IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

VERIZON COMMUNICATIONS INC. :

Petitioner :

v. : No. 02-682

LAW OFFICES OF CURTIS V. :

TRINKO, LLP. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, October 14, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:50 a.m.

APPEARANCES:

RICHARD G. TARANTO, ESQ., Washington, D.C.; on behalf of the Petitioner.

THEODORE B. OLSON, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

DONALD B. VERRILLI, JR., ESQ., Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:50 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 02-682, Verizon Communications v. the Law Offices of Curtis V. Trinko, LLP.

Mr. Taranto.

ORAL ARGUMENT OF RICHARD G. TARANTO

ON BEHALF OF THE PETITIONER

MR. TARANTO: Mr. Chief Justice, and may it please the Court:

On the facts alleged, Trinko cannot sustain its complaint unless the Court newly recognizes a section 2 duty of a monopolist to turn over its sales to rivals by sharing its assets at specially discounted prices, that is, a duty to dismantle itself.

Our argument is that that hasn't ever been a section 2 duty and shouldn't now be made into one.

QUESTION: We have an Illinois Brick problem before we even get to the substantive question, don't we? I mean, why -- why should we entertain this -- this case at all?

MR. TARANTO: I don't think that Illinois Brick -- in fact, I think Illinois Brick is not a jurisdictional point. It is a question of cause of action that goes to certain kinds of damages.

QUESTION: Well, I understand, but -- but those -- those standing rules that are not jurisdictional are still standing rules, and we normally apply them. Why should we not apply our normal rule of standing in this case?

MR. TARANTO: Well, we -- we do think you should, but that it shouldn't preclude the Court from reaching the merits, which are of much broader importance. That is, in the absence of the rule being a jurisdictional one, the Court has the option of considering either of two grounds for reversing and reinstating the dismissal, just as the Court did in the sovereign immunity case involving Israel last year where there were two alternative grounds.

QUESTION: Well, it seems to me --

MR. TARANTO: The merits question is a much more --

QUESTION: It seems to me you're just trying to rush to the merits. I -- I think the standing and the issues are very serious issues here.

MR. TARANTO: Oh, we -- we think so as -- as well, and let me -- let me address that briefly.

QUESTION: What you're -- what you're saying basically it's a claim for relief issue rather than a -- than a jurisdictional issue.

MR. TARANTO: Yes, yes. The -- the statutory

standing question has always been treated as a question of what the meaning of section 4 of the Clayton Act, the damages provision, is here, and both the indirect purchaser rule and the more general indirectness aspect of Associated General Contractor has to do with who can get what kinds of relief. That's not a jurisdictional question, and therefore it remains open to this Court to do what we think the Court should do, which is also to address the question that is directly dividing the circuits, what is the scope of section 2. And --

QUESTION: Mr. Taranto, you made a -- an interesting classification, and I think I tend to agree with it, but I'm not sure that these Court's cases fit that mold.

I had thought that the things that are put under the head of, quote, prudential standing sound like does this person have a claim under this statute for relief. That's a 12(b)(6) question. But the Court seems to have -- think that there's something in between constitutional standing, which everyone agrees exists here, and 12(b)(6), and that's this prudential standing notion.

Is there a difference between the 12(b)(6) inquiry, does this statute afford this plaintiff a claim for relief, and what this Court has called prudential standing?

MR. TARANTO: The best that I can do with that is to describe what the Court has done in the cases that we rely on for saying there's no statutory standing. Associated General Contractors and Illinois Brick and its follow-on, Kansas against UtiliCorp, are all about the interpretation of section 4 of the Clayton Act. In that sense, they are classic 12(b)(6) questions. The entire analysis in Associated General Contractors is about what the term injury to business or property means. They are interpretive questions in that way. They're not separate prudential standing questions somewhere between constitutional standing and statutory coverage. And that's why we think it is both proper and really quite important for purposes of the several other circuit cases that are now sitting in cert petitions in this Court on the merits question that divides the circuits.

There is no section 2 duty on the merits now to turn over your sales to a rival. This Court said, as far back as 1920 in the U.S. Steel case, section 2 does not condemn mere size. Section 2 does not compel competition. The 1996 act does. It has a quite different policy. It says we will mandate creation of competition. Section 2 says we protect against affirmative interferences in independently arising competition. They're fundamentally different statutory approaches to a highly general goal of

competition.

QUESTION: Is this a kind of refusal to deal case? So it could be covered in theory by section 2?

MR. TARANTO: It is a kind of refusal to deal. It is -- all of the claims in this case, all of the facts allege inadequate help to rivals to come and displace one's own sales. This Court has broadly recognized that section 2 protects the right to just make your sales and not turn them over to rivals with a category of exceptions. Every one of those exceptions, the refusal to deal cases, involves discrimination. The firm was voluntarily in the business of selling the product that the plaintiff wanted, and the plaintiff wanted it at the terms that the firm was selling it to others, and the defendant said, no.

That threshold condition has so far been the only sufficiently reliable one to trigger the inquiry, if you're selling it to some -- to everybody else, why not to the particular plaintiff? And the answer, we're not selling to the plaintiff because the plaintiff is a rival or the plaintiff is dealing with a rival, has been the one exception to the general rule that forced sales to help rivals is not adequate. Discrimination doesn't mean that -- mean illegality. There may be good reasons, but it so far has been the necessary threshold condition for

demanding an inquiry.

This case does not involve any kind of discrimination like that. There's no allegation here. There couldn't be an allegation that Verizon was in the business of renting out its facilities to rivals at specially discounted prices before the 1996 act compelled that.

So for Trinko to prevail here, it would have to -- the Court would have to recognize something brand new under section 2. It would have to expand section 2 to where it has never been before, and we submit there are extremely good reasons for not doing that.

QUESTION: And the reason Otter Tail -- Otter Tail seems like the strongest precedent against you. Before you say the reasons against expansion, I'd just like to hear 30 seconds on why in your opinion Otter Tail is different than this.

MR. TARANTO: Otter Tail was also a case of discrimination. If -- the opinion in Otter -- in Otter Tail is a little bit shy on full explanation for what factors matter, and so one has to look at what the facts were. If you look at the extensive findings of fact by the district judge, which are in the -- not the appendix of this case but the appendix in Otter Tail, there's an entire section called discrimination. Otter Tail at -- at

JA 103 to 111.

Otter Tail was undisputedly in the business of wholesaling power and of wheeling power to others. When particular communities came and said we want from you the same thing that you're happily selling to others, Otter Tail said no.

That's exactly the same kind of discrimination that existed in Aspen Skiing where the three mountain defendants said, we won't even take full price ski tickets from people who are using the fourth mountain because that's a rival. So discrimination was the predicate there too.

This is not a case of discrimination. In the absence of discrimination, any court entertaining a section 2 duty would have to undertake tasks that antitrust has never viewed as appropriate. It would have to ask what are the effects on long-run investments, the long-term effects on investments.

QUESTION: Well, now you're back into the merits, aren't you?

MR. TARANTO: Yes, yes.

QUESTION: Yes. Did you finish with the inquiry of whether we should recognize this plaintiff?

MR. TARANTO: Well, I -- we think not really for -- for a combination of reasons. All of the factors in

Associated General Contractors I think point in the same direction. The injury here is indirect. That is, Trinko was a customer of AT&T which was a customer of Verizon, and Trinko's injury was only an indirect result of the alleged injury to AT&T. The additional considerations point in the same direction. There's obviously a better plaintiff. AT&T.

QUESTION: But AT&T didn't bring an antitrust action.

MR. TARANTO: Well, the -- the final -- final reason I'll mention here is that recognizing the statutory cause of action here would also interfere with the voluntarily agreed upon nonjudicial dispute resolution mechanism that AT&T and Verizon entered into.

QUESTION: Mr. Taranto, Judge Katzmann in the Second Circuit, whose decision we're reviewing, seemed to think that AT&T was not, as you expressed it, the better complainant, but that the remedy for AT&T was the administrative context. I -- I thought his opinion suggested that for AT&T the remedy was the administrative route, but for the customer who has no place else to go, it was court or nothing because the customer would not have access to that administrative process.

Now, is there -- first of all, is -- would AT&T have standing or state a claim for relief if AT&T had been

the plaintiff here?

And second, if you're right that this plaintiff has no claim in court, is there anyplace that this plaintiff can go with the complaint? The reality is -- and we accept what the complaint alleges as true for current purposes -- I have gotten the worst service. It's a constant embarrassment. I've lost clients. I've lost my professional reputation. That's a legitimate complaint. Is there anyone in the world that that can be asserted against?

MR. TARANTO: Let me take those in -- in order, if I may.

AT&T could, of course, have brought a Sherman Act suit had it not expressly waived its right to go to court. It adopted instead a mechanism by which it secured relief far more promptly than any antitrust case would have -- would have obtained. So it's like --

QUESTION: But it had no choice in that. I mean, that's a statutory mechanism. There's no independent waiver that AT&T, as apart from others, what they call them, CLEC's. It's -- it's an -- it's a regime imposed on all the participants, isn't it?

MR. TARANTO: Well, that -- that -- nondispute judicial -- dispute judicial -- nonjudicial dispute resolution was here part of an agreement. It's not in the

statute. Many agreements contain it. Some agreements do not contain it. This one does. And it serves very important statutory functions of providing what here took only 3 months or so fully to resolve the problem and to provide compensation to AT&T. And that's --

QUESTION: Okay, and if -- if there hadn't been an agreement, AT&T would go where? To the commission?

MR. TARANTO: It -- it could go to the commission or it could bring a Sherman Act suit unless, of course, as we do contend, there is no legitimate section -- section 2 claim. But as far as standing is concerned, the customer, that is, AT&T, has standing.

QUESTION: Mr. Taranto, would you clarify one thing for me? Did the AT&T settlement just settle the New York area problems or was it nationwide?

MR. TARANTO: The New York Public Service Commission settlement settled the New York problem. There was an FCC national level consent decree that on a going-forward basis settled -- solved the problem. The problem was in fact a -- a New York-specific one, and here we're talking about the only concrete instance in --

QUESTION: Well, I was under the impression AT&T retained the right to sue in other parts of the country. In fact, they filed an amicus brief in this case, which suggests that they still have an interest in the ongoing

controversy, but not in New York.

MR. TARANTO: I -- I'm -- I'm -- I don't know that AT&T has signed similar agreements for the rest of the country. This particular problem that gave rise to this problem was fully resolved in New York with compensation to AT&T and nationally at the FCC level. So I -- I -- AT&T certainly, wherever it hasn't adopted an arbitration agreement, the way any other plaintiff can adopt, certainly has a right to go to court and to argue as -- as Covad has in the Eleventh Circuit case, as Cavalier has in the Fourth Circuit case, to argue that there is a Sherman Act claim, and that's the merits claim that is before this Court as part of this case as well.

QUESTION: Of course, their position is that this isn't the best test case because this plaintiff didn't make all the right allegations, as I read their brief.

MR. TARANTO: Well, I -- I don't think there could have been any different allegations on the dispositive point. As long as the allegations are the incumbent insufficiently helped the rival --

QUESTION: Yes, but they -- they alleged that in other areas, that there had been -- that there's been sham litigation, fraudulent misrepresentations, and -- and affirmative misconduct, in addition to failing to comply

with all the requirements of the '96 statute.

MR. TARANTO: And -- and those -- those claims, to the extent that they're not helping hand kinds of claims, would of course be outside the analysis. The Cavalier case, the Covad case are overwhelmingly, as this case is, helping hand cases, as the Goldwasser case in the Seventh Circuit was, and that's the core issue that -- that all of these cases are about.

Now --

QUESTION: Would you get to the --

MR. TARANTO: Yes.

QUESTION: -- the last part? Does this customer of AT&T have any remedy for the bad service that the customer attributes not to AT&T but to Verizon?

MR. TARANTO: Yes. Well, first, in this very case the Second Circuit reinstated the section 202 claim of this plaintiff and this Court denied cert on that. So that claim is alive in this very case.

QUESTION: Are damages available on that claim?

MR. TARANTO: The claim is -- is a claim under the damages provision of section 207 for an alleged violation of the substantive Communications Act provision in section 202.

They, of course, also have any remedies any customer has for lousy service here against AT&T, the

provider of the service, which received compensation.

QUESTION: But you -- you say that under -- under 202 that there would be if -- if plaintiff prevails on that claim against Verizon, not AT&T, there would be a damage remedy for the loss that the plaintiff could prove? In other words, does it give the plaintiff the same thing that the plaintiff is seeking here except it's not trebled?

MR. TARANTO: The plaintiff certainly asks for the same damages. Section 202 -- section 207 is the liability damages provision of the Communications Act. The Second Circuit said that that provision was available to this plaintiff to seek recovery for injury from the alleged violation of section 202.

QUESTION: Then why did Judge Katzmann say a couple of times the only opportunity for the plaintiff to get damages is if there is this second section 2 suit?

MR. TARANTO: I'm -- I'm afraid I can't answer that question, having -- the court having reinstated that -- that claim. That is a damages claim.

If the Court has no further questions, I would reserve the balance of my time.

QUESTION: Very well, Mr. Taranto.

General Olson, we'll hear from you.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE UNITED STATES,
AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MR. OLSON: Mr. Chief Justice, and may it please the Court:

It is not a Sherman Act violation to breach a telephone interconnection agreement. The telephone -- the Telecommunications Act created an extraordinary, carefully crafted, comprehensive regulatory and remedial regime to force lawful monopolies --

QUESTION: Mr. Solicitor General, before you get into your argument, do you have a position on the standing issue?

MR. OLSON: We did not brief and we did not take a position in our briefing on the standing question. We -- and our reason for doing that, Justice Stevens, is that we believe that in order to ascertain antitrust standing, one has to connect the injury, the alleged injury, to an antitrust violation. We feel that the question of whether or not there's an antitrust violation in this case comes before the determination of the antitrust injury. And therefore, the United States did not brief that question.

We do believe that the '96 statute is, as this Court characterized it in its previous review of that statute, extraordinary in that it -- it set out to create competition in an area where the antitrust laws would not

have accomplished that objective. The --

QUESTION: Excuse me. I've just been thinking about your prior answer, and I -- we certainly don't -- don't do this for standing normally. We -- we say the question of whether there's been an injury comes before the question of whether there's been a violation. That's what standing is all about. And -- and you -- you say that the Government has just concluded that -- that both questions are -- are of equal priority, and that -- that's just not the way we usually work.

MR. OLSON: We -- we felt, Justice Scalia, not in the context of Article III standing, but in the context of prudential standing in the context of antitrust standing which relates specifically to something this Court has called antitrust injury, which ties into the particular violation, and in order to determine that here, we felt that the Court would have to first answer the question whether there is an antitrust injury itself. Is there any violation of the antitrust laws that would give rise to a section 2, Sherman Act claim in this case.

QUESTION: But you're asking us to do that in a case where a -- a plaintiff without a real interest may be the one that's -- that's demanding that -- that adjudication. This is very odd.

MR. OLSON: Well, we do think -- we do think --

and had we briefed the question, we would have -- we would have thought that there was -- that -- that Trinko had some points here, that it -- this is not an Illinois Brick case -- that Trinko was depending in part upon service provided by the Verizon loop and that it had a choice, as the plaintiffs -- the plaintiff -- that Trinko has alleged in this case, that it had a choice between deficient service from AT&T or -- or paying perhaps a higher price or something else from Verizon, that there are distinctions.

And we think that they might -- but because we didn't brief that, because we thought it was -- the Court first -- we have a litigant here that alleges, and we have a Second Circuit decision, and we've got other circuit decisions that have addressed this very antitrust issue -- that it's very important to resolve that case, particularly in the context of where we have an -- a significant, extraordinary effort by Congress to create a comprehensive, complex, carefully modulated effort to create something.

QUESTION: And do you -- do you take the position that that effort gives Trinko a cause of action under the statute?

MR. OLSON: That we take -- I'm sorry.

QUESTION: Can Trinko sue -- does Trinko have a

cause of action under the statute?

MR. OLSON: Under -- well, yes. In fact, this is in answer I think to Justice Ginsburg's question.

QUESTION: Yes.

MR. OLSON: There is a -- there would be -- and the Second Circuit did decide that there was a right to action under the discrimination provisions of section 202. And this appears -- it's the -- the first full --

QUESTION: Is --

QUESTION: But I -- I thought Mr. Taranto said this -- there is no discrimination in this case. So that if that's true, then there wouldn't be a remedy under 207.

MR. OLSON: Well, first of all, to the extent that there is and to the extent that there are allegations of that, the court addressed that and reinstated that very cause of action. This Court decided not to review that. That --

QUESTION: Okay, but on the -- just on the facts pleaded, do you take -- does the United States take the position that -- that Trinko has pleaded a cause of action under 202 or any other section of the statute?

MR. OLSON: We do not dispute, Justice Souter, the existence of the cause of action recognized by the Second Circuit on page 16a --

QUESTION: Do you dispute that he has pleaded a

cause of action?

MR. OLSON: We do not.

QUESTION: Okay.

MR. OLSON: With respect to that section of the Communications Act.

QUESTION: But is there any reason he can't go to the -- the PSC like anybody else can and say I have ducks on the line?

MR. OLSON: That's --

QUESTION: I can't hear anything. It's terrible and then they issue an order. And if they don't follow the order, you go to court and sue them for damages.

MR. OLSON: That's also true and there's also an action against the -- the -- Trinko had a contract with AT&T to supply it with adequate telephone service. It may have a cause of action against AT&T. To the extent that AT&T attributes its inability to provide that service to Verizon, AT&T has already addressed that under the exclusive remedies it had available to it under the contract.

QUESTION: To -- to get to -- to the merits part of the case, the sacrifice test that you want us to adopt assumes that certain acts are not pro-competitive. But in this case, doesn't the telephone -- doesn't the 1996 Communications Act tell us that certain acts are not pro-

competitive?

MR. OLSON: Actually we submit, Justice Kennedy, that what the Communications Act does is something that the antitrust laws never did do. And the reason that the Communications Act was in -- in fact necessary to break up the monopolies, to cause legitimate, lawful monopolies to do something that the antitrust laws wouldn't require, that is, to open up their markets, which they had no obligation under the antitrust laws to do, at a subsidized rate to invite in competition -- that entire regulatory scheme was something that Congress decided was necessary to do which no other laws in existence had been able to do.

Therefore, not only -- and I think that this is clear from the Court's jurisprudence as well, but also well articulated in the Town of Concord decision that was authored by Justice Breyer on the First Circuit. That regulatory regime, which monitors the conduct on an ongoing basis, which the antitrust laws are not well equipped to do, prevents the occurrence of antitrust injury and inhibits the ability to accomplish antitrust benefits and monitors the process in a way that succeeds in dealing with the possibility of anti-competitive conduct, but conduct that was not required at all under the antitrust laws, that on opening of the markets to

selling one's assets at a discount, to going into a business that the lawful monopolist was not already in.

The additional point there is that the treble damage remedy is considerably more draconian. It acts in an ad hoc, specific case under the supervision of generalize -- generalist judges and ad hoc juries. Whereas Congress decided that the scheme was most -- that was most appropriate -- the regime that was most appropriate to create this new world that this Court specifically recognized in the two previous Telecommunications Act cases was this regulatory regime, inhabited by experts, administered by experts, where there are prompt, efficient, effective remedies, and -- and a scheme which is adjustable from time to time to deal with any anti-competitive conduct.

So it's not only a reason why Congress said we do not change the antitrust laws by this statute. There's good reasons why Congress decided to do that. But there's also additional reasons why the section 2 remedy would be a sledge hammer in an area where Congress has enacted a scalpel to deal --

QUESTION: Why -- why do we have to accept or buy into your broader no-help theory of the antitrust laws if we -- we accept what you've just said? Why can't we just say in this particular instance, we don't have to

adopt any general principles of antitrust law, but in this particular instance the Communications Act has just superseded the Sherman Act?

MR. OLSON: I agree with that, Justice Scalia --

QUESTION: You do.

MR. OLSON: -- that the Court does not need to go into broader general principles. And this Court -- we -- we addressed those principles because we felt we had an obligation. And we have addressed -- the Government has articulated those same principles not only in this Court --

QUESTION: How can you say the Communications Act has superseded the Sherman Act when the statute itself says it didn't?

MR. OLSON: It does -- no, we are not suggesting -- we're not saying that the -- that the act provides any immunity. The act still exists side by side. What we do say is that this was not -- this conduct was not a Sherman Act violation before the act, and the act specifically says --

QUESTION: Well, that's a different point than the one Justice Scalia made. You're saying there was no antitrust violation whether or not there was a Communications Act or not.

MR. OLSON: That's correct, but it's

specifically true in the context of this regime that exists. To the extent that there is any anti-competitive activity, this Court has repeatedly said that it must look from -- at the antitrust laws and the application of the antitrust laws in connection with the particular industry and in a particular regime in which it exists. So when this Court -- this case comes to this Court, it is entirely consistent for this Court to look at the alleged violation of the antitrust laws in that context.

The method that Congress selected to create -- to --

QUESTION: Thank you, General Olson.

MR. OLSON: Thank you.

QUESTION: Mr. Verrilli, we'll hear from you.

ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

ON BEHALF OF THE RESPONDENT

MR. VERRILLI: Mr. Chief Justice, and may it please the Court:

I'll address the standing question first and explain why consumers in Trinko's position have standing and why General Olson is correct that Illinois Brick is not a problem. Then I'll show why it would be unwise and unwarranted to adopt the discrimination test that my friends on the other side advocate as a matter of section 2 law and why the 1996 act is crucially relevant and why

the antitrust laws in that act should be enforced in tandem, as Congress indicated.

Now --

QUESTION: And at some point in -- in your standing discussion, could you address whether or not Trinko could just have sued AT&T, say you're giving us lousy service, we want our money back?

MR. VERRILLI: I think Trinko could have brought a suit like that. Of course, AT&T would have then said it was Verizon's fault, which it was, and there would be --

QUESTION: That's not usually a defense, the failure of the contracting party to deliver adequate services under the contract.

MR. VERRILLI: Well, that -- that's correct, but in this situation, there -- there might well be filed rate doctrine problems with a suit like that. There would be all kinds of a problems with a suit like that. And in any event, because Trinko has -- has an is a proper plaintiff under section 4 of the Clayton Act, is entitled to invoke the Sherman Act, the fact that they had -- it has other remedies seems to me beside -- beside the crucial point.

Now, under Reiter against Sonotone, this Court held that consumers have standing under section 4 of the Sherman Act -- under section 4 of the Clayton Act to sue when they are injured by anti-competitive conduct that

raises prices or lowers quality in the market where they purchase. That is what Mr. Trinko is alleging.

Illinois Brick is not a reason to cut off that standing here, as General Olson indicated, for the following reason. Illinois Brick applies when Hanover Shoe applies, and Hanover Shoe does not apply here. Illinois Brick is just the flip side of Hanover Shoe.

Hanover Shoe says that in a case of a price-fixing overcharge -- the same as in UtiliCorp -- price-fixing overcharge -- when a middle man pays too much, the middle man is entitled to sue under the Sherman Act for the entire amount of the price-fixing overcharge, and the -- and the defendant can't assert a pass-through defense. And -- and the reason for that is to ensure full and effective use and enforcement of the Sherman Act's damages remedy.

Now, in that situation, what Illinois Brick holds is that, well, once the -- once the middle man has sued for the full value of the overcharge, then the people subsequently down the chain can't bring antitrust claims themselves because that would create a problem of duplicative recovery. But the -- but the reason that you don't have --

QUESTION: Or even if he hasn't sued I thought.

MR. VERRILLI: That -- well, that's correct, but

there were -- because he could sue and there will be problems of duplicative recovery. But that -- it only applies, Justice Scalia, in situations where the measure of damages that the middle man would have is the overcharge damages. And here, of course, AT&T is a competitor of Verizon. AT&T would bring a monopolization claim, and it's been clear since the Southern Photo case in 1927 that AT&T's measure of damages would be its lost profits, not an overcharge, but its lost profits. And --

QUESTION: So as long as the consumer can bring an action for something that AT&T couldn't bring, no Illinois -- no Hanover, no Illinois Brick.

MR. VERRILLI: Correct. In fact, it would disserve the very policies of Hanover Shoe here because it would result in the -- the monopolist not being responsible for the full value of the antitrust injury it inflicts. So there's no Illinois Brick problem here.

And I think that's why my friends on the other side in Verizon relied so much on Associated General Counsel -- Associated General Contractors rather than Illinois Brick. But, of course, all that case states, as -- as this Court made clear in Holmes, is a rule of proximate cause.

And remember the facts in Associated General Contractors. The allegation was that a landowner

pressured a contractor to hire non-union subcontractors, and as a result the union subcontractors had less business, and as a result, they had fewer employees, and as a result, the union had fewer dues to collect. And the Court quite properly held that proximate causation can't possibly extend that far.

QUESTION: Yes, but isn't there a proximate cause problem in this case too? You -- you represent a class, I think. Your -- and is it not likely that the -- there are many, many members of the class who have different kinds of injuries from the other members of the class? It's a little hard for me to understand precisely how the wrongdoing that affected AT&T necessarily carries over to customers of AT&T.

MR. VERRILLI: The means by which Verizon was trying to monopolize the market, as the complaint alleges -- and I think this is clear from paragraphs 1 and 2 and 54 of the amended complaint -- was that it was -- Verizon was using its control of the local loop that competitors needed to lease to get service going to degrade the service that its competitors, including AT&T, were able to provide to customers. That was the means by which the -- the antitrust scheme was effectuated, and as a result --

QUESTION: Well, are you -- are you alleging that they not merely failed to perform their duties, but

they actually interfered with A&T's performance of its --

MR. VERRILLI: Correct.

QUESTION: -- retail obligation?

MR. VERRILLI: I think -- you know, remember --

QUESTION: Because that's a little different from the way the court of appeals described the complaint.

MR. VERRILLI: Well, I -- I understand it, Your Honor, but the -- but the complaint -- one of the difficulties of this case, of course, is that we're here on a complaint and the test under rule 8 is a notice pleading test, and it can -- and the complaint can only be dismissed if there is no conceivable set of facts that could be proved consistent with the allegations in the complaint that would support relief. And --

QUESTION: Yes, but you have to have alleged in your complaint just how it was that -- that Verizon's misconduct hurt your clients.

MR. VERRILLI: Yes, Your Honor, and I think the -- I think paragraph 2 of the amended complaint says that Bell Atlantic deterred and will continue to deter potential customers from switching to another company for local phone service or cause customers that switch back to Bell Atlantic in frustration for the poor services rendered by their local phone service provider. There are other places in the complaint where it's specifically

alleged that the quality of service that AT&T customers get and other competitors' customers get is degraded in comparison to --

QUESTION: Under the -- what bothers me about the Illinois Brick problem is -- I completely agree with your characterization, but the law would seem odd that would say when Smith, a price-fixing ring, charges Jones $3 extra, we don't let Jones' customers sue for the actual overcharge he undoubtedly suffered. But in fact, when Smith, the monopolist, drives Jones through predatory pricing out of the market, we let Jones' customers come in and say, oh, my service isn't as good, I -- I may -- I don't know exactly. I might have switched. I -- I got bad service, et cetera. You see how much more ephemeral that is, how much more uncertain it is, how much more vague it is? And the more precise thing we don't let them recover for. The more vague thing on your theory, which is highly speculative, we will, on your view, let them recover for.

MR. VERRILLI: Well, I think it's the right answer to let them recover, and -- and it's not speculative. They -- their -- the -- this conduct directly raises the cost of -- and degrades the service that consumers in the market receive. And they are entitled under Reiter against Sonotone to sue for the

damages that those occur.

And it -- you know, Illinois Brick -- I'm not here to defend the wisdom of Illinois Brick in the context in which it exists, Justice Breyer, but it has been narrowly confined to that context. And -- and if you don't have an overcharge case, you don't have Hanover Shoe. If you don't have Hanover Shoe, you don't have Illinois Brick.

QUESTION: The other thing on -- on the -- that I had as a question on the merits of the complaint is I -- I -- if this complaint had said that Verizon went to the customers who were trying to use AT&T and said, Mr. Customer, we're going to wreck your service unless you buy from us, or indeed carried that out in -- through surreptitious ways, but that's what he was saying. You buy from us or you'll be sorry. If that's what the complaint said, you might well have a complaint. But I don't see that in the complaint.

MR. VERRILLI: Well, under --

QUESTION: Rather, what I see in the complaint -- and I want you to point out where it's the contrary -- is that every claim of bad service is connected through a because or some other word like that to the refusal of Verizon to hook up AT&T, i.e., to provide them with the Verizon service so they can provide service to the

customer.

Now, I've read the complaint a few times, but I want you to point out to me the part that you think most clearly contradicts what I just said.

MR. VERRILLI: First, paragraph 2, which is at page --

QUESTION: 2 is the overview.

MR. VERRILLI: Yes, but what it says, Justice Breyer, is that they degraded service. Well, the -- the degraded service has to occur not only during the -- the process of switching over, but after the switching over, and of course, under Swierkiewicz and under Leatherman, the test here is whether there's any set of facts that could be proved consistent with these notice pleading allegations that would support a cause of action. And I think Your Honor's question proves that there is, the first set of facts that Your Honor described. So --

QUESTION: Well, I'm not with you completely for the reason that the overview seems to be an overview which is explicated by the specific complaints of exclusionary conduct which appear later in the complaint.

MR. VERRILLI: But I think those complaints are fairly construed to -- to include denial --

QUESTION: And I would like you to point out.

MR. VERRILLI: I think it's true about paragraph

52. I think it's true about paragraph 54. I think that that is the essence of the complaint here. And of course, that makes sense because these are exactly the kinds of allegations -- this is -- this is the way monopolization occurs. This is the way maintaining monopoly power occurs in this -- in this arena. There's a long and unfortunate history that goes back to MCI against AT&T and continuing --

QUESTION: All right.

MR. VERRILLI: -- to this present day.

QUESTION: Then with paragraph 54, which I thought was the heart of the complaint, what it seems to say at the end is when they did these bad things, the plain effect was that AT&T was prevented from offering local phone service of the quality, as was offered by Bell, and thereby to impede the ability of AT&T to compete. And so I took 54 as being essentially a complaint that AT&T is kept out of the market.

MR. VERRILLI: Well, what it -- what it says --

QUESTION: Yes.

MR. VERRILLI: I -- I don't --

QUESTION: If you don't, in other words, have an obligation to bring them into the market --

MR. VERRILLI: Well, I think you do.

QUESTION: -- under the antitrust laws, you

lose.

MR. VERRILLI: I think -- well, I think you do have an obligation under the antitrust laws, and I'll try to get to that as fast as I can.

QUESTION: If you don't --

MR. VERRILLI: But --

QUESTION: If you don't, do you lose?

MR. VERRILLI: No, because this says --

QUESTION: Where -- where are you reading from, Mr. Verrilli?

MR. VERRILLI: I'm sorry, Mr. Chief Justice. It's at page 46 of the joint appendix, paragraph 54 of the amended complaint.

What it alleges is that AT&T and other competitors weren't able to provide service at the -- at the level of quality -- provide service at the level of quality that -- that Verizon could. It doesn't only say that they weren't able to provide service at all. It says both of those things. And so I think the allegation is there in 54, and I think the -- and it's described in the -- the overview, 1 and 2. And paragraphs 1 and 2 of the amended complaint explains how it works.

And I'd like to -- if I could, go to -- to the core antitrust issue here. I think it is common ground with my friends on the other side that a monopolist's

right to refuse to deal with competitors is not an unqualified right. They acknowledge one qualification. That's where the monopolist discriminates. They argue that's the only time a section 2 duty ought to be imposed because that -- in that situation you can be confident that it's anti-competitive conduct, and you won't have problems with dampening incentives and you won't have administrability problems because you can refer back to the prior course of dealing.

But where they're wrong is in suggesting that that's the only time that you can find liability under section 2 for monopolist refusal to cooperate with its rivals. It is equally true in this case, in this situation where, as Justice Kennedy, your question earlier indicated, there is a regulatory regime in place that requires competitive access on the part of the monopolist in order to bring competition into the market. And what you have -- and -- and I think these allegations are consistent that -- what I am about to say is consistent with the allegations in the complaint, and what you have is a course of conduct on the part of the monopolist that is intended to subvert the competitive entry that those regulations require.

QUESTION: Well, you -- you say then that the 1996 act gives you affirmative momentum that you wouldn't

have with -- that you wouldn't have if it were just the antitrust laws?

MR. VERRILLI: I wouldn't put it quite that way, Your Honor, but I -- and I will answer Your -- Your Honor's question directly. The -- the test, under the Sherman Act, for exclusionary conduct applies in the same way that -- it's the exact same test whether the '96 act is there or not. The test is whether the conduct impairs rivals' opportunities to compete in the market and whether the -- the conduct does or does not further -- by the monopolist further competition on the merits.

That test would apply to a different factual scenario after the 1996 act was passed than before. And it's clear that that must be the case.

For example, Your Honor, one thing that the 1996 act did -- this is section 253 of the act, which I think is at page 90 of the appendix to the petition -- it eliminated, preempted State monopoly franchises. Now, prior to passage of the 1996 act, if -- if Trinko went to sue -- bring a section 2 claim against a local telephone provider in a State where -- where there was a monopoly franchise law, Trinko would be out of court on the State action doctrine. There would be an ironclad defense. Well, section 253 of the act preempted the defense.

So obviously in that situation, there is an

antitrust claim that wasn't there before, and so it can't be the case that what -- that -- that the passage of the 1996 act has no relevance whatsoever to the application of section 2 of the Sherman Act. And indeed, we think it would impermissibly -- it would violate the savings clause and impermissibly modify the applicability of the antitrust laws to conclude that the 1996 act is the sole remedy here for a person in Trinko's position.

QUESTION: Well, you're modifying it either way, aren't you? I mean, you're modifying it if you say sole remedy. You're modifying it if -- if it gives, in the Chief Justice's words, momentum.

MR. VERRILLI: I don't think so.

QUESTION: It's modification either way.

MR. VERRILLI: I don't think so, Justice Souter, because the -- the statute says that nothing shall modify the -- modify, impair, or supersede the applicability of the antitrust laws.

QUESTION: And the momentum theory, in effect, says the applicability is being modified because there's a declaration of certain anti-competitive conduct.

MR. VERRILLI: Well, I don't -- I don't think so. I think it -- the exact same test applies before the act was enacted and after, so it doesn't -- it doesn't modify the substantive antitrust rule one iota. What it

changes is the facts to which the rule applies. Now, in this case it would not be true --

QUESTION: But I thought you were invoking the act for the characterization of those facts as anti-competitive.

MR. VERRILLI: Well, yes, in the following sense, Justice Souter. But I don't think it constitutes a modification of the applicability of the antitrust laws. It might change the result under the antitrust laws, but not modify the applicability because the general rule under the antitrust laws is that one takes the regulatory context into account, and the fact that conduct violates extrinsic norms, and in particular, when it violates, as it did in MCI v. AT&T and in the Litton Systems case and the court -- cases in the court of appeals, when it violates extrinsic norms that are designed to promote competition, that counts against the --

QUESTION: Are -- are you saying that the Telecommunications Act imposes new duties and the violation of those duties now becomes an antitrust violation?

MR. VERRILLI: No. That's --

QUESTION: You want to talk about the -- about -- about the facts of -- of the -- of the market. I understand that.

MR. VERRILLI: They -- I --

QUESTION: But it seemed to me the thrust of Justice Souter's question as well was that the Telecommunications Act imposes new duties, and violation of those new duties is -- is really the gravamen of your complaint.

MR. VERRILLI: I don't think that -- I don't think that's quite right, Justice Kennedy, and let me try to explain why.

The test is whether the monopolist's conduct prevents competition, obstructs competition, whether it does so on a basis other than competition on the merits, and whether it is -- there's otherwise a legitimate business justification. That's the general rule, as the United States acknowledges at page 14 of its complaint. That's the rule that was applied in Aspen, the rule that was applied in Kodak. That's the rule.

That rule applies here. When one answers the first part of that test that -- which is does the monopolist's conduct obstruct competition, the -- the -- it's not the case that any violation of the 1996 act would obstruct competition. What has to be shown there is that the monopolist's conduct is sufficiently grave, sufficiently serious, sufficiently sustained that it -- that it amounts to an overall pattern that obstructs

competition. So it's not the case that there is a -- that -- that there's a -- an automatic transference of a -- of a duty under the 1996 act into an antitrust duty.

But where the -- where the 1996 act becomes relevant is when you get to the next stage of the inquiry. And I think -- and it's just what Your Honor said earlier. At that stage in the inquiry, it is -- the monopolist does not have open to it the argument that this is pro-competitive behavior and that I have a legitimate business justification for it because in that circumstance, it is unlawful to do it. And so it can't be a legitimate business justification to say I don't want to do something that the law compels me to do because I'll be better off as a competitive matter if I don't do it. So it does enter the analysis. It's not irrelevant by any means. But it doesn't transform or change in any way the antitrust standard.

But it -- it does have this -- this additional effect --

QUESTION: Or does it say we define pro-competitive in a -- in a new way based on the Telecommunications Act? The Telecommunications Act is pro-competitive.

MR. VERRILLI: Well, I think -- I think it does say that this is conduct that it -- that it -- I think you

can no longer say that it is -- that it is consistent with competition on the merits for a monopolist to refuse to cooperate when a law designed to promote competition insists on the cooperation. So I think in that way, I agree with Your Honor, that's what's happening here.

And then the other thing that's critical is that --

QUESTION: What is cooperation? I mean, the -- the main obstacle in my mind to your argument is that if we accept your argument, it will be a violation of the antitrust law not to agree to interconnect with the new competitor coming in. Immediately it will be a question of was that refusal reasonable or not. What were the terms? What were the pricing? What was the lease arrangement, et cetera? Because there's no way to know whether it's justified or not justified under the law without going into those details. You and I both know that there have been opinions written in this Court that just skim the surface of the complexity of answering that kind of question.

And the main obstacle to your argument in my mind is it seems to be a question of whether that incredibly complex question will be answered by a regulatory agency in a regulatory proceeding brought by complainants or by 500 judges and juries in antitrust

cases throughout the country, each potentially reaching a different answer.

MR. VERRILLI: I -- I disagree with that, Your Honor, and the reason why is this. Because I think that question -- if I may say so, I think it picks up on what I believe to be a false choice that my friends on the other side are presenting, and that's a choice between, on the one hand, a -- a duty to deal relegated solely to the circumstance of discrimination and, on the other hand, a wholly unqualified duty to deal that -- that might raise a lot of the problems that Your Honor has identified.

But there's a middle ground here, and it's the middle ground that I -- that I submit to Your Honor that -- that Professor Areeda identified in a 1989 article and that makes a world of sense. And that is, when there is a regulatory regime in place that supplies the background norms, then the juries don't answer those questions. The juries decide something very different. What the juries will decide in that set of circumstances is whether the regulatory requirements have been violated or not, and they'll also -- and -- and remember, many of these regulatory requirements are contractual terms.

QUESTION: And many of those regulatory requirements consist of something called TELRIC blank slate, which happened to cover, you know, an unbelievable

number of pages and I'm sure would come into the argument about whether the pricing condition is or is not a reasonable one.

MR. VERRILLI: I don't -- I don't think that's right, Your Honor. I -- I think it is -- it's an obvious defense in a case like this for -- for an incumbent to say, well, I'm -- I'm in compliance with the law and I'm in compliance with my contractual obligations. I think it's also a defense for an incumbent, as it was in the MCI v. --

QUESTION: But does that go to the jury then? Well, I mean, so you say it's -- it's a -- a defense, but it's always going to be argued, no, you're in compliance; yes, I am in compliance.

MR. VERRILLI: Yes. I -- I think the answer is if it can't be resolved on summary judgment -- of course, Matsushita says that summary judgment has a particularly important role to play in antitrust cases, but if it can't, then -- then it will go to the jury.

But that's really not any different --

QUESTION: Well, but then you have the jury determining whether -- whether TELRIC pricing is -- has been properly applied or not. Don't you --

MR. VERRILLI: No, I don't think you do because the way this is going to -- what we're talking about here,

Your Honor, is -- is something very different. There might be a contractual provision, for example, that says you've got to cut over the loops from your own switching system to our switching system within an average of 6 days. Now, if a plaintiff were able to come into court and show, well, you know, the contract says 6 days, but actually it's taken them 6 months and as a result, we're being disabled, that's not anything different than what -- what an antitrust court and what an antitrust jury is asked to decide in any case. These antitrust cases are complex. There's no getting around that. They -- but -- but they go to a jury if there's a dispute of fact. There's no getting around that either. And this is no different from any other one in those respects.

QUESTION: You're saying only when the claim relates not to the refusal to interconnect, but to the failure to provide adequate service after interconnection pursuant to a contract.

MR. VERRILLI: Well, I'm sorry, Your Honor. I -- I think there would be -- I think there would be claims of both kinds possible certainly under the antitrust laws.

QUESTION: Well, let's suppose it's a refusal to interconnect.

MR. VERRILLI: But the --

QUESTION: The refusal to enter into a contract.

MR. VERRILLI: That's also governed by the same set of regulatory norms, and it takes away -- it --

QUESTION: But in that case at least you'd have to put to the jury the question of whether the refusal to enter into this contract was an unreasonable one, which would depend on these very subtle pricing determinations.

MR. VERRILLI: I -- well, I think there might be some circumstances, Your Honor, in which it will be a harder case to make, and that might be a case where a judge could appropriately say, it's too complicated, it can't go to the jury, or might appropriately say, this is a matter for primary jurisdiction. But it is not a black and white situation in which the -- the right answer here is to cut off an antitrust remedy that Congress clearly envisioned when it enacted that savings clause. Congress enacted the savings clause to make clear that antitrust was to operate in conjunction with the regulatory regimes here, and with all due respect --

QUESTION: Mr. Verrilli?

QUESTION: Yes, but this is in some ways a sort of derivative cause of action that Trinko brings with -- with the primary injured party probably being AT&T. And so it is a concern when you address it in this context, isn't it?

MR. VERRILLI: I think that it is a concern, but

it is not a concern that defeats standing for the reasons I gave earlier, and it is a concern that can be overcome through the normal processes of discovery under the Federal rules.

And -- and with respect to the -- to the substantive antitrust claim that's before the Court -- and in fact, the existence of the regulatory regime solves the problems. It sets the benchmarks. It functions as a benchmark in just the same way that a prior course of dealing would function as a benchmark in a discrimination case, and --

QUESTION: Mr. Verrilli, in attempting to determine whether these two pieces of legislation operate on separate tracks, Telecommunications Act, section 2, Judge Wood said one of the problems with reading the Telecommunications Act effectively into section 2 is that it then -- then section 2 of the Sherman Act might eclipse this elaborate regime that Congress set up because why would any player want to use that mechanism instead of coming into court with the possibility of getting treble damages.

MR. VERRILLI: Well, I -- I think the answer is, Your Honor, because in -- in the absence of an effort by a -- an entity, a competitor, to use the mechanisms that the act put in place, then that -- in that situation, the

entity doesn't have an antitrust claim where they could show exclusionary conduct based on subversion on the regulatory requirements and lack of a legitimate business justification based on refusal to abide by the regulatory requirements because they haven't invoked the regulatory requirements.

QUESTION: But after because -- because certainly AT&T could go back to the regulator and say --

MR. VERRILLI: Yes, Justice Ginsburg, that's right, but that's a far -- but -- but I think that's a far different situation from the one that Judge Wood described. And I think it's important, critically important, here to understand where the regulators are on that very question. The regulators don't think there's interference if there's mutual enforcement. It's notable that the Federal Communications Commission is not on the brief for the United States and the Federal Trade Commission today and that's because their position, which is articulated in orders which we cite in the footnote page 38 of our brief, is that the duties that they impose, the -- the access duties and specific obligations, ought to be enforced under the antitrust laws as well as under the -- as well as under the Telecommunications Act and that -- and that -- you know, the lessons of history are behind that and the lessons of common sense are behind

that.

The fact is that the regulatory regime that the FCC tried to put in place to bring long distance competition and to bring telephone equipment competition was insufficient, standing on its own with all of those regulatory mechanisms, to make that competition occur. That competition occurred only when vigorous antitrust enforcement was brought to bear in part to enforce those very regulatory requirements.

And that makes a great deal of common sense, of course, because the incumbents in this situation have every incentive in the world for this system not to work because they want to retain as many customers as they can and they want to make as much money as they can, and they have ample ability to do it. There's a thousand ways in which they could subvert this -- this regulatory regime by -- with -- with using low-level, low-intensity obstructionist conduct that history has shown is beyond the power of the regulators to -- to capture and prevent.

And that is why antitrust law needs to apply here. It's why the FCC says it should apply. It's why the 15 States who have submitted a brief in support of our position on this said it should apply because that's the only way, operating in tandem, that we're going to get to the competition that Congress tried to bring about. And I

submit to this Court that is exactly why the savings clause is in the 1996 act.

Thank you.

QUESTION: Thank you -- excuse me -- Mr. Verrilli.

Mr. Taranto, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF RICHARD G. TARANTO

ON BEHALF OF THE PETITIONER

MR. TARANTO: Thank you, Your Honor.

The words competition, obstruction of competition, pro-competitive mask a fundamental distinction between the 1996 act and the Sherman Act. The '96 act creates competition. Section 2 of the Sherman Act has always gone no further than protecting independently-developed competition. The '96 act is a comprehensive regime for policing the thousand ways, as Mr. Verrilli said, in which the obligations to create competition might be violated.

This complaint, if you look at the two paragraphs that Mr. Verrilli cited, paragraph 2 and paragraph 54, are all -- is all about helping to create competition. Paragraph 2 says the conduct we complain of is that Verizon was making it difficult to obtain full use of Verizon's local loops. There is no allegation of obstruction of AT&T's independent efforts to create

seller/buyer transactions on its own without help.

What we ask the Court to say on the merits here is not that there is a rigid requirement of discrimination or anything else. What we ask the Court to recognize is that up till now -- till now -- helping hand cases have been limited by the requirement of discrimination between customers, not between self and others, but between customers, and there are compellingly strong reasons not to expand section 2 beyond that. For institutional reasons, the antitrust courts are not capable of reliably making the necessary determinations and for fundamental incentive reasons, the incentives of incumbents to invest, the incentives of rivals to invest rather than piggy-back.

In this context, a common law-like context, there's no question of overriding preexisting, settled antitrust obligations. The question is should the Court create something new. And in a common law-like area, the existence of another regime is one strong reason not to create something new. The Court said so in the Black & Decker case only last term involving the common law of ERISA obligations when the Court said the scope of permissible judicial innovation is narrower where other Federal actors are engaged. That's what we ask the Court to decide, that the 1996 act is one compellingly good reason not to create new section 2 law here.

Thank you. If the Court has no further --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Taranto.

The case is submitted.

(Whereupon, at 11:49 a.m., the case in the above-entitled matter was submitted.)