No. _____

IN THE
Supreme Court of the United States

BELL ATLANTIC CORPORATION, *ET AL.*,
Petitioners,
v.

WILLIAM TWOMBLY, *ET AL.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

STEPHEN M. SHAPIRO
KENNETH S. GELLER
RICHARD J. FAVRETTO
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Counsel for BellSouth Corporation

SETH P. WAXMAN
WILLIAM J. KOLASKY
WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6357
Counsel for Qwest Communications International Inc.

March 6, 2006

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
SEAN A. LEV
AARON M. PANNER
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 775-0184
Counsel for Verizon Communications Inc.

(additional counsel listed on inside cover)

LAURA J. COLEMAN
J. HENRY WALKER
MARC W.F. GALONSKY
ASHLEY WATSON
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 249-2720
Counsel for BellSouth Corporation

JOHN THORNE
PAUL J. LARKIN, JR.
DAVID E. WHEELER
ROBERT J. ZASTROW
VERIZON COMMUNICATIONS INC.
1515 North Courthouse Road
Arlington, Virginia 22201
(703) 351-3900

DAN K. WEBB
CHARLES B. MOLSTER III
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-5856
Counsel for Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation)

CYNTHIA P. DELANEY
QWEST COMMUNICATIONS INTERNATIONAL INC.
1801 California Street
Denver, Colorado 80202
(303) 383-6790

TIMOTHY BEYER
BROWNSTEIN HYATT & FARBER, P.C.
410 17th Street, 22nd Floor
Denver, Colorado 80202
(303) 223-1116
Counsel for Qwest Communications International Inc.

JAVIER AGUILAR
WILLIAM M. SCHUR
AT&T SERVICES, INC.
175 E. Houston Street, 2d Floor
San Antonio, Texas 78205
(210) 351-3409
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

QUESTION PRESENTED

Whether a complaint states a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, if it alleges that the defendants engaged in parallel conduct and adds a bald assertion that the defendants were participants in a "conspiracy," without any allegations that, if later proved true, would establish the existence of a conspiracy under the applicable legal standard.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Bell Atlantic Corporation, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc. (now known as AT&T Inc.), and Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation) were defendants in the district court and appellees in the court of appeals.

Respondents William Twombly and Lawrence Marcus, both individually and on behalf of all others similarly situated, were plaintiffs in the district court and appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Bell Atlantic Corporation, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc. (now known as AT&T Inc.), and Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation) state the following:

Bell Atlantic Corporation. On June 30, 2000, GTE Corporation and Bell Atlantic Corporation merged, and Bell Atlantic Corporation subsequently changed its name to Verizon Communications Inc., its successor-in-interest. Verizon Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

BellSouth Corporation. BellSouth has no parent company, and no publicly held company owns 10% or more of its stock.

Qwest Communications International Inc. Qwest Communications International Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

SBC Communications Inc. On November 18, 2005, SBC Communications Inc. ("SBC") merged with AT&T Corp. That same day, SBC changed its name to AT&T Inc. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

Verizon Communications Inc. Verizon Communications Inc. is the successor-in-interest to Bell Atlantic Corporation. Verizon Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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Bell Atlantic Corporation, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc. (now known as AT&T Inc.), and Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-34a) is reported at 425 F.3d 99. The district court's opinion (Pet. App. 35a-58a) is reported at 313 F. Supp. 2d 174.

JURISDICTION

The court of appeals entered its judgment on October 3, 2005. A timely petition for rehearing was denied on January 3, 2006. Pet. App. 59a-60a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, is set forth at Pet. App. 61a.

PRELIMINARY STATEMENT

The Second Circuit has decided an important and recurring question regarding the standards for pleading a claim under Section 1 of the Sherman Act. The court held that a complaint can survive a motion to dismiss simply by alleging otherwise innocuous parallel conduct – conduct that would not support an inference of conspiracy under this Court's precedents – coupled with a bald assertion (but no supporting facts indicating) that such conduct is the result of a "conspiracy." That ruling conflicts with the decisions of other circuits, is inconsistent with this Court's precedent, and invites – by the Second Circuit's own admission – unmeritorious suits intended to extract settlement payments from defendants whose only alternative is to bear the "colossal expense of undergoing discovery." Pet. App. 30a.

Plaintiffs below are consumers, representatives of a purported class, who allege that incumbent telephone companies, acting in parallel: (1) resisted new entrants' efforts to enter their respective markets and (2) failed to compete in each others' territories as new entrants. Absent *agreement* by the defendant companies, the allegations fail to state a claim under Section 1 of the Sherman Act. Plaintiffs therefore added an allegation that the defendants conspired – though they do not say when (sometime in the last decade); they do not say where; they do not say who (the four defendants have nine major corporate predecessors and hundreds of thousands of employees); and they do not even say why (because the alleged conduct is perfectly explicable on grounds of self-interest, without any need for collusion).

The United States District Court for the Southern District of New York (Lynch, J.) dismissed, holding that the complaint could not proceed unless the behavior alleged, if ultimately proved, would support an inference of conspiracy under the legal standards established by this Court. Facts meeting the Sherman Act standards for inferring conspiracy are needed both to "show[ ] that the pleader is entitled to relief," Fed. R. Civ. P. 8(a); *see* Pet. App. 44a, and to give the defendants "some idea of how and why the defendants are alleged to have conspired," *id.* at 45a. Judge Lynch concluded that the parallel conduct alleged in this case failed to support any inference of conspiracy: all businesses are expected, acting on their own, to resist rivals' efforts to take their customers, and there is nothing remotely suspicious – *i.e.*, suggestive of concerted rather than independent action – about a firm's decision not to enter a new line of business, particularly one attended by the risks described in the complaint.

Because the Second Circuit "disagree[d] with the standard that the district court applied," *id.* at 3a, it reversed. It held, instead, that "allegations of parallel anticompetitive conduct" always suffice to state a claim of conspiracy under Section 1 unless "there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the

product of collusion rather than coincidence." *Id.* at 25a (emphasis added). It acknowledged that the "overall result" of its standard – which invites unfounded claims by dispensing with any requirement that a complaint plead facts that would suffice legally to show that collusion lay behind the parallel conduct – would place "a burden on the courts and [have] a deleterious effect on the manner in which and efficiency with which business is conducted." *Id.* at 30a. But it stated that only "Congress or the Supreme Court" could ameliorate the result. *Id.*

The Court should accept the Second Circuit's invitation. It should do so not only to resolve a split in the circuits, but also to make clear that, to survive a motion to dismiss, a Section 1 complaint must state a claim under substantive antitrust standards. *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (reversing Second Circuit decision on motion to dismiss antitrust claim); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (same). Unless corrected, the decision will lead to mushrooming claims, imposing incalculable costs and distorting legitimate, unilateral business judgments.

STATEMENT OF THE CASE

1. The Complaint

In 1982, the AT&T divestiture decree created seven Regional Bell Operating Companies ("Bell companies") and assigned each of them to a different portion of the country. *See United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). These seven Bell companies – predecessors of the four defendants – provided local telephone service pursuant to state-authorized exclusive franchise arrangements but were barred from offering long-distance service. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 413-14 (1999) (Breyer, J., concurring in part and dissenting in part). The Telecommunications Act of 1996 (the "1996 Act") eliminated exclusive franchises and authorized new entry in local

telephone service markets. To jump-start entry without the need for duplication of all local network facilities, the 1996 Act required the incumbent local telephone companies to "unbundle" – that is, to share with new entrants at low, cost-based rates – certain elements of their local networks. *See Trinko*, 540 U.S. at 405-06. In return for opening their local markets to competition, the Bell companies were promised the opportunity – once they had fully complied with their market-opening obligations – to enter the long-distance business on a state-by-state basis. *See generally* 47 U.S.C. § 271. Between 1999 and 2003, after spending billions on regulatory compliance efforts, and having their market-opening efforts exhaustively scrutinized by the Department of Justice and by federal and state regulatory authorities, all the Bell companies eventually earned approval to offer long-distance service in their respective states.

In 2002, the Second Circuit ruled in *Trinko v. Verizon* that an alleged failure to comply with the network-sharing duties of the 1996 Act could be "exclusionary conduct" for purposes of Sherman Act Section 2. In the wake of that ruling, William Twombly sued SBC in the District of Connecticut, on behalf of a purported class, under Section 2. He claimed that 12 categories of conduct, all related to insufficient sharing by SBC, constituted anticompetitive conduct designed "to restrain, stifle and delay any meaningful competition for local telephone and/or high-speed internet services." Consol. Am. Class Action Compl. ¶ 30, *In re SBC Communications, Inc. Antitrust Litig.*, No. 3:02CV1617 (DJS) (D. Conn. filed Feb. 19, 2003). After this Court reversed the Second Circuit in *Trinko*, holding that claims of insufficient sharing are not actionable under Section 2, Twombly abandoned his complaint.

But Twombly's effort to add "new layer[s] of interminable litigation" to implementation of the 1996 Act, *Trinko*, 540 U.S. at 414, was not limited to the Section 2 case he had brought in Connecticut. Joined by a second purported class representative, Twombly brought this separate class action complaint in the Southern District of New York, this time

under Section 1. The complaint alleges that "Defendants . . . have engaged and continue to engage in unanimity of action by committing one or more of the following wrongful acts in furtherance of a common anticompetitive objective to prevent competition . . . in their respective local telephone and/or high speed internet service markets"; the complaint then lists precisely the same 12 categories of conduct that provided the basis for Twombly's earlier complaint under Section 2. Am. Compl. ¶ 47. The complaint adds one more allegation: that defendants "have refrained from engaging in meaningful head-to-head competition in each other's markets." *Id.* ¶ 39.

Although plaintiffs allege that "Defendants and their co-conspirators engaged in a contract, combination or conspiracy," *id.* ¶ 64, the complaint makes clear that the sole basis for the allegation is the observed marketplace conduct of the defendants (and one newspaper quote attributed to one of the defendant's executives). Plaintiffs allege no facts directly indicating any agreement among the defendants. The complaint fails to allege when the agreement was reached, "the exact dates being unknown to Plaintiffs." *Id.* The complaint fails to identify which of the corporate predecessors of the four defendants participated in the conspiracy. Nor does it identify any of the "other persons, firms, corporations and associations" that also allegedly participated in the conspiracy. *Id.* ¶ 16. And, although the complaint alleges that defendants "communicate amongst themselves through a myriad of organizations," *id.* ¶ 46, it fails to identify a single occasion on which any relevant agreement was reached, the mechanism for enforcement of any such agreement, or any individual parties to any such understanding.

Instead, plaintiffs "allege *upon information and belief*," "[i]n the absence of any meaningful competition between the [defendants] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from [new entrants]," that "Defendants have entered into a contract, combination or conspiracy." *Id.* ¶ 51 (emphasis added). Plaintiffs also include two types of allegations

intended to bolster their conjecture. First, plaintiffs argue that each defendant's failure to compete even where their respective territories abut or in some cases surround those of the other defendants "would be anomalous in the absence of an agreement." *Id.* ¶ 40. The complaint alleges that, in competing for business in such nearby areas, each defendant would have "substantial competitive advantages," *id.* ¶ 41, though the complaint says nothing about how any defendant could overcome the obstacles that incumbents have supposedly placed in the way of all new entrants. Moreover, plaintiffs allege, an executive of one of the defendants had commented that competing as a new entrant, or "CLEC,"[1] in the territory of one of the other defendants "might be a good way to turn a quick dollar but that doesn't make it right," *id.* ¶ 42, ignoring the same executive's statement, in the same article, that such entry is not a "sustainable economic model," *see infra* note 6.

Second, plaintiffs allege that defendants had both the ability and the incentive to conspire. The "structure of the market . . . is such as to make a market allocation agreement feasible" in that "[e]laborate communications . . . would not have been necessary in order to enable Defendants to agree to allocate territories" and "[i]f one of the Defendants had broken ranks and commenced competition in another's territory the others would quickly have discovered that fact." *Id.* ¶¶ 48, 49. Also, "[h]ad any one of the Defendants not sought to prevent CLECs . . . from competing effectively . . . the resulting greater competitive inroads into that Defendant's territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct" and "would have enhanced the likelihood that such a CLEC might present a

[1] New entrants to local telephone markets, in the wake of the 1996 Act, are commonly known as "competitive local exchange carriers" or "CLECs." The incumbent local exchange carriers are known as "ILECs."

competitive threat in other Defendants' territories as well." *Id.* ¶ 50.

2. The District Court's Decision

The district court granted defendants' motion to dismiss for failure to state a claim. Judge Lynch began by noting that, "absent an agreement among competitors to restrain trade, anti-competitive behavior does not violate § 1." Pet. App. 40a. Accordingly, to establish their entitlement to relief under Federal Rule of Civil Procedure 8(a), plaintiffs must allege facts that, drawing all inferences in plaintiffs' favor, show the existence of such an agreement.

Noting the absence of direct factual allegations to support the existence of any actual agreement, Judge Lynch began his analysis by observing that "simply stating that defendants engaged in parallel conduct, and that this parallelism must have been due to an agreement, would be equivalent to a conclusory, 'bare bones' allegation of conspiracy" and "insufficient to withstand a motion to dismiss." *Id.* at 42a. The court, therefore, held that, "[i]n the context of parallel conduct claims, the basic requirement that plaintiffs must fulfill is to allege facts that, given the nature of the market, render the defendants' parallel conduct, and the resultant state of the market, suspicious enough to suggest that defendants are acting pursuant to a mutual agreement rather than their own individual self-interest." *Id.* at 46a. Such "plus factors include evidence that the parallel behavior would have been against individual defendants' economic interests absent an agreement, or that defendants possessed a strong common motive to conspire." *Id.* at 41a-42a. "[O]n a motion to dismiss[,] the Court may properly draw these background assumptions only from the facts pleaded in the complaint and the relevant statute, and may rely only on such background facts about the market and its history that are appropriate for judicial notice." *Id.* at 46a.

Plaintiffs failed to satisfy the applicable standard. With regard to plaintiffs' allegation that defendant ILECs conspired

to keep CLECs out of their individual markets, plaintiffs explicitly conceded that "it is in each ILEC's individual economic interest to attempt to keep CLECs out of its market." *Id.* at 48a. While each defendant might gain certain benefits from *other* incumbents' efforts to exclude CLECs, "[n]o agreement would be necessary for all ILECs to be relatively certain to reap the alleged added benefits to be gained from parallel action" and "the motives that plaintiffs have proffered do not provide any basis to infer" that defendants' conduct was the result of agreement. *Id.* at 50a.

With regard to plaintiffs' allegation that defendants agreed not to expand into each others' territories, the court noted that "geographic segregation . . . might be enough . . . to support an inference of conspiracy, in most industries, where one could view the defendants as non-monopolistic competitors who had . . . apparently arranged [the market] into a pattern of territorial fiefdoms." *Id.* at 47a. In this case, however, the Bell companies were "given monopolies in their respective territories" and were "prevented from [competing prior to 1996] by the entry barriers protecting each" company's territory. *Id.*

The court thus held that, "[i]n light of the structure of the market as evidenced by the allegations in the Amended Complaint and the provisions of the 1996 Act, . . . it is apparent that this conduct is also attributable to defendants' individual economic interests, and therefore does not raise an inference of conspiracy." *Id.* at 51a. The court carefully reviewed the history of regulation, the terms of the statute, and the allegations of the complaint – particularly those describing in detail the difficulties faced by new local service entrants – and concluded that "[f]or an ILEC to compete as a CLEC in an adjoining ILEC's territory would not be simply to extend their existing business into a neighboring region, but rather would be to invest in undertaking an entirely different kind of business." *Id.* at 57a. "Given the obstacles to becoming a successful CLEC, . . . [i]t is no more surprising, and raises no more inference of concerted action, that the

ILECs have not gone into business as CLECs than that they have all collectively failed to enter some other line of business." *Id.*

3. The Court of Appeals' Opinion

The Second Circuit reversed, concluding that "the district court applied an incorrect standard for evaluating the defendants' motion to dismiss." Pet. App. 10a-11a. The court of appeals held that allegations of parallel conduct coupled with a bald assertion that the defendants were participants in a "conspiracy" are sufficient to state a claim under Section 1. Accordingly, the court of appeals said that it did not even need to address the district court's conclusion that the facts alleged in the complaint failed to support any inference that the alleged parallel conduct was the result of a conspiracy rather than independent action in each defendant's economic self-interest. Under the proper standard, the court of appeals held, the district court's analysis was simply unnecessary. *Id.*

The court of appeals acknowledged that "a bare bones statement of conspiracy . . . without any supporting facts permits dismissal." *Id.* at 16a (internal quotation marks omitted). And the court stated that "[t]he factual predicate that is pleaded does need to include conspiracy among the realm of plausible possibilities." *Id.* at 19a (footnote omitted). But the court held that "a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy." *Id.* at 25a. "[T]o rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim," the court stated, "a court would have to conclude that there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Id.* (emphasis added). Because it is almost always *possible* that parallel conduct, however unremarkable, was the result of an agreement, the court of appeals believed that any detailed analysis of the complaint of the sort performed by the

district court is not allowed in considering a motion to dismiss. *See id*. at 10a-11a.

Accordingly, the court of appeals held that "plaintiffs have satisfied their burden at the pleading stage." *Id.* at 30a. Devoting approximately three pages of the 43-page slip opinion to the issue, the court concluded that, "[w]hile the amended complaint does not identify specific instances of conspiratorial conduct or communications, it does set forth the temporal and geographic parameters of the alleged illegal activity and the identities of the alleged key participants," by which the court of appeals meant only that the conspiracy was alleged to have begun "around the time the Telecommunications Act became law" and that the "alleged key participants" were the named corporate defendants. *Id.* at 31a.[2]

The court of appeals said it was "mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted." *Id.* at 30a. But the court held that, "[i]f that balance is to be recalibrated, . . . it is Congress or the Supreme Court that must do so." *Id.*

The Second Circuit denied rehearing on January 3, 2006. *See id.* at 59a-60a.

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[2] The Second Circuit suggested that allegations that ILECs attempted to exclude CLECs from their respective territories could constitute "parallel conduct against their self-interest," but explicitly did not rely on that suggestion in its ruling. Pet. App. 32a n.15. The suggestion is in any event paradoxical, given each ILEC's obvious self-interest to prevail over its CLEC rivals. *See* pp. 21-22, *infra*.

REASONS FOR GRANTING THE PETITION

The Second Circuit turned its back on substantive antitrust standards and the requirements of Rule 8 by holding that this complaint – which merely recites parallel business conduct and adds a bald assertion that the conduct is the result of a "conspiracy" – states a claim under Section 1. That decision conflicts with the decisions of other circuits and is inconsistent with this Court's precedent. The Second Circuit's decision has provided a roadmap for nuisance plaintiffs, inviting frivolous suits that burden courts and impose incalculable costs on antitrust defendants. And it frustrates fundamental antitrust policy by failing to recognize that parallel marketplace conduct is most often the result, not of conspiracy, but of the vigorous competition that the antitrust laws are designed to promote. This Court should grant certiorari to correct the Second Circuit's error, to unify the approach taken by the lower courts, and to forestall the avalanche of wasteful litigation that would otherwise result.

I. THE STANDARD ADOPTED BY THE COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. Because Unilateral But Parallel Conduct Is Lawful, a Complaint Alleging a Violation of Section 1 Based on Parallel Conduct Must Allege Additional Facts Supporting an Inference of Conspiracy

1. As Judge Lynch noted, the sufficiency of plaintiffs' complaint must be evaluated in light of substantive antitrust principles. First, the Sherman Act "contains a 'basic distinction between concerted and independent action.'" *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)). "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization." *Id.* at 768. By contrast, "Section 1 of the Sherman Act requires that there be a contract, combination . . . or conspiracy . . . in order to establish a violation.

Independent action is not proscribed." *Monsanto*, 465 U.S. at 761 (internal quotation marks and citation omitted; first ellipsis in original).

Second, mere "parallel" conduct by the defendants is not enough to show conspiracy. Simply stated, "there is no basis for inferring any kind of agreement from . . . mere parallel behavior." 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1410a, at 60 (2d ed. 2002) ("Areeda & Hovenkamp"). Similarly situated businesses may face common business problems or incentives and arrive at common decisions without regard to their competitors' decisions. Parallel conduct may even depend on the conduct of competitors, but nevertheless fail to imply the existence of any conspiracy. Thus, it has long been recognized that even interdependent conduct, known as "conscious parallelism," is "not in itself unlawful." *Id.*; *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (competing firms may "recogniz[e] their shared economic interests" and act in parallel without violating Section 1); *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) ("[T]his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense."). To allow too-easy inference of conspiracy based on parallel conduct, the Court has stressed, would "deter or penalize perfectly legitimate conduct" and hence "both inhibit management's exercise of independent business judgment and emasculate the terms of the statute." *Monsanto*, 465 U.S. at 764.

Accordingly, in the absence of any direct evidence of conspiracy – for example, an admission of illegal collusion or written evidence of illegal agreement – "a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently" – that is, without reaching an agreement that is prohibited by Section 1. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (quoting

Monsanto, 465 U.S. at 764). Such allegations – commonly referred to as "plus factors" – usually involve "a showing that the defendants' behavior would not be reasonable or explicable (i.e., not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade." *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003) (internal quotation marks omitted); *see also, e.g.*, *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 1699 (2005); *Viazis v. American Ass'n of Orthodontists*, 314 F.3d 758, 762, 764 (5th Cir. 2002); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1033 (8th Cir. 2000); *In re Citric Acid Litig.*, 191 F.3d 1090 (9th Cir. 1999).

2. The court of appeals held that these principles were inapplicable to plaintiffs' complaint because it was "reviewing the grant of a motion to dismiss, not the grant of a motion for summary judgment." Pet. App. 25a. The court instead held that, at the pleading stage, a plaintiff "must allege only the existence of a conspiracy" and a factual predicate that "include[s] conspiracy among the realm of 'plausible' possibilities." *Id.* And the court further held – relying on a 50-year-old decision of the Second Circuit, *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957) – that "a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy" unless "there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." Pet. App. 25a.

The court of appeals' standard squarely conflicts with this Court's antitrust rulings. Parallel conduct is not unlawful. *See Theatre Enters.*, 346 U.S. at 541. Therefore, an allegation that defendants acted in parallel does not, without more, state a claim under the antitrust laws. Rather, where, as here, a plaintiff seeks to establish the factual predicate for a conspiracy through allegations of parallel conduct, this Court's rulings in *Monsanto* and *Matsushita* require factual allegations that, under the governing legal standard, would support

the conclusion that the parallel conduct was the result of an illegal agreement.[3]

Nothing in Rule 8 or Rule 12(b) or this Court's decisions interpreting those rules modifies the underlying substantive rules of antitrust law. On a motion to dismiss, factual allegations in the complaint must be accepted as true, while at summary judgment the plaintiff bears the burden of identifying evidence sufficient to establish each element of a claim. *Compare Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993), *with Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). But the legal standard under which the court evaluates the allegations for legal sufficiency is the same legal standard that the court applies at summary judgment. Thus, the complaint itself must allege facts that would state a claim under the substantive Section 1 standards established by this Court. *See* 5B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 544-48 (3d ed. 2004) ("[I]f the allegations in the complaint, taken as true, do not effectively state a claim for relief, the added assertion by the plaintiff that they do state a claim will not save the complaint.").

Judge Lynch captured the point exactly: "[t]he crucial inquiry . . . is what inferences naturally arise from the facts that plaintiffs have pled, taking all facts . . . as true." Pet. App. 46a. By contrast, the Second Circuit's test – which permits an inference of conspiracy from a mere allegation of parallel conduct – does not require plaintiffs to establish the legal sufficiency of their complaint. As the district court correctly concluded, the requirement that a plaintiff allege facts to support a claim of conspiracy under this Court's established standards is mandated both by the plain terms of Rule 8 –

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[3] That collusion is one "plausible possibilit[y]" of parallel conduct does not, of course, mean that independent action is not also plausible, or even *more* plausible. The Second Circuit's mere-plausibility threshold therefore does not require facts that "'tend[] to exclude'" the independent-action possibility. *Matsushita*, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764).

which requires the plaintiff to "show[ ] that [he] is entitled to relief," Fed. R. Civ. P. 8(a) – and by the core purpose of Rule 8 – which is to provide a defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

3. The court of appeals, citing this Court's decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), concluded that it was improper to burden plaintiffs alleging a conspiracy with any obligation to plead specific facts from which the existence of such a conspiracy could reasonably be inferred. But the court of appeals misunderstood *Swierkiewicz* and ignored this Court's later decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005).

In *Swierkiewicz*, this Court reversed an order of the Second Circuit affirming dismissal of a claim of employment discrimination based on national origin and age. The plaintiff alleged that the French chief executive fired him and replaced him with a younger, less qualified French employee. *See* 534 U.S. at 508. The Second Circuit held that the plaintiff had failed to allege facts "constituting a prima facie case of discrimination" under the Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Swierkiewicz*, 524 U.S. at 509. A unanimous Court held that, "under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case." *Id.* at 511. Instead, the plaintiff might be able to provide "direct evidence of discrimination." *Id.* Given that the complaint "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved," the complaint gave the defendant "fair notice of what [the plaintiff's] claims are and the grounds upon which they rest" and "state[d] claims upon which relief could be granted." *Id.* at 514.

As the district court correctly ruled, *Swierkiewicz* does not suggest that plaintiffs' complaint meets Rule 8 standards. The requirement that a plaintiff plead facts sufficient to show a conspiracy "is simply not analogous" to the requirement, disapproved in *Swierkiewicz*, that a plaintiff plead a *prima facie* case of discrimination under Title VII of the Civil Rights Act of 1964. Pet. App. 44a. Unlike discrimination based on national origin, parallel conduct is not unlawful. Accordingly, "allowing simple allegations of parallel conduct to entitle plaintiffs to discovery circumvents both § 1's requirement of a conspiracy and Rule 8's requirement that complaints state claims on which relief can be granted." *Id.* And, unlike the complaint in *Swierkiewicz* – which alleged the who, what, where, when, and why facts underlying a straightforward legal claim – the complaint here contains a bare allegation of conspiracy that fails "to give defendants notice" of the factual basis for the legal claim. *Id.* at 45a. "[A] plaintiff's factual and economic theory of a conspiracy is not evident from a conclusory allegation of conspiracy, and there is simply no way to defend such a claim without having some idea of how and why the defendants are alleged to have conspired." *Id.*

Indeed, just three Terms later, a unanimous Court in *Dura Pharmaceuticals* made clear that *Swierkiewicz* had not altered the principle that the sufficiency of a pleading must be judged by reference to whether the facts alleged in the complaint satisfy the legal standards governing the plaintiff's claim. The Ninth Circuit had allowed a securities class action to proceed despite the plaintiffs' failure adequately to allege two elements of their claim for their securities fraud – proximate causation and economic loss. *See* 125 S. Ct. at 1629. The Court ruled, first, that to establish these two elements, the plaintiffs were required to prove not merely that they paid an "inflated purchase price" but also that the alleged misrepresentation proximately caused a loss, as those concepts have been traditionally understood. *See id.* at 1631-33. Second, and critical here, the Court ruled that its "hold-

ing about plaintiffs' need to *prove* proximate causation and economic loss leads us also to conclude that the plaintiffs' complaint here failed adequately to *allege* these requirements." *Id.* at 1634. Although the complaint alleged that the plaintiffs "paid artificially inflated prices" and had suffered "damages," "the complaint nowhere . . . provides the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the misrepresentation." *Id.*

The Second Circuit never discussed *Dura Pharmaceuticals*, but it is that decision that controls this case. The court of appeals held that, to survive a motion to dismiss, allegations of "facts indicating parallel conduct" are sufficient. Pet. App. 25a. But, because a plaintiff cannot establish a claim under Section 1 by *proving* that the defendants engaged in parallel conduct, a plaintiff cannot state a claim under Section 1 by *alleging* that the defendants engaged in parallel conduct. *See Dura Pharms.*, 125 S. Ct. at 1634.

It is no answer, as the Second Circuit seemed to assume, that plaintiffs "may not be required to establish 'plus factors' at trial – if, for example, they can prove conspiracy directly." Pet. App. 26a. That suggestion, relying entirely on what *might* ultimately be "prove[d]," effectively wipes away any requirement that the complaint actually *allege* sufficient facts to state a claim. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), another complex antitrust case, this Court upheld dismissal, cautioning that "[i]t is not . . . proper to assume that the [plaintiff] can prove facts that it has not alleged." *Id.* at 526 & n.11. Yet, here, the Second Circuit has done precisely what this Court held is not "proper": it has allowed the complaint to proceed because collusion is a "plausible possibilit[y]" based on a "set of facts" *not* alleged. Pet. App. 25a.

Some legally sufficient underlying facts must be alleged; yet, here there are none. No specifics of the conspiracy are

alleged: the complaint does not specify the participants, the time period, the terms of the agreement, the mechanism of enforcement, or any other facts that would permit defendants to defend against the change. A bare assertion of conspiracy is not enough. As this Court has held, "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors*, 459 U.S. at 528 n.17; *see also DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55, 56 (1st Cir. 1999) (Boudin, J.) (referring to "ample" case law for the proposition that a "court is not required to accept" "[c]onclusory allegations" of "conspiracy" or "agreement" if divorced from "more specific allegation[s]"); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994) ("[I]n order to adequately allege an antitrust conspiracy, the pleader must provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; it is not enough merely to state that a conspiracy has taken place.") (internal quotation marks omitted); *Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985).

Accordingly, there can be no justification for dispensing, as the Second Circuit did, with the requirement that the complaint allege "plus factors" for inferring a conspiracy from parallel conduct. In the absence of agreement, there is no claim under Section 1, and a plaintiff cannot satisfy the essential element of the claim simply by asserting, without any supporting facts, that an agreement was reached. The only facts alleged in the complaint that could potentially support its naked allegation of conspiracy are the allegations of parallel conduct and the surrounding market circumstances. The complaint in fact *explicitly* relied on the inferences from defendants' parallel conduct as the sole basis for the conspiracy allegation. *See* Am. Compl. ¶ 51 ("In the absence of any meaningful competition . . . and in light of the parallel course of conduct . . . , Plaintiffs allege upon information and belief that Defendants have entered into a contract, combination or

conspiracy"). In this circumstance, substantive antitrust standards require that the complaint allege facts supporting the conclusory allegation of a conspiracy.

B. The Decision Below Conflicts with Decisions of Other Courts of Appeals

The Second Circuit's holding not only departs from this Court's decisions but also conflicts with the law of at least three other circuits. The Tenth, First, and Sixth Circuits have all required plaintiffs pleading a claim under Section 1 to allege facts that, if true, would support a claim of conspiracy. In these circuits, an allegation of parallel conduct accompanied by a bald allegation of conspiracy is *not* enough to survive a motion to dismiss; those courts regard complaints such as the one in this case to be insufficient as a matter of law.

In *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357 (10th Cir. 1989), the complaint alleged, *inter alia*, horizontal price fixing in violation of Section 1 based on allegedly parallel actions by transmission companies "to uniformly breach contracts with producers with an object and purpose of forcing producers to accept lower prices for natural gas." *Id.* at 1361 (internal quotation marks omitted). The Tenth Circuit affirmed dismissal of the complaint, holding that "[t]he antitrust plaintiff who relies on a theory of 'conscious parallelism' must establish that defendants engaged in consciously parallel action . . . which was contrary to their economic self-interest so as not to amount to a good faith business judgment." *Id.* (internal quotation marks omitted; ellipsis in original). Because the plaintiff "failed to allege *any* facts which would support an inference that the alleged actions by [the defendants] would be contrary to their economic interests absent an agreement," the complaint was properly dismissed. *Id.* The Second Circuit's decision, which did not cite or attempt to distinguish *Cayman Exploration*, and dispenses with any inquiry into whether the facts alleged suggest conduct inconsistent with independently pur-

sued self-interest, cannot be squared with the Tenth Circuit's decision.[4]

The First Circuit in *DM Research* likewise affirmed dismissal of a complaint that alleged a conspiracy to adopt faulty industry standards that had the effect of excluding the plaintiff's product from the market. Although, "[l]iterally read, the complaint does allege . . . a conspiracy," the court nevertheless held that it did not contain a sufficient "*factual* predicate" to support the conclusion that the defendants' conduct was the result of the conspiracy. 170 F.3d at 55-56. The First Circuit noted that "[c]onclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition"; "terms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient *in conjunction with a more specific allegation* – for example, identifying a written agreement *or even a basis for inferring a tacit agreement* . . . but a court is not required to accept such terms as a sufficient basis for a complaint." *Id.* at 55, 56 (emphases added; citation omitted). The First Circuit concluded that "the discovery process is not available where, at the complaint stage, a plaintiff has nothing more than unlikely speculations. While this may mean that a civil plaintiff must do more detective work in advance, the reason is to protect society from the costs of highly unpromising litigation." *Id.* at 56.

The Second Circuit's decision also conflicts with the standard applied by the Sixth Circuit's decision in *NHL Players Association v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005). The court there held – applying circuit precedent derived from *Matsushita* – that a plaintiff could not allege a claim under Section 1 by pleading facts "equally consistent with independent conduct"; instead, a plaintiff must include allegations "showing that the defendants' ac-

[4] Because it failed even to cite, much less grapple with, *Cayman Exploration*, the Second Circuit's bland assertion that its holding "comports with the law of our sister circuits," Pet. App. 22a n.6, cannot be accepted.

tions, taken independently, would be contrary to their economic self-interest." *Id.* at 475 (internal quotation marks omitted). Only after applying that standard, and concluding that the complaint satisfied it, did the Sixth Circuit hold the complaint sufficient. The Second Circuit's decision in this case rejects the legal standard that was expressly applied in the Sixth Circuit and will govern conduct and future litigation there.

Accordingly, the circuits are sharply divided on the proper standards for pleading a Section 1 conspiracy. Given the importance of the Second Circuit for the nation's commerce, the liberal venue rules in antitrust suits against companies doing business nationwide, and the stark terms of the holding below – essentially, a rule barring the dismissal of Section 1 conspiracy claims based on parallel conduct – the Second Circuit is certain to become a magnet for frivolous antitrust claims, turning the circuit into the forum of choice for such suits. *See* pp. 26-28, *infra*.

II. APPLICATION OF THE CORRECT LEGAL STANDARD REQUIRES DISMISSAL OF THE COMPLAINT IN THIS CASE

This case provides a perfect vehicle to address the legal issue presented because – as Judge Lynch's careful analysis illustrates – the complaint does not state a claim under the correct legal standard. The complaint's allegations are entirely consistent with wholly *independent* business conduct and so fail to state facts sufficient for inferring conspiracy under the *Monsanto/Matsushita* standard. That is, taking the complaint's allegations as true, each defendant's conduct is fully explained by considerations of business self-interest irrespective of any agreement with – indeed, irrespective of the conduct of – the other defendants.

A. The complaint is based on two supposed agreements. The first is an agreement to frustrate rivals' efforts to enter each of the defendants' respective markets by failing to live up to the network-sharing obligations of the 1996 Act. *See*

Am. Compl. ¶ 47. There is nothing suspicious from the point of view of antitrust law, however, about an incumbent's alleged reluctance to comply with the 1996 Act's sharing obligations. As this Court has recognized, the dealing with rivals that the 1996 Act requires is not something that an incumbent would ever "voluntarily" undertake. *Trinko*, 540 U.S. at 409. "The sharing obligation imposed by the 1996 Act created 'something brand new' . . . . The unbundled elements . . . exist only deep within the bowels of [the incumbent carriers]; they are brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort." *Id.* at 410. The very purpose of these obligations is to "eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises" by providing competitors access to the incumbent's network at cut-rate prices. *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 476 (2002). "Given that each ILEC has reason to want to avoid dealing with CLECs and having to 'subsidize' their entry into the market, each ILEC would attempt to keep CLECs out, regardless of the actions of the other ILECs." Pet. App. 49a.

Plaintiffs also alleged that defendants had "common motives to conspire" because "any CLEC that succeeded in one ILEC's territory would be more likely to 'present a competitive threat' in other ILECs' territories." *Id.* As the district court correctly observed, however, "[t]he asserted motivations to make an agreement . . . are not considerations that would affect [an ILEC's] initial decision as to whether or not to fight the CLECs in its own market." *Id.* Each defendant "could rationally expect that each of [the others] will reach the same conclusion . . . . No agreement would be necessary for all ILECs to be relatively certain to reap the alleged added benefits to be gained" from other defendants' resistance to CLECs' efforts. *Id.* at 49a-50a.[5]

[5] The district court's observation pays heed to this Court's analysis in *Monsanto*, which sharply limited the permissible inferences of agreement even in situations where observed conduct (*i.e.*, termination of a price-

B. The district court likewise properly dismissed the claim that defendants agreed to limit competition in each others' territories. Plaintiffs did not allege that firms currently in competition allocated the market by passing up available sales opportunities. Rather, the complaint alleged that each defendant declined to enter a *new line of business* – specifically, competition as a CLEC outside of its traditional service territory – which the complaint itself gives ample reasons for each defendant to avoid on its own independent determination.

Thus, the district court explained that the complaint itself recognized that "being a CLEC in another ILEC's territory is an entirely different business than being an ILEC." Pet. App. 51a. While the incumbent carrier "controls and maintains . . . telecommunications infrastructure," new entrants are "dependent on [their] relationship with the local ILEC." *Id.* at 51a-52a; *see also* Am. Compl. ¶ 47(*l*) ("Each Defendant[ ] possess[es] the exclusive and sole source of entry into its own local telephone and/or high speed internet services market").

That dependency provides ample reasons for each defendant independently to decide not to enter this different business. *See* Pet. App. 51a-58a. Like any new entrant, an ILEC competing out-of-region would "depend on the relevant ILEC"; and the profitability of the new entrant "will depend in substantial part on the terms that can be negotiated with the ILEC . . . and whether the ILEC fulfills its obligations" (*id.* at 52a), which – according to a central allegation of the complaint – the ILEC will resist doing. Those facts – from plaintiffs' own complaint – demonstrate that a decision not to devote scarce resources to the risky enterprise of becoming a

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cutting dealer) is consistent with conspiracy and where competing dealers have a motive to secure such an agreement. *See, e.g.*, *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 20-21 (1st Cir. 2004) (action by manufacturer in response to complaint by dealer does not support inference that agreement existed). The key question is whether the conduct is consistent with independent business self-interest.

CLEC – an enterprise subject to the ILECs' control and littered with the bodies of failed competitors – is perfectly rational and explicable on its own terms for each defendant acting entirely out of independently determined self-interest. Such facts – again, facts stated in the complaint itself – are the very opposite of the facts needed to *exclude* the possibility of independent action.[6]

"[A]n awareness of the significance of regulation," *Trinko*, 540 U.S. at 411, supports dismissal in another respect as well. Defendants have been intensely supervised by state and federal regulators since the passage of the 1996 Act. *See id.* at

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[6] Plaintiffs relied on the statement of Qwest CEO Richard Notebaert – who said that competing as a CLEC "might be a good way to turn a quick dollar but that doesn't make it right," Am. Compl. ¶ 42 – as support for the claim that competition as a CLEC presented an attractive business opportunity. As the district court rightly observed, Mr. Notebaert's statements "suggest only that he did not consider becoming a CLEC to be a sound long-term business plan" because "the legal landscape in which CLECs operate could have changed at any time." Pet. App. 56a. Indeed, later in the same article quoted by plaintiffs, Mr. Notebaert, while discussing the regulatory regime that requires incumbent firms to sell network elements to rivals at wholesale prices, is quoted as saying: " 'I don't think it's a sustainable economic model.' . . . 'It's just a nuts pricing model.' " Jon Van, *Ameritech Customers Off Limits: Notabaert*, Chi. Trib., Oct. 31, 2002, at Business p.1. Moreover, another article cited in the complaint confirms that Mr. Notebaert believed that the relevant FCC rules would be "revised next year" and that it would be "*unwise* to base a business plan" on their continuation. Jon Van, *Lawmakers Seek Probe of Bells; Do Firms Agree Not To Compete?*, Chi. Trib., Dec. 19, 2002, at Business p.2 (emphasis added). In fact, although FCC regulations gave CLECs a temporary boost, incumbent LECs' network-sharing obligations have been substantially reduced as a result of judicial decisions and new FCC rulemaking. *See generally* Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005), *petitions for review pending*, *Covad Communications Co. v. FCC*, Nos. 05-1095, *et al.* (D.C. Cir., to be argued March 21, 2006). Actions that are in a party's "long-run interest" are not "contrary to its self-interest" and thus "tell[ ] us nothing about possible conspiracy." 6 Areeda & Hovenkamp ¶ 1415e, at 99-100.

412 ("To be allowed to enter the long-distance market in the first place, an incumbent LEC must be on good behavior in its local market."). In that climate of constant scrutiny, no government enforcement official has suggested that parallel reluctance to enter into new markets (or parallel resistance to CLECs' demands) is suggestive of conspiracy. To the contrary, the Assistant Attorney General for Antitrust testified before Congress that he was "familiar" with the conduct that is cited in the complaint but did not believe it constituted evidence of an antitrust violation. *Antitrust Enforcement Agencies – The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission: Hearing Before the Task Force on Antitrust of the House Comm. on the Judiciary*, 108th Cong., 1st Sess. 77, 79 (July 24, 2003) (Testimony of R. Hewitt Pate). He testified that, "[i]f at any time we think that we have evidence of a concerted agreement to allocate markets, or to decline to compete, we will act very aggressively against it," but that the Antitrust Division "monitor[s] this situation very closely" and was "not aware of evidence of any such agreement" by the ILECs. *Id.*

More generally, it is difficult to imagine that any allegation that defendants "in parallel" failed to enter a new line of business or exploit an untested opportunity would support an inference of conspiracy. Firms have multiple demands on scarce capital, new entry is always risky, and a firm can exploit only a small fraction of available opportunities. Where, as a result of historical accident or deliberate design, two firms compete in adjacent territories, the failure of one to compete in another's region is not evidence even of interdependence: as stated in the leading antitrust treatise, there is no reason to believe that the decision turns on the possibility of retaliatory entry. *See* 6 Areeda & Hovenkamp ¶ 1410c, at 64 (failure of rivals to "sell in the other's area although each is capable of doing so" is *not* evidence of interdependence).

The inherent uncertainty of new entry is reflected in the rule of antitrust law that a plaintiff that claims to be a poten-

tial entrant is denied antitrust standing to challenge exclusionary conduct *unless* the plaintiff has taken "actual and substantial affirmative steps toward entry, such as the consummation of relevant contracts and procurement of necessary facilities and equipment." *Andrx Pharms., Inc. v. Biovail Corp.*, 256 F.3d 799, 807 (D.C. Cir. 2001) (internal quotation marks omitted); *see also, e.g.*, *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d 1460, 1465 (9th Cir. 1993); *Out Front Productions, Inc. v. Magid*, 748 F.2d 166, 170 (3d Cir. 1984) ("[A] company expanding either into a new geographic territory or product line . . . must show not only that it had the background, experience, and financial ability to make a viable entrance, but even more important, that it took affirmative actions to pursue the new line of business."). That limitation on standing makes sense precisely because a variety of factors – not least the availability of more attractive opportunities elsewhere – may lead a firm to pass up what may appear to others to be a potentially profitable new venture. And that limitation underscores the inappropriateness of inferring agreement from the type of parallel *in*action alleged here.

III. THE CASE PRESENTS A RECURRING ISSUE OF SUBSTANTIAL IMPORTANCE

A. The standard adopted by the Second Circuit invites frivolous litigation, imposing significant burdens on the courts and on private businesses. Indeed, the Second Circuit squarely acknowledged the perverse incentives that its rule creates. *See* Pet. App. 30a. By allowing plaintiffs to "drag[] a defendant past the pleading threshold," *DM Research*, 170 F.3d at 55 (internal quotation marks omitted), based on allegations of parallel conduct – combined with a conclusory allegation of conspiracy – the Second Circuit encourages the filing of suits solely to extract settlements that enrich attorneys at the expense of consumers and the economy as a whole. Nothing is easier than to allege that parallel conduct is the product of a conspiracy, if no supporting facts are required to support that allegation. But, as the Court held

unanimously in *Dura Pharmaceutcals*, defendants should not be put through the expense of litigation unless plaintiffs meet the burden of pleading a viable claim.

Antitrust suits are proverbially complex and expensive to litigate. "Because of the complexity of the issues and the breadth of the discovery allowed, antitrust cases have become known as 'serpentine labyrinths' in which discovery is a 'bottomless pit.'" 6 James Wm. Moore, *et al.*, *Moore's Federal Practice* ¶ 26.46[1], at 26-146.24 (3d ed. 2003). Precisely because discovery in antitrust cases is especially burdensome, lowering the bar at the pleading stage by relaxing substantive antitrust rules "condemn[s] defendants to potentially limitless 'fishing expeditions' – discovery pursued just 'in case anything turn[s] up' – in hopes . . . of a favorable settlement." Pet. App. 27a (footnotes omitted; second alteration in original). Commentators have noted that "[t]he risks associated with antitrust class actions . . . dictate that most cases will be on the fast track to settlement shortly after class certification, long before a summary judgment motion or merits adjudication of any kind can play a role." John T. Delacourt, *Protecting Competition by Narrowing Noerr*: *A Reply*, 18 Antitrust 77, 78 (2003).

Such settlements are contrary to antitrust policy because they hurt the very consumers that antitrust rules are designed to protect; the costs of extortionate settlements are (at least in part) inevitably passed on to consumers, while the threat of facing a burdensome strike suit may actually *discourage* aggressive competition by companies that fear their rational business decisions will be mistaken for collusive behavior. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a consumer welfare prescription.") (internal quotation marks omitted). Mindful of that concern, this Court has admonished that district courts "must be especially alert to identify frivolous claims brought to extort nuisance settlements," expressing confidence that antitrust litigation "need not result in administrative chaos, class-action harassment, or 'windfall' settlements *if the dis-*

trict courts exercise sound discretion and use the tools available." *Id.* at 345 (emphasis added). One of those tools, specifically endorsed by this Court in *Associated General Contractors*, is to demand that a plaintiff plead the elements of his antitrust claim with appropriate specificity. *See* 459 U.S. at 528. The district court here did precisely that, yet the Second Circuit reversed, taking this tool away from district courts and inviting the very nuisance suits that this Court condemned. *See also Dura Pharms.*, 125 S. Ct. at 1634 (noting danger of permitting "a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence") (internal quotation marks omitted; alteration in original).

The United States made a comparable point in successfully urging *certiorari* in the securities law context in *Dura*. The Government observed that efforts "to ensure the integrity of the securities markets, and thereby protect the investing public . . . are likely to be hindered rather than furthered by permitting private . . . suits to proceed past the pleading stage" without proper supporting allegations. Brief for the United States as Amicus Curiae at 14, *Dura Pharms., Inc. v. Broudo*, No. 03-932 (U.S. filed May 28, 2004) ("U.S. *Dura Pharms.* Br."). "[R]equiring issuers of securities to expend time and resources litigating, and in most cases settling, such lawsuits . . . is more likely to harm than to aid 'the intended beneficiaries' " of the statute. *Id.* Precisely the same is true here: the "colossal" cost of litigating suits that the Second Circuit frankly characterized as "meritless," Pet. App. 30a – avoidable only through the payment of "blackmail settlements," Henry J. Friendly, *Federal Jurisdiction* 120 (1973) – imposes a tax on legitimate business conduct for the benefit of a small cadre of plaintiffs' lawyers, to the detriment of all consumers.

B. The case's interlocutory posture should pose no obstacle to review. Where the very issue presented is the proper

standard for dismissal at the pleading stage, review of the decision at that stage is particularly appropriate. Moreover, many of this Court's leading antitrust precedents were decided upon review of appellate decisions reversing dismissal (including two recent Second Circuit cases that this Court unanimously reversed).[7] In those cases, as here, the court of appeals had "decided an important issue, otherwise worthy of review, and Supreme Court intervention [could] serve to hasten or finally resolve the litigation." Robert L. Stern, *et al*., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002).

Indeed, immediate review is imperative to forestall the dangers that the Second Circuit itself anticipated likely would flow from its holding. Particularly in light of the unusual commercial importance of the Second Circuit as a forum and the liberal venue rules under the Sherman Act for companies doing business nationwide, there is every reason to expect that would-be plaintiffs will take advantage of this permissive precedent and shun jurisdictions that apply ordinary antitrust standards at the pleading stage. "And while review by this Court could be sought in a case in which some other court of appeals affirmed the dismissal of a complaint . . . many class-action counsel would be reluctant to seek certiorari in such a case because of the risk of affirmance, which would make that standard applicable nationwide." U.S. *Dura Pharms.* Br. at 18-19. Resolution of this critical issue of antitrust law should not wait.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[7] *See, e.g.*, *Trinko*, 540 U.S. 398; *NYNEX*, 525 U.S. 128; *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Associated Gen. Contractors*, 459 U.S. 519; *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

Respectfully submitted,

STEPHEN M. SHAPIRO
KENNETH S. GELLER
RICHARD J. FAVRETTO
MAYER, BROWN, ROWE
& MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

LAURA J. COLEMAN
J. HENRY WALKER
MARC W.F. GALONSKY
ASHLEY WATSON
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 249-2720
Counsel for BellSouth Corporation

JOHN THORNE
PAUL J. LARKIN, JR.
DAVID E. WHEELER
ROBERT J. ZASTROW
VERIZON COMMUNICATIONS INC.
1515 North Courthouse Road
Arlington, Virginia 22201
(703) 351-3900

DAN K. WEBB
CHARLES B. MOLSTER III
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, Illinois 60601
(312) 558-5856

RICHARD G. TARANTO
FARR & TARANTO
1220 19th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 775-0184
Counsel for Verizon Communications Inc. (successor-in-interest to Bell Atlantic Corporation)

March 6, 2006

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
SEAN A. LEV
AARON M. PANNER
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

JAVIER AGUILAR
WILLIAM M. SCHUR
AT&T SERVICES, INC.
175 E. Houston Street, 2d Floor
San Antonio, Texas 78205
(210) 351-3409
Counsel for AT&T Inc. (formerly SBC Communications Inc.)

SETH P. WAXMAN
WILLIAM J. KOLASKY
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6357

TIMOTHY BEYER
BROWNSTEIN HYATT
& FARBER, P.C.
410 17th Street, 22nd Floor
Denver, Colorado 80202
(303) 223-1116

CYNTHIA P. DELANEY
QWEST COMMUNICATIONS
INTERNATIONAL INC.
1801 California Street
Denver, Colorado 80202
(303) 383-6790
Counsel for Qwest Communications International Inc.