Press Release

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WLF Asks Supreme Court to Revisit Refusal-to-Deal Antitrust Liability

(Comcast Corp. v. Viamedia, Inc.)

"In our free-market system, a business—even an alleged monopolist—may choose with whom it will and will not transact."
—Cory Andrews, WLF Vice President of Litigation

WASHINGTON, DC—Washington Legal Foundation today filed an *amicus curiae* brief urging the U.S. Supreme Court to take up an important antitrust refusal-to-deal case decided by the U.S. Court of Appeals for the Seventh Circuit.

Although most television advertising time belongs to the television networks, cable companies receive two or three minutes an hour. The cable companies sell most of this ad time in regional clearing houses called "interconnects." Viamedia acts as a broker for advertisers seeking to buy the cable companies' ad time. For about ten years, it had an agreement with Comcast that enabled it to access certain Comcast-run interconnects. When that agreement expired, however, the two firms failed to agree to new terms.

Viamedia sued Comcast, alleging that it unlawfully refused to deal under Section 2 of the Sherman Act. The district court dismissed that claim, citing Comcast's valid business reason for cutting ties with Viamedia: Comcast legitimately sought to create efficiency by cutting out the middleman and moving into the "ad rep" market itself. Viamedia appealed, and a panel of the Seventh Circuit reversed.

WLF's brief offers the Supreme Court three reasons to grant review. First, the Court should grant review to prevent further misapplication of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). As later qualified by the Court, that decision enables a defendant to win dismissal of a refusal-to-deal claim by invoking a legitimate procompetitive reason for its conduct. Second, the case offers the Court a rare chance to overrule *Aspen Skiing*. Widely criticized for obscuring the distinction between exclusion and competition, *Aspen Skiing* sent an uncertain signal to the lower courts and continues to cause great mischief—despite the Court's recent attempts to cabin its untethered theory of liability. Finally, the Court should seize this opportunity to make imminent recoupment an element in refusal-to-deal analysis. Because the judiciary is ill-equipped to predict whether inflated prices are likely in the future, a plaintiff should have to plead that the defendant's refusal to deal has already resulted in inflated prices.

Celebrating its 43rd year, WLF is America's premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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