No. 07-512

DEC 28 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

REPLY BRIEF FOR PETITIONERS

ED KOLTO
GLEAM O. DAVIS
AT&T SERVICES, INC.
1150 South Olive Street
Los Angeles, CA 90015
(213) 743-6700

PATRICK J. PASCARELLA
AT&T SERVICES, INC.
175 E. Houston Street
San Antonio, Texas 78205
(210) 351-3409

MICHAEL K. KELLOGG
Counsel of Record
AARON M. PANNER
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioners

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CORPORATE DISCLOSURE STATEMENTS

Petitioners' Statements pursuant to Rule 29.6 were set forth at page iii of the petition for a writ of certiorari, and there are no amendments to those Statements.

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"*linkLine* is the most important antitrust case that the Court could take during the Fall 2007 Term." Economists and Legal Scholars Br. 1. Respondents do not contest that the Ninth Circuit has decided a recurring and important question of antitrust law. Instead, respondents argue that the Court should deny review because: first, the Ninth Circuit decision can be reconciled with the D.C. Circuit's *Bell Atlantic* decision and the Eleventh Circuit's *BellSouth* decision; second, the decision below is consistent with *Trinko*; and, third, the Ninth Circuit properly condemned price squeezes under Section 2 as "exclusionary and purposeful elimination of . . . competition." Resp. Br. 4. These arguments are incorrect.

First, respondents' argument that there is no split ignores the panel majority's correct acknowledgement that, by allowing a price-squeeze claim to proceed in the absence of an antitrust duty to deal, it had resolved the question presented in conflict with the D.C. Circuit's decision in *Bell Atlantic*. *See* Pet. App. 10a (recognizing split with *Bell Atlantic*'s holding that price-squeeze claims do not "survive *Trinko*"). The Ninth Circuit's decision also cannot be reconciled with the Eleventh Circuit's decision in *BellSouth*, which permitted a price-related claim to proceed only because the plaintiff had (in the Eleventh Circuit's view) alleged the elements of a predatory-pricing claim under *Brooke Group* – that is, below-cost pricing at the retail level and a likelihood of recoupment. By contrast, the Ninth Circuit held that plaintiffs stated a claim under Section 2 by alleging a price *squeeze* – that is, an insufficient *margin* between upstream and downstream prices charged by a vertically integrated company – without

alleging predatory pricing and despite the absence of an antitrust duty to deal in the upstream input. It was the Ninth Circuit's refusal to require allegations of predatory pricing that led Judge Gould to dissent from the decision below. The split is real.

Second, respondents seek to reconcile the Ninth Circuit's decision with *Trinko* by claiming that petitioners had an antitrust duty to deal with respondents. Resp. Br. 5. To the contrary, as the Ninth Circuit recognized (and as the district court held), there was no such duty – that is why the court below asked "whether a price squeeze is merely another term of the deal governed by the Supreme Court's analysis in *Trinko*." Pet. App. 10a; *see also id.* at 22a (dissent agreeing with *Bell Atlantic* and "a major treatise on antitrust law that 'it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal'") (citations omitted). Respondents' failure to offer any *other* basis on which to distinguish their price-squeeze claim from the allegations of inadequate assistance that were at issue in *Trinko* emphasizes the conflict with controlling authority of this Court.

Third, although respondents argue that the Ninth Circuit's price-squeeze doctrine is a bulwark against anticompetitive conduct, we maintain – joined by *amici* – that the decision below protects competitors at the expense of competition and consumer welfare, in conflict with this Court's fundamental antitrust principles. Given the uncontested importance of the issue, the Court should grant certiorari.

I. THE DECISION CONFLICTS WITH THE D.C. CIRCUIT'S *BELL ATLANTIC* DECISION AND THE DECISIONS OF OTHER COURTS OF APPEALS

The Ninth Circuit squarely ruled that – despite this Court's holding in *Trinko* – a plaintiff can state a claim under Section 2 by alleging "an anticompetitive price squeeze" even when a defendant is "under no [antitrust] duty to deal with the plaintiff." Pet. App. 9a-10a, 19a. The panel majority and the dissent recognized that the D.C. Circuit in *Bell Atlantic* had reached the opposite conclusion. *See id.* at 10a (noting that the D.C. Circuit had held that "price squeeze claims" do not "survive *Trinko*"); *id.* at 22a (dissent); *see also Covad v. Bell Atlantic*, 398 F.3d at 673; *Covad v. Bell Atlantic*, 407 F.3d at 1222 ("[t]he court, following the reasoning of *Trinko*, held . . . that a claim of price squeeze cannot lie" when there is no antitrust duty to deal). The D.C. Circuit's holding accords with the pre-*Trinko* holdings of the Fourth and Seventh Circuits, which rejected price-squeeze claims along with refusal-to-deal and essential-facility claims. *See* Pet. 13. Respondents can contest none of this.

Respondents instead seek to reconcile the panel majority's decision with *Bell Atlantic* by arguing that the D.C. Circuit did not preclude the possibility of a *predatory-pricing* claim in these circumstances. *See* Resp. Br. 3, 22-23. Respondents elaborately argue, furthermore, that the Eleventh Circuit found that allegations similar to respondents' satisfied the standard for price predation under *Brooke Group*. *See id.* at 16-22. According to respondents, because the Ninth Circuit did not "specifically discuss the

applicability of *Brooke Group*" to their allegations, there is no conflict among the circuits. *Id.* at 3.

The argument fails because the panel majority articulated a legal standard for Section 2 liability based on allegations of insufficient margin between upstream and downstream prices; the standard does not require respondents to allege (and prove) predatory pricing. The panel majority did not discuss (or, indeed, even cite) *Brooke Group* because it understood that respondents' claim was a price-*squeeze* claim, *not* a predatory-pricing claim. The Ninth Circuit expressly stated that price-squeeze claims turn on the margin between upstream and downstream prices and the impact on upstream customers that are also downstream competitors. *See* Pet. App. 8a ("[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.") (internal quotation marks omitted).

Moreover, the Ninth Circuit cited seven cases for the proposition that a price squeeze may violate Section 2 – including *Alcoa*, *City of Anaheim*, and *Bonjorno* – all of which likewise make clear that a price-squeeze claim implicates the margin between upstream and downstream prices. *See*, *e.g.*, *Alcoa*, 148 F.2d at 438 ("That is was unlawful to set the price of 'sheet' so low and hold the price of ingot so high, seems to us unquestionable, provided, . . . that . . . the price of ingot must be regarded as higher than a 'fair price.'"); *City of Anaheim*, 955 F.2d at 1376-77 ("The vice that a price squeeze has is that . . . , for example, if a firm has a wholesale monopoly and wishes to extend that to the retail level, where it has competition, it might raise its wholesale prices

to the point that others cannot compete with it at retail."); *Bonjorno*, 752 F.2d at 808-09. The dissent reinforces the point by stressing that the panel majority should have applied – but did not apply – the *Brooke Group* standard to judge the sufficiency of respondents' allegations. *See* Pet. App. 23a (noting that "the retail side of a price squeeze cannot be considered to create an antitrust violation if the retail pricing does not satisfy the requirements of *Brooke Group*, which set unmistakable limits on what can be considered to be predatory within the meaning of the antitrust laws"). Accordingly, the conflict with the D.C. Circuit remains: under the D.C. Circuit's standard, in the absence of an antitrust duty to deal, an allegation of price squeeze does not state a claim; in the Ninth Circuit, it does.

Furthermore, whether or not respondents' complaint would have passed muster in the Eleventh Circuit,[1] the panel majority's *legal standard* also conflicts with the legal standard applied by the Eleventh Circuit.[2] In this regard, the contrast between the courts' opinions is revealing: not only did the Eleventh Circuit (unlike the panel majority) repeatedly cite *Brooke Group*, it did *not* cite a single one of the "price squeeze" cases relied on by the panel majority

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[1] It is also irrelevant that the district court apparently thought that respondents' allegations might satisfy the *Brooke Group* standard. The dissent was clearly correct that they did not (*see* Pet. App. 23a), and, in any event, that issue does not affect the Ninth Circuit's holding that it is enough for respondents to show a price *squeeze*.

[2] For its part, the D.C. Circuit had no occasion even to address what would be required to state a claim of predatory pricing in this context. *See Covad v. Bell Atlantic*, 407 F.3d at 1222 ("Covad did not argue its claim as one of price predation and . . . we did not treat it as such.").

below. The Eleventh Circuit's use of the term "price squeezing" may be confusing, but its requirement that a plaintiff show that a defendant's retail prices were below cost and that it had a dangerous probability of recoupment is plain. *See Covad v. BellSouth*, 374 F.3d at 1050-52.[3] The Ninth Circuit's standard includes no such requirement.

The circuit conflict regarding the governing legal standard merits review. Not only will the Ninth Circuit's recognition of "price squeeze" as a basis for a claim under Section 2 govern this litigation going forward, but also, more broadly, all businesses operating in the Ninth Circuit will have to conform their conduct to the panel majority's standard on pain of potential liability. Even in the absence of a duty to deal, the Ninth Circuit held, a defendant may be held liable for deliberately eliminating competitors' profit margin. As we have discussed, and as *amici* confirm, that standard not only would prohibit conduct that may benefit competition and consumers but also creates significant uncertainty in an area of particular sensitivity to the economy – pricing. *See* Verizon/NAM Br. 18-21. The existence of conflicting legal standards threatens a pervasive and deleterious effect nationwide, and provides a "compelling reason," Resp. Br. 1, for this Court to grant review.

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[3] It is seriously misleading for respondents to suggest that this Court's denial of certiorari in *Covad v. BellSouth* calls into question the appropriateness of review here. *See* Resp. Br. 14 (noting that "review was denied of the Eleventh Circuit's decision in *BellSouth*"). It was *Covad*, not BellSouth, that sought review of the Eleventh Circuit's decision, and it did so on an issue – whether Covad could sue in federal court for breach of an interconnection agreement mandated by and approved under the Telecommunications Act of 1996 – that was unrelated to the court's ruling on Covad's Section 2 claim.

II. THE DECISION CONFLICTS WITH *TRINKO*

A. As the Ninth Circuit recognized, *Trinko* holds that "the failure by a monopolist to deal with a competitor on certain service terms when that monopolist was under no duty to deal with the plaintiff competitor absent statutory compulsion, did not state a claim under § 2 of the Sherman Act." Pet. App. 9a-10a. The Ninth Circuit's decision conflicts with *Trinko* because there is no logical difference (and should be no legal difference) between a claim of inadequate access to network facilities – at issue in *Trinko* – and a claim of too-costly access to facilities – at issue here. *See* Pet. 14-15.

Respondents argue that the decision does not conflict with *Trinko* because this case falls "within [an] exception to the general 'no duty to deal' rule" in that petitioners "refus[ed] to provide competitors the same services or prices otherwise made available to petitioners' retail customers." Resp. Br. 5.[1] Respondents' argument is no defense of the panel majority's decision; it comes closer to a confession of error. Respondents defend their price-squeeze claim by insisting on the *existence* of an antitrust duty to deal – in effect, arguing that the price squeeze here should be analyzed as a constructive refusal to deal. *See* Pet. 25 n.13. But the Ninth Circuit upheld respondents' price-squeeze claim in the acknowledged *absence* of an antitrust duty to deal in the underlying wholesale input. The Ninth Circuit's holding thus conflicts with *Trinko*.

Furthermore, as the panel majority, dissent, and district court all recognized, respondents are incor-

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[1] Respondents seek to distinguish *Bell Atlantic* on the same basis. *See* Resp. Br. 23-25.

rect in asserting that petitioners had any antitrust duty to deal. As respondents elsewhere acknowledge, petitioners sell respondents "DSL transport service," Resp. Br. 8, a wholesale service that simply provides transmission capacity. Both petitioners and respondents sell to retail customers something different – *Internet access* service, *see id.* at 10, which provides not only transmission capacity but also the necessary interfaces, computer processing, connections to networks, and other services (*e.g.*, e-mail) that allow a retail customer to use the Internet.

Respondents' complaint does not allege that petitioners refused to provide *retail* DSL Internet access to respondents. As for wholesale DSL transport, petitioners had no *antitrust* duty to provide that service to respondents at all. *See* Pet. App. 9a-10a (majority), 21a-22a (dissent). The only reason that petitioners ever provided "DSL transport" was because they were compelled to do so by FCC regulations as a condition of providing retail Internet access service. *See id.* at 77a-85a (describing regulatory context). *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), are thus inapposite. *See* Pet. App. 85a (district court: "[p]laintiffs' refusal-to-deal claim does not fall within the limited exception set forth in *Aspen* and is thus barred by *Trinko*").

B. Respondents do not dispute that the FCC had the ability to address any supposed anticompetitive threat posed by excessive DSL transport prices. Instead, they argue that this degree of regulatory oversight permits antitrust intervention under *Trinko* because retail DSL Internet access prices are unregulated, leaving room for antitrust law to place

"'restrictions on pricing at the retail level.'" Resp. Br. 29-30 (quoting Pet. App. 18a). But the restriction antitrust law places on retail prices is the prohibition on predatory pricing. The question in this context is whether antitrust law should also regulate the relationship between retail prices and wholesale prices. There is no reason for it to do so in light of regulators' authority to take retail prices into account in any regulation of wholesale prices. *See* Pet. 16-17.

C. Though respondents quote the Ninth Circuit's assertion that price-squeeze claims "satisfy established antitrust standards," Resp. Br. 1, respondents conspicuously do *not* claim that any precedent of this Court has ever recognized a price squeeze as a basis for liability under Section 2. Nor do respondents make any serious attempt to reconcile the Ninth Circuit's price-squeeze standard with this Court's precedents.

Instead, respondents repeatedly quote dicta from *Town of Concord* to suggest that the price-squeeze allegations here provide an adequate basis for antitrust scrutiny; neither argument supports the claim that the decision below is consistent with *Trinko*. *First*, they note that the First Circuit adverted to the "special problem . . . posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregulated level." 915 F.2d at 29. As an initial matter, the court below relied on no such "regulatory avoidance" theory, and respondents do not explain how it justifies the court's decision.[5] More funda-

[5] Even setting aside "compet[ition] with connections by cable and by satellite" (and wireless networks), Pet. App. 20a, so long as the FCC continues to require petitioners to provide wholesale DSL transport, it is not clear how petitioners could raise retail prices without losing sales.

mentally, any such theory itself conflicts with *Trinko*, which made clear that regulators, not antitrust courts, should see to the effective implementation of obligations that arise from regulation and not from antitrust law. *See* 540 U.S. at 411-15.

Second, respondents emphasize their allegation that "*for a period* wholesale prices exceeded retail prices," Resp. Br. 1 (emphasis added), and note that *Town of Concord* observed that in such a situation "some of the 'administrative' problems" attending application of price-squeeze doctrine would be attenuated, 915 F.2d at 28. But neither respondents' allegations nor the Ninth Circuit's opinion are limited to circumstances where wholesale prices exceed retail prices. More important, *Town of Concord*'s observation – which at best addresses one of the institutional-competence-based objections to price-squeeze doctrine[6] – does not address at all the unsoundness of "prohibit[ing] a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal." 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 767c5, at 129-30 (2d ed. 2002). Petitioners need not challenge, for present purposes, the allegation that the relationship between wholesale and retail prices made it difficult for respondents to earn a profit. What petitioners

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[6] In the complicated Internet-access marketplace, there is no reason to believe that any such wholesale-exceeds-retail benchmark will be meaningful. An Internet Service Provider may have sources of revenue that supplement the monthly service fee – advertising, sales of additional services, partnerships with other Internet businesses – such that a simple comparison between the price of DSL transport and the basic retail price says nothing about whether wholesale cost exceeds expected per-subscriber revenue. The familiar examples of free Internet access service and free e-mail service illustrate the point.

dispute is that that allegation raises any antitrust concern.

III. THE NINTH CIRCUIT'S PRICE-SQUEEZE DOCTRINE IS INCONSISTENT WITH THIS COURT'S ANTITRUST DECISIONS

Respondents do not dispute the importance of the decision below, but argue that price-squeeze doctrine helps to remedy "anticompetitive conduct" that harms "competition-consumer welfare." Resp. Br. 33. We disagree. *Amici* put the matter well: "It is not possible to advance consumer welfare with an antitrust rule that punishes a firm for failing to ensure its competitors' profitability." Economists and Legal Scholars Br. 4.

Amici and commentators agree that the pervasive effect of the Ninth Circuit's decision warrants review by this Court. *See* State Attorneys General Br. 8 ("[t]he prospect of [price-squeeze] liability inevitably will deter firms in the Ninth Circuit from undertaking perfectly legal business practices"); Joseph Angland, *Antitrust in the Supreme Court: What Lies Ahead*, the antitrust source 2 (Dec. 2007) (comment by immediate past Chair of ABA Antitrust Section: "the Court should consider the price-squeeze issues raised by . . . *linkLine*"), *available at* http://www.abanet.org/antitrust/at-source/07/12/Dec07-Angland12-17.pdf. As it did last Term in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007), this Court should bring the law in the Ninth Circuit into conformity with this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ED KOLTO
GLEAM O. DAVIS
AT&T SERVICES, INC.
1150 South Olive Street
Los Angeles, CA 90015
(213) 743-6700

PATRICK J. PASCARELLA
AT&T SERVICES, INC.
175 E. Houston Street
San Antonio, Texas 78205
(210) 351-3409

MICHAEL K. KELLOGG
Counsel of Record
AARON M. PANNER
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioners

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