No. 02-682

In the Supreme Court of the United States

VERIZON COMMUNICATIONS INC., PETITIONER

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP

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

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

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QUESTION PRESENTED

Whether the court of appeals erred in reversing the district court's dismissal of respondent's antitrust claims.

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INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

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

STATEMENT

This case concerns the relationship between the Nation's antitrust laws and the Telecommunications Act of 1996 (1996 Telecommunications Act or 1996 Act), Pub. L. No. 104-104, 110 Stat. 56 (47 U.S.C. 251 *et seq*.). The 1996 Act requires incumbent local exchange carriers to share their facilities with rivals on certain terms. The question presented concerns whether the antitrust laws impose similar duties.

1. Section 2 of the Sherman Act, 15 U.S.C. 2, makes it unlawful for any firm to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." Section 2 does not specify the elements of monopolization and attempted monopolization. It is nonetheless well established

munications industry. See *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 475, 489 (2002). The current structure of that industry is in part a product of the 1982 consent decree that settled the United States' antitrust suit against AT&T. *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). That decree separated AT&T's long-distance and equipment units from the units that provided local telephone service, and barred the latter from providing long-distance telephone service except in limited circumstances. See *Verizon*, 535 U.S. at 475.

Since then, the incumbent local exchange carriers (ILECs), such as the Bell Companies that inherited AT&T's local telephone franchises, have remained dominant in the provision of local telephone service. The 1996 Act seeks to introduce competition into local exchange and related mar-

535 U.S. at 492-493. If they fail to agree, either may seek mediation or arbitration by the public utilities commission of the relevant State. *Ibid.* In furtherance of the goal of "jumpstart[ing]" competition, the 1996 Act provides pricing rules that require incumbents to provide unbundled elements at rates that will "attract new entrants when it would be more efficient to lease than to build or resell." *Id.* at 539. The resulting pricing rules may require ILECs to provide new entrants with access to the local telephone network at rates that are below the ILEC's historical cost. *Id.* at 497-498. The resulting rates may also generate less revenue for the ILEC than would selling to retail customers directly.[1]

The 1996 Act includes an antitrust savings clause, § 601(b), 110 Stat. 143. It declares that, "except as provided" in provisions not relevant here, "nothing in this Act * * * shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. 152 note.

2. This case arises out of a dispute between AT&T, which is a competitive local exchange carrier (CLEC), and petitioner Verizon Communications Inc., an ILEC. The dispute involves petitioner's performance of an agreement with AT&T for telephone service in the State of New York following negotiation and binding arbitration pursuant to 47 U.S.C. 251 and 252. See Pet. App. 5a, 22a; *Order Approving Interconnection Agreement*, Case No. 96-C-0723 (N.Y. Pub. Serv. Comm'n June 13, 1997) (*available in* 1997 WL 410707).

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[1] For example, petitioner asserts that it can earn substantially more by selling its services at retail than it does by leasing facilities at "unbundled network element" rates to competitors. See Pet. Cert. Reply 5 n.5. For present purposes, it is sufficient to observe that the 1996 Act's pricing standards are not designed to ensure that ILECs earn the same revenues selling to competitors as they do by serving retail customers directly. As one competitive local exchange carrier told the FCC, the Act shifts ILECs "from a high margin retail base to lower-margin wholesale business." Letter from Robert A. Curtis, President, Z-Tel Network Services, CC Docket No. 01-338, at 7 (Sept. 23, 2002).

petitioner's competitors "in the provision of" local phone service. J.A. 47 (Am. Compl. ¶ 57). Respondent further alleged that petitioner's conduct "had no valid business reason and was intended to exclude competition * * * 'by making it difficult for competitors to provide service in the Local Phone Service market on the level that [petitioner] is able to provide to its customers in that market.' " Pet. App.

rates. But conduct that violates the obligations imposed by the 1996 Act does not *ipso facto* violate the antitrust laws.

To the contrary, unilateral conduct can violate Section 2 of the Sherman Act—it can constitute monopolization or at-competition, the pertinent standard here. For example, it nowhere asserts that, by refusing to sell to competitors as a wholesaler at regulated rates, instead of serving customers itself as a retailer, petitioner undertook a sacrifice of short-term profits that would make sense only if it had the effect of impairing competition. Nor does the complaint address the cost of providing competitors with wholesale access as required by the Act. Contrast *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608, 610-611 (1985) (conduct that imposed a "sacrifice" of "short-run benefits" and made sense only because it "reduc[ed] competition * * * over the long run"); 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 773, at 211 (2d ed. 2002) ("[N]o firm has a general duty to injure itself in order to benefit a rival."). Instead, the complaint rests on the assumption that any conduct that violates the 1996 Act necessarily violates the antitrust laws. Because that assumption is incorrect, and

The district court dismissed the complaint in this case because respondent failed to allege "exclusionary" practices. The court of appeals did not disagree that the complaint failed to plead such practices. The court of appeals reversed nonetheless because, in its view, Sherman Act liability could be sustained under two alternative theories—"essential facilities" and "monopoly leveraging"—without showing exclusionary conduct. Those theories, however, do not provide stand-alone bases for liability under Section 2, and they do not permit liability absent proof of exclusionary conduct. The Sherman Act prohibits anticompetitive restraints of trade. It is not a license for federal courts to create codes of desirable business conduct under which competitors must assist each other for the public good.

I. The 1996 Act Neither Bars Nor Supports Claims Alleging Sherman Act Violations

The 1996 Act and the Sherman Act implement the national commitment to competitive markets in fundamentally different ways. The 1996 Act was "intended to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises; [an] objective * * * considered both an end in itself and an important step toward the Act's other goals of boosting competition in broader markets and revising the mandate to provide universal telephone service." *Verizon Communications* v. *FCC*, 535 U.S. 467, 476 (2002). The Act thus sought to "uproot[]" local telephone monopolies, *id.* at 488, and to "reorganize" and "bring competition to local-exchange markets," *id.* at 489, 539, without regard to whether ILEC monopolies developed and persisted lawfully in the first instance. To achieve that end, the 1996 Act provides a detailed blueprint under which ILECs must assist their rivals to "jumpstart" competition. See *id.* at 488. It requires ILECs, for example, to "lease elements of their networks" to their competitors "at rates that would attract new entrants when it would be more efficient to lease than to build or resell." *Id.* at 539. The resulting "wholesale market for leasing network elements" and resulting pricing structures are "brand new." *Id.* at 528; pp. 1-3 & note 1, *supra*.

Section 2 of the Sherman Act, in contrast, proscribes *conduct* that monopolizes, *i.e.*, monopolization or attempted monopolization. It thus does not prohibit or condemn "monopoly in the concrete." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 62 (1911)). And it neither expressly mandates the sharing of an incumbent firm's facilities nor provides concrete pricing and access rules for such sharing. That is because, unlike the 1996 Act, the Sherman Act does not impose a generalized duty to assist rivals, much less a generalized duty to assist them by sharing facilities at rates that are "attractive" or on terms different from those offered to non-competitor customers. See *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600-601 (1985); see also *Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 375-376 (7th Cir. 1986) (Section 2 imposes on a monopolist "no general duty to help its competitors" and "no duty to extend a helping hand to new entrants"). Simply put, the Sherman Act does not require firms—whether or not monopolists—to sacrifice profits to sell to competitors at a discount. 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 773, at 211 (2d ed. 2002) ("[N]o firm has a general duty to injure itself in order to benefit a rival."); see *id.* ¶ 772, at 188 (*Aspen Skiing* "certainly does not hold that a monopolist must make its goods, services, or facilities available at a competitive rather than a monopolistic price.").

Although the two statutes adopt different strategies to promote competition, Congress intended them to coexist.

distinct obligations and that neither set of laws displaces the other. Specifically, the 1996 Act provides (with certain exceptions not applicable here) that it should not "be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 47 U.S.C. 152 note. Recognizing the import of that language, the decision below correctly held that the 1996 Act does not immunize conduct from antitrust scrutiny. See Pet. App. 32a. The other courts of appeals have uniformly reached the same conclusion. See *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390, 401 (7th Cir. 2000) (suggestion that the 1996 Act confers "implied immunity on behavior that would otherwise violate the antitrust law * * * would be troublesome at best given the antitrust savings clause in the statute"); *Covad Communications Co.* v. *BellSouth Corp.*, 299 F.3d 1272, 1280-1281 (11th Cir. 2002), petition for cert. pending, No. 02-1423 (filed Mar. 20, 2003); *MetroNet Servs. Corp.* v. *US West Communications*, 325 F.3d 1086, 1099-1101 (9th Cir. 2003); *Cavalier Tel. Co.* v. *Verizon Va., Inc.*, aSee the TD antitrust l the wo an3 -1.288931 2003TD TD t byons not applic

1996 Act and the FCC's implementing regulations, does not de facto create antitrust immunity for otherwise anticompetitive conduct. To the extent petitioners contend otherwise, see Pet. 8-9, they are mistaken. But equally important, the 1996 Act does not create an antitrust minefield in which any regulatory violation by a monopolist substitutes for a showing of exclusionary conduct.

II. The Court of Appeals Erred In Failing To Require Exclusionary Conduct Under Section 2 Of The Sherman Act

Although the court of appeals correctly recognized the distinction between the 1996 Act and the Sherman Act as a matter of form, in substance it imported 1996 Act duties into antitrust law. The Sherman Act may require a dominant firm to deal with competitors in limited circumstances. But the court of appeals' decision unduly expands those circumstances by endorsing "essential facilities" and "monopoly leveraging" theories uncabined by the requirement of exclusionary or predatory conduct.

A. Exclusionary Conduct Is Essential To Any Section 2 Claim Premised On Unilateral Action

Section 2 of the Sherman Act specifies two offenses that can be committed by a firm acting unilaterally—monopolization and attempted monopolization. See *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 459 (1993) (citing *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767-769 (1984)). As this Court made clear long ago, Section 2 does not prohibit monopoly as such, *i.e.*, "monopoly in the concrete." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 62 (1911). Rather, the offense of monopolization is broadly defined as (1) the willful *acquisition or maintenance* of monopoly power (2) by the use of *anticompetitive conduct* "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 482-483 (1992) (quoting *United*

States v. *Griffith*, 334 U.S. 100, 107 (1948)); see *United States* v. *ALCOA*, 148 F.2d 416, 432 (2d Cir. 1945).

1. *Monopolization and Attempted Monopolization Require Exclusionary Conduct*

A *sine qua non* for any claim of monopolization or attempted monopolization is conduct that "reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power." 3 Areeda & Hovenkamp, *supra*, ¶ 651f, at 83-84; *Spectrum Sports*, 506 U.S. at 458-459. Even where actions threaten to create or maintain a monopoly, only "exclusionary" or "predatory" conduct is proscribed by Section 2. *Aspen Skiing*, 472 U.S. at 602. The conduct must "not only (1) tend[] to impair the opportunities of rivals, but also (2) either * * * not further competition on the merits or do[] so in an unnecessarily restrictive way." *Id.* at 605 n.32.

Applying that standard "can be difficult," because "the means of illicit exclusion, like the means of legitimate competition, are myriad." *United States* v. *Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir.) (en banc), cert. denied, 534 U.S. 952 (2001). However, it does not entail open-ended " 'balancing' of social gains against competitive harms," for "a firm is under no obligation to sacrifice its own profits" for the public weal. 3 Areeda & Hovenkamp, *supra*, ¶¶ 651a, 658f, at 72, 131-132, 135. Instead, the harm to competition must be disproportionate to consumer benefits (in terms of providing a superior product, for example) and to the economic benefits to the defendant (aside from benefits that accrue from diminished competition). See *ibid.* Under that standard, this Court has recognized a variety of anticompetitive means by which defendants may seek or maintainLCOA

The requirement of exclusionary conduct emanates from the Sherman Act itself. Imposing liability in the absence of exclusionary conduct risks discouraging, even punishing, the very competition the antitrust laws are intended to encourage. This Court has noted the difficulty of "distinguish[ing] robust competition from conduct with long-run anti-competitive effects." *Copperweld*, 467 U.S. at 767-768. Indeed, the conduct of a vigorous competitor may "appear[] to 'restrain trade' unreasonably" even where that conduct "is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster." *Id.* at 767. Thus, "[s]ubjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote." *Id.* at 775. As Judge Hand wrote, "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins." *ALCOA*, 148 F.2d at 430.[5]

2. *In Cases Asserting A Duty To Assist Rivals, Conduct Is Exclusionary Only If It Would Not Make Economic Sense But For The Tendency To Impair Competition*

Where, as here, the plaintiff asserts that the defendant was under a duty *to assist a rival*, the inquiry into whether conduct is "exclusionary" or "predatory" requires a sharper focus. In that context, 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.

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bad-faith contact with administrative agencies may create a substantial anticompetitive impact in violation of Section 2. See, *e.g.*, *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). And the private standard-setting process may afford opportunities for opportunistic behavior that may harm competition. See, *e.g.*, *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492 (1988).

[5] Different considerations apply to concerted action, which is "inherently * * * fraught with anticompetitive risk." *Copperweld*, 467 U.S. at 768-769. As a result, concerted action is evaluated for its reasonableness—and is, in some instances, summarily condemned as illegal per se.

This Court has emphasized that sort of analysis with respect to predatory pricing. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588-589 (1986); ABA Section on Antitrust, *Antitrust Law Developments* 247 (5th ed. 2002) ("courts have held conduct to be predatory where it would be economically irrational for the monopolist but for the conduct's adverse impact on competition"). In that context, this Court has expressed concern that conduct perfectly consistent with robust competition—"cutting prices in order to increase business"—should not lightly give rise to antitrust liability, because doing so may "chill the very conduct that antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. Price cuts, moreover, rarely harm consumers, because "predatory pricing schemes are rarely tried, and even more rarely successful." *Id.* at 589.

Likewise, in the context of asserted duties to assist rivals, this Court and the courts of appeals have recognized that conduct is exclusionary where it involves a sacrifice of short-term profits or goodwill that makes sense only insofar as it helps the defendant maintain or obtain monopoly power. See *Aspen Skiing*, 472 U.S. at 608, 610-611 (conduct that "sacrifice[s] short-run benefits," such as immediate income and consumer goodwill, undertaken because it "reduc[es] competition * * * over the long run"); *General Indus. Corp.* v. *Hartz Mountain Corp.*, 810 F.2d 795, 803 (8th Cir. 1987) trast, a refusal to aid rivals that makes economic or business sense *apart* from a tendency to impair competition is not exclusionary.

That demanding standard, like the one employed in the predatory pricing context, reflects the infrequent pro-competitive benefits and the frequent anticompetitive risks posed by a generalized requirement that firms assist rivals. Consumers are generally "no better off when a monopoly is shared; ordinarily, price and output are the same as they that someone must oversee the terms and conditions of that sharing." *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 428 (2000) (Breyer, J., concurring in part and dissenting in part).

Congress and regulatory agencies, of course, may identify circumstances where it is economically efficient to require the incumbent to share its facilities under a system of price and access regulation; or where new entrants should be permitted to use the monopolist's facilities while establishing themselves, and their customer base, before they are expected to build their own facilities. Indeed, the 1996 Act rests in part on that kind of industry-specific determination. See *Verizon*, 535 U.S. at 510-511 & n.27; *Cavalier Tel. Co.*, 2003 WL 21153305, at *11 (1996 Act a "distinctly different approach to jump-start and accelerate competition"); *Goldwasser*, 222 F.3d at 399 (similar). But the identification and remediation of those situations is best dealt with through industry-specific legislation and regulation—like the 1996 Act—which can be developed by legislative branches and

1995) ("the antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute"), cert. denied, 516 U.S. 1184 (1996); *Kartell* v. *Blue Shield of Mass., Inc.*, 749 F.2d 922, 927 (1st Cir. 1984) (Breyer, J.) ("even a monopolist is free to exploit whatever market power it may possess" by "charging uncompetitive prices"), cert. denied, 471 U.S. 1029 (1985).

Nonetheless, a monopolist's right to refuse cooperation with rivals is not wholly unqualified. *Aspen Skiing*, 472 U.S. at 600-601. If such a refusal involves a sacrifice of profits or business advantage that makes economic sense only because it eliminates or lessens competition, it is exclusionary and potentially unlawful. In *Aspen Skiing*, for example, this Court upheld a verdict against the Ski Co., which had terminated its former cooperation with a smaller rival, Highlands, and refused numerous proposals for resumed cooperation. In finding sufficient evidence that the Ski Co.'s conduct could "properly be characterized as exclusionary," 472 U.S. at 605, this Court repeatedly stressed that the Ski Co.'s decision to refuse cooperation required the sacrifice of immediate profits. The Ski Co., for example, refused to sell its lift tickets to its rival *at full price*, "forgo[ing] daily ticket sales" and the goodwill of its own customers, who were inconvenienced by that choice. *Id.* at 608; *id.* at 593 & n.14 (Ski Co. refused to sell to its competitor "any lift tickets" of its own, "either at the tour operator's discount or at retail").

explain how its conduct made economic sense apart from the harm to competition. *Id.* at 608. The conduct was thus condemned because it made no economic sense but for its anticompetitive consequences.

When, on the other hand, a monopolist's refusal to deal (or, as here, breach of an agreement to deal) on particular terms does make business sense apart from exclusionary consequences, antitrust law should avoid interfering with such business choices. At one extreme, a refusal to sell an input to a rival when it requires the incumbent to forfeit profits would make obvious business sense. But even in less extreme circumstances, courts should be hesitant to impose a duty to assist rivals. The decisions of a seller, even a monopolist, regarding to whom it will sell, on what terms, and under what sort of quality and purchaser-satisfaction measures, generally reflect its own assessment of how to compete and provide goods most effectively in the marketplace. There is good reason to be cautious when setting the standard under which such conduct is condemned as exclusionary, lest consumers be deprived of the benefits of pro-competitive business practices, or potential competition be displaced by cooperation as would-be rivals share inputs. See *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); pp. 15-18, *supra*.

B. The Court of Appeals Improperly Applied The "Essential Facilities" Doctrine To Dispense With The Exclusionary Conduct Requirement

Departing from that approach, some courts of appeals have developed an "essential facilities" doctrine divorced from traditional antitrust requirements, including proof of exclusionary conduct. As articulated by those courts, the doctrine requires a monopolist to assist rivals by sharing a facility if, by refusing to do so, the monopolist can "extend monopoly power from one stage of production to another" and the following four elements are found:

> (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

MCI Communications Corp. v. *AT&T*, 708 F.2d 1081, 1132-1133 (7th Cir.), cert. denied, 464 U.S. 891 (1983). See 3A Areeda & Hovenkamp, *supra*, ¶ 771a, at 169-170; see also P. Areeda, *The "Essential Facility" Doctrine: An Epithet in Need of Limiting Principles*, 58 Antitrust L. J. 841 (1989).

This Court has never adopted the essential facilities doctrine in a Section 2 case. *Iowa Utils. Bd.*, 525 U.S. at 428 (Breyer, J., concurring in part and dissenting in part). And the doctrine has been heavily criticized. See, but neither necessary nor sufficient to establish Section 2 liability.[6] As one court has explained, the essential facilities doctrine is "a label that may aid in the analysis of a monopoly claim, not a statement of a separate violation of law." *Viacom Int'l, Inc.* v. *Time Inc.*, 785 F. Supp. 371, 376 n.12 (S.D.N.Y. 1992). It relieves plaintiffs "of no burden they would otherwise bear, and constitutes no substitute for a showing that the requirements of a cause of action under the antitrust laws have been met." *Ibid.* Consequently, as with any other monopolization or attempted monopolization claim, so-called essential facilities claims must include some showing of "exclusionary" or "predatory" *conduct.* In this context, that means conduct that would not make sense but for its tendency to reduce or eliminate competition.[7]

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[6] The first two factors—that the facility (1) is controlled by a monop-

For that reason, a monopolist's refusal to sell his goods or services below the monopoly price would not ordinarily be actionable, because that price maximizes profits apart from sential to competing in the local phone service market; that recreating the local loop was prohibitively expensive; and that petitioner denied AT&T, a competitor, "reasonable access" to the loop. Pet. App. 29a-30a.

The court of appeals contemplated that petitioner might eventually escape liability if it established either that the local loop was in fact not essential, or that it actually had provided "reasonable access." Pet. App. 30a. But the court did not address whether the complaint alleged exclusionary or predatory conduct. Furthermore, it appears to have assumed that "reasonable access" means access on the terms provided under the 1996 Telecommunications Act rather than access on such terms as would make business sense in" it "shall be construed to modify * * * the applicability the court of appeals held that a "monopoly leveraging" violation is established if a monopolist in one market uses its monopoly to "gain a competitive advantage" in a second market, Pet. App. 30a, even if the monopolist does not have "a dangerous probability" of successfully monopolizing the second market, *id*. at 31a n.13. That formulation is difficult to reconcile with the text of the Sherman Act, which proscribes monopolization and attempted monopolization, rather than "misuse" of market power. 3 Areeda & Hovenkamp, *supra*, ¶ 652a, at 89. It is also inconsistent with *Spectrum Sports*, 506 U.S. at 459, which clarifies that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so."[12]

Moreover, the Second Circuit's "monopoly leveraging" formulation suffers from the same defect as its "essential facilities" holding—it does not require the monopolist's conduct to be "exclusionary" or "predatory" within the meaning of Section 2 jurisprudence. The court of appeals identified only one conduct element of the leveraging violation alleged here, the "use" of monopoly power in one market. Pet. App. 31a. But use of monopoly power is not unlawful; predatory or exclusionary conduct to create or maintain a monopoly is. The court of appeals failed to recognize that distinction.[13]

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[12] The Second Circuit has elsewhere acknowledged that tension. See *Virgin Atl. Airways Ltd.* v. *British Airways PLC*, 257 F.3d 256, 272 (2001) (*Spectrum Sports* creates "uncertainty * * * as to the continued scope of a monopoly leveraging claim as an independent cause of action."). The court of appeals' use of a "competitive advantage" formulation may not matter in this case, because the complaint may sufficiently allege a dangerous probability of successful monopolization.

[13] The court of appeals appears to have considered the use of monopoly power in a monopoly leveraging claim to be "anticompetitive or predatory conduct" per se, Pet. App. 31a n.13, perhaps as a matter of definition. But the court never explained why petitioner's or any other monopolist's use of monopoly power to gain a competitive advantage in a second market would always be economically irrational except insofar as it tended to eliminate or lessen competition. The Second Circuit appears to have

The court of appeals' test for monopoly leveraging would, like its essential facilities formulation, also condemn non-exclusionary conduct that neither creates nor sustains monopoly power. It would, in essence, create a new category of antitrust liability, applicable to monopolists that gain any competitive advantage—such as that which results from economies of scope or scale, or the ability to sustain expensive research and development efforts—in their activities in competitive markets unless they "share" that advantage with competitors. Such a theory is incompatible with the antitrust laws. What offends the Sherman Act is not the use of monopoly power as such, but exclusionary techniques. Here, petitioner is alleged to have breached contractual and regulatory requirements under the 1996 Act that it provide CLECs with access to its facilities on specified terms. Unless that conduct would not make economic sense apart from a tendency to impair or forestall competition, it is not exclusionary and is not actionable under Section 2.

D. Under The Proper Standards Of Section 2 Liability, Respondent's Complaint Fails To State A Claim

The Federal Rules require only that a complaint include "a short and plain statement of the claim showing that the

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derived its monopoly leveraging formulation from *United States* v. *Griffith*, 334 U.S. 100, 107 (1948), by way of *Berkey Photo*, 603 F.2d at 275. *Griffith* declared it "unlawful" to use "monopoly power, however lawfully acquired, * * * to gain a competitive advantage," and *Berkey Photo* stated that "a firm violates § 2 by using its monopoly power in one market to gain a competitive advantage in another." But the court of appeals took the *Griffith* language out of context. *Griffith* concerned the alleged use of monopoly power to extract "exclusive privileges" that "unreasonably restrained competition"; it was the extraction of privileges that was found problematic. 334 U.S. at 103-104. Moreover, *Berkey Photo* nowhere suggests that a monopolist in one market may not lawfully benefit from that monopoly when competing in a second market. See 603 F.2d at 276 (noting that "an integrated business" does not "offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market").

pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), a statement that need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," *Swierkiewicz* v. *Sorema*, 534 U.S. 506, 512 (2002) (quoting *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957)). Even when evaluated by the liberal notice pleading standards of the Federal Rules of Civil Procedure, respondent's complaint fails to state a claim for relief under Section 2 of the Sherman Act, because it fails to allege exclusionary conduct.

The gravamen of respondent's claim is that, by failing to fill its competitors' orders in a timely fashion, petitioner failed to provide them with full and nondiscriminatory access to its local telephone network so as to permit them to use that network in competition with petitioner's own use of it. See J.A. 39, 46-47 (Am. Compl. ¶¶ 21, 54); p. 4, *supra*. Respondent's complaint does not implicate an antitrust duty to provide such access, because the complaint does not allege that any refusal to deal was predatory or exclusionary in the sense relevant here, *i.e.*, that the refusal would not make business sense unless it tended to eliminate or lessen competition. Contrast *Aspen Skiing*, 472 U.S. at 608, 610-611; pp. 15-17, 19-20, *supra*. The complaint makes no allegations whatsoever relating to price, profitability, or the costs of complying with 1996 Act access requirements. It thus nowhere suggests that petitioner's failure to comply—or failure to devote sufficient resources to achieve any particular level of compliance—would make no economic sense apart from the tendency to impair competition.

That omission is no mere drafting oversight. The district court dismissed respondent's initial complaint for failure to allege facts establishing "any 'willful acquisition or maintenance' of monopoly power," Pet. App. 55a—that is, for failure to allege exclusionary or anticompetitive conduct. After seeking and receiving permission to replead, *id.* at 62a, respondent filed an Amended Complaint, which the district court also dismissed for failure "to allege any anticompetitive conduct." *Id.* at 67a. Respondent's failure to allege exclusionary conduct even after having been put on notice of the need to allege it is reason enough to conclude that "no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984). Notice pleading may not require that a complaint "include evidentiary detail. On the other hand, the price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome." *DM Research, Inc.* v. *College of American Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (Boudin, J.). Respondent's two successive failures to allege such a factual predicate show that it cannot pay the price of entry.

The complaint does allege that petitioner "had no valid business reason" for the challenged conduct, Pet. App. 6a (quoting J.A. 47 (Am. Compl. ¶ 57)), and that petitioner "has engaged in exclusionary and anticompetitive behavior," J.A. 46 (Am. Compl. ¶ 52). But those conclusory assertions are not sufficient allegations that the conduct was exclusionary—in the context of failure to assist a rival, that the conduct would not make economic sense apart from an effort to restrain competition. See *Papasan* v. *Allain*, 478 U.S. 265, 286 (1986) (court not "bound to accept as true a legal conclusion couched as a factual allegation"). The court of appeals, moreover, did not refer to either allegation in its antitrust analysis. See also *Delaware & Hudson Ry.* v. *Consolidated Rail Corp.*, 902 F.2d 174, 180 (2d Cir. 1990) (treating conduct that makes business sense as illegitimate).

Ultimately, the complaint must be dismissed because it rests on the unstated and incorrect assumption that the antitrust laws require a monopolist—either through the "essential facilities" or "monopoly leveraging" doctrines—to assist competitors by acting as a wholesaler, offering them access to the incumbent's facilities equivalent to that which the incumbent gives itself on terms not offered to non-competitor customers. The 1996 Act, as implemented by FCC regulations upheld by this Court in *Verizon* v. *FCC*, *supra*, does impose those requirements. See 535 U.S. at 539; Pet. App. 5a (under 47 U.S.C. 251(c), ILECs must provide competitors access "at least equal in quality to that provided by the local exchange carrier to itself"). But, as the Seventh Circuit recognized in *Goldwasser*, "the duties the 1996 Act imposes" are not "coterminous with the duty of a monopolist to refrain from exclusionary practices." 222 F.3d at 399; see also 47 U.S.C. 152 note (Act does not "modify * * * the applicability of any of the antitrust laws."). Respondent has not alleged an exclusionary refusal, apparently because respondent believed that an allegation of a regulatory violation of the 1996 Telecommunications Act suffices. But not every violation of the 1996 Act constitutes exclusionary or predatory conduct under the antitrust laws. Nor, contrary to the decision below, does the allegation that the monopolist owns an essential facility or employs a facility to leverage market power substitute for allegations of predatory conduct. To permit this case to go forward under the Second Circuit's erroneous construction of Section 2 would fundamentally transform the Sherman Act so as to require monopolists to pull their competitive punches, assist their competitors, convert themselves from retailers into wholesalers, and share monopoly profits on demand. That is not conduct the Sherman Act requires.

CONCLUSION

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

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MAY 2003