No. 02-682

In the Supreme Court of the United States

VERIZON COMMUNICATIONS INC., PETITIONER

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

The United States and the Federal Trade Commission will address the following question presented:

Whether, in reversing the dismissal of a complaint for failure to state a claim upon which relief may be granted under Section 2 of the Sherman Act, 15 U.S.C. 2, the court of appeals erred by relying on a standard of liability that does not require predatory or exclusionary conduct.

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INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

The United States and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws, and a strong interest in the correct application of those laws in the telecommunications industry.

STATEMENT

1. Section 2 of the Sherman Act, 15 U.S.C. 2, makes it unlawful for any firm to "monopolize, attempt to monopolize, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations." Although Section 2 does not specify the elements of monopolization and attempted monopolization, this Court long ago concluded that Section 2 does not prohibit monopoly status as such. Instead, Section 2 makes it unlawful to acquire or maintain monopoly power through the use of predatory or exclusionary conduct. See *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985).

The antitrust laws most often impose negative duties, requiring firms to *refrain* from anticompetitive conduct. Nonetheless, this Court and others have recognized some circumstances in which the Sherman Act imposes an *affirmative* duty to assist rivals. For example, relying on decisions such as *United States* v. *Terminal Railroad Ass'n*, 224 U.S. 383, 411 (1912), and *Aspen Skiing*, *supra*, the lower federal courts have recognized an "essential facility doctrine," under which "a vertically integrated monopolist" may sometimes be required "to share some input in a vertically related market * * * with someone operating in an upstream or downstream market." See 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 771a, at 169-170 (2d ed. 2002).

This case concerns the scope of such affirmative antitrust obligations and presents the issue in the important context of the telecommunications industry. The current structure of the telecommunications industry is in part a product of the 1982 consent decree that settled the United States' antitrust suit against AT&T. *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). That decree, among other things, separated AT&T's long-distance and equipment-manufacturing units, which were subject to competition, from the units that provided monopoly local telephone service, and barred the local telephone companies from providing long-distance telephone service except in limited circumstances. See *Verizon Communications, Inc.* v. *FCC*, 122 S. Ct. 1646, 1655 (2002). Neither the decree nor FCC regulation substantially increased competition in local telephone service, which continued to be dominated by incumbent local exchange carriers (ILECs), such as the Bell Companies that inherited AT&T's local telephone franchises. *Ibid.*

Congress enacted the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56 (47 U.S.C. 251 *et seq.*), in part to bring competition to the local exchange market. The 1996 Act "required incumbent local-exchange carriers to share their own facilities and services on terms to be agreed upon with new entrants," and empowered the FCC to "prescribe methods for state commissions to use in setting rates that would subject both incumbents and entrants to the risks and incentives that a competitive market would produce." *Verizon* v. *FCC*, 122 S. Ct. at 1654 (citing 47 U.S.C. 251(c)). Competitors may purchase an incumbent's local telephone service at a wholesale rate and resell it, 47 U.S.C. 252(c)(4); they may build their own facilities and "interconnect" them with the incumbent's network, 47 U.S.C. 251(c)(2); or they "may choose to lease" components of the incumbent's network—known as "network elements"—"which the incumbent has a duty to provide 'on an unbundled basis' at terms that are 'just, reasonable, and nondiscriminatory,'" 47 U.S.C. 252(c)(3). See 122 S. Ct. at 1662; *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Congress was concerned that, absent such requirements, a "newcomer could not compete with the incumbent carrier without coming close to replicating the incumbent's entire existing network, the most costly and difficult part of which would be laying down the 'last mile' of feederwire, the local loop, to the thousands or millions of terminal points in individual homes and businesses." 122 S. Ct. at 1662.

The 1996 Act provides that new carriers and incumbents must negotiate, in good faith, critical terms for resale of services, interconnection, and leasing of network elements. *Verizon* v. *FCC*, 122 S. Ct. at 1662-1663 (citing 47 U.S.C. 251(c)(1), 252(a)(2)). If the carriers fail to agree, either carrier may seek mediation by the public utilities commission of the relevant State. *Ibid.* (47 U.S.C. 252(a)(2)). State commissions may impose rates consistent with two basic pricing standards established by the Act. First, when the new entrant purchases the incumbent's services under the Act's "resale" provisions, it pays a "wholesale" price based on the incumbent's retail rates, less costs "attributable to any marketing, billing, collection, and other costs that will be avoided by the [incumbent] local exchange carrier." 47 U.S.C. 252(d)(3). Second, when the new entrant purchases interconnection or unbundled network elements, the pricing rules established by the FCC pursuant to 47 U.S.C. 252(d)(1) and upheld by this Court in *Verizon* v. *FCC*, *supra*, apply. Under those rules, the rates for unbundled network elements are based on "total element long-run incremental cost" (TELRIC), which (roughly speaking) represents the cost the incumbent *would incur* to provide the service "based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration," given the existing location of the incumbent's wire centers. 122 S. Ct. at 1664-1665. The incumbent is required to offer the TELRIC rates even if its historical costs are higher or it would earn more by selling to the end-user customers directly on its own. Because the FCC's rules allow new entrants to purchase the entire bundle of network elements that make up local telephone services at TELRIC rates based on forward-looking costs, new entrants may choose those rates rather than the "wholesale" (avoided cost) rate for resale of the incumbent's telephone services if the TELRIC rates are lower.

The 1996 Act also includes an antitrust savings clause. § 601(b), 110 Stat. 143. The savings clause states that, "except as provided" in two other provisions, "nothing in this Act * * * shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. 152 note.

2. This case arises out of a dispute between AT&T, which is a competitive local exchange carrier (CLEC), and petitioner Verizon Communications Inc., an incumbent local exchange carrier (ILEC). The dispute involves petitioner's performance of an interconnection agreement executed for the State of New York following negotiation and binding arbitration pursuant to 47 U.S.C. 251 and 252. See Pet. App. 5a, 22a; Order Approving Interconnection Agreement, Case No. 06-C-0723 (N.Y. Pub. Serv. Comm'n June 13, 1997), *available in* 1997 WL 410707. The agreement specifies the terms and conditions under which petitioner is to provide AT&T with the use of petitioner's local telephone network so that AT&T can sell local telephone service in competition with petitioner. The agreement also specifies dispute-resolution procedures that are "the exclusive remedy for all disputes between" petitioner and AT&T "arising out of th[e] [a]greement or its breach." *Ibid.* The dispute between AT&T and petitioner was resolved nearly three years ago by an FCC consent decree under which petitioner agreed,

among other things, to pay $3 million to the United States and $10 million to AT&T and other CLECs. *Ibid.*

One day after the FCC issued the consent decree, respondent filed this lawsuit as a putative class action. Pet. App. 51a. Respondent is an AT&T customer, *id.* at 5a, but has no apparent business relationship with petitioner. In the complaint, respondent alleged:

> [Petitioner] has not afforded CLECs access to the local loop on a par with its own access. Among other things, [petitioner] has filled orders of CLEC customers after fulfilling 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 substantially identical in circumstances to its own local phone service customers for whom it has filled orders on a timely basis, and has systematically failed to inform CLECs of the status of their customers' orders with [petitioner].

Id. at 6a (quoting Am. Compl. ¶ 21); see Am. Compl. ¶ 54.

Respondent did not allege that petitioner had failed to fill, or had delayed filling, any order relating to its own AT&T local telephone service. Respondent instead alleged that petitioner's conduct had affected its "ability * * * to obtain satisfactory Local Phone Service," and injured petitioner's competitors "in the provision of local phone service." Am. Compl. ¶ 57. Respondent further alleged that petitioner's conduct "had no valid business reason and was intended to exclude competition * * * by making it difficult for competitors to provide service in the Local Phone Service market on the level that [petitioner] is able to provide to its customers in that market." Pet. App. 6a-7a. Respondent asserted, among other things, a treble damages claim under Section 2 of the Sherman Act and several claims under federal telecommunications law. Pet. App. 6a.

The district court dismissed the complaint. Pet. App. 49a-61a. The court held that respondent lacked standing to bring a claim under the Communications Act of 1934, § 202, 47 U.S.C. 202, since the claim attempted to assert the rights of petitioner's competitors rather than respondent's own rights. Pet. App. 60a-61a. With respect to the Sherman Act claims, the court held that respondent had standing. *Id.* at 53a-54a. In the court's view, respondent had alleged a direct injury resulting from the poor service allegedly caused by petitioner's conduct. That injury, the court held, was "wholly distinct" from any injury inflicted on CLECs such as AT&T. *Id.* at 54a.

The court then held that respondent had failed to state a claim of monopolization in violation of the Sherman Act, because the complaint failed to allege willful acquisition or maintenance of monopoly power. Pet. App. 54a. The court explained that the only anticompetitive conduct identified by the complaint was petitioner's "failure to cooperate with local competitors as required by 47 U.S.C. 251." *Ibid.* "The affirmative duties imposed by the Telecommunications Act," the court observed, "are not coterminous with the duty of a monopolist to refrain from exclusionary practices." *Ibid.* (citing *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390, 400 (7th Cir. 2000)).

Respondent amended the complaint, adding allegations that a CLEC "acts as the agent for its customers" in dealing with petitioner and that petitioner breached its contracts with the CLECs "with the purpose of acquiring or maintaining monopoly power in the local phone service market." Pet. App. 63a. The district court again dismissed the complaint. *Id.* at 64a-68a. The court noted that, under respondent's Sherman Act theory, "'when a firm with enough market power breache[s] the terms of contracts it has with competitors that assist those competitors * * * and it does so with the intent to hinder the ability of those competitors to compete in that market, it violates Section 2 of the Sherman Act,' Pl.'s Mem. at 6." *Id.* at 66a. The antitrust laws, the court observed, do not put monopolists under a general duty to cooperate with competitors, *ibid.* (citing *Aspen Skiing*, 472 U.S. at 600), or to continue assistance to a competitor once begun, *ibid.* (citing *Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986)). Thus, the court held that the alleged breaches of contract "were not 'anticompetitive' conduct within the meaning of the antitrust laws." *Id.* at 67a.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-48a. It held that respondent's complaint is sufficient to "support an antitrust claim" under two different theories. *Id.* at 29a. First, the court stated that the complaint "may state a claim under the 'essential facilities' doctrine," under which "a monopolist has a duty to provide competitors with reasonable access to * * * facilities under the monopolist's control and without which one cannot effectively compete in a given market." *Ibid.* Second, the court concluded that respondent "may have a monopoly leveraging claim," which could be established by showing that "the defendant '(1) possessed monopoly power in one market; (2) used that power to gain a competitive advantage . . . in another distinct market; and (3) caused injury by such anticompetitive conduct.'" *Id.* at 30a (quoting *Virgin Atl. Airways* v. *British Airways*, 257 F.3d 256, 272 (2d Cir. 2001)).

The Second Circuit declined to follow the Seventh Circuit's decision in *Goldwasser*, upon which the district court had relied. Pet. App. 31a-39a. The Second Circuit concluded that, although the antitrust claims may be "inextricably linked" to conduct that allegedly violates the 1996 Act, there is no incompatibility between that regulatory scheme and the federal antitrust laws. *Ibid.*[1]

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[1] The Second Circuit agreed that respondent has standing to bring an antitrust action. Pet. App. 26a-28a. The Second Circuit also agreed that respondent lacks standing to bring suit for alleged violations of the

DISCUSSION

The Second Circuit's decision in this case dramatically expands antitrust liability for failure to assist rivals. It conflicts with the decisions of other courts of appeals, including *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), which held that "similar allegations of monopolistic conduct" did not state a claim upon which relief may be granted. Pet. App. 31a. The Second Circuit's decision is erroneous. And it will have significant practical consequences, particularly for the telecommunications industry as it adapts to the fundamental regulatory changes wrought by the Telecommunications Act of 1996.

The 1996 Act requires incumbent telecommunications carriers to assist their rivals by providing them with access to their networks under legislatively and administratively developed conditions and formulae. *Verizon Communications, Inc.* v. *FCC*, 122 S. Ct. 1646, 1654 (2002). This Court has recognized the importance of that complex legislation and the industry it restructures by granting review in two cases raising statutory interpretation issues. See *Verizon* v. *FCC*, *supra*; *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). This case raises similarly important issues. In the courts of appeals, the United States and the FCC have filed briefs as *amici curiae* urging, among other things, the rejection of any construction of the 1996 Act that would render it an implied repeal of the antitrust laws in this important sector of the economy. Well-established principles preclude recognition of such immunity absent clear repugnancy between the antitrust laws and a regulatory statute, *Carnation Co.* v.

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interconnection agreements under 47 U.S.C. 251. Pet. App. 19a, 23a-25a. Finally, the Second Circuit held that respondent has standing under Section 202 of the Communications Act of 1934, 47 U.S.C. 202, which prohibits unreasonable discrimination. Pet. App. 12a-16a. Petitioner has asked this Court to review the Second Circuit's holdings on antitrust and Section 202 standing. Pet. 23-26.

Pacific Westbound Conference, 383 U.S. 213, 218 (1966); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372-375 (1973), and any implied repeal would contravene the 1996 Act's declaration that it should not "be construed to modify, impair, or supersede the applicability of any of the antitrust laws." See 47 U.S.C. 152 note. The Second Circuit in this case, like the Seventh Circuit in *Goldwasser*, correctly concluded that the 1996 Act does not immunize petitioner's conduct from scrutiny under the antitrust laws. See Pet. App. 32a; *Goldwasser*, 222 F.3d at 401 (declining to hold "that the 1996 Act confers implied immunity").

Nonetheless, the 1996 Act's imposition of new duties to assist rivals—coupled with the increasing number of antitrust lawsuits predicated on alleged noncompliance with the 1996 Act—have given new urgency to careful examination of the circumstances under which *antitrust law* requires a dominant firm to provide such assistance. The Second Circuit's decision unduly expands those circumstances by endorsing essential facilities and monopoly leveraging theories that are uncabined by any requirement that the challenged conduct be exclusionary or predatory—*i.e.*, that the refusal not make economic sense *except* as an effort to diminish competition. That approach improperly trivializes the antitrust laws and encourages litigants to seek antitrust remedies for ordinary commercial and regulatory disputes. The decision and the many lawsuits based on the theories it endorses, moreover, could threaten substantial disruption of the telecommunications industry. Accordingly, the petition for a writ of certiorari should be granted.

1. Section 2 of the Sherman Act specifies two offenses that can be carried out by a firm acting unilaterally—monopolization and attempted monopolization. See *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 459 (1993) (noting that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously

threatens to do so") (citing *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767 (1984)). This Court long ago made clear that Section 2 does not prohibit monopoly as such, *i.e.*, "monopoly in the concrete." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 62 (1911). Rather, the offense of monopolization is broadly defined as (1) the willful acquisition or maintenance of monopoly power (2) by the use of 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, 482-483 (1992) (quoting *United States* v. *Griffith*, 334 U.S. 100, 107 (1948)); see *United States* v. *Alcoa*, 148 F.2d 416, 432 (2d Cir. 1945).

A *sine qua non* for any monopolization or attempted monopolization claim is anticompetitive conduct that "reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power." 3 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 651f, at 83-84 (2d ed. 2002). Further, to be "anticompetitive," the conduct must be "exclusionary" or "predatory." *Aspen Skiing*, 472 U.S. at 602. That is, the conduct must "not only (1) tend[] to impair the opportunities of rivals, but also (2) either * * * not further competition on the merits or do[] so in an unnecessarily restrictive way." *Id.* at 605 n.32. Conduct is "exclusionary" or "predatory" in antitrust jurisprudence if the conduct would not make economic sense for the defendant but for its elimination or softening of competition. See, *e.g.*, *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588-589 (1986). For example, exclusionary conduct normally involves the sacrifice of short-term profits or goodwill in order to maintain or obtain long-term monopoly power. *Aspen Skiing*, 472 U.S. at 608, 610-611; see also *General Indus. Corp.* v. *Hartz Mountain Corp.*, 810 F.2d 795, 803

(8th Cir. 1987); *Stearns Airport Equip. Co.* v. *FMC Corp.*, 170 F.3d 518, 523-524 & n.3 (5th Cir. 1999).[2]

a. Consistent with those standards, the antitrust laws generally afford all firms—including monopolists—considerable discretion in determining with whom they will and will not deal, *Aspen Skiing*, 472 U.S. at 600-603, and permit firms to demand whatever rates they can obtain in the marketplace, *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 274 n.12 (2d Cir. 1979); *Blue Cross & Blue Shield United* v. *Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995) ("the antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute").

A monopolist's right to refuse cooperation with rivals, however, is not wholly unqualified. *Aspen Skiing*, 472 U.S. at 600-601. If such a refusal involves a sacrifice of profits or business advantage and makes economic sense only because it softens or injures competition, it is "exclusionary" and

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[2] Such exclusionary conduct need not always entail substantial economic sacrifice. For example, the enforcement of a fraudulently-obtained patent may involve limited expenditures, but may well amount to exclusionary conduct under Section 2, if it also has the requisite effect on competition. See *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-178 (1966). Likewise, sham litigation or bad-faith administrative filings may impose little cost on a monopolist, but create substantial anticompetitive impact in violation of Section 2. See, *e.g.*, *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). Cf. 3 Areeda & Hovenkamp, *supra*, ¶¶ 651a, 658f, at 72, 131-132, 135 (The application of Section 2 does not entail an open-ended "'balancing' of social gains against competitive harms," and "a firm is under no obligation to sacrifice its own profits," but unlawful exclusionary acts are those that "do not benefit consumers * * * or * * * produce harms disproportionate to the resulting benefits."). In *United States* v. *Microsoft Corp.*, 253 F.3d 34, 58-59, cert. denied, 534 U.S. 952 (2001), the en banc District of Columbia Circuit suggested, as one step of its analysis under Section 2, a "balancing approach" analogous to the "rule of reason" standard applied under Section 1 of the Sherman Act. The United States did not suggest or endorse such a "balancing approach" in the *Microsoft* case.

potentially unlawful. In *Aspen Skiing*, for example, this Court upheld a verdict against the Ski Co. where the Ski Co. had terminated its former cooperation with a smaller rival. The Ski Co.'s decision to refuse cooperation had required the sacrifice of immediate profits—the Ski Co. refused to sell its lift tickets to its rival at full price, "forgo[ing] daily ticket sales" and the goodwill of its own customers, who were inconvenienced by that choice. 472 U.S. at 608. The Ski Co. had "elected to forgo these short term benefits," the evidence showed, "because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor." *Ibid.*; see *id.* at 610-611.

b. Relying on an "essential facilities doctrine," the lower federal courts have identified limited circumstances in which a monopolist in one market may have a duty to deal with its competitors in a related market. Under that doctrine, as set forth in the leading case, a monopolist may be required to assist rivals by sharing a facility if the monopolist can "extend monopoly power from one stage of production to another" and the following four elements are found:

> (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.

MCI v. *AT&T*, 708 F.2d 1081, 1132-1133 (7th Cir. 1983).

This Court "has never adopted" the essential facilities doctrine as a basis for liability in a Section 2 case. *Iowa Utils. Bd.*, 525 U.S. at 428 (Breyer, J., concurring in part and dissenting in part). And the doctrine has been heavily criticized. See, *e.g.*, 3A Areeda & Hovenkamp, *supra*, ¶ 771c, at 173 ("the 'essential facility' doctrine is both harmful and unnecessary and should be abandoned"). At a minimum, the doctrine must be applied only in a manner consistent with Section 2 itself, which "prohibits only acts that constitute 'monopolization' or 'attempts to monopolize.'" 3 Areeda & Hovenkamp, *supra*, ¶ 652, at 89-90. Consequently, like other monopolization and attempted monopolization claims, essential facilities claims must at a minimum include some showing of "exclusionary" or "predatory" conduct, *i.e.*, that the refusal to share the facility would not make economic sense unless it tended to reduce or eliminate competition.[3]

2. Rather than require a showing of exclusionary or predatory conduct in this case, the court of appeals applied the essential facilities doctrine as a stand-alone form of liability. The gravamen of respondent's claim is that, by failing to fill its competitors' orders in a timely fashion, petitioner failed to provide its competitors with full and nondiscriminatory use of its local telephone network to permit them to resell petitioner's service in competition with petitioner. See Am. Compl. ¶¶ 21, 54; p. 5, *supra*. Respondent's complaint does not implicate an *antitrust* duty to provide such access, because the complaint does not allege that any refusal to deal was predatory or exclusionary, *i.e.*, that the refusal would not make business sense *unless* it tended to limit or soften competition. Contrast *Aspen Skiing*, 472 U.S. at 608, 610-611 (evidence showed that defendant "elected to forgo * * * short term benefits because it was more interested in reducing competition * * * over the long run").

The complaint does allege that petitioner "had no valid business reason" for its allegedly unlawful conduct. Pet. App. 6a (quoting Am. Compl. ¶ 57). But that conclusory

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[3] *Otter Tail*, *supra*, is not to the contrary. *Otter Tail* was not based on an "essential facilities" theory of liability, and the trial court found that the *sole* reason for the conduct there was to prevent erosion of monopoly power. See 410 U.S. at 378. The defendant, moreover, not only refused to deal, but also engaged in sham litigation, *id.* at 379, and demanded and enforced anticompetitive provisions in contracts with potential competitors, *id.* at 378-379.

assertion is not a sufficient allegation that the conduct would not make economic sense apart from an effort to restrain competition. See *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986) (court not "bound to accept as true a legal conclusion couched as a factual allegation"). Nor did the court of appeals so understand the allegation, since it did not mention that allegation as part of its antitrust analysis. And the allegation is inherently implausible when measured against the regulatory scheme the complaint itself mentions. See *DM Research, Inc.* v. *College of Am. Pathologists*, 170 F.3d 53, 56-57 (1st Cir. 1999) (plaintiff cannot rely on conclusory allegation that is inherently implausible absent concrete factual assertions to support it). Under the 1996 Act and FCC rules, the prices petitioner must charge its competitors appear to be considerably below any it otherwise might set. See pp. 3-4, *supra*. The antitrust laws do not require monopolists to sacrifice profits to sell to competitors at a discount. "[N]o firm has a general duty to injure itself in order to benefit a rival." 3A Areeda & Hovenkamp, *supra*, ¶ 773, at 211; see also *id.* ¶ 772, at 188 (*Aspen Skiing* "certainly does not hold that a monopolist must make its goods, services, or facilities available at a competitive rather than a monopolistic price."). Yet the Second Circuit recognized such a duty here. The court of appeals' decision thus creates the risk of Section 2 liability based merely on the needs of the rival, the violation of regulatory requirements, or perhaps even simple breach of contract. It imposes "precisely the kinds of affirmative duties to help one's competition that * * * do not exist under the unadorned antitrust laws." *Goldwasser*, 222 F.3d at 400.

The 1996 Act, as implemented by the FCC regulations upheld by this Court in *Verizon* v. *FCC*, *supra*, *does* require incumbent local telephone companies to lease their services and facilities to competitors. To stimulate competition in local exchange markets, the Act and the FCC's rules require those carriers to sell "at rates that would attract new entrants when it would be more efficient" for them to lease the incumbent's facilities than to build their own. 122 S. Ct. at 1687. The Act also establishes nondiscrimination rules, requiring incumbents to provide access that is "at least equal in quality to that provided by the local exchange carrier to itself." Pet. App. 5a (quoting 47 U.S.C. 251(c)(2)(C)). As the Seventh Circuit recognized in *Goldwasser*, however, "the duties the 1996 Act imposes" are not "coterminous with the duty of a monopolist to refrain from exclusionary practices." 222 F.3d at 399; see also 47 U.S.C. 152 note (Act does not "modify * * * the applicability of any of the antitrust laws."). Unlike the 1996 Act, the Sherman Act does not impose a duty to sell to rivals in an evenhanded fashion unless the refusal is predatory or exclusionary, *i.e.*, unless the refusal represents a *sacrifice* of profit or goodwill that makes sense only because it has the effect of injuring competition.[4]

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[4] The court of appeals interpreted the essential facilities doctrine to require that access be provided on "just and reasonable terms" placing all on an "equal plane." Pet. App. 29a. That language, however, is not drawn from standards relating to antitrust *liability* but from the *remedial* requirements this Court addressed in *United States* v. *Terminal Railroad Ass'n*, 224 U.S. 383, 411 (1912). See *Southern Pac. Communications Corp.* v. *AT&T*, 740 F.2d 980, 1008-1009 (D.C. Cir. 1984); *United States* v. *AT&T*, 524 F. Supp. 1336, 1352-1353 (D.D.C. 1981). *Terminal Railroad*, moreover, was not based on an essential facilities theory of liability. Instead, that case concerned whether "unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade." 224 U.S. at 394. Nor was a denial of use at issue there, since the fact "[t]hat other companies are permitted to use the facilities of the Terminal Company upon paying the same charges paid by the proprietary companies seem[ed] to be conceded." *Id.* at 400. The Court chose to impose a requirement of equal access on reasonable terms as part of a remedial scheme because it found that dissolving the combination would be injurious to the public. *Id.* at 409-411; *Associated Press* v. *United States*, 326 U.S. 1, 25 (1945) (Douglas,

3. The court of appeals' formulation of its second theory of Section 2 liability—monopoly leveraging—similarly countenances an antitrust violation unsupported by the Sherman Act's text and fundamental antitrust principles. The theory of monopoly leveraging is designed to prevent a firm with a monopoly in one market from using its power in that market to extend its monopoly into a second market. In this case, the court of appeals held that a "monopoly leveraging" violation is established if a monopolist in one market uses its monopoly to "gain a competitive advantage" in a second market—thereby causing injury—Pet. App. 30a, *even if* the monopolist does not have "a dangerous probability" of successfully acquiring or maintaining a monopoly in the second market, *id.* at 31a n.13. That formulation is difficult to reconcile with the text of the Sherman Act, which proscribes monopolization and attempted monopolization, not "the 'abuse' of one's dominant position." 3 Areeda & Hovenkamp, *supra*, ¶ 652, at 89. It is also inconsistent with this Court's decision in *Spectrum Sports*, 506 U.S. at 459, which clarifies that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so."[5] Finally, although followed by one circuit, *Kerasotes Mich. Theatres, Inc.* v. *National Amusements, Inc.*, 854 F.2d 135, 136-138 (6th Cir. 1988), cert. dismissed, 490 U.S. 1087 (1989), the Second Circuit's "competitive advantage" formulation has been rejected by two others, *Fineman* v. *Armstrong World Indus., Inc.*, 980 F.2d

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J., concurring) (*Terminal Railroad* "held that as an alternative to dissolution a plan should be submitted which provided for equality of treatment of all railroads.").

[5] The Second Circuit has elsewhere acknowledged that tension. See *Virgin Atl. Airways* v. *British Airways*, 257 F.3d 256, 272 (2d Cir. 2001) (*Spectrum Sports* creates "uncertainty * * * as to the continued scope of a monopoly leveraging claim as an independent cause of action.").

171, 206 (3d Cir. 1992); *Alaska Airlines, Inc.* v. *United Airlines, Inc.*, 948 F.2d 536, 548 (9th Cir. 1991).[6]

Moreover, the Second Circuit's "monopoly leveraging" formulation suffers from the same defect as its "essential facilities" holding—it does not require the monopolist's conduct to be "exclusionary" or "predatory" within the meaning of Section 2 jurisprudence. The court of appeals identified only one conduct element to the violation alleged here, which was the alleged "use" of monopoly power in one market. Pet. App. 31a.[7] But use of monopoly power is not unlawful; predatory or exclusionary conduct to create or maintain a monopoly is. Indeed, the conduct underlying respondent's monopoly leveraging claim is identical to the conduct at issue in the essential facilities claim—petitioner's alleged breach of contractual and regulatory requirements that it provide CLECs with access to its facilities at specified rates and terms. For the reasons given above, the complaint's allegations are insufficient to render that conduct exclusionary or

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[6] Notwithstanding the clear circuit conflict on this issue, there is reason to doubt whether this case squarely presents it. The complaint's allegations regarding petitioner's market share in the "second" market (retail local telephone service), see Am. Compl. ¶ 50, may sufficiently plead monopolization or a dangerous probability of success. The court of appeals' refusal to require such allegations, however, further manifests its basic error of treating refusal to provide equal access to an "essential facility" and "monopoly leveraging" as antitrust torts, rather than antitrust *theories* that must be applied consistently with the offenses of "monopolization" and "attempted monopolization" created by the Sherman Act. The court of appeals' decision thus provides erroneous guidance for the further proceedings it has required in this case.

[7] The court of appeals made clear that it considered the use of monopoly power in a monopoly leveraging claim to be "predatory or anticompetitive conduct" per se. Pet. App. 31a n.13. Ignoring the substance attached to those labels, however, the court never explained why petitioner's—or any other monopolist's—use of monopoly power to gain a competitive advantage in a second market would *always* be economically irrational unless it tended to soften or eliminate competition.

predatory, *i.e.*, economically inexplicable absent a tendency to reduce competition.

The Second Circuit appears to have derived its monopoly leveraging formulation from *United States* v. *Griffith*, 334 U.S. 100, 107 (1948), which declared it "unlawful" to use "monopoly power, however lawfully acquired, * * * to gain a competitive advantage," by way of *Berkey Photo*, 603 F.2d at 275, which stated that "a firm violates § 2 by using its monopoly power in one market to gain a competitive advantage in another." But the court of appeals took that language out of context. *Griffith* concerned the alleged use of monopoly power to extract "exclusive privileges" that "unreasonably restrained competition"; it was the extraction of privileges that was found problematic. 334 U.S. at 103-104. *Berkey Photo*, building on *Griffith*, nowhere suggests that a monopolist in one market may not lawfully benefit from that monopoly when competing in a second market. 603 F.2d at 276 (noting that "an integrated business" does not "offend the Sherman Act whenever one of its departments benefits from an association with a division possessing a monopoly in its own market"). What offends the Sherman Act is the use of exclusionary techniques, see *id.* at 274 ("predatory pricing, lease-only policies, and exclusive buying arrangements, to list a few"), that make economic sense for the monopolist only because they exclude competitors. The court of appeals' monopoly leveraging formulation in this case lacks that critical qualification. As a result, like the court's essential facilities analysis, it risks converting standards used in remedial and regulatory regimes (equal access at regulated rates) into free-standing bases for Section 2 liability.

4. Accordingly, there are strong reasons for reviewing the Second Circuit's decision, notwithstanding the procedural posture of this case. Because the issues arise on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), further review would have to take into account the

forgiving pleading standards established by Rule 8, see *Swierkiewicz* v. *Sorema*, 534 U.S. 506 (2002), the limited record, and possible disputes about what materials may be considered or how to construe the complaint. While those concerns may raise doubt about whether this Court's review would necessarily result in a final disposition of the case, they pose no impediment to proper articulation by this Court of the antitrust standard of liability to be applied in any further proceedings in this or other similar cases. In our view, such clarification of the governing legal standards under Section 2 of the Sherman Act is now needed.

More than a decade ago, the Solicitor General urged the Court to review another Second Circuit "essential facilities" case, *Delaware & Hudson Ry.* v. *Consolidated Rail Corp.*, 902 F.2d 174 (1990). See U.S. Br., *Consolidated Rail Corp.* v. *Delaware & Hudson Ry.*, 500 U.S. 928 (1991) (No. 90-380). In that case too, the Second Circuit appeared to countenance antitrust liability based on the adverse effect of a refusal to deal with a competitor, even where that refusal tended to maximize the defendant's profits apart from any effect on competition. See 902 F.2d at 178. There too, the Second Circuit construed the Sherman Act to impose a duty to cooperate with rivals on "reasonable" terms. *Id.* at 180. Although this Court declined review (perhaps because of procedural concerns and a lack of clarity in the Second Circuit's decision, see U.S. Br. at 19, *Consolidated Rail*, *supra*), the decision in this case confirms that the Second Circuit has expanded Sherman Act Section 2 liability beyond its proper bounds.

This decision does so, moreover, in the context of the rapidly evolving telecommunications industry, at a time when the unfolding implementation of the 1996 Act is generating an abundance of antitrust litigation involving similar claims. Two other courts of appeals have already wrestled with the interplay of the Sherman Act and the 1996 Act, *Covad Communications Co.* v. *BellSouth Corp.*, 299

F.3d 1272 (11th Cir. 2002); *Goldwasser*, *supra*. More appeals are pending, *Covad Communications Co.* v. *Bell Atl. Corp.*, No. 02-7057 (D.C. Cir. filed May 10, 2002); *Cavalier Tele., LLC* v. *Verizon Va., Inc.*, No. 02-1337 (4th Cir. filed Apr. 2, 2002). Still more claims are being filed in the district courts. See Pet. 28 n.22. Moreover, while the impact on the telecommunications industry in the wake of the 1996 Act by itself makes resolution of this case a matter of substantial importance, further guidance from this Court would resolve issues that affect the entire national economy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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