No. 07-512 NOV 15 2007

IN THE

Supreme Court of the United States

PACIFIC BELL TELEPHONE COMPANY,
D/B/A AT&T CALIFORNIA, ET AL., PETITIONERS

v.

LINKLINE COMMUNICATIONS INC., ET AL.,
RESPONDENTS

**On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit**

**BRIEF OF VERIZON COMMUNICATIONS INC. AND
THE NATIONAL ASSOCIATION OF MANUFACTURERS
AS *AMICI CURIAE* SUPPORTING PETITIONERS**

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BRIEF OF VERIZON COMMUNICATIONS INC. AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

Verizon Communications Inc. (Verizon) is one of the largest providers of telecommunications services in the United States. Verizon affiliates provide a variety of wireless and wireline communications services directly to retail customers and, on a wholesale basis, to other communications service providers that compete with Verizon at the retail level. In particular Verizon is competing at both retail and wholesale for broadband services that provide high speed connections to the Internet.

It is widely recognized that the truly important advances in the telecommunications world in the last 10 years are the advances in broadband, not the sharing of old infrastructure. The advances in broadband have taken place in a vigorously competitive world – cable technology versus, first,

[1] Under S. Ct. R. 37, *amici curiae* states the following: (1) Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. (2) All parties have consented to the filing of this brief. (3) No counsel for a party has written this brief in whole or in part, and no person or entity other than the amici curiae or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to their preparation or submission.

DSL technology and, now, fiber optic and wireless technology.[2]

The antitrust litigation by non-facilities-investing firms seeking to piggyback on the old infrastructure starting in the late 1990s was a drain on Verizon and others seeking to focus on broadband progress. The Court in *Trinko* rightly brought that litigation to an end, recognizing that the litigation powerfully undermined, rather than served, the goals of antitrust law. Now the Ninth Circuit, in conflict with four other circuits, has resurrected a means to create all the harm that this Court had stopped in *Trinko.*

With respect to high-speed services like the one at issue here, following the Court's decision in *Trinko* and the FCC's parallel decision under the 1996 Telecommunications Act to stop requiring telephone companies to share their broadband networks, Verizon has been investing vast sums to deploy a fiber optic network to consumers.[3] Verizon has a

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[2] *See, e.g.*, FCC, Wireline Competition Bureau, Indus. Analysis & Tech. Div., *High-Speed Services for Internet Access* (Oct. 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-277784A1.pdf; *Time Warner Telecom, Inc. v. FCC*, 2007 U.S. App. LEXIS 24204 (3d Cir. Oct. 16, 2007) (dismissing challenges to the FCC's removal of common carrier regulations from telephone company broadband services).

[3] Verizon is investing $23 billion to offer fiber optic connections to 18 million households by 2010. *See* Leslie Cauley, *Verizon's army toils at daunting upgrade*, USA Today, Oct. 25, 2007; Verizon press release (Oct. 29, 2007), available at http://investor.verizon.com/news/view.aspx?NewsID=863 (Verizon's fiber-to-the-premises network currently passes 8.5 million premises). Verizon is the first major telecom company to deploy gigabit passive optical network (G-PON) technology to customers in the

strong interest in the development of sound antitrust principles that neither cap prices on services deriving from beneficial (and risky) investments nor penalize retail price reductions that benefit consumers by intensifying competition against rivals (like cable). Verizon urges this Court to review the decision below and to reject categorically a Sherman Act § 2 "price squeeze" claim as inconsistent with precedent and important antitrust policies, including those requiring clear guidelines for unilateral business conduct.

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

SUMMARY OF ARGUMENT

I. The Ninth Circuit's ruling is at odds with this Court's decisions in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), and *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004). *Brooke Group* held that above-cost retail prices do not constitute predatory pricing under Section 2, and *Trinko* held

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United States which dramatically increases internet access speeds. Verizon press release (Mar. 27, 2007), available at http://investor.verizon.com/news/view.aspx?NewsID=825.

that a firm in the position of petitioner here does not violate Section 2 by refusing to sell goods at wholesale to a rival. Together, those decisions prove that a dominant firm in petitioner's position does not violate Section 2 by failing to sell a rival goods at a wholesale price that enables that competitor to make a profit at the retail level. Four other circuit courts – the D.C., Fourth, Seventh, and Eleventh Circuits – have expressly so held.

II. Even more broadly, recognizing price squeeze liability claims under Section 2 would disrupt the policies underlying that law. All firms should be free both to integrate vertically and to price competitively unless those practices threaten to drive rivals from the market and harm competition. This Court addressed that precise concern in *Brooke Group* and ruled that a price discount is not predatory unless it both is below cost and poses a dangerous risk of subsequent monopoly pricing. The same rule should be applied here. A so-called price squeeze typically reflects the decision of a vertically-integrated firm voluntarily to offer a good to a competitor at wholesale and to compete vigorously over price at retail. Both practices are beneficial and should be encouraged.

The Ninth Circuit's rule, by contrast, will deter such sales and pricing competition. Firms will limit investments or restrict output due to fear of liability for charging too much at the wholesale level or too little at the retail level; they will avoid selling at wholesale to rivals due to fear of liability for charging too much; they will raise their retail prices or forgo price reductions due to fear of liability for charging too little; or they will do all of the above. There is no good reason to incur those harms.

III. The Ninth Circuit's rule creates uncertainty in an area – pricing – where this Court has sought to bring certainty and stability to antitrust law. This Court in *Brooke Group* adopted an objective test to determine when price is used as a predatory weapon to ensure that the bench, bar, and business community could apply the law in a predictable manner. The Ninth Circuit's decision, by contrast, forces juries, antitrust counselors, and managers to decide what wholesale and retail prices leave a rival with the opportunity to secure a "reasonable" profit. Yet, for more than a century it has been settled law that no trier of fact should be tasked with the burden of calculating a "reasonable" price in an antitrust case. By ignoring that settled proposition, the Ninth Circuit in this case has repeated the same mistake that it made in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007), of directing the common law judicial system to answer a question fit (at best) only for regulators.

ARGUMENT

THE ALLEGATION THAT A VERTICALLY-INTEGRATED MONOPOLIST'S WHOLESALE AND RETAIL PRICES CREATE AN UNLAWFUL "PRICE SQUEEZE," AT LEAST WHERE THE MONOPOLIST HAS NO ANTITRUST DUTY TO DEAL, FAILS TO STATE A CLAIM UNDER SHERMAN ACT § 2

I. THE NINTH'S CIRCUIT'S RULING CONFLICTS WITH OTHER CIRCUIT COURT DECISIONS

As Chief Judge (and former Assistant Attorney General for the Antitrust Division) Douglas Ginsburg explained for the D.C. Circuit, there is no merit to the allegation that a vertically-integrated monopolist that lacks an antitrust duty to deal has created an unlawful "price squeeze" by setting its wholesale and retail prices in such a manner that a rival cannot make a profit. *Covad Communications Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 673 (2005). The unanimous panel rejected the price squeeze claim, involving the same type of dual wholesale and retail sales of broadband services as here, as a matter of law. Relying on this Court's 2004 decision in *Trinko*, which held that Sherman Act § 2 does not impose on a dominant firm a duty to deal with a rival, the court of appeals held that, if a monopoly has no duty to deal with a rival in the first place, it has no obligation to ensure that its rival makes a profit when it volunteers to do business with that rival nonetheless. Chief Judge Ginsburg's decision endorsed the analysis of one of the nation's leading antitrust scholars, Professor Herbert Hovenkamp: "it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal." 398 F.3d at 673, quoting 3A Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* 129-30 (2d ed. 2002).

The Ninth Circuit in this case agreed, as it had to under this Court's decision in *Trinko*, that petitioners do *not* have a duty to sell the products here at wholesale to respondents. A divided Ninth Circuit panel nevertheless permitted respondents to assert a price-squeeze claim based on the relative wholesale and retail prices. The panel majority held that "a price squeeze occurs when a vertically integrated company sets its prices or rates at the first (or upstream) level so high that its customers cannot compete with it in the second-level (or downstream) market." Slip op. at 12187 (citation and quotation marks omitted).

The Ninth Circuit stands alone in reaching this decision. In addition to the D.C. Circuit, the Fourth and Seventh Circuits rejected, at the motion to dismiss stage, price squeeze claims indistinguishable from the one that the Ninth Circuit endorsed in this case.[4] Similarly, the Eleventh Circuit limited "price

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[4] The Fourth Circuit upheld dismissal on the pleadings of a complaint that "Verizon's provision of its last-mile facilities" at wholesale to rival Cavalier was "overly ... expensive" and that Verizon offered its own retail services "at a price lower than Cavalier's 'retail' cost ..., or at a price so low that Cavalier could not profitably offer such services" in competition with Verizon. *Cavalier Telephone v. Verizon Virginia*, 330 F.3d 176, 180-81 (4th Cir. 2003), *cert. denied*, 540 U.S. 1148 (2004). The Seventh Circuit, in an opinion written by Judge Diane Wood (who was former Deputy Assistant Attorney General for Antitrust), upheld dismissal on the pleadings of a complaint that "Ameritech has refused to sell to its competitors local telephone

squeezing" antitrust theories to the predatory pricing framework established by this Court in *Brooke Group*: a pricing complaint "must contain ... the two basic prerequisites for a showing of price predation" – prices must be "below an appropriate measure of ... costs" and there must be "a dangerous probability[] of recoup[ment]."[5]

The First Circuit, in an opinion by then-Judge Breyer, expressed strong skepticism about price squeeze liability in an unregulated industry.[6] The court wrote that it must "take account of the institutional fact that antitrust rules are court-

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services at wholesale prices that are just, reasonable, and nondiscriminatory, which prevents the competitors in turn from offering attractive resale prices to consumers." *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 395 (7th Cir. 2000).

[5] *Covad Communications Co. v. BellSouth Corp.*, 374 F.3d 1044, 1050 (11th Cir. 2004), *cert. denied*, 544 U.S. 904 (2005), quoting *Brooke Group*, 509 U.S. at 222. The plaintiff in that case filed a rehearing petition noting correctly that the Eleventh Circuit's "Opinion ... treats Covad's 'price squeeze' claim as if it were a 'predatory pricing' claim and applies the standards of *Brooke Group* ...." Appellants' Petition for Rehearing at 1, *Covad Communications Co. v. BellSouth Corp.*, No. 01-16064-C (11th Cir. filed July 16, 2004). The Eleventh Circuit denied rehearing. The D.C. Circuit similarly read the Eleventh Circuit's decision as requiring pricing complaints, where there is no duty to deal at wholesale, to meet the strict standards for predatory pricing. *Covad Communications Co. v. Bell Atlantic Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005) (discussing sister case against BellSouth).

[6] *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990). The First Circuit's holding extended only to a rejection of price squeeze liability for firms whose prices are regulated at both wholesale and retail levels, but the skepticism noted in text was stated in the context of fully *un*regulated firms. *See id.* at 23.

administered rules"[7] but even in a fully unregulated context "it is not easy for courts to administer Judge Hand's [*Alcoa*] price squeeze test"[8]:

> That test makes it unlawful for a monopolist to charge more than a "fair price" for the primary product while simultaneously charging so little for the secondary product that its second-level competitors cannot make a "living profit." *See Alcoa*, 148 F.2d at 437-38. But how is a judge or jury to determine a "fair price?" Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition "would have set" were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price "gap?" Must it be large enough for all independent competing firms to make a "living profit," no matter how inefficient they may be? If not, how does one identify the "inefficient" firms? And how should the court respond when costs or demands change over time, as they inevitably will?

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[7] 915 F.2d at 22.

[8] 915 F.2d at 25, discussing *United States v. Aluminum Co.*, 148 F.2d 416 (2d Cir. 1945).

> We do not say that these questions are unanswerable, but we have said enough to show why antitrust courts normally avoid direct price administration ***.[9]

Outside the Ninth Circuit, at least where there is no duty to deal (as rarely exists and, the Ninth Circuit agreed, does not exist in this case), the Sherman Act does not forbid a vertically-integrated firm – even one possessing monopoly power – from setting above-cost profit-maximizing prices at both levels. This clear conflict among the circuits requires resolution by this Court.

II. THE NINTH CIRCUIT'S RULING IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND SETTLED ANTITRUST PRINCIPLES

This Court's decisions, most importantly *Trinko, Brooke Group*, and *Weyerhaeuser*, recognize that Section 2 must not condemn single-firm conduct as anticompetitive if doing so will deter activity that typically is legitimate and, indeed, to be encouraged. That fundamental approach requires rejection of the Ninth Circuit's "price squeeze" basis for potential Section 2 liability. For price competition in particular, the principles recognized in *Trinko, Brooke Group*, and *Weyerhaeuser* all compel the conclusion that any concern in this area should be left to the predatory pricing standards already established in the law, and not expanded to embrace non-predatory "price squeezes." This Section focuses

[9] 915 F.2d at 25. Yet another circuit judge, J. Posner, has written more bluntly, "now that the *Alcoa* doctrine is defunct, it is understood that a monopolist is free to compete ...." R. Posner, *Antitrust Law* 250 (2d ed. 2001).

on the substantive antitrust reasons for that conclusion, which are then powerfully reinforced, as explained in Point III, by the concerns about the institutional capacity of juries in antitrust cases to make the judgments inherent in any "price squeeze" claim.

A. The Ninth Circuit's price squeeze theory necessarily questions whether the wholesale prices are too high. But *Trinko* establishes not only that Section 2 supplies no basis for such a concern, but that grave antitrust ***harm*** can easily result from allowing challenges whose mere threat unavoidably would limit prices of a legitimate monopolist. The <u>combination</u> of reasons that led to rejection of a duty to deal there should not be undermined by a price squeeze alternative way of doing what *Trinko* stopped. Indeed, the very complaint in *Trinko* was substantively equivalent to a "price squeeze" – the retail competitors there allegedly couldn't survive against the wholesaler's retail prices given what they had to pay for the wholesale product and the quality of what they got.

Antitrust positively values the freedom to charge prices without caps if the monopoly is lawful. "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system" because it "attracts 'business acumen'" and "induces risk taking that produces innovation and economic growth." 540 U.S. at 407.[10]

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[10] The Justice Department agrees "a firm should not be required to sacrifice profits to sell to competitors at a discount, even if that would on balance produce social gains; therefore, a monopolist's refusal to sell below the monopoly price should not

In addition, the fundamental limits on the institutional capacity of courts and juries, which must limit what Section 2 covers, are particularly strained in pricing cases. As described above, this point was central to Judge Breyer's opinion in *Town of Concord* rejecting price squeeze liability for regulated firms. The Ninth Circuit's decision creates a more difficult regime than the Second Circuit created in *Trinko*. Here, courts and juries must evaluate not one but two sets of prices and terms.

B. The dangers of a price squeeze theory's inhibition on wholesale prices as too high are at least matched by the dangers of such a theory's challenges to retail prices as too low. *Brooke Group*, reinforced by *Weyerhaeuser*, recognizes those dangers and insists on stringent conditions focused on the defendant's own cost-price characteristics before any Section 2 liability can be imposed. Those conditions should govern in this setting, too.

Brooke Group recognized that a company's above-cost price reductions can threaten the profitability of less efficient rivals, but discounts benefit consumers

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be a violation, because that would require that the monopolist share its profits." J. Bruce McDonald, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Remarks to the College of Europe, Global Competition Law Centre, The Modernization of Article 82 Second Annual Conference: Section 2 and Article 82: Cowboys and Gentlemen (June 16-17, 2005). *See* Herbert Hovenkamp, *The Legal Periphery of Dominant Firm Conduct*, University of Iowa Legal Studies Research Paper, No. 07-21, at 5 (Sept. 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014426 ("United States [law provides] unambiguously that once the monopolist has attained its position it may charge any price that the market will bear.").

nonetheless, at least in the short run, regardless of how prices are set.[11] *Brooke Group* also acknowledged that weaknesses in the legal system render it inherently incapable of effectively identifying and deterring only a limited category of disfavored above-cost discounts. Any rule outlawing some disfavored above-cost discounts would end up deterring a larger number of social welfare-enhancing above-cost discounts by risk-averse firms. Accordingly, the Court adopted a stringent test for predation: A plaintiff must prove both that the defendant has engaged in short-run below-cost pricing and reasonably could expect to recoup those losses via long-run monopoly pricing. That test was necessary in order to avoid chilling aggressive price competition. Because the benefits to consumers of discounts are immediate and desirable and the occasions for their proper condemnation rare, this Court approved a limited, simple, and objective standard that readily can be understood and applied by courts, juries, practitioners, and businesses. 509 U.S. at 223-26.

C. This Court revisited the issue of predation last Term in *Weyerhaeuser* and applied the *Brooke Group*

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[11] *See* Thomas O. Barnett, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Opening Remarks at the Antitrust Division and FTC Hearings Regarding Section 2 of the Sherman Act: The Gales of Creative Destruction: The Need for Clear and Objective Standards for Enforcing Section 2 of the Sherman Act (June 20, 2006) ("In *Brooke Group*, the Court recognized the possibility that above-cost pricing might hurt competition but nonetheless insulated above-cost pricing from liability to avoid the greater harm of a legal regime that would cause firms to hesitate before lowering their prices or not to lower prices at all.").

test to a claim that above-cost *purchases* were anticompetitive. The Court reiterated that pricing conduct playing a commonplace role in legitimate market competition must not be chilled by uncertain liability standards. 127 S. Ct. at 1074-75. "We were particularly wary [in *Brooke Group*] of allowing recovery for above-cost price cutting because allowing such claims could, perversely, 'chill legitimate price cutting,' which directly benefits consumers." *Id.* at 1074.[12] The Court then compared the economics and real-world practices of predatory pricing and predatory bidding, finding that, since the economics underlying the two practices is "analytically similar" and the claims of injury were "strikingly similar," the same antitrust rule should apply in both settings. *Id.* at 1076-77.

The reasoning in *Weyerhaeuser* is particular relevant here. The defendant there was a market intermediary; it purchased inputs from upstream suppliers and combined them with other inputs to create products sold downstream. The Court held that a plaintiff who sues an intermediary for "predatory bidding" must prove, among other things that the defendant's supposedly inflated purchase prices "caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs." 127 S. Ct. at 1078. The "relevant output" in that context — a retail product — is analogous to

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[12] *See also id.* at 1075 (cost of erroneous findings of predatory-pricing liability is "quite high" because "the mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition;" "mistaken findings of liability would chill the very conduct the antitrust laws are designed to protect") (citations omitted).

the retail service involved here. And the Court's holding requires a comparison of the aggregate cost of all inputs to the price charged for a defendant's retail product. The sustainability of the particular *plaintiff's* business is of no moment if the stringent standard, based entirely on the defendant's costs and prices, is not met.

Here, by analogy, when a plaintiff sues a defendant for a supposed price squeeze, the relevant cost-price comparison should focus on the *defendant's* profit-making ability, *not* the *plaintiff's*. As in *Brooke Group* and *Weyerhaeuser*, keeping the focus entirely on the integrated firm's costs and prices reflects any advantages or disadvantages that the integrated firm may have, such as scope economies or burdens of legacy processes or equipment, avoids penalizing low retail pricing that benefits retail customers, and prevents antitrust doctrine from being used to shelter inefficient practices by competitors. The only proper comparison should remain between the total cost of all inputs in the defendant's retail service and the defendant's retail price of that service, not *the plaintiff's* prices and costs. Yet the latter is the essence of the Ninth Circuit's "price squeeze" doctrine.

The path taken in *Brooke Group* and *Weyerhaeuser* should be followed here. A so-called price squeeze typically reflects the decision of a dominant vertically-integrated firm voluntarily to offer a good to a competitor at wholesale while vigorously competing against that rival over price at retail. The two practices benefit consumers through increased competition and lower prices and therefore should be encouraged. In fact, if the retail competitor is more efficient and thus has lower costs than the integrated firm, it generally is in the integrated firm's best interest to sell to the competitor, not to exclude it.[13] It might even be desirable for the integrated firm to exit the retail level and rely entirely on the more efficient competitor for distribution of its product or service. In addition, if there is competition in the sale of the upstream product, *i.e.*, the upstream producer is *not* a monopolist, then a price squeeze could only occur by the integrated producer lowering its downstream price, inasmuch as it could not raise its upstream price in a competitive market. In this circumstance, the antitrust analysis is identical to that of predatory pricing and there is no need of a separate "price squeeze" theory of antitrust liability.

The upshot is this: The only setting in which the combination of practices at issue here is likely to raise material concerns about competitive harm is the setting already identified in *Brooke Group* and *Weyerhaeuser* – where a firm sells at a loss downstream in order to drive a rival from the market, and then recoups the loss by charging higher prices. But the *Brooke Group-Weyerhaeuser* test already defines when such conduct can be condemned as

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[13] "An unusual feature of a margin squeeze is that the downstream rival is at the same time a customer of the dominant firm upstream. Thus, by excluding a downstream rival, the dominant firm also reduces its upstream profits because it would also lose a customer. This dynamic can have substantial effects on the incentives for such conduct and may in fact amount to a disincentive to engage in a margin squeeze in the first place." Damien Geradin & Robert O'Donoghue, *The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector* 11 (Apr. 2005).

anticompetitive. The price squeeze doctrine approved by the Ninth Circuit, therefore, is overbroad and affirmatively harmful to social welfare.

D. The ruling below will have several adverse effects on the competitive process. When there is no duty to deal, the threat of a price squeeze challenge creates incentives not to deal, even though there would be benefits to rivals and consumers from dealing. The resulting harm to consumers can be especially great when a downstream firm uses a dominant firm's input to produce a third downstream product that the monopolist does not itself produce. Choosing not to deal thus would deny consumers the benefits derived from the third product. When there is a duty to deal, inefficiencies are created as a firm raises its retail price or withdraws from the retail market in an effort to reduce its liability. Accordingly, the Ninth Circuit's ruling will injure the very parties that it sought to protect.

The Ninth Circuit's decision will cause systemic injuries to the competitive process, too. To start with, the decision below could disrupt the beneficial innovation and investment by facilities-based competitors under the FCC's 2005 decision to free telephone companies from the prior duty to grant rival Internet service providers wholesale access to their facilities.[14] Some firms will be deterred from internal growth; they may limit risky investments that depend on freedom to charge market-bearing

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[14] *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 F.C.C.R. 14,853 (2005), *aff'd*, *Time Warner Telecom, Inc. v. FCC*, Nos. 05-4769 *et al.*, 2007 U.S. App. LEXIS 24204 (3d Cir. Oct. 16, 2007).

upstream prices; they may forgo downstream price cuts; or they may pursue all of the above. Consumers lose when a company that is relatively more efficient than its rivals engages in less aggressive competition for fear of treble damages liability.

III. THE NINTH CIRCUIT'S RULE CREATES UNCERTAINTY WHERE CLARITY IS NEEDED

The Ninth Circuit's decision fails to recognize the need for legal rules that are clear, understandable, and manageable by the bench, bar, and business community. Last Term, this Court granted certiorari in *Weyerhaeuser* to review a Ninth Circuit decision that created a similar problem. Rather than use the *Brooke Group* test to evaluate a "predatory buying" claim, the Ninth Circuit permitted a jury to decide whether such a claim had merit by asking whether the defendant had purchased more raw materials "than it *needed*" from upstream suppliers or had paid a higher price for those materials "than *necessary*, in order to prevent [rivals] from obtaining the [materials] they needed at a *fair* price."[15] Although this Court decided the *Weyerhaeuser* case on a different ground, the issue whether such jury instructions permitted a trier of fact rationally to interpret and apply the Sherman Act was before this Court.

Here, the Ninth Circuit has committed the same type of error: namely, construing Sherman Act § 2 in a manner that leaves it to the jury to decide whether

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[15] *Confederated Tribes of Siletz Indians v. Weyerhaeuser*, 411 F.3d 1030, 1039 n.30 (9th Cir. 2005) (reprinting jury instructions; emphasis added); *see* 127 S. Ct. at 1073.

the defendant has selected "reasonable" prices at two levels. The inevitable consequence of allowing respondents' price squeeze claim to go forward is that at some point the trier of fact may have to decide what is the "reasonable" profit that respondents were denied. Yet, this Court has repeatedly noted that there is no question our common law system is *less* fit to decide than whether a particular price is "reasonable," either in the abstract or as applied.[16] Judges have no special expertise to second-guess the market as to what price is "reasonable."[17] Allowing

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[16] *See, e.g., United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927) (rejecting claim that the Sherman Act outlaws only the fixing of an "unreasonable" price due to difficulty of making that finding); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir. 1898) (Taft, J.) (to examine reasonableness of price is to "set sail on a sea of doubt"), *aff'd*, 175 U.S. 211 (1899); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, J.), quoted in text at page 9; David S. Evans & A. Jorge Padilla, *Excessive Prices: Using Economics to Define Administrable Legal Rules*, 1 J. of Competition Law & Econ. 97, 100 (2005) ("There is no generally accepted definition of what an 'unfair' price is."); Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 Colum. Bus. L. Rev. 257, 293 ("Coming up with the right price is a completely intractable problem for several reasons."); Paul L. Joskow, *Transaction Costs Economics, Antitrust Rules, and Remedies*, 18 J. Law, Econ. & Org. 95, 100 (2002); Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 670 (1962); *cf. City of Milwaukee v. Illinois*, 451 U.S. 304, 325 (1981).

[17] "Markets are much better than judges at sifting efficient from anticompetitive practices." Frank H. Easterbrook, *Contract and Copyright*, 42 Hous. L. Rev. 953, 957 (2005). *See* Thomas O. Barnett, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Presented at the Fordham Competition Law Institute,

juries to make that call would produce radically indeterminate results from one case to the next, because no two juries (or jurors) will share the same intuitions about what above-cost prices are "reasonable."[18]

Price-setting is a job almost always done best by the market, only rarely done adequately by regulators, and never done satisfactorily by courts. This Court made that point in *Trinko*, noting that courts should impose no antitrust duty that "'requires the court to assume day-to-day controls characteristic of a regulatory agency.'"[19] If the law is to replace the

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34th Annual Conference on International Antitrust Law & Policy: Section 2 Remedies: A Necessary Challenge (Sept. 28, 2007) (prescribing the "advice of Hippocrates" for Section 2 – "at least ... do no harm," noting: "markets change in ways we cannot predict"; "imposing a duty on a defendant to provide competitors access to its assets ... can undermine the incentive of those other competitors to develop their own assets as well as undermine the incentive for the defendant competitor to develop the assets in the first instance"); J. Bruce McDonald, The Modernization of Article 82 Second Annual Conference: Section 2 and Article 82: Cowboys and Gentlemen ("Forced sharing also requires courts to determine when resources are competitively advantageous and indispensable and at what price they should be made available, a set of decisions better left to the market.").

[18] "When the judge himself lacks the skills to determine whether an expert's report is technically accurate, the worst possible outcome is the one that too often obtains: the judge washes his hands of the matter and gives it to the jury, thus passing the issue off to an even less qualified decision maker." Herbert Hovenkamp, *The Rationalization of Antitrust Law*, 116 Harv. L. Rev. 917, 942-43 (2003).

[19] *Trinko*, 540 U.S. at 415 (quoting Philip E. Areeda, *Essential Facilities: A Doctrine in Search of Limiting Principles*, 58 Antitrust L.J. 841, 853 (1989)). *See* Antitrust Modernization Commission, Report and Recommendations 105 (Apr. 2007)

market at setting a price, firms need a clear, ex ante pricing rule so that they can decide what decisions to make. A legal rule that rests on a lay jury's after-the-fact estimation whether a price was "reasonable" is anything but clear.

Contrary to what the majority below assumed, reliance on the Rule of Reason is not helpful when pricing is at issue. That approach would not filter out early in the process, at the point before litigation, when businesses need guidance the most, cases that could not pose the type of harm *Brooke Group* feared. The result would be to force the courts to engage in a broad and essentially standardless inquiry into the particular facts and circumstances of each plaintiff company's demand for a "reasonable" profit.

("Moreover, forced sharing requires courts to determine the price at which such sharing must take place, thereby transforming antitrust courts into price regulators, a role to which they are ill-suited."). *See also* Thomas O. Barnett, 34th Annual Conference on International Antitrust Law & Policy: Section 2 Remedies: A Necessary Challenge (Sept. 28, 2007) ("The remedy should use market competition to the greatest extent possible to achieve its ends and should minimize the regulatory restraints, such as market share caps, price regulations or other behavioral restrictions....Suffice it to say that agencies and courts lack the resources and expertise to run business in an efficient manner.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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