No. 18-2852

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

VIAMEDIA, INC.,
Plaintiff-Appellant,

v.

COMCAST CORPORATION, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois
(Case No. 1:16-cv-05486)

WASHINGTON LEGAL FOUNDATION'S *AMICUS CURIAE* BRIEF SUPPORTING DEFENDANTS-APPELLEES

Corbin K. Barthold
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

Counsel for Amicus Curiae
Washington Legal Foundation

December 17, 2018

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Appellate Court No: 18-2852

Short Caption: Viamedia, Inc. v. Comcast Corporation, et al.

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Attorney's Signature: /s/ Cory L. Andrews Date: 12/17/18

Attorney's Printed Name: Cory L. Andrews

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

Address: Washington Legal Foundation
2009 Massachusetts Ave. NW, Washington DC 20036

Phone Number: 202 588 0302 Fax Number: 202 588 0386

E-Mail Address: candrews@wlf.org

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None

Attorney's Signature: /s/ Corbin K. Barthold Date: 12/17/18

Attorney's Printed Name: Corbin K. Barthold

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes ______ No X

Address: Washington Legal Foundation
2009 Massachusetts Ave. NW, Washington DC 20036

Phone Number: 202 588 0302 Fax Number: 202 588 0386

E-Mail Address: cbarthold@wlf.org

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters in all fifty states. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It appears often as *amicus curiae* in important antitrust cases. See, e.g., *Apple v. Pepper*, Case No. 17-204 (U.S., decision pending); *FTC v. Actavis*, 570 U.S. 136 (2013); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

In our free-market system a business—even an alleged monopolist—may choose with whom it will transact. Antitrust law places only one limit on this discretion: a monopolist that ends an established course of dealing must have a rational business reason for doing so. This is not a high bar. The monopolist need not maximize competition—and it certainly need not go out of its way to assist competitors. It need merely act sensibly from a competitive business perspective.

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[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

Applying this straightforward rule, the district court correctly dismissed the plaintiff's refusal-to-deal claim. In appealing that decision, the plaintiff cites only wildly implausible potential harms. The plaintiff's speculative fears cannot overcome the defendant's valid competitive explanation for its conduct.

WLF urges the Court to reject the plaintiff's attempt to upset well-settled and sound antitrust law. If anything, the refusal-to-deal pleading standard should be stricter.

STATEMENT OF THE CASE

Television networks broadcast their content primarily through distributers. (Dkt 40 at ¶ 23.) For simplicity's sake we will refer to these distributers as "cable companies," although distribution often occurs by other means. Most television advertising time belongs to the networks, but cable companies receive two or three minutes an hour. (*Id.* at ¶ 27.) The cable companies' ad time is called "spot-cable advertising."

In each of the country's major media regions, the cable companies sell much of their spot-cable advertising through a clearing house called an "interconnect." (*Id.* at ¶ 24, 35.) The interconnect is operated by the region's largest cable company. (*Id.* at ¶ 44.) The other cable companies

pay a fee to participate in the interconnect. (*Id.*) The interconnect enables local advertisers more easily to purchase spot-cable advertising that will appear on all the region's televisions.

Some cable companies sell their spot-cable advertising themselves. Others hire a broker—an "advertising representative" or "ad rep"—to do it for them. (*Id.* at ¶ 17.) Viamedia, Inc., is an ad rep. Comcast Corporation is both a cable company and (through a subsidiary) an ad rep.

Comcast operates the interconnects in Chicago and Detroit. For about ten years Comcast let Viamedia participate in these interconnects on behalf of two cable companies that had hired Viamedia as their ad rep. (*Id.* at ¶ 103.) In 2012 the contract authorizing this participation expired, and Comcast and Viamedia failed to agree on new terms. (*Id.* at ¶ 110; AOB 11-12.) Viamedia therefore lost access to the Chicago and Detroit interconnects. (*Id.*)

Comcast believed it could provide more efficient and more valuable ad-rep service than Viamedia. (Dkt 356 at 10.) Around eight years ago, therefore, it started to expand its ad-rep business. Cutting ties with Viamedia was part of this effort—a successful effort.

Throughout the country—both in regions where Comcast does, and in regions where it does not, control the interconnect—Comcast beat Viamedia in head-to-head bidding contests for ad-rep contracts. (*Id.* at 11-15.)

In 2016 Viamedia sued Comcast under section 2 of the Sherman Act. 15 U.S.C. § 2. The section 2 claim was comprised, in effect, of a refusal-to-deal claim, a tying claim, and an exclusive-dealing claim.

The district court granted a motion to dismiss the refusal-to-deal claim. A monopolist's refusal to deal violates section 2, the court observed, only when it is "irrational but for its anticompetitive effects." (Dkt 60 at 10.) Comcast, however, acted rationally. Its aim of eliminating a middleman was, the court wrote, "a prototypical valid business purpose." (*Id.*) The refusal-to-deal claim therefore failed. (*Id.* at 10-12.)

The tying and exclusive-dealing claims proceeded to discovery. The district court then granted a motion for summary judgment, and Viamedia appealed.

SUMMARY OF ARGUMENT

To establish that Comcast unlawfully refused to deal, Viamedia must prove at trial—and so must plead in its complaint—that Comcast cut ties with Viamedia for an anticompetitive purpose. Viamedia must plausibly allege that Comcast engaged in predatory—as opposed to merely competitive—conduct.

Viamedia cannot meet its burden. Comcast's conduct makes perfect sense from a conventional business perspective. Moving aggressively into the ad-rep market could enable Comcast to vertically integrate its interconnect and ad-rep services. Vertical integration, in turn, could enable Comcast to provide higher quality services at lower prices. The record suggests that this is exactly what has happened. Comcast now regularly outbids Viamedia for ad-rep clients.

Viamedia's fear that Comcast will raise ad-rep prices in the future is unfounded. Even if it really is an interconnect monopolist, Comcast can collect only one monopoly profit. Comcast would stand to *lose* money by moving into the ad-rep market *unless* it provides the most efficient ad-rep service. The lower ad-rep prices Comcast offers can thus be expected to continue.

The reality is that this type of case—one that involves no *ongoing* anticompetitive effects—should be dismissed out of hand. A refusal to deal becomes harmful only when a monopolist starts trying to recoup, through inflated prices, the losses it incurred predatorily driving out a competitor. The judiciary is not equipped to determine whether inflated prices *are coming*. A plaintiff should therefore have to plead that inflated prices *are here*—something Viamedia cannot do, because Comcast's ad-rep service is more, not less, efficient than Viamedia's. At any rate, even if Viamedia need not plead recoupment, the lack of recoupment confirms that Viamedia is not a victim of monopolistic abuse, but a sore loser in the market.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED VIAMEDIA'S REFUSAL-TO-DEAL CLAIM.

Businesses are as a rule "free to choose the parties with whom they will deal." *Pac. Bell Tel. Co. v. Linkline Commc'ns*, 555 U.S. 438, 448 (2009). Exceptions are rare. *Id.* A plaintiff cannot carry a refusal-to-deal claim beyond the pleading stage merely by grousing about what *it* thinks its dominant rival *could* have done differently. Rather, it must

plausibly allege that the rival's refusal to deal would, absent monopoly power, be an irrational business decision.

Viamedia's refusal-to-deal claim flunks this test both in theory and in practice, both today and tomorrow. As Viamedia itself pleaded, Comcast moved into the ad-rep market to capture the efficiencies that come with vertical integration. The record suggests that Comcast *has* netted those efficiencies, and economic theory confirms that efficiency is the only object that logically could have driven Comcast's conduct.

A. Viamedia Must Show That Comcast Had *No* Legitimate Business Reason For Its Conduct.

Viamedia argues (AOB at 33-35) that Comcast unlawfully refused to deal by failing to adopt an *optimal* course of action. The world would be a better place, in Viamedia's view, had Comcast vertically integrated without cutting ties with Viamedia (had, in other words, Comcast competed with Viamedia a little less vigorously). So Comcast must, Viamedia says, be liable.

But the judiciary is not equipped to distinguish between "optimal" and "sub-optimal" business behavior. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004); Frank H. Easterbrook, *Does Antitrust Have a Comparative Advantage?*, 23

Harv. J.L. & Pub. Pol'y 5, 8 (1999). No surprise therefore that the antitrust laws do "not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition." *Trinko*, 540 U.S. at 415-16. Instead, a refusal-to-deal claim arises only when a company's decision to end an established course of dealing is *inexplicable* without the company's monopoly power. "Put simply, the monopolist's conduct must be irrational but for its anticompetitive effect." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (Gorsuch, J.).

The question is not whether Comcast chose the path "most" conducive to competition (or, for that matter, the path "most" pleasing to its rival Viamedia). The question is simply whether Comcast had a legitimate business reason for doing what it did. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 597, 608 (1985).

B. Comcast Had A Legitimate Business Reason For Cutting Ties With Viamedia.

Comcast had a legitimate business reason for ending its dealings with Viamedia (efficiency derived from integration); that reason has proven robust (integration and lower prices have in fact gone hand in

hand); and we can expect this robustness to persist going forward (integration was rational precisely because lower prices would follow).

1. Comcast Was Entitled To Conclude That Cutting Ties With Viamedia Would Promote Efficiency.

In its amended complaint, Viamedia alleged that Comcast cut ties with it as part of an effort to replace it as an ad rep. (Dkt 40 at ¶ 112.) The district court correctly ruled that pursuing such vertical integration is a "prototypical valid business purpose." (Dkt 60 at 10.)

Vertical integration is generally a "means of creating efficiency." Robert H. Bork, *The Antitrust Paradox*, pp. 226-27 (2d ed. 1993). It is, therefore, "usually procompetitive." *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 710 (7th Cir. 1984). Comcast could reasonably expect it to be procompetitive here. According to economic theory, an expansion of Comcast's ad-rep business, and the resulting integration of its ad-rep business and its interconnect business, would save costs. Comcast could expect, for example, to eliminate:

The Cost of Double Marginalization. When two companies each collect a profit margin selling one ultimate product, the problem of double marginalization arises. Both firms in the supply chain charge more than their marginal cost, creating a deadweight loss to the end

customer. See *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 198 (D.D.C. 2018). If just one firm occupies the supply chain's upstream and downstream positions, however, that firm can "shrink th[e] total margin so there's one instead of two, leading to lower prices for consumers." *Id.* That is exactly what Comcast could expect to achieve by expanding its ad-rep business. By providing a customer both ad-rep service and interconnect service—and imposing just one profit margin on both services—Comcast could provide ad-rep service as good as, but cheaper than, the service provided by an unintegrated firm like Viamedia.

The Cost of Bargaining. A firm will generally seek to expand until coordinating new production internally costs more than coordinating it externally through market purchases. See Ronald Coase, *The Nature of the Firm*, 4 Economica 386 (1937). Some things are harder to purchase on the market than others. A key factor is bargaining cost, which rises as a transaction becomes more complex. See *id.* at 390-91. Contrary to Viamedia's depiction, the multi-million-dollar sale of several years of interconnect service is a complex transaction. By integrating ad-rep service and interconnect service—by cutting out the middleman—Comcast could spare itself the cost of negotiating interconnect deals

with ad reps. It could then pass some of that cost savings on in the form of lower ad-rep prices.

These are not the only efficiencies Comcast could expect to exploit by vertically integrating ad-rep service and interconnect service. Vertical integration can, among other things, "cut sales and distribution costs," "facilitate the flow of information between levels of the industry," and "create economies of scale in management." Bork, supra, at 226-27; Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 513, 519 (1995) ("Potential efficiency benefits" of vertical integration include "more efficient input usage" and "improved coordination in pricing, production, and design that can reduce costs and improve product quality").

Once the benefits of vertical integration are understood, Viamedia's depiction of itself as a victim of anticompetitive behavior crumbles. Viamedia's loss of business was simply a side effect—viewed through the lens of antitrust law, a salutary side effect—of Comcast's bid to increase efficiency.

2. Comcast's Cutting Ties With Viamedia *Did* Promote Efficiency.

To avoid refusal-to-deal antitrust liability, all Comcast needs is a valid business reason for its conduct. Comcast has such a reason: it wants to create efficiency through vertical integration. The analysis can end there. The refusal-to-deal claim fails.

As it happens, however, the record establishes that Comcast *did* generate efficiency. Whether by integrating vertically, or rather by having been the most efficient provider to begin with, Comcast has thrived in the ad-rep market. It has repeatedly offered cable companies a better deal than Viamedia. (Dkt 356 at 11-15.) Even when Comcast and Viamedia submit bids to represent companies in regions where Comcast does not control the interconnect, Comcast offers superior deals and wins the contracts. *Id.*

Had Comcast behaved anticompetitively—had it used monopoly power to exclude an equally or more efficient rival—we would expect to see higher prices or lower output. Yet there is no evidence that Comcast has raised the price, or lowered the quality, of ad-rep service anywhere.

Viamedia has been excluded from the Chicago and Detroit interconnects for several years. It surely searched, during discovery on

its tying claim, for any evidence that ad-rep prices in those interconnects have risen. The record contains no evidence that they have. If the Court reverses the dismissal of the refusal-to-deal claim, an extraordinarily expensive snipe hunt will follow, as the parties conduct extensive discovery on a question whose answer we already know.

3. Viamedia's Hypothetical Fear Of Anticompetitive Conduct Is Misplaced.

Viamedia alleges that Comcast's declining to deal with it makes Comcast "more able" to raise prices. (Dkt 40 at ¶ 171.) Viamedia's concern is unfounded.

"A monopolist can take its monopoly profit just once." *Schor v. Abbott Laboratories*, 457 F.3d 608, 611 (7th Cir. 2006). The best way to take that profit is simply to charge the monopoly price for the product on which the monopolist has a monopoly. Moving into the market for a complement of the monopolized good usually gains a monopolist nothing. If the monopolist tries to continue charging a monopoly price for the monopolized good while raising the price of the complement, the inflated price of the package—monopolized good plus complement—will be higher than the monopoly price. The inflated price will cause sales to drop until the monopolist is making less than the monopoly profit. See

Schor, 457 F.3d at 611-12; Richard A. Posner, *Antitrust Law*, pp. 224-25 (2d ed. 2001).

What a rational monopolist wants is to keep the market for the complement as *competitive* as possible. The more efficient the market for the complement—the less the complement costs—the more the monopolist can charge for the monopoly good. Because the monopolist benefits from the most efficient-possible sale of the complement, however, the monopolist has an incentive to move into the complement market *if* (but only if) the monopolist believes it can provide the complement more efficiently than can others. If the current providers of the complement are *in*efficient, their higher-than-necessary costs soak up some of the monopolist's potential monopoly profit. By moving into the market for the complement and lowering costs there, the monopolist can simultaneously maximize its monopoly profit and lower the price of the complement. It can benefit both itself and consumers. See *Schor*, 457 F.3d at 612. That is the essence of competition.

Had Viamedia been an efficient ad rep, Comcast would have had good grounds for continuing to work with it. Viamedia would have done all the ad-rep work, and Comcast—if truly an interconnect monopolist—

would have collected a full monopoly profit on its interconnect work. That Comcast changed course strongly suggests that Viamedia was not, in fact, an efficient ad rep. So it is wrong to say (AOB 29) that Comcast left money on the table when it forewent receiving further revenue from Viamedia, and incurred some short-term losses, to grow its ad-rep business. If Comcast provides efficient ad-rep service—and, as we've seen, it does—then Comcast can both increase its profit and save consumers money by growing its ad-rep business.

Viamedia itself alleged a sensible reason for Comcast's behavior. (Dkt 40 at ¶ 112.) That reason—the benefit of vertical integration—is presumptively valid, see *Schor*, 457 F.3d at 612-13, and nothing in the pleadings or the record undermines its validity.

C. Viamedia's and AAI's Attacks On Comcast's Legitimate Business Reason Fail.

Along with many arguments that fall outside the scope of this brief, Viamedia and *amicus curiae* The American Antitrust Institute (AAI) raise several attacks on the validity of Comcast's legitimate business reason for cutting ties with Viamedia. These attacks fail.

1. Viamedia argues (AOB at 18-19, 28-29) that Comcast must have harbored an anticompetitive intent because it incurred "no cost"

and enjoyed "only upside" from dealing with Viamedia. As should by now be clear, however, Comcast did not get something for nothing from dealing with Viamedia. To the contrary, Comcast was harmed when Viamedia incurred avoidable expenses by providing inefficient ad-rep service. Vertically integrating and providing lower-cost ad-rep service enabled Comcast both (1) to capture the profit that Viamedia was squandering through inefficiency and (2) to offer cable companies lower prices. Listlessly cashing supposedly "no cost," "only upside" checks from Viamedia would have been the *anti*competitive move. Comcast instead moved to compete aggressively with a less efficient rival. It made an overtly *pro*competitive move.

This discussion of Comcast's logic douses any suggestion that this case resembles that "limited exception" to the otherwise unfettered right to exclude, *Aspen Skiing Co*, 472 U.S. 585. See *Trinko*, 540 U.S. at 409 (calling *Aspen Skiing* a "limited exception"). Aspen Skiing refused to renew its all-access lift-ticket program with Aspen Highlands Skiing even after Highlands offered to pay *retail price* for Aspen Skiing's tickets. 472 U.S. at 593-94. This refusal "revealed a distinctly anticompetitive bent." *Trinko*, 540 U.S. at 409. Here, by contrast,

Comcast's effort to vertically integrate reveals a distinctly procompetitive bent. Aspen Skiing identified no legitimate business reason for refusing to sell tickets at retail—a true example of an "only upside" transaction. *Aspen Skiing*, 472 U.S. at 608-10. Comcast identifies an ironclad business reason (efficiency) for refusing to accept a deadweight loss (Viamedia's inefficiency).

2. AAI argues (AAI at 12, 17) that Comcast improperly justifies a refusal to deal with a merely "theoretical" valid business purpose. In an antitrust case, however, the district court must assess the complaint "in light of common economic experience." *Twombly*, 550 U.S. at 565. To survive a motion to dismiss, therefore, the plaintiff's claim for relief may not stand on an economically illiterate theory of anticompetitive harm. A defendant may win dismissal, meanwhile, by answering unsound economic theory with sound economic theory. This is what happened in *Trinko*, which relies extensively on economic theory in affirming dismissal of a refusal-to-deal claim. *Trinko*, 540 U.S. at 407-08, 414.

There is another problem with AAI's attack on Comcast's "theoretical" legitimate business purpose. The refusal-to-deal claim is

no longer a matter of mere theory. Viamedia conducted extensive discovery on its tying claim. It had every incentive to search, during that discovery, for evidence that Comcast raised its ad-rep prices in pursuit of anticompetitive profit. Yet it has presented no such evidence. Although hiking prices would as we've discussed be futile, the record in any case shows that Comcast never tried such a gambit. Comcast's continuing commitment to low prices strongly suggests that Comcast truly has increased efficiency by vertically integrating. Even if it could have done so before discovery—and it couldn't—Viamedia cannot now overcome a motion to dismiss simply because Comcast's legitimate business reason is "just" theoretical.

3. AAI worries (AAI at 17-18) that vertical integration is not always procompetitive. If, for example, a monopolist gains dominance over the sale of both a monopolized good and a complement, this might delay entry by forcing new competitors to enter the market at two levels instead of one. Such a concern is, however, almost entirely hypothetical. "'Predatory' vertical integration [is] an iffy proposition." Posner, supra, at 226. The monopolist will incur higher costs to produce the complement (if its costs were equal or lower, it would enter the

complement market for *pro*competitive reasons). As competitors enter the complement market and soak up business, the monopolist will be stuck with the deadweight loss of excess production capacity. And in this case, the most viable competitors would not in fact have to enter the market at two levels. Other cable companies could open their own ad-rep shops, just as Comcast has done.

When a practice is usually procompetitive, courts and juries will be bad at rooting out the rare exceptions. In consequence the judicial system does not "infer monopolization from behavior that in most cases is competitive." *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 378 (7th Cir. 1986). "The search for the rare situation in which that second monopoly just might allow the firm to gain a profit by injuring consumers is not worth the candle." *Schor*, 457 F.3d at 613. "The search itself (and the risk of error in the judicial process) has much more chance of condemning a beneficial practice than of catching a detrimental one." *Id.*

Rank speculation that vertical integration might, in this rare instance, prove to be anticompetitive is not a valid ground for reversing the district court's dismissal of the refusal-to-deal claim.

4. When Comcast cut ties with Viamedia, in 2012, Viamedia had contracts to serve as the exclusive ad rep for two cable companies through 2015. Viamedia argues (AOB at 34) that Comcast thus shut these two companies out of the Chicago and Detroit interconnects for three years, and that this exclusion is inconsistent with Comcast's legitimate business purpose. But almost every business action has both costs and benefits. Identifying one of the costs does not establish that an action lacks a valid purpose. A company is entitled "to withdraw from a prior course of dealing and suffer a short-term profit loss in order to pursue . . . procompetitive ends." *Novell*, 731 F.3d at 1075. Comcast had a right to pursue the benefit of vertical integration at the cost of temporarily losing revenue from two cable companies.

It is no answer to say (AOB at 29, 34) that Comcast *might* have been better off had it waited until 2015 to end its dealings with Viamedia. Again, the question is not whether a company acted *optimally*; it is whether a company acted *rationally*. *Novell*, 731 F.3d at 1075. And thank goodness, because a court that tried to identify and punish sub-optimal business behavior would be both very busy and very inept.

Another problem with enlisting the two cable companies in Viamedia's cause is that, as we've seen, Comcast had nothing to gain from an *anti*competitive move into the ad-rep market. Comcast could not "recoup" "sacrificed profits" "by virtue of having eliminated its sole [ad-rep] competitor." (AOB at 4.) On the contrary, Comcast could recoup the profit lost from the two cable companies between 2012 and 2015 only by being the most efficient ad rep.

Remember that the cable companies are not plaintiffs. Nor could they be. Like Viamedia's claim, a refusal-to-deal claim brought by the cable companies would fail because Comcast acted for a legitimate business reason. And it would fail also for invoking no antitrust injury. The cable companies suffered at most a passing, unintended, and useless (even to the supposed monopolist) loss. Comcast has no incentive, either pro- or anticompetitive, to drive cable companies from its interconnects. Such conduct in round one would trigger a mass movement toward alternative options—toward, say, a new AT&T-run interconnect and ad-rep bundle—in round two. Self-deterring behavior is not a proper target of antitrust law. See Posner, supra, at 236.

The lack of a claim notwithstanding, Viamedia wants to use the cable companies' purported loss from being briefly stuck in an exclusive contract as an opening wedge for a $158 million lawsuit. But Viamedia cannot have it both ways. If it is going to bring ad-rep markets across the country into play, it cannot plausibly assert the importance of three years' revenue from two companies in one region. Viewed beside what Comcast stood to gain from efficiently competing with Viamedia nationwide, that temporary and localized lost revenue is small potatoes. Viamedia cannot plausibly cite what is in effect a rounding error as a sign of irrational business conduct.

The cable companies are not Viamedia's props, and, even if they were, their experience sheds no light on this case.

II. THE REFUSAL-TO-DEAL STANDARD IS OUT OF STEP WITH MODERN ANTITRUST LAW.

Given "the difficulty of identifying . . . anticompetitive conduct by a single firm," courts must be "cautious" with claims that a firm unlawfully refused to deal. *Trinko*, 540 U.S. at 408. "Perhaps it is better," in fact, that refusal-to-deal doctrine "should err on the side of firm independence—given its demonstrated value to the competitive process and consumer welfare—than on the other side where we face

the risk of . . . inviting judicial central planning." *Novell*, 731 F.3d at 1076.

Outside the easiest cases, a court cannot distinguish competition from exclusion. "*Every* indicator of exclusion also is present with efficient competition. Both predators and efficient producers undercut rivals and gain market share." Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 Harv. J.L. & Pub. Pol'y 439, 443 (2008).

What we need to know is whether the defendant has predatorily excluded an equally or more efficient competitor from the defendant's market. But we can figure this out only after the monopolist has started acting *in*efficiently. "What distinguishes exclusion from efficiency is what happens in the *future*: exclusion leads to monopoly overcharges later, and efficiency does not." Easterbrook, supra, 31 Harv. J.L. & Pub. Pol'y at 443.

Rather than try to predict whether a refusal to deal *might* lead to inflated prices, a court should simply wait for *actual* inflated prices. "Instead of making predictions that are impossible to test—and will injure consumers if wrong—wait to see what happens. If monopolistic

prices happen later, prosecute then." Frank H. Easterbrook, *When is it Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 Colum. Bus. L. Rev. 345, 347 (2003). This is essentially the rule in predatory-pricing cases. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993). Predatory pricing and refusals to deal should be treated the same. Unless an *aspiring* predator or exclusionist starts to become a *successful* predator or exclusionist by charging inflated prices, the time for an antitrust lawsuit has not yet arrived. Without inflated prices, an antitrust lawsuit will be nothing more than an expensive investigation of ambiguous behavior.

If anyone is going to take on the difficult if not impossible task of finding the unicorn antitrust case—the elaborate exclusionary scheme that harms consumers while keeping prices low—it should not be the judiciary. "Congress and regulatory agencies" are better equipped to "identify circumstances where it is economically efficient to require [an] incumbent to share its facilities under a system of price and access regulation." Brief of the United States and the FTC, p. 18, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682). Congress and the agencies can use their

"superior factfinding ability, greater industry expertise, [and] existing capacity for ongoing oversight and refinement" to craft and implement "industry-specific legislation and regulation." *Id.* The judiciary should stick to the comparatively manageable task of spotting exclusionary practices that protect or allow inflated prices.

It is true that *Aspen Skiing* likely blocks the Court from declaring—what would be the ideal rule—that a refusal to deal *must* come with inflated prices for antitrust liability to kick in. But nothing in *Aspen Skiing* blocks the Court from treating this case's price history as significant. Comcast consistently offers better deals for ad-rep service than does Viamedia. (Dkt 356 at 11-15.) There is no sign—even after wide-ranging discovery—that Comcast ever charges prices above these competitive levels. Even if it may not serve as an independent ground for affirming the dismissal of the refusal-to-deal claim, the lack of uncompetitive prices emphatically confirms that the dismissal was warranted.

CONCLUSION

The judgment should be affirmed.

Dated: Dec. 17, 2018

Respectfully submitted,

/s/ Cory L. Andrews

Corbin K. Barthold
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
Counsel for Amicus Curiae Washington Legal Foundation

CERTIFICATE OF COMPLIANCE

I hereby certify:

This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 4,708 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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Dated: December 17, 2018

/s/ Cory L. Andrews
CORY L. ANDREWS
Counsel for Amicus Curiae
Washington Legal Foundation

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2018, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Seventh Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

/s/ Cory L. Andrews
CORY L. ANDREWS
Counsel for Amicus Curiae
Washington Legal Foundation