No. 07-512

In the Supreme Court of the United States

PACIFIC BELL TELEPHONE COMPANY,
DBA AT&T CALIFORNIA, ET AL., PETITIONERS

v.

LINKLINE COMMUNICATIONS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record
THOMAS O. BARNETT
Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
JAMES J. O'CONNELL, JR.
Deputy Assistant Attorney General
DEANNE E. MAYNARD
Assistant to the Solicitor General
CATHERINE G. O'SULLIVAN
DAVID SEIDMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a plaintiff states a claim under Section 2 of the Sherman Act, 15 U.S.C. 2, by alleging that the defendant—a vertically integrated retail competitor with an alleged monopoly at the wholesale level—engaged in a "price squeeze" by leaving insufficient margin between wholesale and retail prices to allow the plaintiff to compete, when the defendant has no antitrust duty to provide the wholesale input to the plaintiff.

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Petitioners are various affiliates of a dominant regional telephone company that provides telephone and data transmission services, including digital subscriber line (DSL) Internet service, to retail consumers over its telecommunications infrastructure and facilities. Respondents are Internet service providers (ISPs) that also sell DSL service at retail, in competition with petitioners. Pet. App. 2a-3a. Because petitioners own the requisite infrastructure and facilities, including local telephone lines (*id.* at 2a-3a & n.1), respondents leased

"DSL transport" from petitioners on a wholesale basis. Consequently, petitioners supplied respondents at wholesale with a necessary input to their DSL service and also competed with respondents in providing retail DSL service to consumers. *Id*. at 2a-3a. Petitioners did not supply respondents voluntarily, but rather because federal telecommunications law required them to do so. *Id.* at 5a n.6.[1]

Respondents sued petitioners in July 2003, alleging monopolization and attempted monopolization of the regional DSL market in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. Respondents alleged that petitioners had "created a price squeeze by charging [respondents] a high wholesale price in relation to the price at which [petitioners] were providing retail services," Compl. ¶ 23(a), and that this "price squeeze" placed respondents at a "serious unfair disadvantage," *id.* ¶ 19. The district court described respondents' other allegations of improper conduct by petitioners, *id*. ¶ 23(b)-(f), as "refusal to deal" and "denial of access to an essential facility." Pet. App. 77a.

2. After this Court's decision in *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), petitioners moved for judgment on the pleadings, contending that *Trinko* compelled judgment in their favor. Pet. App. 65a. In an October 19, 2004, order (2004 Order), the district court granted petitioners' motion as to respondents' refusal-to-deal and essential-facility allegations, *id.* at 77a-86a, 90a-91a, but

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[1] The district court determined that the Communications Act of 1934 and implementing rules adopted by the Federal Communications Commission obligated petitioners to offer DSL transport to respondents, Pet. App. 78a-85a, and respondents did not dispute that conclusion on appeal, *id.* at 5a n.6.

denied the motion as to the price-squeeze claim. *Id*. at 86a-91a.

The court held that *Trinko* did not "directly" bar a claim based on price-squeeze allegations, rejecting petitioners' argument that "a price squeeze claim is essentially a refusal-to-deal claim," *i.e.*, "a claim that Firm One is refusing to deal with Firm Two on Firm Two's price terms." Pet. App. 86a. Although the court acknowledged that the argument "has a certain logic to it," it rejected it on the ground that not all refusal-to-deal claims can "be reframed as price-squeeze claims." *Id.* at 87a. The court also stated that, "to the extent that price-squeeze claims are subject to the requirements set forth in *Brooke Group Ltd*. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), [for predatory-pricing claims,] then the transmutability of refusal-to-deal claims is limited still more." *Ibid*.

The district court also rejected petitioners' argument that "price squeeze liability is inappropriate where, as here, wholesale prices are regulated by a federal regulatory agency." Pet. App. 87a-88a. The court observed that *Trinko* pointed to the "existence of a regulatory structure designed to deter and remedy anticompetitive harm" as a reason not to expand the scope of Section 2 liability. *Id.* at 88a (quoting *Trinko*, 540 U.S. at 412). The court concluded that regulation of petitioners' wholesale prices was not determinative because, under governing Ninth Circuit precedent, the existence of a regulatory structure does not preclude antitrust liability for a price squeeze, *id.* at 88a-89a (citing *City of Anaheim* v. *Southern Cal. Edison Co.*, 955 F.2d 1373 (1992)), and such a claim "falls within the range of recognized Section 2 claims," *id*. at 90a. Accordingly, the court held that "*Trinko* does not bar [respondents'] price-squeezing claim." *Id*. at 91a.

The district court did not reach petitioners' "objections to the legal sufficiency of [respondents'] price-squeeze claim which [did] not derive from *Trinko*" (Pet. App. 91a), including petitioners' argument that the complaint failed to satisfy the *Brooke Group* requirements—*i.e.*, pricing below an appropriate measure of costs and a dangerous probability of recoupment. See Mem. in Supp. of J. on Pleadings 15. The court instead ordered respondents to file an amended complaint detailing the specific facts supporting their price-squeeze claim. Pet. App. 91a.

3. Respondents filed an amended complaint, and petitioners then moved to dismiss it, arguing *inter alia* that price-squeeze claims must satisfy the *Brooke Group* requirements and that the amended complaint failed to do so. Pet. App. 36a. In an April 1, 2005, order (2005 Order), the district court denied that motion. *Id.* at 25a-57a. Although the court found the "policy arguments" for applying the *Brooke Group* requirements "persuasive," *id.* at 47a, the court concluded that it was unnecessary to resolve that "difficult issue" (*ibid.*) because the amended complaint would satisfy those requirements when "generously construed" in accordance with the "no set of facts" standard of *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Pet. App. 49a, 56a.[2]

The court granted petitioners' alternative request to amend the 2004 Order to certify it for interlocutory appeal pursuant to 28 U.S.C. 1292(b), identifying the "controlling question of law" as "whether *Trinko* bars price squeeze claims in a fully regulated industry" in which "the parties are compelled to deal under the federal

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[2] That view of the applicable pleading requirements was subsequently repudiated by this Court in *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955, 1969 (2007).

communications laws." Pet. App. 53a, 56a-57a. The court stated that "the issue before the Ninth Circuit will not only be whether *Trinko* bars price squeeze claims generally but, more specifically, whether it bars predatory price squeeze claims (i.e., price squeeze claims which comply with the *Brooke Group* requirements)." *Id.* at 56a n.22.

4. The court of appeals granted permission to appeal, Pet. App. 92a, and a divided panel affirmed, *id.* at 1a-24a.

a. The panel majority framed the question presented as whether *Trinko* bars price-squeeze claims against a defendant "who has no duty to deal with the plaintiff absent statutory compulsion." Pet. App. 1a. The majority explained 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." *Id.* at 8a (quoting 2 Julian O. von Kalinowski et al., *Antitrust Laws and Trade Regulation* § 27.04[1], at 27-40 (2d ed. 2007)). It stated that federal courts have recognized the viability of such price-squeeze claims under the Sherman Act since *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). Pet. App. 8a-9a. The panel majority declined to reconsider, and instead reaffirmed, the Ninth Circuit's *Anaheim* decision, which held that price-squeeze claims are "viable against monopolists in regulated industries" if the plaintiff proves "specific intent on the part of the wholesale monopoly holder." *Id.* at 9a, 14a.

The majority reasoned that "*Trinko* did not * * * completely eliminate the viability of a § 2 price squeeze theory in regulated industries." Pet. App. 15a. To the contrary, the majority concluded that *Anaheim* was

"consistent with *Trinko*" in "reject[ing] the wholesale importation of antitrust theory as applicable to regulated industries." *Ibid.* The majority stated that in "any future application of *Anaheim*" the court would "ensure consistency with *Trinko*." *Id.* at 16a.

Applying *Anaheim* and *Trinko*, the court upheld the district court's denial of judgment on the pleadings. Pet. App. 16a-19a. It emphasized that the Federal Communications Commission regulates only "the wholesale prices [petitioners] charged [respondents]; there is no comparable regulatory attention paid to the retail DSL market. Any restrictions on pricing at the retail level derive primarily from the antitrust laws." *Id.* at 18a. The court stated that it was "unclear at this juncture the extent to which [respondents are] basing [their] § 2 price squeezing theory on wholesale pricing, retail pricing, or both." *Ibid.* But, "since [respondents] could prove facts, consistent with [their] complaint, that involve only unregulated behavior at the retail level, [their] action or lawsuit survives a motion for judgment on the pleadings." *Ibid.* The court thus concluded that the price-squeeze allegation "states a potentially valid claim" under Section 2. *Id.* at 19a.

b. Judge Gould dissented, concluding that the district court should have dismissed the amended complaint in its entirety. Pet. App. 19a-24a. In his view, *Trinko* "takes the issues of wholesale pricing out of the case, and thus transforms what is left of any claim of 'price squeeze.'" *Id.* at 20a. Therefore, "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*." *Id.* at 23a. Respondents could state a valid claim only by alleging "market power in the retail market," as well as the *Brooke Group* requisites for a predatory-pricing claim. *Id.* at 20a-21a.

Judge Gould concluded that the amended complaint did not satisfy those standards, although he found "just enough possibility of an injury" to warrant permitting respondents a further opportunity to amend the complaint. *Id.* at 23a, 24a n.2.

DISCUSSION

Section 2 of the Sherman Act does not provide a cause of action for "price-squeeze" claims of the type at issue here—namely, allegations that a vertically integrated company with an alleged monopoly at the wholesale level, but with no antitrust duty to provide that wholesale input to its retail competitors, engaged in a "price squeeze" by leaving insufficient margin between wholesale and retail prices to allow its retail competitors to compete. Accepting such a price-squeeze theory based solely on an inadequate margin between a defendant's wholesale and retail prices would recognize an antitrust claim involving no allegations of predatory pricing, no breach of an antitrust duty to deal, and no conduct that harms competition in a way the antitrust laws forbid. Such a theory of liability could not be reconciled with this Court's modern antitrust jurisprudence. The court of appeals' contrary holding is erroneous and is in conflict with the decisions of other courts of appeals. Despite the interlocutory posture of the case, review is warranted because the Ninth Circuit's endorsement of such a theory threatens to chill retail price-cutting by vertically integrated firms and encourage litigation designed to protect competitors at the expense of competition, thereby undermining the procompetitive purposes of the antitrust laws and harming consumers. Accordingly, the petition should be granted.

A. The Decision Below Is Contrary To This Court's Modern Antitrust Jurisprudence

1. In *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), this Court held that the violation of a statutory and regulatory requirement to deal with rivals does not automatically establish a duty to deal for purposes of the antitrust laws. *Id.* at 405-407. The Court also concluded that Verizon, a dominant telecommunications company that was required by telecommunications law to provide rival companies with access to portions of its network, had no antitrust duty to assist a rival in the circumstances of that case. *Id.* at 407-416. The Court distinguished *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), which held that a particular refusal to deal with a competitor amounted to exclusionary conduct, and observed that *Aspen* "is at or near the outer boundary of § 2 liability." *Trinko*, 540 U.S. at 409.

Contrasting the allegations in *Trinko* with the facts in *Aspen*, the *Trinko* Court emphasized the absence of any allegation that Verizon "voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion." 540 U.S. at 409; cf. *Aspen*, 472 U.S. at 605-611. *Trinko* thus held that "Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents." 540 U.S. at 410. The Court further concluded that "traditional antitrust principles" did not justify expanding "the few existing exceptions from the proposition that there is no duty to aid competitors," especially given "the existence of a regulatory structure designed to deter and remedy anticompetitive harm." *Id.* at 411-412.

Here, respondents' price-squeeze allegations amount to nothing more than a claim that petitioners refused to deal on terms that respondents desired. The original complaint was based on the allegedly "high wholesale price" that petitioners charged respondents "in relation to the price at which [petitioners] were providing retail services." Compl. ¶ 23(a).[3] But as the case comes to this Court, petitioners had no antitrust duty to deal with respondents at the wholesale level (see Pet. App. 1a, 85a), and thus no *antitrust* duty to provide respondents with any particular wholesale price terms. Rather, just like the interconnection services provided by Verizon in *Trinko*, petitioners provided DSL transport to respondents only under compulsion of the telecommunications laws. *Id.* at 5a n.6, 77a-85a.[4]

From the standpoint of federal antitrust law, therefore, there would be no antitrust violation even if petitioners refused to deal with respondents altogether (and thereby barred them from the retail market entirely).

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[3] Because the district court assessed only the viability of the original complaint in the 2004 Order (which is the only order that was unambiguously certified for appeal, see pp. 17-19, *infra*), the discussion in text focuses on that complaint. The analysis would be the same if the allegations of the amended complaint were considered, because those allegations likewise turn on the allegedly insufficient margin between wholesale and retail prices. Pet. App. 5a-8a.

[4] Respondents argue in this Court that petitioners had an antitrust duty to deal cognizable under *Aspen*, based on the contention that petitioners had "refus[ed] to provide competitors the same services or prices made available to their retail customers." Br. in Opp. 24. Neither the court of appeals nor the district court addressed that argument, presumably because the complaint contains no suggestion that respondents ever sought, or desired, to purchase from petitioners the bundled Internet access service (incorporating DSL transport) that petitioners sold at retail. See Compl. ¶¶ 8, 12, 19. Accordingly, that issue is not properly presented here.

It necessarily follows that there can be no valid price-squeeze claim based merely on petitioners' conduct in charging "wholesale prices that were too high in relation to what petitioners were charging their retail DSL customers" (Br. in Opp. 1), because that conduct amounts to nothing more than a refusal to deal with respondents on advantageous terms. A defendant that has no duty to deal with rivals by definition has no duty to deal with them on particular terms that would permit them to compete.

Thus, there can be no stand-alone price-squeeze claim in this case. If respondents could state any antitrust claim arising out of petitioners' pricing, it would have to be a claim of predatory pricing based on the retail price. But the original complaint nowhere alleged that petitioners' retail prices were below an appropriate measure of petitioners' costs, nor did it allege a dangerous probability of recoupment. Accordingly, respondents' allegation that the margin between petitioners' wholesale and retail prices impeded their ability to compete (Compl. ¶¶ 19, 23(a); Br. in Opp. 1) fares no better than the similar allegations regarding the provision of inadequate wholesale services in *Trinko*.

2. The Ninth Circuit rejected the notion that "a price squeeze is merely another term of the deal governed by" *Trinko*. Pet. App. 10a. In its view, "[b]ecause a price squeeze theory formed part of the fabric of traditional antitrust law prior to *Trinko*, those claims should remain viable notwithstanding either the telecommunications statutes or *Trinko*." *Id.* at 14a. Some federal courts have "recognized price squeeze allegations as stating valid claims under the Sherman Act," *id.* at 8a-9a, beginning with *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (*Alcoa*). Like the "'essential facilities' doctrine crafted by some lower

courts," *Trinko*, 540 U.S. at 410, however, the price-squeeze theory of antitrust liability has never been recognized by this Court. In the government's view, the Ninth Circuit erred in reaffirming the viability of pure price-squeeze claims in the circumstances here. When the defendant has no antitrust duty to deal, price-squeeze allegations that are based solely on the margin between an integrated defendant's wholesale and retail prices cannot be reconciled with this Court's post-*Alcoa* antitrust jurisprudence.

As this Court's cases make clear, Section 2 does not condemn unilateral action that disadvantages a rival in the absence of anticompetitive conduct. See, *e.g.*, *Trinko*, 540 U.S. at 407 (monopolization); *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 456-460 (1993) (attempted monopolization). Whether one competitor inflicts "painful losses" on another "is of no moment to the antitrust laws if competition is not injured," because "[i]t is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)); see *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1077-1078 (2007). Even a firm with monopoly power has no general duty under the antitrust laws to assist its rivals. See *Trinko,* 540 U.S. at 407-409.

The price-squeeze theory reaffirmed by the court of appeals—focusing solely on the margin between a vertically integrated firm's retail price and the wholesale price at which it sells an essential input to retail competitors, Pet. App. 8a—is inconsistent with those principles. A low retail price is ordinarily benign or procompetitive because "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above

predatory levels, they do not threaten competition." *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990). This Court has adhered to that principle "regardless of the type of antitrust claim involved." *Ibid.* A high upstream price, on the other hand, is ordinarily lawful because the "charging of monopoly prices[] is not only not unlawful; it is an important element of the free-market system." *Trinko*, 540 U.S. at 407. In most situations, moreover, mitigating a squeeze would require either substituting price regulation for the free-market price-setting mechanism ordinarily protected by the antitrust laws or requiring "firms to maintain supracompetitive prices" downstream, "thus depriving consumers of the benefits of lower prices." *Brooke Group*, 509 U.S. at 224.

Accordingly, a price squeeze does not necessarily, or even ordinarily, entail anticompetitive conduct within the meaning of the antitrust laws. As a leading antitrust treatise explains, "[m]ost" price squeezes are not "invidious." 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 767c at 126 (2d ed. 2002); see *ibid.* (observing that "it is difficult to see any *competitive* significance apart from the consequences of vertical integration itself, which may be adverse, neutral, or beneficial"). See also *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 23-25 (1st Cir. 1990) (Breyer, J.) (noting that "[m]erely eliminating competitors is not necessarily anticompetitive" and discussing "traditional circumstances in which prices that create a squeeze might simultaneously bring about economic benefits"), cert. denied, 499 U.S. 931 (1991).

Price-squeeze theories focus on the economic wellbeing of particular competitors, not on competition. The gravamen of the offense found in *Alcoa* was that independent sheet rollers, squeezed between the pincers of

Alcoa's high price for ingot (from which sheet is made) and the low price at which Alcoa itself sold sheet, could not make a "living profit." 148 F.2d at 437. The court deemed that result unlawful as long as the price of ingot was "higher than a 'fair price.'" *Id.* at 438. Similarly, the price-squeeze theory reaffirmed by the Ninth Circuit forbids pricing wholesale inputs so high that the defendant's "'customers cannot compete with it in the second-level'" market. Pet. App. 8a (citation omitted). In either case, what makes the conduct purportedly unlawful is its adverse effect on a competitor. See Compl. ¶ 19 (alleging that petitioners' price squeeze placed respondents at a "serious unfair disadvantage"). Under this Court's cases, however, a firm's conduct may not be judged anticompetitive, predatory, or exclusionary "by simply considering its effect on" a competitor. *Aspen*, 472 U.S. at 605.

Because a price squeeze is ordinarily not anticompetitive, a complaint whose allegations of anticompetitive conduct are limited to such a squeeze, at least when the defendant has no antitrust duty to deal, does not suffice to establish that "the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); see *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1965-1966 (2007) (noting that a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level"). The court of appeals was therefore wrong to conclude that respondents' price-squeeze allegations stated a potentially valid antitrust claim.

Rather, in this context, respondents' price-squeeze theory could not allege exclusionary conduct without at least satisfying the *Brooke Group* requirements with respect to the retail market. But then the gravamen of the complaint would no longer be a price squeeze (*i.e.*, an insufficient margin between wholesale and retail

prices) as such, but rather the predatory nature of petitioners' retail price (*i.e.*, below-cost pricing). As the dissent concluded (Pet. App. 20a-21a), for such a complaint to be viable, it would at least have to satisfy *Brooke Group* by alleging that "the prices complained of are below an appropriate measure of its rival's costs" and that the defendant had "a dangerous probability[] of recouping its investment in below-cost prices." 509 U.S. at 222-224.[5]

The panel majority adverted to the possibility that respondents "could prove facts, consistent with [their] complaint, that involve only unregulated behavior at the retail level." Pet. App. 18a. But unlike the dissenting judge, the majority did not hold or suggest that a price-squeeze complaint must contain allegations sufficient to satisfy the *Brooke Group* standard in order to survive a motion for judgment. *Id.* at 19a. The Ninth Circuit's reaffirmation (*id.* at 14a) of "price squeeze theory" as a "viable" and independent "part of the fabric of traditional antitrust law" cannot be squared with this Court's modern antitrust cases.

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[5] There may be cases in which a defendant's prices are set for exclusionary purposes, but no antitrust liability arises because the defendant has neither violated an antitrust duty to deal nor priced below cost. Indeed, this Court pointedly acknowledged in *Brooke Group*, 509 U.S. at 223, that above-cost prices may be exclusionary in effect. But whether or not such prices are the downstream component of a price squeeze, their exclusionary effect, even if not simply a reflection of one party's cost structure and therefore of competition on the merits, "is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting." *Ibid.*

B. The Decision Below Conflicts With Decisions Of Two Other Circuits

The decision of the court of appeals conflicts with the post-*Trinko* decisions of two other circuits. First, in *Covad Communications Co.* v. *BellSouth Corp.*, 374 F.3d 1044 (11th Cir. 2004), cert. denied, 544 U.S. 904 (2005), the Eleventh Circuit considered antitrust claims brought by Covad, a DSL provider, against a dominant telephone company that both provided wholesale services to Covad under regulatory compulsion and competed with it in the retail DSL market. On remand from this Court for reconsideration in light of *Trinko*, the Eleventh Circuit held that Covad's price-squeeze allegations remained viable after *Trinko*—but only because (in the court's view) the complaint "contain[ed] allegations that the two basic prerequisites for a showing of price predation under § 2 of the Sherman Act have been met." *BellSouth*, 374 F.3d at 1050 (citing *Brooke Group*). Thus, the Eleventh Circuit *rejected* the viability of a traditional, stand-alone price-squeeze claim (*i.e.*, a claim based on the margin between wholesale and retail prices), and upheld only a predatory-pricing claim involving "price squeezing allegations." *Ibid.* The Ninth Circuit's description of *BellSouth* as "holding that price squeeze claims survive *Trinko*" therefore conveys an inaccurate impression. Pet. App. 10a. In contrast to the decision below, the Eleventh Circuit expressly held that to survive *Trinko* a price-squeeze complaint "*must* contain allegations * * * of price predation." *BellSouth*, 374 F.3d at 1050 (emphasis added). That amounts to a recognition that a price-squeeze claim as such, independent of allegations of predation at the retail level, is not viable after *Trinko*.

Second, as the Ninth Circuit acknowledged (Pet. App. 10a), its decision squarely conflicts with the D.C.

Circuit's decision in *Covad Communications Co.* v. *Bell Atlantic Corp.*, 398 F.3d 666 (2005), which involved similar price-squeeze allegations by Covad against a different dominant telephone company. In the wake of *Trinko*, the D.C. Circuit held that price-squeeze claims based solely on the margin between retail and wholesale prices are not viable in that context. *Id.* at 673-674. The court thus affirmed dismissal of Covad's price-squeeze claim, observing that "it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal." *Id.* at 673 (quoting 3A Areeda & Hovenkamp ¶ 767c5, at 129-130).

Subsequently, the D.C. Circuit explained in an order denying rehearing that its decision in *Bell Atlantic* was not in conflict with *BellSouth*, noting that it had not reached a claim alleging predatory pricing: "Covad did not argue its claim as one of price predation and, unsurprisingly, we did not treat it as such." *Covad Commc'ns Co.* v. *Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005). Thus, both the D.C. Circuit and the Eleventh Circuit have made clear that price-squeeze allegations based solely on the margin between wholesale and retail prices, against a defendant with no antitrust duty to deal, fail to state a Section 2 claim.[6]

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[6] Although the reasoning in pre-*Trinko* decisions from the Fourth and Seventh Circuits is in tension with the decision below, and both accurately foreshadow this Court's decision in *Trinko*, neither of them expressly reaches the viability of a price-squeeze claim. See *Cavalier Tel., LLC* v. *Verizon Va., Inc.*, 330 F.3d 176 (4th Cir. 2003), cert. denied, 540 U.S. 1148 (2004); *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000).

C. The Decision Below Warrants Review

1. The procedural details of the certification process are an unattractive feature of this case, but it remains an adequate vehicle for this Court's review of the important issue presented. The record in this case creates some doubt regarding the precise scope of the matters that were properly before the court of appeals on interlocutory appeal. As this Court has explained, an appeal under Section 1292(b) "is from the *certified order*, not from any other orders that may have been entered in the case," *United States* v. *Stanley*, 483 U.S. 669, 677 (1987), and therefore confers appellate jurisdiction only over that order and "any issue fairly included" within it, *Yamaha Motor Corp.* v. *Calhoun*, 516 U.S. 199, 205 (1996). Although the court of appeals looked to both the initial complaint and the amended complaint in deciding the appeal (Pet. App. 4a-8a), and stated that "[f]or purposes of this appeal, we assume as true the facts pleaded in [respondents'] amended complaint" (*id.* at 2a n.2), it is not clear that the district court certified any order besides the 2004 Order (which addressed only the original complaint). That uncertainty, however, does not affect this Court's jurisdiction to address the question presented, and accordingly it is not a basis for denying review.

In its 2005 Order granting certification, the district court stated that the standards for certification of an interlocutory appeal under 28 U.S.C. 1292(b) were satisfied, and accordingly "GRANT[ED] [petitioners'] Motion to Certify October 20, 2004, Order for Interlocutory Appeal [27]." Pet. App. 57a. The referenced motion asked the court to "certify for interlocutory review its ruling on this motion if adverse to [petitioners], and amend this Court's October 20, 2004 Order to certify for interlocutory review so much of the Order as permits

[respondents'] price-squeeze claim to proceed." Mot. to Strike, Dismiss, or Certify 1 (03-5262 Docket Entry No. 27 (C.D. Cal. Jan. 14, 2005)). By granting the referenced motion, the district court necessarily granted the request to amend the 2004 Order to certify that order for interlocutory appeal, thereby satisfying the requirement that the statutory certification prerequisites be "state[d] in writing in such order." 28 U.S.C. 1292(b); see, *e.g.*, Fed. R. App. P. 5(a)(3) ("the district court may amend its order * * * to include the required permission or statement"); *In re Hamilton*, 122 F.3d 13, 14 (7th Cir. 1997).

Petitioners' motion to certify (although styled a motion to "Certify October 20, 2004, Order") also sought certification of the district court's ruling on "this motion," *i.e.*, petitioners' alternative motion to strike or dismiss the amended complaint, to the extent the court rejected the motion. Because the district court "GRANT[ED]" the motion to certify without any explicit qualification, it could be argued that the court thereby certified (and the Ninth Circuit accepted for appeal) the court's denial of petitioners' motion to dismiss in the 2005 Order, as specifically requested in petitioners' motion to "Certify October 20, 2004, Order." That interpretation is bolstered by the district court's suggestion (Pet. App. 56a n.22) that the issues before the Ninth Circuit would include the ruling on the amended complaint, a view arguably shared by the court of appeals as well (*id.* at 2a n.2, 19a).

On the other hand, the only "controlling question of law" specifically identified by the district court as justifying interlocutory appeal was the 2004 Order's ruling on the viability of price-squeeze claims under *Trinko* (Pet. App. 53a, 56a-57a), whereas the 2005 Order addressed the sufficiency of the amended complaint under

Brooke Group (*id.* at 36a-52a). Moreover, in staying proceedings pending resolution of the interlocutory appeal, the district court referenced only the "interlocutory appeal of this Court's October 20, 2004 Order." Stip. & Order Staying Action 2.[7]

Regardless of whether the 2005 Order was properly before the court of appeals, that court did have jurisdiction to review the propriety of the 2004 Order denying petitioners' motion for judgment with respect to the original complaint. The court of appeals resolved that issue in favor of respondents, holding that price-squeeze claims remain viable after *Trinko* and that the Ninth Circuit's recognition of such claims in *Anaheim* in the context of regulated industries remains good law. Pet. App. 8a-16a. Accordingly, this Court possesses jurisdiction to review those holdings.[8]

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[7] The court of appeals was less than precise about what was before it. The court discussed both the 2004 and 2005 Orders and, in its paragraph summarizing the 2005 Order, stated that the district court certified "the order" for interlocutory appeal. Pet. App. 2a. In the end, however, it affirmed the district court's denial of petitioners' "motion for judgment on the pleadings," *id.* at 19a, which was the ruling in the 2004 Order, not the 2005 Order.

[8] The district court did not decide until the 2005 Order whether respondents' allegations satisfy the *Brooke Group* standard. Even assuming that the district court did not certify that order for interlocutory appeal, however, there would be no jurisdictional impediment to this Court's consideration of *Brooke Group* and other modern antitrust precedents in reviewing the propriety of the 2004 Order. An interlocutory appeal encompasses "any issue fairly included" within the certified order. *Yamaha*, 516 U.S. at 205. The 2004 Order denied petitioners' motion for judgment with respect to respondents' original price-squeeze claim (which plainly did *not* allege predatory pricing under *Brooke Group*), and the certification of that order therefore conferred appellate jurisdiction to review the correctness of that denial. In reviewing the 2004 Order, this Court would therefore possess jurisdiction to determine whether a stand-alone price-squeeze claim against a

2. Respondents contend (Br. in Opp. 14) that the decision below does not warrant review because the Ninth Circuit's decision accords with *Trinko* and *BellSouth* with respect to "predatory price squeeze claims of the type alleged here." Respondents are mistaken.

In the first place, respondents' contention that they have alleged a claim of "predatory" pricing is based on the allegations in the amended complaint, which the district court concluded in its 2005 Order were sufficient to satisfy the *Brooke Group* requisites if "generously construed." Pet. App. 56a. As discussed, however, it is unclear whether the 2005 Order and the amended complaint are properly at issue in this interlocutory appeal. Respondents do not contend, and there is no basis for suggesting, that the original complaint alleged the elements of a predatory-pricing claim under *Brooke Group*.

But more to the point, even if respondents do have a predatory-pricing claim that would satisfy *Brooke Group*, they also have a claim in the Ninth Circuit that does not require satisfaction of *Brooke Group*, and that is not a claim they would have in the Eleventh or D.C. Circuits. That is enough to provide an adequate vehicle for review. The panel majority did not address the sufficiency of respondents' allegations under *Brooke Group* or hold that price-squeeze claims must satisfy the *Brooke Group* standard in order to survive a motion to dismiss. Indeed, the majority did not even discuss the subject of "predatory" pricing at any point in its opinion,

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defendant with no antitrust duty to deal is consistent with modern antitrust precedents (including both *Trinko* and *Brooke Group*). To be sure, the Court might lack jurisdiction to decide the distinct questions whether (a) respondents could avoid dismissal by alleging the elements of a predatory-pricing claim under *Brooke Group*, and (b) whether the amended complaint alleged such a claim, but those questions would not merit this Court's review at this time in any event.

notwithstanding the dissent's extended analysis of that issue.

To be sure, the panel majority did state that respondents might be able to "prove facts, consistent with its complaint, that involve only unregulated behavior at the retail level." Pet. App. 18a. The court did not hold that such a theory would have to satisfy the *Brooke Group* standard in order to be viable, however, nor did it foreclose alternative theories of price-squeeze liability. And the court elsewhere made clear that, in the Ninth Circuit at least, the traditional price-squeeze theory recognized in *Alcoa* and its progeny "remain[s] viable" after *Trinko*. *Id.* at 14a; see *id.* at 8a-9a, 14a-16a. Indeed, respondents endorse that reading of the court's decision, because they continue to "contend * * * [that] their price squeeze claims need not satisfy the predatory pricing requirements of *Brooke Group*." Br. in Opp. 16 n.8.

Accordingly, the majority opinion stands for the erroneous proposition that respondents' price-squeeze allegations survive *Trinko*, regardless of whether respondents also alleged the elements of a predatory-pricing claim under *Brooke Group*. The decision cannot plausibly be read to limit price-squeeze claims to the predatory-pricing context. The conflict with the D.C. and Eleventh Circuits, and with this Court's modern antitrust jurisprudence, is therefore stark.

3. Notwithstanding the interlocutory posture of the case, this Court's review is warranted to correct the Ninth Circuit's erroneous decision on an important legal issue and to resolve the conflict among the circuits. The court of appeals instructed the district court to permit respondents' price-squeeze claim to go forward, without requiring price-predation allegations, thus removing any element of exclusionary conduct from a potentially large class of monopolization and attempted monopolization

claims. The risk of large damage awards may induce settlements in such cases, and thereby deny this Court an appropriate future opportunity to correct the Ninth Circuit's error. Of even greater concern, however, the risk of treble damages may cause firms like petitioners that must offer wholesale services to hesitate to offer low-cost retail products, to the detriment of consumers and competition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
THOMAS O. BARNETT
Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
JAMES J. O'CONNELL, JR.
Deputy Assistant Attorney General
DEANNE E. MAYNARD
Assistant to the Solicitor General
CATHERINE G. O'SULLIVAN
DAVID SEIDMAN
Attorneys

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