

Certiorari Petition in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*

...

QUESTION PRESENTED

Whether it states a claim under Sec. 2 of the Sherman Act to allege that defendant—a vertically integrated retail competitor with an alleged monopoly at the wholesale level but no antitrust duty to provide the wholesale input to competitors—engaged in a “price squeeze” by leaving insufficient margin between wholesale and retail prices to allow plaintiff to compete.

INTRODUCTION

Respondents purchase telecommunications services at wholesale from petitioners (collectively, “AT&T”) and use them to provide retail Internet-access service in competition with AT&T. They alleged that AT&T was a monopolist at the wholesale level and had violated Sec. 2 by creating a “price squeeze,” i.e., by leaving insufficient margin between the wholesale and retail prices that AT&T charged. The Ninth Circuit—stating that “price squeeze theory form[s] part of the fabric of traditional antitrust law”—ruled that respondents had stated a claim, even though...under *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), AT&T...had no antitrust duty to offer the wholesale input to competitors. And it did so despite its acknowledgement that the D.C. Circuit had recently ruled, in indistinguishable circumstances, that such a claim could *not* proceed. See *Covad Communications Co. v. Bell Atlantic Corp.*, 398 F.3d 666 (D.C. Cir. 2005).

The Ninth Circuit has thus decided an important and recurring question of antitrust law in a manner that creates a square circuit-court conflict. The decision also contradicts and undermines *Trinko*, by creating a purported exception to *Trinko*'s rule that—in the absence of any antitrust duty to deal—a rival's allegations that a monopolist has provided insufficient assistance fail to state a claim under Sec. 2. Moreover, the Ninth Circuit's recognition of price-squeeze claims as an independent basis for liability under Sec. 2 threatens to harm consumers by deterring conduct that promotes efficiency and reduces retail prices. Partial vertical integration—the situation where a company both sells an upstream wholesale input to rivals and produces the downstream product itself—is ubiquitous. Under the decision below, any vertically integrated producer with market power at the wholesale level is potentially subject to a claim of “price squeeze” if the combination of its wholesale and resale prices makes competitive life difficult for its rivals. Yet this Court has recognized that Sec. 2 does not prevent a legitimate monopolist from charging high prices. And low prices are not unlawful unless predatory pursuant to the standard established in *Brooke Group*, which requires pricing below cost and a likelihood of recoupment of any losses, neither of which plaintiffs alleged below. The Ninth Circuit's erroneous decision deters voluntary dealing, efficient vertical integration, and retail price competition that benefit consumers.

Last Term, the Court reversed the Ninth Circuit's standard governing predatory bidding claims, after the United States had warned that the decision...“threaten[ed] to chill procompetitive conduct by firms in a wide variety of markets.” Brief for the United States As Amicus Curiae at 19, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* The same concern is emphatically present in this case. ...

STATEMENT OF THE CASE

1. The District Court's Rulings

Respondents purchase a high-speed digital subscriber line service (known as “DSL transport”) from AT&T, combine it with other facilities and services, and then sell retail Internet-access service in competition with AT&T. They sued, claiming that AT&T had engaged in monopolization and attempted monopolization in violation of Sec. 2 of the Sherman Act by refusing to deal, by denying access to an “essential facility,” and by engaging in a “price squeeze.” After this Court decided *Trinko*, AT&T moved to dismiss the claims, noting that AT&T had provided DSL transport to rival providers of retail Internet-access service only under compulsion of Federal Communications Commission (“FCC”) regulations; that AT&T had no *antitrust* duty to deal with respondents at all; and that respondents' complaints about the terms of dealing between petitioners and respondents therefore failed to state a claim under Sec. 2.

The district court agreed that the refusal-to-deal and essential-facilities claims could not proceed. The court refused to dismiss the price-squeeze claim, however, finding that *Trinko* “simply does not involve price-squeeze claims.” The court also rejected the argument that price-squeeze claims are unavailable when “wholesale prices are regulated by a federal regulatory agency,” finding the argument inconsistent with the Ninth Circuit's analysis in *City of Anaheim v. Southern. Calif. Edison Co.*, 955 F.2d 1373 (1992).

As ordered by the district court, respondents amended their complaint to elaborate on their price-squeeze claim. The amended complaint alleged that “defendants unlawfully manipulated their dual role” as a “wholesale-monopoly supplier and retail competitor” by “intentionally charging independent [Internet service providers (“ISPs”)] wholesale prices that were too high in relation to prices at which defendants were providing retail DSL services thereby making it impossible for independent ISP competitors ... to compete at the low retail prices set by defendants.”

The amended complaint charged that “defendants are clearly attempting to compensate for deliberately sacrificing profits on the retail end of their operations (with offsetting margins on the wholesale side) in order to stifle, impede and exclude competition from independent” providers....

AT&T again moved to dismiss, arguing that the claim could proceed only if plaintiffs alleged facts supporting the two prerequisites for a predatory-pricing claim under *Brooke Group*—that is, pricing of the retail Internet-access service below cost and a likelihood of recoupment. Although the district court found that there was “persuasive appeal to [petitioners'] argument that the underlying logic of *Trinko*, which is that no inference of anti-competitive intent can be drawn from a refusal to deal where the parties are compelled by law to deal, applies with equal force to price squeeze claims,” it again denied the motion. In the same order, the court granted

petitioners' motion to certify its order for appeal. The Ninth Circuit granted interlocutory review.

2. The Ninth Circuit's Opinion

The Ninth Circuit affirmed. The court stated that, “[i]n antitrust terms, 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.’” The court stated that, “[f]or over six decades, federal courts have recognized price squeeze allegations as stating valid claims under the Sherman Act.” (citing, *inter alia*, *United States v. Aluminum Co. of Am*). The court also noted its prior holding that “claims of price squeezing under §2 are viable against monopolists in regulated industries.” (citing *City of Anaheim*).

The Ninth Circuit acknowledged *Trinko*'s holding that “failure by a monopolist to deal with a competitor on certain service terms when that monopolist was under no duty to deal with the plaintiff ... did not state a claim under §2 of the Sherman Act.” It stated that *Trinko* thus “raised the question of whether a price squeeze is merely another term of the deal governed by the Supreme Court's analysis in *Trinko*, or whether it is something else.” ... [The] court concluded that the case before it was controlled by the Ninth Circuit's earlier decision in *City of Anaheim*, which recognized potential price-squeeze claims. The court thereby decided the question in direct and acknowledged conflict with the prior decision of the D.C. Circuit [in *Covad v. Bell Atlantic*, 398 F.3d at 673-74 (rejecting price-squeeze claim in the absence of a duty to deal in the upstream input)].

The Ninth Circuit offered two reasons for its decision. *First*, it stated that “*Trinko* did not involve a price squeezing theory” and that, “[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*.” *Second*, the court determined that the standard established in *City of Anaheim* was appropriately circumscribed by the requirement that a plaintiff alleging a price squeeze in a regulated industry show “specific intent on the part of the wholesale monopoly holder to ‘serve its monopolistic purposes at [retail competitors'] expense.’” (quoting *City of Anaheim*, 955 F.2d at 1378).

The Ninth Circuit also stated that “the existence of regulation does not always eliminate the danger of anticompetitive harm.” “The key, under *Trinko*, is the nature of the regulatory structure at issue.” The court found itself “confronted with a partially regulated industry”: while, “[a]t the wholesale level, there are a series of regulatory mechanisms and regulatory agencies charged with assuring fair play,” there is “no comparable regulatory attention paid to the retail DSL market.” “It is unclear at this juncture the extent to which linkLine is basing its §2 price squeezing theory on wholesale pricing, retail pricing, or both. However, since linkLine could prove facts...that involve only unregulated behavior at the retail level,” its claim could not be dismissed on the pleadings.

Judge Gould dissented, stating that *Trinko* “takes the issues of wholesale pricing out of the case,” such that plaintiffs would have to allege the

elements of a predatory-pricing claim with respect to “retail sales of internet connection[s]” to state a claim under Sec. 2. Under this standard, the amended complaint failed to state a claim: “plaintiffs ... did not allege that the seller had the market power to set prices for internet connection[s] in the retail market, that [petitioners'] retail price, contributing to the squeeze, was set below cost, and that losses could later be recouped.”

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision stands in acknowledged conflict with the prior decision of the D.C. Circuit, which recognized that it makes no sense to permit a price-squeeze claim when the defendant has no antitrust duty to deal in the upstream input. It conflicts as well with prior decisions of the Fourth, Seventh, and Eleventh Circuits, which dismissed indistinguishable price-squeeze claims. And the decision provides plaintiffs an end-run around this Court's decision in *Trinko*, which established a categorical limitation on a monopolist's obligation to assist rivals by dealing with them on favorable terms. For those reasons, the Court should grant certiorari.

Review also is warranted because the Ninth Circuit's decision breathes new life into a price-squeeze doctrine that conflicts with important Sherman Act principles articulated by this Court. The Ninth Circuit's decision begins with the proposition that a plaintiff states a “valid claim[] under the Sherman Act” by alleging that “a vertically integrated company set[] 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.” But a standard that makes the legality of pricing conduct turn on the impact on *competitors*—whether such an impact is “intended” or not—is inconsistent with the bedrock principle that antitrust law is intended for the protection of *competition*, not competitors. Because the Ninth Circuit's decision creates a threat of liability and litigation whenever a vertically integrated firm with market power prices aggressively at the downstream level, the decision promises to deter price cuts that benefit consumers. And the decision will likewise distort business decisions concerning vertical integration and voluntary dealing with downstream rivals, all to the detriment of competition. The Court should accept this opportunity to eliminate price squeeze as an independent basis for liability under Sec. 2.

I. THE DECISION BELOW—WHICH ALLOWS A PRICE-SQUEEZE CLAIM TO PROCEED EVEN WHEN THE DEFENDANT HAS NO DUTY TO DEAL—CONFLICTS WITH OTHER CIRCUITS AND WITH TRINKO

A. The Ninth Circuit's Rule Conflicts with the Prior Decision of the D.C. Circuit and the Law in Other Circuits

The Ninth Circuit's determination that a price-squeeze claim may proceed under Sec. 2 despite the absence of any duty to deal in the underlying wholesale input creates a square conflict with the D.C. Circuit and contradicts prior decisions of the Fourth, Seventh, and Eleventh Circuits as well. The Court should grant certiorari, first of all, to resolve the conflict.

1. The Ninth Circuit understood that, under *Trinko*, “the failure by a monopolist to deal with a competitor on certain service terms when that monopolist was under no duty to deal with the plaintiff competitor absent statutory compulsion, did not state a claim under §2 of the Sherman Act.” But it reasoned that this holding did not resolve “the question of whether a price squeeze is merely another term of the deal governed by ... *Trinko*, or

whether it is something else.” The Court ruled that, because “*Trinko* did not involve a price squeezing theory” and “took great care to explain that in this particular regulatory context, ‘claims that satisfy established antitrust standards’ are preserved,” plaintiffs’ price-squeeze claim was not barred.

As the Ninth Circuit acknowledged, that holding squarely conflicts with the D.C. Circuit’s decision in *Covad v. Bell Atlantic*. In *Covad v. Bell Atlantic*, Covad provided DSL service in competition with Bell Atlantic, using wholesale inputs purchased from Bell Atlantic. As respondents did in this case, Covad claimed that Bell Atlantic had “engaged in anticompetitive conduct” by “pursu[ing] an unlawful ‘price squeeze.’” Relying on *Alcoa*, Covad argued that this price squeeze violated the Sherman Act.

The D.C. Circuit rejected the claim. The court noted that Bell Atlantic had no *antitrust* duty to deal with Covad at the wholesale level; rather, Bell Atlantic’s “duty to make those loops available at all” was purely a product of “statutory compulsion.” The court therefore “affirm[ed] the district court’s dismissal of Covad’s §2 claim based upon a price squeeze,” reasoning that a complaint about price squeeze is no different from any other complaint about terms of dealing, and thus barred by *Trinko*. Thus, “as observed in a leading treatise, ‘it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal.’” (quoting 3A Areeda & Hovenkamp, *Antitrust Law* ¶767c3, at 129-30 (2d ed. 2002)). From the point of view of antitrust law, the monopolist can avoid the potential for any price-squeeze allegation by not supplying the competitor.

2. The decision below also conflicts with prior decisions of the Fourth, Seventh, and Eleventh Circuits. [Citations.] ... [Thus,] the very claim that the Ninth Circuit allowed to proceed would have been dismissed in [those] Circuits. The split of authority is undeniable. Moreover, further development of the issue is unlikely to resolve the split. Whenever possible, plaintiffs seeking to litigate a price-squeeze claim will take advantage of the rule in the Ninth Circuit rather than litigate in courts where, at a minimum, a plaintiff cannot proceed with any price-squeeze claim without establishing that the defendant has an antitrust duty to deal.

B. The Ninth Circuit’s Decision Conflicts with *Trinko*

The decision below merits review for the additional reason that it is inconsistent with and threatens to undermine the result in *Trinko*.⁷

1. Respondents’ “price squeeze” claim is logically and legally indistinguishable from the *Trinko* plaintiff’s refusal-to-deal and “essential facilities” claims, which were based on the allegation that the defendant refused to provide adequate service. As this Court has noted, “[a]ny claim for excessive rates can be couched as a claim for inadequate services and vice versa.” *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998). Allowing plaintiffs’ claim to proceed on a price-squeeze theory would thus

⁷ The Ninth Circuit’s holding conflicts so sharply with *Trinko* that this Court may wish to consider summary reversal. See, e.g., *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam) (summarily reversing antitrust decision that was in clear tension with prior decisions of this Court); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam) (same).

flout the core holding of *Trinko*. If the Ninth Circuit were right, plaintiffs might circumvent *Trinko* simply by recasting a claim of *inadequate* access to network elements as a claim of *too-costly* access to network elements.

Furthermore, recognition of a price-squeeze claim in where there is no underlying duty to deal would entail the same ills underlying the Court's antitrust analysis in *Trinko*. By threatening antitrust liability based in part on allegedly high wholesale prices, such claims impinge on “an important element of the free-market system,” that is, a legitimate monopolist's “opportunity to charge monopoly prices.” Allowing such claims to proceed would thus undermine incentives for “innovation and economic growth.” More generally, forcing a firm to protect its downstream rivals from the possibility of a price squeeze is one way of “[c]ompelling such firms to share the source of their advantage,” which may “lessen the incentive for the monopolist, the rival, or both to invest in ... economically beneficial facilities.” Further, it will always be difficult for an adjudicator to distinguish a price squeeze resulting from the defendant's superior efficiency from a price squeeze that reflects “too high” wholesale prices—thus giving rise to a significant risk of false positives. *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 24 (1st Cir. 1990) (Breyer, J.); see *Trinko*, 540 U.S. at 412-14. That possibility will raise the litigation risks associated with vigorous price competition, putting upward pressure on *retail* prices. Thus, “[m]istaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’ ” *Trinko*, 540 U.S. at 414 (quoting *Matsushita* (1986)).

As an institutional matter, *Trinko* holds that antitrust laws eschew imposition of duties that would “require antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited”—or that would “require continuing supervision of a highly detailed decree.” 540 U.S. at 408, 415. Yet the Ninth Circuit's rule would have courts and juries supervise prices at not one but *two* levels—the prices for both wholesale inputs and downstream retail services—and ensure that their interaction did not unduly restrict competitors' ability to compete in the retail market. Because that task is beyond judicial competence, “[t]he problem should be deemed irremediable by antitrust law.” *Trinko*, 540 U.S. at 415.

2. *Trinko* mandated dismissal of the claims below for the additional reason that any conceivable threat to competition posed by the alleged “price squeeze” could be remedied through regulatory oversight.... The Ninth Circuit believed that, because retail prices of Internet access are not regulated, the existence of regulation at the wholesale level did not preclude respondents' claims. The Ninth Circuit's analysis is incorrect. That the FCC has, for many years, affirmatively determined that it should *not* regulate retail prices of Internet access (and, more recently, has deregulated broadband services more generally) reflects an affirmative (and sound) regulatory judgment, and not absence of regulatory oversight. Here, as in *Trinko*, “a regulatory *structure*” exists “to deter and remedy anticompetitive harm” and “the additional benefit to competition provided by antitrust enforcement will tend to be small.” 540 U.S. at 412 (emphasis added); see also *Town of Concord*, 915 U.S. at 25. For that reason as well, the Ninth Circuit should have ruled that respondents failed to state a claim under Sec. 2.

II. THE COURT SHOULD REJECT THE “PRICE SQUEEZE” DOCTRINE ARTICULATED IN THE DECISION BELOW

The Ninth Circuit's embrace of “price squeeze” as a basis for antitrust liability under Sec. 2 warrants review as well because it presents an issue of significant practical impact and doctrinal importance. Under the Ninth Circuit's standard, the touchstone for liability is that a vertically integrated company has set its upstream wholesale prices “so high that its customers cannot compete with it” in the downstream retail market. That follows the rule first established by the Second Circuit in the influential but widely criticized *Alcoa* decision, which imposed liability under Sec. 2 when a wholesale-level monopolist set its wholesale prices above a “fair price” and its retail prices so low that competitors were unable to make “a living profit.” A similar version of price-squeeze doctrine had been recognized—before *Trinko*—by the Third Circuit,⁹ the Seventh Circuit,¹⁰ and the Eighth Circuit.¹¹

The Ninth Circuit's decision and the other decisions recognizing price squeeze as an independent antitrust tort stand in tension with the First Circuit's decision in *Town of Concord*, in which the court—while having no occasion to resolve the *Alcoa* rule's viability as a general matter—rejected application of the doctrine in the presence of price regulation at the wholesale and retail levels. Moreover, price-squeeze doctrine is contrary to important antitrust principles articulated by this Court. Unless corrected by this Court, the doctrine will continue to deter efficient voluntary dealing and price-cutting, harming consumers.

A. Price-Squeeze Doctrine Protects Competitors, Not Competition

As broadly articulated by the Second Circuit in *Alcoa* and by the Ninth Circuit below, price-squeeze doctrine is inconsistent with Supreme Court precedent. *Alcoa* and its progeny imply that a monopolist has a duty to avoid setting its prices in a manner that injures downstream competitors. But the doctrinal focus on the well-being of rivals is fundamentally inconsistent with the principle that the antitrust laws “were enacted for the protection of *competition* not *competitors*.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *see also* Brief for the United States As Amicus Curiae at 11, *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, (arguing that *Alcoa* is incorrect for this reason). As Judge Posner has explained, this principle means that antitrust law does not seek to preserve “competition as a process of rivalry” for its own sake but “competition as a means of promoting economic efficiency.” *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986).

That a prolonged price squeeze may “drive independent competitors out of business...does not mean that a price squeeze is anticompetitive.” *Town of Concord*, 915 F.2d at 23. The principal objection to “price squeeze”—that it allows a first-level monopolist to reduce competition at a second level—is

⁹ *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 809-10 (3d Cir. 1984).

¹⁰ *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 985 (7th Cir. 1980).

¹¹ *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1176 n.4, 1178-79 (8th Cir. 1982).

of no inherent competitive significance. In most circumstances “there is only one monopoly profit to be gained from the sale of an endproduct or service,” such that the elimination of a downstream rival would not generally lead to higher prices. *Western Res., Inc. v. Surface Transp. Bd.*, 109 F.3d 782, 787 (D.C. Cir. 1997).

Further, any possible anticompetitive consequences stemming from the elimination of a second-level rival must be balanced against the likelihood that a price squeeze itself reflects desirable efficiencies. As the leading treatise recognizes, the traditional suspicion of “price squeeze” reflects a misplaced concern about vertical integration. See 3A Areeda & Hovenkamp ¶767c, at 126 (“it is difficult to see any *competitive* significance [of a price squeeze] apart from the consequences of vertical integration itself”). But vertical integration “can produce significant cost reductions” by enabling the integrating firm to achieve both “[p]roduction’ efficiencies”—that is, “savings in the cost of producing or distributing goods”—and “[t]ransactional’ efficiencies”—that is, avoidance of costs associated with dealing with other firms. Where this is so, “prices that squeeze the less efficient second-level competitors, even to the point of forcing them from the business, could (by lowering costs) lower prices, or, in any event, save economic resources.” *Town of Concord*, 915 F.2d at 24. Moreover, when second-level rivals “exhibit[] some market power,” a price squeeze may reflect elimination of supracompetitive margins at the second level. 3A Areeda & Hovenkamp ¶756b3, at 1415. In this situation as well, “price will ordinarily come down and output will ordinarily increase.” *Id.*; see *Town of Concord*, 915 F.2d at 24-25.

Recognizing that “extension” of a monopoly is not *generally* anticompetitive, this Court has held that Sec. 2 does not condemn “monopoly leveraging”—use of monopoly power to gain an advantage in a second market—in the absence of anticompetitive conduct. *Trinko*, 540 U.S. at 415 n.4. The pricing behavior at issue in an alleged price squeeze is not anticompetitive conduct. *First*, Sec. 2 does not prohibit the charging of “high” prices for a monopoly product. “The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system” because it “attracts ‘business acumen’ ” and “induces risk taking that produces innovation and economic growth.” *Id.* at 407.

Second, a defendant cannot be held liable for charging “low” but above-cost prices for a downstream product. “[P]rice competition”—in the absence of predatory pricing—“is not predatory activity.” *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 118 (1986). An integrated retail provider could “squeeze” rivals by lowering its prices below its costs, but, where that is an antitrust wrong, the rules of predatory pricing—which require a plaintiff to show both below-cost pricing and a likelihood of recoupment of losses, see *Brooke Group*, 509 U.S. at 222, 224—fully address that behavior. ...

B. Continued Recognition of Price Squeeze as a Potential Basis for Liability Harms Consumers

1. The foregoing shows why it is “extremely hard to identify” circumstances where an alleged “price squeeze” reflects anything other than a legitimate effort to achieve efficient vertical integration by a lawful monopolist. 3A Areeda & Hovenkamp ¶767c5, at 129. The Ninth Circuit’s approach—

which treats the *existence* of a price squeeze as sufficient to state a claim under Sec. 2—is therefore unjustified as a matter of antitrust policy. Worse, the court's decision will tend to deter conduct that enhances efficiency and that antitrust law should be careful to protect.¹²

First, subjecting a wholesale monopolist to potential liability for a price squeeze would deter efficient vertical integration and socially desirable, voluntary dealing. A monopolist might offer an upstream product, used by producers of two downstream products. If the monopolist begins to produce one of those products itself, it might face the prospect of price-squeeze litigation brought by rival downstream producers. Such a possibility might either deter the monopolist from entering the downstream market (even in cases where it would be more efficient than existing rivals) or deter the monopolist from selling to downstream producers in the first place.

Second, the very incidents of vertical integration that yield the greatest consumer benefit—lower-cost production in downstream markets—are precisely those that will “squeeze” downstream competitors. As the Court has remarked with respect to claims of above-cost predatory pricing claims, in many cases, “the exclusionary effect [here, of price squeeze] ... reflects the lower cost structure of the alleged predator, and so represents competition on the merits.” *Brooke Group*, 509 U.S. at 223.

2. The anticompetitive consequences of the Ninth Circuit's price-squeeze standard are aggravated both because the standard is vague and because it purports to govern prices—“the ‘central nervous system of the economy.’ ” *National Soc’y of Prof’l Eng’rs* (quoting *Socony-Vacuum Oil Co.*).

a. The *Alcoa* price-squeeze test—which makes liability turn on a monopolist's “charg[ing] more than a ‘fair price’ for the primary product while simultaneously charging so little for the secondary product that its second-level competitors cannot make a ‘living profit’ ”—is famously difficult to administer. *Town of Concord*.

[H]ow is a judge or jury to determine a “fair price?” Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition “would have set” were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price “gap?” ... And how should the court respond when costs or demands change over time, as they inevitably will?

The Ninth Circuit's emphasis on a defendant's “specific intent” does not help. The intent to gain more business almost always means doing so at the expense of one's rivals.... More important, this Court has made clear that,

¹² Almost by definition, price-squeeze claims are brought by rivals, not by consumers; consumers benefit from the very downstream prices that discomfit rivals. This provides an additional reason to eliminate such claims. ...

if conduct is not objectively anticompetitive, the fact that it was motivated by hostility to competitors is immaterial. *See Brooke Group*.¹³

b. The urgency of addressing the Ninth Circuit's error is heightened by the fact that its rule distorts pricing decisions, exerting upward pressure on the prices that consumers pay. As then-Judge Breyer noted in similar circumstances, “we ask ourselves what advice a lawyer, faced with the [Ninth Circuit's] rule, would have to give a [vertically integrated] client firm considering procompetitive [price-cuts] in a concentrated industry.” *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 235 (1st Cir. 1983). Lawyers will have to warn clients that, if such a price-cut would “squeeze” customers that are also downstream competitors, litigation is a likelihood....

...

The petition for a writ of certiorari should be granted.

NOTES AND QUESTIONS

1. By the time that you read this, the Supreme Court will probably have rendered its opinion in the above case. Whatever side the majority of the Court eventually chooses, however, the fact is that a Petitioner has no chance at all of prevailing unless its Certiorari petition has persuasive appeal. Thus, especially if you have never read a Petition for Certiorari before, it is worth paying attention to this successful petition's mode of argument.

2. Note the concept of a defendant's duty to transact with a plaintiff, and how it affects the argument concerning the possible illegality of a price squeeze. What is the source of such a duty? Can't parties ordinarily choose with whom they will transact? And what is the difference between a *statutory* and an *anti-trust* duty to deal with another?

3. What does the certiorari petition view as the reason for a “price squeeze here,” that is, charging a price that “makes competitive life difficult” for Pac Bell's downstream rivals? How does this rationale for downstream pricing by an upstream monopolist compare with the reasons Judge Breyer gave in *Town of Concord*?

4. Even after cases like *A.A. Poultry Farms* and *Brooke Group*, it is clear that predatory pricing remains an actionable basis for liability under Sec. 2, however unlikely it is to occur and thus however skeptical courts are of it happening. An alleged price squeeze works like predatory pricing, forcing its victims out of the market so as to increase the market power of the surviving defendant-squeezer. Why is there continued controversy about whether price squeezes can constitute an antitrust violation, if predatory pricing clearly can?

5. The petition faults the Ninth Circuit for establishing a rule whereby “the *existence* of a price squeeze [is] sufficient to state a claim under Sec. 2” (emphasis in original). Does not the mere existence of below-cost pricing, or any of the contracts you read about in Chs. 2 and 3, suffice to state an antitrust claim? Is Petitioner asking the Supreme Court to take certiorari so as to create a *per se* rule for the *legality* of price squeezes?

¹³ While it has been argued that a price-squeeze claim should be treated in some circumstances as a “constructive refusal to deal,” there is no reason to believe that the law of unlawful refusals to deal is not fully capable of dealing with any such concern. And, in any event, such a rationale has no application in this case, where, as the Ninth Circuit found (and as *Trinko* makes clear), petitioners had no antitrust duty to deal in the underlying wholesale input.

6. The petition continually analogizes price squeezes to firms' vertical integration. Why would any similarity between the two practices influence the Supreme Court to take certiorari in this case? Doesn't *any* vertical contract (such as the one you encountered in *Itek* in Ch.1, and those you will read about soon in Ch.5) establish an element of vertical integration?

7. Traditionally, the price squeeze was one of the "pigeonhole" doctrines of antitrust law. Does the evolution of modern antitrust law bode the withering of pigeonholes in favor of more general modes of competitive analysis?