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2 the American Antitrust Institute, as amicus
3 curiae, 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 conflicts with this Court's holding in Trinko and is contrary to important section 2 principles regarding unilateral pricing decisions as explained in Brooke Group 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's -- it is correct, as 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 of the Ninth Circuit. And, indeed, a decision on the merits

1 here is important because the Ninth Circuit's decision
2 is harmful to consumers, deterring beneficial price cuts
3 and efficient partial vertical integration. And it --

4 CHIEF JUSTICE ROBERTS: Do you have any
5 question, or should we have, about the Article III
6 status of this aspect of the dispute?

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

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

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

23 I'd also like to point out that Respondents,
24 while conceding that the position of the Ninth Circuit
25 was incorrect, have not clearly stated that they would

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

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;
10 it is wrong.

11 MR. PANNER: That is right,
12 Justice Ginsburg, but the point is that if this Court
13 were to disagree -- if the -- for example, it's well
14 established that the Solicitor General's confession of
15 error, for example, or a State attorney general's
16 confession of error does not bind this Court. Indeed, a
17 party's position with respect to the proper disposition
18 of a 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 have said that that's 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 they intended to pursue a
10 different legal theory, is sufficient.

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

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

22 And here we don't have that. We don't have
23 anyone that we have appointed and said: You represent
24 the position. You defend the position below.

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

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

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

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

24 MR. PANNER: Well, I think it could, Your
25 Honor. In their brief, they refer to the possibility

1 that the wholesale price that was charged could be in
2 some way a proxy for cost and this Court clearly stating
3 that there's a -- a different issue as to whether a
4 single economic unit is charging prices below cost, that
5 wholesale prices that may be charged are not an
6 appropriate proxy.

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

13 JUSTICE STEVENS: May I just clarify one
14 thing? Are you arguing there's never a price-squeeze
15 claim under section 2? In other words, are you
16 challenging Justice Hand's reasoning in the Alcoa case?

17 MR. PANNER: Well, Your Honor, I believe I
18 am challenging Judge Hand's reasoning in Alcoa. I think
19 that I would not go so far as to say that there could
20 never be a situation in which a price squeeze, that is,
21 the -- an insufficient margin between wholesale and
22 retail prices to allow a competitor to compete -- that
23 that course of conduct could never support a claim under
24 section 2, but the basis for the claim would have to be
25 that there was a duty to deal -- or a duty to deal under

1 section 2, an antitrust duty to deal, that was
2 effectively being evaded through that sort of pricing
3 conduct. But I think that the --

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

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

13 And so what -- what Judge Hand said was that
14 that was unlawful. He expressed some doubt about
15 whether it was appropriate to treat it as an independent
16 basis for -- or an independent wrong under section 2.

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

22 JUSTICE BREYER: There's -- so there's
23 regulation involved there. I mean, suppose you had no
24 regulation at all involved. Why couldn't you have a
25 monopolist at the primary stage, say, ingot, and what

1 that monopolist wants to do is to extend its power into
2 the secondary stage, say, fabrication, in order to make
3 it less likely that there will be a new entry that would
4 attack its primary monopoly?

5 MR. PANNER: Well --

6 JUSTICE BREYER: That would -- suppose you
7 had those circumstances. Perhaps they'd be rare, but if
8 you had them, wouldn't that set forth a section 2
9 violation?

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

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

22 JUSTICE SOUTER: Well, that may be the
23 assumption on this case, but that may not be the
24 assumption on the next case. And I understood you to be
25 arguing that you wanted us to hold that at -- well, you

1 wanted us to hold whether we are dealing with a
2 regulatory case or in Justice Breyer's example, where
3 there is -- where there is no independent regulation,
4 that the greater includes the lesser; that (a) there is
5 no duty to deal and, therefore, there is no obligation
6 that can be violated under the antitrust laws by a price
7 squeeze that does not rise to the level of predatory
8 pricing.

9 Is that your position?

10 MR. PANNER: Well, Justice Souter, let me
11 try to be clear about the relationship. If there is no
12 --

13 JUSTICE SOUTER: Well, the best way to do
14 that is to start with a yes or no answer --

15 (Laughter.)

16 JUSTICE SOUTER: -- so I know --

17 MR. PANNER: I think that that's not --

18 JUSTICE SOUTER: -- so I know where you're
19 going.

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

22 JUSTICE SOUTER: Okay.

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

1 2 claim.

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

8 MR. PANNER: Your Honor, I don't think that
9 the Court has to anticipate that. I think what the
10 Court should say is that there are narrow circumstances
11 as recognized in Trinko, where there may be a duty to
12 deal under section 2. And in that circumstance, there
13 may be conduct that constitutes a refusal to deal, even
14 a constructive refusal to deal. There's really -- to
15 give a simple example, if a widget -- you know, if the
16 downstream product costs \$10 and a widget is made
17 available for a million dollars, that is not really
18 dealing at all.

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

23 JUSTICE BREYER: Well, that's it -- I mean,
24 now maybe you can get me off what I am thinking, but now
25 it sounds that the answer to Justice Stevens's question

1 is yes. Now, I have, yes, overruled Judge Hand's
2 opinion in Alcoa. I've always thought there were
3 circumstances, whether true of Alcoa or not, where that
4 did make out the claim, namely, the one I suggested.

5 MR. PANNER: Well --

6 JUSTICE BREYER: It's quite a different
7 matter if, in fact, the person who is injured, namely,
8 the -- the fabricator who is complaining, has a place to
9 go, such as the FCC or the Alcoa regulatory agency,
10 because under those circumstances, he has a place to
11 complain that these prices are out of line.

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

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

24 JUSTICE BREYER: Then I would say that
25 shouldn't be the law. The reason it shouldn't be the

1 law is because that ingot may, by either withdrawing or,
2 in fact, raising his price way above a competitive level
3 and charging -- you know, just no room to remain in
4 business, is trying to drive out possible new entrants
5 into the ingot stage of the business. And the
6 fabricators are A-number one out there as possible --
7 possibilities to break down the monopolist in ingot.

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

12 MR. PANNER: I think the answer to that
13 argument, Your Honor, is the one that Trinko offers,
14 which is that it is very important in establishing
15 antitrust rules to recognize the incentives that those
16 rules will create for investment and for innovation.

17 If the monopolist is forced to share the
18 benefit of the monopoly with downstream rivals on the
19 basis there is potential entry, that is going to be a
20 significant disincentive to investment and innovation at
21 the upstream level. And the establishment of clear
22 rules, ones that recognize that, in the general run of
23 cases, the -- there is not going to be harm and that
24 recognizes that the very scrutiny of that conduct will
25 deter beneficial conduct and beneficial innovation,

1 beneficial investment by the upstream monopolist, that
2 recognition is the one that argues in favor of saying,
3 in the absence of a duty to deal, where the wholesale
4 input could be withdrawn from the market and where,
5 therefore, the incremental harm from a price squeeze is
6 really quite hard to identify, but in that circumstance
7 it is inappropriate to recognize any sort of a duty
8 under section 2 --

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

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

13 JUSTICE BREYER: And that person is --

14 MR. PANNER: The Federal Communications
15 Commission.

16 JUSTICE BREYER: So we needn't reach this
17 issue in this case?

18 MR. PANNER: Well, Your Honor, I think that
19 the significance of regulation here is -- is not
20 necessary. I agree with Your Honor that that is a
21 factor that the Court could allow to be placed somehow
22 on the -- on the scale. But the analysis that took
23 place in *Trinko* was, first of all, to look, of course,
24 at whether there was an antitrust duty there at all and
25 then whether to extend it in light of the regulatory

1 scheme that existed. And so, in this case, even in the
2 absence of regulation, there should be no duty under
3 section 2.

4 JUSTICE SOUTER: With respect to your
5 argument that there's going to be an upstream
6 disincentive to investment in the monopolist if we do
7 not come up with a clear rule that you want, are we at a
8 stage or is the fashion of economics at a stage where we
9 can say that there is a clear consensus supporting your
10 argument?

11 And if the answer is no, then isn't the only
12 sensible thing for this Court to do to leave it to rule
13 of reason?

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

20 JUSTICE SOUTER: For the -- for the reasons
21 you gave, in effect, the investment disincentive reason?

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

1 JUSTICE SOUTER: Is that, in effect,
2 uncontested within the profession except -- you know,
3 except at the margins?

4 MR. PANNER: I would assume that as -- as in
5 any academic discipline, there are those who would try
6 to find counterexamples. But I think that the point
7 there that's important and one that, for example,
8 Professor Carlton stresses in his article and that has
9 been stressed another scholarly work is that the search
10 for the rare case itself can cause very grave harm by
11 deterring conduct that is harmful.

12 JUSTICE SOUTER: I mean, I follow the
13 argument. The trouble that I have is I don't know
14 whether, in practical terms, that argument is really a
15 significant argument or not. I don't know what's going
16 on out there. And unless we reach the point in which,
17 in effect, the economic literature makes this a kind of
18 slam-dunk decision, then it seems to me the only
19 sensible thing for a court to do is leave it to rule of
20 reason analysis.

21 MR. PANNER: Well, I think that the Brooke
22 -- the Brooke Group decision and the reasoning behind
23 that and then as reaffirmed in Weyerhauser explains the
24 answer to that, Justice Souter, which is that there are
25 a certain kind of conduct where it is possible to create

1 a model where there would be some negative circumstance
2 -- negative consequences of the conduct, but that the
3 very search for it risks deterring conduct that is of
4 obvious benefit to the consumers. And that's true here.

5 Recognition of an independent price-squeeze
6 duty would deter retail price reductions that are
7 immediately beneficial to consumers, and it deters entry
8 into the downstream market by a vertically -- by a
9 wholesale monopolist who may then encounter a duty to
10 protect downstream rivals; and, of course, it will deter
11 voluntary dealing.

12 And I think that that -- you know,
13 discussions with my client reflect that this is a real
14 effect, that they are on the margin. The concern about
15 the potential for litigation makes investment and
16 certainly innovations not worth the gamble.

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

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Ms. Maynard.

21 ORAL ARGUMENT OF DEANNE E. MAYNARD

22 ON BEHALF OF THE UNITED STATES,

23 AS AMICUS CURIAE,

24 SUPPORTING THE PETITIONERS

25 MS. MAYNARD: Mr. Chief Justice, and may it

1 please the Court:

2 If a retail-level rival can state a section
3 2 claim against a vertically integrated company by
4 alleging nothing more than a margin-based price squeeze,
5 one of two outcomes will result: Either the vertically
6 integrated company will have to raise its retail prices
7 to its consumers, or it will be forced to share the
8 benefits of its lawful monopoly with its rivals by
9 lowering its wholesale price. Either outcome is
10 inconsistent with this Court's antitrust jurisprudence.

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

15 JUSTICE STEVENS: Ms. Maynard, do you join
16 in your colleague's suggestion that we should overrule
17 the *Alcoa* case?

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

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

23 MS. MAYNARD: I think it's -- I mean, one
24 could say that Judge Hand didn't necessarily recognize a
25 price-squeeze claim standing alone because he has some

1 language about -- to the effect that perhaps this isn't
2 an independent wrong, but the way that he analyzed it
3 separately and the way courts have ruled -- have relied
4 upon it to suggest that a mere margin-based price
5 squeeze without more does state a section 2 claim is
6 incorrect.

7 JUSTICE STEVENS: My question is whether you
8 think it's -- it's necessary to overrule that decision
9 in order to decide this case correctly?

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

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

16 MS. MAYNARD: I think the Court should say
17 it was decided incorrectly.

18 JUSTICE STEVENS: That's not my question.
19 (Laughter.)

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

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

25 MS. MAYNARD: Yes, unless you're willing to

1 say Judge Hand didn't hold that -- that a price-squeeze
2 claim without more is an independent theory that
3 supports a section 2 claim. As long as you think that's
4 what he did hold -- and many people do think that's what
5 he held -- then, yes, you do need to say it was wrongly
6 decided, and the government believes it is wrongly
7 decided and that it has already been overruled --

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

16 Now, I thought Trinko was a case where that
17 was involved.

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

25 JUSTICE STEVENS: Right.

1 MS. MAYNARD: That holding is relevant here
2 because it means that Petitioners' regulatory to deal --
3 duty to deal does not create an antitrust duty to deal.
4 But then the Court went on and looked at the Court's
5 existing antitrust jurisprudence, to decide whether or
6 not the Court's antitrust jurisprudence recognized a
7 duty to deal in that circumstance, and concluded it did
8 not. And it only looked to the regulation, Justice
9 Breyer --

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

15 Here we are dealing with quite a different
16 thing. We are dealing with someone who has chosen to
17 deal in the past, and they are setting a price such that
18 the plaintiff thinks he is being squeezed out.

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

25 MS. MAYNARD: Well, a couple of things. I

1 mean, this case, as the case comes to the Court, there
2 is no antitrust duty to deal.

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

12 JUSTICE SOUTER: But --

13 MS. MAYNARD: That takes --

14 JUSTICE SOUTER: No, I didn't -- I didn't
15 want to interrupt your answer. Go ahead.

16 MS. MAYNARD: I'm sorry.

17 JUSTICE SOUTER: All right. Go ahead.

18 MS. MAYNARD: That takes the wholesale price
19 and the possibility of lowering that, Justice Breyer,
20 off the table; and without the top pincer as it were,
21 there is no price squeeze. And that leaves the
22 Respondents with only a claim that the Petitioners'
23 prices are too low. And whenever a party claims that
24 its rival's prices are too low for it to be able to
25 compete, that triggers all of the concerns that this

1 Court expressed in Brooke Group.

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

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

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

19 JUSTICE SOUTER: Well, you're -- you're
20 certainly asking us to -- at the very least, to clarify
21 the significance of Alcoa. You're -- you're asking for
22 an articulation of something -- of the significance of
23 Alcoa today, which we have not done. So in that sense
24 you are asking for something more than we've got on the
25 books now; and my question is, if the agency in effect

1 can deal with -- with -- with what the -- the monopolist
2 is concerned with, and what the entrant is concerned
3 with, why do we have to take -- why is it wise for us to
4 take the step of making or clarifying new antitrust law?

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

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

19 And the government is not saying that there
20 might not be some exclusionary conduct, Justice Breyer,
21 that could someday be alleged, if there -- there was an
22 attempt, say, to claim -- of an attempt at the upstream
23 market, as you were positing. That's not the claim
24 here, nor in most price-squeeze claims of which I'm
25 aware; the claim is that they are attempting to

1 monopolize the downstream market.

2 So the government does mean to foreclose --
3 at this Court has recognized, there are myriad ways in
4 which companies can engage in exclusionary conduct. The
5 government's position is a narrow one, which is that a
6 pure margin-based price squeeze, in the absence of a
7 duty to deal -- that is, this person who is dealing with
8 me is -- is charging me too much so that I can't compete
9 against it at retail -- that is nothing more than proof
10 that they can't compete. That doesn't show any harm to
11 the competitive process, which is what this Court has
12 repeatedly held is required for liability under section
13 2, and for good reason.

14 And, Justice Souter, in response to your
15 earlier question, the government is not saying that it's
16 not plausible that there isn't some anticompetitive
17 conduct that will go unchecked as a result of such a
18 rule, but the Court's analysis in Brooke Group is the
19 proper one, which is that when ultimately what you will
20 be doing is telling a retail-level competitor that it
21 must raise its prices in order to prevent liability.

22 That really isn't, as Mr. Panner said, worth
23 the candle, and it creates the risk of chilling
24 legitimate price cutting, and it puts the courts in the
25 -- in the role, essentially, of being a regulator, maybe

1 not just at one level, but at two. And --

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

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

8 JUSTICE SOUTER: Yes.

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

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 JUSTICE KENNEDY: If I could just ask --
20 everything you've said is applicable to a predatory
21 price claim as well as to a price squeeze?

22 MS. MAYNARD: We believe that if they can
23 allege the elements of a predatory pricing claim under
24 Brooke Group, then they would still have that claim even
25 in the absence of a duty to deal, and that labeling it a

1 predatory price squeeze doesn't add anything, that the
2 court should clarify that there is no separate
3 price-squeeze theory of section 2 liability, if that's
4 all that is without more. But there would remain a
5 predatory pricing theory under Brooke Group if those
6 allegations could be met.

7 Does that answer your question?

8 JUSTICE KENNEDY: Yes.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 MS. MAYNARD: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Blecher.

12 ORAL ARGUMENT OF MAXWELL M. BLECHER

13 ON BEHALF OF THE RESPONDENTS

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

16 I don't have a white flag and I don't think
17 we particularly have given up, but let me start by
18 suggesting that you don't need to decide the vitality of
19 Alcoa. I think you need to vacate the decision of the
20 Ninth Circuit, not because it's erroneous, but because
21 it's incomplete, and send the case back to the district
22 court to consider Judge Gould's suggestion that we file
23 an amended complaint.

24 JUSTICE GINSBURG: I don't understand what
25 you just said. Judge Gould dissented. He said the

1 Ninth Circuit majority was wrong. And you're urging us
2 --

3 MR. BLECHER: Not --

4 JUSTICE GINSBURG: -- to accept Judge
5 Gould's position.

6 MR. BLECHER: Yes.

7 JUSTICE GINSBURG: And then it -- how can we
8 do that without saying that the majority was wrong?

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

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

25 There is no more Robinson-Patman primary

1 line law. It's -- it's -- like it or not -- I'm not
2 saying we like it. I'm not saying we agree with it.
3 But the state of the law is that when you are
4 challenging a monopolist price under section 2 of the
5 Sherman Act, Brooke and its predecessors determine the
6 legality of the conduct. And that's -- and that's what
7 we are recognizing here.

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

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

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

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

23 MR. BLECHER: Well, I question whether
24 that's what they held. I view what they did is answer a
25 question: Does a pure price squeeze get subsumed by

1 Trinko as it involves the question that we heard
2 articulated, the duty to deal? Now --

3 JUSTICE KENNEDY: Wasn't the court of
4 appeals' decision consistent with the argument that you
5 made to the court of appeals?

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

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

15 MR. BLECHER: And that's all they were
16 deciding.

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 -- a non-predatory price
24 squeeze 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 so
10 there's no gamesmanship.

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

13 MR. BLECHER: And you don't need --

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 transport 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 cost 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.

13 JUSTICE KENNEDY: Is the first --

14 MR. BLECHER: And this is not --

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

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

21 JUSTICE KENNEDY: But it --

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

23 JUSTICE KENNEDY: -- it seems to me that, in
24 that instance, you seriously prejudiced the -- the
25 Petitioners here, and that that should be weighed

1 heavily against you when you ask to -- for permission to
2 amend your complaint in the district court. I mean --

3 MR. BLECHER: No --

4 JUSTICE KENNEDY: There have -- there have
5 been costs and time --

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

14 Judge Gould said he didn't think the
15 complaint under Twombly's standards, which intervened,
16 satisfied the Brooke standard, and so he said that that
17 could have --

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

22 MR. BLECHER: I'm sorry?

23 CHIEF JUSTICE ROBERTS: You didn't argue
24 that the decision below was essentially moot in your
25 opposition to certiorari here.

1 MR. BLECHER: In -- in the opposition,
2 that's correct.

3 JUSTICE KENNEDY: Nor did you give notice to
4 the Petitioners' attorney that that was your position so
5 that you could have asked for a stipulation on the
6 point.

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

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

22 JUSTICE BREYER: So can we write this
23 following -- we say: In the district court, as of this
24 moment, there is no complaint that alleges the
25 price-squeeze theory of the majority of the Ninth

1 Circuit. There is a complaint that alleges a price
2 theory under Brooke -- a predatory pricing under Brooke
3 Group. That is what is there. Nothing else is there.
4 Therefore, that issue which the Ninth Circuit decided
5 has no bearing on this case. We therefore vacate their
6 decision, leaving it up to the district court to proceed
7 as it believes appropriate under the law with the Brooke
8 Group claim?

9 MR. BLECHER: I think --

10 JUSTICE BREYER: Is that a possible thing to
11 say?

12 MR. BLECHER: And -- and --

13 JUSTICE BREYER: Yes or no, please.

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

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

17 MR. BLECHER: Yes.

18 JUSTICE BREYER: Yes, we could? Okay.

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

21 JUSTICE KENNEDY: Isn't it -- is it --

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

25 JUSTICE KENNEDY: Has the Brooke Group

1 complaint been allowed in the district court or --

2 MR. BLECHER: It was allowed.

3 JUSTICE KENNEDY: It has been tried?

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

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

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

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

1 MR. BLECHER: Yes. It would be --

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

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

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

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

24 MR. BLECHER: Correct.

25 CHIEF JUSTICE ROBERTS: So we don't have to

1 consider, which I guess I thought we had to consider --

2 MR. BLECHER: This is not a case where we
3 are confronting you with the -- with the necessity of
4 deciding the vitality of Alcoa. You -- obviously, you
5 could do that --

6 CHIEF JUSTICE ROBERTS: And you're not going
7 to amend your complaint to raise such a claim on remand?

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

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

13 MR. BLECHER: And we are very comfortable
14 with that. The answer is yes, and we are comfortable
15 with that. So we haven't given up. We've lived to
16 fight another day on another field.

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

22 MR. BLECHER: The answer to that,
23 Justice Alito, I think is that you can remand with
24 the -- with direction --

25 JUSTICE ALITO: No, I don't mean in this

1 case. I mean in another case.

2 MR. BLECHER: Oh, can some -- can we raise
3 that, or can someone else raise that? I'm not sure --

4 JUSTICE ALITO: Either you or anybody else
5 in the Ninth Circuit?

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

10 JUSTICE BREYER: We'd vacate. You'd be in
11 favor of vacating their decision?

12 MR. BLECHER: Yes.

13 JUSTICE BREYER: Yes. All right.

14 MR. BLECHER: That's right, because a
15 vacation can rest on the ground that the Ninth Circuit
16 did not reach the issue, and -- but we're -- we're
17 prepared to abide Judge Gould's view that, in a
18 regulated industry, we can only have a, quote, "price
19 squeeze" if the price is predatory.

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

24 MR. BLECHER: Both. I don't think they
25 decided the Alcoa question. That's the way I read the

1 decision, because I know what he certified. I know what
2 they said. They responded only to a very narrow
3 question, and AT&T said don't venture beyond that.
4 Don't --

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

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

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 MR. BLECHER: Thank you.

17 CHIEF JUSTICE ROBERTS: Mr. Brunell.

18 ORAL ARGUMENT OF RICHARD M. BRUNELL

19 ON BEHALF OF THE AMERICAN ANTITRUST

20 INSTITUTE, AS AMICUS CURIAE,

21 SUPPORTING THE RESPONDENTS

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

24 We think the proper disposition of this case
25 is to vacate the decision below and to remand and let

1 the district court decide whether the complaint should
2 be amended or not. Vacating the judgment would amount
3 to a dismissal with a prejudice of the price-squeeze
4 claim, and, therefore, this Court would have nothing to
5 decide.

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

13 On the specific issue here, if the Court
14 decides not to vacate the judgment below and wants to
15 examine the correctness of the Ninth Circuit judgment,
16 the specific issue of whether the absence of a duty to
17 deal thereby dooms any kind of claim -- a price-squeeze
18 claim or really any other type of antitrust claim,
19 including a predatory pricing claim, if the regulators
20 can address the issue, we think that is -- that is the
21 case, that that is the incorrect view of the law. And,
22 indeed, to some extent we agree with the Solicitor
23 General that the existence of a regulatory remedy is not
24 sufficient to bar a price-squeeze claim because there is
25 no exhaustion requirement under the antitrust laws, and

1 this Court's decision in Trinko, as the Solicitor
2 General suggested, when it looked at the regulatory
3 remedies, that was with respect to expanding section 2
4 enforcement and not with respect to traditional
5 antitrust claims, which Alcoa certainly is.

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

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

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

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

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

23 JUSTICE STEVENS: May -- may I ask? Because
24 I'm ignorant on this point. Apart from Alcoa, what are
25 the cases applying a traditional price-squeeze claim?

1 MR. BRUNELL: We've listed them in our
2 brief. I believe that 9 out of the 12 circuits, not
3 including the Federal Circuit, have recognized an
4 Alcoa-type price-squeeze claim. And in the other three
5 circuits, district courts -- in each of the other three
6 circuits, district courts have recognized an Alcoa-type
7 claim.

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

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

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

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

1 Federal Trade Commission recognizes such a claim.

2 JUSTICE SOUTER: Why do we -- why do we need
3 to?

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

8 JUSTICE SOUTER: Why can't regulation handle
9 it?

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

20 JUSTICE BREYER: So why couldn't you -- why
21 wouldn't you -- couldn't you go to the FCC or the other
22 regulator and say: Regulator, they are selling me this
23 widget or line at a dollar. All right? That's
24 considerably higher than their costs of producing it,
25 and, in addition to that, they sell the same service I

1 do for \$1.20, even though it costs me or would cost any
2 human being at least 60 cents to provide that added
3 service. So we are asking you to tell them that if they
4 continue to sell it at \$1.20, they lower their wholesale
5 price to us so that we only have to pay at most 80
6 cents, or whatever the right number is there.

7 I mean, they'd have someone to complain to.
8 They could make the same complaint. I'm quite surprised
9 that Vickers has written that under the circumstances
10 I've outlined that there is a valid price-squeeze
11 antitrust claim or that the British Commission has held
12 that. I'd be very interested to know the citation of
13 that. Because he may have done. I don't read
14 everything.

15 MR. BRUNELL: Well, the European Commission
16 --

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

20 (Laughter.)

21 JUSTICE BREYER: I am saying the British
22 Monopolies and Restrictive Practices Commission of which
23 Vickers was the head. And I agree with you -- he's very
24 knowledgeable. I would just be surprised if he had
25 written contrary to what I just said in that example,

1 but I am often surprised and willing to read it.

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

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

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

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

24 MR. BRUNELL: Whether there's a duty to deal
25 can only be answered by asking whether a violation -- a

1 refusal to deal would constitute an antitrust violation.
2 And in this case, had -- had there been no required
3 dealing and, therefore, no dealing whatsoever, then the
4 issue of antitrust duty to deal would be totally
5 academic. Furthermore --

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

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

16 MR. BRUNELL: Well, the mere fact that
17 there's a regulatory duty to deal does not completely
18 oust antitrust. Otherwise, there would be no predatory
19 pricing claim.

20 The Petitioner -- the Respondent injured by
21 a predatory-pricing claim could also go to the FCC,
22 presumably. And we don't -- and no one is contending
23 that the -- that a predatory pricing claim wouldn't lie
24 and --

25 JUSTICE SCALIA: Would that lie here first?

1 I mean, you don't think -- you don't think that the
2 regulatory agency would be acting properly if it -- if
3 it prescribed a price that was predatory or allowed the
4 charge of a price that was predatory, would you?

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

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

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

16 JUSTICE SCALIA: Well, they are dealing with
17 the problem there. They're -- they're decreeing the
18 price that can be charged, aren't they? Don't they have
19 to approve the pricing?

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

24 But let me back up for 1 second. The -- the
25 regulatory regime here is quite different from the one

1 in Trinko. In -- in Trinko, you had a regulatory duty
2 that essentially required the monopolist to cooperate
3 with its rivals in the monopoly market in order to
4 dismantle the monopoly.

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

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

23 So the -- the relationship between antitrust
24 and regulation is symbiotic and complementary. And we
25 would suggest that in this case the mere fact that the

1 district court determined that the complaints of
2 insufficient cooperation by the Petitioner in this case
3 did not state a claim for refusal to deal shouldn't
4 preclude a -- a price-squeeze claim any more than it
5 should preclude a predatory pricing claim, which the
6 government and the Petitioners seem to concede would
7 still lie.

8 Finally, this point about over-deterrence
9 and whether there's any evidence that any monopolist at
10 any time has ever been deterred from engaging in
11 legitimate retail price-cutting or efficient vertical
12 integration, I would submit that there is absolutely no
13 evidence anywhere in the literature, no empirical
14 evidence, that there is a problem of over-deterrence.
15 And had there been a problem over the last 63 years that
16 Alcoa has existed, one would think it wouldn't be too
17 hard to find evidence of that. There is no evidence.

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

1 rivals. Any equally efficient rival could meet an
2 above-cost price. The price-squeeze doctrine, under the
3 transfer price test, protects equally efficient
4 downstream rivals. So that issue is quite different.
5 The deterrence issue is -- is quite different when you
6 -- when have a price squeeze.

7 Furthermore, the notion that a monopolist
8 would respond to a price-squeeze complaint -- thank you,
9 Your Honors.

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

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

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Mr. Panner, you have two minutes remaining.

24 REBUTTAL ARGUMENT OF AARON PANNER

25 ON BEHALF OF THE PETITIONERS

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

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

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

24 And, more broadly, it's critical to have a
25 clear rule stating that in the absence of a duty to

1 deal, an allegation of price squeeze -- it doesn't state
2 a claim.

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

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 The case is submitted.

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

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A				
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