In accord with Rule 29(b), Federal Rules of Appellate Procedure, Washington Legal Foundation respectfully requests leave to file a brief as *amicus curiae* in support of rehearing *en banc*.

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. 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*, 139 S. Ct. 1514 (2019); *FTC v. Actavis*, 570 U.S. 136 (2013); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

WLF's brief discusses two ways in which the panel went astray in reversing the dismissal of the appellant's antitrust refusal-to-deal claim. *First*, the panel misapplied *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Properly understood, that decision enables a defendant to win dismissal of a refusal-to-deal claim by invoking a legitimate procompetitive reason for its conduct. The appellees did that here, citing the well-established procompetitive benefits of vertical integration. *Second*, the panel ignored *Schor v. Abbott Laboratories*, 457 F.3d 608 (7th Cir. 2006), which makes clear that the appellees had no reason to vertically integrate into a market as

an anticompetitive predator, and every reason to step forth as a procompetitive low-cost producer.

WLF believes its brief will help the Court. WLF is familiar with antitrust law, both generally and as it applies in this case (indeed, WLF filed a brief at the panel stage). Further, the topics addressed in WLF's brief are important—the panel's expansion of refusal-to-deal liability is, as the brief shows, a big step away from economically sound antitrust law. Finally, the brief's second topic—monopoly leveraging and *Schor*—should have been, but was not, addressed in the panel's opinion.

The appellees consent to, and the appellant does not oppose, the filing of WLF's brief.

WLF respectfully requests leave to file the attached *amicus curiae* brief in support of rehearing *en banc*.

March 26, 2020

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. 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*, 139 S. Ct. 1514 (2019); *FTC v. Actavis*, 570 U.S. 136 (2013); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); and it filed an *amicus* brief with the panel in this case.

SUMMARY OF ARGUMENT

Why did Comcast decline to deal with Viamedia? It did so, WLF argued, in its *amicus* brief before the panel, as part of an effort to vertically integrate its interconnect and ad-rep services. True, cutting ties with Viamedia entailed briefly losing revenue, in one regional market, from two of Viamedia's clients. But Comcast was chasing the profit that could be earned from operating the market's most efficient ad-rep business. "*Viewed beside* what Comcast stood to gain from *efficiently competing with Viamedia nationwide*," WLF wrote, some

[*] 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.

"temporary and localized lost revenue is small potatoes"—a "rounding error." (WLF Br. 22 (emphasis added).)

"As [WLF] *points out*," the panel wrote, in its opinion reversing the dismissal of Viamedia's refusal-to-deal claim, "Comcast could easily afford" to "sacrifice" revenue "*in order to inflict* . . . *harm* on . . . Viamedia." (Slip op. 28 (emphasis added).) "As *the dominant [cable] provider* in markets across the country, this 'temporary and localized lost revenue is small potatoes,' a mere 'rounding error.'" (*Id*. (emphasis added) (quoting WLF Br. 22).) WLF wrote the words "small potatoes" and "rounding error" in sentences about what Comcast could gain from building the industry's most efficient ad-rep service. The panel pulled those words from their sentences and placed them in new lines about how Comcast might abuse its size (while still attributing the "point" to WLF). Having done this, the panel concluded: "A reasonable explanation [for the refusal to deal] is that [Comcast decided to lose revenue from Viamedia] because it could survive those losses (the 'small potatoes' and 'rounding error') to obtain and use monopoly power in the ad rep services market." (*Id*.)

Actually, we submit, that is not a "reasonable explanation." Not under this Court's case law. "A monopolist can take its monopoly profit just once," explains *Schor v. Abbott Laboratories*, 457 F.3d 608 (7th Cir. 2006). Gaining control of a complementary good and "jack[ing] up [its] price" just leads to a lower number of sales and a *reduction* of overall profit. *Id.* at 612. "The monopolist's profit-maximizing strategy," therefore, "is not to take over the market in related products," but "to promote competition among other producers." *Id.* "Comcast," WLF explained in its brief to the panel, had "nothing to gain from an *anti*competitive move into the ad-rep market." (WLF Br. 21.) "On the contrary, Comcast could recoup the profit lost" from a refusal to deal "only by being the most efficient ad rep." (*Id.*)

In this brief to the full Court, we discuss two ways in which the panel went astray. *First*, the panel misapplied *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Properly understood, that decision enables a defendant to win dismissal of a refusal-to-deal claim by invoking a legitimate procompetitive reason for its conduct. Comcast did that here, citing the well-established benefits of vertical integration. *Second*, the panel ignored *Schor*, 457 F.3d 608,

which makes clear that Comcast had no reason to aggressively enter the ad-rep market as an anticompetitive predator—and every reason to step forth as a procompetitive low-cost producer.

"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). In going out of its way to try to detect such a situation, the panel erred. The full Court should grant review.

ARGUMENT

I. THE PANEL MISAPPLIED THE SUPREME COURT'S *ASPEN SKIING* DECISION.

In an opinion taking a skeptical view of refusal-to-deal liability, then-Judge Gorsuch wrote that it might be "better" to "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 inducing collusion and inviting judicial central planning." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1076 (10th Cir. 2013). Judge Gorsuch was applying *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004), in which the Supreme Court

declared that its most notable venture in allowing refusal-to-deal liability, *Aspen Skiing*, 472 U.S. 585, is a "limited exception" that lies "at or near the outer boundary of [Sherman Act] § 2 liability," 540 U.S. at 409.

Contrary to now-Justice Gorsuch's advice and, what's worse, to the guidance the Supreme Court supplied in *Trinko*, the panel greatly expanded the scope of *Aspen Skiing*. In *Aspen Skiing*, the defendant "fail[ed] to offer any efficiency justification whatever" for its conduct. 472 U.S. at 608. Here the plaintiff itself *pleaded* a procompetitive justification—the benefit of combining complementary services in a single firm. (Dkt 40 at ¶ 112.) And as WLF explained in its *amicus* brief, that benefit is legitimate: vertical integration eliminates double marginalization, lowers bargaining costs, and creates various other efficiencies in management, sales, and product quality. (WLF Br. 9-11.)

Comcast "was already vertically integrated," the panel claimed, and the issue in this case is therefore simply whether it "exploit[ed] its control" over interconnects. (Slip. op. 65.) We see it differently. The issue is whether Comcast was free not only to vertically integrate, but also to *compete* as a vertically integrated firm. If it was free to compete,

it was free to pursue Viamedia's clients. And if it was free to pursue those clients, it was free to decline to renew its contract with Viamedia. Viamedia's argument is, at bottom, that Comcast should have competed "a little less vigorously." (WLF Br. 7; see also *id.* at 20-21.) Viamedia contends, in other words, that Comcast should have been careful to realize just *some*, not all, of the procompetitive benefit of vertical integration. An argument like that turns antitrust law on its head.

The panel emphasized that *Aspen Skiing* reviews a jury verdict, whereas the refusal-to-deal claim here was dismissed on the pleadings. (Slip. op. 55.) But a court must assess an antitrust complaint "in light of common economic experience." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 (2007). "A defendant may win dismissal," therefore, by "answering unsound economic theory with sound economic theory." (WLF Br. 17.) That is what happened in *Trinko*, which, after discussing economic theory at length, affirms the dismissal of the plaintiff's refusal-to-deal claim. (*Id.*, discussing *Trinko*, 540 U.S. at 407-08, 414.) And it's what happened here, too, when the district court, citing Comcast's "prototypical valid business purpose," correctly dismissed Viamedia's refusal-to-deal claim. (Dkt 60 at 10.)

II. THE PANEL IGNORED THIS COURT'S DECISION IN *SCHOR V. ABBOTT LABORATORIES*.

If the panel gave short shrift to what economic theory has to say about vertical integration, it flatly ignored what it has to say about monopoly leveraging. A monopolist of one item, economic theory says, generally cannot make more money by trying to use his monopoly power to gain control of the market for a second, complementary item. (WLF Br. 13-15.) That is because the monopolist cannot raise the price of the complementary product without commensurately losing sales of the monopoly product. (*Id*. at 13.) A monopolist should sell the complement, therefore, only if he is *in fact the best* at providing it. (*Id*. at 14.) In that case, he should enter the market and stop other providers from taking some of his monopoly profit through their higher-than-necessary costs. (*Id*.) The upshot here is that Comcast had an incentive to expand its sales in the ad-rep market *only if* it was the most efficient ad-rep provider. (*Id*. at 14-15.)

Don't take our word for it, however. Read *Schor v. Abbott Laboratories*, 457 F.3d 608 (7th Cir. 2006), which weaves the futility of monopoly leveraging into the antitrust law of this Court. The defendant allegedly had a monopoly on a booster for a protease inhibitor, a form of

HIV drug. Meanwhile, the defendant sold an inhibitor of its own. The plaintiff accused the defendant of trying to use the alleged booster monopoly to harm its competitors in the inhibitor market. Because the appeal arose at the pleading stage, the Court assumed (1) that the defendant was indeed a booster monopolist, (2) that the defendant's inhibitor was not as good as its competitors', and (3) that, by combining its booster to its inferior inhibitor, and selling the combined drugs at the right price, the defendant could drive other inhibitors from the market or, at a minimum, reduce the rate of new entry. *Id.* at 611. The plaintiff still lost, however, because he could not overcome the faults inherent in his monopoly-leveraging theory. "The monopolist can take its profit just once," *Schor* concludes; "an effort to do more," as by "get[ting] control of another component" and "tr[ying] to jack up the price of that item," "makes it worse off and is self-deterring." *Id.* at 612.

Schor did not involve a refusal-to-deal claim, so the decision cannot, strictly speaking, be said to govern this case outright. But it is quite close to doing so, because the plaintiff in *Schor* relied on a refusal-to-deal decision from another circuit, and *Schor* decides *not* merely to distinguish the decision on its facts. "It would be possible to cabin [that

decision] by observing that . . . the case arose from a refusal to deal," *Schor* declares; but "we think it better to . . . [say] that [the other court] just got it wrong." *Id.* at 613, disagreeing with *Image Tech. Servs, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208-13 (9th Cir. 1997) (correctly stating that a monopolist may not refuse to deal "absent a legitimate business justification," but failing to consider the economic effects of there being "two markets at issue, rather than only one").

Schor acknowledges that "it is impossible to say that a given practice 'never' could injure consumers." 457 F.3d at 612. But, it continues, "as long as rivals continue to sell, and no second monopoly is in prospect, the search for that rare situation in which that second monopoly just might allow the firm to gain a profit by injuring consumers is not worth the candle." *Id.* at 613. Viamedia does not allege that rivals cannot sell. (See, e.g., Dkt 40 at ¶ 163 (alleging that Viamedia is the only firm that has "***ever*** been excluded from an interconnect").) Nor can Viamedia plausibly allege that a new monopoly is in prospect. The barriers to entry are not high: Comcast's fellow cable companies are its most viable ad-rep competitors. The best evidence that Comcast is that very rare beast, the successful monopoly-leverager,

would be a "jack[ing] up" of prices, *id.* at 612; yet Viamedia has not alleged, cannot in good faith allege, any such attempt at recoupment (slip op. 107 (partial dissent)).

Rather than find an imminent danger of recoupment, the panel simply speculated that prices might rise in the future. (Slip op. 85.) To the extent it relied on this speculation, the panel placed itself in direct conflict with the logic of *Schor*—and of sound antitrust more generally. Antitrust law does "very poorly," including in "the field of exclusionary practices," with any task that "require[s] predictions." Frank H. Easterbrook, *Information and Antitrust*, 2000 U. Chi. Legal F. 1, 7 (2000). "Judges," after all, "are no better than the rest of us at predicting the future." Easterbrook, supra, 31 Harv. J.L. & Pub. Pol'y at 443.

CONCLUSION

The petition should be granted.

March 26, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

This brief complies with the type-volume limits of Fed. R. App. P. 29(b)(4) because it contains 1,975 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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March 26, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2020, 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.

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