

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PACIFIC BELL TELEPHONE :

4 COMPANY DBA AT&T :

5 CALIFORNIA, ET AL., :

6 Petitioners :

7 v. : No. 07-512

8 LINKLINE COMMUNICATIONS, :

9 INC., ET AL. :

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11 Washington, D.C.

12 Monday, December 8, 2008

13

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

17 APPEARANCES:

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

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

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

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

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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

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

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

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

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

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

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

1 Court affirming the Ninth Circuit. And I think that
2 that's important, because there really would be no
3 reason for these Respondents to say that if for whatever
4 reason the Court decided that the Ninth Circuit is
5 right, that they would not go ahead and take advantage
6 --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 conduct. But --

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

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

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

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

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

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

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

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

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

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

5 Is that your position?

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

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

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

13 JUSTICE SOUTER: Okay.

14 MR. PANNER: Our position is that in the
15 absence of a duty to deal, one does not look at an
16 allegation of insufficient margin as a potential section
17 2 --

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

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

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

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

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

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

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

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

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

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

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

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

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

1 MR. PANNER: Yes, there is, Your Honor.

2 JUSTICE BREYER: And that place is --

3 MR. PANNER: The Federal Communications
4 Commission.

5 JUSTICE BREYER: So we needn't reach the
6 issue in this case?

7 MR. PANNER: Well, Your Honor, I think that
8 the -- significant regulation is not necessary. I agree
9 with Your Honor that that is a factor that the Court
10 could allow to be placed somehow on the scale. But the
11 analysis that took place in *Trinko* is, first of all,
12 whether there is an antitrust duty there at all and
13 whether to extend it in light of the regulatory scheme
14 that existed. And so, in this case, even in the absence
15 of regulation, there should be no duty under section 2.

16 JUSTICE SOUTER: With respect to your
17 argument that there is going to be an upstream
18 disincentive to investment in the monopolist if we do
19 not come up with a clear rule that you want, are we at a
20 stage or is the fashion of economics at a stage where we
21 can say that there is a clear consensus supporting your
22 argument?

23 And if the answer is no, then isn't the only
24 sensible thing for this Court to do to is leave it to
25 rule of greedy?

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

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

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

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

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

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

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

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

8 JUSTICE SOUTER: Is there --

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

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

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

1 innovations not worth the gamble.

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

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Ms. Maynard.

6 ORAL ARGUMENT OF DEANNE E. MAYNARD

7 ON BEHALF OF THE UNITED STATES,

8 AS AMICUS CURIAE,

9 SUPPORTING THE PETITIONERS

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

12 If a retail level rival can state a section
13 2 claim against a vertically integrated company by
14 alleging nothing more than a margin-based price squeeze,
15 one of two outcomes will result. Either the vertically
16 integrated company will have to raise its retail prices
17 to its consumers or it will be forced to share the
18 benefits of its lawful monopoly with its rivals by
19 lowering its wholesale price. Either outcome is
20 inconsistent with this Court's antitrust jurisprudence.

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

25 JUSTICE STEVENS: Ms. Maynard, do you join

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

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

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

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

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

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

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

25 MS. MAYNARD: I think the Court should say

1 it was decided incorrectly.

2 JUSTICE STEVENS: That's not my question.

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

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

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

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

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

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

8 JUSTICE STEVENS: Right.

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

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

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

1 the plaintiff thinks he is being squeezed out.

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

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

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

20 JUSTICE SOUTER: But --

21 MS. MAYNARD: In that case --

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

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

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

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

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

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

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

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

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

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

17 That doesn't show any harm to the
18 competitive process, which is what this Court has
19 repeatedly held is required for liability under section
20 2, and for good reason. And Justice Souter, in response
21 to your question, the government is not saying that it
22 is not plausible that there isn't some anticompetitive
23 conduct that will go unchecked as a result of such a
24 rule, but the Court's analysis in Brooke Group is the
25 proper one, which is that ultimately what you will be

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

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

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

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

14 JUSTICE SOUTER: Yes.

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

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 JUSTICE KENNEDY: If I could just ask some

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

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

12 Does that answer your question?

13 CHIEF JUSTICE ROBERTS: Yes. Thank you,
14 counsel.

15 Mr. Blecher?

16 ORAL ARGUMENT OF MAXWELL M. BLECHER

17 ON BEHALF OF THE RESPONDENTS

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

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

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

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

7 MR. BLECHER: Not -- yes.

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

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

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

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

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

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

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

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

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

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

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

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

14 CHIEF JUSTICE ROBERTS: Counsel, I am
15 confused --

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

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

19 MR. BLECHER: A non-predatory --

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

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

25 CHIEF JUSTICE ROBERTS: So you still want to

1 be able to argue that --

2 MR. BLECHER: No.

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

5 MR. BLECHER: No.

6 CHIEF JUSTICE ROBERTS: -- somehow violate
7 Brooke Group?

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

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

13 MR. BLECHER: We would --

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

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

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

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

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

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

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

19 JUSTICE KENNEDY: But it --

20 MR. BLECHER: -- a predatory pricing --

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

1 MR. BLECHER: No --

2 JUSTICE KENNEDY: I mean, there have --
3 there have been costs and time --

4 MR. BLECHER: See, see-- Justice Kennedy,
5 you granted certiorari and agreed to review a decision
6 that was essentially moot, because the complaint that
7 you are talking about in this case has been superseded.
8 Judge Wilson said it was superseded by a complaint
9 charging predatory pricing, and he said, generously
10 construed, you have pled predatory pricing, and let's go
11 forward.

12 Judge Gould said he didn't think the
13 complaint under Twombly's standard which intervened
14 satisfied the Brooke standard; And so he said --

15 CHIEF JUSTICE ROBERTS: Well, I guess it
16 would have been nice if you thought the case was
17 essentially moot, to hear about that in the cert
18 opposition.

19 MR. BLECHER: I'm sorry?

20 CHIEF JUSTICE ROBERTS: You didn't argue
21 that the decision below was essentially moot in your
22 opposition to certiorari here.

23 MR. BLECHER: In -- in the opposition,
24 that's correct.

25 JUSTICE KENNEDY: Nor did you give notice to

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

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

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

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

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

5 MR. BLECHER: I think --

6 JUSTICE BREYER: Is that a possible thing to
7 say?

8 MR. BLECHER: And --

9 JUSTICE BREYER: Yes or no, please.

10 MR. BLECHER: It avoids the need to --

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

13 MR. BLECHER: Yes.

14 JUSTICE BREYER: Yes we can?

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

17 JUSTICE BREYER: Isn't it --

18 MR. BLECHER: That you --

19 JUSTICE BREYER: -- that --

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

23 JUSTICE KENNEDY: Has the Brooke Group
24 complaint been allowed in the district court or was it
25 --

1 MR. BLECHER: It was allowed.

2 JUSTICE KENNEDY: Yes, it was?

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

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

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

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

25 MR. BLECHER: Yes.

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

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

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

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

23 MR. BLECHER: Correct.

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

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

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

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

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

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

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

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

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

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

1 the Ninth Circuit --

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

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

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

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

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

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

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

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

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 MR. BLECHER: Thank you.

13 CHIEF JUSTICE ROBERTS: Mr. Brunell.

14 ORAL ARGUMENT OF RICHARD M. BRUNELL

15 ON BEHALF OF THE AMERICAN ANTITRUST

16 INSTITUTE, AS AMICUS CURIAE,

17 SUPPORTING THE RESPONDENTS

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

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

1 decide.

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

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

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

1 respect to traditional antitrust claims, which Alcoa
2 certainly is.

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

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

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

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

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

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

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

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

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

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

16 JUSTICE SOUTER: Does he support --

17 MR. BRUNELL: Pardon me?

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

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

1 JUSTICE SOUTER: Why do we need to?

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

6 JUSTICE SOUTER: Why can't regulation handle
7 it?

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

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

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

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

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

14 MR. BRUNELL: The European commission --

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

18 (Laughter.)

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

25 MR. BRUNELL: The question of the

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

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

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

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

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

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

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

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

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

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

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

1 charge of a price that was predatory, would you?

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

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

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

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

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

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

1 order to dismantle the monopoly.

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

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

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

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

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

13 And had there been a problem over the last
14 63 years that Alcoa has existed, one would think it
15 wouldn't be too hard to find evidence of that. There is
16 no evidence.

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

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

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

9 CHIEF JUSTICE ROBERTS: You can finish your
10 sentence there.

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

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

23 REBUTTAL ARGUMENT OF AARON PANNER

24 ON BEHALF OF THE PETITIONERS

25 MR. PANNER: I have two points I would like

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

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

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

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

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

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 The case is now submitted.

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

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