No. 20-319

In The Supreme Court of the United States

COMCAST CORPORATION, ET AL.

Petitioners,

v.

VIAMEDIA, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* SCHOLARS OF ECONOMICS AND ANTITRUST IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are leading scholars of economics and antitrust. Their scholarship reflects years of experience and publications in the field of competition economics. The names and affiliations of *amici* are:

- Janusz A. Ordover, Emeritus Professor of Economics, New York University; former U.S. Deputy Assistant Attorney General for Economics (1991-1992);
- Kenneth G. Elzinga, Robert C. Taylor Professor of Economics, University of Virginia; former Special Economic Advisor to the Assistant Attorney General, Antitrust Division (1970-1971);
- Benjamin Klein, Professor Emeritus of Economics, UCLA; former consultant to the U.S. Federal Trade Commission (1976-1980, 1983-86, 1988-1989, 2001-2007) and the U.S. Department of Justice, Antitrust Division (1994);
- Geoffrey A. Manne, President & Founder, International Center for Law & Economics;

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[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, nor did any party or other person or entity other than *amici curiae* and their counsel make a monetary contribution intended to fund the brief's preparation or submission. Counsel of record for all parties received notice of this filing at least 10 days prior to the due date.

- Kevin M. Murphy, George J. Stigler Distinguished Service Professor of Economics, University of Chicago;
- Robert D. Willig, Professor Emeritus of Economics and Public Affairs, Princeton University; former Deputy Assistant Attorney General, U.S. Department of Justice (1989-1991); and
- Joshua Wright, Executive Director, Global Antitrust Institute; University Professor, Antonin Scalia Law School at George Mason University; former Commissioner, Federal Trade Commission (2013-2015).

Amici's expertise and academic perspectives will aid the Court in deciding whether to grant certiorari in two respects. First, *amici* provide the Court an explanation of key economic concepts underpinning the primary theory of liability addressed in the decision below—specifically, how economists understand the welfare effects of a monopolist's refusal to deal voluntarily with a competitor. Second, *amici* offer their perspective on the constrained circumstances that might justify penalizing a monopolist's unilateral refusal to deal—and why this case is not one of them.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici, scholars of economics and antitrust, submit this brief to address the broad consensus in the academic literature disfavoring the theory underlying plaintiff's case—so-called "unilateral refusal to deal" doctrine. In antitrust parlance, a unilateral refusal to deal describes an allegation that a monopolist refuses to enter into a business relationship with a rival. Plaintiff Viamedia alleges that Comcast refused to allow it to access, on reasonable terms, an important input (Comcast's Interconnect) for competition in advertising representation services.

Mainstream economists and competition law scholars are skeptical of imposing liability on a monopolist based solely on its choice of business partners. Because the free choice of business dealings is both a fundamental tenet of a free market economy and the mechanism by which markets produce the greatest welfare gains, cases compelling business dealings—even if one of the parties to the deal is a monopolist—should be confined to particularly delineated circumstances. The Seventh Circuit's analysis, which embraces Viamedia's theory of liability at face value, is thus out of step with the generally accepted academic view of efficient antitrust enforcement.

In Part A below, *amici* describe why it is generally inefficient for courts to compel economic actors to deal with one another against their will. Such "solutions" are generally unsound in theory and unworkable in practice, in that they ask judges to operate as public utility regulators over the defendant's business. Courts should be guarded about taking on such a role.

In Part B, *amici* describe how scholars have roundly criticized *Aspen Skiing*, this Court's most prominent precedent permitting liability for a monopolist's unilateral refusal to deal. This Court has backed away from *Aspen Skiing*'s core theory, calling it "at or near the outer boundary of § 2 liability." The Seventh Circuit erred in failing to take this Court's cues and confine *Aspen Skiing* to its unusual facts.

In Part C, *amici* make clear that, even if delimited situations might warrant antitrust scrutiny of a monopolist's refusal to deal with a competitor, this case is not one of them. A unilateral refusal to deal should trigger antitrust liability only where a monopolist turns down *more profitable* dealings with a competitor in an effort to drive a competitor's exit or to disable its ability to compete, thereby allowing the monopolist to recoup its losses by increasing prices. But Viamedia's allegations come nowhere near that scenario.

ARGUMENT

THE SEVENTH CIRCUIT'S OPINION DIVERGES SHARPLY FROM THE ACADEMIC CONSENSUS ON UNILATERAL REFUSALS TO DEAL.

A. Courts Should Be Reluctant To Compel Business Actors To Deal With Others In The Name Of Efficient Competition Policy.

1. Our economic system privileges the freedom to choose one's business partners.

Scholars agree that, in a market system, firms generally should be free to choose their own business partners because that leads to the greatest welfare gains. Scholars also agree that, "[a]s a general proposition[,] competition is best served not by numerous firms sharing the same productive assets, but rather when firms each have and control their own production resources." Herbert J. Hovenkamp, *Unilateral Refusals to Deal, Vertical Integration, and the Essential Facility Doctrine* 35 (Univ. of Iowa Coll. L. Research Paper No. 08-31, 2008) ("Hovenkamp Paper").

By and large, imposing liability for unilateral refusals to deal—i.e., allowing a court or jury to decide whether a monopolist[2] should be compelled to enter a business relationship or share its property against its

[2] The undersigned *amici* do not know, and offer no opinion, as to whether Comcast is in fact a monopolist. *Amici* are merely assuming as much for purposes of this analysis.

will—upsets those fundamental precepts. *See* Hovenkamp Paper 3 ("Forcing a firm to share its monopoly is inconsistent with antitrust basic goals[.]"). For one thing, forced sharing can harm consumers, who "are no better off when a monopoly is shared; ordinarily, price and output are the same as they were when one monopolist used the input alone." *Id.*

For another, forced dealing can reduce innovation because it "discourages firms from developing their own alternative inputs." Hovenkamp Paper 3. Such compulsion creates "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." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407-408 (2004). Moreover, any "doctrine that forces an owner to share his property or otherwise dictates the terms and conditions of exchange deprives the owner of an incentive to create the property." Dennis W. Carlton & Ken Heyer, *Extraction vs. Extension: The Basis For Formulating Antitrust Policy Towards Single-Firm Conduct*, COMPETITION POL'Y INT'L 285, 296 (2008); *see* Thom Lambert & Alden F. Abbott, *Recognizing the Limits of Antitrust: The Roberts Court Versus the Enforcement Agencies*, 11 J. OF COMPETITION L, & ECON. 791, 805 (2015) (similar); Richard J. Gilbert & Carl Shapiro, *An economic analysis of unilateral refusals to license intellectual* property, 93 PROC. NAT'L ACAD. SCI. 12749, 12754 (1996) (observing that forced dealing "can have profound adverse incentives for investment and for the creation of intellectual property").[3]

The important economic take-away is that private contracting generally advances efficiency and consumer welfare because of its voluntary nature, not in spite of it.

2. Permitting antitrust law to compel entities to engage in commerce with rivals would turn federal courts into public utility regulators.

In most cases, penalizing unilateral refusals to deal is problematic not only for economic reasons, but also because courts are ill-equipped to identify those that merit penalty and to remedy those that might. Indeed, the difficulties in identifying anticompetitive unilateral refusals to deal are rivaled by the practical problems of enjoining them.

The facts of this case help illustrate why. Comcast does not want to contract with Viamedia. Notably, Viamedia "continued to compete" with Comcast despite lacking access to Comcast's Interconnect. Pet. App. 31a ("Even though Comcast had barred it from Interconnect access, Viamedia

[3] The Antitrust Division of the Department of Justice expressed the same concerns earlier this year when it intervened on behalf of the *defendant* in an FTC enforcement action: "compelling monopolists to share the source of their advantage with rivals may lessen the incentive of all market participants to invest in economically beneficial facilities." Br. of U.S. as Amicus Curiae at 19, *FTC v. Qualcomm*, 969 F.3d 974 (9th Cir. 2020) (No. 19-16122), ECF No. 86 (internal quotation marks and ellipsis omitted) (citing *Trinko*, 540 U.S. at 408-409).

continued to compete for RCN's and WOW!'s business."). Yet Viamedia seeks an injunction to compel Comcast to share its property—its Interconnect—to give Viamedia a better chance to compete.

For starters, it is not accurate to deem Comcast's conduct a "unilateral refusal to deal." Comcast indisputably *was* willing to deal with Viamedia, but not on terms Viamedia was willing to accept. *See* Pet. App. 7a. So how is a court to determine when terms unacceptable to one party rise to the level of anticompetitive behavior?

Many scholars agree that courts have a poor track record in making that difficult determination. "Anyone who thinks that judges would be good at detecting the few situations in which cooperation would do more good than harm has not studied the history of antitrust." Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 HARV. J.L. & PUB. POL'Y 439, 442 (2008); *see also* Lambert, *supra* at 805 ("[T]he sum of error costs and decision costs would be higher under a general rule requiring vertically integrated monopolists to deal in the upstream market with their downstream rivals.").

Trial judges would be burdened with a challenging task *even if* there were economic consensus on unilateral refusals to deal. Assume that a court (on remand) deemed Comcast's conduct anticompetitive and wanted to force Comcast to deal with Viamedia. Questions abound: What specific terms should it choose? For how long? What concessions must Comcast offer, and what penalties may Comcast enforce? How much should Viamedia pay Comcast for its services, if anything? What guidance, if any, would be provided by the prices in Comcast's contracts with customers that are situated differently than Viamedia, and which have different non-price terms? If the trial judge were motivated to look to the economic literature for guidance on how to recreate the conditions of pre-exclusion competition, he or she would find the literature limited and lacking consensus.

Suppose a federal trial judge is able to discern the "right" (efficient) answer to all of these questions. 5G wireless is on the horizon. The telecommunications industry is, by its nature, a dynamic high-technology industry. The "right" answers will change, and even those that make a living in this business may disagree on what the new answers are. But they would likely agree that a single federal trial judge would struggle to find them.

As this thought experiment reveals, every term of the commercial arrangement becomes a potential battleground where the losing party can return to court. That creates perverse incentives "in which one party may prefer to rely on the courts to create (or perpetuate) the joint venture, and may hope thereby to gain a financial advantage" by appealing to the court's view of what is "fair." Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal – Why* Aspen *and* Kodak *are Misguided* 6 Nat'l Bureau of Econ. Rsch. Working Paper No. 8105, 2002) ("Carlton, *General Analysis*").

As this Court has recognized, federal courts are "ill suited" to "act as central planners, identifying the proper price, quantity, and other terms of dealing." *Trinko*, 540 U.S. at 407-408. Yet that is what "solving" a unilateral refusal to deal entails: "requir[ing] the court to assume the day-to-day controls characteristic of a regulatory agency." *Id.* at 415; *see* Lambert, *supra* at 805 (noting that "[a] broad forced-sharing rule would also entail high decision costs"). The Department of Justice noted the same problem earlier this year. *See* Br. of U.S. at 19, 26-27, *Qualcomm*, *supra*.

In short, any regime in which courts create and enforce terms of a commercial interaction that the court itself has compelled into existence would share the difficulties that attend public utility regulation.

B. *Aspen Skiing* Does Not Support the Seventh Circuit's Decision.

1. Scholars have roundly criticized Aspen Skiing*, which should be confined to its facts.*

Much of the scholarship surrounding unilateral refusals to deal in the legal context has trained its focus—and criticism—on this Court's *Aspen Skiing* decision, which imposed liability on a monopolist for refusing to continue a business relationship with a rival.

Aspen Skiing's scholarly reception has not been positive; to find any antitrust scholar who is enthusiastic about *Aspen Skiing* would be a challenge. One scholar, for example, has argued for "a very narrow reading that effectively removes it as a precedent for future cases." Carlton, *General Analysis* at 24. If taken as an endorsement of "plaintiffs successfully taking property from defendants," *Aspen Skiing* threatens "a dangerous direction for antitrust policy" that can only be prevented by giving the decision "a narrow construction." *Id.* at 1, 4, 22; *see also id.* at 22-24 (specific criticism of the economics of *Aspen Skiing*).

Other scholars have cast *Aspen Skiing* as a negation of property rights and free markets more generally. *See* Alan J. Meese, *Property,* Aspen*, and Refusals to Deal*, 73 ANTITRUST L.J. 81, 82 (2005) (observing that "the Court unduly qualified the defendant's property rights and did so in a way that enhanced the prospect of opportunistic free riding by venture partners"). Still others have noted that the "ill-considered" *Aspen Skiing* "failed to recognize a possible procompetitive explanation of the defendant's conduct and failed to identify evidence sufficient to support a plausible anticompetitive explanation." John E. Lopatka & William H. Page, *Bargaining and Monopolization: In Search of the "Boundary of Section 2 Liability" Between* Aspen *and* Trinko, 73 ANTITRUST L.J. 115, 118 (2005); *see also* Hovenkamp Paper at 18-22 (explaining how the ruling in *Aspen Skiing* invites judicial excess).

Professor Hovenkamp describes yet another fundamental problem of *Aspen Skiing*:

> [A]s a matter of principle, public utility style price regulation is not the antitrust solution to a failure of competition. But even then an

> antitrust order to deal creates a perverse incentive that runs counter to the entire principle of the antitrust laws that where the government has not prescribed regulation, competition is to be the norm.

Herbert Hovenkamp, *The Monopolization Offense*, 61 OHIO STATE L.J. 1035, 1044 (2000). As a result, "[a]ntitrust should never intervene in a market unless it can provide an incentive toward competition"—and *Aspen Skiing* "ha[s] not been able to meet this test." *Id.* at 1045.

It is not surprising, then, that few cases have followed *Aspen Skiing*—particularly after *Trinko* deemed it "at or near the outer boundary of § 2 liability" for unilateral refusals to deal. 540 U.S. at 409; *see* Hovenkamp, *The Monopolization Offense*, *supra* at 1044-1045 (noting that "the courts have generally responded" to "problems" in doctrine "by construing the *Aspen* and *Kodak* cases narrowly"). Indeed, commentators understandably concluded that *Aspen Skiing*'s liability theory "bit the dust" after *Trinko* and *Pacific Bell Telephone Co. v. linkLine Communications, Inc.,* 555 U.S. 438 (2009). Easterbrook, *supra* at 441-442; *see also* J. Matthew Schmitten, *Antitrust's Single-Entity Doctrine: A Formalistic Approach for a Formalistic Rule*, 46 COLUM. J.L. & SOC. PROBS. 93, 99-100 (2012) (observing that "unilateral refusals to deal are virtually per se legal under § 2" of the Sherman Act).

2. *Viamedia's allegations do not warrant expanding* Aspen Skiing.

As the foregoing shows, even if *Aspen Skiing* remains good law for situations involving near-identical facts, scholars (joined by this Court and the Department of Justice) overwhelmingly agree that it should not be broadened to apply to *new* factual situations. Yet in invoking *Aspen Skiing* without recognizing multiple key distinctions between its facts and Viamedia's allegations, the Seventh Circuit did exactly that.

First, there was no vertical relationship between the parties in *Aspen Skiing*. Rather, the parties were *horizontal* competitors—former joint venture partners and nothing more. The Seventh Circuit did not meaningfully address that distinction in its comparison of the two cases.

Second, the Seventh Circuit described Viamedia's business, at bottom, as a sales staff, a billing system, and some people to "deal with the necessary equipment." *See* Pet. App. 21a. So it is essentially a middleman between advertisers and MVPDs. Economic middlemen (especially unprofitable ones) face a constant risk of being overtaken by more-efficient vertically integrated entities. *See* A.W. Shaw, *Some Problems in Market Distribution*, 26 Q.J. ECON., 703, 728-730 (Aug. 1912). The *Aspen Skiing* parties, by contrast, were true competitors—competing ski slope operators.

Relatedly, such low "barriers to entry"—i.e., the cost of investing in a sales staff—for Viamedia customers' own vertical integration mean that it would not be particularly costly (even if somewhat inefficient) for customers to vertically integrate into advertising representation services themselves. That renders implausible the hypothesis that Comcast could ever wield insuperable market power for such services.

Third, in *Aspen Skiing*, the parties had negotiated the joint arrangement annually for over a decade until the defendant's abrupt about-face. *Aspen Skiing Co. v. Aspen Highlands Skiing*, 472 U.S. 585, 589-592 (1985). Here, by contrast, the only prior cooperative relationship consisted of a single contract with a fixed term originally entered in 2003. And that contract governed only two DMAs out of dozens in which Comcast operates the Interconnect. *See* Pet. App. 25a. Moreover, the cable industry has faced major industry-wide changes in recent years. *See id.* at 17a-19a. Yet the Seventh Circuit points to no allegations other than the existence of the lone term contract (which expired in 2012) to support the proposition that it continued to be profitable for Comcast to deal with Viamedia.

Fourth, in *Aspen Skiing*, the defendant would not even accept the *face value* of its ski tickets from the plaintiff—a fact strongly suggesting that the monopolist was engaging in less efficient behavior to hurt a rival. *See Trinko*, 540 U.S. at 409. The Seventh Circuit did not point to any similar fact in this case or account for its absence.

The bottom line is that Comcast's actions look like ordinary competition, not anticompetitive exclusion. At the very least, the facts alleged here are far afield from *Aspen Skiing*'s facts. As a consequence, the Seventh Circuit missed the mark in deeming Viamedia's case "stronger than *Aspen Skiing*." Pet. App. 52.

C. Economics Can Defend Liability For A Monopolist's Unilateral Refusal To Deal Only In Narrow Circumstances Absent Here.

The question remains: Given that mainstream scholarship casts a jaundiced eye on compelled dealing, and *Aspen Skiing* provides meager support (or, at best, the "outer boundary") for that doctrine, when should unilateral refusals to deal give rise to liability beyond the facts of *Aspen Skiing*? The answer: only under carefully delimited circumstances absent in this case.

Some economists conclude that unilateral refusals to deal should be per se *legal*. *See, e.g.*, Carlton, *General Analysis* at 3 ("[I]t is understandable why some could take the position that the evidence to date on refusals to deal is so ambiguous that there should be no antitrust restrictions.").

Beyond a *per se* rule, however, virtually all scholars agree that a refusal to deal "should give rise to liability only rarely"—at most, where a plaintiff can plausibly show that a defendant gave up a *more profitable* cooperative arrangement with a competitor in favor of a less profitable exclusion strategy that recouped its losses through the plaintiff's resultant inability to compete. For example, Ordover and Willig advocate for a test that "examines whether the actual strategic decisions adopted by a firm make business sense (i.e., are profitable) irrespective of their effect on the economic viability of rivals, or whether these strategic decisions are only profitable because they destroy rivals' ability to compete and, thereby, enable the firm to earn additional monopoly profits in some relevant market." Janusz A. Ordover & Robert D. Willig, *Access and Bundling in High-Technology Markets in* COMPETITION, INNOVATION AND THE MICROSOFT MONOPOLY: ANTITRUST IN THE DIGITAL MARKETPLACE 103, 109 (J.A. Eisenach and T.M Lenard (eds.), Kluwer Academic Publishers, 1999). Other scholars are in accord. *See, e.g.*, Br. Of Amici Curiae International Center For Law & Economics & Scholars Of Law & Economics at 7, *Qualcomm, supra* ("[A] duty to deal requires that the company gave up a profitable course of dealing with rivals and adopted a less profitable alternative.") (emphasis omitted); Hovenkamp Paper 21-22 (suggesting liability only appropriate where there is no business justification—or one "that is poorly fitted to the result or wholly disproportionate to the harm that is inflicted"—as well as conduct that is "capable of creating or sustaining a monopoly").[4]

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[4] The Department of Justice is also in accord. *See* Br. for U.S. as Amicus Curiae at 6, *Viamedia, Inc. v. Comcast Corporation* (7th Cir. Nov. 8, 2018) (No. 18-2852), ECF No. 33 (urging "longstanding" position that § 2 "permits refusals to deal that are supported by valid business justifications"); Br. of U.S. at 25, *Qualcomm*, *supra* ("[N]o finding by the court suggests that Qualcomm's decision to license in a profit-maximizing way was a scheme calculated to cause 'losses to drive rivals from the market or to discipline them,' as necessary under *Aspen Skiing*.").

At a minimum, a properly restricted rule would not countenance judicial intervention when a vertically integrated firm simply stops dealing with others altogether. *See, e.g.*, Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 312 (2003) (noting that any "limitation on a monopolist's right to discriminate among outsiders should be sharply distinguished from claims that the defendant has discriminated in favor of itself over all outsiders," which "is inherent in the property right to exclude").

That consensus rule governs this case. Comcast's "prototypical valid business purpose"—"improv[ing] efficiency" by "replac[ing] an intermediary with a direct relationship"—was clear from the complaint. Pet. App. 188a, 203a (second alteration in original). Comcast's investment to transition away from Viamedia cost only what the court below called "small potatoes, a mere rounding error." Pet App. 29a. That fact strongly suggests that trivial efficiency gains would make Comcast's vertical integration profitable even in the absence of exclusionary effects.

Additionally, because Viamedia's value-add is basically a sales staff and billing systems, Pet. App. 21a, the ease with which cable providers can vertically integrate into advertising representation services themselves (as Comcast and other cable providers have) militates against any hypothesis that Comcast's motivation is anything other than enhancing efficiency—in legitimate, procompetitive furtherance of its bottom line. If Comcast's goal were to extract market power at the advertising representation services level following Viamedia's exit, it would be constrained by the ability of Viamedia's customers (like RCN) simply to hire their own sales staff and implement their own billing systems.

In sum, Viamedia has not plausibly alleged the types of facts that would suggest Comcast engaged in anticompetitive exclusion that would reduce consumer welfare or harm competition, rather than the conduct of ordinary competition. This Court should grant certiorari to eliminate any doubt that *Aspen Skiing* represents the outer limit of unilateral refusal to deal liability and should not be expanded to situations where a defendant offers valid business justifications for the refusal.

CONCLUSION

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

Respectfully submitted.

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