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. : No. 07-512

Washington, D.C.

Monday,December 8, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

AARON PANNER, ESQ., Washington, D.C.; on behalf of the Petitioners.

DEANNE E. MAYNARD, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

MAXWELL M. BLECHER, ESQ., Los Angeles, Cal.; on behalf of the Respondents.

RICHARD BRUNNELL, ESQ., Newton, Mass., on behalf of
American Antitrust Institute, as amicus curiae,
supporting the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 07-512, Pacific Bell v. LinkLine Communications.

Mr. Panner.

ORAL ARGUMENT OF AARON PANNER

ON BEHALF OF THE PETITIONERS

MR. PANNER: Mr. Chief Justice, and may it please the Court:

The Court should reverse the Ninth Circuit's decision because it asserts that this Court's holding in Trinko and principles regarding unilateral pricing decisions as explained in Brooke and elsewhere.

CHIEF JUSTICE ROBERTS: You are probably feeling pretty good about your chances since your opponent has given up, right?

(Laughter.)

MR. PANNER: Well, Your Honor, it is correct that this Court observed in Roberts that the Respondents' agreement that the legal position of the court below is incorrect, certainly should provide this Court great comfort in reversing the decision in the Ninth Circuit. And, indeed, a decision on the merits here is important because the Ninth Circuit's decision

is harmful to consumers, deterring beneficial price cuts and sufficient particle integration.

CHIEF JUSTICE ROBERTS: Any question should we have about the Article III status of this aspect of the dispute?

MR. PANNER: No, Your Honor. The parties' agreement on a point of law does not deprive this Court of jurisdiction in any way, and the parties remain adverse in this case. The Respondents continue to pursue a section 2 claim, and the same intend to -- evidently intend to pursue the same relief.

CHIEF JUSTICE ROBERTS: Well, you might be right, but, you know, with respect to standing we have held that that is an issue-by-issue inquiry, not a live case broadly conceived.

MR. PANNER: Well, in Laidlaw the Court said that it was for a particular type of relief, that the plaintiff had to establish standing, but that's not at issue here. The Respondents continue to pursue a section 2 claim and pursue, evidently, the same type of relief based on the same course of conduct.

I would also like to point out that Respondents, while conceding that the position of the Ninth Circuit was incorrect, have not clearly stated that they would not take advantage of a decision by this

Court affirming the Ninth Circuit. And I think that that's important, because there really would be no reason for these Respondents to say that if for whatever reason the Court decided that the Ninth Circuit is right, that they would not go ahead and take advantage --

JUSTICE GINSBURG: I thought they asked to have the Ninth Circuit decision vacated. They didn't ask us to affirm it. They said vacate that decision is wrong.

MR. PANNER: That is right, Justice Ginsburg, but the point is that if this Court were to disagree -- for example, it is well established that the Solicitor General's confession of error, for example, or a State attorney general's confession of error does not bind this Court. Indeed, a party's position with respect to the proper disposition of the case never binds the Court.

So the Court certainly has the power to say, now that the case is properly before it: We think that the Ninth Circuit got it right.

Obviously, we don't think that that's what we think the Court should say; but, given that circumstance, if the Court, for whatever reason, were to affirm the Ninth Circuit, there would be nothing that

would bar the Respondents from taking advantage of that. Even though they said that that was a legal error, if that were the established law, there would be no reason for them not to pursue it.

And I think that that's relevant, again, to the question whether the parties remain adverse for Article III purposes. As a jurisdictional issue, the adversity of the parties with respect, even to the section 2 claim, even if intended to pursue it differently, the theory is sufficient.

But the point I am making is simply to illustrate that adversity even with respect to the narrow legal issue remains, even though they are not contesting the proper -- contesting the proper disposition of that legal issue.

JUSTICE GINSBURG: When this comes up, we usually, if a -- if a party abandons a position in support of a decision, the court of appeals decision, we have appointed -- as you noted in your brief, we have appointed a friend of the court to represent the position of the circuit.

And here we don't have that. We don't have anyone that we have appointed and say you presented the position. You defend the position below.

MR. PANNER: Well, that's true, Your Honor,

but there is an amicus arguing before the Court today defending the Ninth Circuit's decision. And there were two amicus briefs filed on that. Had those not been filed, the Court could have sought additional help. But the positions -- the arguments in favor of the Ninth Circuit decision had been put forward in the amicus brief, and there will be argument in support of the Ninth Circuit's decision today.

And I think -- I think that the jurisdictional issue is answered by your question. That is to say, the fact that the Court could appoint amicus shows that this Court retains Article III jurisdiction. And it's very important in this case for the Court to reach the merits of the decision and clearly to rule that there is no independent price-squeeze theory under Section 2 because recognition of such a theory, as in the Ninth Circuit's, decision is very -- very harmful to consumers.

CHIEF JUSTICE ROBERTS: Is there any way in which the resolution of their price-squeeze claim would affect their Brooke Group Section 2 claim?

MR. PANNER: I think it could, Your Honor. In their brief they refer to the possibility that the wholesale price that was charged could be in some way a proxy for costs. And this Court clearly stated that

there's a different issue as to whether a single economic unit is charging prices below cost; that the wholesale prices that may be charged are not an appropriate proxy.

But I -- so, in that respect, I think that a clear declaration with respect to what is required -- I guess the distinction between the predatory-pricing theory of liability and a price-squeeze claim as recognized by the Ninth Circuit could have an impact.

JUSTICE STEVENS: May I just clarify: Are you arguing there is never a price-squeeze claim under Section 2? In other words, are you challenging Judge Hand's reasoning in the Alcoa case?

MR. PANNER: Well, Your Honor, I believe, I am challenging Judge Hand's reasoning in Alcoa. I think that I would not go so far as to say that there would never be a situation in which a price squeeze, that is, an insufficient margin between wholesale and retail prices to allow a competitor to compete -- that that course of conduct could never support a claim under Section 2.

But the basis for the claim would have to be that there was a -- a duty to deal -- or a duty to deal under Section 2, an antitrust duty to deal that was effectively being debased through that sort of pricing

conduct. But --

JUSTICE STEVENS: Was there such a duty in the Alcoa case?

MR. PANNER: Well, I think that the Alcoa case was wrongly decided, Your Honor, in several respects. The critical point about -- the first point about Alcoa is that the conduct that was at issue was said to be unlawful because it was an abuse of the power in the ingot market and not monopolization of the downstream market in sheet.

And so what Judge Hand said was that that was unlawful. But he expressed some doubt as to whether it was appropriate to treat it as an independent basis for -- or an independent wrong under section 2.

But the notion that the abuse -- that charging too high a price at the wholesale level could be an independent section 2 wrong is quite inconsistent with what this Court said in -- in -- most recently in Trinko where it recognize --

JUSTICE BREYER: So there is regulation involved there. I mean, suppose you had no regulation at all involved. Why couldn't you have a monopolist at the primary stage, say, ingot, and what that monopolist wants to do is to extend its power into the secondary stage, say, fabrication, in order to make it less likely

that there would be a new entries to attack its primary monopoly? That would -- suppose you have those circumstances? Perhaps they would be rare, but if you have them, wouldn't that set forth a Section 2 violation?

MR. PANNER: It -- it -- it wouldn't, Your Honor, for the following reason: That I think it is -- it is true that the -- the key point of the -- the basis upon which the question -- the question presented has been granted and upon which the analysis has to turn is that there is no duty to deal at all at the wholesale level.

So that the ingot monopolist has no obligation to provide an ingot to a downstream rival. And that judgment is a judgment that it is not worth protecting downstream dependent competitors in order to promote the competitive process.

JUSTICE SOUTER: Well, that may be the assumption on this case, but that may not be the assumption on the next case. And I understood you to be arguing that you wanted us to hold that at -- well, you wanted us to hold whether we are dealing with a regulatory case or in Justice Breyer's example, where there is -- where there is no independent regulation, that the greater includes the lesser; that A, there is

no duty to deal and therefore there is no obligation that can be violated under the antitrust laws by a price squeeze that does not rise to the level of predatory pricing.

Is that your position?

MR. PANNER: Well, Justice Souter, trying to be clear about the relationship.

JUSTICE SOUTER: Well, the best way to do that is to start with a yes or no answer. That way, so I know where you are going.

MR. PANNER: Thank you, Your Honor. And I think that's not precisely our position.

JUSTICE SOUTER: Okay.

MR. PANNER: Our position is that in the absence of a duty to deal, one does not look at an allegation of insufficient margin as a potential section 2 --

JUSTICE SOUTER: Okay. But what I think we are trying to get at is, should we foresee a situation, with or without the regulatory participation of something like the agency here, in which there would be a duty to deal, which would support a price squeeze theory that did not amount to predatory pricing?

MR. PANNER: Your Honor, I don't think that the Court has to anticipate that. I think what the

Court should say is that there are narrow circumstances as recognized in Trinko, where there may be a duty to deal under section 2. And in that circumstance there may be conduct that constitutes a refusal to deal, even a constructive refusal to deal. There is really -- to give a simple example, if a widget, if the downstream product costs $10 and a widget is made available for a million dollars, that is not really dealing at all.

But the point is that the section -- the price squeeze piece of the allegation really does not add to the underlying question of what is the section 2 duty that needs to be enforced.

JUSTICE BREYER: Well, that's it -- I mean, now maybe you can get me off what I am thinking, but now it sounds that the answer to Justice Stevens's question is yes. Now, I have, yes, overruled Judge Hand's opinion in Alcoa. I always thought there were circumstances, whether true of Alcoa or not, where that did make out the claim, namely, the one I suggested.

Well, it's quite a different battle if, in fact, the person whose injured, namely, the fabricator who is complaining, has a place to go, such as the FCC or the Alcoa regulatory agency, because under those circumstances, he has a place to complain that these prices are out of line.

But if there is no place to go, well, I'm suddenly -- I'm a little hesitant to overturn Alcoa under those circumstances, and the reason the duty to deal doesn't deal with it is we could come into an existing world where duty or no duty, there have been independent fabricators who for a long time have bought their ingot from this monopolist.

MR. PANNER: Well, Your Honor, the answer to that is two-fold. First of all, because there is no duty to deal, by assumption the producer of ingot, the alleged wholesale monopolist, has the privilege to withdraw the supply of that.

JUSTICE BREYER: Then I would say that shouldn't be the law. The reason it shouldn't be the law is because that ingot may, by either withdrawing or, in fact, raising his price way above a competitive level and charging just no room to remain in business, is trying to drive out possible new entrants into the ingot stage of the business. And the fabricators are a number one out there as possibilities to break down the monopolist in ingot.

And if that is the motive, as shown by the behavior, there should be a section 2 claim. If you want to argue that straight on the merits, what's the answer to that argument?

MR. PANNER: The answer to that argument, Your Honor, is the one that Trinko offers, is that it's very important in establishing the antitrust rules to recognize the incentive that those rules will create for investment and for innovation.

If the monopolist is forced to share the benefit of the monopoly with downstream rivals on the basis there is potential entry, that is going to be a significant disincentive to innovation at the upstream level. And the establishment of clear rules, ones that recognize that in the general run of cases there is not going to be harm and recognizes that the very scrutiny of that conduct will deter beneficial conduct and beneficial innovation and beneficial investment by the upstream monopolist, that recognition is the one that argues in favor of saying, in the absence of a duty to deal, where -- where the wholesale input could be withdraw from the market and where, therefore, the incremental harm from a price squeeze is really quite hard to identify. But that in that circumstance it is inappropriate to recognize any sort of a duty under section 2.

JUSTICE BREYER: Just out of curiosity, is there a place where in this case the plaintiffs could go, a place which has a label "regulator" under it?

MR. PANNER: Yes, there is, Your Honor.
JUSTICE BREYER: And that place is --
MR. PANNER: The Federal Communications Commission.
JUSTICE BREYER: So we needn't reach the issue in this case?
MR. PANNER: Well, Your Honor, I think that the -- significant regulation is not necessary. I agree with Your Honor that that is a factor that the Court could allow to be placed somehow on the scale. But the analysis that took place in Trinko is, first of all, whether there is an antitrust duty there at all and whether to extend it in light of the regulatory scheme that existed. And so, in this case, even in the absence of regulation, there should be no duty under section 2.
JUSTICE SOUTER: With respect to your argument that there is going to be an upstream disincentive to investment in the monopolist if we do not come up with a clear rule that you want, are we at a stage or is the fashion of economics at a stage where we can say that there is a clear consensus supporting your argument?
And if the answer is no, then isn't the only sensible thing for this Court to do to is leave it to rule of greedy?

MR. PANNER: Your Honor, I think there is a consensus in all of the scholar literature that was cited by the American Antitrust Institute, there wasn't anyone who supported, there was no scholar who supported the recognition of a price squeeze claim under section 2. I do think that --

JUSTICE SOUTER: For the reasons you gave, in effect, the investment disincentive?

MR. PANNER: Well, I think the scholarly literature that explains the recognition of price squeeze duty would be harmful does indeed rely on the sorts of reasons that --

JUSTICE SOUTER: Is that, in effect, uncontested within the profession except for the margins?

MR. PANNER: I would assume as in any academic discipline, there would be those who are trying to find counterexamples. But I think the point there and one for example Professor Carlton stresses in his article and stressed another scholarly works is that the search for the rare case itself can cause very grave harm in the conduct that is following.

JUSTICE SOUTER: I follow the argument. The trouble I have that I have is I don't know whether, in the practical sense, that argument is a significant

argument or not. I don't know what's going on out there. And unless we reach the point in which the economic literature makes this a kind of slam dunk decision, then it seems for me the only thing for a Court to do is leave it for reasoning and analysis.

MR. PANNER: Well, I think that the Brooke decision -- and as reaffirmed the answer to that.

JUSTICE SOUTER: Is there --

MR. PANNER: There is a certain kinds of conduct where it is possible to create a model where there would be some negative consequences of the conduct, but that the very search for it risks deterring conduct that is of obvious benefit to the consumers. And that's true here.

The recognition of an independent price squeeze duty would deter retail price reductions that are immediately beneficial to consumers, and it deters entry into the downstream market by a vertical -- by a wholesale monopolist who may then encounter a duty to protect downstream rivals; and, of course, it would deter voluntary dealing.

And I think that that you know, discussions with my client reflect that this is a real effect, that they are on the margin, the concern about the potential for litigation makes investment and certainly

innovations not worth the gamble.

Unless the Court has further questions I, will reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Maynard.

ORAL ARGUMENT OF DEANNE E. MAYNARD

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE,

SUPPORTING THE PETITIONERS

MS. MAYNARD: Mr. Chief Justice, and may it please the Court:

If a retail level rival can state a section 2 claim against a vertically integrated company by alleging nothing more than a margin-based price squeeze, one of two outcomes will result. Either the vertically integrated company will have to raise its retail prices to its consumers or it will be forced to share the benefits of its lawful monopoly with its rivals by lowering its wholesale price. Either outcome is inconsistent with this Court's antitrust jurisprudence.

As we know from Trinko, in the absence of a duty to deal, a monopolist cannot be forced to share the benefits of its lawful monopoly with its rivals at any particular turn.

JUSTICE STEVENS: Ms. Maynard, do you join

in your colleague's suggestion that we should overrule the Alcoa case?

MS. MAYNARD: I do think -- the government believes the Alcoa case is wrongly decided, Justice Stevens.

JUSTICE STEVENS: Do you think it's necessary to do so to decide this case?

MS. MAYNARD: I mean if -- I mean, one could say that Judge Hand didn't necessarily recognize a price squeeze claim standing alone, because he has some language about, to the effect of perhaps this isn't an independent wrong, but the way that he analyzed it separately and the way courts have ruled -- have relied upon it, to suggest that a mere margin-based price squeeze without more, does state a section 2 claim, is incorrect.

JUSTICE STEVENS: My question is really, you think it's necessary to overrule that decision in order to decide this case correctly?

MS. MAYNARD: Well, I don't think technically it needs overruling. It's a Second Circuit decision, and I think it is -- has in effect --

JUSTICE STEVENS: Do we have to say it was decided incorrectly?

MS. MAYNARD: I think the Court should say

it was decided incorrectly.

JUSTICE STEVENS: That's not my question.

MS. MAYNARD: Yes, Justice Stevens, I think it's incorrect.

JUSTICE STEVENS: I know you think it's incorrect. I am asking whether you think we have to say it's incorrect in order to decide this case correctly?

MS. MAYNARD: Yes, unless you're willing to say Judge Hand didn't hold that a price squeeze claim without more is an independent theory that supports the section 2 claim. As long as you think that's what he did hold, and many people do think that is what he held, then, yes, you do need to say that it was wrongly decided and the government believes it is wrongly decided, and that it has already been overruled.

JUSTICE BREYER: Well, why -- why can't we just say Trinko is a case, as is this case, where there is a regulator? So, in fact, if you, Mr. Plaintiff, are upset about this, and feel you are being very badly treated and squeezed out under circumstances where competition might be hurt as a result, then you go to the Commission, and you say: "This is an unreasonable price. " All right?

Now I thought Trinko was a case where that was involved.

MS. MAYNARD: The regulation, Justice Breyer, in Trinko was relevant for two reasons that are not relevant to the question before the Court here. First, the Court looked to the regulations, the regulatory duty, and made a decision whether the regulatory duty itself created an antitrust duty to deal, and the Court held it did not.

JUSTICE STEVENS: Right.

MS. MAYNARD: That holding is relevant here, because it means that Petitioners' regulatory duty to deal -- duty to deal does not create an antitrust duty to deal. But then the Court went on and looked at the Court's existing antitrust jurisprudence, to decide whether or not the Court's antitrust jurisprudence recognized a duty to deal in that circumstance, and concluded it did not. It only looked to the regulation that --

JUSTICE BREYER: But it -- it -- it said that the issue in that case was a duty to deal. That's not the issue in this case. And it was about Aspen, and whether you had a duty to deal. And the Court said no, you don't have a special duty to deal.

Here we are dealing with quite a different thing. We are dealing with someone who has chosen to deal in the past, and they are setting a price such that

the plaintiff thinks he is being squeezed out.

Now I can't find anything in Trinko that tells me I can't say, we're at least not worried about this where there is a regulator that you can go and complain to. And if that's so, I don't have to reach the question of whether Judge Hand is right or wrong. What's wrong with what I just said?

MS. MAYNARD: Well, a couple of things. To me, this case, as the case comes to the Court there is no antitrust duty to deal.

And the -- the Petitioners here, the district court determined weren't dealing voluntarily, Justice Breyer; they were dealing as a result of regulatory compulsion; but be that as it may, the -- the important point from Trinko that is relevant here is that a lawful monopolist without an antitrust duty to deal has no duty to deal on any particular terms; and Trinko specifically says that a lawful monopolist is entitled to charge the monopoly price.

JUSTICE SOUTER: But --

MS. MAYNARD: In that case --

JUSTICE SOUTER: No, I didn't -- I didn't want to interrupt your answer, go ahead -- just go ahead.

MS. MAYNARD: I'm sorry. That takes the

wholesale price and possibility of lowering that, Justice Breyer, off the table; and without the top pincer as it were, there is no price squeeze; and that leaves the Respondents with only a claim that the Petitioner's prices are too low. And whenever a party claims that its rival's prices are too low for it to be able to compete, that triggers all of the concerns that this Court expressed in Brooke Group.

JUSTICE SOUTER: Isn't it -- isn't it the case that if in effect, we -- we refuse to come down with a -- the kind of blanket answer, with a rule that you want, that the parties here can go out -- the complaining party here can go back to the FCC and say there's something wrong with your wholesale pricing order; look what's happening; and the FCC may adjust the wholesale pricing order as a result of that.

And if that is true, if they can do that, and the FCC can act, isn't that a good reason for us not to be developing new antitrust doctrine, if there is no need of it?

MS. MAYNARD: Well, the government's view is that the current antitrust doctrine already forecloses this claim for the reasons that I was explaining. Now if the Court were going to consider this as whether were you going to reach out and extend the antitrust law --

JUSTICE SOUTER: Well, you're certainly asking us to -- at the very least -- to clarify the significance of Alcoa. You're -- you are asking for an articulation of something -- of the significance of Alcoa today, which we have not done. So in that sense you are asking for something more than we've got on the books now; and my question is, if the agency in effect can deal with -- with -- with what the -- the monopolist is concerned with, and what the entrant is concerned with, why do we have to take -- why is it wise for us to take the step of making or clarifying new antitrust law?

MS. MAYNARD: Well, the -- the Respondents here were attempting to press, and the Ninth Circuit has allowed them to go forward on, a treble damages claim where they seek $40 million under a pure margin-based price squeeze theory. And in the government's view, that -- such a rule would protect only competitors, and doesn't allege any harm to the competitive process, which section 2 requires.

Whether or not the FCC has regulatory authority or not over the basic question -- over its own issues -- isn't relevant to the antitrust question before the Court here, which is, does the Court's current antitrust jurisprudence foreclose such a pure margin-based price squeeze.

And the government is not saying that there might not be some exclusionary conduct, Justice Breyer, that could someday be alleged, if there was an attempt say, to claim an attempt of the upstream market, as you were positing. That's not the claim here, nor in most price squeeze claims of which I'm aware; the claim is that they are attempting to monopolize the downstream market. The government does not mean to foreclose; at this point it has recognized there are myriad ways in which companies can engage in exclusionary conduct. So the government's position is a narrow one, which is that a pure margin-based price squeeze, in the absence of a duty to deal -- that is, this person who is dealing with me is -- is charging me too much, so that I can't compete against it at retail -- that is nothing more than proof that they can't compete.

That doesn't show any harm to the competitive process, which is what this Court has repeatedly held is required for liability under section 2, and for good reason. And Justice Souter, in response to your question, the government is not saying that it is not plausible that there isn't some anticompetitive conduct that will go unchecked as a result of such a rule, but the Court's analysis in Brooke Group is the proper one, which is that ultimately what you will be

doing is telling a retail level competitor that it must raise its prices in order to prevent liability.

That really isn't, as Mr. Panner said, worth the candle, and it creates the risk of chilling legitimate price cutting, and it puts the courts in the role, essentially, of being a regulator, maybe not just at one level, but at two.

JUSTICE SOUTER: So you are saying in practical terms that if there is a squeeze, it's highly unlikely it's going to be anything but a Brooke Group kind of squeeze, and therefore it's --

MS. MAYNARD: That if there is something anticompetitive going on, that section 2 cares about --

JUSTICE SOUTER: Yes.

MS. MAYNARD: -- they would need to allege that the Petitioners' retail prices are below some appropriate measure of the Petitioners' costs; and what they want to do is essentially what Alcoa does, which is why it's mistaken, is it attributes -- it would attribute to Petitioners the wholesale price they are willing to sell their upstream input to others, and what Brooke Group makes clear is that the relevant cost is the internal cost to the Petitioners.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

JUSTICE KENNEDY: If I could just ask some

-- everything you said is applicable to a predatory price claim as well as a price squeeze?

MS. MAYNARD: We believe that if they can allege the elements of a predatory pricing claim under Brooke Group, then they would still have that claim even in the absence of a duty to deal, and then labeling it a predatory price squeeze doesn't add anything. The court just clarified that there isn't a separate price squeeze liability. But there would remain a predatory pricing theory under Brooke Group if those allegations could be met.

Does that answer your question?

CHIEF JUSTICE ROBERTS: Yes. Thank you, counsel.

Mr. Blecher?

ORAL ARGUMENT OF MAXWELL M. BLECHER

ON BEHALF OF THE RESPONDENTS

MR. BLECHER: Mr. Chief Justice, and may it please the Court:

I don't have a white flag and I don't think we particularly have given up, but let me start by suggesting that you don't need to decide the totality of Alcoa. I think you need to vacate the decision of the Ninth Circuit -- not because it's erroneous, but because it's incomplete. Just send the case back to the

district court to consider Judge Gould's suggestion that we file an amended complaint.

JUSTICE GINSBURG: I don't understand what you just said. Judge Gould dissented. He said the Ninth Circuit majority was wrong. And you're urging us to accept Judge Gould's position.

MR. BLECHER: Not -- yes.

JUSTICE GINSBURG: How can we do that without saying that the majority was wrong?

MR. BLECHER: There is a difference between being wrong and being incomplete. The Ninth Circuit decision responded to a very narrow question certified by the district judge, which was whether or not price squeeze taken as a generic violation was subsumed or not subsumed by the Trinko decision. It answered that question correctly; but in doing that, it did not consider whether or not price squeeze survived -- the living margin part of price squeezing survived Brooke.

And to that extent, Judge Gould picked up the -- the -- the argument and said, in effect, especially in a regulated industry where the wholesale price is -- is regulated, the offense of price squeeze becomes predatory pricing, just as in a primary Robinson-Patman case, the offense becomes predatory pricing.

There is no more Robinson-Patman primary line law. It's -- it's -- like it or not -- I'm not saying we like it; I'm not saying we agree with it, but the state of the law is that when you are challenging a monopolist price under section 2 of the Sherman Act, Brooke and its predecessors determine the legality of the conduct. And that's -- and that's what we are recognizing here.

Now, understand that when the issue was framed to the Ninth Circuit, the district judge, in a footnote, said he thought that they ought to consider the Brooke issue, but he did not decide that question, and he did not certify it. So when the Ninth Circuit --

JUSTICE KENNEDY: Well, you don't certify questions; you certify orders. And in the certification of this order, I take it, your position was in support of what the district court did and in support of what the court of appeals did, correct?

MR. BLECHER: Partly, Justice Kennedy. What -- in part what we said was --

JUSTICE KENNEDY: You made -- you made -- you made an argument, or did you not, that is consistent with what the court of appeals did hold in this case?

MR. BLECHER: Well, I question whether that's what they held. I view what they did is answer a

question: "Does a pure price squeeze get subsumed by Trinko as it involves the question that we heard articulated, the duty to deal?" Now --

JUSTICE KENNEDY: Was the court of appeals' decision consistent with the argument that you made to the court of appeals?

MR. BLECHER: It is consistent, but it didn't say, we endorse Alcoa, and it didn't say we require a -- a -- predatory pricing. It was silent on the elements of the offense of a price squeeze. It answered this very narrow question: Does price squeeze generically -- is it an existing kind of antitrust violation that is not subsumed by the Trinko rule?

CHIEF JUSTICE ROBERTS: Counsel, I am confused --

MR. BLECHER: That's all that was decided.

CHIEF JUSTICE ROBERTS: I am confused about what you mean when you say "the price squeeze claim."

MR. BLECHER: A non-predatory --

CHIEF JUSTICE ROBERTS: Is that any different -- is that any different than a Brooke Group claim?

MR. BLECHER: A non-predatory price squeeze case.

CHIEF JUSTICE ROBERTS: So you still want to

be able to argue that --

MR. BLECHER: No.

CHIEF JUSTICE ROBERTS: -- above-cost retail prices --

MR. BLECHER: No.

CHIEF JUSTICE ROBERTS: -- somehow violate Brooke Group?

MR. BLECHER: I am very content to go back to file an amended complaint purely under Brooke for this no games --

CHIEF JUSTICE ROBERTS: And you -- you agree that that requires --

MR. BLECHER: We would --

CHIEF JUSTICE ROBERTS: That requires below-cost retail pricing?

MR. BLECHER: Yes. We have below-cost pricing. I have no concern about that, because, unlike what Mr. Panner told you, this is not proxy pricing. This is a case in which AT&T is mandated by the FCC to sell the DSL transfer to itself, to its own affiliate and to outside independent companies like the plaintiffs at the same price.

CHIEF JUSTICE ROBERTS: Is the wholesale price claim that the Ninth Circuit looked at in -- in the case below, in the decision below, a necessary or

significant or partial element of your Brooke Group claim, or is it totally irrelevant?

MR. BLECHER: More or less irrelevant. Only -- it only sets the benchmark for the costs that the retail affiliate is selling below. There -- there is no question the retail affiliate, in many of the time periods covered by the complaint, sold below -- just the DSL transport; and in addition to that, they threw in a modem, installation, and online services. So, if you put those into the cost bundle, they will be below cost for the -- substantially the entire damage period that we are complaining about; and --

JUSTICE KENNEDY: Is the first -- is the first time that you indicated that you were in agreement with the Gould dissent in your -- the brief that you filed here in this Court?

MR. BLECHER: Yes, directly, but we did have --

JUSTICE KENNEDY: But it --

MR. BLECHER: -- a predatory pricing --

JUSTICE KENNEDY: -- it seems to me that, in that instance, you seriously prejudiced the Petitioners here, and that that should be weighed heavily against you when you ask to -- for permission to amend your complaint in the district court.

MR. BLECHER: No --
JUSTICE KENNEDY: I mean, there have -- there have been costs and time --
MR. BLECHER: See, see-- Justice Kennedy, you granted certiorari and agreed to review a decision that was essentially moot, because the complaint that you are talking about in this case has been superseded. Judge Wilson said it was superseded by a complaint charging predatory pricing, and he said, generously construed, you have pled predatory pricing, and let's go forward.
Judge Gould said he didn't think the complaint under Twombly's standard which intervened satisfied the Brooke standard; And so he said --
CHIEF JUSTICE ROBERTS: Well, I guess it would have been nice if you thought the case was essentially moot, to hear about that in the cert opposition.
MR. BLECHER: I'm sorry?
CHIEF JUSTICE ROBERTS: You didn't argue that the decision below was essentially moot in your opposition to certiorari here.
MR. BLECHER: In -- in the opposition, that's correct.
JUSTICE KENNEDY: Nor did you give notice to

the Petitioners' attorney that that was your position so you could have asked for a stipulation on the point.

MR. BLECHER: Well, I think what you are overlooking, though, is when we went to the Ninth Circuit, we endorsed Judge Wilson's suggestion that they decide the Brooke issue, so that, when we went back, we would have guidance as to what the appropriate standard was. They elected not to deal with either Alcoa or Brooke. They just decided the very narrow question he certified.

In the Ninth Circuit, AT&T said, to the Ninth Circuit, don't reach the Brooke issue; you don't need to reach the Brooke issue to decide this case, even though the complaint you are ruling on has been superseded by an allegation in an amended complaint that states a Brooke violation, or purported to or attempted to state a Brooke violation.

JUSTICE BREYER: So can we write this following, we say: In the district court, as of this moment, there is no complaint that alleges the price squeeze theory of the majority of the Ninth Circuit. There is a complaint that alleges a price theory under Brooke -- a predatory pricing under Brooke Group. That is what is there. Nothing else is there. Therefore, that issue which the Ninth Circuit decided has no

bearing on this case. We therefore vacate their decision, leaving it up to the district court to proceed as it believes appropriate under the law with the Brooke Group claim?

MR. BLECHER: I think --

JUSTICE BREYER: Is that a possible thing to say?

MR. BLECHER: And --

JUSTICE BREYER: Yes or no, please.

MR. BLECHER: It avoids the need to --

JUSTICE BREYER: Is it, yes, we could do that, or no --

MR. BLECHER: Yes.

JUSTICE BREYER: Yes we can?

MR. BLECHER: Yes, you can. That's what we're suggesting.

JUSTICE BREYER: Isn't it --

MR. BLECHER: That you --

JUSTICE BREYER: -- that --

MR. BLECHER: -- don't need to reach Alcoa here, because the Ninth Circuit did not endorse Alcoa. It just didn't reach that question.

JUSTICE KENNEDY: Has the Brooke Group complaint been allowed in the district court or was it --

MR. BLECHER: It was allowed.

JUSTICE KENNEDY: Yes, it was?

MR. BLECHER: Judge Wilson ruled that it was, a, quote, "generously construed," we stated a Brooke claim, and he would review it again at summary judgment stage. Judge Gould disagreed with that, and he said, if you want to state a Brooke claim, you should go back and amend the complaint and do it.

CHIEF JUSTICE ROBERTS: Justice Breyer's draft judgment said we would vacate the decision below. Shouldn't we reverse it, because if we think on the price squeeze claim, as distinct from the Brooke Group claim, the Ninth Circuit was wrong. You don't just throw it out and let everybody go home. You say whether it was right or wrong. And if you are saying it's wrong, we would reverse.

MR. BLECHER: That's certainly as an option, but I think it would be more appropriate to vacate it because I don't consider that they did a direct frontal assault on Brooke. They didn't consider Brooke because AT&T suggested that they didn't need to read it.

JUSTICE GINSBURG: The Ninth Circuit had a precedent that it thought it was following. Was it Anaheim?

MR. BLECHER: Yes.

JUSTICE GINSBURG: So isn't it important that if you think that they were wrong and we agree with you, that we get -- not just vacate but say you were wrong on the law; you were wrong in this case, and you were wrong in Anaheim. And then the Ninth Circuit will not follow those decisions anymore.

MR. BLECHER: Well, that's if you want to approach the rules and decide that there can only be a price squeeze claim if the price is predatory. You may want to get there. I'm saying you don't need to get there here.

You could simply say the Ninth Circuit decision, I think, correctly decided the very narrow question that was presented by the certification order. They abided AT&T's suggestion not to go outside that order, and, therefore, their decision can be viewed as incomplete because they didn't go on to discuss what the elements of a price squeeze claim were.

CHIEF JUSTICE ROBERTS: You are saying we don't have to cross the Rubicon because your Brooke Group predatory pricing claim will say that the prices here were below cost?

MR. BLECHER: Correct.

CHIEF JUSTICE ROBERTS: So we don't have to consider, I guess, what I thought we had to consider --

MR. BLECHER: This is not a case where we are confronting you with the necessity of the settings or the vitality of Alcoa. You --

CHIEF JUSTICE ROBERTS: And you are not going to amend your complaint to raise such a claim on remand?

MR. BLECHER: I am going to file an amended complaint that will be limited entirely to the Brooke predatory pricing.

CHIEF JUSTICE ROBERTS: Which you understand to require that the retail prices be below cost?

MR. BLECHER: And we are very comfortable with that. The answer is yes, and we are comfortable with that. But we haven't given up, and we live to fight another day on another field.

JUSTICE ALITO: But if we follow your proposal, then, you could, in a case filed next week or the week after we decide the case, assert exactly the same claim that you asserted here originally, and that would be good law in the Ninth Circuit?

MR. BLECHER: The answer to that, Justice Alito, I think you can remand it --

JUSTICE ALITO: I don't mean in this case. I mean in another case.

MR. BLECHER: Oh, we could raise that, and

the Ninth Circuit --

JUSTICE SOUTER: Either you or anybody else in the Ninth Circuit?

MR. BLECHER: I think if you abide my idea how to deal with this, the issue of Alcoa's vitality would remain open to be decided in another case on another day.

JUSTICE BREYER: If we vacate, you would be in favor of vacating their decision?

MR. BLECHER: Yes, because a vacation can rest on grounds that the Ninth Circuit did not reach the issue. They said, we are prepared to abide Judge Gould's view that, in a regulated industry, we can only have a, quote, "price squeeze" if the price is predatory.

CHIEF JUSTICE ROBERTS: But the reason you think we should vacate is not because the Ninth Circuit didn't decide the question, but because you are willing not to press it?

MR. BLECHER: No. I don't think they decided the Alcoa question. That's the way I read the decision. Because I know what was certified. I know what they said. They responded only to a very narrow question, and AT&T said don't venture beyond that. Don't --

CHIEF JUSTICE ROBERTS: So, I guess -- I guess that's where we are about to go. But in answer to Justice Alito's question, if you think the Ninth Circuit was wrong and don't want to see those claims raised again, we need to address the merits and reverse?

MR. BLECHER: Or you can simply say that the case is remanded, the district court may decide the propriety of an amended complaint, except that the amended complaint cannot state a non-predatory price squeeze claim. We are prepared to live with that.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. BLECHER: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Brunell.

ORAL ARGUMENT OF RICHARD M. BRUNELL

ON BEHALF OF THE AMERICAN ANTITRUST INSTITUTE, AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

MR. BRUNELL: Mr. Chief Justice, and may it please the Court:

We think the proper disposition of this case is to vacate the decision below and to remand and let the district court decide whether the complaint should be amended or not. Vacating the judgment would amount to a dismissal with prejudice of the price squeeze claim, and, therefore, this Court would have nothing to

decide.

The Court doesn't need to reach out to decide the vitality of Alcoa, the question of which is not even presented by the question raised in the cert petition. And there are many reasons why -- and I am happy to address why Alcoa should remain good law, if the Court wishes to get into that. However, we don't think it's necessary.

On the specific issue here, if the Court decides not to vacate the judgment below and wants to examine the correctness of the Ninth Circuit judgment, the specific issue of whether the absence of a duty to deal thereby dooms any kind of claim -- a price squeeze claim or really any other type of antitrust claim, including a predatory pricing claim, if the regulators can address the issue.

We think that is -- that is the case, that that is the incorrect view of the law, and indeed, to some extent we agree with the Solicitor General that the existence of a regulatory remedy is not sufficient to bar a price-squeeze claim because there is no exhaustion requirement under the antitrust laws, and this Court's decision in Trinko, as the Solicitor General suggested when it looked at the regulatory remedies, that was with respect to expanding section 2 enforcement and not with

respect to traditional antitrust claims, which Alcoa certainly is.

Now, with respect to the issue of the duty to deal. What does that mean, that there's no duty to deal? In our view --

CHIEF JUSTICE ROBERTS: Well, that means they don't have to deal. They don't have to sell you the stuff if they don't want to.

MR. BRUNELL: In our view, it means that a court has found that there's no liability in the event of a refusal to deal, which is what Trinko did. And one has to ask whether the rationale for finding no liability for refusal to deal also applies to a predatory -- excuse me, a price squeeze claim.

CHIEF JUSTICE ROBERTS: You mean a Brooke Group retail price squeeze claim?

MR. BRUNELL: No, I mean a traditional price squeeze claim. That doesn't have to meet the Brooke Group standard. Mr. Panner suggested --

JUSTICE STEVENS: May I ask this: I'm not familiar on this point. Apart from Alcoa, what are the cases applying a traditional price squeeze claim?

MR. BRUNELL: We've listed them in our brief. I believe that 9 out of the 12 circuits, not including the Federal Circuit, have recognized an

Alcoa-type price squeeze claim. And in the other three circuits, district courts -- in each of the other three circuits, district courts have recognized an Alcoa-type claim.

JUSTICE STEVENS: Do you agree with your opponent's submission that antitrust scholars uniformly agree that the Alcoa case was incorrectly decided?

MR. BRUNELL: No, I do not agree with that. And, indeed, our brief cites an eminent professor, John Vickers at Oxford, an economist who supports a traditional Alcoa-type claim, that is a claim based on what we've call the transfer price test, where one looks at the margin between the retail and wholesale prices and asks whether that is sufficient to cover the monopolist's downstream costs. Professor Vickers --

JUSTICE SOUTER: Does he support --

MR. BRUNELL: Pardon me?

JUSTICE SOUTER: I thought somebody else was -- does he support recognition of that claim in the circumstances in which there was regulatory involvement like the FCC here?

MR. BRUNELL: I believe he does, Your Honor. I believe the European Commission also recognizes such a claim in the presence of regulation. I believe the Federal Trade Commission recognizes such a claim.

JUSTICE SOUTER: Why do we need to?

MR. BRUNELL: Why do we need to? Because a -- you mean in the absence why can't regulation handle this or why do we worry about the anticompetitive effects of a price squeeze?

JUSTICE SOUTER: Why can't regulation handle it?

MR. BRUNELL: Well, in this case, regulation -- simply the -- the regulation that is referred to is simply the prospect of the complainant going to the Federal Communications Commission and simply asking for some kind of post hoc relief, as opposed to a situation as in Town of Concord or in Trinko where the regulation at issue was quite extensive. All of the conduct at issue in Trinko was heavily regulated. And in this case, we have wholesale rates that are lightly regulated and retail rates that are completely unregulated.

JUSTICE BREYER: So why couldn't you -- why wouldn't you -- couldn't you go to the FCC or the other regulator and say: Regulator, they are selling me this widget or line at a dollar. All right. That's considerably higher than their costs of producing it. And, in addition to that, they sell the same service I do for $1.20, even though it costs me or would cost any human being at least 60 cents to provide that added

service. So we are asking you to tell them that if they continue to sell it at $1.20, they lower their wholesale price to us so that we only have to pay at most 80 cents, or whatever the right number is there.

I mean, they have someone to complain to. They could make the same complaint. I'm quite surprised that Vickers has written that under the circumstances I have outlined that there is a valid price squeeze antitrust claim or that the British Commission has held that.

I would be very interested to know the citation of that. Because he may have done. I don't read everything.

MR. BRUNELL: The European commission --

JUSTICE BREYER: I'm not saying the European Commission. They have done all kinds of things. I am saying the -- the --

(Laughter.)

JUSTICE BREYER: I am saying the British Monopolies or Restricted Practices Commission of which Vickers was the head. I agree with you that he is very knowledgeable, but I would be surprised if he had written contrary to what I just said in that example. But I am often surprised and willing to read it.

MR. BRUNELL: The question of the

relationship between the regulatory authority to address a question and whether an antitrust claim exists is normally decided on the basis of implied antitrust immunity. The mere existence of a regulatory remedy is insufficient under this Court's precedent in Credit Suisse, certainly, for -- for having implied immunity.

JUSTICE KENNEDY: Well, would you say that absent the regulatory regime, there would be a duty to deal here?

MR. BRUNELL: Absent the regulatory regime, would there be a duty to deal? Would the Court have found -- in this case, the Petitioners may well have voluntarily dealt with the Respondents --

JUSTICE KENNEDY: No. No. My question was: Was there a duty to deal under the antitrust laws? Because it seems to me the only reason that there is a duty to deal is because of the regulation. So, you use the regulation in order to establish the duty, but then you don't want to go to the regulators to regulate the price. And it seems to me that that's inconsistent.

MR. BRUNELL: Whether there is a duty to deal can only be answered by asking whether a violation -- a refusal to deal would constitute an antitrust violation. And in this case, had -- had there been no required dealing and, therefore, no dealing whatsoever,

then the issue of antitrust duty to deal would be totally academic. Furthermore --

JUSTICE KENNEDY: It's still seems to me that you, therefore, must rely on the regulation to establish the initial predicate of a duty to deal. And You rely on the regulation that far, but you don't want to go to the regulators to -- to argue about the price. You want us to look at regulation first and antitrust law second.

Why can't we just look at this case as purely antitrust; and then, as Justice Breyer said, if it's a regulatory problem, go to the regulators.

MR. BRUNELL: Well, the mere fact that there is a regulatory duty to deal does not completely oust antitrust. Otherwise, there would be no predatory-pricing claim.

The petitioner -- the -- the respondent injured by a predatory-pricing claim could also go to the FCC, presumably. And we don't -- and no one is contending that the -- that a predatory-pricing claim wouldn't lie and --

JUSTICE SCALIA: Would that lie here first? I mean, you don't -- you don't think -- you don't think that the regulatory agency would be acting properly if it prescribed a price that was predatory or allowed the

charge of a price that was predatory, would you?

MR. BRUNELL: No. I -- I don't think the regulators would -- would permit predatory pricing.

JUSTICE SCALIA: They wouldn't permit it. Then is there -- is there no such thing as primary agency responsibility to take care of that problem rather than rushing into a court and take care of it through the -- through the Sherman Act?

MR. BRUNELL: There certainly is the doctrine of primary jurisdiction, which arises typically when the agency is already dealing with a problem and not --

JUSTICE SCALIA: Well, they are dealing with the problem there. They are decreeing the price that could be charged, aren't they? Don't they have to approve the pricing?

MR. BRUNELL: They certainly don't approve the retail pricing, no. The retail pricing in this case is entirely unregulated. It purports to be in a competitive market.

But let me back up for one second. The -- the regulatory regime here is quite different from the one in Trinko. In -- in Trinko you had a regulatory duty that essentially required the monopolist to cooperate with its rivals in the monopoly market in

order to dismantle the monopoly.

In this case you have a regulation that is designed to ensure that the monopolist does not extend its monopoly power into unregulated competitive markets. And so the -- surely, the regulators focus -- can focus on the wholesale rates and ensure in this case that the rate that the monopolist charges itself is the same as the rate it charges its rivals with the object of ensuring a competitive downstream market.

But that doesn't mean that that should oust antitrust law. The regulators may, in fact, think that it's important to have antitrust law available to enforce claims in order for them to cut back on their regulations. And indeed, in this case, when the -- when AT&T sought to de-tariff its wholesale offering, the regulators referred to the fact that one of the justifications for de-tariffing would be that the antitrust laws would be available in case there were a problem.

So the -- the relationship between antitrust and regulation is symbiotic and complementary. And we would suggest that in this case the mere fact that the district court determined that the complaint of insufficient cooperation by the Petitioner in this case did not state a claim for refusal to deal shouldn't

preclude a -- a price-squeeze claim any more than it should preclude a predatory pricing claim, which the government and the Petitioners seem to concede would still lie.

Now, finally, this point about an over-deterrence and whether there is any evidence that any monopolist at any time has ever been deterred from engaging in legitimate retail price-cutting or efficient vertical integration, I would submit that there is absolutely no evidence anywhere in the literature, no empirical evidence, that there is a problem of over-deterrence.

And had there been a problem over the last 63 years that Alcoa has existed, one would think it wouldn't be too hard to find evidence of that. There is no evidence.

Furthermore, in Brooke Group the Court did not simply rely on the risk of over-deterrence as a basis for holding that above-cost price-cutting was not actionable. In Brooke Group it relied on two factors: The fact -- the fear that making above-cost price-cutting illegal would deter legitimate price-cutting, but also the fact that above-cost price-cutting would not eliminate equally efficient rivals. Any equally efficient rival could meet an

above-cost price. The price squeeze doctrine under the transfer price test protects equally efficient downstream rivals.

So that issue is quite different. The deterrence issue is -- is quite different when you -- when have a price squeeze. Furthermore, the notion that a monopolist would respond to a price squeeze complaint -- thank you, Your Honors.

CHIEF JUSTICE ROBERTS: You can finish your sentence there.

MR. BRUNELL: The notion that they would respond to a price squeeze complaint by raising their retail price, rather than lowering their wholesale price, I would submit is certainly as belied by the facts of the Alcoa case which in the district court reflect that when the government started looking into the price squeeze and the price squeeze was ended, it was ended voluntarily by Alcoa lowering its wholesale price, not raising its retail price.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Now, Mr. Panner, you have two minutes remaining.

REBUTTAL ARGUMENT OF AARON PANNER

ON BEHALF OF THE PETITIONERS

MR. PANNER: I have two points I would like

to make. First of all, I think, in agreement with Justice Breyer and Justice Kennedy, and others, I do think that the presence of a regulatory remedy here is a critical factor arguing in favor of reversal of the Ninth Circuit's decision.

The second point that I really want to make is the importance of clear rules. In the antitrust context where we are talking about a system of rules that is going to govern decisionmaking by businesses where most of those decisions are never going to lead to litigation or are never going to come before the courts, it is critically important to have clear rules that avoid deterring beneficial conduct, that avoid having the rules themselves harm consumers.

I think that was the point that Justice Alito and Justice Ginsburg were getting at in the questioning. It is critical to adopt a decision on the merits explaining why the Ninth Circuit's price squeeze decision -- not just here, but in the prior decision, in City of Anaheim -- is incorrect and inconsistent with this Court's precedents.

And, more broadly, it is critical to have a clear rule stating that in the absence of a duty to deal, an allegation of price squeeze, it doesn't stay a claim.

And I think that it's also -- would be very valuable to say that the complaint that was before the district court -- and the amended complaint at a minimum is supplying one version of the facts that might try to be elaborated -- fail to state a claim under this Court's precedents. The clear gravamen of that complaint, indeed the explicit gravamen of that complaint, was that the margin between the wholesale price and retail price was insufficient. And --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is now submitted.

(Wherepon, at 12:05 p.m., the case in the above-entitled matter was submitted.)

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