTHEW T. MURCHISON  
LATHAM & WATKINS LLP  
555 Eleventh Street, NW  
Suite 1000  
Washington, DC 20004  
(202) 637-2200  
matthew.brill@lw.com

*Counsel for Amicus Curiae*

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

NCTA – The Internet & Television Association is the principal trade association of the U.S. cable television industry. Its members include owners and operators of cable television systems serving nearly 80 percent of the nation’s cable television customers, as well as more than 200 video programming networks. Most relevant to this case, NCTA is the main trade association for cable operators, which jointly sell ad inventory through advertising “interconnects” on behalf of multichannel video programming distributors (MVPDs) in a designated market area.

NCTA has first-hand familiarity with the procompetitive benefits of interconnects for MVPDs, advertisers, and video subscribers. By expanding customer access while decreasing transaction costs, interconnects benefit both sides of the cable advertising marketplace. The Seventh Circuit’s opinion, cited in the Petition Appendix at 1a–144a, initially acknowledges the procompetitive benefits of interconnects even as it notes that their legality is not at issue in this case, but then it goes on to express doubt on their legality. The Seventh Circuit’s misportrayal of interconnects muddies the analytical waters of this case, interjecting irrelevant and mistaken dicta that underscore the decision’s clear legal errors. NCTA submits this brief to help clear up

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<sup>1</sup> The parties have consented in writing to the filing of this brief, and received timely notice of the intent to file. No counsel for a party authored this brief in whole or in part; and no such counsel, any party, or any other person or entity—other than amicus curiae and its counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

any confusion about the nature and import of these underlying issues and encourages the Court to grant certiorari to consider the important legal questions identified by Comcast in its Petition.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

Comcast's Petition amply demonstrates that the Seventh Circuit's decision below warrants the Court's review. The Seventh Circuit made two fundamental errors—in (1) holding that a refusal-to-deal claim under § 2 of the Sherman Act may proceed despite the presence of valid business justifications for the refusal, and (2) allowing the plaintiff to avoid the limitations on a refusal-to-deal claim by reframing it as some other form of anticompetitive conduct, such as tying. As the Petition shows, these determinations conflict with multiple decisions of this Court and other Circuits.

Adding to these errors, the Seventh Circuit's tangential discussion of the nature of interconnects muddied its consideration of the legal questions actually presented in this case. While a generalized analysis of interconnects is not necessary to resolve the two pleading-stage questions of pure antitrust law that this case presents, the inherently *procompetitive* nature of interconnects further undercuts the Seventh Circuit's holding that a duty to deal was adequately pled in this case.

As the Petition explains, interconnects are collaborations among MVPDs that pool cable advertising inventory in a particular geographic region (Designated Market Area, or DMA) to create a convenient "one-stop shop" through which advertisers can reach every viewer of a particular network at a

particular time, no matter which MVPD serves that viewer. This unified point of sale saves advertisers from having to deal separately with each individual MVPD. Interconnects also promote efficiency and eliminate redundancy among member MVPDs through the use of shared infrastructure; traffic and billing systems; and research, marketing, sales, and technical personnel. The practice in nearly every DMA has long been for the largest MVPD to manage the interconnect, because that entity typically is best positioned to provide the necessary facilities, systems, and personnel and to take advantage of existing relationships with advertisers.

The Seventh Circuit apparently assumed that interconnects bring competing sellers of ad space under one roof. That is wrong. Advertisers do not choose among MVPDs in a given DMA—they want to do business with all of them. Whether an advertiser is targeting an entire DMA or a more localized zone, its goal is typically to get its ads into as many households as possible. There is thus no substitution among different MVPDs' advertising slots, and hence no competition, because advertisers generally seek to reach *all* households in whatever geographic area they are targeting. MVPD offerings are fundamentally complements that expand opportunities to advertise in a DMA, and that is why interconnects are decidedly procompetitive.

The Seventh Circuit panel initially acknowledged the procompetitive nature of interconnects and made clear that, in any event, their legality was not before the court in this case. Quite right. Nevertheless, the court later suggested—without relevant evidence or briefing from the parties—that interconnects operated by a participating MVPD are

*anticompetitive*. Reaching that conclusion *sua sponte*, and then apparently relying on it as a basis to reverse the district court's judgment, was error.

## ARGUMENT

### I. THE LEGAL QUESTIONS AT ISSUE SHOULD NOT HAVE REQUIRED THE SEVENTH CIRCUIT TO OPINE ON INTERCONNECTS GENERALLY

Comcast's Petition presents two questions: (1) whether the Seventh Circuit erred in holding that a refusal-to-deal claim under § 2 of the Sherman Act may proceed despite the presence of valid business justifications for the refusal, and (2) whether the Seventh Circuit erred in allowing a plaintiff to avoid the limitations on a § 2 refusal-to-deal claim by reframing it as a tying claim. Pet. at i. Nothing about those questions—indeed, nothing in Viamedia's complaint—turns on whether interconnects are anticompetitive.

Comcast forthrightly acknowledges that it declined to renew its contract with Viamedia, Pet. 6, and the Seventh Circuit held that Comcast's valid business justification—improving efficiency by removing a middleman—was insufficient to warrant dismissal of the refusal-to-deal claim, Pet. App. 56a–57a. Reviewing this pleading-stage question of antitrust law requires no deeper inquiry into the workings of the cable television industry than that, and certainly did not require the Seventh Circuit to opine on interconnects more generally.

The tying question is, if anything, even cleaner. Viamedia conceded that any injury it suffered flowed from Comcast's refusal to deal, and thus that there

was no separate source of harm from the alleged tie. Pet. 27. The Seventh Circuit saw no problem with this, holding that “a tying claim does not fail as a matter of law simply because it was implemented by refusing to deal with an intermediary.” Pet. App. 81a. The question is again one of pure antitrust law: can a plaintiff double-dip by piggybacking a redundant tying claim on top of a refusal-to-deal claim, or not?

This Court can, and should, resolve these two questions solely on the law—without concerning itself with, or lending any credence to, the Seventh Circuit’s misguided skepticism of the procompetitive nature of interconnects.

## **II. INTERCONNECTS ARE PROCOMPETITIVE, AND THE SEVENTH CIRCUIT ERRED IN FINDING OTHERWISE**

In all events, contrary to the Seventh Circuit’s assumption that participant-led interconnects warrant “skepticism” and that reliance on that arrangement here “weigh[s] against Comcast,” Pet. App. 92a–93a, the manifestly procompetitive nature of interconnects (irrespective of who manages them) should have, if anything, weighed in Comcast’s favor.

### **A. Interconnects Provide Substantial Procompetitive Benefits**

As both the district court and the Seventh Circuit recognized, interconnects are by design procompetitive, efficiency-enhancing collaborations that lower costs for both MVPDs and advertisers and increase the value of cable advertising. That observation applies with equal force when an interconnect is operated by a participating MVPD—as is the case with almost all interconnects. These



collaborations ultimately increase consumer welfare and should be viewed as presumptively beneficial, contrary to the musings of harm voiced in the Seventh Circuit's opinion.

An interconnect is a one-stop shop where advertisers can purchase cable ad spots on a DMA-wide basis instead of an MVPD-specific basis. Before interconnects were formed, an advertiser could easily reach the entire regional audience of any broadcast television station, but to reach the whole audience of a cable network the advertiser would have to negotiate and contract separately with each MVPD that served customers in that DMA. *See* Pet. App. 12a. “[M]any advertisers found [this] difficult, if not impossible.” *Id.* at 292a (Am. Compl. ¶ 36).

Hindered by cost and complexity, cable advertising could not compete effectively against broadcast advertising. Advertisers want to reach as many viewers as possible within a DMA, *see id.* at 15a, so ad spots offered by different MVPDs for the same cable channel spots are complementary goods, not substitutes. As a result, MVPDs generally do not compete with each other for advertisers. They instead compete against other forms of advertising: broadcast television most directly, but also radio, print, and Internet ads. The difficulty of effectively reaching entire geographic markets through MVPDs historically made it a disfavored option for many advertisers.

Interconnects solved that problem by pooling together the ad inventory of participating MVPDs to provide a single point of sale to advertisers seeking access to video subscribers across an entire DMA. By purchasing advertising space through an interconnect, an advertiser can simply select its

channel and time slot and rest assured that its advertisement will appear for every viewer throughout the DMA who subscribes to any participating MVPD. *See* Pet. App. 12a. And efficiency gains are not limited to improved customer access; interconnects also decrease MVPD costs by eliminating the need for redundant facilities, systems, and personnel. *See id.* at 13a. This collaborative approach allows cable advertising to match the convenience of broadcast advertising—increasing its value to advertisers, expanding the availability of robust advertising channels, and introducing new competitive pressure to the broader television advertising market. *See id.* at 12a–14a. Given their core procompetitive nature, interconnects should receive favorable treatment by the courts.

**B. The Seventh Circuit’s Suggestion That Participant-Operated Interconnects Are Anticompetitive Is Unfounded and Mistaken**

The Seventh Circuit initially acknowledged that interconnects are presumptively procompetitive and that, in any event, their legality is not at issue in this case. But the court later reversed course and apparently concluded that participant-operated interconnects are in fact *anticompetitive*. Without the benefit of the full adversarial discussion that this question would have received had it been part of the litigation, the court drew mistaken conclusions about the competitive risks involved. Not only is there no evidentiary (or even sound theoretical) basis for those conclusions, the court’s focus on this issue led it to overcomplicate—and ultimately, incorrectly decide—the doctrinal questions at issue.

At the outset, the Seventh Circuit’s opinion recognizes that this case involves “no challenge” to the legality of interconnects in the abstract. Pet. App. 16a n.4. At the same time, consistent with all the evidence and analysis set out above, the opinion acknowledges that interconnects “seem to fit the model of certain procompetitive cooperative arrangements among competitors.” *Id.* (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979)). And the opinion expressly notes that “[w]hether that remains the case when one MVPD controls an Interconnect is a question not presented here.” *Id.*

Despite these (wholly appropriate) comments, the opinion goes on to find certain “facts” that it claims reveal participant-operated interconnects to actually be *anticompetitive*. See Pet. App. 92a–93a. The net competitive benefits and legality of interconnects were not fully briefed or argued by the parties, nor passed upon by the district court. Rather, the Seventh Circuit took it upon itself, as a matter of first impression, to assess the competitive nature of the participant-operated interconnects involved in this case by weighing them against the joint Federal Trade Commission and Department of Justice’s *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000), [https://www.ftc.gov/sites/default/files/documents/public\\_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf). See Pet. App. 92a–93a. The opinion questions whether those interconnects meet any of four criteria for anticompetitive harm laid out in the guidelines, and then immediately answers—without apparent analysis—stating only “[c]heck, check, check, and

check.” *Id.* at 93a. These supposed “red flags” led the court to conclude that “skepticism is now warranted.” *Id.* at 92–93a. These were not mere hypothetical musings; the opinion indicates that they influenced its ultimate disposition of the case, concluding that “[t]hese facts weigh against Comcast.” *Id.* at 93a.

Compounding the Seventh Circuit’s error in passing judgment on a question neither litigated by the parties nor necessary to the resolution of the case, the court’s conclusion is simply wrong on its merits: participant-operated interconnects offer no greater anticompetitive risks than other interconnects, which, as discussed above, are competitively beneficial.

The opinion suggests that participant-operated interconnects satisfy four criteria of anticompetitive harm from the Joint Guidelines: It posits that these interconnects “[l]imit independent decision making or combine the control of or financial interests in production, key assets, or decisions regarding price, output, or other competitively sensitive variables”; “[o]therwise reduce the participants[] ability or incentive to compete independently”; “facilitate[] explicit or tacit collusion through facilitating practices such as the exchange or disclosure of competitively sensitive information or through increased market concentration,” Pet. App. 92a–93a (third alteration in original) (quoting *Antitrust Guidelines* § 2.2 at 6); and “[s]uccessfully eliminate[] procompetitive pre-collaboration conduct, such as withholding services that were desired by consumers when offered in a competitive market,” *id.* (second alteration in original) (quoting *Antitrust Guidelines* § 3.31, at 12).

As an initial matter, it is not clear that the Joint Guidelines even apply here, because interconnect members are not competitors in any relevant sense. Cable operators that participate in an interconnect typically serve different geographic areas because of historic franchising practices, and even where MVPDs compete for *retail subscribers* (i.e., where traditional cable operators compete against overbuilders and DBS providers), they do not compete for *advertisers*. That is so because advertisers generally want to reach as many households as possible in whatever geographic area they target. Thus, one MVPD's ad inventory is not a substitute for any other's—an advertiser would want to reach both MVPDs' subscribers. Because MVPDs do not compete for advertiser business, they are not actual or potential competitors in the ad sales market. See *Antitrust Guidelines* § 1.1, at 2. The Seventh Circuit overlooked this reality and mistakenly assumed that the Joint Guidelines provide the proper framework to appraise the competitive merits of interconnects.

In any event, even assuming that interconnects fall within the scope of the Joint Guidelines, the opinion offers no explanation—beyond simply quoting the generic criteria—to show how participant-operated interconnects run afoul of them. Nor does it point to any characteristics of these interconnects that would explain its conclusion that participant-operated interconnects are inherently anticompetitive while the “truly cooperative original concept of the Interconnects”—which, in the Seventh Circuit's view, apparently entails forgoing the efficiencies of relying on a participating MVPD to manage the collaboration—remains procompetitive. Pet. App. 93a. Any ability or incentive to reduce

independent decisionmaking and competition, facilitate collusion, or eliminate procompetitive pre-collaboration conduct is no different whether an interconnect is operated by an MVPD participant or an elected board composed of multiple MVPD representatives. Neither the plaintiff nor the court suggested that such anticompetitive flaws generally characterize interconnects—rightly so. The conclusion that participant-operated interconnects are somehow worse in that regard was an unforced error, and it should not have played any role in the Seventh Circuit’s analysis.

\* \* \*

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICK C. CHESSEN  
NEAL M. GOLDBERG  
NCTA – THE INTERNET &  
TELEVISION ASSOCIATION  
25 Massachusetts Ave., NW  
Suite 100  
Washington, DC 20001

MATTHEW A. BRILL  
*Counsel of Record*  
MATTHEW T. MURCHISON  
LATHAM & WATKINS LLP  
555 Eleventh Street, NW  
Suite 1000  
Washington, DC 20004  
(202) 637-2200  
matthew.brill@lw.com

*Counsel for Amicus Curiae*

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