No. 02-682

IN THE

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 THE STATES OF NEW YORK, ARIZONA, CONNECTICUT, DISTRICT OF COLUMBIA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, OREGON, PUERTO RICO, VERMONT, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

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The *Amici* States, through their Attorneys General, respectfully submit this brief as *amici curiae* urging affirmance of the decision below.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Attorneys General of the States enforce federal and state antitrust and consumer protection laws and advocate on behalf of consumers and businesses within their States. The States also play an important role in enforcing the obligations of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act"). For more than a century, a few firms have dominated telecommunications markets in the *Amici* States. As advocates for consumers and businesses, the *Amici* States have worked to overcome the adverse effects of lack of competition and desire to see the 1996 Act's goal of promoting competition realized. These experiences have confirmed their belief, like that of Congress when it enacted the 1996 Act, that antitrust remedies must remain available to further competition in local telecommunications markets.

SUMMARY OF ARGUMENT

Verizon, an incumbent local exchange carrier ("ILEC"), owns local exchange facilities. Access to those facilities is essential to providers of telecommunications services in a wide array of product markets. Verizon also is a competitor in those markets. The complaints in this and other similar antitrust actions allege conduct by Verizon and other ILECs which, if true, could entrench and extend their monopoly power, allowing them to raise prices and stifle innovation.

Verizon and its *amici* propose a rigid, categorical test for exclusionary conduct under Section 2 of the Sherman Act, 15 U.S.C. § 2, which would permit dismissal of such complaints on their face, without any factual inquiry into whether a threat to competition — and hence, to consumers — exists. The novel standard that Verizon and its *amici* urge departs markedly from the Section 2 analysis developed by this Court and applied by the lower courts. If adopted, their proposal would significantly limit the availability of Section 2 as a means to protect competition not only in telecommunications markets, but in markets generally.

In Point I, *Amici* States demonstrate that antitrust enforcement has a well-established and vital role to play — expressly recognized by Congress when it enacted the 1996 Act — in guarding against anticompetitive refusals to deal by ILECs in local telecommunications markets. History demonstrates that an ILEC's control of a local exchange confers significant opportunities to harm rivals and — in turn —the competitive process that benefits the public at large.

In Point II, the *Amici* States explain that, under this Court's precedents, an ILEC's refusal to deal with rivals may result in Section 2 liability if the refusal is likely to maintain or extend the ILEC's monopoly power and is unnecessary to achieve overriding efficiency benefits. The limits on Section 2 that Verizon and its *amici* would impose are unwarranted. In particular, the notion that a monopolist may engage in any conduct that makes "business sense" apart from enhanced monopoly returns is directly contrary to this Court's Section 2 precedents and would immunize conduct that plainly harms consumers.

Point II also responds to Verizon and the United States' arguments that the Section 2 theories cited by the Second Circuit — essential facilities and monopoly leveraging — cannot support liability under Section 2 where an ILEC has allegedly refused to deal with rivals. Point II shows that where such allegations are properly made, these theories of liability have a legitimate role to play in identifying exclusionary conduct.

ARGUMENT

I. Antitrust And Regulatory Enforcement Under The 1996 Act Are Complementary Means To Achieve The Benefits Of Competition In Local Telecommunications Markets

A. Congress Expressly Stated its Intent to Preserve Antitrust Enforcement in Telecommunications Markets.

When it enacted the 1996 Act, Congress expressed its intent to preserve antitrust remedies in local telecommunications markets in unmistakable language: "[N]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 1996 Act, *supra*, § 601, 110 Stat. at 143, 47 U.S.C. § 152 (note). The 1996 Act also provides: "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments." *Id*.

Just as the 1996 Act's antitrust savings clause leaves no room to argue an implied repeal of the antitrust laws, so too the Act's express purpose precludes any assertion that its objectives conflict with those of antitrust enforcement. Emphasizing the common purpose that the antitrust laws and the 1996 Act share, Congress stated that the Act is designed to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 1996 Act, *supra* (title).

In regulatory proceedings, Verizon itself has emphasized that antitrust laws continue to apply to local interconnection disputes. In obtaining FCC approval of its application to serve the long distance market in New York, Verizon argued against more stringent regulatory safeguards, acknowledging that if it "were nevertheless to engage in anticompetitive conduct, 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*."[1] The FCC specifically noted Verizon's admission in approving the application.[2]

B. Antitrust Remedies Are Essential to Police Anticompetitive Behavior by ILECs.

Despite Congress' explicit rejection of antitrust immunity, Verizon argues that denials of, and interference with, access to local exchanges are a concern only of telecommunications regulation. According to Verizon, duties to permit access to local exchanges are the "novel" creation of the 1996 Act and do not otherwise exist under the "unadorned" antitrust laws (*See* Pet. Br. at 9 (quoting *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 399-400 (7th Cir. 2000)); *id.* at 16-17).

In fact, the opposite is true. The antitrust laws are the preeminent legal tool to promote and protect marketplace competition — "the Magna Carta of free enterprise." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). In telecommunications markets, in particular, antitrust tribunals played a vital role in introducing the very competition that the 1996 Act seeks to expand. Drawing on Sherman Act Section 2 standards, discussed further in Point II, *infra*, antitrust courts properly recognized a duty to provide access to local exchanges where essential to achieve competition in long distance and equipment markets. Indeed, the history of telecommunications markets teaches that regulatory attempts to introduce competition are aided—not impaired—by the existence of flexible antitrust responses to threats to competition. That is why Congress expressly preserved antitrust remedies when it adopted the 1996 Act.

1. *The network character of telecommunications markets and ILEC control of local exchanges pose threats to competition for*

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1. *Application By Bell Atlantic-New York For Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Services In the State of New York*, FCC Docket No. 99-295, filed Sept. 29, 1999, at 71 [hereinafter "*Bell Atlantic-New York § 271 Application*"] (emphasis added).

2. *In the Matter of Application By Bell Atlantic-New York For Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Services In the State of New York*, Mem. Op. and Order, 15 F.C.C.R. 3953, ¶ 430 & n.1320 (Dec. 21, 1999) [hereinafter "*Bell Atlantic-New York § 271* Order"].

which there is no single, obvious legal response. The incentive and opportunities for an ILEC to harm competition in telecommunications markets through refusals to deal are well-recognized. Telecommunications markets are network markets. In general, purchasers of telecommunications services buy the ability to connect with all other users of the network. Accordingly, a provider of telecommunications services must interconnect to other providers' customers. The need to interconnect eliminates the possibility of completely independent rivalry because rivals must cooperate in order to provide customers with the network connection they require. *See* Stephen Breyer, REGULATION AND ITS REFORM 287-314 (1982) (discussing centrality of "joint costs" in telecommunications markets). This inescapable market condition creates significant potential for an ILEC to interfere with its competitors.[3]

Virtually all telecommunications roads lead to and through an ILEC's local exchange network facilities. Competitors need access to, for example, switches (equipment directing calls to their destinations), local loops (wires connecting switches to telephones), and transport trunks (wires carrying calls between switches). As this Court has explained, "[i]t is easy to see why a company that owns a local exchange . . . would have an almost insurmountable competitive advantage not only in routing calls within the exchange, but, through its control of this local market, in the markets for terminal equipment and long distance calling as well." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 490 (2002). Thus, ILECs have unparalleled *opportunities* for anticompetitive behavior.

Moreover, because ILECs almost always compete in final product markets — they provide telephone services and generally seek to compete in other emerging telecommunications markets — they also have strong *incentives* to engage in anticompetitive behavior. As one commentator

3. For a fuller description of the market characteristics that have contributed to lack of competition in telecommunications markets, see, *e.g.*, FCC, *In the Applications of NYNEX Corp. Transferor - and - Bell Atlantic Corp. Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 F.C.C.R. 19985, ¶ 133 (Aug. 14, 1997); W. Baumol & J. Sidak, TOWARD COMPETITION IN LOCAL TELEPHONY (1994).

aptly put it, the "fundamental complicating phenomenon" in achieving competition in telecommunications markets is that the local exchange facilities, controlled by ILECs, "constitute inputs for the activities of the rivals of these firms in other arenas — inputs without which the rivals cannot hope to operate"; unconstrained by legal rules, an ILEC could "force rivals to bend to its will or . . . destroy those rivals altogether." Baumol & Sidak, *supra* n.3, at 7.

2. *Antitrust actions played an important role in opening up long distance and equipment markets to competition.* The history of incumbent resistance to competition in long distance and equipment markets is well known. Certain points bear emphasis, however, as they demonstrate the preeminent role antitrust tribunals played in opening telecommunications markets and underscore the dangers of relying on a single approach to achieve competition in this area.

After the FCC lowered regulatory barriers to competition in long distance and equipment markets, AT&T, then-owner of most local exchanges, allegedly used its control of those exchanges to raise rivals' costs in those markets. The FCC attempted to address competitors' concerns, using its regulatory tools.[4] When regulatory processes proved incapable of overcoming AT&T's opposition to competition, the United States and private parties used the antitrust laws to challenge entry barriers that AT&T had erected. *See S. Pac. Communications Co. v. AT&T Co.*, 740 F.2d 980 (D.C. Cir. 1984); *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983); *United States v. AT&T Co.*, 524 F. Supp. 1336 (D.D.C. 1981) .

In those actions, evidence showed that, although regulatory processes had been relatively effective in

4. *See*, *e.g.*, *Carterfone*, 13 F.C.C.2d 420, 423-25 (1968) (declaring unlawful practice of prohibiting interconnection to customers who used competitors' equipment); *Microwave Communications*, *Inc.*, 18 F.C.C.2d 953 (1969), *reconsideration denied*, 21 F.C.C.2d 190 (1970) (permitting private line services); *Specialized Common Carriers*, 29 F.C.C.2d 870 (1971) (declaring that there should be open competition in markets for certain "specialized" services). The FCC's market opening policy required some judicial prompting. *See MCI Telecomm. Corp. v. FCC*, 561 F.2d 365, 380 (D.C. Cir. 1977) (setting aside decision of FCC and permitting MCI to offer competitive services).

overcoming AT&T's categorical opposition to network access by competitors, the regulatory regime was unable to deal with AT&T's broader pattern of low-level conflict with potential competitors over access. *See United States v. W. Elec. Co.*, 673 F. Supp. 525, 530-531 (D.D.C. 1987). The *MCI* case, for example, demonstrated that despite regulatory oversight, AT&T refused to permit long distance carriers to interconnect to local exchanges; where AT&T permitted access, it imposed unnecessary or unwarranted costs on competitors; and it used regulatory processes to impose costs on competitors by raising groundless objections. *See* 708 F.2d at 1145-1153, 1156-1159. Similarly, in *United States v. AT&T*, the United States introduced evidence that AT&T had imposed unnecessarily expensive requirements on customers who sought to use competitors' phones or other equipment, 524 F. Supp. at 1348-1352, and on customers who sought to use rival long distance providers. *Id.* at 1353-1357. Federal antitrust enforcers also demonstrated that AT&T had delayed competitors' entry through groundless objections in regulatorily mandated negotiations over interconnection. *See id.* at 1356.

In response to such evidence, the courts drew on cases going back to this Court's decision in *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912), to recognize that antitrust law may impose affirmative duties to deal where such dealing is necessary to protect competition. *See S. Pac.*, 740 F.2d at 1008-1009; *MCI*, 708 F.2d at 1132-1133; *United States v. AT&T*, 524 F. Supp. at 1352-53.

In *MCI*, the Seventh Circuit adopted workable distinctions to identify those instances in which refusals to deal posed a sufficient threat to competition to be subject to antitrust, as opposed to only regulatory, scrutiny. The court held that access to local exchanges was essential to competition in long distance markets, and that AT&T's denial of access undermined competition without overriding business justification. 708 F.2d at 1133. Thus, the court invoked antitrust law to order interconnection. *Id.* At the same time, it declined to require AT&T to share its long distance lines, finding that competitors could build their own lines and that AT&T's denial of access therefore did not undermine competition. *Id*. at 1148. In the

United States' action, a consent decree was entered which sought to address anticompetitive incentives and access issues in long distance and equipment markets. *See United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983). Only after these cases did wide-spread competition develop in long distance and equipment markets. [5]

3. *As Congress anticipated, antitrust can play an essential role in introducing and safeguarding competition in local telecommunications markets.* Efforts to jumpstart competition in local telecommunications markets began in earnest in the early 1990s. Inspired by the success of antitrust law in introducing competition into long distance and equipment markets, state legislators and regulators sought to transform local telephone service monopolies into competitive markets. Illinois passed a statute mandating that ILECs price unbundled wholesale services at long-run incremental prices and make them available to competitors on a nondiscriminatory basis. [6] Similarly, the New York State Public Service Commission required ILECs to develop a means to enable consumers to retain their telephone numbers when changing local service providers.[7]

The 1996 Act continues the process of promoting competition in telecommunications markets. Building on affirmative duties of access recognized in *MCI* and other antitrust decisions, Congress created a regulatory scheme to codify duties of access to local exchanges. Among other things,

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5. *See*, *e.g.*, Zolnierek, Rangos & Eisner, Industry Analysis Division, Common Carrier Bureau, FCC, *Long Distance Market Shares-Fourth Quarter 1998*, *March 1999*, at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/mksh4q98.pdf (detailing entry by ATT&T's competitors from July 1984 through December 1998).

6. *See* 220 Ill. Comp. Stat. §§ 13-505.1, *et seq.* (1993); *see also* Calif. Pub. Util. Comm'n, *In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers*, 33 C.P.U.C.2d 43 (1989).

7. New York Pub. Serv. Comm'n, *Proceeding on Mot. of the Comm'n to Examine Issues Related to the Continued Provision of Universal Service and to Develop a Framework for the Transition to Competition in the Local Exchange Market*, *Order Requiring Interim Number Portability*, *Directing a Study of the Feasibility of a Trial of True Number Portability and Directing Further Collaboration*, Case 94-C-0095, 1995 N.Y.P.U.C. LEXIS 70 (Mar. 8, 1995).

the 1996 Act requires ILECs to provide access to local exchange facilities on negotiated terms, 47 U.S.C. § 251(b) and (c); grants the FCC and state commissions the power to review terms of access, *id.* § 252(b); and provides aggrieved parties with a variety of remedies while specifically preserving antitrust claims, *see id.* §§ 152 (note), 206, 207; *see also In re Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, First Rep. and Order*, 11 F.C.C.R. 15499, ¶ 124-129 (Aug. 8, 1996) [hereinafter "FCC *First Rep. and Order*"].

The evidence on entry by competitors under the 1996 Act is mixed and inconclusive, however. In several major metropolitan markets, increased competition in services for large businesses has been encouraging, but the results in other markets are less impressive. Of the 38 states for which the latest FCC report provides data, ILECs' share of end-user switched access lines is still as high as 96% in one state (Kentucky) and over 90% in eleven others (Alabama, Connecticut, Indiana, Louisiana, Maryland, Mississippi, North Carolina, Ohio, Oregon, South Carolina, and Tennessee).[8] New York, Rhode Island, and Michigan have experienced the highest levels of entry by competitors, but even in those states, ILECs' shares remain at 75%, 78%, and 79%, respectively. [9] Equally important, in those states where there has been notable entry by competitors, gains have been heavily concentrated in limited geographic areas.[10] The States, however, have a vital interest in seeing that all their citizens benefit from competition in telecommunications markets, whether they live in smaller towns and cities or major metropolitan areas, and whether

8. FCC, *Local Telephone Competition: Status As Of December 31, 2002* (Table 6), at http://www.fcc.gov/Bureaus/Common_Carrier/ Reports/ FCC-State_Link/IAD/1com0603.pdf.

9. *Id.*

10. *See id.* (map showing zip code areas where competitors have challenged ILECs and the number of competitors operating within those areas). Disparities in entry in different regions do not consistently follow population density patterns. *Id.* at 3 (noting that entry was more significant in Rhode Island, New Hampshire, Nebraska, and Utah than in California, Florida or Ohio).

they are residential telephone customers or businesses seeking high-end services.

Anticompetitive conduct may account for the mixed performance reflected in the data. A large number of antitrust actions have been filed alleging persistent anticompetitive behavior by ILECs.[11] The allegations are of a piece with those found to have had substance in the *MCI* and *AT&T* cases. In this case, for example, Respondent alleges that Verizon engaged in unjustified delays in establishing connections to the local exchange for competitors' customers. *See Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp.*, 305 F.3d 89, 95 (2d Cir. 2002). In *Covad Communications Co. v. Bell Atlantic Corp.*, a Verizon competitor alleges that when it sought to compete in providing high-speed network and data services, Verizon, among other things: fraudulently claimed that there was no room to collocate Covad's equipment in Verizon's central offices; required Covad to build unnecessary special rooms before collocating; delayed providing loops to Covad; and abused the regulatory and negotiation process to impede Covad's entry. 201 F. Supp. at 129-130 nn.10-17.

Competitors, in short, have alleged "death by a thousand cuts" at the hands of the ILECs. Even with the 1996 Act's prophylactic tools, ILECs can frustrate competition by raising the costs of rivals who seek access to local exchanges — as alleged in this and other cases — just as AT&T did a generation earlier when threatened by competition in long distance and equipment markets.

Although the 1996 Act provides regulatory means to address conduct that raises the costs of access to local exchanges, there are limits to what the regulatory process can be expected to accomplish. As the current Chairman of the FCC has recognized, delays in regulatory action often "hinder[] companies from improving their existing offerings or from entering new markets that lie outside their traditional

11. *See*, *e.g.*, *Cavalier Tel. Co. v. Verizon Va., Inc.*, 330 F.3d 176 (4th Cir. 2003); *Goldwasser*, 222 F.3d 390; *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002); *Covad Communications Co. v. Bell Atl. Corp.*, 201 F. Supp. 2d 123 (D.D.C. 2002), *appeal filed*, (May 6, 2002 D.C. Cir.) (No. 02-7057).

regulatory boundaries."[12] Federal and state regulators therefore face a difficult trade-off. On the one hand, they can quickly review applications and resolve discrete disputes between ILECs and competitors so that the parties can carry on with the business of competing. Or, they can devote the time and resources necessary to resolve complex technical and economic disputes with sufficient certainty to ensure that the ILEC does not impose unjustified costs on competitors.

As Congress recognized, the availability of antitrust enforcement helps to resolve this dilemma. With antitrust remedies available, regulators may, if appropriate within the parameters of their statutory and regulatory duties, limit certain proceedings. At the same time, if an ILEC's overall conduct *is* anticompetitive, government enforcers and aggrieved parties may bring an antitrust action. This complementary role has been recognized since the inception of the 1996 Act. In implementing the Act, the FCC explicitly stated that "predatory behavior . . . can be adequately addressed through our complaint process *and enforcement of the antitrust laws*."[13] In implementing Sections 251 and 252 of the 1996 Act, the FCC emphasized that "parties have several options for seeking relief if they believe that a carrier has violated the standards under section 251 or 252," including "*the ability of persons to seek relief under the antitrust laws*." *FCC First Rep. and Order*, *supra*, ¶¶ 124-129 (emphasis added).

Both regulators and regulated firms, in proceedings under Section 271 of the 1996 Act, have acknowledged this connection between regulatory efficiency and the availability of antitrust enforcement. As the FCC explained in approving Verizon's Section 271 application for New York State:

> [I]t is important to evaluate the benefits of these reporting and enforcement mechanisms in the

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12. Hearing Before the Subcomm. on Communications of the Sen. Comm. on Commerce, Science and Transport., 105th Cong. (1998) (statement of Michael K. Powell, Commissioner, FCC) , 1998 FCC LEXIS 2764, at *9.

13. *In the Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate*, *Interexchange Marketplace*, 12 F.C.C.R. 15756, 15831 (April 17, 1997) (emphasis added).

> context of other regulatory and legal processes that provide additional positive incentives to Bell Atlantic [*i.e.*, Verizon]. . . . [W]e recognize that the Commission's enforcement authority under section 271(d)(6) already provides incentives for Bell Atlantic to ensure continuing compliance with its section 271 obligations. We also recognize that Bell Atlantic may be subject to payment of liquidated damages through many of its individual interconnection agreements with competitive carriers. *Furthermore, Bell Atlantic risks liability through antitrust and other private causes of action if it performs in an unlawfully discriminatory manner*.[14]

Verizon shared this view when, in its Section 271 application for New York, it opposed more stringent regulatory restrictions and assured the FCC that competitors could resort to antitrust enforcement if the proposed safeguards did not prevent it from harming competition.[15]

II. An ILEC's Refusal To Deal With Rivals May Result In Section 2 Liability If The Refusal Is Likely To Maintain Or Extend The ILEC's Monopoly Power And Is Unnecessary To Achieve Overriding Efficiency Benefits

The court of appeals held that, assuming the truth of the allegations, Verizon might be found to have violated Section 2 by engaging in exclusionary or predatory conduct to maintain its monopoly power over local telecommunications markets. In particular, the court found that the allegations in the complaint are consistent with an exclusionary refusal to deal under either the essential facilities doctrine or a monopoly leveraging theory.

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14. *Bell Atlantic-New York § 271* Order, *supra* n.2, at ¶ 430 & n.1320 (emphasis added). The FCC reiterated this position in Section 271 approvals in other States. *See, e.g.*, *In the Matter of Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecomm. Act of 1996 To Provide In-Region InterLATA Services in Texas*, *Mem. Op. and Order*, 15 F.C.C.R. 18354, ¶ 421 & n.1222 (June 30, 2000); *In the Matter of Joint Application by BellSouth Corp., et al., for Provision of In-Region, InterLATA Services in Ga. and La.*, *Mem. Op. and Order*, 17 F.C.C.R. 9018, ¶ 296 & n.1144 (May 15, 2002).

15. *Bell Atlantic-New York § 271 Application*, *supra* n.1, at 71.

Recognizing that Respondent's claim cannot be dismissed on the pleadings using the fact-specific criteria for exclusionary conduct developed by this Court, Verizon and the United States propose a new test. Unilateral conduct, they contend, may not be condemned as exclusionary unless it "make[s] no business sense apart from enabling monopoly returns" (Pet. Br. at 20; U.S. Br. at 15-17). By ignoring the potential impact on consumers and the market, and by focusing entirely on whether Verizon could have a lawful business objective — specifically, whether the refusal to deal could be profitable apart from enabling monopoly returns — the proposed test ignores nearly a century of Section 2 jurisprudence. If adopted, Verizon's test would undermine the central objective of antitrust law itself — enhancing consumer welfare**.**

A. Section 2 Precedents Establish the Need for a Fact-Intensive Inquiry to Determine Whether Conduct Is Exclusionary

Unlawful monopolization under Section 2 requires proof of two elements: "(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966). The first element is not at issue here. Conduct that satisfies the second element is variously referred to as "exclusionary . . . or anticompetitive . . . or predatory." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985).

"[A]nticompetitive strategic behavior by dominant firms comes in many kinds, many of which may not be known or even anticipated today." III P. Areeda & H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles* ¶ 651i, at 88 (2002). Appropriately then, the test for exclusionary conduct is fact-specific. Early in the Sherman Act's history, this Court recognized that Section 2 was "intended to supplement [Section 1 of the Sherman Act, 15 U.S.C. § 1] and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded." *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911). As in Section 1 cases, "the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of [Section 2] have been committed[] is the rule of reason." *Id.* at 62.

Reflecting the parallels between rule of reason analysis under Sections 1 and 2, in determining whether conduct violates Section 2, this Court has instructed courts "to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Aspen Skiing*, 472 U.S. at 605. Merely showing that a challenged practice harms individual rivals, or even that it reduces the overall level of competition, is not sufficient to prove a Section 2 violation, just as it is insufficient to establish Section 1 liability. The challenged practice may have pro-competitive benefits. It may offer product improvements or choice, or increase economic efficiency, thus rendering markets more, rather than less, competitive. Nevertheless, conduct may be condemned as exclusionary if it achieves pro-competitive benefits "in an unnecessarily restrictive way." *Id.* at 605 n.32 (quoting III Areeda & Turner, *supra*, at 78 (1978)). Under the rule of reason standards that underpin both Section 1 and Section 2, the inquiry focuses on "the competitive effects of challenged behavior relative to such alternatives as its abandonment or a less restrictive alternative." VII Areeda & Hovenkamp, *supra*, ¶ 1500, at 336-37 (2003).

Thus, the proper standard is appropriately summarized as follows:

> Exclusionary conduct is acts that (1) are reasonably capable of creating, enlarging, or prolonging monopoly power by impairing the opportunities of rivals; and (2) that either .. . do not benefit consumers at all, or . . . are unnecessary for the particular consumer benefits that the acts produce, or . . . produce harms disproportionate to the resulting benefits.

III Areeda & Hovenkamp, *supra*, ¶ 651j, at 88-89. Applying this analytical framework, the courts of appeals have detailed the burdens of proof that it suggests: (1) a plaintiff is required to demonstrate anticompetitive effect; (2) if the plaintiff does so, the burden shifts to the defendant to demonstrate a pro-competitive justification; and (3) if the defendant does so, the plaintiff may still prevail if it demonstrates that the challenged conduct is not necessary to achieve the consumer benefits conferred or that the harm to competition is disproportionate to the benefit conferred. *See*, *e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (*en banc*).

Under this analytical approach, properly plead allegations that an ILEC is interfering with a rival's access to a local exchange so as to raise the rival's costs — and thereby maintain or extend power over price — cannot be dismissed on the pleadings. *See Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 468-69 (1992); *see generally* T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 YALE L.J. 209, 234-35 (1986).

B. Verizon's Exclusionary Conduct Test Finds No Support in Section 2 Precedents or in Underlying Antitrust Principles

In an attempt to secure dismissal without any examination of market conditions or a determination that the challenged conduct is necessary to achieve overriding pro-competitive justifications — matters that cannot be resolved on the face of a complaint — Verizon and the United States urge this Court to discard the existing analytic framework developed under Section 2. They propose, instead, to replace this Section 2 jurisprudence with a new test: Unilateral conduct, they contend, may not be condemned as exclusionary unless it "make[s] no business sense apart from enabling monopoly returns" (Pet. Br. at 20).[16] Restating its proposed test, Verizon writes: "[i]f the conduct is sustainable by the defendant

16. Strictly speaking, the United States refers to conduct that lacks business sense "apart from its tendency to impair competition," or "to eliminate or lessen competition" (U.S. Br. at 17, 19). Whether this is intended to express something different than Verizon's "enabling monopoly returns" characterization is unclear, but we assume no difference. Also, perhaps recognizing the novelty of the test, the United States would limit it to the context in which the alleged exclusionary conduct is a refusal to deal with rivals (U.S. Br. at 17).

without monopoly profits, i.e., it makes business sense without the prospect of monopoly profits, then it is 'valid,' 'normal' conduct" (Pet. Br. at 22-23; *see also* U.S. Br. at 17).

Relying on this premise, Verizon asserts that its denial to a rival of access to a local loop could never violate Section 2 because "[w]hat is challenged is Verizon's alleged failure to provide adequate access at forced discounts to rivals . . . to help them sever Verizon's relationship with its retail customers . . . . It is granting . . . access, with the ensuing severance of important customer relationships, that requires a sacrifice that no ordinary competitor would freely make" (Pet. Br. at 26, 27). Having thus offered "economic sense" – that is, a colorable motive – for its refusal to deal, according to Verizon, the case is over (*see also* U.S. Br. at 20 ("a refusal to sell an input to a rival when it requires an incumbent to forfeit profits would make obvious business sense")). This argument ignores nearly a century of Section 2 jurisprudence.

1. Verizon's proposed test ignores the special concern this Court has shown for unilateral conduct by a dominant firm. This Court has recognized that "the right of a monopolist to deal with whom he pleases" is "qualif[ied]." *Aspen Skiing*, 472 U.S. at 603; *see United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Thus, "practices that harm rivals unnecessarily may be violations of § 2 when committed by a dominant firm, even though they would not be violations of other provisions when no dominant firm is involved." III Areeda & Hovenkamp, *supra*, ¶ 651h, at 87; *see also Kodak*, 504 U.S. at 488 (Scalia, J., dissenting) (recognizing that "[b]ehavior 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").

Judge Wyzanski's seminal monopolization opinion in *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), illustrates the shortcomings of Verizon's test. There, the court reviewed United Shoe's restrictive leasing practices for shoe-manufacturing machinery, which it found to be "the sorts of activities which would be engaged in by other honorable firms." *Id.* at 344. Judge Wyzanski nevertheless held the practices illegal because, when engaged in by a monopolist, "they unnecessarily exclude actual and potential competition." *Id.* at 345. Under Verizon's test, the anticompetitive effect of United Shoe's leasing practices would have been irrelevant; the fact that the defendant's conduct made "business sense" would almost certainly have shielded it from Section 2 liability. *See also United States v. Griffith*, 334 U.S. 100, 108-09 (1948) (acknowledging that "[l]arge-scale buying is not . . . unlawful *per se*" because it "may yield price or other lawful advantages to the buyer," but holding that such large-scale buying by a motion picture circuit violated Section 2 because it extended monopoly power).

2. Verizon's proposal also disregards prevailing law on intent in Section 2 cases. The test's leading academic proponents acknowledge that an approach that focuses on whether the conduct could be profitable apart from monopoly returns is designed to isolate circumstances where the only possible conclusion is "that the firm's . . . action was motivated by the desire for the monopoly profits attendant on the exit of the rival." J. Ordover & R. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 YALE L. J. 8, 13 (1981). The test would therefore insulate a monopolist from any monopolization claim unless the plaintiff could plead facts establishing a sole and specific intent by the monopolist to exclude competition or control price.

But in *United States v. Aluminum Co. of America ("Alcoa")*, the Second Circuit, in a decision by Judge Hand, declined to limit Section 2 violations to conduct "actuated solely by a desire to prevent competition." 148 F.2d 416, 431 (2d Cir. 1945). This Court has since agreed: although in an *attempted* monopolization case, "it is necessary to prove a 'specific intent' to accomplish the forbidden objective — as Judge Hand explained, 'an intent which goes beyond the mere intent to do the act'" — in an *actual* monopolization case, "evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary.'" *Aspen Skiing*, 472 U.S. at 602 (quoting *Alcoa*, 148 F.2d at 432); *see generally* ABA Antitrust Section, ANTITRUST LAW

DEVELOPMENTS 248 (5th ed. 2002) ("[M]ore recent decisions focus on intent only as bearing on probable effect").

3. The test proposed here would undermine the central objective of antitrust law itself — enhancing consumer welfare. *See generally Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (explaining that "Congress designed the Sherman Act as a 'consumer welfare prescription.'") (quoting R. Bork, THE ANTRITRUST PARADOX 66 (1978)). As this Court instructed in *Aspen Skiing*, "impact on consumers" is relevant to determine whether challenged conduct is exclusionary. 472 U.S. at 605. Yet the test here is indifferent to the real-world impact of the challenged conduct on prices to consumers; it applies "*despite the fact that consumers are worse off as a result*."[17]

By way of hypothetical, suppose that an ILEC redesigns the interfaces of its switching equipment at a cost of $5,000 per switch, but is able to sell the new equipment for $6,000 per switch. Assume further that the change will cost rivals, who must access its switches, $50,000 per switch, an amount that puts rivals at an insurmountable competitive disadvantage. Because the only question that Verizon's test would address is whether the investment is profitable for the ILEC apart from enabling monopoly returns — and on these facts, it is — a Section 2 challenge would necessarily fail. Our hypothetical is analogous to what AT&T did when it required customers of rival equipment manufacturers to lease prohibitively expensive "protective connecting arrangements" before connecting to the local exchange network. *See, e.g.*, *United States v. AT&T*, 524 F. Supp. at 1349. According to Verizon and its *amici*, no amount of harm to competition or consumers would condemn the conduct in this scenario.

The United States, by contrast, acknowledges that as a general matter, exclusionary conduct may be found where "the harm to competition" is "disproportionate to consumer benefits (in terms of providing a superior product, for example)

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17. J. Ordover & R. Willig, *Access and Bundling in High-Technology Markets* 103-128, at 112, in COMPETITION, INNOVATION, AND THE MICROSOFT MONOPOLY: ANTITRUST IN THE DIGITAL MARKETPLACE (J. Eisenach & T. Leonard eds. 1999) (emphasis added).

and to the economic benefits to the defendant (aside from benefits that accrue from diminished competition)" (U.S. Br. at 14). But, according to the United States, when a defendant is alleged to be under a duty to deal with a rival, "the inquiry into whether conduct is 'exclusionary' or 'predatory' requires a sharper focus" (*id.* at 15). Then, the United States argues, "conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition" (*id.* at 15). This radical change in Section 2 standards is warranted, the United States asserts, because exposing monopolists to liability for refusing to deal with rivals rarely offers procompetitive benefits, while frequently risking collusion and the dampening of incentives for investment (*id.* at 17).

The history of anticompetitive conduct and antitrust enforcement in telecommunications markets undercuts the United States' unsupported assertions. The findings in antitrust actions in this area demonstrate that unjustified refusals to deal by ILECs have served to maintain monopoly power. And the remedies afforded in those actions opened markets to investment and competition without requiring unnecessary sharing of facilities. *See United States v. AT&T*, 552 F. Supp. at 226-234 (approving consent decree opening long distance markets to investment); *MCI*, 708 F.2d at 1133, 1148 (drawing the line between necessary and unnecessary sharing). Because the test proposed by the United States disregards this Court's Section 2 standards and antitrust law's core goal, it does not sharpen — it dulls — the necessary inquiry.

4. As support for their exclusionary conduct test, both the United States and Verizon cite the test for predatory pricing, adopted by this Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (U.S. Br. at 16; Pet. Br. at 22). The predatory pricing analogy, however, is unpersuasive.

As the *Matsushita* Court noted, "cutting prices . . . [is] the very conduct the antitrust laws are designed to protect." 475 U.S. at 594. Every price cut confers immediate benefits on consumers. At the same time, the price cutter — who is, in the predatory pricing model, selling below cost — must endure on-going and mounting economic loss until rivals are eventually driven from the market. A failed effort is, therefore, costly to the perpetrator. *See id.* at 595. Even the ultimate result is uncertain because, after bearing the economic pain along the way, when the predator finally excludes rivals and achieves the theoretical opportunity to raise prices, it is gambling that doing so will not induce entry by excluded or, indeed, new rivals. For all these reasons, there is "a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful." *Id.* at 589.

By contrast, the consumer benefits of a dominant firm's refusal to deal with rivals cannot properly be assessed without analyzing market conditions. Depending on the context, a refusal to deal may entrench or extend monopoly power without offering significant pro-competitive benefits. Equally important, the dominant firm can realize immediate revenue from the refusal to deal, and thus is in a fundamentally different position than a predatory pricer. *See* T. Krattenmaker & S. Salop, *Economic Concepts and Antitrust Analysis: A Critical Reexamination*, 56 ANTITRUST L. J. 71, 73 (1987) ("In contrast to predatory pricing, where the dominant firm loses money faster than its smaller victims, [refusals to deal by the dominant firm] can raise rivals' costs disproportionately."). Accordingly, predatory pricing schemes bear no comparison to refusals to deal and offer no support for Verizon's arguments.

C. Although Verizon's Exclusionary Conduct Test May Have Limited Value, Section 2 Claims Are Not Susceptible to a "One Size Fits All" Approach.

The exclusionary conduct test offered here would radically depart from Section 2 precedents. That is not to say, however, that it is devoid of all value. The showing that the test contemplates may well be sufficient to establish liability. But, as we have demonstrated, any attempt to use the test to create a *necessary* condition of Section 2 liability is untenable, even if, as the United States proposes, the new test were limited to refusals to deal with rivals.

There may be circumstances in which the monopolist can be proven to have engaged in conduct that has no colorable business explanation, except to enable monopoly returns. Where those are the facts, liability under Section 2 should generally follow. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), can be viewed as such a case. There, the Court upheld Section 2 liability on the basis of a lower court finding that the defendant power company's sole motive for refusing to deal was "to prevent the municipal power systems from eroding its monopolistic position." *Id.* at 378. Because the court found that its only business objective was to obtain monopoly returns, the power company's refusal to deal flunks the test proposed by Verizon and the United States. Section 2 liability was properly imposed.

Otter Tail reflects that the proposed test can identify cases of clear illegality. But even so, the test raises significant questions that neither Verizon nor the United States address. For example, neither commits itself clearly on whether, in going through the necessary analysis, one includes, as a justifiable benefit to the monopolist, profits from customer sales that the monopolist's exclusionary conduct captures from the injured rival. Verizon suggests that it may include these profits on the theory that "sever[ing] . . . important customer relationships . . . requires a sacrifice that no ordinary competitor would freely make" (Pet. Br. at 27). However, if this were the correct analysis, then even the naked refusal to deal in *Lorain Journal Co. v. United States* would escape condemnation. In that case, the monopolist newspaper had "practically indispensable coverage" of those persons whom an advertiser would want to reach in the relevant market, and its pages were therefore "essential" for many advertisers. 342 U.S. 143, 148, 149-50 (1951). The newspaper refused to deal with advertisers who used the services of its potential rival, a newly established radio station, thereby assuring itself of continued profits from advertisers captured from its excluded rival. Because there was no countervailing procompetitive justification for the newspaper's conduct, to allow it to use these captured profits to escape Section 2 liability would denude the statute of serious content in the refusal to deal context. Indeed, were profits captured by means of the challenged conduct allowable as a justifiable benefit to the monopolist, *Otter Tail* itself would have been decided differently, for the justification which Verizon here proposes — retaining customers — is precisely the justification rejected by this Court in *Otter Tail*. *See Otter Tail*, 410 U.S. at 380 (rejecting Otter Tail's justification that "without the weapons which it used, more and more municipalities will turn to public power and Otter Tail will go downhill").

Similarly, neither Verizon nor the United States explain whether application of the test requires exclusion of the incremental profit to the monopolist that comes from protecting an existing monopoly price against erosion from competition by the excluded rivals.[18] Yet, like captured profits, this exclusion from the profit analysis is necessary. Profits captured by nakedly exclusionary conduct, such as protecting an existing monopoly price, cannot justify otherwise anti-competitive conduct. A business justification "does not succeed [in avoiding Section 2 liability] merely because it is profitable, for one can profit from both competitive and monopolistic acts." III Areeda & Hovenkamp, *supra*, ¶ 658f, at 131.

While the test may have some uses, if it had been a necessary criteria for exclusionary conduct, many of this Court's Section 2 cases likely would have been decided differently. The monopolist in *Aspen Skiing* put forward potentially plausible business justifications for its conduct, which the jury rejected at trial. *See* 472 U.S. at 608-11. Kodak did as well, and secured a favorable summary judgment that this Court reversed. *See* 504 U.S. at 482-86. Under Verizon's and the United States' exclusionary conduct

18. Failure to recognize this profit element would be akin to adopting the "Cellophane Fallacy," *see United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956), where the Court used elasticity of demand at current prices — without regard for whether the defendant already priced at monopoly levels — in the market definition analysis. *See generally* W. Landes & R. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 961, 970-71 (1981); *Kodak*, 504 U.S. at 471 ("'The existence of significant substitution in the event of *further* price increases or even at the *current* price does not tell us whether the defendant *already* exercises significant market power.'") (quoting Areeda & Kaplow, *supra*, ¶ 340(b)); ABA Antitrust Section, *supra*, at 542 n.56 (citing additional authorities).

test, it is doubtful that either case could have survived a motion to dismiss. Thus, Verizon's test would provide cover for a broad range of practices that this Court has determined may maintain or extend monopoly power.

In sum, the exclusionary conduct test could be a useful analytic tool for a limited number of situations where the conduct at issue is necessarily pernicious to competition. In this respect, the test might be thought of as identifying a kind of per se Section 2 violation — a rough analog to the per se rule of Section 1. But while the test can discern naked anticompetitive conduct, where a dominant firm's refusal to deal is not demonstrably senseless except to enable monopoly returns — and most Section 2 cases are likely to fall within this category — the test offers no help. It does not assist in resolving Section 2 claims where the motive for the exclusionary conduct includes both pro- and anti- competitive elements, and where the marketplace effects are similarly mixed. For that, the lower courts need what this Court has already developed: a fact-based inquiry that enables the court to probe both anticompetitive consequences — which may include, but are not limited to, foregoing short-term revenue for the long-term objective of monopoly returns — and procompetitive benefits. Verizon's exclusionary conduct test, by contrast, would discard *Standard Oil* and the many decisions since then, which emphasize the complementary relationship between Sections 1 and 2 and the parallel fact-based inquiries applicable under each statute. The lawfulness of Verizon's conduct may, of course, be established on summary judgment or at trial. However, as the court of appeals below recognized, at this juncture in the case, dismissal is inappropriate.

D. An ILEC's Obstruction Of Access to its Local Exchange May Be Actionable under the Essential Facilities Doctrine.

This Court's decision in *Terminal R.R. Ass'n*, 224 U.S. 383, is the foundation for the essential facilities doctrine. It identifies a circumstance in which a monopolist's refusal to deal threatens to harm competition unnecessarily and may therefore be exclusionary under Section 2. The Seventh Circuit in *MCI* more specifically articulated the doctrine's elements: (1) control of an essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) denial of the facility to a competitor; and (4) the feasibility of providing the facility. *See* 708 F.2d at 1132-1133. The Second Circuit drew on these authorities in sustaining Respondent's claim. *Trinko*, 305 F.3d at 107-08.

The United States criticizes (U.S. Br. at 20-23) the Second Circuit's reliance on the essential facilities doctrine because its ruling allegedly "dispense[d]" with Section 2's exclusionary conduct requirement. Verizon argues (Pet. Br. at 41-42) that the doctrine should be limited to situations where the defendant voluntarily provides access to some, but not all, competitors. The Second Circuit allegedly erred by ignoring this limitation and then, left without a benchmark against which to measure exclusionary conduct, by substituting the regulatory duties required under the 1996 Act.

However, as applied here, the essential facilities doctrine comports with established Section 2 analysis and is well suited to discern anticompetitive conduct in the telecommunications market. Moreover, the Second Circuit did not blindly import regulatory duties into Section 2; it left the reasonableness of the specific terms of network access that might be required under antitrust law, as well as the accommodation between the 1996 Act and antitrust duties in general, for the district court to resolve on remand.

1. As *MCI* and *United States v. AT&T* illustrate, the essential facilities doctrine is suited for telecommunications markets because dominant firms control inputs (local exchanges), which can be essential to any competition, and access to those inputs need not burden the dominant firms unduly. *See MCI*, 708 F.2d at 1133; *United States v. AT&T*, 524 F. Supp. at 1353.

While the essential facilities doctrine is not without critics, its value in addressing unique conditions in telecommunications network markets is generally acknowledged. For example, the late Professor Areeda wrote that *MCI*, "which rests on the essential facilities notion, is probably correct." Philip Areeda, *The "Essential Facility"*

Doctrine: An Epithet in Need of Limiting Principles, 58 ANTITRUST L. J. 841 (1989); *see also* IIIA Areeda & Hovenkamp, *supra*, ¶ 787c1 (2002) (noting the doctrine's "relevance in regulated monopolies when it serves to limit the monopolist's power to expand the monopoly into 'adjacent' unregulated (or less regulated) markets").

While the doctrine is useful in identifying exclusionary conduct, it is applied with great restraint: "[c]ourts rarely impose liability . . . , in large part because the doctrine requires a showing that the facility controlled by the defendant firm is truly *essential* to competition — *i.e.*, constitutes an input without which a firm cannot compete with the monopolist." R. Pitofsky, D. Patterson & J. Hooks, *The Essential Facilities Doctrine Under U.S. Law*, 70 ANTITRUST L. J. 443 (2002). By requiring both that an input be essential and that the competitor be unable practically or reasonably to duplicate the facility, courts filter out cases where harm to competition is unlikely. *See, e.g.*, *Paladin Assocs. Inc. v. Montana Power Co.*, 328 F.3d 1145, 1163 (9th Cir. 2003) (noting that to be "essential," the facility must afford "the power to eliminate competition in a downstream market"). Accordingly, the lower courts frequently grant summary judgment or dismissal on this basis,[19] or where denial of access was necessary for the defendant to compete on the merits.[20] Dismissal is not warranted here, however, because the claimed harm to competition is not facially implausible; nor is it self-evident that Verizon's business needs justify denying access.

19. As illustrations of non-essential facilities, see *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568-70 (2d Cir. 1990) (advertising space in leading magazine); *Laurel Sand v. CSX*, 924 F.2d 539, 544-45 (4th Cir. 1991) (lease terms for railroad track usage); *Directory Sales Management Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612-13 (6th Cir. 1987) (telephone company's directory delivery, billing, and classification systems); *Midwest Gas Servs. v. Ind. Gas Co.*, 317 F.3d 703, 713-14 (7th Cir. 2003) (gas pipeline); *Paladin Assoc.*, 328 F.3d at 1163 (pipeline); *Malden v. Union Elec. Co.*, 887 F.2d 157, 161-62 (8th Cir. 1989) (power lines); *McKenzie v. Mercy Hospital*, 854 F.2d 365, 370-71 (10th Cir. 1988) (emergency room facilities).

20. *See, e.g.*, *William v. Heartland Hosp.*, 34 F.3d 605, 612-13 (8th Cir. 1994) (terminating physician's staff privileges was based on reasonable needs); *Laurel Sand*, 924 F.2d at 545 (access to a railroad line was inconsistent with defendant's efficient business operations).

2. Verizon also argues that the doctrine should not apply where the defendant denies access to the essential facility to *all* those seeking access, but instead only where a monopolist discriminates — voluntarily providing access to some, but not to others. This would turn basic antitrust on its head. Where other competitors receive access to the essential facility, the likely harm to competition of denying access to one *more* competitor would not seem as great as when all competitors are denied access. Applying the doctrine in these circumstances, while rejecting it where the essential facility is closed to *all* competitors — as Verizon urges — would surely not improve on the current state of affairs. *See MCI*, 708 F.2d at 1133.

3. The United States argues that in applying the essential facilities doctrine, the court of appeals equated regulatory duties under the 1996 Act with conduct required by the antitrust laws. Specifically, the court of appeals is said to have equated the "reasonable terms" applicable to access under the essential facilities doctrine with the access terms mandated by the 1996 Act. This, the United States maintains, could not be sound: The 1996 Act requires ILECs to grant access to local network facilities at rates below the monopoly prices that ILECs otherwise could charge, whereas a monopolist's refusal to sell below the monopoly price would not "ordinarily" be actionable (U.S. Br. at 3 n.1, 23).

The court of appeals, however, merely recognized that the reasonableness of local network access, as well as the accommodation between the 1996 Act and antitrust duties, implicate fact issues, which a Rule 12(b)(6) motion is unsuitable to resolve. *See Trinko*, 305 F.3d at 108. To decide such questions, the district court needs the benefit of evidence probative of the conduct alleged to be exclusionary, the conditions associated with access, the justifications for its denial, and the impact of the 1996 Act regulatory scheme itself. *See* IA Areeda & Hovenkamp, *supra*, ¶ 240(d), at 15, 17 (1997) ("even when conduct is not exempt from antitrust laws, regulation of a market can bear heavily on the application of antitrust principles"); *S. Pac.*, 740 F.2d at 1001 (holding that the district court erred "in failing to consider the realities of the regulatory scheme . . . [which] leaves pricing and interconnection decisions to AT&T in the first instance").

The United States advocates shortcutting this necessary factual inquiry, citing the approach taken in *Goldwasser*, 222 F.3d 390. There, the Seventh Circuit dismissed at the pleading stage a complaint comparable to the complaint in this case. Although the *Goldwasser* court recognized that the 1996 Act affords no antitrust immunity, it nevertheless dismissed on the ground that the 1996 Act imposes "affirmative duties to help one's competitors that .. . do not exist under the unadorned antitrust laws." *Id.* at 400 (citations omitted). That approach insulates interconnection disputes from antitrust review just as effectively as a statutory or implied immunity would. It gives dispositive effect to judicially noticed "facts" about the conduct alleged and the regulatory environment, which cannot be determined on the pleadings alone, and it relies on unprecedented restrictions on Section 2's scope.

The *Goldwasser* approach would dismantle the complementary system that Congress erected in the 1996 Act to promote competition in local telecommunications markets. Virtually any monopolization claim arising from an ILEC's denial of access to its local exchange networks would be subject to a Rule 12(b)(6) dismissal. That is not what Congress — mindful of the lessons of history — intended. In cases such as this, the essential facilities doctrine is reasonably calculated to identify denials of access by regulated monopolists that are likely to harm competition unnecessarily and are therefore exclusionary.

E. A Monopoly Leveraging Claim Is Proper When an ILEC Obstructs Interconnection in Ways That Unnecessarily Threaten Harm to Competition and Consumers.

Verizon and the United States criticize (Pet. Br. at 26-27; U.S. Br. at 26-27) the Second Circuit's monopoly leveraging ruling because it allegedly imposes liability for the mere "use" of monopoly power, and fails to require exclusionary conduct. *See Trinko*, 305 F.3d at 108. But when an ILEC obstructs access to the local loop through anticompetitive conduct, thus threatening to raise costs or to decrease quality or output of retail telephone service in downstream markets, a monopoly leveraging claim may be pled. The ILEC's conduct is appropriately actionable because it threatens the very harm that Section 2, and its exclusionary conduct requirement, seek to prevent.

"Tangible harm" to competition and consumers may occur even absent circumstances that reflect actual or probable monopoly power in a secondary market. If

> the defendant uses monopoly power in [market] A to place rivals in [market] B at a competitive disadvantage, perhaps by raising their costs or making their offerings less attractive . . . the defendant does not threaten a market *share* that we ordinarily associate with monopoly, but it clearly threatens those things commonly identified as economic monopoly, namely higher prices or reduced output or quality.

III Areeda & Hovenkamp, *supra*, ¶652c, at 96. Those effects may well occur where an ILEC, by anticompetitive means, frustrates a competitor's interconnection efforts.

The court of appeals thus correctly invoked the monopoly leveraging doctrine, as developed in two recent circuit decisions. *See Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 272-73 (2d Cir. 2001); *Ad/Sat v. Associated Press*, 181 F.3d 216, 230 (2d Cir. 1999). Both cases heeded the teaching of *Spectrum Sports v. McQuillan*, 506 U.S. 447, 559 (1993), and limited the leveraging doctrine accordingly.[21] In *Virgin Atlantic*, on which the court of appeals principally relied, the Second Circuit ruled that a monopoly leveraging claim required a showing that monopoly power was used to gain a competitive advantage in a distinct market which "threatened the [second] market with the higher prices or reduced output or quality associated with the kind of monopoly that is ordinarily accompanied by a large market share." 257 F.3d at 272 (quoting III Areeda & Hovenkamp, *supra*, *¶ 652).* The Second Circuit has also made clear that the doctrine requires "predatory or anticompetitive conduct," rather than actions which

21. The monopoly leveraging doctrine itself traces its origins to *Griffiths*, 334 U.S. 100, and *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979), which the court below did not cite.

presuppose only efficient size or integration. *Id.* at 273. In *AD/Sat*, the Second Circuit similarly limited the doctrine "to those circumstances where the challenged conduct actually injures competition, not just competitors, in the second, non-monopolized market." 181 F.3d at 230. In view of these limitations on the doctrine's scope, the United States' argument (U.S. Br. at 27) that the Second Circuit's ruling below would proscribe "the use of monopoly power as such" is strained.

In sum, a monopoly leveraging claim thus circumscribed is consistent with this Court's statement in *Spectrum Sports* that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so." 506 U.S. 447, 459 (1993). The Court was not there addressing whether an "*actual* monopolist violates § 2 by conduct bringing a non-monopolistic advantage in a secondary market." III Areeda & Hovenkamp, *supra*, ¶ 652. Where an actual monopolist, such as an ILEC, obstructs its competitors' interconnection, it can inflict substantial injury on consumers in downstream markets, where the ILEC itself competes. These are market conditions to which monopoly leveraging applies because the harm is of the type that the antitrust laws are intended to prevent.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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