No. 02-682

IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Court granted certiorari on the following question: Did the Court of Appeals err in reversing the District Court's dismissal of respondent's antitrust claims?

RULE 29.6 STATEMENT

Verizon Communications Inc., is the successor corporation of Bell Atlantic Corp., named as defendant and appellee below. Verizon has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The court of appeals' amended opinion (Pet. App. 1a-48a) is reported at 305 F.3d 89, with the partial dissent reported at 294 F.3d 307, 330-35. The district court's initial opinion (Pet. App. 49a-61a) is reported at 123 F. Supp. 2d 738. The district court's second opinion (Pet. App. 62a-68a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2002. The court amended its opinion and denied rehearing on October 1, 2002. Pet. App. 69a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant antitrust provisions, 15 U.S.C. §§ 2, 15, and provisions of the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, amended by the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56, are printed at Pet. App. 70a-103a.

STATEMENT

Respondent alleges deficiencies in Verizon's provision of the novel price-discounted assistance the 1996 Act requires Verizon to furnish rivals. The Second Circuit extended Section 2 precedent to cover that claim. In doing so, it ignored the normal requirements for antitrust condemnation of unilateral conduct, particularly those limiting duties to help rivals, and imposed on antitrust judges and juries tasks traditionally and properly reserved to regulators. This Court should reject the Section 2 expansion that respondent requires to sustain its claim, particularly in light of the 1996 Act's comprehensive regulatory regime. The Court should also reaffirm traditional statutory standing limits that bar respondent, an indirect purchaser, from suing for injury derivative of harm to the direct customer.

A. Statutory Background

This case arises against the background of 47 U.S.C. §§ 251-253, added by the 1996 Act and described in *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 476, 491-94 (2002), and *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1999). Those provisions ended all legal barriers to entry into local telecommunications markets, § 253, and required all carriers (new and old) physically to "interconnect," so that customers reached by one carrier's facilities can communicate with customers served by all other carriers, § 251(a). But the 1996 Act did not stop there: it also required incumbents to share their facilities and services at specially discounted rates with rivals.

These latter provisions created "something brand new"–"the wholesale market for leasing network elements" (*Verizon*, 535 U.S. at 528)–by directing the incumbents, for the first time, to assist new intermediaries to displace them, line by line, in providing local service to local customers over the incumbents' own networks. This assistance, as implemented, must be rendered at heavily discounted prices designed "to give aspiring competitors every possible incentive to enter local retail telephone markets." *Id.* at 489. Congress recognized this forced change in the incumbents' businesses to be "'extraordinary'" precisely because incumbents were being ordered to help "'competitors come in and try to beat your economic brains out.'" *Id.* at 488 (quoting 141 Cong. Rec. 15572 (1995) (Sen. Breaux)); *see id.* (the 1996 Act duties aim "to achieve *the entirely new objective of uprooting the monopolies* that traditional rate-based methods had perpetuated") (emphasis added).

Thus, the Act newly requires incumbents to turn over pieces of their networks ("unbundled network elements," or UNEs) at discounted government-set rates based on "cost." §§ 251(c)(3), (d)(1), (d)(2). Incumbents also must allow rivals to set up their equipment in the buildings that house the incumbents' switches and wire centers ("collocation"). § 251(c)(6). And incumbents must sell rivals their retail services, at yet another discounted rate, so that rivals can resell those services as mere marketers and middlemen. §§ 251(c)(4), 252(d)(3). These provisions force incumbents into an altogether new role as price-discounted wholesalers, uprooting themselves as retailers in favor of new rivals using the incumbents' own facilities and services.

The 1996 Act relies on two levels of expert regulators, federal and state, to implement and enforce these obligations. *First*: The FCC has issued, and repeatedly updated, massive orders creating an unparalleled regime prescribing what network elements and services rivals are entitled to demand, how and when such demands must be met, and how much incumbents may charge for dozens of different network elements and services in hundreds of discrete geographic markets. *See* United States Telecom Ass'n *Amicus* Brief. For example, the FCC has granted rivals rights to use the incumbents' buildings, loops, trunks, switches, and computerized ordering, billing, and other "operation support systems."[1] For rented loops (the wire to the home or business), the rival acquires "exclusive control."[2] Rates for network-element

[1] This Court reversed the FCC's first ruling on rentable network elements in *Iowa Utilities*, 525 U.S. at 388-92. The FCC's second ruling was reversed in *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 424, 427 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003) ("too broad" a sharing duty can deter *independent* investment).

[2] First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCCR 15,499, ¶ 385 (1996).

rental are set by a "novel ratesetting" methodology, which prescribes low rates just "short of confiscating the incumbents' property," including rates based on "most efficient" and "lowest cost" technologies. *Verizon*, 535 U.S. at 489; *id.* at 467.[3]

Second: Within the federal standards, the Act assigns implementation responsibilities to state regulators, with the FCC as backup. Under the statutory regime of negotiated agreements and forced arbitration, (a) every term of incumbent-rival relations is approved in advance by regulators and (b) any rival disappointed in its request for assistance is guaranteed a prompt regulatory decision, itself reviewable in court. Every term of dealing is either agreed to by the rival or imposed by regulators subject to judicial review. § 252(b), (c), (e)(1)-(5). The Act also guarantees nondiscrimination among rivals by making any agreement's terms available to all rivals. § 252(i).

Third: These comprehensive agreements, once entered, can be enforced by the regulators. And, if either the parties or the regulators believe it advisable, the agreements can provide for expedited nonjudicial enforcement mechanisms.[4]

Fourth: The FCC, aided by state regulators and the Justice Department, enforces the assistance duties, and prescribes still more duties, as a condition for allowing the largest incumbents (the Bell companies) to enter, and remain in, the

[3] Concrete rate setting is done by state regulators applying to specific companies the methodology prescribed by the FCC. *See* § 252(e)(4), (6); *Verizon*, 535 U.S. at 492-93, 524.

[4] *See BellSouth Telecommunications Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1275-78 (11th Cir. 2003) (*en banc*) (uniform recognition in other circuits); *Bell Atlantic-Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 304-05 (4th Cir. 2001), *vacated on other grounds*, 535 U.S. 635 (2002); *Starpower Communications*, 15 FCCR 11277, 11280, ¶ 7 (2000) (FCC recognizing state agency enforcement authority).

long-distance market. 47 U.S.C. § 271. Through detailed "performance assurance plans," the regulators have meticulously monitored and enforced the incumbents' rendering of the required assistance. Verizon has met these Section 271 requirements in every State it serves.[5]

In response to these mandates, incumbents like Verizon have signed thousands of comprehensive agreements to share facilities with their rivals. *See Cavalier Telephone, LLC v. Verizon Virginia, Inc.*, 2003 WL 21153305 (4th Cir. May 20, 2003), at *8; www.dps.state.ny.us/Interconnection_Agreements.htm (New York agreements). They have spent billions of dollars re-configuring their facilities, developing new computer systems, and deploying personnel to enable rivals to place and confirm vast numbers of orders for network elements or wholesale services to displace the incumbents' service of customers. As of June 2002, the incumbents had lost 22 million lines (11.4%) to competitors. In New York, where this case originated, the figure was 3.2 million lines (25%). *See* FCC, *Local Telephone Competition: Status as of June 30, 2002*, tables 6, 8 (Dec. 9, 2002), http://ftp.fcc.gov/Bureaus/Common_Carrier/Reports/FCCState_Link/IAD/lcom1202.pdf.

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[5] Verizon was the first incumbent to satisfy Section 271–for New York, in late 1999 (*AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000))–and now has long-distance authorization for all of its lines. *See Application of Verizon Maryland Inc.*, 2003 WL 1339419 (Mar. 19, 2003) (Maryland, West Virginia, and D.C.). For the other FCC approvals, see 17 FCCR 21880 (2002) (Virginia); 17 FCCR 18660 (2002) (New Hampshire, Delaware); 17 FCCR 12275 (2002) (New Jersey); 17 FCCR 11659 (2002) (Maine); 17 FCCR 7625 (2002) (Vermont); 17 FCCR 3300 (2002) (Rhode Island); 16 FCCR 17419 (2001) (Pennsylvania); 16 FCCR 14147 (2001) (Connecticut); 16 FCCR 8988 (2001) (Massachusetts); 15 FCCR 3953 (2000) (New York). The *Verizon Maryland* order, among others, lays out, in appendices, the exacting requirements for long-distance approval, including numerous Section 251 duties, and the performance measures to which the Bell companies are held.

B. Verizon-AT&T Transactions

In 1997, AT&T and Verizon entered into an agreement approved by the New York Public Service Commission (PSC) under the 1996 Act. The agreement details the discounted services, facilities, and network elements that Verizon must furnish AT&T.[6] And it provides for resolution of "disputes through arbitration and the administrative process" as the "'exclusive remedy for all disputes between [Verizon] and AT&T arising out of this Agreement or its breach.'" Pet. App. 5a, 38a n.19.

Respondent, a New York City law firm, bought local telephone service from AT&T. It had no relationship with Verizon. Pet. App. 1a, 5a. Respondent described the AT&T service as "resold" service physically furnished by Verizon.[7]

In December 1999, Verizon encountered a problem in new software used to confirm to rivals that Verizon had indeed fulfilled the orders they had placed. AT&T complained to regulators, and within three months, on March 9, 2000, Verizon entered a consent decree with the FCC "to resolve the problem promptly and pay $3 million to the United States and $10 million to AT&T and other competitors." Pet. App. 5a. By July 2000, the software bug having long been fixed, the decree was dissolved. *Id.*[8] Thus,

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[6] *See* Order Approving Interconnection Agreement, 1997 WL 410707 (NY PSC No. 96-C-0723), at *41, *47, *56-57.

[7] *See* CA Trinko Br. 39-40 ("resale agreement"). Economically, AT&T was a reseller of service physically being furnished by Verizon whether it was purchasing Verizon "service" at a wholesale price for "resale" or, instead, the end-to-end package of Verizon-assembled piece parts ("UNE platform"). The price differs, but not the reality that Verizon is physically furnishing the service. *Iowa Utilities*, 525 U.S. at 393-95.

[8] *See* Memorandum Opinion and Order, *Application of Verizon New England*, 16 FCCR 8988, 9034-35, ¶ 87 (2001) (summarizing events); Order, *Bell Atlantic-New York Authorization*, 15 FCCR 5413 (2000) (consent decree). The New York PSC also addressed the problem. Order

the only problem concretely mentioned by respondent was efficiently resolved. Pet. App. 24a.

C. This Litigation

1. One day after entry of the March 9 consent decree, respondent brought this consumer class action against Verizon, on behalf of all customers of Verizon's competitors since 1996. Respondent broadly complained that it had "received poor local phone service" from AT&T and that Verizon, with "no valid business reason," had treated competitors' orders for special discounted service worse than it treated orders for retail service from its own customers. Pet. App. 6a-7a. Aside from noting the just-entered consent decree, the complaint (and amended complaint) contained no specifics, but generally alleged deficient terms of service to competitors. *Id.* at 7a; *see* JA 12-50.

Respondent alleged that the deficiencies in Verizon's assistance to AT&T amounted to violations of Section 2 of the Sherman Act, warranting treble damages and injunctive relief. Pet. App. 6a.[9] The district court dismissed. Section 2 requires both monopoly power (actual or dangerously probable) and "anticompetitive" ("predatory," "exclusionary") conduct. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 480 (1992). The district court followed

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Addressing OSS Issues, *MCI WorldCom, Inc. v. Bell Atlantic-New York*, 2000 WL 1531916 (NY PSC Nos. 00-C-0008 *et al.*); Order Directing Market Adjustments and Amending Performance Assurance Plan, *MCI WorldCom, Inc. v. Bell Atlantic-New York*, 2000 WL 517633 (NY PSC Nos. 00-C-0008 *et al.*); Order Directing Improvements to Wholesale Service Performance, *MCI WorldCom, Inc. v. Bell Atlantic-New York*, 2000 WL 363378 (NY PSC Nos. 00-C-0008 *et al.*). The New York Attorney General received daily reports of Verizon's performance following correction of the problem.

[9] Respondent also alleged violations of the Communications Act, 47 U.S.C. §§ 202(a), 251. The Second Circuit allowed the Section 202(a) claim to proceed. Certiorari was limited to the antitrust claim.

Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000) (Diane Wood, J.), in concluding that the conduct element was not satisfied by respondent's allegations of deficient assistance to rivals. Pet. App. 55a-56a; *see id.* at 63a, 66a-67a (dismissing amended complaint).

2. Respondent appealed the dismissal of its claims for damages, and the court of appeals reinstated the Section 2 claim. Pet. App. 16a-25a. The court ruled that, even though the only asserted injury was receipt of "poor local phone service" from AT&T, respondent had statutory standing to complain that AT&T had received poor treatment from Verizon. *Id.* at 26a. Although the indirect-purchaser injury was derivative of injury to AT&T, the court relied on the fact that AT&T was not "solely" a customer of Verizon, but "also a competitor," and on *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). Pet. App. 26a-27a.

On the merits, the Second Circuit did not point to this Court's precedents as identifying actionable Section 2 conduct that covered respondent's claim. Rather, it relied on "essential facilities" and "monopoly leveraging" theories as articulated by various appellate courts. Pet. App. 28a-30a. Thus, the court held: "a monopolist has a duty to provide competitors with reasonable access to 'essential facilities,' facilities under the monopolist's control and without which one cannot effectively compete in a given market." *Id.* at 29a, 29a-30a. The court also found sufficient the allegations that Verizon (a) has monopoly power in "a wholesale market in which it sells access to the local loop" (albeit under legal compulsion) and (b) "*used that power to gain a competitive advantage* in a retail market in which telecommunications carriers sell local phone service to consumers." *Id.* at 30a (emphasis added).

The Second Circuit recognized that, "[i]n *Goldwasser*, the Seventh Circuit dismissed similar allegations." Pet. App. 31a. But in discussing *Goldwasser*, the Second Circuit reasoned only that the 1996 Act did not override what were, in the court's view, established theories of Section 2 liability. *Id.* at 31a-33a. It did not discuss *Goldwasser*'s ruling that the "unadorned" Sherman Act, of its own force, does not impose duties to assist rivals in the ways alleged by respondent and the *Goldwasser* plaintiffs (222 F.3d at 399-400).

Nor did the Second Circuit discuss the relevance of the applicable regulatory regime to any attempt to define new Section 2 duties. The court noted that *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), shows that some antitrust claims can co-exist with some regulatory regimes. But it did not compare the particulars of the 1996 Act, which include a plain-on-its-face guarantee of an advance, reviewable regulatory ruling on all access demands, with the regulatory regime in the background of *Otter Tail*, which provided no remotely comparable substantive sharing rights or procedural remedy. Pet. App. 34a-35a. Although this case concerns the threshold question of whether any wrong is an *antitrust* wrong, the Second Circuit pervasively stressed the importance of "affording the consumer compensation that the Telecommunications Act does not provide." Pet. App. 33a; *see id.* at 35a, 36a, 37a n.18.

INTRODUCTION AND SUMMARY OF ARGUMENT

The extraordinary duties of affirmative assistance to rivals created by the 1996 Act, with all their complexity and uncertain economic experimentation, are fully enforceable through the 1996 Act regime. Such duties, however, have never been part of Section 2 of the Sherman Act, and they should not now become so, enforceable through treble-damages litigation with nonexpert juries and judges determining the "reasonable" price and terms of discounted "access." The novel demand to wield that *in terrorem* weapon and to turn antitrust courts into regulatory agencies should be rejected as bad antitrust law in general and particularly unnecessary and inadvisable in the face of the 1996 Act.

We begin with this Court's precedents, which do not encompass respondent's claim. We then explain why multiple antitrust principles reflected in those precedents preclude expansion of Section 2 duties to reach respondent's claim. We then show that the two non-Supreme-Court theories of Section 2 liability that the Second Circuit relied on–essential facilities and monopoly leveraging–cannot support a contrary result. Finally, we describe the statutory-standing limits that bar suits by indirect purchasers like respondent.

I. A. Respondent's claim falls outside this Court's most pertinent precedents, addressing duties to deal. Those decisions have found liability *only* where the defendant refused a rival the very thing, on the very terms, defendant was already voluntarily providing non-competitor customers (or, indeed, had voluntarily been providing the rival itself). *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Only that circumstance presents a prima facie reason to question whether refusing to deal with the competitor makes any business sense apart from enabling monopoly; only such a facially aberrant refusal has triggered a demand for justification; and only in such a case can the court focus on a simple disparity in treatment of would-be customers (rather than determining the proper terms of dealing afresh). *Olympia Equip. Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 375 (7th Cir. 1986) (Posner, J.).

This essential circumstance of *discrimination among outsiders as would-be customers seeking the same good at the same price* is not present in this case. There is, and could be, no allegation that Verizon was voluntarily providing non-competing customers the special price-discounted wholesale services it now extends to AT&T and other rivals under the 1996 Act. Respondent's claim thus goes beyond this Court's Section 2 precedents.

B. Respondent's proposed expansion of Section 2 cannot be squared with a basic Section 2 principle—that unilateral conduct is lawful as long as it makes business sense *apart from* enabling monopoly returns. SG Pet. Br. 11-16. This principle is affirmed in this Court's refusal-to-deal cases and gives objective definition to what constitutes a "valid business reason[]." *Aspen*, 472 U.S. at 605; *Kodak*, 504 U.S. at 483. It limits illegality to conduct that *only* a would-be monopolist would pursue–conduct necessarily tied to gaining or extending monopoly power–thus performing the essential task of sifting out impermissible conduct from the intentionally rival-harming conduct that *is* competition.

Respondent does not and could not allege that this requirement is met by Verizon's alleged deficiencies in complying with the 1996 Act's affirmative-assistance mandates. The Act requires Verizon to displace its own full-priced sales by sharing its facilities and services with rivals at specially discounted prices, and to assume the massive costs of creating and maintaining this system of dealing with new intermediaries. It is taking on, not failing in, this role that would be contrary to any business's normal interests.

C. Respondent's claim should be rejected for an additional reason: its character as a claim for novel unilateral affirmative assistance to rivals. Such a claim presents distinctive problems that are deeply unsuited to antitrust resolution. Forced sharing dampens incentives to invest–for incumbents who have to share the rewards of often risky investments, and for competitors whose independent investments in new facilities become riskier (and perhaps costlier) than sharing. Forced sharing also creates high costs of implementation, requiring an apparatus for setting and monitoring terms. But courts cannot reliably and continuously calibrate the "right" level of sharing, or reliably ensure that a regime of rivalry dependent on sharing is a net positive for consumer welfare. This uncertain task is inherently one of experimentation for regulators, not judges and juries in costly (class action) treble-damages litigation. Indeed, in a technologically fast-evolving market, frequent revisiting of assistance duties is needed to lower the ever-present risk that the costs of intervention will outweigh the benefits.

Because any determination of net benefits would depend on the terms of sharing, an unavoidable task inherent in respondent's claim–even in establishing *liability*–is the assessment of "reasonable" prices and other terms. Antitrust law, however, has rigorously (if not absolutely) foresworn that task as unsuitable for federal judges and juries, which lack the expertise and flexibility of regulators. Proper prices, moreover, would have to be set independently of the 1996 Act determinations: the Act's savings clause leaves antitrust duties where the Act found them; and *antitrust* principles would not impose the prices–or other terms–adopted under the 1996 Act to serve the new goal of uprooting monopolies and jump-starting entry. This is a regulatory task, not one for antitrust judges and juries. *See Cavalier*, *supra*.

D. The presence of the 1996 Act regime adds special reason not to transform federal courts into shadow regulators by expanding Section 2 duties as respondent proposes. The 1996 Act, on its face, guarantees prompt judicially reviewable agency action on all demands for affirmative assistance from rival phone companies. No prior regulatory regime was comparable. *Compare Otter Tail, supra.* Any genuine obstacle to competition will escape redress under that regime only if both the agencies and the reviewing courts systematically fail to discern it–in which case there is no *less* basis for expecting systematic failure (of the same courts) under respondent's new antitrust duty (where errors are less easily corrected). Adopting respondent's novel antitrust duty, therefore, would add no significant protection of competition to the 1996 Act regime. *See Goldwasser*, *supra*; *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990)

(Breyer, J.). To the contrary, it would threaten that regime by deterring the negotiation of sharing agreements and limiting the agencies' flexibility to strike balances and change them as circumstances evolve. With comprehensive regulatory superintendence already in place, this is the last sensible setting in which to expand Section 2 to make federal judges and juries into regulators.

E. "Essential facilities" and "monopoly leveraging" theories cannot alter the result here. Neither theory is a Section 2 standard approved by this Court, and all the reasons for refusing to expand *this* Court's Section 2 duties are also reasons for limiting any lower-court doctrine this Court might in some other case adopt. In any event, the circuit courts' "essential facilities" doctrine itself has not supported liability for breach of duties like those at issue here. In the truly exceptional case of actual essential-facilities liability for unilateral action, *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), the claim most like respondent's was rejected, and the claim resulting in liability involved circumstances far more like *Aspen*: in particular, AT&T was voluntarily in the business of offering others the very service MCI demanded. Respondent's claim would thus require an extension of even the lower courts' "essential facilities" precedents, which could not be justified. As for "monopoly leveraging," adopting that theory would simply violate Section 2 and this Court's precedents. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993).

II. Even if the conduct alleged here is actionable under Section 2, respondent should be denied statutory standing to bring the claim. Respondent is an indirect purchaser asserting injury only as an indirect result of injury to the direct victim. Respondent's claim thus fails to meet the basic statutory requirement of direct injury. *See Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258 (1992); *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990). Underlying policy considerations bolster that conclusion. In particular, allowing suits like respondent's would, by vastly raising the stakes, impair the goal of expeditious resolution of disputes between the incumbent and its rival, a goal reflected in the exclusive nonjudicial dispute resolution mechanism of the Verizon-AT&T agreement approved by regulators under the 1996 Act.

ARGUMENT

This Court should reject respondent's claim as not stating a valid Section 2 claim: the claim is novel and would be bad antitrust law, especially in light of the 1996 Act. The Court should initially decide that substantive issue, which divides the circuits and is presented in numerous suits brought by competitors, direct purchasers, and indirect purchasers. The separate question whether respondent in particular can sue–a matter of statutory standing or, equivalently, the reach of the statutory cause of action or "right to sue" (*Holmes*, 503 U.S. at 264)–is not an issue of subject matter jurisdiction and so, unlike constitutional standing (which unquestionably exists here), need not be addressed before deciding the scope of the antitrust duty. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 97 & n.2 (1998); *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 456 (1974). This second issue, however, provides an independent ground requiring dismissal of respondent's antitrust claim.

I. RESPONDENT ALLEGES NO COGNIZABLE SECTION 2 VIOLATION

Respondent's claim confronts fundamental limits on Section 2. Most basically, acquiring or continuing a monopoly is not unlawful; Section 2 condemns only limited types of unilateral conduct for doing so.[10] A firm that has lawfully

[10] *United States v. United States Steel Corp.*, 251 U.S. 417, 451 (1920) (Section 2 "does not compel competition"); *Kodak*, 504 U.S. at 480

obtained monopoly power thus need not dismantle its monopoly by subjecting itself to a process of creeping divestiture, shedding its customers one at a time by meeting every would-be rival's demand to buy its facilities or services at wholesale rates. *See Cavalier*, at *11 ("if a company such as Verizon, which was a longstanding legal monopoly, were asked to share its office space and to rent its telephone lines and other facilities to a competitor when it was not already in the business of renting office space, lines, or facilities, it could have legally refused the request to expand into such a business without violating § 2").

The "'central message of the Sherman Act'" is, instead, that all firms, including new entrants, "'must find new customers and higher profits through internal expansion–that is, by competing successfully rather than by arranging treaties with its competitors.'"[11] The Sherman Act promotes independent, unilateral rivalry; it treats cooperation among competitors with suspicion.[12] For a century, the Act has

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(power plus *conduct*); *Aspen*, 472 U.S. at 596 n.19; *see United States v. Microsoft Corp.*, 253 F.3d 34, 51, 58 (D.C. Cir. 2001) (*en banc*) ("merely possessing monopoly power is not itself an antitrust violation"; "having a monopoly does not by itself violate § 2"; "'the successful competitor, having been urged to compete, must not be turned on when he wins,'" quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) (per L. Hand, J.)).

[11] *Aspen*, 472 U.S. at 600 (quoting *United States v. Citizens & Southern Nat'l Bk.*, 422 U.S. 86, 116 (1975)).

[12] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-69 (1984) ("The Sherman Act contains a 'basic distinction between concerted and independent action.' *** Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. *** Concerted activity inherently is fraught with anticompetitive risk."); *see* 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 772d at 192-93 (2d ed. 2002).

overwhelmingly focused on *negative* duties (to avoid acts that hinder rivals' independent efforts to attract customers) and not *affirmative* ones.[13]

Respondent's claim, asserting a duty to give rivals adequate price-discounted affirmative assistance through sharing facilities and services, thus seeks to define an exceptional class of unlawful Section 2 conduct. This claim is unprecedented. And there are compelling reasons for not expanding Section 2 to embrace it.

A relevant analytic framework is laid out in *Town of Concord*, where the court applied "[t]raditional antitrust principles" in two steps: *first*, it explained why, regulation aside, relevant antitrust principles and policies, including workability and predictability requirements and institutional considerations, weighed against recognizing the claim at issue (915 F.2d at 21-25); *second*, it explained why that conclusion was cemented, as a matter of antitrust law itself, by the presence of regulation (915 F.2d at 21, 25-29). In *Goldwasser*, the opinion by Judge Diane Wood (antitrust law professor and former Antitrust Division official) followed a

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[13] *See Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1484 (7th Cir. 1991) (negative/affirmative line); *Olympia Equip.*, 797 F.2d at 375-76 ("'There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter.'"); S. Breyer, *Regulation and Its Reform* 157 (1982) (antitrust laws "act negatively, through a few highly general provisions *prohibiting* certain forms of private conduct. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do.").

The distinction between acts negatively interfering with others, on one hand, and a failure to lend affirmative assistance, on the other, is fundamental elsewhere in the law. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (relying on same line to hold that failure to provide assistance is not "deprivation" under Due Process Clause).

similar course to reject claims like respondent's. The asserted duties, the court explained, are "precisely the kinds of affirmative duties to help one's competitors that *** do not exist under the unadorned antitrust laws." *Id.* at 400. The court then added that the 1996 Act furnished an especially strong reason for refusing to expand Section 2 duties: the "antitrust laws would add nothing to the oversight already available under the 1996 law," and adding antitrust duties would impair the "elaborate system of negotiated agreements and enforcement established by the 1996 Act." *Id.* at 401. The Fourth Circuit recently agreed. *Cavalier*, *supra*. This Court should follow the same path and draw the same conclusion.

A. Respondent's Claim Falls Outside This Court's Precedents On Antitrust Duties To Deal

Duties to deal (and the "essential facilities" theory itself) are often traced to *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912). That case, however, involved *concerted* action: a multiparty agreement for operating a terminal railroad facility, in which the members discriminated against nonmembers. Likewise, *Associated Press v. United States*, 326 U.S. 1, 10-11 (1945), involved a multiparty agreement, one that openly discriminated in membership between those who would compete with existing members and those who would not. Both cases involved simple denial to one set of would-be customers (competitors) the precise service offering being made available to others (noncompetitors); and the remedy, upon finding a violation, was self-evident—forbid the selective denial.

The rare cases in which this Court has since found liability under Section 2 for *unilateral* refusal to deal with rivals all involve a similar, common fact: the defendant was already in the business of providing customers what it then denied on the same terms to a competitor. None of the cases involved refusals of new demands for discounted sales not otherwise being made voluntarily to others. As Judge Posner observed, these cases involve, as one "essential" fact, that the defendant chose to "withhold from one member of the public a service offered to the rest." *Olympia*, 797 F.2d at 376, 377; *see* R. Posner, *Antitrust Law* 204 (2d ed. 2001).

Thus, the defendant in *Aspen* refused to make full retail-price ski-lift ticket sales to its competitor, although it was making such sales to customers generally and had previously been voluntarily making such sales in collaboration with the competitor itself. 472 U.S. at 593-94, 608, 610-11. In *Otter Tail*, the defendant refused to wheel power for certain local-distribution competitors even though it was in the business of wheeling power for other such customers. 410 U.S. at 371, 378; *see United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 57 (D. Minn. 1971); *Cavalier*, at *11 (stressing that Otter Tail "*was* in the business of wheeling power and selling electricity at wholesale").[14] In *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the defendant newspaper flatly refused sales of advertising space to persons that were customers of the defendant's competitor (a radio station). In *Kodak*, *supra*, the defendant, while selling parts to customers generally, refused to sell them to customers who bought service from competing service providers–which the Court characterized as not a "unilateral refusal to deal" at all. 504 U.S. at 464 n.8.

That all of these decisions involved the simplest form of disparate treatment *among two groups of would-be customers seeking the identical offering*–not "discrimination" between oneself and outsider-competitors, which is intrinsic to com-

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[14] In addition, the Government rested liability in *Otter Tail* not just on a refusal to deal but also on sham litigation and "anticompetitive provisions in contracts with potential competitors" (SG Pet. Br. 13 n.3), amounting to territorial-allocation agreements (410 U.S. at 378). The 4-3 ruling in *Otter Tail*, thus, is not a pure refusal-to-deal ruling.

petition[15]–circumscribes the underlying antitrust principle. When the very terms refused to a competitor are voluntarily being offered to others (or previously were offered to the competitor itself), there may be reason at least to inquire why the disparity (or sudden change) reflects anything but an expectation of monopoly returns from eliminating competition: the defendant's own conduct has already presumptively revealed the dealing, rather than refusing to deal, to be in its own business interest. *See Aspen*, 472 U.S. at 603-04 & n.31. And the judicial remedy, if the disparity turns out to be unjustified, is straightforward: insist on equal availability of the same terms.

There is, in contrast, no prima facie reason to question a refusal of never-before-offered terms. Doing so would open every monopolist to the burden of entertaining and litigating demands to alter day-to-day business choices and to dismantle its retail monopoly—which Section 2 has not required. The judicial task would also be radically different. With no voluntarily adopted benchmark to use, just deciding whether a violation had occurred–well before the remedy stage–would require a fresh judicial determination of what "reasonable" prices and other terms the defendant ought to have provided.[16]

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[15] Even the Robinson-Patman Act, 15 U.S.C. § 13(a), applies to discrimination only between independent retailers, not between the defendant's own retail operation and independent retailers. 14 H. Hovenkamp, *Antitrust Law* ¶ 2312c at 23-24 (1999).

[16] *Cf.* Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 844 (1989) (explaining why concerted-action cases present fewer problems: "concerted exclusion is much easier to remedy," by inclusion on nondiscriminatory terms; "admission to a joint venture is a one-time remedy that does not require day-to-day control" by the courts); 3 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 658f at 130-31 (2d ed. 2002).

The unilateral conduct challenged in the present case plainly falls outside this Court's duty-to-deal precedents. Respondent does not and could not allege that Verizon was voluntarily in the business of offering price-discounted assistance of the forms now mandated under the 1996 Act. It was the 1996 Act that forced Verizon into the "brand new" wholesaler role at issue. *Verizon*, 535 U.S. at 528. Verizon is not turning away offers from competitors that it was, or is, freely accepting from noncompetitors; after all, AT&T and others are not being denied the opportunity to purchase retail services at retail rates. Respondent does not claim that Verizon denies one group of would-be customers the same thing on the same terms it provides another group; respondent claims that Verizon was deficient in performing a new regulatory duty to sell at *special* discounted rates and to treat outsider-rivals as well as it treats itself. JA 18, 39. And what respondent demands, just to decide if a violation has occurred, is a judicial determination of reasonable terms of dealing with outsiders that must be invented from scratch.

This Court's precedents do not encompass even a flat-out refusal to engage in such special discounted sales, let alone insufficient alacrity and responsiveness in making them. Even the "essential facilities" theory, as noted below, has not reached so far. Respondent thus needs an expansion of Section 2–which the Court should reject.

B. Recognizing Respondent's Claim Would Violate The Normal Requirement That Conduct, To Be Condemned As Predation, Make No Business Sense Apart From Enabling Monopoly Returns

Allowing respondent's claim would violate the general principle, reflected in *Aspen*, that defines the normal requirement for condemning unilateral conduct as unlawful under Section 2. As the Solicitor General has explained (SG Pet. Br. 11-16), conduct is lawful as long as it makes business sense *even apart* from any expectation of monopoly returns. A *necessary* requirement of illegality, at least in this setting, is that the conduct make no business sense *except for* its enabling monopoly returns.[17] But respondent's claim fails that test.

In *Aspen*, the Court condemned the refusal to deal because the defendant imposed on itself immediate up-front costs that made no business sense except for the prospect of recouping the losses later, through monopoly returns attending a rival's diminished ability to compete. Liability rested on a finding that the defendant's *accepting* the sales, rather than refusing them, "would have entailed no cost to [defendant] itself, would have provided it with immediate benefits, and would have satisfied its potential customers." 472 U.S. at 610. By terminating a preexisting, voluntary arrangement with the plaintiff, and refusing full-price sales, the defendant "sacrifice[d] short-run benefits and consumer goodwill"; that made no sense but for the hope of recouping the loss through later monopoly returns. 472 U.S. at 610-11; *id.* at 608 (defendant "elected to forgo *** short-run benefits because it was more interested in reducing competition *** over the long run"). In *Aspen*, and the other refusal-to-deal cases, the voluntary sales to *non-competing* customers strongly indicated that such sales make ordinary business sense, thus raising a question whether refusing the same terms to a competitor makes business sense other than by undermining competition to enable monopoly returns.

[17] It is questionable whether this requirement could be a *sufficient* condition of illegality, at least without fine-tuning the formulation to tie expected monopoly returns to impairing rivals' efficiency, rather than improving or exploiting the monopolist's own efficiency. An investment in innovation might, for example, be worthwhile only if monopoly returns are expected, yet should hardly be condemned. All that is relevant here is the simple formulation in text of a *necessary* condition of illegality–which respondent does not meet.

The requirement that conduct make no business sense except for its enablement of monopoly returns is hardly unique to refusals to deal. It underlies the predatory pricing standard of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), requiring proof *both* that the defendant was absorbing immediate losses (below-cost pricing) *and* that the losses are likely to be recouped through monopoly returns. It is also reflected in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986). Lower courts, too, have used this standard to define what is required for condemnation of unilateral action under Section 2.[18]

This standard, as a necessary requirement, gives coherent and workable content to the more general formulation that a "valid business reason[]" makes conduct lawful. *Aspen*, 472 U.S. at 605; *see Kodak*, 504 U.S. at 483. If the conduct is sustainable by the defendant without monopoly profits, *i.e.*, it

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[18] Judge Bork explained in *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir. 1986): "predation involves aggression against business rivals through the use of business practices that would not be considered profit maximizing except for the expectation that (1) actual rivals will be driven from the market, or the entry of potential rivals blocked or delayed, so that the predator will gain or retain a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds threatening to its realization of monopoly profits." For similar reliance on the need to find a short-term sacrifice sensible only because it enabled monopoly returns, see, *e.g., Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 523, 524 (5th Cir. 1999); *Advanced Health-Care Serv's. v. Radford Community Hosp.*, 910 F.2d 139, 148 (4th Cir. 1990); *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 803 (8th Cir. 1987). *See also Southern Pac. Communications Co. v. AT&T Co.*, 740 F.2d 980, 999 n.19 (D.C. Cir. 1984) ("The issue is whether the defendant's conduct is reasonable in light of its business needs ***."); *Trace X Chemical, Inc. v. Canadian Indus., Ltd.*, 738 F.2d 261, 266 (8th Cir. 1984) ("conduct without legitimate business purpose [is] conduct [that] makes sense only because it eliminates competition").

makes business sense without the prospect of monopoly profits, then it *is* "valid," "normal" conduct. Because such conduct cannot drive out an equally efficient rival (one with similar costs), condemning it would undermine basic antitrust policy by protecting comparative inefficiency. Leading commentators have used such an approach, focusing on *unprofitability* of the conduct without monopoly returns as an essential requirement for unlawful unilateral conduct. *See* Bork, *The Antitrust Paradox* 144-45 (1978) (predation is "an investment in future monopoly profits"); 3 *Antitrust Law* ¶ 658f at 131-32.[19]

There is no adequate substitute for this requirement. Without it, the "justification" standard is left undefined–which "begs the question of what it is" (3 *Antitrust Law* ¶ 658f at 131)–or, worse, undermines the policies that shape antitrust law. Section 2 affirmatively encourages vigorous competition by monopolists. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986). At the same time, standards that encourage costly litigation without overriding need harm the economy and the judicial system. *See Kodak*, 504 U.S. at 479 ("we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished"). Standards incapable of relatively predictable advance application,

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[19] "[A] 'business justification' should be something that one reasonably assumes would be profitable to the firm. At the same time, however, an offered justification does not succeed merely because it is profitable, for one can profit from both competitive and monopolistic acts. *** Nevertheless, not even a monopolist operates as a trustee for the public. A successful business justification need not improve market efficiency overall. *** *[S]hort-term profitability must be a complete defense, lest monopolists be obliged to join every proposed joint venture*. As a general matter, a firm is under no obligation to sacrifice its own profits in order to make the overall market larger." 3 *Antitrust Law* ¶ 658f at 131-32 (emphasis added).

standards that therefore spawn many costly treble-damages actions with uncertain jury judgments, carry grave risks of deterring competition, protecting inefficiency, and inducing massive waste.[20] These problems are particularly acute in the present setting, where the discounted assistance required under the 1996 Act is novel and distinctly unnatural for incumbents, yet new entrants persistently want more, cheaper, better assistance–a recipe for the spate of Section 2 suits against incumbent telephone companies that has in fact materialized. *See* BellSouth *Amicus* Br. 3, 15 (petition stage).

In particular, a standard that condemns "willfulness" or an "intent" to vanquish rivals is at best unhelpful and at worst highly misleading, especially to juries. 3 *Antitrust Law* ¶ 651b at 73-75; *compare Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1283-90, *en banc rehearing denied over dissent*, 314 F.3d 1282 (11th Cir. 2002), *cert. pending*, No. 02-1423. Willful, intentional striving to capture every available sale from competitors, even to the point of driving them out of business, is what impels competition.[21] A

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[20]*See Town of Concord*, 915 F.2d at 22 ("[A]ntitrust rules are court-administered rules. They must be clear enough for lawyers to explain them to clients. They must be administratively workable. *** They must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings."); Baumol & Ordover, *Use of Antitrust To Subvert Competition*, 28 J. L. & Econ. 247, 254 (1985) ("The potential defendant who cannot judge in advance with any reasonable degree of certainty whether its behavior will afterward be deemed illegal is particularly vulnerable to guerrilla warfare and intimidation into the sort of gentlemanly competitive behavior that is the antithesis of true competition.").

[21]*See* 3 *Antitrust Law* ¶ 601 at 5 ("The competitively aggressive firm always 'intends' to harm rivals if injury to rivals is a consequence of one's own increase in market share. *** [T]he same manifestations of intent can accompany competitive, socially beneficial acts (such as aggressive but remunerative price cutting) and anticompetitive, harmful acts (such as properly defined predatory pricing). As a result, bad intent is easily

firm's belief about whether means used make sense apart from expected monopoly returns may have evidentiary value in answering *that* question, but the means used, not the intent to get or keep a monopoly, must identify unlawful conduct.

Similarly, Section 2 cannot define illegal conduct by a standard requiring that competitors remain viable. Otherwise, Section 2 would forbid monopoly itself, which it does not– and which it cannot forbid without turning on the competitor who fully succeeds in what it has been exhorted to do: compete. *See* pages 14-15 & n. 10, *supra*. More generally, "harm to rivals" does not distinguish which conduct should be condemned. *Competition* harms all rivals and destroys many, and the efficiencies that Section 2 encourages (*e.g.*, innovation or economies of scale or scope) can perfectly well lead to a monopoly market. *Copperweld*, 467 U.S. at 767 ("an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster."); *Town of Concord*, 915 F.2d at 21, 23 ("a practice is not 'anticompetitive' simply because it harms competitors"; "[m]erely eliminating competitors is not necessarily anticompetitive, for *** even

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proven but seldom serves to distinguish situations where the defendant's conduct deserves condemnation from those in which it should be left alone."); *id.* ¶ 651b, at 75 ("in most circumstances the intent to [behave competitively] cannot be distinguished from the intent to [monopolize]"). The unhelpful, misleading character of an "intent" standard is well recognized. *E.g.*, *Microsoft*, 253 F.3d at 59; *Town of Concord*, 915 F.2d at 21; *A.A. Poultry Farms, Inc. v. Rose Acre Farms., Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989); *Olympia*, 797 F.2d at 379; *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins. Inc.*, 784 F.2d 1325, 1338-39 (7th Cir. 1986) (Easterbrook, J.); *Association for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 583 (D.C. Cir. 1984) (panel including Ruth Ginsburg, J.); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (Breyer, J.).

legitimate business activity that succeeds in helping a firm will likely disadvantage the firm's competitors").[22] Section 2 has never condemned such results, and it cannot do so without turning the Sherman Act into a law that suppresses rather than encourages efficiency.

Respondent's claim fails under the normal predation requirement, because the conduct at issue cannot be condemned as making no sense except for monopoly returns from lessened competition. SG Pet. Br. 11-16. What is challenged is Verizon's alleged failure to provide adequate assistance at forced discounts to rivals, even mere resellers, to help them sever Verizon's relationship with its retail customers. Respondent does not and could not responsibly allege, and the Second Circuit did not conclude, that even an outright refusal to provide such assistance–and to establish elaborate, costly mechanisms for dealing with intermediaries on such terms–would make no business sense for Verizon but for the prospect of monopoly-level returns.[23] It is granting,

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[22] *Ball Memorial*, 784 F.2d at 1338 ("Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals – sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds. *** Action that injures rivals *may* ultimately injure consumers, but it is also perfectly consistent with competition, and to deter aggressive conduct is to deter competition.").

[23] In New York, where 25% of the business and residential lines are now served by competitors, about two thirds of the competitors' lines are leased under UNE rates. FCC, *Local Telephone Competition*, *supra*, tables 6, 8. Verizon leases out those lines at an average of $19.14 per line, giving up the average of $41.98 per line revenue it obtains selling at full retail prices (and sacrificing the customer relationship that might lead to sales of more services). NYPSC, *Analysis of Local Exchange Service Competition in New York State* 10-12 (2002), www.dps.state.ny.us/telecom/telanalysis.htm; NYPSC, *Press Release*, www.dps.state.ny.us/fileroom/doc11086.pdf.

not denying, the discounted access, with the ensuing severance of important customer relationships, that requires a sacrifice that no ordinary competitor would freely make. The challenged failures in providing such access are therefore lawful under Section 2.

C. Recognizing Respondent's Claim Would Raise Special Unsolvable Problems Of Antitrust Policy, Including Inappropriate Transformation Of Judges And Juries Into Regulatory Agencies

Respondent's claim should fail even if it met the normal requirement for predatory conduct. This novel claim for affirmative assistance in the piece-by-piece uprooting of local telephone companies' historical monopolies raises distinctive antitrust policy problems, both substantive and institutional. These problems of forced sharing are not solvable in a system of treble-damages jury-determined litigation. They traditionally have been, and should remain, the preserve of special regulatory regimes.

1. Substantively, respondent's proposed Section 2 duty to provide rivals adequate affirmative assistance presents two unavoidable problems. *First*: Forced sharing reduces the incentives that antitrust law centrally encourages–to make investments in competing facilities and thus raise output. Incumbents will invest less if they must share the rewards of their investments, because rivals will use the incumbents' investments that turn out well, while incumbents alone shoulder the burden of investments that do not. At the same time, forced sharing diminishes the incentive of *new entrants* to make independent investments whenever the incumbent's facilities or services are available at prices low enough to make the choice of sharing less costly or risky.[24]

Second: A duty of forced sharing on terms not already being offered to others creates significant costs of implementation. *See Iowa Utilities*, 525 U.S. at 428 (Breyer, J., concurring in relevant part) ("compulsory sharing can have significant administrative and social costs"; "someone must oversee the terms and conditions of that sharing"); *United States Telecom Ass'n*, 290 F.3d at 427 (quoted above).[25] There must be means for negotiating and litigating over the arrangements between incumbent and any number of new entrants; means for allocating facilities or services between incumbents and rivals, and between rivals themselves; means for handling billing and collection in two layers rather than

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[24] *See Iowa Utilities*, 525 U.S. at 428-29 (Breyer, J., concurring in relevant part) (sharing "may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research, or labor"; "[n]or can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement"); *United States Telecom Ass'n*, 290 F.3d at 424, 427 ("Some innovations pan out, others do not. If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines."; "Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."); 3A *Antitrust Law* ¶ 771b at 171-72 ("[f]orcing a firm to share *** discourages [competing] firms from developing their own alternative inputs").

[25] Two economists skeptical of incumbents' legal positions have explained the high implementation costs and inherent uncertainties of a regime under which entrants demand ever more and incumbents resist, producing persistent disputes over terms, to be resolved based on standards that produce no reliably correct answers. Joskow & Noll, *The Bell Doctrine: Applications in Telecommunications, Electricity, and Other Network Industries*, 51 Stan. L. Rev. 1249, 1281-84 (1999).

one; means for relaying and responding to communications–about new service orders, service changes, service quality, and so forth–from customer to entrant back up to the actual service supplier. How high these costs can get is shown by the multibillion dollar investments incumbents have made to create new "operation support systems" and to manage the negotiate-arbitrate-litigate system that the 1996 Act establishes.

That investment-deterring risks and transaction costs accompany sharing duties is a fact familiar from property law. One of the most "essential" aspects of property, acknowledged under the Constitution itself, is the right to exclude others, *i.e.*, not to have to share involuntarily. *Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Exclusive property rights–and clarity of such rights–are important for an efficient, competitive, capital-intensive market system, in which owners can confidently make risky investments for which they alone will reap the rewards. *See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730-31 (2002) ("clarity" in property rights "is essential to promote progress, because it enables efficient investment in innovation"); Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harv. L. Rev. 621, 624 (1998) (multiple rights of access diminish investment incentives).

2. To recognize these risks and costs does not imply that there never could be a potential benefit from compelled sharing. Congress plainly predicted that such benefits would result from the regulatory regime it created in the 1996 Act. *See Verizon*, 535 U.S. at 510 n.27. But there is no available basis for courts (much less juries) reliably to determine when the possibility of benefits overrides the risks and costs. The only approach is experimental, reasoned balancing, with constant adjustment–for which antitrust is distinctly unsuited.

The risk that the costs of a sharing regime will outweigh benefits are greatest when the benefits are thinnest–which they are in a case like the present one, where the sharing is so complete that the rival simply resells the incumbent's service, relying not only on the incumbent's facilities but on its personnel to operate them. In such cases, the rival is competing only to reduce costs within the marketing slice of the business, making no contribution to finding cheaper or better equipment to reduce all other service *creation and delivery* costs. Resale thus presents the smallest chance that benefits will outweigh the costs of adding the middleman layer and deterring independent investments. For such reasons, several courts of appeals, well before the 1996 Act, rejected claims under Section 2 to insert such "non-competitive middlem[e]n" as resellers into what had evolved as integrated retail businesses.[26] When a market has cut out the middleman, antitrust has not reinserted one by force.

Pure resale presents only the most extreme case, for the difficulties of confidently striking a net-beneficial balance are insuperable generally–even when particular competitors have some of their own equipment and facilities to use in conjunction with the incumbent's facilities. There is simply no basis to assume that "more sharing" will enhance efficiency, not when it is forced at discounted prices rather than evolving voluntarily.[27] Even the 1996 Act is no more

[26] *HyPoint Tech., Inc. v. Hewlett-Packard Co.*, 949 F.2d 874, 877-78 (6th Cir. 1991); *MCI*, 708 F.2d at 1149; *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 353 (5th Cir. 1980).

[27] *See Iowa Utilities*, 525 U.S. at 429 (Breyer, J., concurring in relevant part) ("The more complex the facilities, the more central their relation to the firm's managerial responsibilities, the more extensive the sharing demanded, the more likely these [investment-deterring and transaction] costs will become serious. *** And the more serious they become, the more likely they will offset any economic or competitive gain that a sharing requirement might otherwise provide. *** Nor are any added

than an experiment.[28] The need to weigh risks and costs against potential benefits is intrinsic to respondent's claim. Yet the standards for doing so have none of the reliability required for a treble-damages, jury-determined antitrust system, in which uncertainty itself adds massive litigation costs and risks, creating inevitable pressure toward *over*generous terms of sharing.[29]

Most concretely, any determination of overall costs and benefits from a sharing duty necessarily depends on the specific price and other terms of sharing. Yet determining such terms, here in a technically complex and fast-changing context, is a task that historically, and properly, has been reserved for special agency-administered regimes. Regulatory agencies are characterized by industry-specific expertise developed over time, procedural and information-gathering flexibility, continuity of attention, and, perhaps most important, the ability to experiment prospectively and to alter policies as evidence suggests that an experiment has failed or circumstances have changed. There is no guarantee that regulators will always get the terms right, but with their expertise and flexibility, they have a clear comparative advantage over antitrust litigation. *Far East Conf. v. United*

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costs imposed by more extensive [sharing] requirements necessarily offset by the added potential for competition.").

[28] "We cannot say whether the passage of time will show competition prompted by TELRIC [the low-price methodology prescribed by the FCC] to be an illusion ***." *Verizon*, 535 U.S. at 523. Subject to constitutional constraints, of course, Congress is free to adopt the experiment of industry improvement.

[29] *See* Baumol & Ordover, 28 J.L. & Econ. at 254, 264 ("Mere accusation and trial subjects the defendant firm to enormous expenses and even greater ex ante risks of an expensive adverse decision, even if it transpires ex post on the basis of convincing evidence that it is completely innocent."); *Associated General Contractors v. California Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983) (justification needed to allow "potentially massive factual controversy to proceed").

States, 342 U.S. 570, 574-75 (1952) (specialization, experience, flexibility). And, of course, regulators' ability to approach system-wide consistency is unmatched by an antitrust regime in which results can vary from case to case and jury to jury.

The comparative institutional weakness of antitrust courts is reflected in antitrust law's extreme (if not absolute) reluctance to take on such tasks. Because determinations of proper prices are deeply uncertain ("[e]ven full-time regulators have great difficulty" making such determinations), and price regulation "inevitably distorts the incentive to reduce costs or engage in further innovation" and tends to chill new entry that higher prices might attract, "[a]ntitrust courts have rightly resisted undertaking the heavy, continuous, and unguided burden of supervising the economic performance of business firms."[30] Then-Judge Breyer explained in *Town of Concord*, 915 F.2d at 25, in the related context of price-squeeze law, "why antitrust courts normally avoid direct price administration":

> [H]ow is a judge or jury to determine a "fair price?" Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition "would have set" were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years?

[30] 3 *Antitrust Law* ¶ 720b at 256 (footnote omitted, noting rare exceptions embodied in judicial decrees); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927) (recognizing problems with antitrust price administration); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir. 1898) (Taft, J.) (to examine reasonableness of price is to "set sail on a sea of doubt"); *see Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1225 (9th Cir. 1997) (rejecting even a remedial "reasonable price" order, restricting order to "non-discriminatory pricing").

> Further, how is the court to decide the proper size of the price "gap?" Must it be large enough for all independent competing firms to make a "living profit," no matter how inefficient they may be? If not, how does one identify the "inefficient" firms? And how should the court respond when costs or demands change over time, as they inevitably will?

Tasks at least as inappropriate as those are absolutely unavoidable under respondent's view of Section 2. Unlike in *Aspen* and similar cases, judges and juries adjudicating claims like respondent's would have no ability simply to use voluntarily adopted terms of dealing with other customers as the benchmark for dealing with rivals. Such terms would have to be determined afresh.

These refractory problems could not be sidestepped by simply transposing regulatory determinations under the 1996 Act into the Sherman Act. The savings clause of the 1996 Act, by leaving antitrust standards where the Act found them, precludes antitrust adoption of 1996 Act standards just because they are conveniently available under the 1996 Act. 47 U.S.C. § 152 note, Pet. App. 103a. Substantively, moreover, the standards do not fit: the 1996 Act's policy of aggressive jump-starting of new entry (to uproot monopolies, an "entirely new objective," *Verizon*, 535 U.S. at 488) has never been part of the Sherman Act. For pricing particularly, while the 1996 Act has led to special low prices, antitrust law itself does not bar a monopolist from charging any price it finds profitable. *See* 3 *Antitrust Law* ¶ 720a at 254-56; SG Pet. Br. 11 (monopolists may charge "whatever rates they can obtain in the marketplace").[31] The FCC has noted that, in

[31] *See Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1412-13 (7th Cir. 1995) (Posner, C.J.); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 548-49 (9th Cir. 1991); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 252 (D.C. Cir. 1987); *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir. 1984) (Breyer, J.); *Trace X*, 738 F.2d at 267-68;

specific contrast to the 1996 Act standards, "the essential facilities doctrine allows monopolists to continue charging monopoly rates for use of their facilities." *UNE Remand Order*, 15 FCCR 3696, ¶ 60 (1999); *see* 3A *Antitrust Law* ¶ 771b at 172, ¶ 772c2 at 188, ¶ 773b2 at 203, ¶ 774d at 217; SG Pet. Br. 14 ("The antitrust laws do not require monopolists to sacrifice profits to sell to competitors at a discount.").

There would, in short, be no escaping the imposition of novel and inappropriate regulatory tasks on antitrust judges and juries if Section 2 were now expanded to embrace respondent's claim. Antitrust judges and juries would become the shadow, omnipresent regulators of the telecommunications industry–even more than the district court that supervised the Bell breakup decree. The Bell decree regime was pointedly rejected by Congress in the 1996 Act. 47 U.S.C. § 152 note (1996 Act § 601); H.R. Conf. Rep. 104-458 at 198-201 (1996).

D. The 1996 Act Regime Makes A Novel Extension Of Section 2 Duties Especially Inadvisable

Section 2 would be the wrong vehicle for respondent's new duty of discounted affirmative assistance even if no regulatory regime were in place to address the very matters at issue. In fact, the 1996 Act already establishes such a regulatory regime. This regime provides conclusive reason not to transform Section 2, and antitrust courts, as respondent's claim demands.

1. "Immunity" Aside, The 1996 Act Regime Counts Against Respondent's Novel Section 2 Duty

The Second Circuit discussed the 1996 Act primarily in explaining why it creates no "antitrust immunity." Pet. App.

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979).

31a-33a. But Verizon did not, and does not, argue for antitrust immunity, *i.e.*, for the implied repeal needed to abrogate an otherwise-established Sherman Act proscription based on another statute at odds with the Sherman Act. Rather, the role of the 1996 Act in the market, and the institutional landscape, shapes the decision whether to expand antitrust standards themselves.

Even outside the antitrust setting, and without invoking any implied-repeal principle, this Court has looked to later-enacted, specific statutes to reject or confine claims under earlier, more general statutes that had not previously been extended to the situation at hand, and that did not unavoidably cover it.[32] That approach is particularly apt for the 1996 Act. The Act's savings clause (47 U.S.C. § 152 note, Pet. App. 103a) indicates that previous limits on Section 2 assistance duties were *not* altered by the Act's creation of new assistance obligations. *See Cavalier*, at *12.

Antitrust law has long recognized that regulatory regimes help shape Section 2 standards.[33] *Town of Concord* illustrates

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[32] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000); *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998); *Patterson v. McLean Credit Union*, 491 U.S. 164, 180-82 (1989) (accommodating 42 U.S.C. § 1981 to Title VII); *United States v. Fausto*, 484 U.S. 439, 453 (1988); *cf. J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 & n.9 (2001) (later specific statute overriding prior statute already construed to contrary, versus later specific statute governing where earlier statute not previously construed to contrary).

[33] *See Citizens & S. Nat'l Bk.*, 422 U.S. at 91 ("careful account must be taken of the pervasive federal and state regulation characteristic of the industry"); *Phonetele, Inc. v. AT&T Co.*, 664 F.2d 716, 742 (9th Cir. 1981) (Kennedy, J.) (antitrust courts must "accommodate the peculiar circumstances under which regulated entities operate. *** '[A]ntitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation. Just as the administrative agency must consider the competitive premises of the antitrust laws, the antitrust court must consider the

one of the several ways in which regulation can be relevant. There, the First Circuit reversed a verdict and rejected a Section 2 claim of price squeeze, as a matter of law, because both the wholesale and retail levels of the product (electric power) were price regulated. Regulation, the court explained, "dramatically alters the calculus of antitrust harms and benefits" and "significantly diminishes the likelihood of major antitrust harm"; it also creates special potential for institutional interference, so that "the relevant antitrust considerations differ significantly, in degree and in kind." 915 F.2d at 25, 28. That use of regulation in shaping antitrust standards requires no *trial*. *Town of Concord*, far from relying on any adjudication of the "effectiveness" of the regulatory regime, relies entirely on publicly available legal and economic materials, with no citation to any record of a regulatory-effectiveness trial. Here, the pertinent aspects of the 1996 Act are plain on the face of the statute and beyond triable dispute, as *Goldwasser* held. *See also Cavalier*, *supra*.[34]

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peculiarities of an industry as recognized in a regulatory statute.'") (quoting Areeda treatise), *modified*, 1982 WL 11277 (9th Cir.).

[34] This Court has found even the demanding immunity standard of strong incompatibility met without trial. *E.g.*, *United States v. National Ass'n of Securities Dealers*, 422 U.S. 694 (1975); *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975).

A quite distinct use of regulation is reflected in the principle that a Section 2 claim can be defeated based on the defendant's good-faith reliance on regulatory policies asserted to be incompatible with competition. *E.g.*, *Southern Pacific*, 740 F.2d at 1009-10; *MCI*, 708 F.2d at 1081; *Phonetele*, 664 F.2d at 716; *Almeda Mall*, 615 F.2d at 354. In that context, a record may have to be developed, and a trial may have to be held, on certain issues–*e.g.*, good faith reliance–if, for example, regulatory policies have to be discerned from how a general discretionary authorization to regulate has in fact been exercised.

2. The 1996 Act Regime Substantially Eliminates Competitive Risks And An Antitrust Duty Threatens To Impair That Regime

a. The 1996 Act regime reduces to insignificance any possibility of competitive harm, *i.e.*, any possibility of "'more-than-temporary harmful effects on competition,'" of a market-wide and "enduring adverse impact on competition itself." *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 482 (5th Cir. 2000) (quoting 3A *Antitrust Law* ¶ 782 at 259); *American Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns Inc.*, 108 F.3d 1147, 1152 (9th Cir. 1997). The substantive guarantees of assistance under Section 251 are, to understate matters, no *less* demanding of incumbents than Section 2. And, procedurally, the 1996 Act guarantees any new entrant a right to a fast, judicially reviewable agency determination of any assistance claim under those standards–all further backed by systemic reviews in connection with the Bell companies' long-distance authority. Nothing remotely similar was present under prior regulatory regimes, like the regime in *Otter Tail*, 410 U.S. at 375, which did not guarantee the access at issue at all. Pet. App. 35a.

Under the uniquely comprehensive 1996 Act, every challenged aspect of an incumbent's dealing with a competitor falls into one of two categories. If the challenged conduct is authorized by the competitor-incumbent agreement, then it has, by statute, already been approved by regulators: indeed, such approval *either* was agreed to by the competitor *or* was imposed by regulators with either party entitled to judicial review. If, on the other hand, the challenged conduct is not authorized by the competitor-incumbent agreement, then *either* the competitor never sought an agreement barring such conduct, despite the statutory right to have done so (including agency and court review), *or* the conduct is a violation of the agreement and can be redressed through enforcement mechanisms defined in the agreement or imposed by regulators. This case is illustrative: multiple levels of enforcement redressed the problem underlying the present case within a few months.

Unlike prior regulatory schemes, the 1996 Act is not one of broad agency discretion to delay consideration of claims for long periods. Under the 1996 Act procedures, there is no significant possibility that the regulatory agencies, and then the courts on review of those agencies, would miss any sufficiently strong and market-affecting claim of assistance that could be even a candidate for antitrust recognition. For that to occur, multiple agencies and the courts would have to fail systematically in their jobs under the 1996 Act–in which case there is as much reason to expect antitrust judges and juries to fail as well. The expertise, flexibility, and multiple layers of scrutiny built into the 1996 Act regime make that regime far more likely to make reliable judgments about competition. As *Goldwasser* correctly concluded, coverage by Section 2 "would add nothing to the oversight already available under the 1996 law." 222 F.3d at 401.

b. As *Goldwasser* also concluded, *id.*, a new antitrust duty, administered through discrete jury determinations and treble-damages awards, seriously risks impairing the 1996 Act regime. That regime contemplates an intrinsically experimental, shifting *balance* by FCC and state policy-makers to ensure, among other things, that sharing does not get pushed to the point where it reduces independent investment and raises transaction costs to self-defeating levels. The striking and altering of that balance would be threatened by the looming prospect that juries might impose class-action treble-damages liability for too little sharing.

Any standard of Section 2 liability that would allow respondent's claim would leave, at a minimum, a vast range of uncertainty about what antitrust judges or juries will condemn. An antitrust liability finding may conflict with a past agency determination or simply bypass agency processes for making the critical judgments. An antitrust judgment that a particular form of assistance was deficient at some point in time will make it much harder for regulators to wean entrants off that form of help later on, even after regulators have reevaluated evidence of an initial experiment or market conditions have changed.

More broadly, adding antitrust processes to the regulatory processes addressing the same matters vastly inflates costs, draining resources from actual marketplace competition. And the costs of class-action antitrust litigation and uncertain risks of treble-damages liability, even limited to violating regulator-imposed requirements, is certain to skew the behavior of all participants in regulatory processes. Regulators will have to be more cautious about experimenting with new sharing obligations, if any violations are then likely to engage the heavy artillery of antitrust. Incumbents will have to be more cautious about accepting–rather than contesting in court–each new regulatory imposition, if part of the cost of acquiescing is new exposure to treble-damages litigation.

The regulatory task of carrying out the experiment of the 1996 Act is difficult enough without all these distractions. It should not be further complicated by creating a new Section 2 duty to duplicate, supplement, override, or otherwise interfere with the multi-layer regime of the 1996 Act.[35]

[35] *See* Remarks of John A. Rogovin, FCC Acting General Counsel, Manhattan Institute (Oct. 30, 2002), available at www.manhattan-institute.org/html/clp_10-30-02.htm ("unquestionably there is going to be a lot of tension" between antitrust litigation and FCC implementation of 1996 Act; "[I]t's difficult to imagine how a private case getting into this 'essential facilities' issue—dealing, for example, with the local loop—is not going to bump up quite seriously into what the commission is doing").

E. Respondent's Claim Should Not Be Recognized Under An "Essential Facilities" or "Monopoly Leveraging" Theory

Respondent's claim cannot properly be sustained on the non-Supreme-Court theories invoked by the Second Circuit.

1. Essential Facilities

The Second Circuit invoked an "essential facilities" duty of a monopolist "to provide competitors with reasonable access to *** facilities under the monopolist's control and without which one cannot effectively compete in a given market." Pet. App. 29a-30a. But this Court has not recognized any such sweeping theory of Section 2 liability. Indeed, the Court expressly avoided reliance on the doctrine in *Aspen*, 472 U.S. at 611 n.44, and has not recognized it elsewhere. *See Iowa Utils.*, 525 U.S. at 428 (Breyer, J., concurring in part and dissenting in part).

This case is no occasion to adopt any such doctrine. Leading commentators have urged outright repudiation of the doctrine as raising just the sorts of substantive and institutional problems discussed above–problems inherent in the Second Circuit's open-ended declaration that the doctrine guarantees "reasonable" terms of access.[36] But whether any

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[36] *See United States Telecom Ass'n*, 290 F.3d at 424, 427 n.4 ("scholars have raised very serious questions about the wisdom of the essential facilities doctrine as a justification for judicial mandates of competitor access, and accompanying judicial price setting"); 3A *Antitrust Law* ¶¶ 770e, 773a at 167-169, 195-98; *id.* ¶ 771c at 173 ("Lest there be any doubt, we state our belief that the essential facility doctrine is both harmful and unnecessary and should be abandoned."); Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 St. Louis U. L.J. 433, 479-80 (1987) (long-time Antitrust Division economist and scholar: "The Supreme Court has never acknowledged the essential facility doctrine. The Court's abstention was wise. The lower courts should reject the doctrine.").

such doctrine should be adopted in other circumstances, no such doctrine could soundly embrace respondent's claim, for all the reasons of precedent and principle already explained.

In fact, even in the lower courts, the doctrine, though frequently *articulated*, has almost never been relied on to support liability for unilateral action–certainly never for claims like respondent's. *See* Pet. 17-18 n.12 (quoting explanation of AT&T, a principal proponent of 1996 Act rights, that essential-facility analysis had never extended to a context like that of Section 251). Recognizing how profoundly difficult it is for courts to prescribe terms of access, the lower courts have repeatedly identified limitations that have led to rejection of claim after claim. They have explained, for example, that a defendant need not transform its business from a service business to a facilities-rental business,[37] that the defendant had not *denied* access,[38] or that a defendant need not give "preferential access" or "abandon its facilities" or "cease using its own facility so that [a rival] can begin using it."[39]

Strikingly, there may be only a single case of liability for unilateral action being upheld under the doctrine–the Seventh Circuit's *MCI* case in 1983.[40] But that decision does not

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[37] *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544-45 (4th Cir. 1991); *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641 (10th Cir. 1992).

[38] *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *see Alaska Airlines*, 948 F.2d at 545-46.

[39] *MCI*, 708 F.2d at 1133; *cf. City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1366-67 (9th Cir. 1992).

[40] *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), which seems to have introduced the "essential facilities" term, involved a multiparty *contract* of exclusivity. *See also Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986) (concerted action).

support recognition of respondent's claim. Indeed, it *rejected* liability on a claim similar to respondent's and found liability only on a claim closer to the plaintiff's claim in *Aspen*.

Thus, *MCI* rejected a demand that AT&T allow MCI to buy and resell AT&T's long-distance service in order for MCI to fill out its still-young long-distance network. MCI was relegated to the (usual) step-by-step process of building its own. 708 F.2d at 1148-49. As the Seventh Circuit later explained (*Burris*, 935 F.2d at 1484), "AT&T's refusal to voluntarily assume 'the extraordinary obligation to fill in the gaps in its competitor's network' did not suffice to support a finding that it was trying to maintain its monopoly of long-distance telephone service by anticompetitive means." *Goldwasser* relied on *that* part of *MCI* to reject local-market-access claims like respondent's. 222 F.3d at 400.

MCI upheld liability, in contrast, based on AT&T's refusal to sell to MCI, as a competitor, the very same connections (for "FX" and "CCSA" service) that AT&T was already in the business of offering to "local customers independent telephone companies and others." 708 F.2d at 1144; *Bell System Tariff Offerings*, 46 FCC2d 413, 426 (1984) ("Bell presently has arrangements with *** numerous independent telephone companies for access to its local distribution facilities for the purpose of enabling *** [them] to provide FX and CCSA services"), discussed at 708 F.2d at 1097, 1134; *see MCI Communications Corp. v. AT&T Co.*, 462 F. Supp. 1072, 1092 (N.D. Ill. 1978). Indeed, MCI sought damages based simply on the price AT&T was voluntarily charging Western Union. 708 F.2d at 1095, 1165. As in *Aspen*, therefore, the court was not being asked to transform itself into a regulatory agency that would determine afresh the "reasonable" price and other terms of dealing. It was being asked to vindicate a principle of equal dealing among outside customers, and that is all it did.

That is enough to exclude respondent's claim, but the circumstances present in *MCI* further distinguish this case. MCI was not "asking that AT&T in any way abandon its facilities" (708 F.2d at 1133), which loop rental and physical collocation under Section 251 do require. *See Local Competition Order*, 11 FCCR 15,499, ¶ 385 (1996). Moreover, like the power network in *Otter Tail*, local service operated under exclusive franchises at the time of *MCI* (708 F.2d at 1093), thus protecting incumbents' local investments and mooting any issue of deterring competitors' local investments (which were already barred). Section 253 today removes legal protections against local entry. Further, in *MCI* there was no law guaranteeing prompt, reviewable agency action on demands for access: it took almost a decade for the FCC, acting under broadly discretionary standards, to provide MCI the access it sought. Today, the 1996 Act indisputably provides, by plain textual guarantee, quick regulatory action on access demands, eliminating any meaningful prospect of an uncorrected genuine competitive problem.

2. Monopoly Leveraging

The Second Circuit also relied on "monopoly leveraging" as a distinct Section 2 theory–forbidding "use" of one monopoly to "gain a competitive advantage" in another market, even when the two "markets" are vertically related (wholesale and retail). Pet. App. 30a. But that theory, largely discredited even in the lower courts (Pet. 21-22), can provide no separate ground of Section 2 liability here. Any such doctrine could not reach respondent's claim for all the reasons already discussed. Even more fundamentally, however, any such standard for liability is inconsistent with the statute, precedent, and policy.

A liability standard that hinges on merely "using" a monopoly does nothing to distinguish efficiency-enhancing or competition-inviting conduct from efficiency-harming or competition-deterring conduct. A monopoly may be "used" to charge *high* prices, which positively *invite* new entry. Or it may be "used" to charge *low* but nonpredatory prices, serving efficiency by exploiting economies that come from monopoly scale. *Brooke Group*, 509 U.S. at 223-24; *see* SG Pet. Br. 17 ("use of monopoly power is not unlawful"). The normal requirements for condemning conduct–rather than "using" monopoly–are critical to protecting against consumer-harming challenges to superior efficiency from multi-market integration or superior aggressiveness. The threat from such challenges is particularly stark when the "two markets" are simply the (1) making and (2) selling of the same service, which are commonly "integrated" throughout the economy. *See* Posner, *Antitrust Law*, at 224. And a "use" standard addresses none of the *distinctive extra* reasons for limiting Section 2 duties of affirmative assistance.

Similarly, both the statute and this Court's precedent make clear that Section 2 condemns unilateral conduct "*only* when it actually monopolizes or dangerously threatens to do so." *Spectrum Sports*, 506 U.S. at 459 (emphasis added); *see Copperweld*, 467 U.S. at 767 ("The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization.").[41] "Gaining a competitive advantage" in the second market does not amount to actual or threatened monopolization of that market (or it would add nothing to those requirements) and says nothing at all about any effect on the first market. As *Copperweld* explains, 467 U.S. at 767, Section 2 provides wide breathing space for unilateral conduct, lest aggressive competition be chilled, precisely by insisting on actual or threatened monopolization.

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[41] *United States v. Griffith*, 334 U.S. 100, 107 (1948), had one statement about "competitive advantage." But even that statement, when later quoted, was tied to getting or keeping "monopoly power" (*Kodak*, 504 U.S. at 483); *Griffith* did not involve *vertical* integration; and the statement cannot be read in isolation without conflicting with the statute, *Spectrum Sports*, and *Copperweld*. *See* 3 *Antitrust Law* ¶ 613 at 30-31; *id.* ¶ 652b at 91-92.

For these reasons, there is no separate offense of monopoly leveraging under Section 2. "Leveraging" as a concept describes various actions relating to two markets—some beneficial, some perhaps not. What distinguishes them, under Section 2, are the requirements for predatory conduct. It is those requirements that must be met, and they are not.

II. RESPONDENT LACKS STATUTORY STANDING

Respondent is not a customer of Verizon, or even a would-be customer of Verizon, but a customer of Verizon's customer, AT&T. Respondent does not allege excessive prices or deficient service available from Verizon; any such claim would run into filed-tariff-doctrine problems. Rather, respondent alleges poor AT&T service caused by the harm that Verizon did to AT&T. This claim cannot support statutory standing.

Allowing respondent to sue would violate the long-standing principle construing federal statutes not to reach those injured only indirectly. *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918) (Holmes, J.) ("The general tendency of the law *** is not to go beyond the first step."). This "requirement" demands a "direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." *Holmes*, 503 U.S. at 268-69. The requirement is embodied in the antitrust laws. *See* 15 U.S.C. § 15; *Holmes*, 503 U.S. at 267 n.13; *Associated Gen. Contractors*, 459 U.S. at 534, 540 (citing *Darnell-Taenzer*). It is reflected specifically in antitrust law's bar on indirect-purchaser standing. *Utilicorp*, *supra*; *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Here, the alleged injury was indirect: it derived entirely from harm to the direct customer.

The Second Circuit cited this Court's decision in *Blue Shield v. McCready* to support respondent's standing, but plaintiff's injury in *McCready* was *direct*: the defendant refused to pay her. *See Associated Gen. Contractors*, 459 U.S. at 540 n.44 (*McCready* involved "direct" injury). And the Second Circuit cited no basis for creating an exception to the normal rule when the directly injured firm is also a competitor of the defendant. The injury to the indirect purchaser remains indirect in such a case, and the reasons for the direct-injury requirement continue to apply. *Cf. Associated Gen. Contractors*, 459 U.S. at 527-28 (harmed intermediaries were competitors of some defendants).

The policies behind the direct-purchaser restriction make standing particularly inappropriate here. There are obvious difficulties in determining how much if any of the poor service quality that respondent says it suffered was due to Verizon, and how much due to AT&T itself, or to any of AT&T's other suppliers. *See Holmes*, 503 U.S. at 269; *Associated Gen. Contractors*, 459 U.S. at 542-43. Some amount of the compensation received by the direct customer (AT&T) may already have been passed through to respondent, in the form of improved service quality or lower prices. *See Holmes*, 503 U.S. at 269; *Associated Gen. Contractors*, 459 at 543-544. And AT&T and other competitors can be "counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Holmes*, 503 U.S. at 270; *Associated Gen. Contractors*, 459 U.S. at 541- 542.

Concentrating full enforcement power in the directly injured party promotes enforcement. It also raises the likelihood that the parties that actually do the sharing will resolve their disputes efficiently, without the prospect of further litigation and liability exposure hovering over every attempt to resolve disputes.[42] Here, the regulators approved an exclusive nonjudicial dispute resolution mechanism written into the AT&T-Verizon agreement. Treble-damages class actions, filed by indirect customers, can only deter efficient resolution of the countless differences that will inevitably arise under a sharing scheme as novel and vast as the one created by the 1996 Act.

CONCLUSION

The judgment of the court of appeals reinstating the antitrust claims should be reversed.

Respectfully submitted.

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[42] *See* Epstein, *Into the Frying Pan: Standing and Privity Under the Telecommunications Act of 1996 and Beyond* (Dec. 2002), __ Col. Sci. & Tech. L. Rev. ___, http://ssrn.com/abstract_id=362620; Landes & Posner, *Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws?*, 46 U. Chi. L. Rev. 602, 604-05 (1979) ("allowing indirect purchasers to sue would probably retard rather than advance enforcement").