1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - -X

3 VERIZON COMMUNICATIONS INC. :

4 Petitioner :

5 v. : No. 02-682

6 LAW OFFICES OF CURTIS V. :

7 TRINKO, LLP. :

8 - - - - - - - - - - - - - - - -X

9 Washington, D.C.

10 Tuesday, October 14, 2003

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 10:50 a.m.

14 APPEARANCES:

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

16 the Petitioner.

17 THEODORE B. OLSON, ESQ., Solicitor General, Department of

18 Justice, Washington, D.C.; on behalf of the United

19 States, as amicus curiae, supporting the Petitioner.

20 DONALD B. VERRILLI, JR., ESQ., Washington, D.C.; on behalf

21 of the Respondent.

22

23

24

25

C O N T E N T S

ORAL ARGUMENT OF	PAGE
RICHARD G. TARANTO, ESQ.	
On behalf of the Petitioner	3
THEODORE B. OLSON, ESQ.	
On behalf of the United States,	
as amicus curiae, supporting the Petitioner	15
DONALD B. VERRILLI, JR., ESQ.	
On behalf of the Respondent	24
REBUTTAL ARGUMENT OF	
RICHARD G. TARANTO, ESQ.	
On behalf of the Petitioner	49

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.

1 QUESTION: Well, I understand, but -- but those
2 -- those standing rules that are not jurisdictional are
3 still standing rules, and we normally apply them. Why
4 should we not apply our normal rule of standing in this
5 case?
6 MR. TARANTO: Well, we -- we do think you
7 should, but that it shouldn't preclude the Court from
8 reaching the merits, which are of much broader importance.
9 That is, in the absence of the rule being a jurisdictional
10 one, the Court has the option of considering either of two
11 grounds for reversing and reinstating the dismissal, just
12 as the Court did in the sovereign immunity case involving
13 Israel last year where there were two alternative grounds.
14 QUESTION: Well, it seems to me --
15 MR. TARANTO: The merits question is a much
16 more --
17 QUESTION: It seems to me you're just trying to
18 rush to the merits. I -- I think the standing and the
19 issues are very serious issues here.
20 MR. TARANTO: Oh, we -- we think so as -- as
21 well, and let me -- let me address that briefly.
22 QUESTION: What you're -- what you're saying
23 basically it's a claim for relief issue rather than a --
24 than a jurisdictional issue.
25 MR. TARANTO: Yes, yes. The -- the statutory

1 standing question has always been treated as a question of
2 what the meaning of section 4 of the Clayton Act, the
3 damages provision, is here, and both the indirect
4 purchaser rule and the more general indirectness aspect of
5 Associated General Contractor has to do with who can get
6 what kinds of relief. That's not a jurisdictional
7 question, and therefore it remains open to this Court to
8 do what we think the Court should do, which is also to
9 address the question that is directly dividing the
10 circuits, what is the scope of section 2. And --
11 QUESTION: Mr. Taranto, you made a -- an
12 interesting classification, and I think I tend to agree
13 with it, but I'm not sure that these Court's cases fit
14 that mold.
15 I had thought that the things that are put under
16 the head of, quote, prudential standing sound like does
17 this person have a claim under this statute for relief.
18 That's a 12(b)(6) question. But the Court seems to have
19 -- think that there's something in between constitutional
20 standing, which everyone agrees exists here, and 12(b)(6),
21 and that's this prudential standing notion.
22 Is there a difference between the 12(b)(6)
23 inquiry, does this statute afford this plaintiff a claim
24 for relief, and what this Court has called prudential
25 standing?

1 MR. TARANTO: The best that I can do with that
2 is to describe what the Court has done in the cases that
3 we rely on for saying there's no statutory standing.
4 Associated General Contractors and Illinois Brick and its
5 follow-on, Kansas against UtiliCorp, are all about the
6 interpretation of section 4 of the Clayton Act. In that
7 sense, they are classic 12(b)(6) questions. The entire
8 analysis in Associated General Contractors is about what
9 the term injury to business or property means. They are
10 interpretive questions in that way. They're not separate
11 prudential standing questions somewhere between
12 constitutional standing and statutory coverage. And
13 that's why we think it is both proper and really quite
14 important for purposes of the several other circuit cases
15 that are now sitting in cert petitions in this Court on
16 the merits question that divides the circuits.
17 There is no section 2 duty on the merits now to
18 turn over your sales to a rival. This Court said, as far
19 back as 1920 in the U.S. Steel case, section 2 does not
20 condemn mere size. Section 2 does not compel competition.
21 The 1996 act does. It has a quite different policy. It
22 says we will mandate creation of competition. Section 2
23 says we protect against affirmative interferences in
24 independently arising competition. They're fundamentally
25 different statutory approaches to a highly general goal of

1 competition.

2 QUESTION: Is this a kind of refusal to deal

3 case? So it could be covered in theory by section 2?

4 MR. TARANTO: It is a kind of refusal to deal.

5 It is -- all of the claims in this case, all of the facts

6 allege inadequate help to rivals to come and displace

7 one's own sales. This Court has broadly recognized that

8 section 2 protects the right to just make your sales and

9 not turn them over to rivals with a category of

10 exceptions. Every one of those exceptions, the refusal to

11 deal cases, involves discrimination. The firm was

12 voluntarily in the business of selling the product that

13 the plaintiff wanted, and the plaintiff wanted it at the

14 terms that the firm was selling it to others, and the

15 defendant said, no.

16 That threshold condition has so far been the

17 only sufficiently reliable one to trigger the inquiry, if

18 you're selling it to some -- to everybody else, why not to

19 the particular plaintiff? And the answer, we're not

20 selling to the plaintiff because the plaintiff is a rival

21 or the plaintiff is dealing with a rival, has been the one

22 exception to the general rule that forced sales to help

23 rivals is not adequate. Discrimination doesn't mean that

24 -- mean illegality. There may be good reasons, but it so

25 far has been the necessary threshold condition for

1 demanding an inquiry.

2 This case does not involve any kind of

3 discrimination like that. There's no allegation here.

4 There couldn't be an allegation that Verizon was in the

5 business of renting out its facilities to rivals at

6 specially discounted prices before the 1996 act compelled

7 that.

8 So for Trinko to prevail here, it would have to

9 -- the Court would have to recognize something brand new

10 under section 2. It would have to expand section 2 to

11 where it has never been before, and we submit there are

12 extremely good reasons for not doing that.

13 QUESTION: And the reason Otter Tail -- Otter

14 Tail seems like the strongest precedent against you.

15 Before you say the reasons against expansion, I'd just

16 like to hear 30 seconds on why in your opinion Otter Tail

17 is different than this.

18 MR. TARANTO: Otter Tail was also a case of

19 discrimination. If -- the opinion in Otter -- in Otter

20 Tail is a little bit shy on full explanation for what

21 factors matter, and so one has to look at what the facts

22 were. If you look at the extensive findings of fact by

23 the district judge, which are in the -- not the appendix

24 of this case but the appendix in Otter Tail, there's an

25 entire section called discrimination. Otter Tail at -- at

1 JA 103 to 111.

2 Otter Tail was undisputedly in the business of

3 wholesaling power and of wheeling power to others. When

4 particular communities came and said we want from you the

5 same thing that you're happily selling to others, Otter

6 Tail said no.

7 That's exactly the same kind of discrimination

8 that existed in Aspen Skiing where the three mountain

9 defendants said, we won't even take full price ski tickets

10 from people who are using the fourth mountain because

11 that's a rival. So discrimination was the predicate there

12 too.

13 This is not a case of discrimination. In the

14 absence of discrimination, any court entertaining a

15 section 2 duty would have to undertake tasks that

16 antitrust has never viewed as appropriate. It would have

17 to ask what are the effects on long-run investments, the

18 long-term effects on investments.

19 QUESTION: Well, now you're back into the

20 merits, aren't you?

21 MR. TARANTO: Yes, yes.

22 QUESTION: Yes. Did you finish with the inquiry

23 of whether we should recognize this plaintiff?

24 MR. TARANTO: Well, I -- we think not really for

25 -- for a combination of reasons. All of the factors in

1 Associated General Contractors I think point in the same
2 direction. The injury here is indirect. That is, Trinko
3 was a customer of AT&T which was a customer of Verizon,
4 and Trinko's injury was only an indirect result of the
5 alleged injury to AT&T. The additional considerations
6 point in the same direction. There's obviously a better
7 plaintiff. AT&T.
8 QUESTION: But AT&T didn't bring an antitrust
9 action.
10 MR. TARANTO: Well, the -- the final -- final
11 reason I'll mention here is that recognizing the statutory
12 cause of action here would also interfere with the
13 voluntarily agreed upon nonjudicial dispute resolution
14 mechanism that AT&T and Verizon entered into.
15 QUESTION: Mr. Taranto, Judge Katzmann in the
16 Second Circuit, whose decision we're reviewing, seemed to
17 think that AT&T was not, as you expressed it, the better
18 complainant, but that the remedy for AT&T was the
19 administrative context. I -- I thought his opinion
20 suggested that for AT&T the remedy was the administrative
21 route, but for the customer who has no place else to go,
22 it was court or nothing because the customer would not
23 have access to that administrative process.
24 Now, is there -- first of all, is -- would AT&T
25 have standing or state a claim for relief if AT&T had been

1 the plaintiff here?

2 And second, if you're right that this plaintiff

3 has no claim in court, is there anyplace that this

4 plaintiff can go with the complaint? The reality is --

5 and we accept what the complaint alleges as true for

6 current purposes -- I have gotten the worst service. It's

7 a constant embarrassment. I've lost clients. I've lost

8 my professional reputation. That's a legitimate

9 complaint. Is there anyone in the world that that can be

10 asserted against?

11 MR. TARANTO: Let me take those in -- in order,

12 if I may.

13 AT&T could, of course, have brought a Sherman

14 Act suit had it not expressly waived its right to go to

15 court. It adopted instead a mechanism by which it secured

16 relief far more promptly than any antitrust case would

17 have -- would have obtained. So it's like --

18 QUESTION: But it had no choice in that. I

19 mean, that's a statutory mechanism. There's no

20 independent waiver that AT&T, as apart from others, what

21 they call them, CLEC's. It's -- it's an -- it's a regime

22 imposed on all the participants, isn't it?

23 MR. TARANTO: Well, that -- that -- nondispute

24 judicial -- dispute judicial -- nonjudicial dispute

25 resolution was here part of an agreement. It's not in the

1 statute. Many agreements contain it. Some agreements do
2 not contain it. This one does. And it serves very
3 important statutory functions of providing what here took
4 only 3 months or so fully to resolve the problem and to
5 provide compensation to AT&T. And that's --
6 QUESTION: Okay, and if -- if there hadn't been
7 an agreement, AT&T would go where? To the commission?
8 MR. TARANTO: It -- it could go to the
9 commission or it could bring a Sherman Act suit unless, of
10 course, as we do contend, there is no legitimate section
11 -- section 2 claim. But as far as standing is concerned,
12 the customer, that is, AT&T, has standing.
13 QUESTION: Mr. Taranto, would you clarify one
14 thing for me? Did the AT&T settlement just settle the New
15 York area problems or was it nationwide?
16 MR. TARANTO: The New York Public Service
17 Commission settlement settled the New York problem. There
18 was an FCC national level consent decree that on a going-
19 forward basis settled -- solved the problem. The problem
20 was in fact a -- a New York-specific one, and here we're
21 talking about the only concrete instance in --
22 QUESTION: Well, I was under the impression AT&T
23 retained the right to sue in other parts of the country.
24 In fact, they filed an amicus brief in this case, which
25 suggests that they still have an interest in the ongoing

1 controversy, but not in New York.

2 MR. TARANTO: I -- I'm -- I'm -- I don't know

3 that AT&T has signed similar agreements for the rest of

4 the country. This particular problem that gave rise to

5 this problem was fully resolved in New York with

6 compensation to AT&T and nationally at the FCC level. So

7 I -- I -- AT&T certainly, wherever it hasn't adopted an

8 arbitration agreement, the way any other plaintiff can

9 adopt, certainly has a right to go to court and to argue

10 as -- as Covad has in the Eleventh Circuit case, as

11 Cavalier has in the Fourth Circuit case, to argue that

12 there is a Sherman Act claim, and that's the merits claim

13 that is before this Court as part of this case as well.

14 QUESTION: Of course, their position is that

15 this isn't the best test case because this plaintiff

16 didn't make all the right allegations, as I read their

17 brief.

18 MR. TARANTO: Well, I -- I don't think there

19 could have been any different allegations on the

20 dispositive point. As long as the allegations are the

21 incumbent insufficiently helped the rival --

22 QUESTION: Yes, but they -- they alleged that in

23 other areas, that there had been -- that there's been sham

24 litigation, fraudulent misrepresentations, and -- and

25 affirmative misconduct, in addition to failing to comply

1 with all the requirements of the '96 statute.

2 MR. TARANTO: And -- and those -- those claims,

3 to the extent that they're not helping hand kinds of

4 claims, would of course be outside the analysis. The

5 Cavalier case, the Covad case are overwhelmingly, as this

6 case is, helping hand cases, as the Goldwasser case in the

7 Seventh Circuit was, and that's the core issue that --

8 that all of these cases are about.

9 Now --

10 QUESTION: Would you get to the --

11 MR. TARANTO: Yes.

12 QUESTION: -- the last part? Does this customer

13 of AT&T have any remedy for the bad service that the

14 customer attributes not to AT&T but to Verizon?

15 MR. TARANTO: Yes. Well, first, in this very

16 case the Second Circuit reinstated the section 202 claim

17 of this plaintiff and this Court denied cert on that. So

18 that claim is alive in this very case.

19 QUESTION: Are damages available on that claim?

20 MR. TARANTO: The claim is -- is a claim under

21 the damages provision of section 207 for an alleged

22 violation of the substantive Communications Act provision

23 in section 202.

24 They, of course, also have any remedies any

25 customer has for lousy service here against AT&T, the

1 provider of the service, which received compensation.

2 QUESTION: But you -- you say that under --

3 under 202 that there would be if -- if plaintiff prevails

4 on that claim against Verizon, not AT&T, there would be a

5 damage remedy for the loss that the plaintiff could prove?

6 In other words, does it give the plaintiff the same thing

7 that the plaintiff is seeking here except it's not

8 trebled?

9 MR. TARANTO: The plaintiff certainly asks for

10 the same damages. Section 202 -- section 207 is the

11 liability damages provision of the Communications Act.

12 The Second Circuit said that that provision was available

13 to this plaintiff to seek recovery for injury from the

14 alleged violation of section 202.

15 QUESTION: Then why did Judge Katzmann say a

16 couple of times the only opportunity for the plaintiff to

17 get damages is if there is this second section 2 suit?

18 MR. TARANTO: I'm -- I'm afraid I can't answer

19 that question, having -- the court having reinstated that

20 -- that claim. That is a damages claim.

21 If the Court has no further questions, I would

22 reserve the balance of my time.

23 QUESTION: Very well, Mr. Taranto.

24 General Olson, we'll hear from you.

25 ORAL ARGUMENT OF THEODORE B. OLSON

1 ON BEHALF OF THE UNITED STATES,

2 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

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

4 the Court:

5 It is not a Sherman Act violation to breach a

6 telephone interconnection agreement. The telephone -- the

7 Telecommunications Act created an extraordinary, carefully

8 crafted, comprehensive regulatory and remedial regime to

9 force lawful monopolies --

10 QUESTION: Mr. Solicitor General, before you get

11 into your argument, do you have a position on the standing

12 issue?

13 MR. OLSON: We did not brief and we did not take

14 a position in our briefing on the standing question. We

15 -- and our reason for doing that, Justice Stevens, is that

16 we believe that in order to ascertain antitrust standing,

17 one has to connect the injury, the alleged injury, to an

18 antitrust violation. We feel that the question of whether

19 or not there's an antitrust violation in this case comes

20 before the determination of the antitrust injury. And

21 therefore, the United States did not brief that question.

22 We do believe that the '96 statute is, as this

23 Court characterized it in its previous review of that

24 statute, extraordinary in that it -- it set out to create

25 competition in an area where the antitrust laws would not

1 have accomplished that objective. The --

2 QUESTION: Excuse me. I've just been thinking

3 about your prior answer, and I -- we certainly don't --

4 don't do this for standing normally. We -- we say the

5 question of whether there's been an injury comes before

6 the question of whether there's been a violation. That's

7 what standing is all about. And -- and you -- you say

8 that the Government has just concluded that -- that both

9 questions are -- are of equal priority, and that -- that's

10 just not the way we usually work.

11 MR. OLSON: We -- we felt, Justice Scalia, not

12 in the context of Article III standing, but in the context

13 of prudential standing in the context of antitrust

14 standing which relates specifically to something this

15 Court has called antitrust injury, which ties into the

16 particular violation, and in order to determine that here,

17 we felt that the Court would have to first answer the

18 question whether there is an antitrust injury itself. Is

19 there any violation of the antitrust laws that would give

20 rise to a section 2, Sherman Act claim in this case.

21 QUESTION: But you're asking us to do that in a

22 case where a -- a plaintiff without a real interest may be

23 the one that's -- that's demanding that -- that

24 adjudication. This is very odd.

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

1 and had we briefed the question, we would have -- we would
2 have thought that there was -- that -- that Trinko had
3 some points here, that it -- this is not an Illinois Brick
4 case -- that Trinko was depending in part upon service
5 provided by the Verizon loop and that it had a choice, as
6 the plaintiffs -- the plaintiff -- that Trinko has alleged
7 in this case, that it had a choice between deficient
8 service from AT&T or -- or paying perhaps a higher price
9 or something else from Verizon, that there are
10 distinctions.
11 And we think that they might -- but because we
12 didn't brief that, because we thought it was -- the Court
13 first -- we have a litigant here that alleges, and we have
14 a Second Circuit decision, and we've got other circuit
15 decisions that have addressed this very antitrust issue --
16 that it's very important to resolve that case,
17 particularly in the context of where we have an -- a
18 significant, extraordinary effort by Congress to create a
19 comprehensive, complex, carefully modulated effort to
20 create something.
21 QUESTION: And do you -- do you take the
22 position that that effort gives Trinko a cause of action
23 under the statute?
24 MR. OLSON: That we take -- I'm sorry.
25 QUESTION: Can Trinko sue -- does Trinko have a

1 cause of action under the statute?

2 MR. OLSON: Under -- well, yes. In fact, this

3 is in answer I think to Justice Ginsburg's question.

4 QUESTION: Yes.

5 MR. OLSON: There is a -- there would be -- and

6 the Second Circuit did decide that there was a right to

7 action under the discrimination provisions of section 202.

8 And this appears -- it's the -- the first full --

9 QUESTION: Is --

10 QUESTION: But I -- I thought Mr. Taranto said

11 this -- there is no discrimination in this case. So that

12 if that's true, then there wouldn't be a remedy under 207.

13 MR. OLSON: Well, first of all, to the extent

14 that there is and to the extent that there are allegations

15 of that, the court addressed that and reinstated that very

16 cause of action. This Court decided not to review that.

17 That --

18 QUESTION: Okay, but on the -- just on the facts

19 pleaded, do you take -- does the United States take the

20 position that -- that Trinko has pleaded a cause of action

21 under 202 or any other section of the statute?

22 MR. OLSON: We do not dispute, Justice Souter,

23 the existence of the cause of action recognized by the

24 Second Circuit on page 16a --

25 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-

1 competitive?

2 MR. OLSON: Actually we submit, Justice Kennedy,

3 that what the Communications Act does is something that

4 the antitrust laws never did do. And the reason that the

5 Communications Act was in -- in fact necessary to break up

6 the monopolies, to cause legitimate, lawful monopolies to

7 do something that the antitrust laws wouldn't require,

8 that is, to open up their markets, which they had no

9 obligation under the antitrust laws to do, at a subsidized

10 rate to invite in competition -- that entire regulatory

11 scheme was something that Congress decided was necessary

12 to do which no other laws in existence had been able to

13 do.

14 Therefore, not only -- and I think that this is

15 clear from the Court's jurisprudence as well, but also

16 well articulated in the Town of Concord decision that was

17 authored by Justice Breyer on the First Circuit. That

18 regulatory regime, which monitors the conduct on an

19 ongoing basis, which the antitrust laws are not well

20 equipped to do, prevents the occurrence of antitrust

21 injury and inhibits the ability to accomplish antitrust

22 benefits and monitors the process in a way that succeeds

23 in dealing with the possibility of anti-competitive

24 conduct, but conduct that was not required at all under

25 the antitrust laws, that on opening of the markets to

1 selling one's assets at a discount, to going into a
2 business that the lawful monopolist was not already in.
3 The additional point there is that the treble
4 damage remedy is considerably more draconian. It acts in
5 an ad hoc, specific case under the supervision of
6 generalize -- generalist judges and ad hoc juries.
7 Whereas Congress decided that the scheme was most -- that
8 was most appropriate -- the regime that was most
9 appropriate to create this new world that this Court
10 specifically recognized in the two previous
11 Telecommunications Act cases was this regulatory regime,
12 inhabited by experts, administered by experts, where there
13 are prompt, efficient, effective remedies, and -- and a
14 scheme which is adjustable from time to time to deal with
15 any anti-competitive conduct.
16 So it's not only a reason why Congress said we
17 do not change the antitrust laws by this statute. There's
18 good reasons why Congress decided to do that. But there's
19 also additional reasons why the section 2 remedy would be
20 a sledge hammer in an area where Congress has enacted a
21 scalpel to deal --
22 QUESTION: Why -- why do we have to accept or
23 buy into your broader no-help theory of the antitrust laws
24 if we -- we accept what you've just said? Why can't we
25 just say in this particular instance, we don't have to

1 adopt any general principles of antitrust law, but in this
2 particular instance the Communications Act has just
3 superseded the Sherman Act?
4 MR. OLSON: I agree with that, Justice Scalia --
5 QUESTION: You do.
6 MR. OLSON: -- that the Court does not need to
7 go into broader general principles. And this Court -- we
8 -- we addressed those principles because we felt we had an
9 obligation. And we have addressed -- the Government has
10 articulated those same principles not only in this
11 Court --
12 QUESTION: How can you say the Communications
13 Act has superseded the Sherman Act when the statute itself
14 says it didn't?
15 MR. OLSON: It does -- no, we are not suggesting
16 -- we're not saying that the -- that the act provides any
17 immunity. The act still exists side by side. What we do
18 say is that this was not -- this conduct was not a Sherman
19 Act violation before the act, and the act specifically
20 says --
21 QUESTION: Well, that's a different point than
22 the one Justice Scalia made. You're saying there was no
23 antitrust violation whether or not there was a
24 Communications Act or not.
25 MR. OLSON: That's correct, but it's

1 specifically true in the context of this regime that
2 exists. To the extent that there is any anti-competitive
3 activity, this Court has repeatedly said that it must look
4 from -- at the antitrust laws and the application of the
5 antitrust laws in connection with the particular industry
6 and in a particular regime in which it exists. So when
7 this Court -- this case comes to this Court, it is
8 entirely consistent for this Court to look at the alleged
9 violation of the antitrust laws in that context.
10 The method that Congress selected to create --
11 to --
12 QUESTION: Thank you, General Olson.
13 MR. OLSON: Thank you.
14 QUESTION: Mr. Verrilli, we'll hear from you.
15 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.
16 ON BEHALF OF THE RESPONDENT
17 MR. VERRILLI: Mr. Chief Justice, and may it
18 please the Court:
19 I'll address the standing question first and
20 explain why consumers in Trinko's position have standing
21 and why General Olson is correct that Illinois Brick is
22 not a problem. Then I'll show why it would be unwise and
23 unwarranted to adopt the discrimination test that my
24 friends on the other side advocate as a matter of section
25 2 law and why the 1996 act is crucially relevant and why

1 the antitrust laws in that act should be enforced in
2 tandem, as Congress indicated.
3 Now --
4 QUESTION: And at some point in -- in your
5 standing discussion, could you address whether or not
6 Trinko could just have sued AT&T, say you're giving us
7 lousy service, we want our money back?
8 MR. VERRILLI: I think Trinko could have brought
9 a suit like that. Of course, AT&T would have then said it
10 was Verizon's fault, which it was, and there would be --
11 QUESTION: That's not usually a defense, the
12 failure of the contracting party to deliver adequate
13 services under the contract.
14 MR. VERRILLI: Well, that -- that's correct, but
15 in this situation, there -- there might well be filed rate
16 doctrine problems with a suit like that. There would be
17 all kinds of a problems with a suit like that. And in any
18 event, because Trinko has -- has an is a proper plaintiff
19 under section 4 of the Clayton Act, is entitled to invoke
20 the Sherman Act, the fact that they had -- it has other
21 remedies seems to me beside -- beside the crucial point.
22 Now, under Reiter against Sonotone, this Court
23 held that consumers have standing under section 4 of the
24 Sherman Act -- under section 4 of the Clayton Act to sue
25 when they are injured by anti-competitive conduct that

1 raises prices or lowers quality in the market where they
2 purchase. That is what Mr. Trinko is alleging.
3 Illinois Brick is not a reason to cut off that
4 standing here, as General Olson indicated, for the
5 following reason. Illinois Brick applies when Hanover
6 Shoe applies, and Hanover Shoe does not apply here.
7 Illinois Brick is just the flip side of Hanover Shoe.
8 Hanover Shoe says that in a case of a price-
9 fixing overcharge -- the same as in UtiliCorp -- price-
10 fixing overcharge -- when a middle man pays too much, the
11 middle man is entitled to sue under the Sherman Act for
12 the entire amount of the price-fixing overcharge, and the
13 -- and the defendant can't assert a pass-through defense.
14 And -- and the reason for that is to ensure full and
15 effective use and enforcement of the Sherman Act's damages
16 remedy.
17 Now, in that situation, what Illinois Brick
18 holds is that, well, once the -- once the middle man has
19 sued for the full value of the overcharge, then the people
20 subsequently down the chain can't bring antitrust claims
21 themselves because that would create a problem of
22 duplicative recovery. But the -- but the reason that you
23 don't have --
24 QUESTION: Or even if he hasn't sued I thought.
25 MR. VERRILLI: That -- well, that's correct, but

1 there were -- because he could sue and there will be
2 problems of duplicative recovery. But that -- it only
3 applies, Justice Scalia, in situations where the measure
4 of damages that the middle man would have is the
5 overcharge damages. And here, of course, AT&T is a
6 competitor of Verizon. AT&T would bring a monopolization
7 claim, and it's been clear since the Southern Photo case
8 in 1927 that AT&T's measure of damages would be its lost
9 profits, not an overcharge, but its lost profits. And --
10 QUESTION: So as long as the consumer can bring
11 an action for something that AT&T couldn't bring, no
12 Illinois -- no Hanover, no Illinois Brick.
13 MR. VERRILLI: Correct. In fact, it would
14 disserve the very policies of Hanover Shoe here because it
15 would result in the -- the monopolist not being
16 responsible for the full value of the antitrust injury it
17 inflicts. So there's no Illinois Brick problem here.
18 And I think that's why my friends on the other
19 side in Verizon relied so much on Associated General
20 Counsel -- Associated General Contractors rather than
21 Illinois Brick. But, of course, all that case states, as
22 -- as this Court made clear in Holmes, is a rule of
23 proximate cause.
24 And remember the facts in Associated General
25 Contractors. The allegation was that a landowner

1 pressured a contractor to hire non-union subcontractors,
2 and as a result the union subcontractors had less
3 business, and as a result, they had fewer employees, and
4 as a result, the union had fewer dues to collect. And the
5 Court quite properly held that proximate causation can't
6 possibly extend that far.
7 QUESTION: Yes, but isn't there a proximate
8 cause problem in this case too? You -- you represent a
9 class, I think. Your -- and is it not likely that the --
10 there are many, many members of the class who have
11 different kinds of injuries from the other members of the
12 class? It's a little hard for me to understand precisely
13 how the wrongdoing that affected AT&T necessarily carries
14 over to customers of AT&T.
15 MR. VERRILLI: The means by which Verizon was
16 trying to monopolize the market, as the complaint alleges
17 -- and I think this is clear from paragraphs 1 and 2 and
18 54 of the amended complaint -- was that it was -- Verizon
19 was using its control of the local loop that competitors
20 needed to lease to get service going to degrade the
21 service that its competitors, including AT&T, were able to
22 provide to customers. That was the means by which the --
23 the antitrust scheme was effectuated, and as a result --
24 QUESTION: Well, are you -- are you alleging
25 that they not merely failed to perform their duties, but

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

2 MR. VERRILLI: Correct.

3 QUESTION: -- retail obligation?

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

5 QUESTION: Because that's a little different

6 from the way the court of appeals described the complaint.

7 MR. VERRILLI: Well, I -- I understand it, Your

8 Honor, but the -- but the complaint -- one of the

9 difficulties of this case, of course, is that we're here

10 on a complaint and the test under rule 8 is a notice

11 pleading test, and it can -- and the complaint can only be

12 dismissed if there is no conceivable set of facts that

13 could be proved consistent with the allegations in the

14 complaint that would support relief. And --

15 QUESTION: Yes, but you have to have alleged in

16 your complaint just how it was that -- that Verizon's

17 misconduct hurt your clients.

18 MR. VERRILLI: Yes, Your Honor, and I think the

19 -- I think paragraph 2 of the amended complaint says that

20 Bell Atlantic deterred and will continue to deter

21 potential customers from switching to another company for

22 local phone service or cause customers that switch back to

23 Bell Atlantic in frustration for the poor services

24 rendered by their local phone service provider. There are

25 other places in the complaint where it's specifically

1 alleged that the quality of service that AT&T customers
2 get and other competitors' customers get is degraded in
3 comparison to --
4 QUESTION: Under the -- what bothers me about
5 the Illinois Brick problem is -- I completely agree with
6 your characterization, but the law would seem odd that
7 would say when Smith, a price-fixing ring, charges Jones
8 $3 extra, we don't let Jones' customers sue for the actual
9 overcharge he undoubtedly suffered. But in fact, when
10 Smith, the monopolist, drives Jones through predatory
11 pricing out of the market, we let Jones' customers come in
12 and say, oh, my service isn't as good, I -- I may -- I
13 don't know exactly. I might have switched. I -- I got
14 bad service, et cetera. You see how much more ephemeral
15 that is, how much more uncertain it is, how much more
16 vague it is? And the more precise thing we don't let them
17 recover for. The more vague thing on your theory, which
18 is highly speculative, we will, on your view, let them
19 recover for.
20 MR. VERRILLI: Well, I think it's the right
21 answer to let them recover, and -- and it's not
22 speculative. They -- their -- the -- this conduct
23 directly raises the cost of -- and degrades the service
24 that consumers in the market receive. And they are
25 entitled under Reiter against Sonotone to sue for the

1 damages that those occur.

2 And it -- you know, Illinois Brick -- I'm not

3 here to defend the wisdom of Illinois Brick in the context

4 in which it exists, Justice Breyer, but it has been

5 narrowly confined to that context. And -- and if you

6 don't have an overcharge case, you don't have Hanover

7 Shoe. If you don't have Hanover Shoe, you don't have

8 Illinois Brick.

9 QUESTION: The other thing on -- on the -- that

10 I had as a question on the merits of the complaint is I --

11 I -- if this complaint had said that Verizon went to the

12 customers who were trying to use AT&T and said, Mr.

13 Customer, we're going to wreck your service unless you buy

14 from us, or indeed carried that out in -- through

15 surreptitious ways, but that's what he was saying. You

16 buy from us or you'll be sorry. If that's what the

17 complaint said, you might well have a complaint. But I

18 don't see that in the complaint.

19 MR. VERRILLI: Well, under --

20 QUESTION: Rather, what I see in the complaint

21 -- and I want you to point out where it's the contrary --

22 is that every claim of bad service is connected through a

23 because or some other word like that to the refusal of

24 Verizon to hook up AT&T, i.e., to provide them with the

25 Verizon service so they can provide service to the

1 customer.

2 Now, I've read the complaint a few times, but I

3 want you to point out to me the part that you think most

4 clearly contradicts what I just said.

5 MR. VERRILLI: First, paragraph 2, which is at

6 page --

7 QUESTION: 2 is the overview.

8 MR. VERRILLI: Yes, but what it says, Justice

9 Breyer, is that they degraded service. Well, the -- the

10 degraded service has to occur not only during the -- the

11 process of switching over, but after the switching over,

12 and of course, under Swierkiewicz and under Leatherman,

13 the test here is whether there's any set of facts that

14 could be proved consistent with these notice pleading

15 allegations that would support a cause of action. And I

16 think Your Honor's question proves that there is, the

17 first set of facts that Your Honor described. So --

18 QUESTION: Well, I'm not with you completely for

19 the reason that the overview seems to be an overview which

20 is explicated by the specific complaints of exclusionary

21 conduct which appear later in the complaint.

22 MR. VERRILLI: But I think those complaints are

23 fairly construed to -- to include denial --

24 QUESTION: And I would like you to point out.

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

1 52. I think it's true about paragraph 54. I think that
2 that is the essence of the complaint here. And of course,
3 that makes sense because these are exactly the kinds of
4 allegations -- this is -- this is the way monopolization
5 occurs. This is the way maintaining monopoly power occurs
6 in this -- in this arena. There's a long and unfortunate
7 history that goes back to MCI against AT&T and
8 continuing --
9 QUESTION: All right.
10 MR. VERRILLI: -- to this present day.
11 QUESTION: Then with paragraph 54, which I
12 thought was the heart of the complaint, what it seems to
13 say at the end is when they did these bad things, the
14 plain effect was that AT&T was prevented from offering
15 local phone service of the quality, as was offered by
16 Bell, and thereby to impede the ability of AT&T to
17 compete. And so I took 54 as being essentially a
18 complaint that AT&T is kept out of the market.
19 MR. VERRILLI: Well, what it -- what it says --
20 QUESTION: Yes.
21 MR. VERRILLI: I -- I don't --
22 QUESTION: If you don't, in other words, have an
23 obligation to bring them into the market --
24 MR. VERRILLI: Well, I think you do.
25 QUESTION: -- under the antitrust laws, you

1 lose.

2 MR. VERRILLI: I think -- well, I think you do

3 have an obligation under the antitrust laws, and I'll try

4 to get to that as fast as I can.

5 QUESTION: If you don't --

6 MR. VERRILLI: But --

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

8 MR. VERRILLI: No, because this says --

9 QUESTION: Where -- where are you reading from,

10 Mr. Verrilli?

11 MR. VERRILLI: I'm sorry, Mr. Chief Justice.

12 It's at page 46 of the joint appendix, paragraph 54 of the

13 amended complaint.

14 What it alleges is that AT&T and other

15 competitors weren't able to provide service at the -- at

16 the level of quality -- provide service at the level of

17 quality that -- that Verizon could. It doesn't only say

18 that they weren't able to provide service at all. It says

19 both of those things. And so I think the allegation is

20 there in 54, and I think the -- and it's described in the

21 -- the overview, 1 and 2. And paragraphs 1 and 2 of the

22 amended complaint explains how it works.

23 And I'd like to -- if I could, go to -- to the

24 core antitrust issue here. I think it is common ground

25 with my friends on the other side that a monopolist's

1 right to refuse to deal with competitors is not an
2 unqualified right. They acknowledge one qualification.
3 That's where the monopolist discriminates. They argue
4 that's the only time a section 2 duty ought to be imposed
5 because that -- in that situation you can be confident
6 that it's anti-competitive conduct, and you won't have
7 problems with dampening incentives and you won't have
8 administrability problems because you can refer back to
9 the prior course of dealing.
10 But where they're wrong is in suggesting that
11 that's the only time that you can find liability under
12 section 2 for monopolist refusal to cooperate with its
13 rivals. It is equally true in this case, in this
14 situation where, as Justice Kennedy, your question earlier
15 indicated, there is a regulatory regime in place that
16 requires competitive access on the part of the monopolist
17 in order to bring competition into the market. And what
18 you have -- and -- and I think these allegations are
19 consistent that -- what I am about to say is consistent
20 with the allegations in the complaint, and what you have
21 is a course of conduct on the part of the monopolist that
22 is intended to subvert the competitive entry that those
23 regulations require.
24 QUESTION: Well, you -- you say then that the
25 1996 act gives you affirmative momentum that you wouldn't

1 have with -- that you wouldn't have if it were just the
2 antitrust laws?
3 MR. VERRILLI: I wouldn't put it quite that way,
4 Your Honor, but I -- and I will answer Your -- Your
5 Honor's question directly. The -- the test, under the
6 Sherman Act, for exclusionary conduct applies in the same
7 way that -- it's the exact same test whether the '96 act
8 is there or not. The test is whether the conduct impairs
9 rivals' opportunities to compete in the market and whether
10 the -- the conduct does or does not further -- by the
11 monopolist further competition on the merits.
12 That test would apply to a different factual
13 scenario after the 1996 act was passed than before. And
14 it's clear that that must be the case.
15 For example, Your Honor, one thing that the 1996
16 act did -- this is section 253 of the act, which I think
17 is at page 90 of the appendix to the petition -- it
18 eliminated, preempted State monopoly franchises. Now,
19 prior to passage of the 1996 act, if -- if Trinko went to
20 sue -- bring a section 2 claim against a local telephone
21 provider in a State where -- where there was a monopoly
22 franchise law, Trinko would be out of court on the State
23 action doctrine. There would be an ironclad defense.
24 Well, section 253 of the act preempted the defense.
25 So obviously in that situation, there is an

1 antitrust claim that wasn't there before, and so it can't
2 be the case that what -- that -- that the passage of the
3 1996 act has no relevance whatsoever to the application of
4 section 2 of the Sherman Act. And indeed, we think it
5 would impermissibly -- it would violate the savings clause
6 and impermissibly modify the applicability of the
7 antitrust laws to conclude that the 1996 act is the sole
8 remedy here for a person in Trinko's position.
9 QUESTION: Well, you're modifying it either way,
10 aren't you? I mean, you're modifying it if you say sole
11 remedy. You're modifying it if -- if it gives, in the
12 Chief Justice's words, momentum.
13 MR. VERRILLI: I don't think so.
14 QUESTION: It's modification either way.
15 MR. VERRILLI: I don't think so, Justice Souter,
16 because the -- the statute says that nothing shall modify
17 the -- modify, impair, or supersede the applicability of
18 the antitrust laws.
19 QUESTION: And the momentum theory, in effect,
20 says the applicability is being modified because there's a
21 declaration of certain anti-competitive conduct.
22 MR. VERRILLI: Well, I don't -- I don't think
23 so. I think it -- the exact same test applies before the
24 act was enacted and after, so it doesn't -- it doesn't
25 modify the substantive antitrust rule one iota. What it

1 changes is the facts to which the rule applies. Now, in
2 this case it would not be true --
3 QUESTION: But I thought you were invoking the
4 act for the characterization of those facts as anti-
5 competitive.
6 MR. VERRILLI: Well, yes, in the following
7 sense, Justice Souter. But I don't think it constitutes a
8 modification of the applicability of the antitrust laws.
9 It might change the result under the antitrust laws, but
10 not modify the applicability because the general rule
11 under the antitrust laws is that one takes the regulatory
12 context into account, and the fact that conduct violates
13 extrinsic norms, and in particular, when it violates, as
14 it did in MCI v. AT&T and in the Litton Systems case and
15 the court -- cases in the court of appeals, when it
16 violates extrinsic norms that are designed to promote
17 competition, that counts against the --
18 QUESTION: Are -- are you saying that the
19 Telecommunications Act imposes new duties and the
20 violation of those duties now becomes an antitrust
21 violation?
22 MR. VERRILLI: No. That's --
23 QUESTION: You want to talk about the -- about
24 -- about the facts of -- of the -- of the market. I
25 understand that.

1 MR. VERRILLI: They -- I --

2 QUESTION: But it seemed to me the thrust of

3 Justice Souter's question as well was that the

4 Telecommunications Act imposes new duties, and violation

5 of those new duties is -- is really the gravamen of your

6 complaint.

7 MR. VERRILLI: I don't think that -- I don't

8 think that's quite right, Justice Kennedy, and let me try

9 to explain why.

10 The test is whether the monopolist's conduct

11 prevents competition, obstructs competition, whether it

12 does so on a basis other than competition on the merits,

13 and whether it is -- there's otherwise a legitimate

14 business justification. That's the general rule, as the

15 United States acknowledges at page 14 of its complaint.

16 That's the rule that was applied in Aspen, the rule that

17 was applied in Kodak. That's the rule.

18 That rule applies here. When one answers the

19 first part of that test that -- which is does the

20 monopolist's conduct obstruct competition, the -- the --

21 it's not the case that any violation of the 1996 act would

22 obstruct competition. What has to be shown there is that

23 the monopolist's conduct is sufficiently grave,

24 sufficiently serious, sufficiently sustained that it --

25 that it amounts to an overall pattern that obstructs

1 competition. So it's not the case that there is a -- that
2 -- that there's a -- an automatic transference of a -- of
3 a duty under the 1996 act into an antitrust duty.
4 But where the -- where the 1996 act becomes
5 relevant is when you get to the next stage of the inquiry.
6 And I think -- and it's just what Your Honor said earlier.
7 At that stage in the inquiry, it is -- the monopolist does
8 not have open to it the argument that this is pro-
9 competitive behavior and that I have a legitimate business
10 justification for it because in that circumstance, it is
11 unlawful to do it. And so it can't be a legitimate
12 business justification to say I don't want to do something
13 that the law compels me to do because I'll be better off
14 as a competitive matter if I don't do it. So it does
15 enter the analysis. It's not irrelevant by any means.
16 But it doesn't transform or change in any way the
17 antitrust standard.
18 But it -- it does have this -- this additional
19 effect --
20 QUESTION: Or does it say we define pro-
21 competitive in a -- in a way based on the
22 Telecommunications Act? The Telecommunications Act is
23 pro-competitive.
24 MR. VERRILLI: Well, I think -- I think it does
25 say that this is conduct that it -- that it -- I think you

1 can no longer say that it is -- that it is consistent with
2 competition on the merits for a monopolist to refuse to
3 cooperate when a law designed to promote competition
4 insists on the cooperation. So I think in that way, I
5 agree with Your Honor, that's what's happening here.
6 And then the other thing that's critical is
7 that --
8 QUESTION: What is cooperation? I mean, the --
9 the main obstacle in my mind to your argument is that if
10 we accept your argument, it will be a violation of the
11 antitrust law not to agree to interconnect with the new
12 competitor coming in. Immediately it will be a question
13 of was that refusal reasonable or not. What were the
14 terms? What were the pricing? What was the lease
15 arrangement, et cetera? Because there's no way to know
16 whether it's justified or not justified under the law
17 without going into those details. You and I both know
18 that there have been opinions written in this Court that
19 just skim the surface of the complexity of answering that
20 kind of question.
21 And the main obstacle to your argument in my
22 mind is it seems to be a question of whether that
23 incredibly complex question will be answered by a
24 regulatory agency in a regulatory proceeding brought by
25 complainants or by 500 judges and juries in antitrust

1 cases throughout the country, each potentially reaching a
2 different answer.
3 MR. VERRILLI: I -- I disagree with that, Your
4 Honor, and the reason why is this. Because I think that
5 question -- if I may say so, I think it picks up on what I
6 believe to be a false choice that my friends on the other
7 side are presenting, and that's a choice between, on the
8 one hand, a -- a duty to deal relegated solely to the
9 circumstance of discrimination and, on the other hand, a
10 wholly unqualified duty to deal that -- that might raise a
11 lot of the problems that Your Honor has identified.
12 But there's a middle ground here, and it's the
13 middle ground that I -- that I submit to Your Honor that
14 -- that Professor Areeda identified in a 1989 article and
15 that makes a world of sense. And that is, when there is a
16 regulatory regime in place that supplies the background
17 norms, then the juries don't answer those questions. The
18 juries decide something very different. What the juries
19 will decide in that set of circumstances is whether the
20 regulatory requirements have been violated or not, and
21 they'll also -- and -- and remember, many of these
22 regulatory requirements are contractual terms.
23 QUESTION: And many of those regulatory
24 requirements consist of something called TELRIC blank
25 slate, which happened to cover, you know, an unbelievable

1 number of pages and I'm sure would come into the argument
2 about whether the pricing condition is or is not a
3 reasonable one.
4 MR. VERRILLI: I don't -- I don't think that's
5 right, Your Honor. I -- I think it is -- it's an obvious
6 defense in a case like this for -- for an incumbent to
7 say, well, I'm -- I'm in compliance with the law and I'm
8 in compliance with my contractual obligations. I think
9 it's also a defense for an incumbent, as it was in the MCI
10 v. --
11 QUESTION: But does that go to the jury then?
12 Well, I mean, so you say it's -- it's a -- a defense, but
13 it's always going to be argued, no, you're in compliance;
14 yes, I am in compliance.
15 MR. VERRILLI: Yes. I -- I think the answer is
16 if it can't be resolved on summary judgment -- of course,
17 Matsushita says that summary judgment has a particularly
18 important role to play in antitrust cases, but if it
19 can't, then -- then it will go to the jury.
20 But that's really not any different --
21 QUESTION: Well, but then you have the jury
22 determining whether -- whether TELRIC pricing is -- has
23 been properly applied or not. Don't you --
24 MR. VERRILLI: No, I don't think you do because
25 the way this is going to -- what we're talking about here,

1 Your Honor, is -- is something very different. There
2 might be a contractual provision, for example, that says
3 you've got to cut over the loops from your own switching
4 system to our switching system within an average of 6
5 days. Now, if a plaintiff were able to come into court
6 and show, well, you know, the contract says 6 days, but
7 actually it's taken them 6 months and as a result, we're
8 being disabled, that's not anything different than what --
9 what an antitrust court and what an antitrust jury is
10 asked to decide in any case. These antitrust cases are
11 complex. There's no getting around that. They -- but --
12 but they go to a jury if there's a dispute of fact.
13 There's no getting around that either. And this is no
14 different from any other one in those respects.
15 QUESTION: You're saying only when the claim
16 relates not to the refusal to interconnect, but to the
17 failure to provide adequate service after interconnection
18 pursuant to a contract.
19 MR. VERRILLI: Well, I'm sorry, Your Honor. I
20 -- I think there would be -- I think there would be claims
21 of both kinds possible certainly under the antitrust laws.
22 QUESTION: Well, let's suppose it's a refusal to
23 interconnect.
24 MR. VERRILLI: But the --
25 QUESTION: The refusal to enter into a contract.

1 MR. VERRILLI: That's also governed by the same
2 set of regulatory norms, and it takes away -- it --
3 QUESTION: But in that case at least you'd have
4 to put to the jury the question of whether the refusal to
5 enter into this contract was an unreasonable one, which
6 would depend on these very subtle pricing determinations.
7 MR. VERRILLI: I -- well, I think there might be
8 some circumstances, Your Honor, in which it will be a
9 harder case to make, and that might be a case where a
10 judge could appropriately say, it's too complicated, it
11 can't go to the jury, or might appropriately say, this is
12 a matter for primary jurisdiction. But it is not a black
13 and white situation in which the -- the right answer here
14 is to cut off an antitrust remedy that Congress clearly
15 envisioned when it enacted that savings clause. Congress
16 enacted the savings clause to make clear that antitrust
17 was to operate in conjunction with the regulatory regimes
18 here, and with all due respect --
19 QUESTION: Mr. Verrilli?
20 QUESTION: Yes, but this is in some ways a sort
21 of derivative cause of action that Trinko brings with --
22 with the primary injured party probably being AT&T. And
23 so it is a concern when you address it in this context,
24 isn't it?
25 MR. VERRILLI: I think that it is a concern, but

1 it is not a concern that defeats standing for the reasons
2 I gave earlier, and it is a concern that can be overcome
3 through the normal processes of discovery under the
4 Federal rules.
5 And -- and with respect to the -- to the
6 substantive antitrust claim that's before the Court -- and
7 in fact, the existence of the regulatory regime solves the
8 problems. It sets the benchmarks. It functions as a
9 benchmark in just the same way that a prior course of
10 dealing would function as a benchmark in a discrimination
11 case, and --
12 QUESTION: Mr. Verrilli, in attempting to
13 determine whether these two pieces of legislation operate
14 on separate tracks, Telecommunications Act, section 2,
15 Judge Wood said one of the problems with reading the
16 Telecommunications Act effectively into section 2 is that
17 it then -- then section 2 of the Sherman Act might eclipse
18 this elaborate regime that Congress set up because why
19 would any player want to use that mechanism instead of
20 coming into court with the possibility of getting treble
21 damages.
22 MR. VERRILLI: Well, I -- I think the answer is,
23 Your Honor, because in -- in the absence of an effort by a
24 -- an entity, a competitor, to use the mechanisms that the
25 act put in place, then that -- in that situation, the

1 entity doesn't have an antitrust claim where they could
2 show exclusionary conduct based on subversion on the
3 regulatory requirements and lack of a legitimate business
4 justification based on refusal to abide by the regulatory
5 requirements because they haven't invoked the regulatory
6 requirements.
7 QUESTION: But after because -- because
8 certainly AT&T could go back to the regulator and say --
9 MR. VERRILLI: Yes, Justice Ginsburg, that's
10 right, but that's a far -- but -- but I think that's a far
11 different situation from the one that Judge Wood
12 described. And I think it's important, critically
13 important, here to understand where the regulators are on
14 that very question. The regulators don't think there's
15 interference if there's mutual enforcement. It's notable
16 that the Federal Communications Commission is not on the
17 brief for the United States and the Federal Trade
18 Commission today and that's because their position, which
19 is articulated in orders which we cite in the footnote
20 page 38 of our brief, is that the duties that they impose,
21 the -- the access duties and specific obligations, ought
22 to be enforced under the antitrust laws as well as under
23 the -- as well as under the Telecommunications Act and
24 that -- and that -- you know, the lessons of history are
25 behind that and the lessons of common sense are behind

1 that.

2 The fact is that the regulatory regime that the

3 FCC tried to put in place to bring long distance

4 competition and to bring telephone equipment competition

5 was insufficient, standing on its own with all of those

6 regulatory mechanisms, to make that competition occur.

7 That competition occurred only when vigorous antitrust

8 enforcement was brought to bear in part to enforce those

9 very regulatory requirements.

10 And that makes a great deal of common sense, of

11 course, because the incumbents in this situation have

12 every incentive in the world for this system not to work

13 because they want to retain as many customers as they can

14 and they want to make as much money as they can, and they

15 have ample ability to do it. There's a thousand ways in

16 which they could subvert this -- this regulatory regime by

17 -- with -- with using low-level, low-intensity

18 obstructionist conduct that history has shown is beyond

19 the power of the regulators to -- to capture and prevent.

20 And that is why antitrust law needs to apply

21 here. It's why the FCC says it should apply. It's why

22 the 15 States who have submitted a brief in support of our

23 position on this said it should apply because that's the

24 only way, operating in tandem, that we're going to get to

25 the competition that Congress tried to bring about. And I

1 submit to this Court that is exactly why the savings
2 clause is in the 1996 act.
3 Thank you.
4 QUESTION: Thank you -- excuse me -- Mr.
5 Verrilli.
6 Mr. Taranto, you have 3 minutes remaining.
7 REBUTTAL ARGUMENT OF RICHARD G. TARANTO
8 ON BEHALF OF THE PETITIONER
9 MR. TARANTO: Thank you, Your Honor.
10 The words competition, obstruction of
11 competition, pro-competitive mask a fundamental
12 distinction between the 1996 act and the Sherman Act. The
13 '96 act creates competition. Section 2 of the Sherman Act
14 has always gone no further than protecting independently-
15 developed competition. The '96 act is a comprehensive
16 regime for policing the thousand ways, as Mr. Verrilli
17 said, in which the obligations to create competition might
18 be violated.
19 This complaint, if you look at the two
20 paragraphs that Mr. Verrilli cited, paragraph 2 and
21 paragraph 54, are all -- is all about helping to create
22 competition. Paragraph 2 says the conduct we complain of
23 is that Verizon was making it difficult to obtain full use
24 of Verizon's local loops. There is no allegation of
25 obstruction of AT&T's independent efforts to create

1 seller/buyer transactions on its own without help.

2 What we ask the Court to say on the merits here

3 is not that there is a rigid requirement of discrimination

4 or anything else. What we ask the Court to recognize is

5 that up till now -- till now -- helping hand cases have

6 been limited by the requirement of discrimination between

7 customers, not between self and others, but between

8 customers, and there are compellingly strong reasons not

9 to expand section 2 beyond that. For institutional

10 reasons, the antitrust courts are not capable of reliably

11 making the necessary determinations and for fundamental

12 incentive reasons, the incentives of incumbents to invest,

13 the incentives of rivals to invest rather than piggy-

14 back.

15 In this context, a common law-like context,

16 there's no question of overriding preexisting, settled

17 antitrust obligations. The question is should the Court

18 create something new. And in a common law-like area, the

19 existence of another regime is one strong reason not to

20 create something new. The Court said so in the Black &

21 Decker case only last term involving the common law of

22 ERISA obligations when the Court said the scope of

23 permissible judicial innovation is narrower where other

24 Federal actors are engaged. That's what we ask the Court

25 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.)