No. 02-682

IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

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

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

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REPLY BRIEF FOR PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF FOR PETITIONER

Trinko boldly asserts, as it must, that Section 2 requires a monopolist to dismantle itself, through piece-by-piece sharing of its assets, if a jury finds that such creeping divestiture, at prices and on terms the jury finds "reasonable," would improve the market overall. Such a duty, however, has never been recognized by Section 2, would require antitrust judges and juries to do what they have never done and are not suited to do, and would conflict with antitrust doctrine and policy. Indeed, Trinko effectively concedes as much: at crucial turns, it relies on the Telecommunications Act of 1996 to support what it cannot justify on antitrust grounds alone. But relying on the 1996 Act to expand Section 2 gets things backwards. Congress imposed an "extraordinary" dismantling duty in the 1996 Act (FCC, *August 2003 Local Competition Order* ¶ 2), choosing expert agencies (not juries) and traditional regulatory mechanisms (not class actions and treble-damage awards) to carry out the experimental task of quickly inducing new entry while not unduly deterring new investment. That regime makes Trinko's proposed new Section 2 duty both inappropriate and unnecessary.

The positions of Trinko and its supporting *amici* are unavoidably sweeping. Roughly 25 million local lines are being served by competitors, more than 18 million of them obtained from incumbents under the supervision of federal and state regulators. FCC, *Local Telephone Competition* (June 2003) (December 2002 figures, showing drop in incumbent lines as competitor lines increase). Unable to allege an actual refusal to deal, Trinko must invoke Section 2 to address the price, pace, types, and other terms of "reasonable" sharing. This claim would transform antitrust juries and judges into shadow utility regulators empowered to supplant agency resolutions of intricate disputes involving hundreds of competitor-incumbent agreements. The Court should reject this duty and, in any event, should apply traditional statutory-standing rules to bar Trinko from suing for injury derivative of the alleged direct injury to AT&T.

A. Section 2 Precedents Do Not Support Trinko's Claim

Trinko has not cited a single decision that imposed Section 2 liability on a firm that *did* share its assets, but on insufficiently generous terms. Some decisions impose Section 2 liability where the defendant outright refused to deal, but only where the defendant was voluntarily selling to other customers what it denied to competitors. Trinko Br. 21-22, 43-45. The "essential" feature of every pertinent duty-to-deal precedent, as Judge Posner noted, was a flat denial to competitors (or their customers) of terms offered to other outside customers. VZ Br. 17-19; *see also Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 368-69, 375 (1927) (manufacturer suddenly "refused" to sell to the plaintiff dealer "on the same terms as other dealers"). This case undisputedly involves no such selective refusal to deal.

The selective character of a refusal to deal is centrally relevant to the antitrust analysis, and the uniform presence of a selective refusal in the facts of this Court's cases is critical to their scope. *Armour & Co. v. Wantock*, 323 U.S. 126, 132-33 (1944) (Court's precedents "are to be read in the light of the facts of the case under discussion"); *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 529-30 & n.19 (1983) (*AGC*). Sharing duties present two core problems. They dampen incentives for investment, thus risking harm to competition, and they require detailed and uncertain prescriptions of price and other terms of sharing. Antitrust litigation cannot sensibly manage those problems. *Cf.* R. Posner, *Antitrust Law* 242 (2d ed. 2001) (to adopt unilateral duty to deal, court would "become[] charged with the supervision of an ongoing commercial relationship, a function that courts are not equipped to perform effectively"). If, however, a defendant is voluntarily offering non-competitor outsiders the terms the competitor wants, those terms are presumptively adequate to repay the owner's investments, and they also supply a simple judicial remedy if the selective refusal is not otherwise justified: order equal treatment. *See* VZ Br. 18-19; SG Br. 23 n.8. In all the pertinent cases, the discriminatory refusals eliminated insuperable problems that the Court otherwise would have had to confront. *See* SG Br. 10, 19, 22 n.7, 23 & n.8, 24 n.9.

This essential feature is present in both *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), and *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), which also differ from Trinko's case on additional grounds. Otter Tail was held liable for entering into restrictive agreements as well as for its naked refusal to supply power to downstream competitors that it willingly supplied to non-competitor customers. *See* 410 U.S. at 378-39; R. Bork, *The Antitrust Paradox* 354-55 (1978) (also highlighting sham litigation). And unlike here, Section 2 was not being invoked to supplement a requirement already imposed by a regulatory scheme: the regulatory scheme in *Otter Tail* did not require dealing. 410 U.S. at 375. Even at the remedy stage, no judicial determination of proper terms of dealing was required. No damages were sought, so there was no issue of what terms would have been reasonable. The prospective relief simply barred the outright refusal to deal, with terms of dealing left to a federal agency. *Id.*

The *MCI* decision, which is not a precedent of this Court, undermines rather than supports Section 2 recognition of Trinko's claim. Br. 16-17, 24-25 (describing allegations here, not including actual denials).[1] As Trinko accepts (Br. 45),

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[1] Trinko (Br. 22 & n.9) accepts that the essential facilities doctrine is not this Court's doctrine and cites no decision except *MCI* finding liability for unilateral conduct under it. (The article Trinko cites is criticized in Marquardt & Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitofsky, Patterson, and Hooks*, 70 Antitrust L.J. 847 (2003).) Moreover, Trinko oversells *MCI*'s role in creating long-distance competition: as shown by MCI's seeking of only *retrospective* relief, by the time *MCI* was decided, the FCC plainly required the access MCI sought; and it was the Seventh Circuit's *rejection* of MCI's

MCI involved AT&T's flat refusal to connect MCI's independent long-distance facilities to AT&T's local network, even though AT&T was selling such connections for the very same services to other "'independent telephone companies.'" VZ Br. 42 (quoting 708 F.2d at 1144 and FCC decision).[2] In fact, Trinko's demand is that Verizon "'fill in the gaps in its competitor's network,'" a duty the Seventh Circuit specifically rejected, and that Verizon do this gap-filling by giving up the opportunity to use the facilities surrendered, which *MCI* specifically did not require. *See* VZ Br. 42-43. Moreover, as Trinko notes (Br. 3), *MCI* addressed claims arising at a time when the applicable regulatory regimes positively endorsed local monopolies, protected their investments through rate-of-return regulation, and barred rival investments. As to the long-distance access MCI sought, the *MCI*–era regulatory regime lacked the key features of the 1996 Act: substantive *statutory* rights to access, and a guarantee of fast, reviewable agency action on all access demands. VZ Br. 43. Trinko's

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demand to share AT&T's long-distance network that forced MCI to *build* competing long-distance facilities.

Litton Sys., Inc. v. AT&T, 700 F.2d 785 (2d Cir. 1983), was not an essential facilities case. "The gist of Litton's case and the jury's findings" was that AT&T made "bad faith" regulatory filings to stop competitors' activities (*id.* at 790); the decision recognized no duty of AT&T to share its facilities with rivals on reasonable terms so the rivals could displace its use of them. The district court in *United States v. AT&T*, 524 F. Supp. 1336, 1354-57 (D.D.C. 1981), merely denied dismissal after the Government's evidence but did not adjudicate its claims (including some accepted and some rejected in *MCI*). The *AT&T* court's later decade-long control of telephone matters by consent decree was specifically repudiated in the 1996 Act, which returned authority to regulators.

[2] AT&T tries to fudge this fact but does not deny it. AT&T Br. 6 n.6. It says of the above-cited page—*MCI*'s discussion of MCI's tying claim—that the court "did not accept" the claim. What the court said was that it "need not reach" the claim because it was substantively identical to the Section 2 claim it *did* accept. The existence of the voluntary AT&T sales to non-competitors, recited in the FCC orders elsewhere discussed in *MCI*, was undisputed.

claim is far more like the claim *MCI* rejected than the claim it approved.

B. Section 2 Doctrine Does Not Support Trinko's Claim

The Court's articulations of how to distinguish permissible from impermissible unilateral conduct under Section 2 lend no independent support to Trinko's claim. Much of Trinko's brief sidesteps that critical question, *e.g.*, when it says that some refusals to share "can" be unlawful, or when it invokes words ("exclusionary," "predatory," "anticompetitive") that convey no more than a bottom-line conclusion of wrongfulness, or when it urges a "case-by-case" "contextual approach." Br. 20-25, 44. Elsewhere Trinko invokes two of this Court's formulations for making the critical distinctions—"efficiency" and "legitimate business justification"—but those formulations undermine rather than support Trinko's unreasonable-sharing claim. This Court's doctrines do not require a dominant firm to displace its own retail sales to customers in favor of discounted wholesale sales to rivals.[3]

1. Trinko's principal position is that Section 2 condemns "acts not premised on the monopolist's superior efficiency." Br. 1; *id.* at 17, 20, 25, 27 (drawing from *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985)). But that standard does not condemn the simple refusal to furnish one's assets to rivals, at discounted prices, for them to use instead. Section 2 *protects* the ability of firms, even monopolists, to engage in competition by using inputs that rivals lack because they came too late. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992) (monopo-

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[3] Trinko's footnote on "monopoly leveraging" (Br. 24 n.10) defends neither the Second Circuit's statement that "use of a monopoly" is actionable conduct (*see* SG Br. 26 ("use of monopoly power is not unlawful")) nor its statement that merely gaining a competitive advantage in a market, rather than actual or attempted monopolization, suffices under Section 2. The Second Circuit's statements amount to a frontal assault on vertical integration of a wholesale monopolist into retail sales, based simply on its refusal, or insufficient efforts, to support resellers.

list *may* keep the fruits of "growth or development as a consequence of a superior product, business acumen, or historic accident") (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)). Contrary to Trinko (Br. 40-41 & n.18), Section 2 has never required a firm to facilitate *overall* market expansion by turning over its assets for resellers and other rivals to use in its place. *See* 3 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 658f, at 131-32 (2d ed. 2002) ("not even a monopolist operates as a trustee for the public. A successful business justification need not improve market efficiency overall. *** As a general matter, a firm is under no obligation to sacrifice its own profits in order to make the overall market larger."); P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 773e at 146 (2003 Supp.); SG Br. 14.

Trinko's argument rests on a misunderstanding of the use of "efficiency" in *Aspen*. The Court used the phrase "'on some basis other than efficiency'" (472 U.S. at 605) to refer to the *defendant*'s efficiency, not overall market improvement. *Aspen* drew the phrase from the Bork book, which uses "efficiency" to mean "the effective use of resources *by particular firms*" (Bork, at 91, 105-06 (emphasis added)), and which makes clear, at the very page quoted by the Court, that a firm's "market behavior with *** the expectation *** [or] result of making money" *is* acting on the basis of efficiency. *Id.* at 138. Indeed, the book defines acting on a basis other than efficiency ("predation") to mean conduct that makes no business sense *for the defendant* except for its buttressing monopoly.[4] That is why this Court in *Aspen* stressed the defendant's self-sacrifice in turning away sales at prices it had readily accepted from mere customers, thereby making less productive use of the assets it owned. This lowering of prof-

[4] Bork, at 144 (predation is "aggression against" rivals by conduct "that would not be considered profit maximizing except for the expectation either that (1) rivals will be driven from the market, leaving the predator with a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior").

its made no business sense, except for recoupment through enhancing the monopoly.

Trinko's public-trustee view—that monopolists must share on terms a jury finds would improve the market overall—is unworkable in practice and doctrinally unsound. Direct judicial assessment of overall market efficiency and net social welfare effects is exceptionally difficult if not impossible. Bork, at 124-127; Posner, at 29. And individual firms, while they can assess their own interests, can hardly assess overall market efficiency, or predict individual juries' or judges' assessments, to decide day by day whether and on what terms they must share. More fundamentally, Section 2 doctrine has long recognized that *long-run* market efficiency requires protecting the *ex ante* incentives of all firms, including dominant ones, to invest and to compete hard. *See* VZ Br. 14-15, 23. Even for allegedly nonduplicable assets, it is critical to preserve the incentives to invest—in maintenance, upgrade, and replacement. *AT&T Corp. v. Iowa Utils. Bd.*, 535 U.S. 366, 428-29 (1999) (Breyer, J., concurring in relevant part). A Section 2 duty to share assets, whenever a jury finds short-run market benefits, would seriously undermine investment incentives and thus diminish the long-run efficiency of the market as a whole. *See* VZ Br. 29 (exclusivity of property rights—letting firms use what they build for their own services—encourages continued investment); Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. (forthcoming Nov. 2003), www.law.harvard.edu/faculty/elhauge.

Accordingly, Section 2 does not condemn merely *acquiring or continuing* a lawful monopoly, or exploiting one by charging high prices. *See Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136 (1998) (exploiting lawful monopoly is not harming competition); SG Br. 13, 18-19; Posner, at 250. Likewise, Section 2 "does not prohibit failure to share monopoly power" and "does not require firms–whether or not monopolists–to sacrifice profits to sell to competitors at a discount." SG Br. 7, 10. "As Judge Hand wrote, '[t]he successful competitor, having been urged to compete, must not be turned upon when he wins.'" SG Br. 15 (quoting *United States v. ALCOA*, 148 F.2d 416, 430 (2d Cir. 1945)).

2. Trinko gets no further when it frames the antitrust standard as condemning conduct unsupported by a "legitimate business justification" or "'legitimate competitive reason.'" Br. 17, 21, 23, 25, 26, 31-32. There *is* a "legitimate justification" for using an asset to sell service at retail rates rather than selling it at wholesale rates to a rival. "[T]he Sherman Act has never required a firm to make an unprofitable sale or forego profitable sales in order to make less profitable sales to a competitor." *Antitrust Law* (2003 Supp.) at 148 n.6 (citing *Aspen*, *Kodak*, *Otter Tail*, and other cases). *Id.* at 149 ("'Unjustified' refusals make economic sense only because of their adverse impact on rivals."); SG Br. 20 ("refusal to sell an input to a rival when it requires the incumbent to forfeit profits would make obvious business sense").

3. Trinko makes no serious attempt to show that it has alleged enough to sustain a claim under the principle that, to be condemned, a refusal to deal must make business sense *only* insofar as it tends to buttress monopoly power. SG Br. 15-20; VZ Br. 20-27. Trinko makes one passing reference to regulatory fines under the 1996 Act (Br. 32 n.14), but does not even allege that it is irrational to risk such fines except in anticipation of reinforcing a monopoly. Everywhere else, Trinko accepts, as it must, that a simple refusal to surrender a monopoly sale, in favor of a discounted sale to a rival retailer, cannot be treated as reinforcing monopoly power without transforming Section 2 into a bar on monopoly itself—which, as explained, it is not. And Trinko's complaints do not allege, and its brief does not seriously assert, that it makes ordinary sense for Verizon to give up retail sales and customer contacts in favor of wholesale sales at regulated discounts, least of all when doing so requires developing new and expensive electronic interfaces for dealing with rivals and assuming the high transactions costs of negotiating, arbitrating, and resolving disputes under agreements with these same rivals. *See* SG Br. 8, 28-29; *id.* at 3 n.1 (*amicus* Z-Tel: wholesale discounts reduce incumbents' margins).

Unable to dispute that its complaint flunks the no-business-sense requirement, Trinko attacks the requirement. Br. 39-43. But the attack fails. As noted, this Court's efficiency and business-justification formulations are properly understood to condemn refusals to deal only if the refusal makes no business sense except to reinforce monopoly. *Aspen* decisively relied on this inquiry when it stressed—in *addition* to harm to rivals and harm to consumers—that the defendant was making a self-sacrifice that made no sense but for enhancing monopoly power. This Court's predatory-pricing decisions likewise condemn price cuts only if the defendant is acting against its interests by incurring losses through below-cost prices, regardless of whether rivals can survive the price cuts or whether the defendant later charges higher prices. *See* SG Br. 16, 20. Even the *amici* economists promote this requirement as important to protecting aggressive competition; they support Trinko *only* for a distinctly non-economic reason, that the 1996 Act requires sharing. Economists Br. 4-9, 27.

Mischaracterizing or misapplying the requirement cannot undermine it. The requirement does not protect "'promotion of self-interest alone'" (*Otter Tail*, 410 U.S. at 380, quoted at Trinko Br. 44); it protects conduct that advances self-interest *independent of enhancing monopoly power*—a distinction that is essential if antitrust law is to make any economic sense at all. It does not license sham litigation or burning down a rival's factory (Trinko Br. 40), which presumably serve *only* to delay or prevent competition. Like any other legal standard, it does not hand victory to any defendant that makes a "claim" of benefits, let alone an "insubstantial" one. *Id.* at 40. Conduct does not make business sense just because it confers some benefit; what matters are *net* benefits. Allegiance Br. 12. At least for sharing claims, there has been no sound criticism of the "no business sense apart from buttressing monopoly" requirement for condemnation.[5]

4. Trinko invokes two other formulations from outside this Court. It refers in passing to "raising rivals' costs," citing certain articles. *See* Br. 40. But that phrase is not a standard of conduct at all. It merely identifies a form of harm to rivals, *i.e.*, raising their costs rather than excluding them. Harm to rivals, which occurs equally with impermissible and permissible conduct, does not state a claim. *See* Posner, at 196-97. Trinko also quotes (Br. 39) the D.C. Circuit's statement that the last step of a potential five-step inquiry is to ask if "the anticompetitive harm of the conduct outweighs the procompetitive benefit." *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001). But *Microsoft* never engaged in any such weighing, and therefore never explained how it could be carried out. For every one of the challenged actions, the court either held it lawful (there was no *prima facie* market harm or it was justified) or held it unlawful (there was market harm but no justification) at a prior stage of the analysis, without any balancing. The Government did not urge balancing in *Microsoft* and does not do so here. At least for sharing claims, a vague "balancing" test carries intolerable risks of deterring aggressive competition.

Finally, Trinko asserts that refusing to turn over one's retail customers is "facially anticompetitive," *Kodak*, 504 U.S. at 478-79, like Kodak's sudden refusal to sell to rivals what it was selling to others. Br. 42. But there is nothing "facially anticompetitive" about simply using one's own resources to

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[5]This context, like price cutting, involves a high risk of high-cost error. There is no need to decide here whether the same requirement applies to cases of false representations, which may or may not raise *antitrust* issues (Economists Br. 8).

provide one's own service. It is cooperation, not competition, that is "facially anticompetitive." 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 772c at 192 (2d ed. 2002) (monopolist-rival cooperation "almost always invite[s] antitrust scrutiny"), cited at Trinko Br. 30.

C. Trinko's Claim Is Inconsistent With Substantive And Institutional Antitrust Policies

Under Trinko's theory, an antitrust treble-damages action could arise from any of the countless disputes that are inevitable in the new regime of forced incumbent-competitor relations. Any disappointed new entrant could accuse an incumbent of deliberately providing unreasonable terms of access to assets that are not "practical" or "feasible" to duplicate, with significant effects on the market. Trinko Br. 18, 29. A Section 2 rule recognizing such claims carries unavoidable risks of discouraging investment that antitrust law has long encouraged. The FCC (*August 2003 Local Competition Order* ¶ 3) and the industry's equipment suppliers have explained the reasons. Incumbents will face higher capital costs and will invest less if rewards must be shared while risks are borne alone; and if sharing is too cheap, new entrants will invest less in new facilities, including in wireless or cable or optical fiber substitutes for copper loops.[6] The risk is that the status quo gets frozen.

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[6] *See id.* ¶ 3 ("excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology"); *id.* ¶¶ 6, 22, 33, 64, 113-14, 173 n.556; TIA Br. 18-19; Latour, *Local-Phone Companies Face Siege in an Industry in Turmoil*, Wall St. J., Aug. 13, 2003, at A1, A6 (because of forced rental, "[t]he four Bells have drastically reduced spending to upgrade their networks"; "Even some consumer advocates," who "had pressed regulators to foster more competition," now "worry that the resulting price wars have led SBC to invest less in its network. The long-distance companies aren't investing much either, of course, since they can tap SBC's network at low cost. 'Something is not quite right here,' says Mark Philger, chairman of a group called Americans for Competitive Telecommunications.").

Managing the risk of deterring new investment requires weighing the long-term effects of a sharing principle and evaluating the short-term benefits and risks of a particular sharing mandate in light of the exact prices and other terms the mandate prescribes. That delicate task is surely not one that juries and judges can perform reliably in after-the-fact treble-damages antitrust litigation, least of all class-action litigation. It is, at best, a highly uncertain balancing task that depends on identifying situations where forced sharing on particular terms yields greater predicted benefits than costs. Any such terms must be set tentatively, experimentally, and prospectively, and repeatedly fine-tuned, and, when unnecessary, repealed altogether. *See August 2003 Local Competition Order* ¶ 200 (FCC "balances *** promoting facilities-based investment and innovation against *** stimulating competition"; divided Commission repealing earlier sharing duties and retaining others).

> [T]he identification and remediation of these situations is best dealt with through industry-specific legislation and regulation–like the 1996 Act–which can be developed by legislative branches and administrative agencies with superior factfinding ability, greater industry expertise, existing capacity for ongoing oversight and refinement, and the public accountability that is an important companion to such economic policy choices.

SG Br. 18.; *see also Antitrust Law*, at 150-51 (2003 Supp.) ("technically complex task for which antitrust courts are ill suited, particularly via jury trials"). It would be unwise to expand Section 2 to take on such traditionally regulatory tasks, even if there were no 1996 Act. *See* CWA Br. 6-12.

Trinko's main response is to treat Section 2 simply as a tool of 1996 Act enforcement–a fallacy addressed below. But it also makes two erroneous arguments for why forced sharing cannot deter investment. *First*, Trinko says that investments cannot be deterred because loops cannot be duplicated. Br. 29. But this assertion wholly ignores needed investments by *incumbents*. Loop plant constantly is being created, maintained, upgraded, and replaced by hundreds of thousands of workers deploying tens of billions of dollars of new equipment annually. CWA Br. 1; TIA Br. 18 n.6. And much more than loop plant is at issue here. As the *amicus* briefs show, the *legal principle* that Trinko proposes–"reasonable" access to facilities deemed "infeasible" or "impractical" to duplicate—has been invoked in demands to share interoffice trunks, switches, space in central offices, bathrooms, and computerized ordering, billing, and other operations-support systems, either because those facilities are themselves not feasibly or practically duplicated or because they are needed adjuncts to loop access.

Trinko's point ignores new investment by rivals as well. With over 6 million independent loops (*Local Telephone Competition*, Tables 3, 10; *see also* Table 13 (136 million wireless lines)), and substantial independent investment in other facilities (*e.g.*, *August 2003 Local Competition Order* ¶ 436 ("significantly increased" switch deployment)), it is plain that some rivals do not share Trinko's and its supporting *amici*'s views that such investments are infeasible. Trinko's proposed "successful sharing or triple your money back" guarantee for rivals skews the choice toward sharing and away from independent investment.

Second, Trinko says that the investment-deterring effects of forced sharing are eliminated because the 1996 Act already forces it. Br. 30. That contention is wrong. Agencies exercise their judgment not just in formulating but in interpreting and applying access requirements, and they use traditional regulatory mechanisms to enforce them. At all the places in that process where there is room for judgment, changing the adjudicator and dramatically amplifying the threatened consequences of supposed misconduct would sharply influence conduct across the board, as two *amici* economists have written. *See* VZ Br. 24 n.20, 31 n.29. The prospect of costly class-action antitrust litigation, retroactive treble-damages liability determined by lay juries, and judgments that have preclusive and precedential effects (and are difficult to prove outmoded) would push sharing decisions in one direction only, upsetting the balance struck by regulators. The alteration of liability risks is surely just what those bringing antitrust claims like Trinko's are seeking to achieve.

D. The 1996 Act Makes Recognizing Trinko's Novel Claim Especially Inappropriate

Trinko, like its supporting *amici*, recognizes that the 1996 Act is relevant to whether it has stated a Section 2 claim, wholly apart from any argument that the Act confers "immunity" by overriding a pre-existing antitrust proscription. Br. 18, 30, 35-38. But Trinko gets matters precisely backwards in urging that the 1996 Act *supports* recognition of a new Section 2 duty that it cannot otherwise justify. The 1996 Act supplies conclusive reason *not* to expand Section 2 duties to address the fine-tuning of sharing that is already subject to comprehensive control under the 1996 Act.

1. Evidently recognizing the problems with a Section 2 unilateral duty to share on terms never before offered, Trinko seeks to avoid the problems by relying on determinations under the 1996 Act to define the antitrust violations. Br. 31. There can be no "legitimate" business justification, Trinko reasons, for conduct that violates the 1996 Act. *Id.* at 32, 35-38. Its supporting *amici* economists would turn deficiencies in the terms of sharing into antitrust violations *solely* because they fall short of 1996 Act requirements.

These arguments fly in the face of the savings clause. They invoke 1996 Act duties to "modify" the duties Section 2 otherwise recognized. *See* SG Br. 6 (savings clause bars use of 1996 Act to "expand[] antitrust liability by creating new antitrust duties that did not exist before"). The savings clause declares that Congress was *not* treating the new 1996 Act sharing duties as if they defined a new standard for "restraint of trade" or "monopolizing" conduct under the Sherman Act. *Compare Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 439-40 (1992) (law deeming certain conduct to come within prior statute "modified" prior statute).[7] To say that 1996 Act violations are not "legitimate," moreover, is a mere linguistic ploy, as irrelevant to the Section 2 question as saying "that the public interest is not well-served" by 1996 Act violations. Economists Br. 26. The question is whether the conduct is contrary to *Section 2* policy, not whether it is contrary to another statutory policy or legal norm. The Court has specifically cautioned against confusing antitrust wrongs with other wrongs, including even the evasion of regulatory controls on exploitation of a monopoly. *NYNEX*, 525 U.S. at 136, 137.[8]

It makes no difference that both Section 2 and the 1996 Act reflect a desire for competition: the statutes differ sharply in the duties they create and the enforcement mechanisms they adopt. As the Government confirms, the 1996 Act's substantive standards are *not* antitrust standards. Notably, the 1996 Act regime prescribes low prices to attract entry, stopping just short of confiscation (VZ Br. 4), whereas "the antitrust laws *** permit firms to charge whatever prices they can obtain in the marketplace." SG Br. 18 (citing authorities); *id.* at 9, 10, 23; *see also August 2003 Local Competition Order* ¶ 107 ("Congress chose to use a different standard" from "essential facilities doctrine"). In addition, the two statutes embody radically different implementation and remedial choices. This Court has long insisted on respecting those

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[7] After *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), a House committee considered an amendment to the Clayton Act that would have expressly "deemed" a 1996 Act violation to be an antitrust violation. H.R. 1698, § 2, 107th Cong., 1st Sess. (May 3, 2001). The present savings clause does not do that.

[8] That violations of other standards overlap *as a matter of fact* with violations of Section 2 standards (*see* ABA, *Antitrust Law Developments* 249 (5th ed. 2002), cited at Trinko Br. 32; SG Br. 12 n.3), does not mean that wrongfulness under the former is the reason, or even a reason, for finding the conduct wrongful under Section 2. An examination of the ABA statement and its footnote support confirms that it is, at best, a description of overlap.

choices as well. *See* R. Fallon, D. Meltzer & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 841-42 (4th ed. 1996).[9] Such respect is most important when one statute "comes as close to the line of over-regulation as possible–that is, to achieve the benefits of regulation right up to the point where the costs of further benefits exceed the value of those benefits." Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 541 (1983).

2. That the Sherman Act and the 1996 Act embody such different enforcement regimes is an affirmative reason *not* to expand the former to cover the sharing duties addressed in the latter. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 180-82 (1989) (refusing "'to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute'"). The "specific governs the general" principle applies here, because congressional policies are at stake. *Varity Corp. v. Howe*, 516 U.S. 489, 511-12 (1996).[10] Whether juries and judges would re-

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[9] In many contexts since the 1970s, the Court has rejected the notion that it is better, or even permissible, to add remedies to those Congress chose for particular statutory violations, recognizing the importance of congressional *remedial* choices, such as whether agencies (or numerous individual judges or juries) resolve disputes under potentially open-ended standards, and what remedies attach to violations. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 290 (2001); *Karahalios v. Nat'l Fed. of Federal Employees*, 489 U.S. 527, 533 (1989); *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145, 146-147 (1985); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Assn.*, 453 U.S. 1, 19-20 (1981); *Northwest Airlines, Inc. v. Transport Wkrs.*, 451 U.S. 77, 93-94 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-20 (1979).

[10] This is particularly appropriate for shaping the "common law" of antitrust. *Business Electronics v. Sharp Electronics*, 485 U.S. 717, 732-33 (1988). In another context the Court explained: "Not only are the technical problems difficult–doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise–but the general area is particularly unsuited to the approach in-

decide questions of reasonableness by balancing costs and benefits of sharing, or whether they would subject matters already decided by agencies to treble damages, class actions, and judicial injunctions, the result would be displacement of the congressional choice of agencies to handle these matters through regulatory processes. And Section 2 litigation would inevitably operate as an "extraneous pull" on agency processes themselves (*Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 353 (2001)), distorting the choices of participants and decision-makers alike.

The 1996 Act makes it not just inappropriate but unnecessary to create new Section 2 duties. As the Government emphasizes, a regulatory regime properly limits the expansion of antitrust duties where it "'dramatically alters the calculus of antitrust harms and benefits' by 'significantly diminish[ing] the likelihood of major economic harm.'" SG Br. 12, quoting *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990); *see Kansas v. UtiliCorp. United, Inc.*, 497 U.S. 199, 211-12 (1990) (regulatory remedies are reason to reject new exception to indirect purchaser bar). The 1996 Act, unlike the very different regulatory regimes in *Otter Tail* and *MCI*, does just that.[11]

Trinko's main response is a blanket reference to *pre-1996* regimes. Br. 37; *id.* at 2-7. But that response wholly ignores the specifics of the 1996 Act. By Trinko's own account, the

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evitable under a regime of federal common law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 325 (1981).

[11] The Government is careful not to assert the contrary, saying only that the 1996 Act "does not de facto create antitrust immunity *for otherwise anticompetitive* conduct." SG Br. 13 (emphasis added); *id.* at 10-13. That is also what is said in the statements Trinko quotes (Br. 37-38 & n.17) from the FCC and from Verizon and other incumbents, which acknowledge the continued availability of antitrust claims for price fixing, exclusive dealing, tying, boycotts, and other conduct not based on inadequate sharing. None of these statements says that sharing deficiencies are actionable under Section 2.

earlier regimes lacked the critical features of the 1996 Act—not only preemption of bars on independent competition, but substantive statutory access guarantees that are enforceable through fast reviewable agency action. With these features, the 1996 Act cannot systematically fail unless reviewing courts systematically fail, in which case the antitrust system that depends on the same courts would fail too.

Trinko's selective account of problems under the 1996 Act (Br. 11-13) not only ignores the primary role of *state* regulators,[12] but misses the key point. The dual system of state and federal regulation has resolved the problems Trinko cites (which often reflect legitimate disputes over the scope of regulatory requirements), including the one that triggered this lawsuit. *See* VZ Br. 6-7. A huge amount of access has already been given—incumbents have surrendered over 18 million lines—and more is being given daily. The FCC has found that Verizon's dealings with competitors meet such high levels of compliance with extraordinarily demanding standards that the FCC has approved Verizon's long-distance entry in every single one of its service areas. *See* VZ Br. 5 n.5. The public-record facts confirm that the indisputable statutory rights of redress are effective, undermining any argument for a novel Section 2 duty to address the same matters.

E. Trinko Lacks Statutory Standing

Even if Section 2 recognized the duty Trinko asserts, Trinko should not be able to assert it. Trinko's injury–deficient or curtailed service from its service provider AT&T

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[12] State regulators have prescribed exacting "performance assurance plans" and set automatic penalties up to hundreds of millions of dollars annually for shortfalls. *See, e.g.*, *Application of Verizon New England*, 16 FCCR 8988 (2001), ¶ 241 (Massachusetts plan: penalties of $155 million); *Application of Verizon New York*, 15 FCCR 3953 (2000), ¶ 435 (New York: $269 million); USTA Br. 22 n.40; VZ Br. 5 n.5 (FCC orders describing other States' plans).

(Trinko Br. 16)–is derivative of alleged injury to AT&T. Because this Court has described directness of injury as a "requirement" (*Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992)), Trinko asserts that it was "injured directly." Br. 46-47. Assertion cannot make it so. Trinko's own direct service provider, AT&T, confirms that Trinko's alleged poor telephone service *from AT&T* was "derivative of harms suffered by AT&T." AT&T Br. 3.

Making an obscure distinction between "directness of transaction" and "directness of injury," Trinko invokes *AGC* to support its standing. Br. 47. But Trinko misunderstands *AGC*. The Court there denied standing, and, as in *Holmes*, did so for an injury (lost union dues) that was plainly "distinct" (Br. 49) from the injury suffered by direct victims (impaired choice of workers). *See* Pet. 25 n.18. *AGC*'s *dictum* that some hypothetical nonplaintiff subcontractors would have been able to sue apparently refers to *directly* injured unionized subcontractors—who "refused to yield to the defendants' coercive practices and therefore suffered" loss of contracts, presumably from contractors among the defendant conspirators. *See* 459 U.S. at 540 n.44. Likewise, *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), cannot help Trinko, because, as *AGC* repeatedly recognizes (459 U.S. at 529 n.19, 538 n.39, 540 n.44), the *McCready* plaintiff suffered "direct" injury: the defendant refused to pay her. *See also Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 724 F.2d 290 (2d Cir. 1983) (defendants, as potential purchasers, directly boycotted plaintiff and also arranged for others to do so), cited at Trinko Br. 47 n.21.

The other considerations (besides directness) flagged in *Holmes* and *AGC* (503 U.S. at 269; 459 U.S. at 540-45) further undermine Trinko's standing: the directly injured party can be counted on to challenge and recover for any service disruptions or deficiencies, as AT&T did here; there is real potential for duplicative damage awards to both AT&T and its customers; and there are serious complications in tracing to their true source any deficiencies in AT&T's service. For a claim of deficiencies in needed access, the direct purchaser is plainly a *better* plaintiff (*see Antitrust Law* ¶774d at 151-52 (2003 Supp.)) than a downstream customer who, in AT&T's words, "has no knowledge of any of the details of the relationships between incumbent local exchange carriers and competitive carriers." AT&T Br. 3.

Allowing indirect purchaser suits often will actually impair the interests of direct purchasers and of regulators implementing the 1996 Act. Direct purchasers and regulators typically will want to ensure *prompt* resolution, without spending heavily on litigation or arbitration; indirect purchasers (particularly in a treble-damages consumer class action) will typically be seeking a one-time award of damages, and will have to conscript the direct purchaser, and thus its time and resources, to explain its role in the provision of the allegedly deficient service. The shared interest of direct purchasers and regulators in prompt, inexpensive resolution of problems prompts them to include arbitration and no-third-party-enforcement provisions in competitor-incumbent agreements like the one here. *Order Approving Interconnection Agreement*, §§ 16, 22.3, 1997 WL 410707 (NY PSC). Recognition of tag-along consumer claims can only impair such resolutions. *See* Posner, at 279-80 (multiple antitrust litigation has costs: "The effect is to lengthen out the original lawsuit, complicate settlement, magnify and protract the uncertainty engendered by the litigation, and increase litigation costs."). Statutory standing should thus be denied to Trinko if any Section 2 claim is recognized.

For the foregoing reasons, and for the reasons previously stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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August 29, 2003