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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

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

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SUPPLEMENTAL BRIEF FOR PETITIONERS

A senior Justice Department official recently reiterated the government's "continu[ed]," "nearly twenty year" support "for the 'no economic sense' test" for refusal-to-deal claims "that the Solicitor General advocated for" in *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), and "now-Justice Gorsuch adopted" in *Novell, Inc.* v. *Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013).[1] Apparently, this was a eulogy.

With a modicum of the candor this Court should expect from the United States, the government should have frankly avowed that it is *explicitly repudiating* the no-economic-sense test, and *citing and embracing* the Seventh Circuit's balancing approach in its own § 2 refusal-to-deal claims in lower courts. *See* FTC Mem. of Law 36-37, *FTC* v. *Facebook, Inc.*, No. 1:20-cv-3590 (D.D.C. Apr. 7, 2021) ("FTC Br."). Despite heartily embracing the panel decision in other litigation, the government here feigns ignorance as to the "precise import" of its "balancing" approach. OSG Br. 17. The government thereby seeks to shield the decision below from review by pretending that the decision was *not* based on the balancing approach the panel spent over 100 pages making up and justifying, but instead rested on a single paragraph summarizing Viamedia's conclusory allegations that Comcast had no legitimate business justification for not renewing its contract with Viamedia. *Id.* at 8, 15-16; *see* Pet. App. 63a. As the government successfully argued in

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[1] *Remarks of Deputy Ass't Att'y Gen. Michael Murray*, Mar. 17, 2020, https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-murray-antitrust-division-delivers-remarks-new.

Trinko, such formulaic recitations carry no weight at the pleading stage and are no obstacle to review.

Indeed, the government previously took the position in *this* case that refusing to deal with a rival is not actionable unless the refusal makes "no economic sense" apart from the exclusion of the rival. U.S. Panel Br. 15. Under that test, "[i]f a refusal to deal serves a legitimate business purpose, [§] 2 makes no further inquiry into its effects on competition." *Ibid*. That has been the consistent litigating position of the United States until now. *See*, *e.g.*, U.S. *Amicus* Br. 12, *CSU, L.L.C.* v. *Xerox Corp.*, 2001 WL 34135314 (U.S.) (a defendant can "be held liable under [§] 2 for a refusal to deal … only if … it sought to … exclude rivals on some basis other than efficiency").

The government's longstanding endorsement of the "no economic sense" test follows from both *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*—where the defendant "fail[ed] to offer any efficiency justification" for refusing to deal with a rival, 472 U.S. 585, 608 (1985)—and *Trinko*, which confined refusal-to-deal liability to the "limited" circumstances of *Aspen*, 540 U.S. at 409. The government has now changed course, arguing that the *Aspen* defendant "*did* offer" procompetitive justifications, and that *Trinko* set no "universal standard governing all refusal-to-deal claims." OSG Br. 10, 13. It thus defends the decision below as consistent with *Aspen*, a moribund precedent, while treating *Trinko*, this Court's controlling decision, as an outlier.

Notably, the government never contests that the court of appeals' balancing approach conflicts with the decisions of the Second, Ninth, Tenth, and Eleventh Circuits, or the position the government successfully advocated in *Trinko*, U.S. *Amicus* Br. 14, 2003 WL

21269559 (U.S.) ("U.S. Trinko Br."), and previously advanced in this case. If the decision below stands, then antitrust plaintiffs (including federal enforcers) will invoke this balancing in every refusal-to-deal scenario. The propriety of that approach is starkly and perfectly presented by this petition, and should be addressed and resolved now. The government's brief thus amplifies, rather than reduces, the likelihood that the economy will be harmed, Chamber Br. 5; NCTA Br. 2-5; Scholars Br. 8-10; WLF Br. 1, that inefficient business arrangements will be ossified, *Trinko*, 540 U.S. at 408, 414, and that the antitrust laws will be abused to extend uneconomic contracts, Pet. App. 99a. The Court should grant review.

I. THE REFUSAL-TO-DEAL CLAIM WARRANTS REVIEW

A. The panel decision rests on an expansive reading of *Aspen* that contradicts *Trinko* and the government's "longstanding" support for the no-economic-sense test. The government's surprisingly muscular defense of *Aspen*, and its implausibly miserly reading of *Trinko*, gets the law precisely backwards and conflicts with the decisions of multiple circuits.

The government repeatedly asserts that *Trinko* affirmed the "continuing vitality" of *Aspen*. OSG Br. 8, 10. But this Court held that *Aspen* has little vitality at all and instead is clinging to life. *Trinko* declined to overrule *Aspen expressly*, but made clear that *Aspen* is an artifact of an earlier era and is limited to its peculiar facts. 540 U.S. at 409. Far from breathing new life into this comatose precedent, "*Aspen Skiing* … bit the dust in *Verizon* v. *Trinko*." Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 Harv. J.L. & Pub. Pol'y 439, 442 (2008). The notion

that *Aspen* provides the lower courts high-level, manipulable factors that nearly always require a *trial* is at war with *Trinko*'s holding.

According to the government, however, abandoning a "profitable course of dealing" with rivals at "market prices" remains actionable outside *Trinko*'s specific facts—where the prior dealing was "not voluntary" but "statutorily mandated." OSG Br. 10-12. But the government's notion that the only "relevant" distinctions from *Aspen* are those specifically noted in *Trinko*, *id.* at 14, flips *Trinko* on its head, wrongly placing *Trinko* at the outer boundary of lawful conduct, rather than *Aspen* at the "outer boundary" of "liability." 540 U.S. at 409; U.S. Panel Br. 9-10. As other lower courts and (until recently) the government have recognized, Pet. 16-24; Reply 6-8; U.S. Panel Br. 9-16, *Trinko*'s point is that where "difference[s]" from *Aspen* weaken the inference of "anticompetitive malice"—rather than "competitive zeal"—*Aspen* does not apply, and extending liability risks "chill[ing]" legitimate conduct. 540 U.S. at 409, 414; *see* U.S. *Trinko* Br. 15.

The government tries to avoid saying so, but the upshot of its inventive reading of *Trinko* and attempted revivification of *Aspen* is the repudiation of the "no-economic-sense" test. Below, the government recognized that antitrust law "makes no further inquiry" when a "refusal to deal serves a legitimate business purpose." U.S. Panel Br. 15. Now, by contrast, the absence of a legitimate business purpose is not even *one* of the "circumstances" the government calls "significant" to liability under *Aspen*. OSG Br. 12. Indeed, the government now contends that the *Aspen* defendant "*did* offer several justifications" for its refusal to deal. *Id*. at 13. But as *Novell* recognized and

the government previously agreed, "no possible efficiency justification" existed in *Aspen*. 731 F.3d at 1077. Unlike here—where "Viamedia admitted" there was "an efficiency justification in its allegations," Pet. App. 119a (Brennan, J.)—the defendant in *Aspen* "could not satisfactorily explain how its conduct made economic sense," U.S. *Trinko* Br. 19-20, because the record disposed of its supposed justifications, *Aspen*, 472 U.S. at 609-10.

The government further attempts to obfuscate the central issue by equating the no-economic-sense test with the panel's balancing approach. OSG Br. 17-18. Below, the government told the panel to "follow *Novell*" and hold that "refusal to deal with a competitor does not violate [§] 2 if 'valid business reasons exist for that refusal.'" U.S. Panel Br. 15. Now, by contrast, the government contends that this valid business reason must be "offse[t]" by "the [defendant's] short-term losses" from refusing a profitable deal, OSG Br. 17—an analysis found nowhere in *Novell*, any other appellate case, or government brief prior to the panel decision.

The government's endorsement of that approach conflicts with this Court's precedents, and also contradicts the government's statement at oral argument that the no-economic-sense test can "be applied meaningfully at the pleading stage," Pet. 25, to the extent the proposed "offsetting" requires a jury. The government's test thus creates the same risk of "[m]istaken inferences" that *Trinko* sought to avoid. 540 U.S. at 414.

The government never reconciles the panel's balancing approach with the no-economic-sense test, which (as the government has previously recognized) "'does not entail open-ended balancing of social gains

against competitive harms.'" U.S. Trinko Br. 14. But in pursuing its own § 2 refusal-to-deal claims against other defendants, the government now explicitly disavows the no-economic-sense test, calling it a "misconstru[ction] [of] controlling precedent." FTC Br. 36. Instead, the government cites the panel decision in this case to argue that the proper approach requires "'[b]alancing anticompetitive effects against'" the defendant's business "'justifications'" for refusing to deal "'and is not amenable to resolution on the pleadings.'" *Id.* at 37.

Thus, while the government as *amicus* pretends here that the panel's balancing approach is *dicta*, the government *as enforcer* is actively endorsing and relying on the panel decision. If the United States really believes that is the right approach, it should have the courage of its convictions and ask this Court to grant review—because the balancing approach would require overruling or modifying *Trinko*. The government is obviously unwilling to acknowledge that reality, and thus its "deny" recommendation here is nothing other than a tactic to increase its leverage in other litigation.

B. Taking a loupe to the panel's opinion, the government argues that despite the 100-plus pages dedicated to creating and defending a new "balancing" approach, the "proper disposition of the appeal did not turn on the propriety" of that approach, OSG Br. 18, because, in a tiny paragraph buried within that opinion, the panel supposedly "*applied* the no-economic-sense test," making the decision "factbound." *Id.* at 8 (emphasis added). This naked attempt to avoid review is unqualifiedly wrong.

1. The panel spent dozens of pages inventing the "legal standards under [§] 2 that apply to Viamedia's

claims," Pet. App. 8a, emphasizing at each step its erroneous view of balancing "possible procompetitive justifications" and "harmful impacts on … competition," stating that it was "[c]ritical" that this is an "issue properly resolved by the jury." *Id.* at 52a-53a. The opinion is an extensive treatment of what to do with a "[v]alid business justification" in the context of "balancing of anticompetitive effects"—a test that "is not amenable to resolution on the pleadings." *Id.* at 57a.

That was the reason "why [the panel held] this claim should not have been dismissed on the pleadings," Pet. App. 39a; and those reasons were reiterated again and again, because *this approach* is what the court unambiguously announced would govern "the remainder of the case," *id.* at 64a. That is the law of the Seventh Circuit, as even Viamedia concedes. Opp. 26. Accordingly, the panel dedicated an entire subsequent section of its opinion to the "considerations that will be relevant on remand" necessary to balance "the harm to competition alleged by Viamedia and the procompetitive justifications offered by Comcast" when the case is sent to the jury "for trial." Pet. App. 8a; *see also id.* at 86a-104a.

2. The panel majority's quip that "[e]ven if an allegation that a defendant's conduct was irrational but for its anticompetitive effect were necessary, Viamedia has plausibly alleged just that," Pet. App. 63a, presents no barrier to review anyway. The government (like Viamedia) never deals with the substance of the panel's paragraph, proceeding instead as if merely parroting a standard were sufficient. That would make a mockery of dispositive motion practice in antitrust litigation. *See generally Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007). The paragraph in

question is manifestly insufficient to survive a motion to dismiss.

Formulaic assertions that Comcast had "no procompetitive justifications," Pet. App. 323a, ¶ 165, or that the previous course of dealing was profitable, *id.* at 320a, ¶¶ 157-58, are empty buzzwords that are never credited on the pleadings. *See Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). They are indistinguishable from the plaintiff's allegations in *Trinko*, which also "allege[d] that [the defendant] 'had no valid business reason'" for the refusal to deal, but which the government said were "conclusory" and insufficient to meet the no-economic-sense test. U.S. *Trinko* Br. 29. Far from being a "factbound antecedent" question, OSG Br. 19, the sufficiency of Viamedia's allegations presents a *legal* question, which is why the government supported certiorari in *Trinko*, U.S. *Amicus* Br. 13-14, No. 02-682, 2002 WL 32354606 (U.S.), and why this Court reached that very question, 540 U.S. at 416.

There are additional problems with these allegations. The conclusory assertion that the prior course of dealing was profitable masks the fact that Viamedia seeks to expose Comcast, based on this allegation, to treble damages and to force Comcast to continue adhering to the terms of a contract that, *in 2003*, Viamedia agreed would expire in *2012*. Pet. App. 99a; *cf. Christy Sports, LLC* v. *Deer Valley Resort Co.*, 555 F.3d 1188, 1197 (10th Cir. 2009) ("competitors" were on notice "from the beginning that the relationship could change at any time"). Permitting such allegations to go forward will ossify the business practices of a highly "complex, and constantly changing" market, *Trinko*, 540 U.S. at 414.

Viamedia's assertion that there is no procompetitive justification is also contradicted by the "efficiency

justification" that "Viamedia admitted … in its allegations," Pet. App. 119a (Brennan, J.); *id.* at 188a, 203a (St. Eve, J.): the "prototypical" justification of disintermediation. The panel majority, Viamedia, and the government all miss the boat in focusing on whether Comcast was "already" vertically integrated, OSG Br. 14, or whether there were "material administrability problems" with allowing Viamedia in the interconnect, Pet. App. 323a, ¶ 167. *There is no dispute* that cutting out Viamedia's middleman margins was efficient. Reply 5; *see also* Pet. App. 65a; *id.* at 110a n.1 (Brennan, J.). That should end the matter, as in *Port Dock & Stone Corp.* v. *Oldcastle Northeast, Inc.*, 507 F.3d 117, 119-20 (2d Cir. 2007).

3. The government's remaining efforts to force this case within the supposedly "unambiguous[]" parameters of *Aspen* falter. OSG Br. 13. The "course of dealing" between the parties, *id*. at 12—a single contract that expired by its own terms—bears no relation to *Aspen*. Reply 3. And Viamedia did *not* "alleg[e]" that "[Comcast] behaved differently in other regions 'where it did face competition,'" in any relevant sense. OSG Br. 14. In *Aspen* the defendant offered the joint lift-ticket *together with its competitors in other markets*. 472 U.S. at 603 n.30, 609. No such allegation exists here. Reply 3-4; *FTC* v. *Qualcomm Inc.*, 969 F.3d 974, 994 (9th Cir. 2020). Nor did Viamedia allege that it was willing to pay retail prices; it made the conclusory assertion that it had paid "fair market value" for access to the interconnect. OSG Br. 12 (citing Pet. App. 320a, ¶ 157).

C. The government fares no better in pretending that there is no circuit conflict. OSG Br. 19. Indeed, at no point does the government even attempt to ar-

gue that the balancing approach applied by the Seventh Circuit is consistent with the tests applied in the Second, Ninth, Tenth, and Eleventh Circuits. *See* Pet. 16-24. It is not. The government does not address those cases, presumably because they hold that when there is a legitimate business justification for refusing to deal—whether on the pleadings, *Port Dock*, 507 F.3d at 119-20; on summary judgment, *Morris Commc'ns Corp.* v. *PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004); or post-trial as a matter of law, *Novell*, 731 F.3d at 1078—the case is over, without balancing. At the same time, the government does not (and cannot) dispute that in the Tenth Circuit a refusal-to-deal claim may proceed "*only*" when it makes no economic sense, while the Seventh Circuit *refused* to adopt that as the "exclusive standard." OSG Br. 19 (quoting *Novell*) (emphasis added). This Court should grant review to resolve this festering conflict now.

II. THE TYING CLAIM WARRANTS REVIEW

The Court should also review the second question presented. Pet. 26-31; Reply 9-11.

First, *linkLine* held that a refusal to deal by any other name is still a refusal to deal, and cannot be relabeled to survive. *Pac. Bell Tel. Co.* v. *linkLine Commc'ns, Inc.*, 555 U.S. 438, 450 (2009). That holding is not, as the government asserts, limited to where a plaintiff "'amalgamat[es]'" two meritless claims. OSG Br. 22. Indeed, the government successfully sang a different tune in *linkLine*, arguing that when a plaintiff's "allegations" of some other kind of antitrust violation—however labeled—"amount to nothing more than a claim that [the defendant] refused to deal on terms that [the plaintiff] desired," they fail as a matter of law "[l]ike the claims in *Trinko*." U.S. *Amicus* Br. 13, 2008 WL 4125498 (U.S.).

The government now says its previous position is "unsound," OSG Br. 21, and that "derivative" tying claims were approved in *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992). That is wrong. The analysis in *Kodak* the government cites involved a *§ 1 claim of collusive agreements*—not a unilateral § 2 refusal-to-deal claim. 504 U.S. at 463 n.8. Moreover, unlike *Kodak*, there is no independent tying conduct here: the majority conceded the supposed tie "was implemented by refusing to deal with" Viamedia, Pet. App. 81a, and Viamedia conceded that "any injury it suffered is derivative of Comcast's refusal to deal, not the alleged tie," *id.* at 127a (Brennan, J.).

Second, the government erroneously asserts that *Aerotec International, Inc.* v. *Honeywell International, Inc.*, 836 F.3d 1171 (9th Cir. 2016), and *Service & Training, Inc.* v. *Data General Corp.*, 963 F.2d 680 (4th Cir. 1992), found no evidence of a tie. OSG Br. 23. In fact, each case rejected what the majority allowed here: that a unilateral refusal to deal with a third-party intermediary can constitute a tie as to the downstream customer. *See Aerotec*, 836 F.3d at 1178-80, 1183-84; *Data General*, 963 F.2d at 682-83, 686.

Resolving this clear conflict is critical to ensuring that "the hard road of refusal to deal doctrine" is not "easily evaded." *Novell*, 731 F.3d at 1077-79. By allowing Viamedia to relabel a refusal to deal as a tie, the panel exacerbated its principal error. Both questions warrant review and reversal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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