UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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Case Caption: UNITED STATES OF AMERICA

v.

AT&T INC., et. al.

Case No: 18-5214

ENTRY OF APPEARANCE

The Clerk shall enter my appearance as ○ Retained ◉ Pro Bono ○ Appointed (CJA/FPD) ○ Gov't counsel for the ○ Appellant(s)/Petitioner(s) ○ Appellee(s)/Respondent(s) ○ Intervenor(s) ◉ Amicus Curiae below:

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(List each represented party individually - Use an additional blank sheet as necessary)

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Notes: This form must be submitted by a member of the Bar of the U.S. Court of Appeals for the D.C. Circuit. **Names of non-member attorneys listed above will not be entered on the court's docket.** Applications for admission are available on the court's web site at http://www.cadc.uscourts.gov/.

CERTIFICATE OF SERVICE

I certify that on August 13, 2018, I caused the foregoing Entry of Appearance to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all counsel for the parties.

/s/Jonathan W. Cuneo
Jonathan W. Cuneo

Dated: August 13, 2018

ORAL ARGUMENT NOT YET SCHEDULED

No. 18-5214

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

AT&T INC.; DIRECTV GROUP HOLDINGS, LLC;
AND TIME WARNER INC.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia
No. 1:17-cv-2511 (Hon. Richard J. Leon)

BRIEF OF AMICI CURIAE AMERICAN ANTITRUST INSTITUTE, CONSUMERS UNION, AND PUBLIC KNOWLEDGE IN SUPPORT OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), amici certify as follows:

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for the United States. Amici curiae are:

The American Antitrust Institute

Consumers Union

Public Knowledge

B. Rulings Under Review

References to the rulings at issue appear in the Brief for the United States.

C. Related Cases

The case now pending before this Court was not previously before this Court or any court other than the district court below. Counsel is not aware of any related case pending before this Court or any court.

/s/Jonathan W. Cuneo
Jonathan W. Cuneo

CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, amici state:

The American Antitrust Institute is a non-profit, non-stock corporation. It has no parent corporation and no publicly held corporation has any ownership interest in it.

Consumers Union is the advocacy division of Consumer Reports, Inc., a non-profit, non-stock New York corporation. Consumer Reports has no parent corporation and, because it issues no stock, no publicly held corporation owns 10% or more of its stock.

Public Knowledge has no parent corporation, and no publicly held corporation holds 10% or more of its stock.

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

INTRODUCTION 3

ARGUMENT 6

THE DISTRICT COURT PLACED AN EXCESSIVE BURDEN OF PROOF ON THE GOVERNMENT TO SHOW ANTICOMPETITIVE HARM 6

CONCLUSION 12

CERTIFICATE REGARDING SEPARATE BRIEF

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

Brown Shoe Co. v. United States,
370 U.S. 294 (1962) 6

Copperweld Corp. v. Indep. Tube Corp.,
467 U.S. 752 (1984) 8, 9

FTC v. Whole Foods Market, Inc.,
548 F.3d 1028 (D.C. Cir. 2008) 1

Hosp. Corp. of Am. v. FTC,
807 F.2d 1381 (7th Cir. 1986) 6

In re Comcast Corp.,
26 F.C.C. Rcd. 4238 (2011) 4

United States v. Anthem, Inc.,
855 F.3d 345 (D.C. Cir. 2017) 1, 7

United States v. Philadelphia Nat'l Bank,
374 U.S. 321 (1963) 6

Statutes

15 U.S.C. § 18 5

Other Authorities

Robert H. Bork, *The Antitrust Paradox* (1978) 11

Steven C. Salop, *Invigorating Vertical Merger Enforcement*,
127 Yale L.J. 1962 (2018) 3, 7

Competitive Impact Statement, *United States v. Comcast Corp.*,
808 F. Supp. 2d 145 (D.D.C. 2011) (No. 11-106) 4

INTEREST OF AMICI CURIAE[1]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org. AAI frequently submits amicus briefs in important antitrust cases, including briefs in merger cases in this Court that supported the position adopted by the Court. *E.g., United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017); *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008).

Consumers Union ("CU") is the advocacy division of Consumer Reports ("CR"), which was chartered under New York law in 1936, and is currently headquartered in Yonkers. CU/CR is an expert, independent, non-profit organization

[1] All parties consent to the filing of this amicus brief. Pursuant to Fed. R. App. 29(c)(5), amici curiae state that no party's counsel has authored this brief either in whole or in part; that no party or its counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than amici curiae and their counsel have contributed money intended to fund preparing or submitting the brief. Professor John Kwoka, a member of the board of directors of the American Antitrust Institute, was retained as an expert witness for the government in this matter but he played no role in this brief.

working for a fair, just, and safe marketplace for all consumers, and to empower consumers to protect themselves. CU conducts its advocacy work in a number of policy areas, including antitrust and competition policy, as well as telecommunications, financial services, food and product safety, privacy and data security, and other areas. Its antitrust/competition policy work has included engagement in the consideration of a number of proposed mergers in telecommunications and media markets. Consumer Reports is the world's largest independent product-testing organization. Using its dozens of labs, auto test center, and survey research department, the non-profit organization rates thousands of products and services annually. CR has over 7 million subscribers to its magazine, website, and other publications.

Public Knowledge is a nonprofit technology policy organization that promotes freedom of expression, an open Internet, and access to affordable communications tools and creative works. As part of that mission, Public Knowledge advocates on behalf of consumer interests for balanced and pro-competitive media and communications policies though grassroots efforts, educating policymakers in Washington, D.C. and around the country, participating in regulatory proceedings, and where appropriate, filing amicus curiae briefs in cases of significance. Antitrust law, and particularly matters relating to video competition,

are subject areas in which Public Knowledge has both strong interests and substantial expertise.

INTRODUCTION

The result reached by the district court was not only a setback for consumers of video programming,[2] but potentially for consumers in myriad markets subject to vertical consolidation. It is well settled that vertical mergers can be anticompetitive, especially in concentrated oligopoly markets with high entry barriers. Economic thinking has advanced far since the days when conservative Chicago School theorists like Robert Bork argued that vertical mergers are almost always benign or procompetitive. Vertical mergers are anticompetitive when they create incentives for the merged firm to "foreclose" upstream or downstream rivals and thereby gain the power to impair horizontal competition and harm consumers. *See generally* Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 Yale L.J. 1962 (2018).

The Justice Department and Federal Trade Commission have brought numerous successful vertical merger challenges over the years, although few took the

[2] As a preview of the risks of this merger, it is noteworthy that DirecTV raised the price of its DirecTV Now service just after the trial. *See* U.S. Br. 60 n.5.

form of litigated decisions.[3] Many vertical merger cases involve an increased risk that the merged firm will raise the costs or otherwise diminish the competitive vigor of its rivals by withholding critical inputs or distribution channels. However, the government has also successfully challenged vertical mergers on the theory advanced in this case, namely that the merged firm will be able to raise its rivals' costs by extracting higher negotiated rates for valuable content through its increased bargaining leverage. For example, the challenge brought by the Department and the Federal Communications Commission to the Comcast-NBCU merger rested on this theory, in large part.[4]

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[3] *See* American Antitrust Institute, *AAI Applauds Move to Block AT&T-Time Warner Merger, Sets Record Straight on Vertical Merger Enforcement* (Dec. 6, 2017) (citing data) ["AAI Statement"], https://www.antitrustinstitute.org/sites/default/files/AT&T_Time%20Warner%20Commentary_F.pdf.

[4] *See* Competitive Impact Statement 23-24, *United States v. Comcast Corp.*, 808 F. Supp. 2d 145 (D.D.C. 2011) (No. 11-106); *In re Comcast Corp.*, 26 F.C.C. Rcd. 4238, 4390-97 (2011). The district court below thought it significant that the government's main theory was "'not a foreclosure-withholding story.'" Op. 73, 82, 117 (quoting Professor Shapiro, the government's expert economist). Rather, it is a foreclosure-leverage story, in the sense that rivals' costs are raised and their ability to compete and discipline the merged firm is diminished. This type of foreclosure can be even more pernicious than simple withholding, insofar as it is a less costly strategy for the merged firm, and tends to lead more directly to increases in prices rivals charge consumers. Moreover, the foreclosure may be particularly effective in hobbling upstart rivals in their efforts to bring products and services to consumers, such as the virtual multichannel video programmers offering alternatives that threaten DirecTV's traditional business model.

To be sure, the Justice Department was not willing in this case to accept a behavioral remedy, as it had in Comcast-NBCU and other vertical merger challenges. But such remedies have been subject to substantial criticism. *See* AAI Statement at 4-5. And the government offered persuasive evidence that AT&T's "behavioral remedy," i.e., its offer to arbitrate the fees that it would charge for Turner programming, was inadequate to prevent the merger's substantial anticompetitive harm, even if the offer were made enforceable by a court order.

Importantly, however, the district court did not even get to the point of considering the adequacy of AT&T's arbitration offer or other behavioral remedies. Rather, the court dismissed the case on the basis that the government had failed to make even a prima facie showing that the effect of the merger "may be substantially to lessen competition." 15 U.S.C. § 18. This was an extraordinary result.

The court concluded that the merger would not enable AT&T to increase the rates it charges rival distributors *at all*. In reaching this conclusion, the court erred by imposing an excessive burden of proof on the government. The court exhorted that "the temptation by some to view this decision as being something more than a resolution of this specific case should be resisted by one and all!" Op. 171. However, its rejection of basic principles of bargaining theory and corporate-wide profit maximization, in particular, if not reversed by this Court, promises to lead other

courts astray and to encourage firms to attempt ever more anticompetitive vertical mergers that harm consumers.

ARGUMENT

THE DISTRICT COURT PLACED AN EXCESSIVE BURDEN OF PROOF ON THE GOVERNMENT TO SHOW ANTICOMPETITIVE HARM

The burden of proving a violation of Section 7 is the same whether a merger is vertical or horizontal. As the government points out, "'All that is necessary is that the merger create an appreciable danger of [higher prices] in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for.'" U.S. Br. 4 (quoting *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986)) (brackets in original). Indeed, the incipiency doctrine, under which courts are instructed to "arrest anticompetitive tendencies in their 'incipiency,'" *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963), applies to both horizontal and vertical mergers. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962).

The district court held that the government was required to show the merger is "likely" to lessen competition substantially but said it would reach the same result under a "reasonable probability" standard. Op. 52 n.16. In any event, it is clear that the court actually placed too high a burden of proof on the government. This is reflected in the court's rejection of basic economic and legal principles, skewed treatment of industry evidence, and undue demands on the government's

economic expert, as detailed in the government's brief. Indeed, at virtually every turn, the court seems to have readily accepted the defendants' version of the evidence and rejected the government's.

The excessive burden placed on the government is evident in the court's repeated invocation of the government's purported concession that the merger would result in $350 million in consumer benefit as a result of the elimination of double marginalization (EDM).[5] *See* Op. 59 ("The case at hand . . . turns on whether, notwithstanding the proposed merger's conceded procompetitive effects, the Government has met its burden of proof . . . ."); *id.* at 60 ("Notwithstanding these conceded consumer benefits . . . ."); *id.* at 61 ("Mindful of those conceded benefits . . . I will then evaluate whether the Government has carried its burden . . . ."); *see also id.* at 149 (emphasizing the "conceded $350 million in annual cost savings to AT&T's customers"). In assessing whether the government has made its initial showing of an anticompetitive effect, efficiencies should not be relevant. *See Anthem*, 855 F.3d at 349, 353-56.

[5] The elimination of double marginalization is neither a result that ordinarily can be expected, nor typically a merger-specific efficiency. *See* Salop, *supra*, at 1970-71. As the government points out, Professor Shapiro did not concede $350 million in consumer benefits. Rather, his model predicted that DirecTV's *costs* would be reduced by about $350 million; the amount of savings that it would pass on to consumers would be much smaller. U.S. Br. 64; *see* Tr. 3824:19-3826:7 (estimating pass through of about 22%).

Indeed, the court's acceptance of, and emphasis on, the supposed benefits from elimination of double marginalization is inconsistent with its rejection of the government's bargaining leverage theory, which is built on the same principles. The court took the position that the bargaining theory did not apply because Turner would not take into account AT&T's overall profitability in negotiating with DirecTV's distribution rivals. *See* Op. 113-115. However, the government correctly points out that the benefits from elimination of double marginalization arise *only* under the assumption that Turner *will* take into account AT&T's overall profitability. U.S. Br. 57. As Professor Shapiro testified in discussing the benefits from EDM, "I'm assuming that Turner and DirecTV will work together in the joint interests of AT&T, and so Turner will lower the price that it charges DirecTV. If you want to tell me that Turner is going to operate independently, then that wouldn't happen." Tr. 2251:7-11.

Moreover, the court's conclusion that AT&T would not maximize corporate-wide profits in bargaining with its rivals over access to Turner content is plainly inconsistent with fundamental antitrust principles and with *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984), as the government demonstrates. U.S. Br. 49-53. More generally, it would set a dangerous precedent for future merger challenges. Allowing merging companies to defend their merger on the basis of a vow

that they will not raise prices in the future because, for institutional or other reasons, they will opt not to maximize corporate-wide profits would open the door to all sorts of mischief in reviewing mergers. Should a horizontal merger be permitted if the acquiring company says it will operate the company it is acquiring as an independent entity? The reason that antitrust operates under an *irrebuttable* presumption that entities under the same corporate umbrella will maximize corporate-wide profits is not simply that such an assumption is realistic. In addition, whatever a company says today, it will have the ability and incentive—and ordinarily the duty—to structure itself to maximize corporate-wide profits tomorrow. *See Copperweld*, 467 U.S. at 771-72 (parent and subsidiary "share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests").[6]

[6] To be sure, the court said that it was not rejecting the profit-maximizing premise, but rather merely concluding that "vertically integrated corporations have previously determined that the best way to increase companywide profits is for their programming and distribution components to separately maximize their respective revenues." Op. 115. But the government points out that the evidence does not support this assertion. U.S. Br. 53-55. Moreover, bargaining theory teaches that Turner would increase its bargaining leverage and maximize its division's own profits, post-merger, by invoking the very credible threat that in a blackout, its DirecTV affiliate would gain.

That the court applied a heightened burden of proof is also reflected in its unwillingness to accept the basic economics of bargaining theory. The court believed that because AT&T would lose money in the event of a blackout, and that therefore a blackout was unlikely to occur, AT&T could not obtain increased bargaining leverage and drive up the rates of rival distributors by threatening to withhold content.[7] But bargaining theory *and common sense* dictate otherwise. It is a common bargaining tactic to threaten to engage in conduct that would be unprofitable when considered in isolation, as trade wars, nuclear deterrence, and labor strikes illustrate. Leverage arises because the threat is even more unprofitable for the counterparty. Moreover, the district court recognized that Turner already exercises bargaining leverage over distributors, which is necessarily based on Turner's implicit or explicit threat to withhold content. *See* U.S. Br. 43-44.

Finally, the district court's rejection of the government's bargaining theory is inconsistent with its conclusion that AT&T's offer to arbitrate affiliate fees would "influence affiliate negotiations" and have "real world effects." Op. 149

[7] The district court stated, "Numerous witnesses explained, and Professor Shapiro acknowledged, that a long-term blackout of Turner content, even post-merger, would cause Turner to lose more in affiliate fee and advertising revenues than the merged entity would gain. Given that, there is an insufficient evidentiary basis to support Professor Shapiro's contention that a post-merger Turner would, or even could, drive up prices by *threatening* distributors with long-term blackouts." Op. 116 (internal citations omitted).

n.51. If the merger would not increase AT&T's bargaining leverage, it is hard to see why the arbitration proposal would affect the outcome of affiliate negotiations.[8]

* * *

Antitrust enforcement and understanding have progressed considerably since the days of Robert Bork's *Antitrust Paradox*. The government is appropriately selective in the merger cases it brings (in fact, sometimes excessively so in the view of amici). The government uses sophisticated economic theory and analysis to guide its discretion (perhaps to an undue extent in the view of amici). And it employs lawyers and economists who are at the top of the profession and dedicated to public service. So, when the government actually brings a merger case in court based on sound economic theory backed up by strong industry testimony and other evidence, as it did here, it ought to receive appropriate consideration. It should not be hobbled with a heightened burden of proof and erroneous economic analysis.

[8] Indeed, the government reasonably suggested that the proposal itself was an admission that the government's bargaining leverage theory had merit. The court rejected this inference, accepting AT&T's executives' testimony to the contrary. Op. 150 n.51. In another example of skewed treatment, the court accepted the relevance of the remediated Comcast-NBCU merger to show the likely effects of the AT&T-Time Warner merger. *See id.* at 104-05. However, it largely rejected the relevance of the defendants' own prior predictions (and the FCC's) that an unremediated Comcast-NBCU merger would raise rates due to increased bargaining leverage. *Id.* at 83-84.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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Dated: August 13, 2018

CERTIFICATE REGARDING SEPARATE BRIEF

Pursuant to D.C. Circuit Rule 29(d), I certify that a separate amicus brief was necessary because of the expedited schedule associated with this appeal and the unique perspective offered by consumer groups.

/s/Jonathan W. Cuneo
Jonathan W. Cuneo

Dated: August 13, 2018

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f), the brief contains 2,658 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(b) because the brief has been prepared in Microsoft Word, using 14-point Times New Roman font, a proportionally spaced typeface**.**

/s/Jonathan W. Cuneo
Jonathan W. Cuneo

Dated: August 13, 2018

CERTIFICATE OF SERVICE

I certify that on August 13, 2018, I caused the foregoing Brief of *Amici Curiae* to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all counsel for the parties.

/s/Jonathan W. Cuneo
Jonathan W. Cuneo

Dated: August 13, 2018