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 RESPONDENT

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QUESTION PRESENTED

Did the Court of Appeals err in reversing the District Court's dismissal of respondent's antitrust claims?

RULE 29.6 STATEMENT

Respondent is a limited-liability partnership organized under the laws of the State of New York. It has no parent corporation, and no publicly-held firm owns a 10% or more interest in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

LEGISLATIVE MATERIALS

ADMINISTRATIVE RULINGS

BRIEF FOR RESPONDENT

Section 2 of the Sherman Act, 15 U.S.C. § 2, bars a company with monopoly power from excluding rivals by anticompetitive acts – that is, acts not premised on the monopolist's superior efficiency. This Court and the courts of appeals have consistently applied that standard to evaluate claims that a monopolist has anticompetitively refused to deal with competitors, including claims that a monopolist has denied competitors access to essential facilities. Verizon would have the Court scrap this settled law and replace it with a standard that immunizes a monopolist's exclusionary conduct except in the rare case in which the monopolist has sacrificed short-term profits in pursuit of a long-term monopoly. Ironically, Verizon advances this contention in the very context in which the antitrust standards Verizon seeks to discard have been spectacularly successful in promoting consumer welfare. The antitrust cases that ended the Bell System's long distance and telephone equipment monopolies – which were based on claims that Bell refused to deal with competitors and denied them access to essential facilities – brought about sharply reduced prices, a proliferation of new consumer options, and an explosion in investment and innovation in the telecommunications sector.

Had Verizon's proposed standard been the law then, those cases would have failed. If it is adopted now, the prospects for real competition in the market for local telephone service – the last bastion of the Bell monopoly – will darken considerably. It is no happenstance that the Telecommunications Act of 1996 includes an express antitrust savings clause. Congress understood that regulation alone might not suffice to end monopoly control of local telephone markets, and that antitrust enforcement might be needed if incumbents resisted the transformation to competition. Indeed, that is precisely what happened in the long distance and equipment markets. Verizon has advanced no persuasive reason for ignoring this history and rewriting Section 2 law to immunize the conduct at issue here. To the contrary, as will be shown, the theoretical policy arguments Verizon advances are irrelevant in the present context, and if applied generally would diminish consumer welfare.

COUNTERSTATEMENT OF THE CASE

A. The Bell System Monopoly.

Until 1984, the vast majority of the nation's local telephone service was provided by companies that were part of the integrated Bell System. These state-franchised monopolies were affiliated with AT&T, which monopolized the long distance market, and Western Electric, which monopolized the business of manufacturing telecommunications equipment. The Bell System's dominance depended upon its control of the networks used to provide local telephone service. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 413 (1999) (Breyer, J., concurring in part, dissenting in part). Such networks consist of lines (local loops) from each customer's home or business to switches, as well as lines (trunks or transport facilities) between the switches. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 489-90 (2002).

The Bell monopoly initially came into existence through a combination of anticompetitive conduct and government facilitation. In the early 1900s, independents owned as many phone stations as did the Bell System. Roger G. Noll & Bruce M. Owen, *The Anticompetitive Uses of Regulation:* United States v. AT&T, *in The Antitrust Revolution* (J. Kwoka & L. White eds., 1989). But the Bell System refused to allow competitors to interconnect with Bell's network, making it impossible for the customers of competitors to call or receive calls from Bell customers. The Bell System likewise refused to allow connection of telephones and other non-Bell equipment to the network. *Id.*; *see also* Michael Kellogg *et al.*, *Federal Telecommunications Law* 11 (1992); H.R. Rep. No. 103-559(II) at 32 (1994) ("H. Rep."). This strategy succeeded, and the Bell System grew into the dominant provider of telephone service. State public utility commissions solidified Bell's control "by refusing to certify any telephone company which would duplicate service already available." H. Rep. at 34.

In subsequent years, state commissions remained content to superintend a traditional rate-of-return regime in local markets. Because local service was considered a "natural monopoly," the incumbents were given exclusive franchises, and state commissions set retail prices. *AT&T Corp.*, 525 U.S. at 371; *Verizon*, 535 U.S. at 477. On the federal level, the Communications Act of 1934 applied similar rate regulation to AT&T's interstate services. Operating with the safety net of government protection and guaranteed rates of return, the Bell System built up the vast local telecommunications infrastructure that exists today.

In the 1950s and 1960s, the FCC, "recognizing the feasibility of greater competition, passed regulations to facilitate competitive entry." *MCI Telecomm. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 220 (1994). In 1957, the FCC required the Bell System to permit customers to interconnect customer premises equipment to the network, thereby making competition in the equipment market possible. *See Hush-A-Phone Corp. v. American Tel. & Tel. Co.*, 22 F.C.C. 112, 114 (1957). The FCC reiterated the requirement in a proceeding in 1968. *See In re Use of the Carterfone Device in Message Toll Tel. Serv.*, 13 F.C.C.2d

420 (1968); *Litton Sys., Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785 (2d Cir. 1983). Shortly thereafter, the FCC also required the Bell System to permit long distance competitors to interconnect to the Bell network. *See In re Applications of Microwave Communications, Inc. for Construction Permits*, 18 F.C.C.2d 953, ¶ 37 (1969); *In re Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Servs.*, 29 F.C.C.2d 870 (1971), *aff'd*, 513 F.2d 1142 (9th Cir. 1975); *United States v. American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1354-57 (D.D.C. 1981) ("*AT&T*").

These regulatory efforts failed to produce competition. "The Bell System's reaction was characteristically hostile [and] the FCC's attempt to ascertain the competitive implications proved characteristically halting." H. Rep. at 46; *see also* Stephen Coll, *The Deal of the Century* 373 (1986) (describing FCC testimony regarding its inability to keep the Bell System in line). Thus, "[b]y the fall of 1974, it was again apparent that regulation would not curtail the Bell System's anticompetitive tendencies – indeed, that it was characterized by inaction and equivocation." H. Rep. at 47. Thereafter, when the FCC imposed additional requirements that local Bell Operating Companies ("BOCs") provide reasonable and nondiscriminatory interconnection to long distance carriers (and imposed detailed interconnection and unbundling requirements on AT&T's long distance network),[1] the Bell System persisted in its evasions by

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[1] *See, e.g., In re Bell System Tariff Offerings of Local Distribution Facilities*, 46 F.C.C.2d 413 (1974); *In re Proposals for New or Revised Classes of Interstate and Foreign Message Toll Tel. Serv.*, 56 F.C.C.2d 593, 599-613 (1975); *In re Proposal for New or Revised Classes of Interstate and Foreign Message Toll Tel. Serv.*, 58 F.C.C.2d 736 (1976); *In re Regulatory Policies Concerning Resale and Shared Use of Common Carrier Servs. and Facilities*, 60 F.C.C.2d 261 (1976); *In re Regulatory*

"commit[ing] a number of anticompetitive acts" that the FCC left unremedied. H. Rep. at 58.

Regulation's inability to overcome the Bell monopoly prompted antitrust litigation. *See AT&T Corp.*, 525 U.S. at 413 (recounting history); *United States v. American Tel. & Tel.*, 552 F. Supp. 131, 160-70 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). MCI sued, claiming that even after the FCC required Bell to interconnect its local networks with long distance competitors, Bell continued to refuse to provide the interconnection necessary for MCI to compete effectively. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1131-35 (7th Cir. 1983) ("*MCI*"). Moreover, when Bell eventually acceded to interconnection for a limited number of MCI services, it insisted that MCI interconnect in a manner that increased MCI's costs and decreased the reliability of its service. *Id.* at 1150-51. Bell also failed to provide repair procedures appropriate for wholesalers, providing only procedures ordinarily used by retail customers. *Id.* at 1151-52. Based on this evidence, a jury found a violation of Section 2 of the Sherman Act. The Seventh Circuit affirmed, relying on this Court's decisions in *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912), and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). *See MCI,* 708 F.2d at 1132.

At about the same time, the Second Circuit upheld a jury verdict finding that the Bell System's parallel efforts to limit interconnection of non-Bell telephone equipment violated

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Policies Concerning Resale and Shared Use of Common Carrier Domestic Pub. Switched Network Servs., 83 F.C.C.2d 167 (1980); *In re Restrictions on Interconnection*, 60 F.C.C.2d 939 (1976); *In re MTS and WATS Markets Structure*, 81 F.C.C.2d 177 (1980); *In re American Tel. & Tel. Co. and Bell Sys. Operating Cos. Tariff*, 90 F.C.C.2d 202 (1982).

Section 2. *Litton Sys.*, 700 F.2d at 811. Even after the FCC required the Bell System to permit such interconnection, Bell sabotaged competition by requiring customers to pay substantial fees for an interface device before they could connect their equipment to the network, making it difficult for customers to obtain the device, and delaying "cutovers – the final step involved in switching from AT&T to non-AT&T equipment." *Id.* at 811, 815. Bell required the network interface device even though "its own people thought that the device was a redundant 'artificial barrier' to competition" and even though it knew that the FCC would eventually forbid the device's use. *Id.*; *see also id.* at 798-802, 814. Bell hoped, however, to delay regulatory action and thereby maintain its control over the retail market.

The United States brought its own enforcement action, contending that the Bell System was using its monopoly control over the local network to obstruct competition in the long distance and equipment markets. H. Rep. at 47. The government presented evidence showing that Bell initially refused to deal with potential long distance competitors altogether. After FCC regulations required interconnection, Bell strung competitors along in negotiations by raising "groundless technical objections," persisted in denying interconnection that had the best technical properties, provided inferior repair procedures, and engaged in other exclusionary practices. *AT&T*, 524 F. Supp. at 1354-57; *Antitrust Revolution*, *supra*, at 304-05. The government presented similar evidence with respect to equipment. The government maintained that the Bell System's desire to maintain its retail "revenues and market position" by increasing rivals' costs and delaying their ability to interconnect was not an acceptable justification for this anticompetitive conduct. *AT&T*, 524 F. Supp. at 1349-51.

Denying a motion for judgment at the close of the government's case, the court concluded that, if unrebutted, the government's evidence established a Section 2 violation, because "[a]ny company which controls an 'essential facility' or a 'strategic bottleneck' in the market violates the antitrust laws if it fails to make access to that facility available to its competitors on fair and reasonable terms that do not disadvantage them." *Id.* at 1352-53. The court rejected the argument that antitrust liability would interfere with the FCC's regulatory scheme, explaining that the regulations did not "require[] or encourage[]" anticompetitive actions by Bell and served a purpose consistent with that of the antitrust laws. *United States v. American Tel. & Tel. Co.*, 461 F. Supp. 1314, 1328 (D.D.C. 1978).

Long distance and equipment competition took root as a result of these antitrust actions. The private cases – including some 35 private antitrust actions that had been filed by the time the government commenced its action in 1974 – deterred continuing anticompetitive conduct, and the government's case resulted in a 1982 consent decree ("MFJ") that divested from AT&T the incumbent local exchange carriers (which controlled local services on a regional basis), and barred those companies from entering the markets for long distance, equipment manufacturing, and other services. *See AT&T*, 552 F. Supp. at 131. Competition soon led to a "steep" decrease in AT&T's market shares in long distance service and equipment manufacturing, a "striking" decline in price, and an "unprecedented degree of innovation." H. Rep. at 56; *see also In re Policy and Rules Concerning Rates for Dominant Carriers*, 4 F.C.C.R. 2873, ¶ 26 (1989); *Federal Telecommunications Law*, *supra*, at 533-34.

B. The 1996 Act.

In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 251-276 ("the 1996 Act"), Congress sought to translate the access obligations that created long distance and equipment competition into comparable access obligations for the local exchange market. *Verizon*, 535 U.S. at 487.

To allow competition to exist at all, Congress preempted state monopoly franchise laws and similar legal barriers to local competition. 47 U.S.C. § 253. Congress then turned to the biggest hurdle: encouraging competition in the face of the incumbents' control of the existing local network, which was the product of nearly a century of state-protected monopoly. Congress recognized that competition had developed in the long distance market through a combination of leasing and facilities-based competition, and structured the 1996 Act accordingly. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, ¶ 12 (1996) ("*Local Competition Order*"). Under § 251(c) of the Act, a would-be local competitor – including, for instance, the post-divestiture AT&T – "can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network 'on an unbundled basis'; and it can interconnect its own facilities with the incumbent's network." *AT&T Corp.*, 525 U.S. at 371; *see also Verizon*, 535 U.S. at 491-92.

The Act gave the FCC authority to oversee this regulatory regime, including the Act's unbundling requirements, which were designed to provide entrants with use of "facilities that are very expensive to duplicate (say, loop elements) in order to be able to compete in other, more sensibly duplicable elements (say, digital switches or signal-multiplexing technology)." *Verizon*, 535 U.S. at 510 n.27. Analogizing to the access obligations required by the FCC and the MFJ for the long distance markets, *Local Competition Order* ¶ 520, the FCC ordered unbundling of local loops, switching and transport, and required incumbents to allow competitors to order, provision, bill, and perform maintenance and repair in "substantially the same time and manner that an incumbent can for itself," *id.* ¶ 518.

The Act also authorized the FCC to establish the methodology for setting rates for leasing of unbundled elements. *See* 47 U.S.C. §§ 251(c)(2)-(3), 252(d)(1). The FCC concluded that these rates should be based on "Total Element Long Run Incremental Cost" ("TELRIC"), which calculates the rate for network elements on the basis of what it would cost to provide the functions the element provides efficiently using up-to-date technology. *Verizon*, 535 U.S. at 495-96. Because TELRIC "should produce rates for monopoly elements and services that approximate what the incumbent LECs would be able to charge if there were a competitive market for such offerings," TELRIC enables incumbents "to recover a fair return on their investment" – including a reasonable profit. *Local Competition Order* ¶ 738.

In Section 271 of the 1996 Act, Congress authorized BOCs to provide in-region long-distance service once they satisfied (on a state-by-state basis) a "competitive checklist." *See* 47 U.S.C. § 271(c). Foremost among the checklist requirements are the obligations to offer interconnection and nondiscriminatory access to network elements in accordance with the 1996 Act's local competition provisions.

Congress was well aware, however, of the "inherent . . . limitations" of regulation, and of the role of antitrust suits in creating long distance and telephone equipment competition. *See, e.g.*, H. Rep. at 57-58; *see also* 142 Cong. Rec. H1145 (daily ed. Feb. 1, 1996) (statement of Rep. Conyers) ("[T]his legislation would not be possible had the Justice Department not broken up the old Bell monopoly in 1984. . . . [B]y maintaining the role of the antitrust laws, the bill helps to ensure that the Bells cannot use their market power to impede competition and harm consumers."). The 1996 Act thus includes an antitrust savings clause making explicit that "*nothing* in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 1996 Act, 110 Stat. 56, 143, § 601(b)(1) (codified at 47 U.S.C. § 152 note) (emphasis added); *see also* 142 Cong. Rec. S687 (daily ed. Feb. 1, 1996).[2]

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[2] *See, e.g.*, S. Rep. No. 104-23, at 17 (1995) ("[T]he provisions of this bill shall not be construed to grant immunity from any future antitrust action against any entity referred to in the bill."); Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-458, at 201 (1996) (the savings clause "prevents affected parties from asserting that the bill impliedly preempts other laws"); 141 Cong. Rec. S8154 (daily ed. June 12, 1995) (statement of Sen. Hollings) ("Section 2 of the Sherman Antitrust Act is untouched, absolutely untouched"); 142 Cong. Rec. S687 (daily ed. Feb. 1, 1996) (statement of Sen. Thurmond) ("The second important antitrust issue in this legislation is the unequivocal antitrust savings clause that explicitly maintains the full force of the antitrust laws in this vital industry. Today we take for granted that the antitrust laws apply to the communications sector. . . . Application of the antitrust laws is the most reliable, time-tested means of ensuring that competition, and the innovation it fosters, can flourish to benefit consumers and the economy."); 141 Cong. Rec. S18586 (daily ed. Dec. 14, 1995) (statement of Sen. Leahy) ("I firmly believe that we must rely on the bipartisan principles of antitrust law in order to move as quickly as possible toward competition in all segments of the telecommunications industry, and away from regulation. Relying on

C. The Incumbents' Anticompetitive Conduct Since The 1996 Act.

When the 1996 Act was passed, the hope was that the incumbents would swiftly comply with local competition requirements in order to obtain Section 271 authorization to provide long distance service, as Congress contemplated. The reality has been different. Like AT&T before them, the incumbents aggressively resisted competition on the merits, waging trench warfare in courts and agencies across the country to block implementation of the Act's requirements, and using a variety of time-tested stratagems to deny competitors the access promised by the Act. At the same time, the incumbents aggressively sought Section 271 approval to provide long distance service. In rejecting the first five Section 271 applications, the FCC found that the incumbents rejected a high percentage of competitors' orders (thus forcing competitors to submit the orders multiple times), delayed provisioning of competitors' orders, modified the requested due dates on those orders, failed to inform competitors of the status of their orders, and provided inaccurate wholesale bills.[3] State commissions have made similar findings.[4]

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antitrust principles is vital to ensure that the free market will work to spur competition and reduce government involvement in the industry.").

[3] *See, e.g.*, *In re Application of Ameritech Michigan*, 12 F.C.C.R. 20543, ¶¶ 172-221 (1997); *In re Application of BellSouth Corp. (South Carolina)*, 13 F.C.C.R. 539, ¶¶ 82-181 (1997); *In re Application by BellSouth Corp. (Louisiana)*, 13 F.C.C.R. 6245, ¶¶ 20-58 (1998).

[4] *Joint Petition of Nextlink Pennsylvania, Inc. et al.*, Docket No. P-00991648 at 219 (Pa. Pub. Util. Comm'n, Aug. 26, 1999) (documenting "numerous examples where [Verizon] has abused its market power by providing competitors with less than comparable access to its network or engaged in other discriminatory conduct that prevented [Verizon] customers from switching to a competitor"); *see also, e.g., In re*

Even after the FCC granted its first Section 271 application in 1999, BOCs were forced to withdraw nine subsequent applications (for sixteen States) in response to evidence demonstrating anticompetitive practices like those that led to the rejection of the first five applications.[5] As recently as April 2003, SBC withdrew its application for Section 271 authority in Michigan because it had overbilled competitors by millions of dollars. *See, e.g.*, Charles E. Ramirez, *SBC Puts Long Distance on Hold*, Detroit News, Apr. 17, 2003, at E01. And while the incumbents for the most part have now taken the minimal steps necessary to convince the FCC to grant them Section 271 approval, this has served only to remove the primary incentive provided by the Act for compliance with the Act's local competition obligations. In fact, just months after obtaining approval in New York, Verizon entered a consent decree in which it agreed to pay $3 million to the U.S. Treasury and $10 million to competitors as a result of the discriminatory treatment it provided competitors. Pet. App. 5a. Although Verizon downplays this incident, Verizon Br. 6, the reality is that Verizon "lost" hundreds of thousands of competitors'

Application and Complaint of WorldCom Techs. Inc. Against Ameritech Michigan, Case No. U-12072 (Mich. Pub. Serv. Comm'n, Mar. 3, 2000) (finding that Ameritech denied WorldCom access to unbundled transport in bad faith, which was anticompetitive and discriminatory).

[5] *See, e.g., In re Application by Qwest Multi-State Application to Provide In-Region, InterLATA Services*, Order, DA-02-2230 (FCC rel. Sept. 10, 2002) (terminating Qwest application based on letter of withdrawal); *In re Application of Verizon New England Inc., et al. to Provide In-Region InterLATA Services in Massachusetts*, Order, DA-00-2851 (FCC rel. Dec. 18, 2000) (terminating Verizon application based on letter of withdrawal); News Release, FCC, *Statement of FCC Chairman Michael Powell on Withdrawal of BellSouth 271 Application* (Dec. 20, 2001) (noting BellSouth withdrawal based on questions regarding adequacy of operational support systems and data integrity).

orders over a period of several months and was therefore unable to process, or even inform competitors of the status of, those orders.

As the FCC Chairman explained to Congress, competitors "may have been stymied by practices of incumbent local exchange carriers that appear designed to slow the development of local competition."[6] Indeed, Verizon continues to resist competitive entry by carriers seeking to compete entirely with their own facilities, or seeking to lease unbundled loops from Verizon and combine those with their own facilities. The FCC recently concluded that Verizon had unreasonably delayed by months the interconnection of a competitive provider, Core Communications, and had failed even to inform this new entrant that the delay would occur or when the delay would be resolved, thereby frustrating its business plans and preventing it from serving customers on the facilities it had already built. *In re Core Communications, Inc. v. Verizon Maryland Inc.*, File No. EB-01-MD-007, FCC 03-96 (FCC rel. Apr. 23, 2003). The FCC has also investigated Verizon's failure to provide competitors with reasonable access to the collocation space competitors need to connect Verizon's loops to their own switches and transport facilities. *In re Verizon Communications, Inc.*, 16 F.C.C.R. 16270 (2001) (consent decree in which Verizon agreed to pay $77,000); *In re GTE Service Corp.*, 15 F.C.C.R. 13946 (2000) (consent decree in which GTE agreed to pay $2,700,000).

Notwithstanding the FCC's recognition of the problem, regulatory agencies have been unable to ensure that

[6] News Release, FCC, *FCC Chairman Powell Recommends Increased FCC Enforcement Powers for Local Telephone Competition* (May 7, 2001).

incumbents provide reasonable access to the facilities competitors need in the local market. FCC enforcement is sporadic, with complaints languishing, and the prospect that the FCC would actually withdraw Section 271 long distance authority is far too speculative to provide any meaningful deterrence. *See, e.g.*, Joel I. Klein, *The Race for Local Competition: A Long Distance Run, Not a Sprint* 6-7 (Nov. 5, 1997) ("As for 'sticks,' there are real questions at this point; the Act itself calls for no real penalties for non-compliance . . . ."); Philip J. Weiser, Goldwasser, *The Telecomm Act, and Reflections on Antitrust Remedies*, 55 Admin. L. Rev. 1, 8 (2003). The FCC Chairman has noted that FCC authority is "insufficient to punish and to deter violations in many instances," particularly given "the vast resources" of the incumbents. *See supra* n.6. Indeed, FCC fines are a mere "cost of doing business" for carriers earning billions per year. *FCC Chairman Michael K. Powell: Agenda and Plans for Reform of the FCC: Hearing Before the Subcomm. on Telecomm. and the Internet of the House Comm. on Energy and Commerce*, 107th Cong. 17, 60-61 (Mar. 29, 2001) (testimony of Chairman Powell); *see also id.* (noting that fines are "trivial" and enforcement tools are "inadequate with billion dollar industries").

Thus, seven years after passage of the 1996 Act, competitors serve only 13.2% of the lines in the country, and only 10.2% of the residential and small business lines.[7]

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[7] *See* News Release, FCC, *Local Telephone Competition: Status as of December 31, 2002* at 1 (June 12, 2003) ("*Local Telephone Competition*"). Verizon boasts that competitors have achieved a 25% market share in New York, Verizon Br. 5, but New York remains an extremely concentrated market by any measure, and competitors have been more successful in New York than in any other state. *Local Telephone Competition* at table 6. Even in New York, competitive gains

D. Antitrust Litigation Since The 1996 Act.

Once again, the inherent limitations of the regulatory regime have spurred antitrust litigation. Competitors across the country have brought antitrust actions challenging the incumbents' efforts to obstruct competitive entry into local markets. Contrary to Verizon's suggestion here, these cases do not involve claims by competitors who merely seek to "resell" incumbent services. For example, Cavalier, a Verizon competitor in Virginia, challenged Verizon's baseless refusal to interconnect its own network with the facilities-based network of switches and transport facilities Cavalier had constructed, Verizon's multifarious efforts to prevent Cavalier from leasing local loops to connect with Cavalier's network, and Verizon's efforts to sabotage the process of transferring subscribers to Cavalier's network. *See* Complaint, *Cavalier Tel., LLC v. Verizon Va. Inc.*, Civ. A. No. 03:01CV736 (E.D. Va. filed Nov. 1, 2001). Other competitive carriers have raised nearly identical claims about Verizon and other incumbents. *See, e.g.*, *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3640 (U.S. Mar. 20, 2003) (No. 02-1423); *MetroNet Servs. Corp. v. US West Communications*, 329 F.3d 986 (9th Cir. 2003). Consumers have likewise sued, challenging the poor service and inflated prices in local markets that have resulted from the anticompetitive conduct of Verizon and the other incumbents.

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have stalled. After increasing from 9% to 23% between year-end 1999 and June 30, 2001, competitors' market shares increased only to 25% by December 31, 2001, and did not increase at all in 2002. *Id.* at tables 6, 7.

E. The Proceedings In This Case.

Trinko was a local customer of AT&T in New York who received inferior service and, at times, no service at all, as a result of Verizon's anticompetitive actions. On behalf of itself and other customers of competitive local exchange carriers ("CLECs") in the Verizon region (except for former GTE territory), Trinko brought this antitrust action alleging that Verizon "engaged in exclusionary and anticompetitive behavior by, *inter alia*, attempting to exclude or reduce the market share of rivals in the Local Phone Service on a basis other than efficiency." Am. Compl. ¶ 52, JA46. Among other things, the amended complaint alleged that Verizon "has not afforded CLECs access to the local loop on a par with its own access." *Id.* ¶ 21, JA39; *see also id.* ¶ 24, JA40. Trinko also alleged that Verizon "has filled orders of CLEC customers [only] after filling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for CLEC customers . . . , and has systematically failed to inform CLECs of the status of their customers' orders." *Id.* ¶ 21, JA39; *see also id.* ¶ 54, JA46. Trinko further explained that Verizon acted with "no valid business reason." *Id.* ¶ 57, JA47. Although the amended complaint cited Verizon's mishandling of orders in New York that led to Verizon's March 9, 2000 consent decree with the FCC as one example of that misconduct, *see id.* ¶ 22, JA40, the allegations extend to States throughout Verizon's region and cover a wide range of anticompetitive conduct. Trinko alleged that, as a result of Verizon's conduct, consumers have been injured "in their business and property interests," and that overall competition in the market was diminished. *Id.* ¶¶ 58-59, JA47-48.

The district court dismissed Trinko's case on the theory that the antitrust laws do not impose on a monopolist the duty to deal with its competitors. The Second Circuit reversed, relying on precedent of this Court holding that the right to refuse to deal with competitors is not unqualified. Pet. App. 28a-29a (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985)). "For example," the court explained, "a monopolist has a duty to provide competitors with reasonable access to 'essential facilities.'" *Id.* 29a. The court also relied on a monopoly leveraging theory. *Id.* 30a-31a. The court further found that the purposes of the antitrust laws and regulatory requirements were "in synch," and that, at least on a motion to dismiss, "the record does not allow us to conclude that the regulatory process has successfully eliminated the risk of anticompetitive behavior." *Id.* 38a.

SUMMARY OF ARGUMENT

I. Trinko's amended complaint states a claim under Section 2 of the Sherman Act. Trinko alleges that Verizon has monopoly power and is maintaining that power through exclusionary conduct – that is, through conduct that "exclude[s] rivals on some basis other than efficiency." *Aspen*, 472 U.S. at 605. The amended complaint specifically alleges that Verizon is denying competitors reasonable access to the local loop and is sabotaging the process of switching customers from Verizon's network to those of its competitors. Trinko also specifically alleges that this conduct excludes AT&T on a basis other than efficiency, and that Verizon lacks any legitimate business justification for its conduct. These allegations easily satisfy Federal Rule of Civil Procedure 8.

Although purporting to challenge the sufficiency of these particular allegations under existing law, Verizon is in reality seeking a radical revision of that law. As Verizon would have it, conduct should be deemed exclusionary for Section

2 purposes only if the monopolist's conduct involves a sacrifice of short-term profits.

II. Whatever its merits in other contexts, the Section 2 standard advocated by Verizon is completely inappropriate in this case because the policy arguments Verizon makes to support it are all inapposite in the present context. Imposing Section 2 liability on Verizon for denying access to the local loop creates no risk of chilling investment and innovation. The local loop is an essential facility that cannot, as a practical matter, be duplicated. Requiring Verizon to provide AT&T access to the loop under Section 2 thus deters no innovation that would otherwise occur. In any event, the 1996 Act already requires Verizon to give competitors access to the loop on terms set by the regulatory regime. Section 2 thus can impose no incremental risk of deterring investment. Enforcing Section 2 here creates no risk of collusion for similar reasons. Nor does Section 2 enforcement create problems of administration. No antitrust court need set and supervise the terms of access because the 1996 Act has created a regulatory regime that is already doing just that.

Longstanding and uncontroversial principles of antitrust law require particular sensitivity to the regulatory milieu in which a monopolist's conduct occurs, thus foreclosing Verizon's contention that the 1996 Act should be ignored in evaluating Trinko's Section 2 claim. Moreover, far from providing a reason to preclude antitrust enforcement, the 1996 Act contains an express instruction that the antitrust laws shall apply to conduct also regulated under the Act.

III. Even apart from the special context of this case, Verizon's unitary "sacrifice" standard is misguided. That standard would immunize all misconduct by a monopolist that obstructs competition, except in the rare instance in which a monopolist sacrifices short-term profits in the process. Such a sweeping cutback of Section 2 liability finds no support in this Court's precedents, and is unwarranted as a matter of antitrust policy and common sense. If it were adopted, the touchstone under Section 2 would no longer be consumer welfare – it would be the monopolist's welfare. Moreover, the rule makes no more sense in the specific context of refusals to deal than it does generally. And the additional showing of "discrimination" that Verizon proposes for refusal to deal cases would make all of these problems worse.

IV. Trinko has standing. As a consumer in a market Verizon monopolizes, Trinko falls well within the class of persons authorized to sue by the plain terms of Section 4 of the Clayton Act. Moreover, Trinko suffers direct harm to his business or property because his injuries are "inextricably intertwined" with Verizon's antitrust violation. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 473 (1982). For this reason, and because this case does not involve the pass-through of an overcharge, the exception to standing set forth in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), has no application here.

ARGUMENT

A firm violates Section 2 of the Sherman Act when it possesses monopoly power in a relevant market and maintains that power by engaging in anticompetitive conduct to "'foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482-83 (1992) (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)). As this case comes to the Court, Verizon's principal argument is that Trinko has not alleged the second of these elements –

anticompetitive conduct – sufficiently to survive a motion to dismiss.

Anticompetitive or "exclusionary" conduct is behavior that "not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits, or does so in an unnecessarily restrictive way." *Aspen*, 472 U.S. at 605 n.32 (quoting III Phililp E. Areeda & Donald F. Turner, *Antitrust Law* 78 (1978)). Conduct is exclusionary if it harms the competitive process; harm to individual competitors does not suffice. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). Conduct is exclusionary in this sense if a monopolist "has been attempting to exclude rivals on some basis other than efficiency." *Aspen*, 472 U.S. at 605 (internal quotation marks omitted); *see also, e.g., Kodak*, 504 U.S. at 482-85. The dividing line is between conduct that advances competition's basic goals – lower prices, greater consumer choice, better products, and more efficient production methods – and conduct that obstructs them.

The conduct Trinko alleges in the amended complaint falls well within any reasonable Section 2 definition of exclusionary conduct. To overturn the Second Circuit's decision, Verizon is thus forced to advocate a standard that would drastically revise Section 2. But Verizon's argument is meritless, particularly in light of the 1996 Act and the nature of the facilities at issue – both of which render Verizon's conduct the paradigmatic case for refusal to deal liability.

I. TRINKO'S AMENDED COMPLAINT ALLEGES EXCLUSIONARY CONDUCT UNDER SETTLED SECTION 2 LAW.

Trinko's amended complaint alleges a valid cause of action under well-established theories of Section 2 liability.

First, the amended complaint alleges facts sufficient to support a "refusal to deal" claim under this Court's Section 2 precedents. Although as a general matter a firm can choose with whom to deal, a monopolist's refusal to deal with a competitor can impermissibly obstruct the goals of competition. That is merely a specific example of the general principle that "[w]here a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws – or that might even be viewed as procompetitive – can take on exclusionary connotations when practiced by a monopolist." *Kodak*, 504 U.S. at 487 (Scalia, J., dissenting). Thus, where a monopolist refuses to cooperate with a competitor in a situation where some cooperation is indispensable to effective competition, that conduct can be "exclusionary" in the absence of a "legitimate competitive reason" for the refusal. *Kodak*, 504 U.S. at 483 n.32; *see also Aspen*, 472 U.S. at 603; *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986).

That a monopolist can violate Section 2 by refusing to deal with competitors has been settled law for the better part of a century. *See, e.g.*, *Kodak*, 504 U.S. at 483-86 (refusal by manufacturer of photocopiers to sell parts to competitors in the market for servicing those copiers); *Aspen*, 472 U.S. at 601 (refusal to sell a multi-area ski ticket in cooperation with competitor); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (refusal to sell power at wholesale or transmit power over defendant's lines to its rivals in the retail market); *Lorain Journal Co. v. United States*, 342 U.S. 143, 154-55 (1951); *Eastern Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) (refusal to sell "photographic materials" at wholesale prices to retail competitor); *see also, e.g.*, *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912).[8]

Second, Trinko's amended complaint alleges facts sufficient to support an "essential facilities" claim under legal standards that have been uniformly recognized by the courts of appeals.[9] An "essential facility" is a facility competitors cannot reasonably duplicate and to which they need access in order to have an opportunity to compete at all.

The essential facilities analysis applied in the circuits generally, and followed by the Second Circuit in this case, Pet. App. 29a-30a, is set forth in *MCI*. That case upheld a jury verdict that AT&T violated Section 2 by unlawfully refusing (or effectively refusing) to interconnect MCI, which sought to provide long-distance service, "with the local distribution facilities of Bell operating companies." *MCI*, 708 F.2d at 1132-33; *see also supra* p.5. The *MCI* court

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[8] Contrary to Verizon's contention, the fact that *Terminal Railroad* involved concerted action was not central to the Court's Section 2 holding, *see* 224 U.S. at 409; rather, the decision turned on the essentiality of the facilities that the defendants controlled, *see id.* at 397, 405 (explaining that the "geographical and topographical situation" requiring competitors to use defendants' facilities was "most extraordinary," and that the Court based its "conclusion . . . , in large measure, on that fact").

[9] *See, e.g.*, *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 & n.44 (D.C. Cir. 1977); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *Covad*, 299 F.3d at 1285–88; *see also* Robert Pitofsky *et al.*, *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 Antitrust L.J. 443, 448-49 & nn.23-24 (2002) (collecting cases).

identified four elements that a plaintiff would have to establish as a prerequisite to finding Section 2 liability: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *Id.*; *see also AT&T*, 524 F. Supp. at 1352-53. The four-prong test is not divorced from the general requirements of Section 2, but simply recognizes the fact of essentiality as "helpful" in identifying circumstances in which a refusal to deal is most likely to contribute to maintenance of monopoly power. US Br. 21-22. Denial of the essential facility must substantially harm the competitive process, and must lack a legitimate business justification.

Although the "essential facilities" doctrine has been criticized on the ground that it may (if not rigorously applied) reach further than Section 2 properly should, even its detractors have recognized that the Seventh Circuit's *MCI* decision was correct, *see* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 853 n.21 (1989), and that the doctrine is properly applied in a regulated industry in which the facility (of which the local loop is the paradigmatic example) simply cannot be duplicated but can be used to shut down completely any competition in what would otherwise be a viably competitive market. *See, e.g.*, IIIA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 771c, at 173, ¶ 773a, at 196, ¶ 773b, at 199, ¶ 787c, at 310 (2d ed. 2002) ("Areeda") (explaining that the essential facilities doctrine is arguably appropriate in the context of a natural or regulated monopoly, such as hard-wired local telephone service).

Trinko's amended complaint states a claim under this settled law.[10] The complaint's allegations must be taken as true, *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), and must be construed "in favor of the complaining party." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979). The amended complaint gives Verizon fair notice of the basis of each element of Trinko's case, and alleges a course of exclusionary conduct that would be rational for a monopolist in Verizon's position to undertake. *Cf. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Specifically, Trinko alleges that Verizon used its monopoly power in the local phone service market, *see* Am. Compl. ¶¶ 50, 56, JA45, 47, to block competitors' access to the local loop – thereby adversely affecting service to the competitors' customers – by, "[a]mong other things," failing to "fill in a timely manner, or not at all, a substantial number of orders for CLEC customers." *Id.* ¶ 21, JA39; *see also id.* ¶¶ 22, 54, JA40, 54-

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[10] The amended complaint also states a claim under monopoly leveraging doctrine, which prohibits a monopolist from "exploit[ing] his dominant position in one market to expand his empire into the next." *Kodak*, 504 U.S. at 479 n.29 (quoting *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 611 (1953)). Verizon attacks the Second Circuit for permitting a finding of liability under this doctrine absent an attempt to monopolize or actual monopolization of the retail market. But while it is true that there is disagreement among the Circuits on whether mere "competitive advantage" in the second market is sufficient to state a Section 2 claim, *see, e.g.*, *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256 (2d Cir. 2001), that disagreement is not implicated here. Trinko alleges that Verizon has leveraged its power over the regulated market for the local loop to maintain a full-fledged monopoly in the retail local service market. *See* US Br. 26 n.12. No more is required in order to state a claim. *See, e.g.*, *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); *United States v. Griffith*, 334 U.S. 100, 107 (1948); III Areeda, *supra*, ¶ 652a, at 90, ¶ 652c, at 95-97; IIIA *id.* ¶ 787b, at 296-98.

55. Trinko also alleges that Verizon was willing to suffer the short-term cost of regulatory penalties, *see id.* ¶ 22, JA40, in order to further Verizon's long-term "inten[t] to enhance or maintain its dominant position in the market for local phone service in the region," *id.* ¶ 2, JA35; *see also id.* ¶¶ 1, 40, 58, JA34-35, 43-44, 47. Indeed, the amended complaint specifically alleges that Verizon attempted to exclude rivals "on a basis other than efficiency," *id.* ¶ 52, JA46, and without any "valid business reason," *id.* ¶ 57, JA47; *see also id.* ¶¶ 33(b), 53, 54-56, 58, JA42, 46-47. It also alleges that Verizon's competitors cannot meaningfully compete without access to the local loop and cannot duplicate it, and that Verizon has denied reasonable access to the loop in circumstances in which (as a result of the 1996 Act) access is not merely feasible but mandatory. *Id.* ¶¶ 2-21, 24, 48, 51, 54, JA35-40, 45-47.

As these allegations make plain, there is no basis for the contention advanced by Verizon and the Department of Justice ("DOJ") that Trinko's amended complaint fails to plead – or that the Second Circuit excused Trinko from the need to plead – exclusionary conduct. The amended complaint alleges in plain English that Verizon sought to exclude rivals on some basis other than efficiency. *See Aspen*, 472 U.S. at 605; *Kodak*, 504 U.S. at 482-85. It likewise alleges that Verizon lacked a legitimate business justification. Thus, irrespective of whether Trinko's allegations are understood as a general "refusal to deal" claim or a specific "essential facilities" claim, Trinko has alleged that Verizon's conduct was exclusionary in precisely the sense Section 2 requires.

No more is needed to satisfy Federal Rule of Civil Procedure 8, which requires only a "short and plain statement showing that the pleader is entitled to relief." Fed.

R. Civ. P. 8. Rule 8 means what it says. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). A plaintiff is not required "to set out in detail the facts upon which he bases his claim." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Rather, in deciding the Rule 12(b)(6) motion presently before the Court, the question is whether "relief could be granted under *any set of facts that could be proved* consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (emphasis added) (internal quotation marks omitted). "This rule applies with no less force to a Sherman Act claim." *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980). The amended complaint easily satisfies Rule 8.

Nor is there a deficiency in the allegation that Verizon's conduct lacks a legitimate business justification. *See* US Br. 28-30. Whether such a justification exists is a question of fact, and Trinko cannot be required to anticipate in a complaint business justifications that Verizon might conceivably advance. *See Kodak*, 504 U.S. at 483 n.32; *Aspen*, 472 U.S. at 608; *cf. Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746-47 (1976). The arguments put forth by Verizon and the United States are thus simply inappropriate efforts to engraft onto Rule 8 heightened pleading requirements for monopolization cases.

Faced with these insuperable obstacles under existing law, Verizon (supported in part by DOJ) launches a frontal assault on the very idea that a monopolist's refusal to deal with a competitor can be a basis for imposing Section 2 liability. Although not so bold as to call for *per se* Section 2 immunity for all refusals to deal, Verizon advocates a test that amounts to much the same thing in practice – a test that would have resulted in a different outcome in this Court's refusal to deal cases, as well as in the landmark antitrust actions against AT&T. Specifically, Verizon proposes a "sacrifice" test, under which liability obtains only for "conduct [that] makes no business sense except for its enablement of monopoly returns." Verizon Br. 22. Verizon adds the gloss that courts should not even inquire into the possibility of such impermissible sacrifice unless a monopolist discriminates by refusing to deal with a competitor on terms the monopolist offers to noncompetitors. *Id.* 10. Indeed, Verizon goes so far as to suggest that this is what Section 2 law currently requires, and that the "sacrifice" test applies not merely to refusals to deal but to every claim of monopolization.[11] What Verizon's test does not ask is whether a monopolist is "attempting to exclude rivals on some basis other than efficiency." *Aspen*, 472 U.S. at 605 (internal quotation marks omitted). Under Verizon's test, it is permissible for a monopolist to exclude rivals on bases other than efficiency, unless the conduct also involves sacrifice as Verizon has defined it.

Verizon supports its test with sweeping theoretical policy arguments. Specifically, Verizon asserts that Section 2 should not impose upon monopolists any duty to cooperate with competitors – even where the monopolist controls an essential facility or where such cooperation is otherwise indispensable to effective competition – because antitrust courts are ill-equipped to decide the terms of such access and to administer the ongoing cooperation that an access obligation would require. Verizon also contends that

[11] For its part, DOJ acknowledges the reality that the usual test under Section 2 is whether the "harm to competition [is] disproportionate to consumer benefits . . . and to the economic benefits to the defendant." US Br. 14. DOJ does not advocate wholesale revision of that standard. It advances the narrower proposition that the "sacrifice" test should apply in refusal to deal cases. *Id.* 15-17.

imposing such duties risks chilling innovation both by the monopolist (who may be forced to share the fruits of innovation) and by the competitor (who may see no need to innovate), creates additional risks of collusion between the monopolist and its rivals, and imposes significant costs. For these reasons, Verizon concludes, a monopolist should be free to decide whether to deal with competitors, and competition should proceed only if it can do so through independent action rather than cooperation.

These abstract arguments for cutting back Section 2 law lack force generally (as will be shown in Point III *infra*), but there is no reason for the Court to consider them because they have no relevance whatsoever in *this* case. As will be shown in Point II *infra*, two critical features make this case a singularly inappropriate one for adopting Verizon's proposal. First, Verizon's competitors have been denied access to what is indisputably an essential facility under even the most narrowly drawn understanding of the concept. Because there can be no meaningful competition unless competitors have access to the local loop, it makes no sense to insist that the antitrust laws should encourage competition without any cooperation in this context. Second, under the regulatory regime put in place by the 1996 Act, access to the local loop and the terms of that access are mandated by law. Thus, Verizon cannot have a legitimate business justification for unreasonably denying or sabotaging access to the loop, and Verizon's policy arguments against an access requirement necessarily contravene judgments Congress has already made, or are mooted by Congress's judgments.

II. SECTION 2 PROVIDES A REMEDY WHEN A MONOPOLIST DENIES A COMPETITOR ACCESS TO AN ESSENTIAL FACILITY IN CIRCUMSTANCES IN WHICH AN EXISTING REGULATORY REGIME REQUIRES SUCH ACCESS.

A. The Policy Arguments Advanced By Verizon For Limiting Section 2 Liability Are Inapposite.

The most glaring flaw in Verizon's argument is that none of the purported "problems" offered as justifications for adopting its truncated Section 2 standard exist in the present context. Indeed, every one of Verizon's arguments is rendered irrelevant by the fact that this case involves an essential facility and that it arises in the regulatory milieu of the 1996 Act: here, there is no risk of deterring investment in innovation by competitors or incumbents; there is no risk of inappropriate collusion; and there are no problems of administering the terms of access to the local loop. Whatever its merits in other contexts, Verizon's proposed focus on "sacrifice" and "discrimination" would perversely serve to defeat the objectives of the Sherman Act here.

No risk of deterring innovation. The contention that any requirement of forced cooperation will deter innovation has no force here, for two reasons. First, that risk is "insubstantial in the case where neither the plaintiff nor anyone else could ever duplicate the claimed input in any effective way." IIIA Areeda, *supra*, ¶ 771b, at 172-73. As Trinko alleges, it is not feasible for competitors to reproduce the local loop. *See* Am. Compl. ¶¶ 19-20, 24, 48, 51, JA39, 40, 45-46; *see also MCI*, 708 F.2d at 1132-33. Moreover, the interconnection required by the *AT&T* antitrust case did not deter investment but rather spurred aggressive innovation that greatly benefited consumers. *See supra* p. 7.[12] Second, the 1996 Act already requires access to the local loop and mandates compensation to the incumbents for the costs of providing it. Congress has thus already made the judgment that the risks Verizon speculates about here are not a sufficient reason to preclude access. *See Verizon*, 535 U.S. at 475, 516-17 (rejecting similar challenge to FCC method for setting rates for leasing the local loop). Enforcing the antitrust laws will result in no incremental deterrence, because forced sharing has already been imposed by the 1996 Act.

No risk of collusion. For the same reasons, enforcing Section 2 in this context presents no risk of collusion between competitors. "Collusion risks are presumably insubstantial when the plaintiff cannot compete in the market at all unless given access to the claimed facility." IIIA Areeda, *supra*, ¶ 772c, at 191; *see generally MCI*, 708 F.2d at 1132-34. In all events, the cooperation required by the 1996 Act can hardly be said to be impermissible collusion. To the contrary, it is what makes competition possible. Nor does it make sense to describe Section 2 as imposing on Verizon an obligation to convert itself from a retailer to a wholesaler. To the extent such an obligation exists, it results from the 1996 Act; antitrust analysis simply takes as a fact of market life Verizon's dual role resulting from that Act. Moreover, Verizon is obliged to provide wholesale facilities used to serve a particular customer only if it fails to compete successfully for that customer in its role as retailer.

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[12] Similarly, access to the loop provides an incentive for both the incumbent and its competitors to develop downstream facilities, which would be useless without such access. It also produces an incentive for competitors to use existing facilities in new and innovative ways. *Cf. Verizon*, 535 U.S. at 516-17.

No problems of administration. Verizon's concern about the administrability of any sharing regime likewise lacks force in this context. No antitrust court need superintend the terms of competitors' access to the local loop, or set the price for such access. Regulatory authorities already do that pursuant to the 1996 Act. In this respect, the present case is like *Otter Tail,* where the Court enjoined Otter Tail from refusing to sell or wheel power to municipalities, but provided that power need only be furnished on "terms and conditions which are filed with and subject to approval by the Federal Power Commission." 410 U.S. at 375.[13]

Inconsistency with the Sherman Act's objectives. Focusing the Section 2 analysis on whether the monopolist "sacrificed" short-term profits and "discriminated" against a rival is counterproductive in the present context. The ostensible purpose of Verizon's test is to ascertain when refusals to deal might lack a legitimate business purpose. Verizon Br. 11. Certainly, the sacrifice of short-term profits and discrimination against rivals are powerful evidence of exclusionary conduct. But they are not indispensible even

[13] To be sure, as the Second Circuit recognized, a conflict between the 1996 Act and the Sherman Act is theoretically possible. But any potential conflict can and should be addressed at the remedy stage, not on a motion to dismiss, *see* Pet. App. 38a-39a, at which point courts can craft remedies that avoid conflict with the agency goals and regulations, "exercis[ing] their discretion with restraint . . . , consistent with respect for the overarching regulatory regime that Congress has created," *id.* 39a; *accord Otter Tail,* 410 U.S. at 377 ("It will be time enough to consider whether the antitrust remedy may override the power of the Commission under § 202(b) as, if, and when the Commission denies interconnection and the District Court nevertheless undertakes to direct it. At present, there is only a potential conflict, not a present concrete case or controversy concerning it.").

without the 1996 Act, and they are hardly necessary here because the 1996 Act already requires access to the local loop and effective interconnection, and Verizon is violating those obligations. Whatever the status of such actions in a world without the 1996 Act, conduct by an incumbent that violates the Act or obstructs its core objectives cannot be said to have a "legitimate business purpose" – even when the monopolist might be maximizing its short-term profits by sabotaging the competitive entry the 1996 Act seeks to enable.[14] *See* ABA Section on Antitrust, *Antitrust Law Developments* 249 (5th ed. 2002) ("[w]here conduct contributes to establishing or maintaining monopoly power, a court will be especially likely to find that conduct predatory or anticompetitive if it is also improper for reasons extrinsic to the antitrust laws").[15]

That the 1996 Act limits what Verizon can charge for local loop access does not alter this conclusion. Under Verizon's own definition of exclusionary conduct, a monopolist is liable for refusing to deal if the refusal makes no business sense except by enabling monopoly returns, and freedom to charge rivals unfettered monopoly rates for

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[14] In all events, Verizon's refusal to deal *does* involve a short-term sacrifice. The amended complaint alleges that Verizon assumed the risk of immediate regulatory penalties (and actually received a $13 million fine for but one incident of its egregious misconduct) in order to permit it to sell more services to local telephone customers and keep the CLECs from competing in the local phone market.

[15] This Court has applied that principle repeatedly. *See, e.g., Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 173, 177 (1965). Far from being inapposite (as the United States suggests, US Br. 12 n.3), this principle applies with particular force here because the regulations Verizon is violating have been imposed for the very purpose of promoting competition in Verizon's monopoly market.

access is not a prerequisite to fulfilling that condition. Here, plaintiff is not complaining that Verizon violated the antitrust laws by charging more than regulated rates. Rather, plaintiff is complaining that Verizon violated the antitrust laws by effectively failing to sell to competitors at all – and the fact that Verizon would have been required to charge regulated rates if it had completed the sales cannot insulate Verizon from such a claim. Otherwise, any actions Verizon took to block access to the loop, which must be provided at regulated rates under the 1996 Act, would automatically have a legitimate business justification. This would mean that the antitrust laws would be effectively preempted by the Act, contravening the Act's savings clause. It would also be inconsistent with *Otter Tail*, which upheld a judgment under which the defendant power company was required to sell power to municipalities at wholesale rates, even though it could have obtained higher profits by selling at the retail price in furtherance of its monopoly. *See Otter Tail*, 410 U.S. at 375-76; *Kodak*, 273 U.S. at 369, 375 (finding actionable defendant's "refus[al] to sell the plaintiff its goods at the dealers' discounts," where defendant "would no longer furnish [the goods] except at the retail prices").

That is not to say that violations of the 1996 Act are *ipso facto* violations of Section 2. Far from it. For one thing, to be exclusionary within the meaning of Section 2, conduct must seriously obstruct the competitive process; it must make "a significant contribution to creating or maintaining a monopoly." IIIA Areeda, *supra*, ¶ 651f, at 83-84. With respect to many of the requirements imposed pursuant to the 1996 Act, a monopolist's violation will not rise to that level. For another thing, a monopolist's action must be deliberate to violate the antitrust laws, whereas even inadvertent action might violate the 1996 Act. Moreover, what the amended complaint here alleges, and what the Second Circuit allowed to go forward, is a claim that Verizon denied access to an *essential facility* – the local loop. By definition, an essential facility is something competitors cannot duplicate and cannot compete without. Although the local loop unquestionably qualifies, that is hardly true about the entire range of leased elements available pursuant to the 1996 Act.

For similar reasons, there is nothing to Verizon's repeated refrain that the competitors' business here is "mere resale" of Verizon's services, and that imposing a Section 2 obligation to cooperate would thus create no genuine competition. Verizon Br. 6, 30. This case is about access to the local loop and nondiscriminatory interconnection, not about reselling Verizon's services. The reality is that AT&T and other competitors often provide competitive service relying principally on their own switches and transport facilities, and rely on leasing the incumbents' local loops because it would be prohibitively expensive and inefficient to duplicate that essential connection to each customer. Denying access to the loop thus does not merely preclude resale – it precludes competition in "the unshared ... portions of the [network where] meaningful competition would likely emerge." *AT&T Corp.*, 525 U.S. at 429 (Breyer J., concurring in part and dissenting in part).[16]

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[16] Moreover, even what Verizon is calling resale – the leasing of all elements necessary to provide service – provides significant competitive benefits by leading to innovative marketing of different combinations of features and pricing packages, and by protecting competition in downstream markets, such as the DSL market, as well as the long distance market itself, where competition may soon be threatened now that the Bell companies are again providing long distance service and have the same incentives they once did to leverage their local monopolies into that market.

B. The 1996 Act Cannot Be Ignored In Determining How Section 2 Applies.

Doubtless because Verizon's arguments make so little sense when considered in the context of the 1996 Act's regulatory regime, Verizon seeks to wall off any consideration of the Act. Verizon Br. 16-17. As Verizon would have it, the question before this Court is whether Section 2 would impose a duty on Verizon to grant access to the local loop in the absence of the 1996 Act. The Act enters Verizon's analysis only to confirm antitrust law's irrelevance – on the theory that the 1996 Act "reduces to insignificance any possibility of competitive harm" and provides a fully effective means of redressing any such harm should it arise. *Id.* 37.

The complete separation between antitrust and regulatory analysis proposed by Verizon is fundamentally at odds with settled antitrust law and practice. It is well established that "antitrust 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." IA Areeda, *supra*, ¶ 240c3, at 12. "[T]he impact of regulation must be assessed simply as another fact of market life." *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 742 (9th Cir. 1981) (Kennedy, J.). Regulatory requirements can sometimes support the conclusion that particular conduct is not exclusionary. *See, e.g., Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.). But it is equally clear that a monopolist's violation of regulatory requirements – particularly requirements designed to promote competition in situations where some degree of cooperation is needed to make competition possible – can support a finding of monopolization. Indeed, violations of market-opening regulatory requirements formed a critical part of the factual case in both the private and government antitrust actions brought to end the Bell long distance and equipment monopolies. *See supra* pp. 5-7.

DOJ contends that, whatever the general rule, *see* US Br. 12 n.3, 14 n.4, the savings clause of the 1996 Act forbids considering the Act as part of the antitrust analysis here, *see* US Br. 11. On this view, invoking the 1996 Act to support Section 2 liability impermissibly "modifies" the antitrust law that would exist absent the Act. But what the savings clause actually says is that nothing in the 1996 Act should be construed "to modify, impair, or supercede *the applicability of* the antitrust laws" (emphasis added). That instruction confirms Congress's intent that nothing in the Act should change the fact of the antitrust laws' applicability. The statutory language cannot mean that courts must either disregard the regulatory regime the 1996 Act puts in place or imagine a counterfactual scenario that ignores the changes to the market structure that have resulted from the Act. Indeed, to read the savings clause that way would impermissibly "modify" existing antitrust law because it would remove from the analysis a consideration the antitrust laws make central – the effect of the regulatory regime.

Similarly without merit is Verizon's contention that the mere existence of the 1996 Act obviates any need to enforce the Sherman Act. Verizon does not expressly contend that the 1996 Act repeals Section 2 by implication. Nor could it. The Act's *express* savings clause defeats any argument for *implied* repeal. In any event, an implied repeal requires "a plain repugnancy between the antitrust and regulatory provisions," *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 682 (1975) (internal quotation marks omitted), and there is none here.

Abjuring repeal in name, Verizon seeks it in substance, contending that the 1996 Act is (in the words of the Seventh Circuit) "more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field." *Goldwasser v. Ameritech*, 222 F.3d 390, 401 (7th Cir. 2000); *see* Verizon Br. 34-39. That canon of construction is inapposite. Congress has spoken in the statute itself and stated that the antitrust laws continue to apply to precisely the same field the 1996 Act covers. *See Varity Corp. v. Howe*, 516 U.S. 489, 511-12 (1996) (rejecting application of canon in similar circumstances).

History also disproves Verizon's contention that Section 2 "'add[s] nothing to the oversight already available under the 1996 law.'" Verizon Br. 38 (quoting *Goldwasser*, 222 F.3d at 401). Congress understood that antitrust enforcement – rather than regulation alone – had been critical to breaking the Bell System's long distance and equipment monopolies, and it included the antitrust savings clause precisely because of the inherent limitations of regulation.

Verizon likewise lacks any basis for its claim that enforcing Section 2 will disrupt the regulatory regime. Verizon Br. 38-39. In fact, the relevant actors hold the opposite view. Congress expressed its intention unambiguously in the savings clause, and the FCC, when implementing the 1996 Act, stated explicitly that the 1996 Act and the FCC's regulations did not provide the exclusive remedy for anticompetitive violations of the local competitive provisions. *See Local Competition Order* ¶¶ 124, 129 ("[W]e clarify . . . that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws."); *see also Covad*, 299 F.3d at 1282. The incumbents themselves, including Verizon, sing this tune when it suits their purposes.[17] Thus, the 1996 Act provides no basis to limit Section 2 liability.

III. VERIZON'S CONSTRICTED DEFINITION OF "EXCLUSIONARY CONDUCT" IS AN UNSOUND INTERPRETATION OF SECTION 2 IN ALL CONTEXTS.

As demonstrated, this case presents no occasion for the Court to consider Verizon's broader arguments about the definition of exclusionary conduct under Section 2. In all events, the arguments are meritless.

As Verizon would have it, a monopolist's conduct should be subject to Section 2 challenge only when it "make[s] no business sense except for its enablement of monopoly returns," Verizon Br. 22 – by which Verizon means that the monopolist must forego short-term profits in pursuit of

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[17] To bolster its application for long distance authority under Section 271, for example, BellSouth argued that "[a]ll of the Act's and the Commission's specific statutory and regulatory protections are backed up by federal and state antitrust laws." Brief in Support of Second Application by BellSouth for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, at 100 (FCC filed July 9, 1998). Verizon itself in its New York application stated that "carriers would of course be able to resort to private remedies under generally applicable statutes, including the treble-damages remedy of the federal antitrust laws." Application by Bell Atlantic New York for Authorization to Provide In-Region, InterLATA Servs. in New York, CC Docket No. 99-295, at 71 (FCC filed Sept. 29, 1999). Moreover, the FCC expressly relied on Bell Atlantic's representations regarding the availability of antitrust remedies when it granted relief. *See In re Application by Bell Atlantic New York*, 15 F.C.C.R. 3953, ¶ 435 (1999) (relying on "remedies associated with antitrust and other legal actions" to force Bell Atlantic to "sustain a high level of service to competing carriers").

maintaining a long-term monopoly. *Id.* 22. For refusal to deal claims, Verizon adds the further requirement that the only situation in which a court need even inquire into the possibility of such impermissible sacrifice is where the monopolist "discriminates" against a competitor by denying the competitor terms and conditions offered to noncompetitor customers. *Id.* 10.

Although Verizon purports to be describing extant Section 2 law, in fact Verizon's test flies in the face of what a unanimous en banc D.C. Circuit recently described as a "century of case law on monopolization" categorizing conduct as exclusionary if the "the anticompetitive harm of the conduct outweighs the procompetitive benefit." *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc); *see also supra* n.11 (citing US Br. 14). As will be shown, Verizon's proposed test defeats antitrust's consumer welfare objectives and lacks any foundation in precedent.

The sacrifice test is unsound. The fundamental problem with Verizon's approach is that it impermissibly shifts the focus from the welfare of the consumer to the welfare of the monopolist. Verizon's explanation of how the test would apply in this case illustrates the point. Verizon contends that, as a matter of law, the conduct alleged by Trinko is not actionable because Verizon makes a greater profit from maintaining its stranglehold on the retail market than it would from leasing access to the local loop and permitting competition. In other words, Verizon contends that because it does not make a sacrifice when it denies reasonable access to the local loop, *as compared with the returns it is presently making in a monopolized retail market*, its conduct is not exclusionary. *See* Verizon Br. 26-27. But that is just a claim that Verizon's conduct is profit-maximizing *because* it excludes rivals from the market.

That standard would immunize a wide range of affirmative misconduct that historically has been, and indisputably should be, subject to Section 2 scrutiny. For example, a monopolist that blocked competitors' access to a market through sham litigation or regulatory proceedings would be immune from antitrust scrutiny because such conduct, though plainly exclusionary, would involve no sacrifice of short-term profits. Indeed, for the same reason, a monopolist could burn down a competitor's factory without any fear of Section 2 exposure. A standard that produces such results is obviously untethered to the consumer welfare principle that is the foundation of the antitrust laws.

It is readily apparent that monopolists can exclude rivals on a basis "other than efficiency" without sacrificing short-term profits. 472 U.S. at 605. In particular, "[r]aising rivals' costs can be a particularly effective method of anticompetitive exclusion. This strategy need not entail sacrificing one's own profits in the short run . . . ." Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209, 224, 230-31 (1986); *see also* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 Colum. Bus. L. Rev. 257, 318-23 (2001); *Microsoft*, 253 F.3d at 60-61 (imposing Section 2 liability for licensing conditions that had the effect of limiting distribution of rival browsers). Verizon's test would foreclose imposing antitrust liability on that basis. Indeed, Verizon's test cuts off Section 2 liability whenever a defendant comes up with any claim, no matter how insubstantial, that it benefits from its conduct apart from the realization of monopoly returns, even if the monopolist's action causes harm to consumers completely disproportionate to the benefit.[18] Thus, Verizon's proposed sacrifice test would work a radical and manifestly deleterious change in antitrust law.

The "sacrifice" test makes no more sense in the narrower context of refusals to deal and essential facilities cases. To the contrary, had such a test been in place, the antitrust challenges to the Bell System's long distance and equipment monopolies would have failed. In neither situation did the Bell System's refusal to deal reasonably with potential competitors involve a sacrifice of its short-term profits. There – as here – the Bell System's sole objective for refusing to cooperate with its rivals was the desire to hold on to all its customers, and the monopoly profits it made from them, by refusing to cooperate in ways that would facilitate competitive entry.[19]

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[18] Thus, under Verizon's test, "if the exclusionary conduct improves product performance by $5 and also creates barriers to competition that permit the monopolist to raise prices by $50, that conduct nonetheless would not be condemned," because it could not be said that "the sole purpose and effect of the conduct is to exclude and raise barriers to competition." Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and* Microsoft, 7 Geo. Mason L. Rev. 617, 650 (1999).

[19] In this regard, Verizon is wrong that the refusal to deal claim as to which the *MCI* court "rejected liability" – a claim based on AT&T's refusal to provide access to its long-distance facilities ("multipoint service") – is "a claim similar to respondent's." Verizon Br. 42. With respect to that claim, the *MCI* court concluded that the evidence did not demonstrate that access to the facility was essential or that the FCC had required access. *MCI*, 708 F.2d at 1148-49. But Trinko alleges both essentiality and violation of FCC regulation. Trinko's claim is therefore unlike the failed multipoint service claim, but it is virtually identical to the claim that the *MCI* jury and the Seventh Circuit accepted, which was based on AT&T's obstruction of long distance competitors' access to the local network, in violation of federal regulation. *See id.* at 1132; *see also Covad*, 299 F.3d at 1287-88 (rejecting efforts to distinguish *MCI*).

This drastic curtailment of Section 2 liability cannot be supported by an analogy to predatory pricing law. Courts analyzing claims of predatory pricing do focus on whether a monopolist has cut prices below cost solely because of its expectation of later monopoly return. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986); *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). But the test is constructed in this way because of the peculiar nature of such claims. *See Matsushita*, 475 U.S. at 589 (noting that "predatory pricing schemes are rarely tried, and even more rarely successful"). Cutting prices generally benefits consumers. Indeed, it is precisely the kind of conduct that antitrust laws are intended to foster. Courts must therefore be "concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition" and harming consumers. *Matsushita*, 475 U.S. at 594.

In sharp contrast, a monopolist's refusal to deal with competitors has no comparable short-term benefits for consumers, and often harms the competitive process. Monopolists can be expected to routinely engage in such exclusionary conduct and can expect such conduct (if unchecked) to succeed. *See* Steven C. Salop & David T. Scheffman, *Recent Advances in the Theory of Industrial Structure: Raising Rivals' Costs*, 73 Am. Econ. Rev. 267, 267 (May 1983). For just such reasons, this Court has already rejected the analogy Verizon presses here. *Kodak*, 504 U.S. at 478-79 (refusing to accept predatory pricing rule because the "alleged conduct – higher service prices and market foreclosure – is facially anticompetitive and exactly the harm that antitrust laws aim to prevent").

The discrimination test is unfounded. The additional "discrimination" hurdle Verizon proposes for refusal to deal cases is also ill-advised. Section 2 is an anti-monopolization statute, not an anti-discrimination statute, and the touchstone is exclusionary conduct, not differential treatment. The massive benefits that consumers have received from the antitrust actions against AT&T in no way turned on whether or not AT&T was engaging in discrimination. Further, a discrimination requirement would have the perverse effect of exempting the most dominant monopolists from the reach of Section 2 liability for refusals to deal. In *Otter Tail*, for example, it was precisely because Otter Tail did not have monopoly control of all retail markets that it was willing to wheel power to the "customers" who served non-monopoly markets. If Otter Tail had controlled retail markets everywhere, as Verizon does, it would have refused to deal everywhere, just as Verizon says it would in the absence of the 1996 Act. But a company should not be able to escape antitrust liability and impose substantial harm on competition and consumers simply because its monopoly is pervasive.

This Court's precedents do not support Verizon's approach. Verizon purports to derive its sacrifice test, as well as its discrimination gloss, from this Court's Section 2 precedents. But no case from this Court has ever held, or even stated, that sacrifice or discrimination are indispensable elements of any showing of exclusionary conduct under Section 2. While their existence is certainly evidence that conduct is exclusionary, their absence hardly proves the contrary. That is why, as the Court explained in *Aspen*, an evaluation of whether conduct is exclusionary must include "the effect of the challenged pattern of conduct on consumers, on [the monopolist's] smaller rival, and on [the monopolist] itself." *Aspen*, 472 U.S. at 605.

Indeed, Verizon's effort to distill a single defining trait for exclusionary conduct is misguided. This Court has been careful to hew to a case-by-case approach to Section 2, guided by the general principles described in *Griffith*, *Aspen*, and other cases and discussed above. These cases did not purport to make any single variable determinative in addressing complex fact patterns and different types of exclusionary conduct. *See Aspen*, 472 U.S. at 605; *Kodak*, 504 U.S. at 467. This contextual approach is consistent with this Court's general disfavor of sweeping, per se antitrust rules, including those that displace the rule of reason in a Section 1 Sherman Act analysis. *See, e.g.*, *California Dentists Ass'n v. FTC*, 526 U.S. 756, 773-75 (1999).

In this regard, Verizon's "sacrifice" test is irreconcilable with *Otter Tail*, in which the monopolist's "refusals to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopoly position." 410 U.S. at 378. The monopolist defended that conduct by contending that "without the weapons which it used, more and more municipalities will turn to public power [to serve retail customers] and Otter Tail will go downhill." *Id.* at 380. The Court refused to accept that argument, explaining that the "promotion of self-interest alone does not . . . immunize otherwise illegal conduct" and that the Sherman Act "assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency." *Id.* at 380-82. The same was true in *Kodak*. 504 U.S. at 485.[20]

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[20] Ignoring *Otter Tail* and *Kodak*, Verizon purports to derive its "sacrifice" test almost entirely from *Aspen*. Verizon Br. 21. But *Aspen* is to the contrary. While *Aspen* references the short-term sacrifice involved in that case as *evidence* that the defendant's conduct was

There is likewise no merit to Verizon's claim that all relevant cases, including *MCI* and *Otter Tail*, involved "discrimination" because in each case "the defendant was already in the business of providing customers what it then denied on the same terms to a competitor." Verizon Br. 17. There is no indication in *Otter Tail* that Otter Tail was discriminating with respect to wholesale facilities (as compared to wheeling), yet its conduct was found to be exclusionary with respect to both. *Otter Tail*, 410 U.S. at 373, 382; *United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 56 (D. Minn. 1971) (noting that Otter Tail's business is "almost exclusively retail"). Nor was discrimination referenced in Judge Greene's decision in *AT&T*. *See supra* p. 7. And while Verizon takes out of context a few scattered snippets of the Seventh Circuit's extensive opinion in *MCI* in an attempt to show that the refusal to deal case was really about discrimination between customers, the purported discrimination was never even mentioned in the court's discussion of the pertinent claims. *Compare, e.g., MCI*, 708 F.2d at 1132-43 (discussion of denial of interconnection), *with id.* at 1095, 1159, 1200-03 (discussion of price issues).

Thus, Verizon's sacrifice and discrimination tests should be rejected as incompatible with Section 2.

IV. TRINKO HAS STATUTORY STANDING.

In a perfunctory denouement, Verizon asserts that Trinko lacks "statutory standing." That contention is meritless.

Verizon's burden is a heavy one. "[T]he Sherman Act was enacted to assure customers the benefits of price competition." *See Associated Gen. Contractors of Cal., Inc.*

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exclusionary, it defines exclusionary conduct without reference to such sacrifice. *Aspen*, 473 U.S. at 605.

v. California State Council of Carpenters, 459 U.S. 519, 538 (1983); *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477, 486 n.10 (1977). Thus, "[i]n the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting," the Court has applied the treble-damages provision set forth in Section 4 of the Clayton Act, 15 U.S.C. § 15, "in accordance with its plain language and its broad remedial and deterrent objectives." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 473 (1982). Here, Verizon cannot possibly defeat Trinko's standing because Trinko is a customer in the very market in which Verizon seeks to maintain its monopoly and Trinko is injured directly by that monopolization.

In this regard, Verizon's argument is at odds with *McCready*. There, a group of psychiatrists conspired with an insurance company to cease reimbursing patients for services rendered by psychologists. *Id.* at 486-89 (Rehnquist, J. dissenting). The patients had standing because, as pawns in the psychiatrists' anticompetitive scheme, they were forced to choose between abandoning their chosen medical care practitioner and being reimbursed for their care. *Id.* at 483-84. This case is no different: by forcing consumers such as Trinko to abandon their provider of choice or suffer degraded and overpriced service, Verizon is driving consumers away from AT&T and toward itself. Moreover, the success of Verizon's scheme depends on the harm imposed on consumers like Trinko. Thus, as in *McCready*, Trinko's injuries are "inextricably intertwined" with the antitrust violation, and are "the essential means by which defendants' illegal conduct brings about the ultimate injury to the marketplace." *See* II Areeda, *supra*, ¶ 339f, at 336 (noting that courts have found injury sufficiently direct for standing when it "was not merely a foreseeable consequence of injury to the [plaintiff], it was the means by which the conspiracy accomplished its illegal object").

In contending that Trinko (unlike the *McCready* plaintiffs) suffered only indirect injury, Verizon confuses directness of transaction with directness of injury. The absence of privity between an antitrust plaintiff and defendant does not mean that the *injury* is indirect. In *Associated General Contractors*, for example, the Court denied standing to unions who claimed that they had been injured when management associations conspired to pressure contractors and builders to hire nonunion subcontractors. The Court stated, however, that the subcontractors *did* suffer a direct injury as a result of the associations' scheme, even though they directly transacted business only with the contractors pressured by the associations, and never with the associations themselves. 459 U.S. at 541-42.[21]

Contrary to Verizon's argument, *Illinois Brick Co. v. Illinois*, 434 U.S. 881 (1977), and *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990), should not be extended to

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[21] *See also In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1168 (3d Cir. 1993) (holding that plaintiff's injury was "undeniably" direct even though plaintiff never transacted business with defendant); *Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 724 F.2d 290, 294 (2d Cir. 1983) (Friendly, J.) (concluding that injury was direct even though plaintiff was not in privity with defendants, and noting that "[i]njury to Crimpers was precisely the intended consequence of defendants' boycott"). Even under Verizon's crabbed understanding of directness, the amended complaint cannot be dismissed. Trinko and other consumers could recover for Verizon's delay in processing orders and switching customers because, until the orders were processed, the consumers remained with Verizon against their will, thereby being denied the opportunity to receive service from their provider of choice or denied service altogether. *See* Am. Compl. ¶ 21, JA40 (alleging delays in order processing). Some of these consumers are thus direct purchasers even under Verizon's theory, and their standing is thus unquestioned.

deny standing here. Those cases, after all, establish an *exception* to the general rule set forth in the plain language of the Clayton Act that all who have been injured by antitrust violations shall have standing. Neither involved a claim of monopolization or a situation in which the plaintiff was a consumer in the monopolized market. They were overcharge cases, in which the defendants were alleged to have fixed prices and overcharged a customer (the direct purchaser), who in turn passed on a portion of that overcharge to its customers (subsequent indirect purchasers). As *Illinois Brick* recognized, overcharge cases present unique risks of duplicative payments from the defendant to compensate for the same injury. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968), this Court had held that a direct purchaser in an overcharge case can recover from the defendant the full amount of the overcharge, and that the defendant cannot avoid antitrust liability (or reduce antitrust damages) by alleging that the direct purchaser has "passed on" a portion of the overcharge to its customers. In *Illinois Brick*, an overcharge case brought by customers of the direct purchaser, the Court held that such customers lack standing because, in light of *Hanover Shoe*, permitting recovery by an indirect purchaser would allow a double recovery.[22]

This case is fundamentally different. Verizon did not interact with AT&T solely as a supplier, but also as a competitor. Verizon's aim was not to extract monopoly profits by overcharging AT&T for loop access. Verizon sought to force AT&T out of the retail market (or delay, or

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[22] In any event, *Illinois Brick* and *UtiliCorp* do not bar claims for injunctive relief. *See, e.g.*, II Areeda, *supra*, ¶ 346d, at 364; *cf.* Pet. App. 2a, 7a (describing Trinko's claims for injunctive relief).

raise the costs of, AT&T's participation in that market) so that Verizon could maintain its monopoly control.

Moreover, Trinko's damages are distinct from those suffered by AT&T, and therefore, the risk of double recovery is not present. Competitors whose entry was hindered suffer lost profits, both because they have fewer customers and because they have higher costs for those customers they retain.[23] Consumers, on the other hand, suffer a loss of choice, degraded service or no service at all, and inflated retail prices.[24] Denying standing to Trinko would allow Verizon to escape liability for the unique antitrust injury it inflicts on consumers. *McCready*, 457 U.S. at 473 n.10 (finding standing in part because "denying standing to McCready and the class she represents would also result in the denial of compensation for injuries resulting from unlawful conduct"). Verizon is thus wrong to suggest that "AT&T and other competitors can be counted on to vindicate

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[23] AT&T could recover lost profits for the customers who were prevented from switching to it, as well as customers who left because of Verizon's actions. For its own customers, AT&T would recover profits that were lost as a result of increased costs imposed by Verizon's conduct (such as costs of responding to calls from customers about poor service). AT&T's customers, on the other hand, would recover for the diminished value of their service as a result of its poor quality, as well as any profits they lost as a result of inability to transact business when phone lines were down. *Cf.* II Areeda, *supra*, ¶ 346a, at 360 ("the correct solution is to permit damages actions based on lost profits to all intermediaries and overcharge damages to end-use customers").

[24] *See Iron Ore*, 998 F.2d at 1169 (holding that the injuries at issue "are not the particular kind of double recovery that *Illinois Brick* sought to prevent" because "different parties allege different injuries"); *Crimpers*, 724 F.2d at 294 (holding that a forced boycott case presented no risk of duplicative recovery because the plaintiffs' injuries were distinct).

the law as private attorneys general." Verizon Br. 46 (internal quotation marks omitted).[25]

Nor is there any other justification for denying standing to Trinko. *See generally Associated Gen.*, 459 U.S. at 538-45 (listing and applying numerous factors for statutory standing). Trinko's injury is, for example, of the sort that antitrust law was intended to remedy. *Id.* at 538. Trinko was undeniably a "participant in the relevant market," *id.*, and was a consumer of services "within that area of the economy . . . endangered by [that] breakdown of competitive conditions," *McCready*, 457 U.S. at 480-81.

Finally, contrary to Verizon's suggestion, Verizon Br. 46, the calculation of damages raises no issues beyond the ken of the antitrust courts. To be sure, damages calculations can be complex, but they are calculations that antitrust courts perform routinely, and thus provide no basis for Verizon's proffered restriction on standing here. *See McCready*, 457 U.S. at 475 n.11 ("Difficulty of ascertainment [should not be] confused with right of recovery." (quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 267 (1946))).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[25] Amicus argues that Trinko's injury "will not necessarily go uncompensated" because Trinko "could simply sue AT&T for breach of its express or implied contractual obligation." Washington Legal Foundation Br. 5-6. But even if such relief were available (and the record does not suggest that it is), that relief would not substitute for the Clayton Act's treble-damages provisions, which serve deterrent and remedial goals. *Compare Associated Gen.*, 459 U.S. at 541-42.

Respectfully submitted,

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