No. 20–319

In the Supreme Court of the United States

COMCAST CORPORATION AND COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC, PETITIONERS

v.

VIAMEDIA, INC., RESPONDENT

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief addresses the first question presented in the petition: Whether a refusal-to-deal claim under Section 2 of the Sherman Act may proceed where a valid business justification for the refusal is apparent on the face of the complaint.

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INTRODUCTION AND 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. The Chamber 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. If left in place, the decision below will have a major impact on businesses' ability to choose the parties with whom they deal. Under United States antitrust law, firms should be free to refuse to deal with others whenever doing so is supported by a rational, procompetitive purpose. Any other rule—especially the subjective balancing test adopted by the Seventh Circuit here—would deprive businesses of the certainty needed to adapt and innovate in competitive markets, while subjecting them to costly antitrust litigation that deters procompetitive behavior, all to the detriment of consumers.[2]

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

[2] Although this brief focuses on the first question presented in the petition, the Chamber agrees with petitioners

STATEMENT

Respondent Viamedia, the plaintiff below, alleges claims under Section 2 of the Sherman Act for monopolization in markets for the spot cable television advertising business. To meet 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 petitioners ("Comcast"), which provide cable services, engaged in exclusionary conduct.

According to Viamedia, Comcast unlawfully used its market power to exclude Viamedia from accessing the infrastructure of certain "interconnects"—central marketplaces that sell simultaneous advertising opportunities on multichannel video programming distributors (MVPDs) across a region—and from participating in ad sales in certain regions. Viamedia asserts that Comcast unilaterally ended Viamedia's access to these interconnects so it could take over as advertising representative, and that eliminating the middleman in this manner constitutes an unlawful refusal to deal.

The district court rejected that view, holding that "plaintiffs seeking to establish an unlawful refusal to deal must show that the defendant's actions serve no rational procompetitive purpose." Pet. App. 202a; see *id*. at 200a–201a (requiring conduct that is "irrational but for its anticompetitive effect"). In dismissing Viamedia's claim at the Rule 12(b)(6) stage, the court held that, as alleged, Comcast's conduct replaced a

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that limits on refusal-to-deal claims should not be circumvented merely by recasting the underlying conduct as falling under another theory of antitrust harm.

middleman with a direct relationship—a prototypical valid business purpose that promotes efficiency.

The Seventh Circuit reversed. It 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." *Id.* at 57a.

SUMMARY OF ARGUMENT

Eliminating the middleman is a proven way to reduce costs and benefit consumers. Doing so requires a refusal to deal with the middleman, and refusals to deal in this and related contexts are common, indeed pervasive. Such refusals to deal are so predominantly procompetitive that four circuits have held that, if a plausible business justification is present, judgment for the defendant follows as a matter of law.

The Seventh Circuit's decision in this case directly conflicts with these decisions. Certiorari is needed not only to resolve that conflict, but also to maintain consistency with this Court's decisions in *Verizon Commc'ns* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004), and *Pacific Bell Telephone Co.* v. *linkLine Communications*, 555 U.S. 438 (2009). Review would permit the Court to articulate a rule of antitrust law that upholds the fundamental American right of firms to choose the parties with whom they will deal. And the importance of that right is underscored by the fact that refusals to deal are ubiquitous across a host of American industries—from mobile phones to beauty products—involving major sectors of the economy.

I. This Court's decision in *Trinko*, reaffirmed and expanded in *linkLine*, establishes a general rule that business firms have the right to determine the counterparties, if any, with whom they deal. Only where a refusal to deal has no justification other than eliminating competition, as in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), is antitrust liability justified.

The decision below, however, articulated a "balancing" test that, if followed, would effectively preclude dismissals on the pleadings in refusal-to-deal cases, subjecting efficient firms to the substantial costs and investment of time required to defend themselves in antitrust suits. That decision is fundamentally inconsistent with this Court's decisions, which prescribe deference to a firm's choice of counter-parties. Review is warranted on that basis alone.

But there is more. The Seventh Circuit's decision creates a conflict with decisions of the Second, Ninth, Tenth, and Eleventh Circuits holding that any plausible business justification precludes refusal-to-deal liability. Although some of these cases were decided on summary judgment, all of them hold that such a business justification is sufficient, without more, to end the case. The conflict with the Second Circuit's decision in *Port Dock* and the Tenth Circuit's decision in *Christy Sports* is especially stark, as each of those decisions upheld the dismissal, under Federal R. Civ. P. 12(b)(6), of a Section 2 claim challenging the defendant's elimination of a middleman. In *Port Dock*, moreover, the defendant's refusal to deal occurred after the defendant's business had already vertically integrated—mirroring the facts of this case.

II. Given the substantial time and expense associated with antitrust litigation, it is vital that businesses know the antitrust risks of declining to deal with potential rivals. A rule that precludes litigation for refusals to deal supported by a legitimate business justification provides the certainty that firms need.

The Seventh Circuit's hazy balancing test, by contrast, is the antithesis of business certainty, and firms that operate nationwide—who routinely refuse to deal with other national or international firms—now face conflicting rules in different circuits. Balancing can be appropriate in contexts such as exclusive dealing, where the challenged conduct is not overwhelmingly procompetitive. But refusals to deal are overwhelmingly procompetitive, especially when the basis for refusing to deal is to eliminate a middleman. Balancing the real efficiencies of such conduct against a mere hypothesis of harm is not worth the candle.

The Seventh Circuit's indeterminate "case-by-case" multi-factor test—under which "no factor is always decisive by itself" (Pet. App. 53a)—is thus an invitation to arbitrary judicial decisionmaking that deters procompetitive conduct. The uncertainty of that test is magnified by the Seventh Circuit's apparent view that a conclusory allegation that a refusal to deal lacks a procompetitive justification is sufficient to put that claim before a jury, which would be asked to pass on inflammatory claims that the defendant is engaged in "exclusionary conduct." And because the antitrust laws' liberal venue provision states that "antitrust [suits] against a corporation may be brought * * * in any district wherein it may be found or transacts business" (15 U.S.C. § 22), the decision below threatens to set a harmful, practically-national rule.

The issue is also recurring. Firms in every sector of the economy make decisions to deal or not deal all the time. As a result, countless firms' routine practices could be caught up in the Seventh Circuit's balancing test, causing needless consumer harm.

REASONS FOR GRANTING THE PETITION

I. This Court's 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 has a rational, procompetitive purpose.

This case presents a question of great importance to the administration of the antitrust laws—whether a refusal to deal supported by a procompetitive business justification is subject to challenge under Section 2 of the Sherman Act. The Seventh Circuit's resolution of that question conflicts both with decisions of the Second, Ninth, Tenth, and Eleventh Circuits, and with this Court's precedents. Further, it threatens to deprive businesses of the certainty needed to adapt in competitive markets, while subjecting them to costly antitrust discovery that deters procompetitive behavior—to the ultimate detriment of consumers. Review is needed to provide businesses with clarity concerning when they can, and cannot, decline to help their rivals.

Here, the business justification for Comcast's acts is apparent on the face of Viamedia's complaint. Comcast terminated Viamedia's spot advertising representations in the Detroit and Chicago interconnects to deal directly with its customers, cutting out the middleman and the associated expense. *E.g.,* Pet. App. 309a. That is an eminently rational business purpose. To balance that objective against supposed anticompetitive effects, as the decision below requires, places a dark cloud over any business's efforts to increase efficiency in the same way.

As this Court has made clear, 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. *Trinko*, 540 U.S. at 409. The ruling below 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" (Pet. App. 57a), is inconsistent with this Court's refusal-to-deal decisions and those of four circuits.

A. A business's unilateral refusal to deal with another business supports antitrust liability only in exceedingly narrow circumstances.

1. The right to choose the parties with whom one will deal is an essential aspect of American freedom. In decisions spanning a century, this Court has established that the Sherman Act 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). The general rule is that "businesses are free to choose" whether to deal with other businesses. *linkLine*, 555 U.S. at 448.

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) (Easterbrook, J.). And for good reason. In the vast majority of cases, "Cooperation is a *problem* in antitrust, not one of its obligations." *Ibid.*

Indeed, "[f]orcing a firm to share its monopoly is inconsistent with antitrust['s] basic goals," as "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 ¶ 771b (4th ed. 2018). Thus, "[t]here is no general duty to share" and "[c]ompulsory 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.").

Citing "the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm," this 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. As the Court has recognized, forcing a business to deal with competitors clashes with "the underlying purpose of antitrust law." *Id.* at 407–408. 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." *Ibid.* And 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." *Id.* at 411.

2. In finding that Comcast was potentially subject to refusal-to-deal liability, the court below invoked *Aspen Skiing*. Pet. App. 48a–56a. The defendant there —which owned three ski resorts in Aspen, Colorado— cooperated for years with the plaintiff, which owned a fourth, to sell a joint ticket to all four mountains. 472 U.S. at 593–594. The defendant ultimately canceled that ticket, however, "refus[ing] to sell [the plaintiff] any lift tickets," even at "retail." *Id*. at 593. "[T]here were no valid business reasons for the refusal." *Id*. at 605. The defendant's *only* reason for "forgo[ing] these short-run benefits" was "reducing competition * * * over the long run." *Id.* at 608. In those unique circumstances, where the defendant "fail[ed] to offer *any* efficiency justification whatever for its pattern of conduct," a refusal-to-deal theory was viable. *Ibid*. (emphasis added).

Trinko clarified the key features of *Aspen Skiing*'s narrow holding: 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." 540 U.S at 409 (emphasis added).

In the ruling below, however, the Seventh Circuit stretched *Aspen Skiing* beyond the breaking point. There, the defendant's refusal to deal made economic sense only as a means of "harming its smaller competitor." 472 U.S. at 608. Accordingly, this Court—with the support of other courts and leading scholars—has cabined refusal-to-deal liability to cases where business justification is wholly absent. 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. *Aspen Skiing*'s "limited exception" to a business's freedom to deal thus lies "at or near the outer boundary of § 2 liability" (*Trinko*, 540 U.S. at 409), and the Court has steadfastly declined to find refusal-to-deal liability where a business justification exists. *Ibid.*; *linkLine*, 555 U.S. at 448.

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, 441–442 (2008); accord AREEDA & HOVENKAMP ¶ 770e. As this Court recognized in *Trinko*, "firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the 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." 540 U.S. at 407–408. Yet the decision below does just that, in conflict with this Court's precedents and the principles that animate U.S. antitrust law. Review is warranted.

B. The ruling below conflicts with Second, Ninth, Tenth, and Eleventh Circuit decisions rejecting refusal-to-deal claims whenever the defendant's conduct serves a rational procompetitive purpose.

1. Consistent with the narrow confines of refusal-to-deal liability, the district court applied the proper test: unilateral refusals to deal support antitrust liability only when a defendant's conduct is "irrational but for its anticompetitive effect." Pet. App. 200a–

201a. "Accordingly, plaintiffs seeking to establish an unlawful refusal to deal must show that the defendant's actions serve no rational procompetitive purpose." *Id*. at 202a.

The district court was correct. In fact, the seed for its test comes straight from *Aspen Skiing*—which called it "[p]erhaps most significant" that Ski Co. "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 explain, it is "fundamental" that "*Aspen* leaves monopolists free to refuse to deal or cooperate with rivals for legitimate business reasons." AREEDA & HOVENKAMP ¶ 772c2.

2. The Seventh Circuit's contrary conclusion conflicts with decisions of the Second, Ninth, Tenth, and Eleventh Circuits.

Take *Christy Sports, LLC* v. *Deer Valley Resort Co*, 555 F.3d 1188 (10th Cir. 2009), where the Tenth Circuit 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—the desire to cut out the middleman and serve customers directly. As the court explained: "allowing resorts to decide for themselves what blend of vertical integration and third-party competition will produce the highest return may well increase competition in the ski resort business as a whole, and thus benefit consumers." *Id.* at 1195; accord, *e.g.*, *Novell, Inc.* v. *Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (Gorsuch, J.).

The Seventh Circuit's decision also conflicts with several other circuit court decisions, including *Morris Commc'ns Corp*. v. *PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004); *Port Dock & Stone Corp*. v. *Oldcastle*

Northeast, 507 F.3d 117 (2d Cir. 2007); *Aerotec Int'l, Inc.* v. *Honeywell Int'l*, 836 F.3d 1171, 1184 (9th Cir. 2016); and *Oahu Gas Service, Inc.* v. *Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir. 1988).

Morris rejected a refusal-to-deal claim 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. *Port Dock* upheld the termination of a middleman, holding that a refusal to deal is actionable only in the "absence of a legitimate business purpose." 507 F.3d at 124–125. As the Second Circuit recognized, prior vertical integration decisions support a rule that removing a middleman is "most likely in pursuit of increased efficiency," a "legitimate business reason" for the defendant's action. *Id.* at 126. And *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 refusal. 838 F.2d at 368–369; accord *Aerotec,* 836 F.3d at 1184 (refusals actionable where "only conceivable rationale or purpose is * * * 'the exclusion of competition'").

3. The Seventh Circuit distinguished these authorities on two bases: several were decided on a full record, while others involved customers that competed with the defendant. Pet. App. 57a–67a. Neither distinction matters.

Although most of the cited cases were decided on a full record, the decisions all confirm that a legitimate business justification is dispositive. There is no reason why that principle should hold less sway under Rule 12, provided the complaint itself reveals the legitimate business justification for the defendants' actions. Indeed, *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), an antitrust case, held 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 (citation omitted). Further, both *Trinko* and *linkLine* were dismissals under Rule 12(b)(6). And, as noted, the Tenth Circuit held in *Christy Sports* that where, as here, the business justification is apparent from the face of the complaint, that is the end of the matter. 555 F.3d at 1195. Yet the court below 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." Pet. App. 57a.

The Seventh Circuit also noted that one "section" of Viacom's complaint, entitled "'Comcast's Refusal to Deal with Viamedia is Irrational But for its Anticompetitive Effects," alleges that "'[t]here are no procompetitive justifications' to be achieved by the conduct given that there were 'no material administrability problems in allowing Viamedia to participate in Interconnects' on behalf of its MVPD customers." Pet. App. 115a. But as the district court recognized, those allegations are conclusory. *Id.* at. 201a–205a. And as *Twombly* and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), confirm, a complaint cannot be sustained based on bare or implausible allegations, let alone where other allegations themselves show a procompetitive business justification for the defendant's actions.

Nor does it matter that Comcast competes in some respects with its interconnect customers. Both *Trinko* and *linkLine* involved refusals to deal with customer-competitors, and that had no effect on the outcome. Case after case is to the same effect. *E.g.*, *PSKS, Inc.* v. *Leegin Creative Leather Prods.*, 615 F.3d 412, 420–421 & n.8 (5th Cir. 2010); *Elecs. Commc'ns Corp.* v. *Toshiba Am. Consumer Prods.*, 129 F.3d 240, 243 (2d Cir. 1997). And the fact that Comcast and Viamedia compete is especially irrelevant where, as here, the refusal to deal cuts out the middleman—lowering costs throughout the distribution chain. *Cf. Jack Walters & Sons Corp.* v. *Morton Bldg.*, 737 F.2d 698, 710 (7th Cir. 1984) ("If there are cost savings from bringing into the firm a function formerly performed outside it, the firm will be made a more effective competitor.").

4. The ruling below is also inconsistent with government antitrust enforcement policy. The government asked the court below to "hold 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. As the government acknowledges, "[its] position permits refusals to deal that are supported by valid business justifications." *Id.* at 6. The relevant question is "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).

In other words, once a defendant's conduct has a legitimate business purpose, there can be no refusal-to-deal liability. That rule is needed to "guard against 'false positive' determinations that conduct is exclusionary, because such determinations chill innovation and risk taking from which consumers benefit greatly."

Id. at 432–433. This Court's review is needed to make that clear.

C. Vertical integration predominantly advances the interests of consumers and should not be hobbled by unclear antitrust rules.

Eliminating the middleman—the basis of Viamedia's claim—is a type of vertical integration and is almost always procompetitive. Even the decision below acknowledged that eliminating a middleman allows a company "to achieve cost-savings by 'elimination of double marginalization,'" the additional cost necessitated by using an intermediary. Pet. App. 65a.

All other things equal, middlemen add costs to the distribution process, and avoiding those costs lowers prices to consumers. As the Fourth Circuit has put it, 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." *It's My Party, Inc.* v. *Live Nation, Inc.*, 811 F.3d 676, 689 (4th Cir. 2016). Likewise, Areeda and Hovenkamp explain that, "[i]n the vast majority of instances, [vertical] integration [by a monopolist] reflects adaptation to more efficient ways of doing business or an effort to overcome high prices or other poor competitive performance in vertically related markets." AREEDA & HOVENKAMP ¶ 759b. They add that, "[i]f it appeared necessary to adopt the simplest solution, we would without hesitation make the act of vertical integration by a monopolist per se lawful." *Ibid.*; see also *id.* ¶ 1700j1, at 14–16 & n.35.

In the 1970s and 1980s, the courts of appeals recognized as much in rejecting challenges brought by dealers who were terminated as the newspaper industry moved from independent distributors to direct distribution. See, *e.g.*, *Kowalski* v. *Chi. Tribune Co.,* 854 F.2d 168 (7th Cir. 1988); *Belfiore* v. *New York Times Co.*, 826 F.2d 177 (2d Cir. 1987); *Paschall* v. *Kansas City Star Co.*, 727 F.2d 692 (8th Cir. 1984); *Bowen* v. *New York News, Inc.*, 522 F.2d 1242 (2d Cir. 1975). Yet the Seventh Circuit's opinion casts a pall over these and other legitimate business decisions designed to lower costs and, thus, prices to consumers. Review is needed to eliminate the uncertainty that the decision below has created.

II. Rejecting refusal-to-deal claims on the pleadings where a defendant has a rational procompetitive purpose gives businesses much-needed certainty.

A. Clear rules are especially important in this area of antitrust law.

This 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." A. Douglas Melamed, *Exclusionary Conduct under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 BERKELEY TECH. L.J. 1247, 1252 (2005).

Administrable rules are especially important in the refusal-to-deal context, as the standards governing this area of law affect a broad range of industries representing wide swaths of the economy. For example, recent refusal-to-deal cases have involved claims against cellular phone technology companies,[3] pharmacy benefits managers,[4] aviation firms,[5] and manufacturers of beauty products.[6] Earlier cases likewise involve diverse industries ranging from elevator vendor and maintenance companies[7] and the publishers of real-time golf scores[8] to hospitals[9] and the manufacturers of crushed stone.[10]

The Seventh Circuit's balancing approach fails to provide businesses with the requisite clarity and predictability. The justification for Comcast's conduct is plain: It seeks to "eliminate the middleman" and serve customers directly—choosing the parties with whom it will deal, rather than have 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

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[3] *FTC* v. *Qualcomm Inc.*, 969 F.3d 974, 982 (9th Cir. 2020).

[4] *Park Irmat Drug Corp*. v. *Express Scripts Holding Co.,* 911 F.3d 505, 518 (8th Cir. 2018).

[5] *SOLIDFX, LLC* v. *Jeppesen Sanderson, Inc.*, 841 F.3d 827, 830 (10th Cir. 2016).

[6] *Duty Free Ams., Inc.* v. *Estee Lauder Cos.*, 797 F.3d 1248, 1256 (11th Cir. 2015).

[7] *In re Elevator Antitrust Litig.*, 502 F.3d 47, 49 (2d Cir. 2007).

[8] *Morris*, 364 F.3d at 1290.

[9] *Four Corners Nephrology Assocs., P.C.* v. *Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1217 (10th Cir. 2009) (Gorsuch, J.).

[10] *Port Dock*, 507 F.3d at 119–120.

price cutting is unlawful only when 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.

In the antitrust context generally, 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). In other words, "antitrust rules must 'be clear enough for lawyers to explain them to clients.'" *linkLine*, 555 U.S. at 453 (quoting *Town of Concord* v. *Bos. Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.)). 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." *Ibid.* What's more, a bright-line rule favoring firm independence avoids "the risk of inducing collusion and inviting judicial central planning." *Novell, Inc.*, 731 F.3d at 1076 (Gorsuch, J.).

The district court's approach rightly permits disposing of refusal-to-deal cases under Rule 12 wherever a business justification is clear. 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 reveals a legitimate procompetitive justification for the defendant's conduct. As then-Judge Gorsuch once observed:

for the claim to survive, "the monopolist's conduct must be irrational but for its anticompetitive effect." *Id.* at 1075.

Twombly 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. Indeed, it is this precise context—a narrow doctrine at the outer bounds of liability, with the potential for massive discovery that could compel businesses to settle meritless claims—that calls out for enforcement of the "practical significance" of Rule 8's pleading requirement. *Id.* at 557.

Adopting the sensible test applied by the district court and the other courts of appeals would enable businesses to avoid the burdens of unjustified antitrust discovery while exercising their lawful freedom to choose those with whom to deal.

B. Dismissal on the pleadings should not be inhibited by a balancing test.

The balancing test adopted by the court below, by contrast, threatens the clarity needed in addressing refusal-to-deal claims. Pet. App. 54a–64a. This Court should intervene.

The Seventh Circuit's test is inherently vague. The court ticked off a series of factors that it deemed relevant in refusal-to-deal cases post-*Aspen Skiing*, including a refusal to sell at market price, a pre-existing business relationship absent a statutory duty, and the alleged presence of "unhappy customers." Pet. App. 54a–55a. But since the court's formulation of that test provides that "no factor is always decisive by itself" (Pet. App. 53a), it provides essentially no guidance for firms faced with situations where some, but not all, of the cited factors are present. Instead, firms will be left at the mercy of "case-by-case assessments of whether a challenged refusal to deal is indeed anticompetitive," in cases where the relative strength of each factor is unlikely to be duplicated. *Ibid.*

The Seventh Circuit's balancing test "provides no guidance about how to determine whether or when the harms are disproportionate to the benefits," and thus "[b]y its terms * * * is an invitation to ad hoc balancing with no explicit or commonly understood algorithm." A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 Antitrust L.J. 375, 380 (2006). That means businesses cannot make pro-consumer efficiency gains with confidence; instead, the threat of treble damages hangs over their heads, deterring such decisions, to the detriment of the very people antitrust is supposed to protect—consumers. Over time, applying that ad hoc balancing test will lead to "arbitrary judicial decision making and its corollaries, unpredictable antitrust laws and a resulting undermining of the ability of antitrust law to deter anticompetitive conduct while not deterring procompetitive conduct." *Ibid.* Balancing anticompetitive effects against the benefits of eliminating a middleman requires assessing the magnitude and likelihood of both, a difficult task at best in the throes of litigation. Businesses cannot operate effectively if they have to guess the outcome of that weighting in advance.

Balancing can be appropriate where the conduct at issue is not overwhelmingly procompetitive. Exclusive dealing, for example, pervasively has the potential for anticompetitive foreclosure but can also have significant efficiencies or be the result of competition for the contract. For example, in *McWane, Inc.* v. *FTC*, the Eleventh Circuit held that a producer of ductile iron pipe fittings violated the antitrust laws by imposing exclusive dealing arrangements on its distributors in response to a new competitor's entry into the market. 783 F.3d 814, 833–842 (11th Cir. 2015). But in *NicSand, Inc.* v. *3M Co.*, the Sixth Circuit upheld the defendant's exclusive dealing agreements with sellers of "do-it-yourself automotive sandpaper," explaining that the plaintiff's own previous contracts confirmed that the agreements were typical of the industry and fostered competition. 507 F.3d 442, 451–457 (6th Cir. 2007) (en banc). When both anticompetitive foreclosure and significant efficiencies are common effects of a business arrangement, balancing is an effective necessity. Not so with refusals to deal, let alone where the refusal is to eliminate a middleman. Refusals in that context are so predominantly procompetitive (or at least neutral) that comparing the very real efficiencies against a mere hypothesis of harm is not worth the candle.

In this context, the need to have clarity—and thus to avoid balancing—is acute. As a practical matter, balancing means a risk-averse company will avoid a refusal to deal because it cannot assess or calculate in advance the extensive cost and distraction of antitrust litigation. The safer course will always be continuing to deal, even where a refusal would offer significant cost savings and associated benefits to consumers.

In sum, the only appropriate rule for unilateral refusals to deal is to allow for dismissal under Rule 12 when a plausible business justification appears on the face of the complaint. This Court's intervention is needed to make that clear.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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