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

REPLY BRIEF FOR PETITIONERS

Arthur J. Burke
David B. Toscano
Christopher P. Lynch
John M. Briggs
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, NY 10017
(212) 450-4000
Arthur.Burke@davispolk.com

Ross B. Bricker
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350
RBricker@jenner.com

Miguel A. Estrada
Counsel of Record
Mark A. Perry
Cynthia E. Richman
Matthew S. Rozen
Jeremy M. Christiansen
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MEstrada@gibsondunn.com

Counsel for Petitioners

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

REPLY BRIEF FOR PETITIONERS

While this Court confined *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), to its facts in *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004), Viamedia prevailed below by persuading the Seventh Circuit to revive—and indeed *expand*—*Aspen*. Put simply, Viamedia's grievance is that Comcast let its nine-year-old contract with Viamedia expire *according to its own terms*. As is evident from the complaint, and as both courts below recognized, Comcast had perfectly appropriate business—and procompetitive—reasons for not renewing that contract. As the petition explained, under a correct understanding of *Aspen* and *Trinko*, that should have ended the case, and it *would* have ended it in other circuits. *Novell, Inc.* v. *Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (Gorsuch, J.); *Port Dock & Stone Corp.* v. *Oldcastle Ne., Inc.*, 507 F.3d 117, 124-25 (2d Cir. 2007).

Viamedia's attempts to obfuscate the clear legal conflict fall flat. Viamedia defends the decision below as a fact-bound application of "primary factors" that the Seventh Circuit supposedly derived from "useful guidance" provided in *Aspen*. Opp. 14. It defends the Seventh Circuit's novel rule-of-reason approach to refusals to deal by claiming that "in evaluating evidence of [a] legitimate business justification … there must be some balancing of proven benefits against proven harms." *Id.* at 2. This is pure *ipse dixit*. Under controlling law there is no "evidence" to weigh and no "factors" or "useful guidance" to be applied other than this: "a refusal to deal with a competitor doesn't violate [§] 2 if 'valid business reasons exist for th[e] refusal.'" *Novell*, 731 F.3d at 1075. That the Seventh

Circuit spent over a hundred pages inventing ways to depart from this Court's clear precedent that other circuits can sum up in one sentence does not make this case "fact-bound"; it makes it cert-worthy. Nor does Viamedia succeed in its suggestion that these types of claims should not be decided at the pleading stage. This Court decided *Trinko* on a motion to dismiss, and other circuits have followed suit. *Port Dock*, 507 F.3d at 124-25.

Finally, Viamedia fails in its attempt to defend its "tying" claim, which seeks to "untie" nothing, but is instead another means to compel Comcast to deal with its competitor, Viamedia, on favorable terms. Viamedia's ploy is precluded by *Pacific Bell Telephone Co.* v. *Linkline Communications, Inc.*, 555 U.S. 438, 448 (2009), would be rejected in other circuits, *e.g.*, *Aerotec Int'l, Inc.* v. *Honeywell Int'l, Inc.*, 836 F.3d 1171, 1184 (9th Cir. 2016), and should be reviewed and reversed.

I. THE REFUSAL-TO-DEAL CLAIM WARRANTS REVIEW

A. Contrary to Viamedia's principal submission, *Trinko* leaves no room for lower courts to pick and choose which "factors" from *Aspen* are "relevant." *See* Opp. 14, 17, 29. Nor does it permit the Seventh Circuit's "analogiz[ing]" to cases that did not involve refusing to deal with competitors. Opp. 11 (citing Pet. App. 47a (citing *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951))). Because *Trinko* cabined *Aspen* to its unusual facts—as a "limited exception" at "the outer boundary" of refusal-to-deal liability, 540 U.S. at 408-09—reciting a handful of superficial similarities with *Aspen* at a high level of generality, while ignoring key differences, Opp. 14-17, is insufficient to state a refusal-to-deal claim.

1. Most grievously, Viamedia's abridged list of relevant "factors" omits *Aspen*'s dispositive element—the absence of "any efficiency justification whatever." 472 U.S. at 608. Allowing liability without this element would expand refusal-to-deal liability beyond the outer boundary of *Aspen*. Comcast's business justification therefore cannot be reduced merely to an "affirmative defense" for trial. Opp. 18-19. To state a claim, it was *Viamedia's* burden to plead plausibly that Comcast had *no* legitimate business justification and with more than the "[t]hreadbare," "conclusory" recital in the complaint. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009); Pet. App. 323a, ¶ 165.

Viamedia also ignores other salient differences with *Aspen*. This Court has never extended *Aspen* to "highly technical" industries like multichannel video distribution, where "constantly changing" market dynamics may justify abandoning prior courses of dealing, and where courts are most wary to assume the mantle of "central planners." *Trinko*, 540 U.S. at 408, 414. Viamedia's back-of-the-hand attempt to dismiss these distinctions as not "principled," Opp. 17 n.6, ignores that *Trinko* itself articulated the relevant principles. Also unlike *Aspen*, where the "course of dealing" at issue was renegotiated annually for more than a decade, *see* 472 U.S. at 589-92, this case concerns a single contract that expired under its express terms, *see* Pet. App. 109a-10a (Brennan, J.).

Even Viamedia's cherry-picked "factors"—*e.g.*, the defendant's continued dealing with rivals in other markets where it "'lacked dominance,'" Opp. 15 (alteration omitted)—distinguish this case. Viamedia alleges only that Comcast sometimes dealt differently with *other MVPDs* (*i.e.*, customers), Opp. 15, not that

Comcast engages with *rival ad representatives as intermediaries* or ever did so outside of Chicago and Detroit. Indeed, what Viamedia casts (at 1) as "decades of industry practice" is neither Comcast's regular practice nor the industry's—it is indisputably a one-off contract covering two cities that Comcast declined to renew when it chose to pursue more efficient direct deals with MVPDs.

Because *Aspen* does not "ma[p] onto Comcast's conduct" in numerous ways, Pet. App. 116a (Brennan, J.), the Seventh Circuit's derivation of freewheeling, malleable, and easily abused "factors" turns *Aspen's* "limited exception" into a new rule, *contra Trinko*, 540 U.S. at 409. Review is needed to restore the limits.

2. Viamedia's attempt to pitch this case as "fact-bound," Opp. 14, 30, only confirms the need for review. The label "fact-bound" suggests the application of an established legal test to a set of facts. But apart from the Seventh Circuit, *no one* agrees with Viamedia that *Aspen* provides easily manipulable "primary factors" to apply in refusal-to-deal cases. *Id.* at 14. The key question is whether there is "any efficiency justification" for the refusal. *Aspen*, 472 U.S. at 608.

According to Viamedia, "the Seventh Circuit held that, just as in *Aspen*, there [was] no such 'admitted' justification" on the pleadings. Opp. 17. But the panel never said that. Nor could it have. Notwithstanding the complaint's statement that there were "no procompetitive justifications" here, Pet. App. 323a, ¶ 165 (a conclusory allegation entitled to no weight under *Iqbal*), the complaint acknowledged Comcast's vertical integration and disintermediation justifications, and even admitted they could "potentially" be efficient, *id.* at 323a, ¶ 166; *see also id.* at 55a-56a, 65a-66a, 119a,

188a-89a, 309a, ¶ 112. The only "fact" dispute the majority found "not amenable to resolution on the pleadings" was balancing "anticompetitive effects against" Comcast's justification under its newly invented rule-of-reason balancing test. *Id.* at 57a. Requiring balancing at all was *legal* error.

Viamedia tries to manufacture a fact dispute by arguing (at 20-21) that a vertical integration/disintermediation justification "makes no sense," and that Comcast fails to explain the relevant "efficiency" gained. That argument ignores the "common," "procompetitive[,] efficient" justification for disintermediation, Pet. App. 110a n.1 (Brennan, J.), and reveals Viamedia's ambition to use antitrust law to convert an expired term contract, *see id.* at 109a-110a, into a perpetual one. Vertical integration is efficient because the alternative—dealing with a middleman—results in "two entities" "earn[ing] margins" instead of one, driving up costs to the consumer, *id.* at 66a. Cutting out the middleman solves the problem. Viamedia concedes that it is "compensated" for its services. Opp. 20. And Comcast's superior efficiency is plain in the record, including because Comcast was able to share significantly more ad revenues with WOW! and RCN (63 percent) than Viamedia did (36 percent). *See* Appellant's C.A. App. 147-48; 150-52; 158-164; Appellees' C.A. App. 277-98.

The real driver of the Seventh Circuit's decision was its balancing test, which was dispositive in both reversing dismissal and ordering a *trial*. Pet. App. 39a, 57a. Viamedia's assertion (at 3, 26-27) that this test "may never arise" in this case is puzzling, given that it *has already arisen* as the linchpin of the majority's and concurrence's decisions. Pet. App. 57a, 59a

& n.13, 115a. If the case is tried—as Viamedia assures this Court it will be, Opp. 27—the erroneous balancing test will define the triable issues.

Importantly, Viamedia's own defense of balancing (at 28-29) admits the extreme consequences of the Seventh Circuit's test: A decision not to renew an expiring contract with a rival, however well founded, is *never* free from the risk that a court or jury will declare that decision unlawful after the fact. Avoiding these consequences is precisely why *Trinko* limited *Aspen* to its facts.

B. Viamedia purports to "distinguish" other court of appeals decisions on their facts or procedural postures, Opp. 21-25, but misses the forest for the trees: *No* other court of appeals adopts an open-ended balancing test under which conclusory allegations get a refusal-to-deal claim to trial. In *any* other circuit, Viamedia's claims would fail as a matter of law. The Seventh Circuit stands alone. Pet. 16-24.

Viamedia claims the circuits are united in applying a balancing test to *all* § 2 claims. Opp. 28. But the sole source of its balancing test—dicta from *United States* v. *Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (en banc)—did not involve a refusal to deal, and the application of *Microsoft*'s balancing test in other § 2 contexts is *itself* subject to a circuit conflict that Viamedia ignores. Pet. 22-23.

The circuits Comcast cited reject balancing in the refusal-to-deal context, and treat a valid business purpose as dispositive. Viamedia's assertion that "no case" holds that "any business justification" can defeat such a claim, Opp. 28, is belied by the holdings of numerous courts that "if 'valid business reasons exist for th[e] refusal'" it "doesn't violate [§] 2," *e.g.*, *Novell*, 731

F.3d at 1074-75; *Christy Sports, LLC* v. *Deer Valley Resort Co.*, 555 F.3d 1188, 1197 (10th Cir. 2009).

Contrary to Viamedia's assertion, Comcast's cited cases "accepted at the pleading stage" a defendant's pro-competitive justification, Opp. 21; *see Port Dock*, 507 F.3d at 124-25, or reached the same conclusion as a matter of law at later stages without any "balancing," *see Aerotec*, 836 F.3d at 1184; *SOLIDFX, LLC* v. *Jeppesen Sanderson, Inc.*, 841 F.3d 827, 843 (10th Cir. 2016); *Novell*, 731 F.3d at 1076; *Morris Commc'ns Corp.* v. *PGA Tour, Inc.*, 364 F.3d 1288, 1295 (11th Cir. 2004). Viamedia side-lines *Novell* by arguing there was not sufficient evidence of short-term profit loss, Opp. 23, but ignores *Novell*'s holding, *as a matter of law*, that such a sacrifice would have been irrelevant because of Microsoft's legitimate goal of "maximizing overall profits" from its various business lines. 731 F.3d at 1077. The Seventh Circuit's balancing test therefore *would* "lead to different outcomes" in these cases. Opp. 22.

Viamedia is left with irrelevant or illusory distinctions. It makes no difference, for example, that the pro-competitive justifications in *SOLIDFX* and *Morris* are different from here. *See* Opp. 23 n.7, 25. The key to *Aspen* is the absence of "*any*" legitimate justification, 472 U.S. at 608 (emphasis added); *Aerotec*, 836 F.3d at 1184; *Christy*, 555 F.3d at 1197, and nothing in the decision below limits the panel's balancing test to vertical integration and disintermediation.[1]

---

[1] Viamedia writes off *Christy* as failing to allege the termination of a "profitable" relationship, Opp. 23 n.7, but ignores that, like *Christy*, Viamedia "should have been aware" of the possibility of the relationship terminating, "[u]nlike the competitor in

Port Dock, moreover, involved the *same* business justification as this case. 507 F.3d at 124-25. Viamedia says this case is different because Comcast "was already vertically integrated" when it refused to deal, Opp. 24, but the same was true in *Port Dock*: The defendant vertically integrated nearly ten years *before* it "announced that it would no longer sell" to the plaintiff. 507 F.3d at 119-20. Nor is it "critical" whether *Port Dock* involved lost sales, Opp. 24; the basis for dismissal was that the plaintiff alleged a legitimate business justification, as Viamedia did here. And while Viamedia emphasizes that *Port Dock* involved a competitive relationship, *ibid.*, Comcast and Viamedia are also direct competitors, Pet. 6. *Port Dock* is on all fours.

C. Viamedia also obfuscates the direct conflict between the panel's holding and the United States' longstanding position. Pet. 24-26. Tellingly, Viamedia never quotes the *United States*' own words. It invokes (at 28) only the *majority opinion*'s erroneous characterization of statements the United States made at oral argument. *See* Pet. 25. Far from "expressly disavow[ing]" that "any business justification" precludes refusal-to-deal liability, Opp. 27-28, the United States agrees with Comcast: "If a refusal to deal serves a legitimate business purpose, Section 2 makes no further inquiry into its effects on competition." U.S. Panel Br. 15. This conflict supports

---

Aspen," 555 F.3d at 1197. And Viamedia's basis for distinguishing *Aerotec*—that the defendant did not "refuse to deal" but "simply imposed business terms that the plaintiff 'did not like,'" Opp. 25—is no distinction because Comcast likewise offered terms that Viamedia rejected as "commercially unreasonable," Pet. App. 219a, 311a, ¶ 122.

review—or at minimum a call for the views of the United States.

II. THE TYING CLAIM WARRANTS REVIEW

The premise of Viamedia's opposition on the second question presented is that the panel got the first question right. Opp. 29. But because the first question warrants review, *see supra* Part I, the Court should take up the second to foreclose an end-run around *Trinko*, Pet. 26-30.

Viamedia's effort to again cast the issue here as fact-bound fails. The panel's error was legal: 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 (emphasis added). Comcast never "agree[d]" that the majority "applied the correct legal standard," Opp. 30, but has maintained that *Trinko* and *Linkline* categorically preclude a tying claim premised on a refusal to deal. Pet. 28.

There is no "tying conduct separate from Viamedia's refusal-to-deal claim." Pet. App. 142a (Brennan, J.). Viamedia does not dispute that its *damages* flow *only* from Comcast's refusal to deal *with Viamedia*, not any tie. Pet. 27. If Comcast's refusal was lawful, then Viamedia thus has no claim. Pet. App. 127a (Brennan, J.).

Because Viamedia's claim is "based on the same course of conduct, resulted in the same anticompetitive harms, and would be subject to the same pro-competitive justifications or defenses" as the refusal to deal, Pet. App. 39a, the conflict with *Linkline* and circuit precedents is clear.

Viamedia argues that *Linkline* "provides no support" because it involved "independently lawful" acts (including a refusal to deal), whereas Comcast's refusal was supposedly unlawful. Opp. 31. But Comcast's refusal was legal. Thus, "the reasoning of *Trinko* applies with equal force," and the claim fails. *Linkline*, 555 U.S. at 450.

The only grounds Viamedia gives to distinguish *Aerotec* and *Service & Training, Inc.* v. *Data General Corp.*, 963 F.2d 680 (4th Cir. 1992), are that both lacked a tying "condition," whereas here, there was "economic pressure" to purchase Comcast's ad rep services. Opp. 31-33. Even *if* that were true (and it is not), the circuit conflict would remain because both cases involved "economic pressure" on the end customer and the middleman as "part of" the refusal to deal. *Ibid.* In *Aerotec*, the defendant "put pressure on the parts supply chain" while refusing to deal with an intermediary, yet the court declined to stretch the refusal into a tie. 836 F.3d at 1178, 1185, 1189. And in *Data General*, the software that the defendant refused to license to the middleman was "necessary" to maintain the computer systems produced by the defendant and used by end customers. 963 F.2d at 687. In any event, it is undisputed that WOW! and RCN only ever sought interconnect access bundled with ad rep services. Pet. App. 220a-221a, 242a, 248a. Accordingly, as in *Aerotec* and *Data General*, there is no tying condition here. Pet. App. 131a (Brennan, J.) (citing *Will* v. *Comprehensive Accounting Corp.*, 776 F.2d 665, 669 (7th Cir. 1985) (Easterbrook, J.))

Viamedia relegates *Novell* to a footnote, saying it does not address "customer-directed conduct," Opp. 33 n.10, while ignoring its teaching: "recast[ing]" conduct as some other form of antitrust violation, when it is

actually "a 'unilateral' refusal to deal," cannot serve as "an escape route" around *Trinko* and *Linkline*. *Novell*, 731 F.3d at 1078.

III. THIS CASE IS AN IDEAL VEHICLE

While Viamedia would have this Court wait until after trial, Opp. 27, "interlocutory" status is "no impediment" when, as here, "the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Shapiro et al., *Supreme Court Practice* ch. 4.18, p. 285 (10th ed. 2013). Resolving disputed legal standards before trial is important in antitrust cases. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 553 (2007); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 578-80 (1986). And it is *especially* important in refusal-to-deal cases, which is why certiorari was granted in *Linkline*, 555 U.S. at 445, and *Trinko*, 540 U.S. at 398, in postures just like this case. Given the panel's expansion of *Aspen*, it is vital that this case be cut off early to avoid chilling efficient and competitive behavior, which is exactly what *Trinko* set out to do by limiting *Aspen*.

Viamedia concedes "the importance of categorical rules in defining the types of unilateral conduct that should be subject to scrutiny," but asserts that the panel's "*Aspen* factors … provide such guidance." Opp. 29. That assertion does not even pass the straight-face test, as the *amicus* briefs supporting certiorari attest. Chamber Br. 5; NCTA Br. 2-5; Scholars Br. 8-10; WLF Br. 1. In open defiance of *Trinko* and *Linkline*, the Seventh Circuit has created a new and easily invoked path to antitrust liability. That decision deserves review sooner rather than later.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Arthur J. Burke
David B. Toscano
Christopher P. Lynch
John M. Briggs
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, NY 10017
(212) 450-4000
Arthur.Burke@davispolk.com

Ross B. Bricker
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350
RBricker@jenner.com

Miguel A. Estrada
Counsel of Record
Mark A. Perry
Cynthia E. Richman
Matthew S. Rozen
Jeremy M. Christiansen
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MEstrada@gibsondunn.com

Counsel for Petitioners

November 16, 2020