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**Reviving the Essential Facilities Doctrine:
Revisiting *Verizon Communications, Inc. v.
Law Offices of Curtis V. Trinko, LLP* to Assert
an Essential Facilities Claim against Apple
and the App Store**

*Tyler Angelini**

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INTRODUCTION

The Apple App Store is the sole means of application (“app”) distribution for all Apple devices, and Apple maintains exclusive control over which apps can do business on its platform.¹ If developers want their apps to reach the immense number of Apple consumers, specifically iPhone users, developers must comply with all of Apple’s App Store policies.²

In recent years, Apple has expanded its role within the App Store and become a very active developer itself, launching numerous apps such as *Apple Music*, *Apple TV+*, and *Apple Arcade*.³ Now that the company has placed more of its own apps onto the App Store, Apple regularly competes with the independent apps it effectively controls.⁴ Apple’s latest app launches combined with its subjective enforcement of App Store policies have raised antitrust concerns, including scrutiny under and comparisons to “essential facilities’ doctrine” caselaw.⁵

The essential facilities doctrine generally stands for the principle that a company in control of a facility essential to its competitors is required to provide reasonable access to the

¹ See STAFF OF H.R. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 334–35 (2020) (Majority Staff Rep.) [hereinafter INVESTIGATION OF COMPETITION IN DIGITAL MARKETS], http://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 [<http://perma.cc/P9HC-RGKY>].

² See *App Store Review Guidelines: Introduction*, APPLE DEV., <http://developer.apple.com/app-store/review/guidelines/> [<http://perma.cc/4UBD-Y2CG>] (last visited Feb. 1, 2022).

³ See, e.g., Stuart Dredge, *Apple Music launches To Take on Spotify—and Traditional Radio*, THE GUARDIAN (June 30, 2015, 11:00 AM), <http://www.theguardian.com/technology/2015/jun/30/apple-music-launch-spotify-radio> [<http://perma.cc/674S-HCUX>]; *Apple TV+ Launches November 1, Featuring Originals from the World’s Greatest Storytellers*, APPLE NEWSROOM (Sept. 10, 2019) [hereinafter *Apple TV+ launches November 1*], <http://www.apple.com/newsroom/2019/09/apple-tv-launches-november-1-featuring-originals-from-the-worlds-greatest-storytellers/> [<http://perma.cc/CQ3W-BP2Y>]; Thomas Knowlton, *Apple Arcade Offers Educators Options*, SCH. LIBR. J. (Mar. 9, 2020), <http://www.slj.com/?detailStory=apple-arcade-offers-educators-options> [<http://perma.cc/V59R-BRJW>].

⁴ See Jack Nicas & Keith Collins, *How Apple’s Apps Topped Rivals in the App Store It Controls*, N.Y. TIMES (Sept. 9, 2019), <http://www.nytimes.com/interactive/2019/09/09/technology/apple-app-store-competition.html> [<http://perma.cc/YEU7-MWKC>] (“But as Apple has become one of the largest competitors on a platform that it controls, suspicions that the company has been tipping the scales in its own favor are at the heart of antitrust complaints in the United States, Europe and Russia.”).

⁵ See generally Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237 (2021) (describing how the essential facilities doctrine should be expanded to apply to large technology companies in the digital age); Babu Kotapati et al., *The Antitrust Case Against Apple 1* (Yale Univ. Digit. Platform Theories of Harm, Paper No. 2, 2020), <http://ssrn.com/abstract=3606073> [<http://perma.cc/CQD3-EQG8>] (noting that Apple’s policies have raised new concerns regarding the essential facilities doctrine).

facility.⁶ And while the doctrine has remained largely undefined, for almost a century Courts employed its principles to “enable [competitors] access to critical markets.”⁷

However, during the late 1980s, the doctrine “fell prey” to judicial and theoretical criticism.⁸ Moreover, as recently as 2004, “the Supreme Court all but formally disowned the idea of curbing gatekeeper power by imposing access rights and fair dealing requirements in” *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP* (“*Trinko*”).⁹ Despite the recent judicial condemnation of the essential facilities doctrine, government investigations and scholars have called for the revitalization of the essential facilities doctrine to combat the monopoly concerns within the Apple App Store.¹⁰ Upon analyzing the 100 plus years of essential facilities doctrine caselaw precedent, including the case most damning to its reputation, two propositions appear more plausible. First, the case responsible for the essential facilities doctrine’s condemnation and recent abandonment, *Trinko*, can be reconciled to support a finding that the essential facilities doctrine is still an available instrument in the antitrust “toolkit.” And second, after reconciling those cases most unfavorable to the doctrine, the Apple App Store could serve as the ideal conduit for the essential facilities doctrine’s revival.

⁶ See U.S. DEP’T OF JUST., COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT, 127 & n.73 (2008), <http://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf> [<http://perma.cc/RK8D-PYP9>] (“[C]ourts have drawn from . . . the essential-facilities doctrine—the proposition that the antitrust laws require a single firm in control of a facility essential to its competitors to provide reasonable access to the facility if possible.”).

⁷ See Guggenberger, *supra* note 5, at 287 (“The Court refrained from defining specificities of the remedy and instead threatened divestiture to induce the parties to negotiate equitable terms of access. Over the course of the following decades, the idea of mandating access to practically irreplicable bottlenecks gained steam.”).

⁸ See *id.* at 245.

[The essential facilities doctrine] fell prey to an excessive judicial trust in self-correcting markets, misguided “techtopia,” as Rebecca Haw Allensworth frames it, and the ensuing curtailment of antitrust enforcement. Following decades of anti-enforcement commentary from academics, policymakers, and industry groups, the courts clipped the doctrine’s wings beginning in the late 1980s and throughout the 1990s.

Id.

⁹ See *id.* at 245 & n.37.

¹⁰ See INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 398 (“Congress should consider overriding judicial decisions that have treated unfavorably essential facilities—and refusal to deal-based theories of harm.”); Guggenberger, *supra* note 5, at 246 (“It is high time to revive, renew, and expand the essential facilities doctrine to address apparent market foreclosures in the digital economy.”).

A. Apple's Business Operations

Apple has undoubtedly pushed technology forward, and its ingenuity and innovation have transformed several areas of business. Apple is the leading smartphone vendor in the United States, and its coveted iPhone accounts for almost half of the United States smartphone market.¹¹ All iPhones run exclusively on the “iOS” mobile operating system, which is preinstalled onto these devices prior to distribution. iOS is not licensed to any other smartphone or tablet manufacturers and is one of two dominant mobile operating systems in the world, the other being Google’s “Android.”¹² The iPhone’s physical design is certainly appealing, but its true appeal is derived from what it enables users to do. To accomplish almost any task on an iPhone, a user will need to use an app. iPhone apps can only be accessed and purchased through Apple’s own App Store, as Apple does not permit alternative app stores to be installed or used on iOS devices.¹³

Apple exclusively controls which apps are marketed and available on the App Store, so independent app developers looking to market their apps to the millions of iOS users can only do so on Apple’s terms.¹⁴ Most App Store policies are harmless, whereas some have placed Apple under the antitrust microscope.¹⁵

Some of Apple’s most controversial App Store policies require independent app developers to pay Apple a thirty percent commission on all revenue derived from consumers purchasing their apps from the App Store.¹⁶ The company is also entitled to a thirty percent commission on consumer “in-app purchases” (“IAP”) of digital goods and services within all apps.¹⁷ The App Store policies do not stop at commissions. For example, under the App Store Guidelines, independent apps may not provide any information “that direct[s] customers to purchasing mechanisms

¹¹ See S. O’Dea, *Manufacturers’ Market Share of Smartphone Sales in the United States from 1st Quarter 2016 to 2nd Quarter 2021*, STATISTA (Nov. 22, 2021), <http://www.statista.com/statistics/620805/smartphone-sales-market-share-in-the-us-by-vendor> [<http://perma.cc/RFK2-WXWF>].

¹² See INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 334.

¹³ See *id.* at 335.

¹⁴ See *App Store Review Guidelines: Introduction*, APPLE, <http://developer.apple.com/app-store/review/guidelines/> [<http://perma.cc/YWP2-Q74U>] (last visited Feb. 1, 2022).

¹⁵ See *generally* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 330–76.

¹⁶ See *id.*

¹⁷ See Ian Carlos Campbell & Julia Alexander, *A Guide to Platform Fees*, THE VERGE (Aug. 24, 2021, 9:00 AM), <http://www.theverge.com/21445923/platform-fees-apps-games-business-marketplace-apple-google> [<http://perma.cc/JS8T-XTBU>].

other than [Apple's] in-app purchase.”¹⁸ This policy effectively guarantees that Apple will get its thirty percent commission on all app-related purchases.

The Apple App Store has proven to be a very profitable business venture. According to a 2019 market analysis, Apple's net revenue from the App Store was projected to be \$17.4 billion for the 2020 fiscal year.¹⁹ Independent app developers have shared in the App Store riches as well. It is estimated that the App Store has created over 1.3 million jobs in the United States and resulted in more than \$120 billion in worldwide revenue for independent app developers.²⁰ Apple's latest business ventures, however, may ultimately harm the competition its platform previously fostered.

In the last five years, Apple has entered both the mobile music streaming app market and the mobile video streaming app market with the launch of *Apple Music* and *Apple Tv+*.²¹ Apple's business expansion shows no signs of slowing down as they also entered the mobile video game subscription app market with the launch of *Apple Arcade* in late 2019.²² All of these apps are available on the Apple App Store and are competing directly with apps such as *Spotify*, *YouTube Music Premium*, *TIDAL*, *Pandora*, *Netflix*, *Hulu*, and other app-based video games.²³

Apple's track record in dealing with competing apps developers is less than ideal. For example, Apple has refused to approve apps that serve similar functions to Apple's own “Find My Friends” app.²⁴ Additionally, Apple has refused to approve an

¹⁸ *App Store Review Guidelines: 3. Business*, APPLE, <http://developer.apple.com/app-store/review/guidelines/#business> [<http://perma.cc/JNG3-XSTN>] (last visited Mar. 16, 2021); see also *App Store Review Guidelines: 3.1.3 Other Purchase Methods*, APPLE, <http://developer.apple.com/app-store/review/guidelines/#other-purchase-methods> [<http://perma.cc/U5FW-RFBB>] (last visited Mar. 16, 2021).

¹⁹ Eric J. Savitz, *App Stores Could Be Ripe for Regulation. Here's Who Benefits if Commissions Fall*, BARRON'S (July 25, 2019, 6:45 AM), <http://www.barrons.com/articles/app-store-fees-regulation-51564019432> [<http://perma.cc/D2B9-7HMQ>].

²⁰ Brett Larson & Cortney Moore, *Apple COO Says App Store Stimulates Economy with \$120B and Tech Jobs*, FOX BUS. (Sept. 17, 2019), <http://www.foxbusiness.com/technology/apple-coo-app-store-creates-jobs-stimulates-economy-with-120b> [<http://perma.cc/7NDZ-JMWY>].

²¹ See Dredge, *supra* note 3; see also *Apple TV+ Launches November 1*, *supra* note 3.

²² Thomas Knowlton, *Apple Arcade Offers Educators Options/Tech Review*, SLJ (Mar. 09, 2020), <http://www.slj.com/?detailStory=apple-arcade-offers-educators-options> [<http://perma.cc/KF66-DNZS>].

²³ Lexy Savvides & Vanessa Hand Orellana, *Apple Music vs. Spotify: Comparing the Top Music Streaming Services*, CNET (Sept. 25, 2021, 3:00 AM), <http://www.cnet.com/tech/services-and-software/apple-music-vs-spotify-comparing-the-music-streaming-giants-best-2021/> [<http://perma.cc/9W3J-HTZU>].

²⁴ See Peter Kafka, *Spotify Says Apple Won't Approve a New Version of Its App Because It Doesn't Want Competition for Apple Music*, VOX (June 30, 2016, 12:45 PM),

App Store apps such as *Steam*, a popular video game service, citing a “business conflict” considering the arrival of its own video game service, *Apple Arcade*.²⁵

As Apple puts more of its own apps into the App Store, it moves farther away from its position as the “shopkeeper” of the App Store. Apple now competes directly with the products featured on its “shelves.” This puts Apple in a very advantageous position as iPhone users can only search the Apple App Store for app services like music streaming. By placing one of Apple’s apps, such as *Apple Music*, onto the App Store, Apple has inherently increased the chances that its own app will be purchased. More importantly, even if consumers decided to go with another music streaming app like *Spotify*, under the app store policies, if that customer elects to subscribe to Spotify through Apple’s IAP, Apple is entitled receive a thirty percent commission on that consumer’s monthly *Spotify* payment.²⁶ Because of the commission on IAP, Apple’s competitors have been forced to factor the commissions into their subscription pricing plans and pass the overcharge to their consumers. Accounting for the commissions can commonly result in their in-app services being priced thirty percent higher than Apple’s.²⁷ Some developers have dealt with Apple’s commission by removing the IAP purchase option all together.²⁸

B. Apple’s Recent Antitrust Scrutiny

Both iOS users and app developers have taken issue with Apple’s App Store policies, resulting in numerous allegations that these policies violate antitrust laws.²⁹

<http://www.vox.com/2016/6/30/12067578/spotify-apple-app-store-rejection>
[<http://perma.cc/RHD2-9GZL>].

²⁵ Nick Statt, *Apple Rejects Valve’s Steam Link Game Streaming App over ‘business conflicts’*, THE VERGE (May 24, 2018, 8:59 PM), <http://www.theverge.com/2018/5/24/17392470/apple-rejects-valve-steam-link-app-store-ios-game-streaming> [<http://perma.cc/33AS-UGBS>].

²⁶ *Four Fast Facts*, TIME TO PLAY FAIR (Apr. 30, 2019), <http://timetoplayfair.com/facts> [<http://perma.cc/ZU6D-NLUF>].

²⁷ *A Timeline: How We Got Here*, TIME TO PLAY FAIR, <http://timetoplayfair.com/timeline/> [<http://perma.cc/97B2-HSSW>] (last visited Mar. 10, 2022); Saidat Giwa-Osagie, *App Store vs. Google Play*, FUELED (Aug. 30, 2017), <http://fueled.com/blog/app-store-vs-google-play/> [<http://perma.cc/7X42-KQ42>].

²⁸ *Apple Payments for Spotify*, SPOTIFY (Mar. 10, 2022, 3:25 PM) <http://support.spotify.com/us/article/apple-payments/> [<http://perma.cc/Y8T7-ES46>] (“It used to be possible to pay for Premium using Apple’s in-app payment system (iAP). However, this has been discontinued for new subscribers.”).

²⁹ See, e.g., *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1518–19 (2019); *Epic Games, Inc. v. Apple Inc.*, No. 20-05640, 2020 U.S. Dist. LEXIS 154231 (N.D. Cal. Aug. 24, 2020); *Cameron v. Apple Inc. (In re Apple iPhone)*, No. 11-06714, 2020 U.S. Dist. LEXIS 188670 (N.D. Cal. Oct. 9, 2020).

Most recently, in 2020, Apple's policies regarding commissions on IAP landed it in a legal battle with video game giant Epic Games, the creators of *Fortnite*.³⁰ Epic Games' *Fortnite* was entirely free to download from the Apple App Store.³¹ *Fortnite's* profitability was derived almost exclusively from users purchasing the digital content within the game, such as character cosmetics and customizations.³² Considering *Fortnite's* massive success, Epic Games became unwilling to give thirty percent of *Fortnite's* IAP revenue to Apple and directed iOS users to available discounts on Epic Games' website from within *Fortnite's* iOS app.³³ Epic Games' actions resulted in Apple removing *Fortnite* from the App Store and Epic Games later filing a lawsuit.³⁴

Courts have recognized that the Epic Games lawsuit, and those like it, deal with "questions at the frontier edges of antitrust law in the United States" and that "no analogous authority exists."³⁵

Apple's conduct has not only drawn it into litigation, but also garnered it attention from Congress. In October 2020, the United States House of Representatives Committee on the Judiciary, specifically the Subcommittee on Antitrust, Commercial and Administrative Law, launched an extensive investigation into the digital markets within "big tech" (the "Report").³⁶ The Report specifically studied the digital markets within Amazon, Facebook, Google, and Apple and took a close look at Apple's App Store practices.³⁷ The Report cited Apple's exclusion of rival apps, self-preferencing, arbitrary policy enforcement, and commission system as a basis for finding that Apple exerts monopoly power over app distribution on iOS devices.³⁸ In conclusion, the Report called upon Congress to draw upon the "mainstay tools of the antimonopoly toolkit" to restore competition in these online markets.³⁹ One of the Report's recommendations asked Congress to revitalize "the essential facilities doctrine, or the legal requirement that dominant

³⁰ See *Epic Games, Inc.*, 2020 U.S. Dist. LEXIS 154231, at *2–3.

³¹ Akhilesh Ganti, *How Does Fortnite Make Money*, INVESTOPEDIA (Sept. 10, 2020) <http://www.investopedia.com/tech/how-does-fortnite-make-money/> [http://perma.cc/HE27-QHDT].

³² See *id.*

³³ See *Epic Games, Inc.*, 2020 U.S. Dist. LEXIS 154231, at *4.

³⁴ See *id.* at *4–5.

³⁵ *Epic Games, Inc. v. Apple Inc.*, 493 F. Supp. 3d 917, 832–33 (N.D. Cal. 2020) ("The questions and issues raised in this litigation concern novel and innovative business practices in the technology market that have not otherwise been the subject of antitrust litigation.")

³⁶ See generally INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1.

³⁷ See *id.* at 7, 336.

³⁸ See *id.* at 345, 352.

³⁹ See *id.* at 379.

firms provide access to their infrastructural services or facilities on a nondiscriminatory basis.”⁴⁰ Specifically, the Report suggested that “Congress should consider overriding judicial decisions that have treated unfavorably essential facilities—and refusal to deal-based theories of harm.”⁴¹

On September 10, 2021, the judge for the *Epic Games v. Apple* case, U.S. District Judge Yvonne Gonzalez Rogers, issued the “long-awaited” ruling in the *Epic Games v. Apple* case.⁴² The court’s ruling focused primarily on whether Apple had monopolized the digital mobile gaming transactions market and found that “Epic Games failed in its burden to demonstrate Apple is an illegal monopolist.”⁴³ Judge Gonzalez Rogers also briefly addressed an essential facilities claim, finding that the App Store was not “essential” given that there are “multiple avenues [that] do exist” to distribute mobile apps such as web apps, by web access, and through other games stores.⁴⁴ However, the court’s ruling only addressed Apple’s role as the operator of the App Store and did not inquire into Apple’s new expanded role of a competitor in the App Store.⁴⁵

Currently, those companies doing business on the Apple App Store may have to wait for legislation to restore competition within the App Store. However, application and enforcement of the essential facilities doctrine may present an equally effective solution, especially when aimed at Apple as a competitor in the App Store, rather than just an operator.⁴⁶

I. THE HISTORY OF THE ESSENTIAL FACILITIES DOCTRINE

Generally, companies such as Apple do not have a duty to deal with their competitors, so ordinarily, developers who compete with Apple apps would be out of luck and forced to follow to the App Store policies or leave the platform. Fortunately, in some

⁴⁰ See *id.* at 399.

⁴¹ See *id.*

⁴² See Bobby Allyn, *What the Ruling in The Epic Games v. Apple Lawsuit Means for iPhone Users*, NPR (Sept. 10, 2021) <http://www.npr.org/2021/09/10/1036043886/apple-fortnite-epic-games-ruling-explained> [<http://perma.cc/37KL-5F8J>].

⁴³ *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR, 2021 U.S. Dist. LEXIS 172303, at *11–13 (N.D. Cal. Sept. 10, 2021) (“Central to antitrust cases is the appropriate determination of the ‘relevant market.’”).

⁴⁴ See *id.* at *285–86.

⁴⁵ See *id.* at *283–87.

⁴⁶ See INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 379–81 (calling upon Congress and the courts to “revitaliz[e] the essential facilities doctrine, or the legal requirement that dominant firms provide access to their infrastructural services or facilities on a nondiscriminatory basis”).

instances, the law will require a company to deal with its competitors on more “reasonable terms.”⁴⁷

Under the essential facilities doctrine, a company in control of a facility essential to its competitors is required to provide reasonable access to the facility.⁴⁸ The doctrine is generally understood to be a part of a subset of “refusal to deal” cases that place limitations on a monopolist’s ability to exclude actual or potential rivals from competing with it.⁴⁹

As the Ninth Circuit has stated, the doctrine “imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first.”⁵⁰

However, plaintiffs looking to invoke the doctrine face a significant challenge as the doctrine is “famously disreputable.”⁵¹ Several scholars have heavily scrutinized the doctrine, and others view the doctrine as a “useful label” rather than an established and theorized legal doctrine.⁵² Scholars’ uncompromising assessment of the doctrine may be due to the Supreme Court’s recent unwillingness to acknowledge the doctrine’s existence.⁵³ Specifically, in *Trinko*, Justice Scalia

⁴⁷ See *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act: Chapter 7*, U.S. DEPT OF JUST. <http://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-7> [<http://perma.cc/5J3E-JVHH>] (last updated June 25, 2015) (“[C]ourts have drawn from . . . the essential-facilities doctrine [for] the proposition that the antitrust laws require a single firm in control of a facility essential to its competitors to provide reasonable access to the facility if possible.”) (citing *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1128–29 (9th Cir. 2004); *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132–33 (7th Cir. 1983); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992–93 (D.C. Cir. 1977); *United States v. Am. Tel. & Tel. Co.*, 524 F. Supp. 1336, 1360–61 (D.D.C. 1981)).

⁴⁸ See *id.*

⁴⁹ See Robert Pitofsky et al., *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443, 446 (2002).

⁵⁰ *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991).

⁵¹ Stephen M. Maurer & Suzanne Scotchmer, *The Essential Facilities Doctrine: The Lost Message of Terminal Railroad*, 5 CAL. L. REV. CIR. 296, 298 (2014).

⁵² See *id.* (quoting Sergio Baches Opi, *The Application of the Essential Facilities Doctrine to Intellectual Property Licensing in the European Union and the United States: Are Intellectual Property Rights Still Sacrosanct?*, 11 FORDHAM INTELL. PROP. L.J. 409, 419 (2001); see also *id.* at 419 n.3).

The so-called ‘essential facility’ doctrine is one of the most troublesome, incoherent, and unmanageable bases for Sherman § 2 liability. The antitrust world would almost certainly be a better place if it were jettisoned, with a little fine tuning of the general doctrine of refusal to deal to fill any gaps.

Id. (quoting HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE (4th ed. 2011)).

⁵³ See *Verizon Commc’ns., Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 410–11 (2004).

asserted that “[w]e have never recognized such a doctrine . . . and we find no need either to recognize it or to repudiate it here.”⁵⁴

Justice Scalia was correct in asserting that the Court has never recognized the essential facilities doctrine *by name*, but the doctrine’s principles have a long history within antitrust law.⁵⁵ In fact, requiring competitors to share their “essential” resources with their competition has served as a remedy in monopoly leveraging (the extending power over the essential facility into another market) and refusals to deal cases for almost a century.⁵⁶

A. Rise of the Essential Facilities Doctrine

Courts on all levels have balanced competition within various markets by requiring competitors to share their “essential” facility with their competitors.

1. Early Supreme Court Cases

The essential facilities doctrine is believed to originate from the Supreme Court’s 1912 decision in *United States v. Terminal Railroad Association of Saint Louis* (“*Terminal Railroad*”).⁵⁷ *Terminal Railroad* involved railroad connections necessary for train-based commerce to cross the Mississippi River into the St. Louis area.⁵⁸ At the time, St. Louis constituted a gateway between the eastern and western United States and represented an invaluable epicenter for railroad-based commerce.⁵⁹ Initially, there were several independent connections available to trains transporting goods across the Mississippi River into St. Louis.⁶⁰

Nonetheless, as time went on, a group of railroad companies collectively referred to as “Terminal Railroad Association” or “Terminal Company” began to acquire all bridges and terminals providing railroad access to St. Louis.⁶¹ Due to the geographical isolation of St. Louis, it became “impossible for any railroad

⁵⁴ *Id.* at 411 (citations omitted).

⁵⁵ See Guggenberger, *supra* note 5, at 298.

Of the essential facilities doctrine, [Scalia] writes that it had never been recognized by the Court. This observation is true insofar as the doctrine had not been named in any of the Court’s previous decisions. However, *Aspen Skiing* and *Otter Tail* had been widely understood as reflecting the idea of the essential facilities doctrine and vice versa.

Id.

⁵⁶ See Maurer & Scotchmer, *supra* note 51, at 321–22.

⁵⁷ *United States v. Terminal R.R. Ass’n of St. Louis*, 224 U.S. 383 (1912).

⁵⁸ See *id.* at 390–92.

⁵⁹ *Id.* at 403 (“St. Louis is one of the largest railroad centers in the world.”).

⁶⁰ See *id.* at 392–93.

⁶¹ See *id.* at 392.

company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the terminal company.”⁶² The Terminal Company also forced any railroad company outside of the Terminal Company to pay arbitrary hauling charges to use the newly acquired connections.⁶³

The Terminal Company did not confine its business to “supplying and operating mere facilities for the interchange of traffic between railroads,” they also continued to operate their individual railroad charters through the collectively owned terminals.⁶⁴ Terminal Company membership provided a significant competitive advantage as members could access St. Louis without any hauling fees.⁶⁵

The United States took issue with the Terminal Company’s “discriminatory and extortionate” practices and filed a lawsuit under the Sherman Act of 1890.⁶⁶ The Government urged for a complete dissolution of the Terminal Company, but the Court emphasized that the law’s (the Sherman Act of 1890) intent is to “protect, not to destroy, rights of property.”⁶⁷

Instead of breaking up the Terminal Company and its control over the railroad connections, the Court aimed to put both Terminal Company members and non-members on a “plane of equality.”⁶⁸ The Court recognized the importance of St. Louis to railroad-based commerce.⁶⁹ Additionally, the Court considered the City’s geographical location, which rendered alternative routes impossible, and the waste of natural space and costs of construction that would follow if independent railroad companies were forced to build their own connections.⁷⁰

The Court ultimately ordered the Terminal Company to abolish all arbitrary hauling charges for independent railroad companies. The Terminal Company was required to allow any independent railroad company to use the connections on “just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and

⁶² *Id.* at 397.

⁶³ *See id.* at 408.

⁶⁴ *Id.* at 406–07.

⁶⁵ *Id.* at 408.

⁶⁶ *See id.* at 407.

⁶⁷ *Id.* at 409.

⁶⁸ *See id.* at 411.

⁶⁹ *See id.* at 403.

⁷⁰ *See id.* at 395, 397–98.

charges as that occupied by the proprietary companies.”⁷¹ Essentially, the Court realized that one of the primary ways to create an equal plane was to provide all competitors equal, or at least reasonable, access to the same invaluable resources. This concept of putting competitors on an “equal plane” effectively represented the birth of the essential facilities doctrine.

In the decades following *Terminal Railroad*, the Court continued to enforce the principle: “If an entity controls a facility that is necessary for other businesses to compete effectively in the marketplace, that entity must grant its competitor access to the facility.”⁷²

For example, in *Lorain Journal Co. v. United States* (“*Lorain*”), the Lorain Journal, the only daily newspaper in an Ohio city, attempted to harm a competing radio station by refusing to accept local advertisements from any Lorain County company who also advertised or was about to advertise over the local radio station.⁷³ As a result, companies could only purchase newspaper ads or radio ads, but not both.⁷⁴ In determining if the Lorain Journal’s conduct constituted an illegal attempt to monopolize interstate commerce, the Court evaluated whether “advertising in the Journal was essential for the promotion of . . . sales in Lorain County.”⁷⁵ The Journal covered ninety-nine percent of Lorain County families, and therefore, the Court believed the Journal represented an “indispensable medium of advertising for many Lorain concerns.”⁷⁶

The Court’s holding resembled *Terminal Railroad* and required the Lorain Journal to share its “essential” advertising space.⁷⁷ Furthermore, the Lorain Journal was enjoined from:

Refusing to accept for publication or refusing to publish any advertisement or advertisements . . . where the reason for such refusal or discrimination is, in whole or in part, express or implied, that the person, firm or corporation submitting the advertisement or advertisements has advertised, advertises, has proposed or proposes to advertise⁷⁸

A little more than twenty years after *Lorain*, the Court grappled with another company in possession of an “essential”

⁷¹ *Id.* at 411.

⁷² Guggenberger, *supra* note 5, at 295 (“Though, over time, some of the leading considerations, and their emphasis has evolved. The notion of equal access to the marketplace and creating a level playing field stretch through the decisions.”).

⁷³ See *Lorain J. Co. v. United States*, 342 U.S. 143, 148 (1951).

⁷⁴ See Maurer & Scotchmer, *supra* note 51, at 306 (summarizing *Lorain*).

⁷⁵ See *Lorain*, 342 U.S. at 148.

⁷⁶ *Id.* at 152.

⁷⁷ See *id.* at 157.

⁷⁸ *Id.*

service in *Otter Tail Power Co. v. United States* (“*Otter Tail*”).⁷⁹ In this case, the corporation was engaged in two different businesses: the first involved selling and distributing electricity to city residents directly (the retail level), and the second involved selling and distributing electricity to municipalities (the wholesale level).⁸⁰ The cities eventually decided to construct their own power generation plants to distribute electricity at the retail level; however, they needed Otter Tail to provide them wholesale power to effectuate the distribution.⁸¹ The company’s profits primarily relied on its retail-level sales, so Otter Tail refused to sell the cities the required wholesale power.⁸² According to the District Court for the District of Minnesota, Otter Tail’s refusal to deal constituted a violation of section 2 of the Sherman Act.⁸³ And upon later review, the Supreme Court agreed.⁸⁴

The Court emphasized that “[t]here were no engineering factors that prevented Otter Tail from selling power at wholesale to those towns that wanted municipal plants.”⁸⁵ Furthermore, the Court believed that Otter Tail’s refusal to sell at wholesale was “solely to prevent municipal power systems from eroding its monopolistic position” within the retail level market.⁸⁶ In conclusion, the Court ordered Otter Tail to provide the “essential” wholesale power to its new retail-level competition at “compensatory” rates set by the Federal Power Commission.⁸⁷

The aforementioned Supreme Court cases saw an array of resources effectively deemed “essential”: railroad connections, advertising space, and wholesale electricity services. In reaching these conclusions, the Court focused on the impracticality of duplicating the essential facility, the facility’s significance to competitors in the market, and the feasibility of sharing the facility. In the years that followed, lower courts would further develop and define these factors.

2. Lower Courts Begin to Develop the Doctrine

Following this trend of Supreme Court decisions, several lower courts began to deal with cases involving access to an alleged “essential facility.”⁸⁸ These lower court cases resulted in a more refined and developed framework to apply to essential facilities

⁷⁹ *Otter Tail Power Co. v. United States*, 410 U.S. 366, 368 (1973).

⁸⁰ *See id.* at 377–79.

⁸¹ *See id.* at 371.

⁸² *See id.*

⁸³ *See id.* at 368.

⁸⁴ *See id.* at 379–82.

⁸⁵ *Id.* at 378.

⁸⁶ *Id.*

⁸⁷ *Id.* at 375, 381–82.

doctrine claims.⁸⁹ For example, in *Terminal Railroad*, the Court included the impracticability of duplicating the facility in question into its reasoning.⁹⁰ In *Hecht v. Pro-Football, Inc.*, the D.C. Circuit Court built upon *Terminal Railroad* by asserting that “where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.”⁹¹ The D.C. Circuit Court believed that it would be an “illegal restraint of trade to foreclose [such a] scarce facility.”⁹²

In 1983, the essential facilities doctrine reached its “most expansive form” to date in *MCI Communications Corporation v. AT&T*.⁹³ In this case, the Seventh Circuit officially set forth four required elements to establish liability under the essential facilities doctrine:

1. control of an essential facility by a monopolist;
2. a competitor’s inability practically or reasonably to duplicate the essential facility;
3. the denial of the use of the facility to a competitor; and
4. the feasibility of providing access to the facility.⁹⁴

The Seventh Circuit’s articulation of these elements influenced several subsequent decisions.⁹⁵

B. Decline of the Essential Facilities Doctrine

Two Supreme Court cases can be pointed to as particularly responsible for the essential facilities doctrine’s decline, the first

⁸⁸ Maurer & Scotchmer, *supra* note 51, at 308–09.

By the late 1970s the Court’s newfound willingness to find that facilities were “essential” had invited a flood of lower court litigation involving access to such disparate facilities as stock exchanges, produce markets, real estate listing services, electricity and gas networks, airports, sports stadiums, phone systems, contracting advantages, replacement parts, raw materials, IP licenses, airline reservation systems, harbor/railroad facilities, power generation or phone networks, airport landing and takeoff slots and ground services, two way billing, voice mail, cell phone roaming contracts, and short haul rail lines.

Id. (citations omitted).

⁸⁹ See, e.g., *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992–93 (D.C. Cir. 1977); *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132–33 (7th Cir. 1983); *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1128–30 (9th Cir. 2004); *United States v. Am. Tel. & Tel. Co.*, 524 F. Supp. 1336, 1360–61 (D.D.C. 1981).

⁹⁰ See *United States v. Terminal R.R. Ass’n of St. Louis*, 224 U.S. 383, 394–98 (1912).

⁹¹ *Hecht*, 570 F.2d at 992.

⁹² *Id.*

⁹³ Maurer & Scotchmer, *supra* note 51, at 309.

⁹⁴ *MCI Commc’ns*, 708 F.2d at 1132–33.

⁹⁵ See Maurer & Scotchmer, *supra* note 51, at 310 n.85 (citing HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 337 (4th ed. 2011)) (“In *MCI*, the Seventh Circuit stated the essential facility doctrine in a way that has influenced numerous subsequent decisions.”).

being *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* (“*Aspen Skiing*”).⁹⁶ And the second, being *Trinko*.⁹⁷ However, both cases are not as condemning as they may initially seem.

1. *Aspen Skiing*

The Supreme Court’s 1985 decision in *Aspen Skiing* marked the first instance in which the Court appeared reluctant to acknowledge the essential facilities doctrine.⁹⁸ Before *Aspen Skiing* reached the Supreme Court, the Tenth Circuit believed that “the substance of an essential facilities case was made,”⁹⁹ however, the Supreme Court never reached an essential facilities doctrine analysis and found liability on other grounds.¹⁰⁰ The Court’s apparent hesitancy to embrace and acknowledge the doctrine in *Aspen Skiing* casted a “long and unfortunate shadow over the essential facilities doctrine cases.”¹⁰¹ Nevertheless, *Aspen Skiing* should not be read to be inconsistent with prior essential facilities caselaw. In fact, the Court’s finding that there is an occasional duty to “assist a competitor through joint marketing has the strong aroma of the cases that invoke the essential facilities doctrine by name.”¹⁰²

Aspen Skiing involved the four major ski resorts in Aspen, Colorado.¹⁰³ All four ski resorts were independently owned, but one of the resort owners, Ski Co., acquired three of the four resorts over time.¹⁰⁴ When the resorts were all independently owned, they jointly offered the “all-Aspen” ski lift ticket, giving

⁹⁶ 472 U.S. 585, 609–11 (1985); see also Guggenberger, *supra* note 5, at 294–95. *Aspen Skiing* was widely criticized in the literature. In fact, many—erroneously—understood [the case] as a dire warning of what an expansive essential facilities doctrine would look like in practice. Lower courts applied the *Aspen* ruling but did not expand it in any meaningful way. . . . From thereon, the doctrine’s decline began—much to the detriment of businesses that rely on access to crucial infrastructure.

Id.; see also Maurer & Scotchmer, *supra* note 51, at 312 (“The most famous peculiarity of the Supreme Court’s opinion in *Aspen* is that it nowhere uses the words ‘essential facility.’ This persuaded lower courts to restyle essential facilities cases as monopolization or attempted monopolization cases.”)

⁹⁷ Guggenberger, *supra* note 5, at 298 (“The biggest blow to the practical impact of the essential facilities doctrine did not come until 2004, when the Supreme Court all but formally disowned the idea of curbing gatekeepers’ power in *Trinko*.”).

⁹⁸ See *Aspen Skiing*, 472 U.S. at 609–11.

⁹⁹ *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1521 (10th Cir. 1984), *aff’d*, 472 U.S. 585 (1985).

¹⁰⁰ See *Aspen Skiing*, 472 U.S. at 611, n.44.

¹⁰¹ See Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1207 (1999).

¹⁰² *Id.*; see *Aspen Skiing*, 472 U.S. at 609–11.

¹⁰³ *Aspen Skiing*, 472 U.S. at 587–88.

¹⁰⁴ *Id.* at 587–89, 611 nn.2 & 5.

resort guests access to all four mountains during their stay.¹⁰⁵ The “all-Aspen” pass was beloved by consumers and was a profitable venture for all companies involved.¹⁰⁶ Yet, once Ski Co. gained control of three of the four resorts, Ski Co. refused to offer the “all-Aspen” pass, allegedly in an effort to drive out the remaining resort owner, Highlands.¹⁰⁷

In light of Ski Co.’s refusal to jointly market the “all-Aspen” pass, Highlands tried desperately to offer its consumers a similar product.¹⁰⁸ The company even purchased retail lift tickets from Ski Co. to combine them with its own ticket to give the appearance of such an “all-Aspen” pass.¹⁰⁹ These passes were valid and no different from regular Ski Co. tickets, but Ski Co. refused to honor any consumer attempting to use it.¹¹⁰

Without the “all-Aspen” pass, Highlands’ share of the Aspen-area downhill skiing market fell from just over twenty percent to eleven percent within five years.¹¹¹ Additionally, Highlands could not develop other ski resorts in the Aspen area due to governmental barriers and financial difficulties.¹¹²

Highlands eventually sued Ski Co., alleging that Ski Co.’s refusal to deal constituted a violation of section 2 of the Sherman Act.¹¹³ The Court found that Ski Co. had chosen to forgo a profitable venture solely for the purpose of harming its competitor, which “provided adequate evidence to uphold the monopolization [jury] verdict.”¹¹⁴ The Court’s reasoning rested heavily on the fact that Ski Co. had no legitimate business justification for turning away consumers attempting to use a Highlands-purchased Ski Co. ticket.¹¹⁵ Along with treble damages, the Court ordered Ski Co. to again offer the “all-Aspen” pass with Highlands.¹¹⁶

¹⁰⁵ *Id.* at 605–06.

¹⁰⁶ *Id.* at 603, 605–06.

¹⁰⁷ *Id.* at 594.

¹⁰⁸ *Id.* at 605–08.

¹⁰⁹ *Id.* at 607–08.

¹¹⁰ *Id.* at 599.

¹¹¹ *Id.* at 594–95.

¹¹² *Id.* at 588–89.

Most of the terrain in the vicinity of Aspen that is suitable for downhill skiing cannot be used for that purpose without the approval of the United States Forest Service. That approval is contingent, in part, on environmental concerns. Moreover, the county government must also approve the project, and in recent years it has followed a policy of limiting growth.

Id.

¹¹³ *Id.* at 595.

¹¹⁴ See Lipsky Jr. & Sidak, *supra* note 101, at 1210–11.

¹¹⁵ *Aspen Skiing*, 472 U.S. at 608–11.

¹¹⁶ *Id.* at 598, 611 n.23.

Due to the overwhelming evidence condemning Ski Co., the Court saw no need to consider liability under the essential facilities doctrine.¹¹⁷ Nevertheless, *Aspen Skiing's* outcome was still analogous to those essential facilities cases before it. In essence, the Court required a company in control of a resource essential to its competitor to share that resource with its competitor. While the Court believed that Ski Co.'s inherent anticompetitive conduct justified this order, *Aspen Skiing* still possessed all of the traditional elements of an essential facilities case. First, Highlands could not practically duplicate access to alternative ski resorts.¹¹⁸ Second, Ski Co.'s resorts were crucial to Highland's ability to compete in their respective market.¹¹⁹ And third, Ski Co. could feasibly grant Highlands' access, as evidenced by the Court's order to do so.¹²⁰ So, although *Aspen Skiing* is viewed as an "unfortunate shadow" over the essential facilities doctrine, its holding does not actually diminish any prior caselaw. Further, *Aspen Skiing* may only represent an attempt by the Court curb inherently anticompetitive behavior on simpler and more defined grounds.¹²¹

2. *Trinko*

In 2004, the Court's opinion in *Trinko* brought any momentum the essential facilities doctrine had gathered to a screeching "halt."¹²² While *Aspen Skiing* conveyed reluctance to apply the essential facilities doctrine, *Trinko* demonstrated firm disapproval of the doctrine.¹²³ The *Trinko* decision has been

¹¹⁷ *Id.* at 611 n.44.

¹¹⁸ *See id.* at 588–89.

¹¹⁹ *See id.* at 594–95.

Without a convenient all-Aspen ticket, Highlands basically "becomes a day ski area in a destination resort." Highlands' share of the market for downhill skiing services in Aspen declined steadily after the 4-area ticket based on usage was abolished in 1977: from 20.5% in 1976-1977, to 15.7% in 1977-1978, to 13.1% in 1978-1979, to 12.5% in 1979-1980, to 11% in 1980-1981. Highlands' revenues from associated skiing services like the ski school, ski rentals, amateur racing events, and restaurant facilities declined sharply as well.

Id. (internal citations omitted).

¹²⁰ *See id.* at 598 n.23, 611.

¹²¹ *See id.* at 611 n.44.

Given our conclusion that the evidence amply supports the verdict under the instructions as given by the trial court, we find it unnecessary to consider the possible relevance of the "essential facilities" doctrine, or the somewhat hypothetical question whether nonexclusionary conduct could ever constitute an abuse of monopoly power if motivated by an anticompetitive purpose. If, as we have assumed, no monopolist monopolizes unconscious of what he is doing, that case is unlikely to arise.

Id.

¹²² *See* Guggenberger, *supra* note 5, at 245; Verizon Commc'ns, Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004).

¹²³ *See Trinko*, 540 U.S. at 399.

described to represent “the near extinction of the doctrine in the Supreme Court, in a case in which it probably should not have been discussed at all.”¹²⁴ The decision concluded by questioning the doctrine’s years of development and effectively denying the doctrine’s existence.¹²⁵

In *Trinko*, Verizon Communications, a local exchange carrier, was newly required under the 1996 Telecommunications Act (the “Act”) to share its telephone network with its competitors so that they could provide retail cellular services.¹²⁶ AT&T was a retail cellular services competitor that relied on Verizon’s exchange network infrastructure to provide its services and claimed that Verizon failed to provide adequate access to its network as required by the Act.¹²⁷ *Trinko*, an AT&T customer, asserted that Verizon had violated section 2 of the Sherman Act by discriminating against AT&T customers by providing them worse service through the network exchange than it provided to its own customers.¹²⁸ The complaint alleged that Verizon provided inadequate and subpar access “to rivals in order to limit entry,” which represented a denial of an essential facility.¹²⁹

In assessing whether Verizon’s conduct constituted an antitrust violation, the Court concluded that the complaint failed to state an antitrust claim.¹³⁰ As mentioned earlier, *Trinko* did not require an extensive essential facilities doctrine discussion.¹³¹ For example, the existence of the Act seemed to be the key differentiating factor between *Trinko* and other essential facilities

¹²⁴ Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1, 9 (2008).

¹²⁵ Maurer & Scotchmer, *supra* note 51, at 298 (“In 2004, the Supreme Court’s *Trinko* opinion strongly hinted that the doctrine had, at the very least, reached its ‘outer limits’ and might not exist at all.”); *see generally Trinko*, 540 U.S. at 415–16.

¹²⁶ *See Trinko*, 540 U.S. at 401–05.

¹²⁷ *See id.* at 404.

¹²⁸ *See id.* at 404–05.

¹²⁹ *See id.* at 405, 407, 411.

Trinko’s complaint alleged that Verizon had filled rivals’ orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs, thus impeding the competitive LECs’ ability to enter and compete in the market for local telephone service. According to the complaint, Verizon “has filled orders of [competitive LEC] customers after filling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for [competitive LEC] customers . . . , and has systematically failed to inform [competitive LECs] of the status of their customers’ orders.”

Id. at 404–05 (citation omitted); *see also* Maurer & Scotchmer, *supra* note 51, at 313 (citing *Trinko*, 540 U.S. at 404–05).

¹³⁰ *See Trinko*, 540 U.S. at 416.

¹³¹ *See* Frischmann & Waller, *supra* note 124, at 9 (“Although its statements on the doctrine were not ‘essential’ to the ruling, and technically dicta, the Court in *Trinko* appeared to go out of its way to restrict, and nearly reject, the essential facilities doctrine.”).

doctrine precedent.¹³² Thus, the Court could have decided *Trinko* on the basis that there is no duty to deal with a competitor when the competitor has the opportunity to appeal to a regulatory scheme other than antitrust for relief.¹³³ But, instead of deciding the case on such grounds, the Court went in a different direction, and through dicta, distinguished and diminished several essential facilities doctrine cases from *Trinko*.¹³⁴

The Court's opinion separated *Trinko* from other precedent finding a duty to deal with a competitor. In comparing *Aspen Skiing* to *Trinko*, the Court effectively limited the scope of *Aspen Skiing* to only those unique instances where a defendant ceases a *voluntary* and *profitable* venture to achieve an anticompetitive end.¹³⁵ Here, the Court highlighted that Verizon would have never *voluntarily* shared its network exchange before the Act's compulsion.¹³⁶ The Court believed that previous voluntary dealings between competitors were important because it could shed light on a defendant's motivation to suddenly refuse to deal.¹³⁷ For example, in *Aspen Skiing*, Ski Co. "turned down a proposal to sell at its own retail price," suggesting that Ski Co. believed "its future monopoly retail price would be higher."¹³⁸ Similarly, in *Otter Tail*, the company had previously provided business services and ceased such services when its status within the market was threatened.¹³⁹ Conversely, Verizon, prior to the Act, did not share its network exchange, so the Court could not ascertain whether Verizon's later regulatory lapses were prompted by "competitive zeal" or "anticompetitive malice."¹⁴⁰

The Court further distinguished *Aspen Skiing* from *Trinko*, noting that in *Aspen Skiing*, "what the defendant refused to provide to its competitor was a product that it already sold at retail . . . lift tickets."¹⁴¹ The Court differentiated *Otter Tail* from *Trinko* on the same grounds, pointing out that in *Otter Tail*, the

¹³² *See id.*

¹³³ *See Trinko*, 540 U.S. at 412.

Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent's "essential facilities" argument is distinct from its general §2 argument, we reject it.

Id. at 411.

¹³⁴ *See id.* at 409–10.

¹³⁵ *See id.* at 409.

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ *See id.*

¹³⁹ *Id.* at 410 (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)).

¹⁴⁰ *Id.* at 409. ("Verizon's reluctance to interconnect at the cost-based rate of compensation available under § 251(c)(3) tells us nothing about dreams of monopoly.")

¹⁴¹ *Id.* at 410.

“defendant was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide the same service to certain other customers.”¹⁴² However, in *Trinko*, the services allegedly withheld were not otherwise marketed or available to the public: “The sharing obligation imposed by the Act created ‘something brand new’—the wholesale market for leasing network elements.”¹⁴³ Considering the above differences, the Court found that “Verizon’s alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court’s existing refusal-to-deal precedents.”¹⁴⁴

But, to the disappointment of essential facilities doctrine supporters, the Court’s opinion did not stop after distinguishing previous precedent. Instead, the Court continued, expressing at length its “hostile” view of the doctrine.¹⁴⁵ To some, the Court appeared to go “out of its way to discuss the essential facilities doctrine in the harshest possible terms.”¹⁴⁶ Writing for the Court, Justice Scalia added that their conclusion in *Trinko* would remain “unchanged even if [they] considered to be established law the ‘essential facilities’ doctrine crafted by some lower courts.”¹⁴⁷ The Court dealt the biggest blow to the doctrine by directly questioning its existence, stating that “[w]e have never recognized such a doctrine . . . and we find no need either to recognize it or to repudiate it here.”¹⁴⁸

While the Court’s statements regarding the doctrine were only dicta, all essential facilities doctrine cases have been unsuccessful since *Trinko*.¹⁴⁹

II. THE REVIVAL OF THE ESSENTIAL FACILITIES DOCTRINE

The aftermath of *Trinko* caused both the legal and academic community to effectively abandon the essential facilities doctrine, leaving the impression that the doctrine never existed, or at least that it may never return.¹⁵⁰ Although *Trinko* left the doctrine’s future uncertain, a complete

¹⁴² *Id.*

¹⁴³ *Id.* (quoting *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 528 (2002)).

¹⁴⁴ *Id.*

¹⁴⁵ Maurer & Scotchmer, *supra* note 51, at 313.

¹⁴⁶ Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, WIS. L. REV. 359, 364 (2008).

¹⁴⁷ *Trinko*, 540 U.S. at 410.

¹⁴⁸ *Id.* at 411 (internal citations omitted).

¹⁴⁹ Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1, 9 (2008) (“[The Court’s] statements on the doctrine were not ‘essential’ to the ruling, and technically dicta.”); Waller, *supra* note 146, at 365 (noting that all post-*Trinko* essential facilities cases have been unsuccessful).

¹⁵⁰ Waller, *supra* note 146, at 365.

“overriding” of *Trinko*’s holding, as recommended by the Report, may not be necessary for a revival.¹⁵¹

The caselaw before *Trinko* has not been overruled and demonstrates that the essential facilities doctrine did have a place within the Court’s antitrust toolkit. For example, in *Aspen Skiing*, we are reminded that Ski Co.’s conduct inferred that it was “willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.”¹⁵² Ultimately, the Court condemned Ski Co. for this inherent anticompetitive behavior, but *did not* necessarily condemn Ski Co. for denying access to an “essential facility.”¹⁵³ *Aspen Skiing* actually left questions regarding the essential facilities doctrine open, stating in a footnote that “[g]iven our conclusion . . . we find it unnecessary to consider the possible relevance of the ‘essential facilities’ doctrine.”¹⁵⁴ *Aspen Skiing* demonstrates that, at the time, the essential facilities doctrine appeared to be a valid judicial tool but was simply not needed to remedy the situation at hand. And by acknowledging the essential facilities doctrine by name, albeit in a footnote, the Court seemed to indicate that the essential facilities doctrine *did* actually “exist” at that time.

Furthermore, it is *Trinko*’s obiter dicta, rather than its holding, that stands in the way of a successful revitalization.¹⁵⁵ The *Trinko* Court was clear in stating that they have never recognized the essential facilities doctrine.¹⁵⁶ However, it would be an oversight to claim that, on this basis, the essential facilities doctrine does not exist. Upon closely examining *Trinko*, the Court’s dicta leaves plenty of room for future essential facilities claims to be made.

A. Overcoming *Trinko*’s Obiter Dicta

Trinko, in hindsight, may not actually represent the nail in the coffin of the essential facilities doctrine. Rather, it may just narrow the factual circumstances in which the doctrine can be asserted. In *Trinko*, after claiming that they have never “recognized” the doctrine, the Supreme Court elaborated on what

¹⁵¹ See INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 399 (“Congress should consider overriding judicial decisions that have treated unfavorably essential facilities- and refusal to deal-based theories of harm.”)

¹⁵² *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610–11 (1985).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 611 n.44

¹⁵⁵ See Frischmann & Waller, *supra* note 149.

¹⁵⁶ *Verizon Commc’ns, Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004) (internal citations omitted) (“We have never recognized such a doctrine . . . and we find no need either to recognize it or to repudiate it here.”).

the essential facilities doctrine's hypothetical requirements would be and why it could not be applied in this specific instance.¹⁵⁷ However, the Court's requirements and analysis are not inconsistent with any prior essential facilities precedent.

First, the Court noted that access to the facility in question must be unavailable for the doctrine to apply:

It suffices for present purposes to note that the indispensable requirement for invoking the [essential facilities] doctrine is the unavailability of access to the "essential facilities"; where access exists, the doctrine serves no purpose. Thus, it is said that "essential facility claims should . . . be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms."¹⁵⁸

The Court's statement here is consistent with prior essential facilities cases. In cases like *Terminal Railroad* and *Otter Tail*, a private party held access to the facility in question—the Terminal Company and Otter Tail, respectively—and before the Court's intervention, those parties were able to deny access to a competitor entirely. This is very different from the situation in *Trinko*, where the Act deprived Verizon of the ability to deny access to the "essential facility," and the plaintiff's claim centered around the quality of access, rather than access in general.¹⁵⁹

The Act not only provided access to the facility, but also served as a regulatory structure designed to deter and remedy anticompetitive behavior within the specific market.¹⁶⁰ The Court believed that antitrust enforcement could only minorly benefit competition when a regulatory structure within a specific market already exists.¹⁶¹ The Court saw antitrust as better equipped to deal with those instances where "there is nothing built into the regulatory scheme" to perform "the antitrust function."¹⁶² This added element of regulatory structure in *Trinko* was not present in cases such *Terminal Railroad* and *Lorain*, which left the Court to perform the antitrust function within those specific markets.

Trinko also warned that, in this case, because providing *adequate* access is subjective, forced sharing ran a significant risk of "false positives."¹⁶³ False positives could punish defendants for

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (quoting P. Areeda & H. Hovenkamp, *Antitrust Law*, p. 150, ¶773e (2003 Supp.)).

¹⁵⁹ *Id.* at 404–05.

¹⁶⁰ *Id.* at 412.

¹⁶¹ *Id.*

¹⁶² *Id.* (quoting *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 358 (1963)).

¹⁶³ *Id.* at 414.

refusals that have nothing to do with exclusionary behavior.¹⁶⁴ The Court was especially wary because “mistaken inferences and the resulting false condemnations” could “chill the very conduct the antitrust laws are designed to protect.”¹⁶⁵ Prior cases like *Lorain* and *Otter Tail* avoided the risk of false positives by focusing only on instances where a company refused to deal with a competitor. By focusing on a competitor’s sudden refusal to deal, the Court could better understand the company’s motives and more accurately identify exclusionary behavior.¹⁶⁶

Finally, the Court noted that, even if it required Verizon to share its networks with its competitors on more favorable terms, those requirements would be difficult to enforce effectively. Prior to *Trinko*, most ordered sharing requirements forced defendants to recommence previous dealings with competitors. Orders of this nature could be effectively enforced by the Court because, once ordered, the matter would be out of the Court’s hands. However, in *Trinko*—due to the nature of the complaint—effective enforcement would have been much more involved and would have required highly detailed and continual supervision on a day-to-day basis. The Court should not and could not reasonably implement that level of oversight and enforcement.¹⁶⁷

Due to *Trinko*’s dissimilarities with previous essential facilities cases, one could argue that the Court was correct not to apply the doctrine in *Trinko*. With that said, *Trinko*’s dicta set forth several requirements for a successful essential-facilities claim. By no means does this represent a comprehensive list of elements, but to briefly summarize, according to *Trinko*, the following factors would need to be met before an essential-facilities claim could be made:

1. The defendant refuses to provide a service that it publicly provides *voluntarily* as part of its normal business operations.

¹⁶⁴ *Id.* (“One false-positive risk is that an incumbent LEC’s failure to provide a service with sufficient alacrity might have nothing to do with exclusion.”); Maurer & Scotchmer, *supra* note 51, at 314 & n.186.

¹⁶⁵ *Trinko*, 540 U.S. at 414 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

¹⁶⁶ *See id.* at 410.

¹⁶⁷ *Id.* at 414–15 (quoting Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1989)).

Effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree. We think that Professor Areeda got it exactly right: “No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.”

Id.

2. The absence of a regulatory scheme compelling access to the essential facility and aimed at curbing anti-competitive behavior in that market.
3. A low risk of “false positives.”
4. The ability for the Court to effectively and efficiently enforce any ordered sharing requirements.¹⁶⁸

Since *Trinko* does not invalidate essential facilities precedent, revitalization seems even more probable provided that future plaintiffs can satisfy *Trinko*'s requirements.

III. APPLICATION OF THE ESSENTIAL FACILITIES DOCTRINE TO APPLE AND THE APP STORE

If *Trinko* does not truly represent the end of the essential facilities doctrine, it seems plausible that the doctrine could be revived in future antitrust lawsuits against Apple.

As mentioned previously, the Seventh Circuit has put forth the most expansive and most adopted definition of the doctrine. The general requirements being: “(1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.”¹⁶⁹ Additionally, to assure enforcement by the Supreme Court, *Trinko*'s inherent requirements should also be included in any essential facilities analysis. Below is a brief analysis to demonstrate why Apple, on its face, can satisfy the current essential facilities doctrine requirements, including *Trinko*.

A. Satisfying the Seventh Circuit’s Requirements

1. Control of the Essential Facility/Competitor’s Inability Practically or Reasonably to Duplicate the Essential Facility

The Seventh Circuit’s first two requirements for an essential-facilities claim go hand in hand. A company needs to control an “essential” facility, and competitors must be unable

¹⁶⁸ See generally *Trinko*, 540 U.S. at 409–16.

¹⁶⁹ *MCI Commc’n Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132–33 (7th Cir. 1983); see also *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977) (“The essential facility doctrine . . . states that ‘where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.’”); see Pitofsky et al., *supra* note 49, at 447–49 (stating that virtually every lower court adheres to the Seventh Circuit’s definition of essential facilities set forth in the 1983 *MCI* decision).

to practically or reasonably duplicate the essential facilities.¹⁷⁰ A company is said to control an essential facility if it controls a facility that a competitor cannot practically duplicate, and access is crucial to other competitors' ability to compete.¹⁷¹ According to the Court of Appeals for the District of Columbia Circuit, an "essential" facility "need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants."¹⁷² This discussion of feasibility is relatable to *Terminal Railroad's* consideration of the high construction costs that would have followed the construction of alternative railroad connections.¹⁷³

Here, asking independent app developers to create their own app stores appears analogous to asking independent railroad companies to build their own railroad tracks. Requesting developers to duplicate a service such as the Apple App Store would not only be economically infeasible, but also an impracticable means of reaching consumers.¹⁷⁴ Part of the App Store's draw is that it creates a central place for developers to market their products to consumers, similar to *Terminal Railroad's* indication that "all in-coming trains should reach a common focus."¹⁷⁵ Creating more app stores would eliminate a common medium for consumers to browse mobile apps and be an impracticable means of doing business.¹⁷⁶

Furthermore, denying access to the Apple App Store would create a "severe handicap" for independent app developers.¹⁷⁷ Apple does not allow alternative app stores to be used on iOS

¹⁷⁰ *MCI Commc'n Corp.*, 708 F.2d at 1132–33; see *Hecht*, 570 F.2d at 992 ("The essential facility doctrine . . . states that 'where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.'").

¹⁷¹ See *MCI Commc'ns Corp.*, 708 F.2d at 1132.

¹⁷² *Hecht*, 570 F.2d at 992.

¹⁷³ *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 395, 397 (1912).

¹⁷⁴ See INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 345 (estimating that Apple spends over \$100 million annually to operate the App Store).

¹⁷⁵ *Terminal R.R. Ass'n*, 224 U.S. at 403.

[N]ot only would the expense of obtaining the necessary rights of way be so enormous as to amount to the exclusion of all but a few of the strongest roads, but, if it could be accomplished, the city would be cut to pieces with the many lines of railroad intersecting it in every direction, and thus the greatest agency of commerce would become the greatest burden.

Id.

¹⁷⁶ See Kotapati et al., *supra* note 5, at 18 ("In the mobile-app market, absurdity and inefficiency would result—requiring developers to create their own app platform would hinder users' ability to discover apps and impede developers from entering in the first place, given the crushing entry costs they would bear."). See *Hecht*, 570 F.2d at 992; see also INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 341.

¹⁷⁷ See *Hecht*, 570 F.2d at 992; see also INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 341.

devices, and competing mobile app stores on other smartphones, such as Android, are not available to iOS users.¹⁷⁸ So, if Apple's rivals are denied App Store access or forced to pay commissions, independent app developers will either be completely excluded from forty-five percent of the United States smartphone market, or placed at a significant competitive disadvantage.¹⁷⁹

On this basis, it appears likely that Apple controls an "essential" facility given that its competitors cannot practically duplicate their App Store. Additionally, denying App Store access or requiring commissions imposes a "severe handicap" on Apple's rivals.¹⁸⁰

2. Denial of the Use of the Essential Facility to a Competitor

Refusing to allow competitors such as Epic Games and Steam onto the Apple App Store plainly satisfies the Seventh Circuit's denial requirement. Whether a thirty percent commission on competing apps' IAP revenue constitutes a "denial" is much more involved.

According to the Fourth Circuit, a complete denial of access to an essential facility is not required.¹⁸¹ Instead, only a denial of "reasonable" access is needed to find essential facilities liability.¹⁸² Seemingly inspired by *Terminal Railroad*, courts have interpreted "reasonable access" to mean access on "fair and reasonable terms that do not disadvantage" competitors.¹⁸³ So, to determine whether Apple's competitors have been denied access through Apple's thirty percent commission on in-app purchasing, we must look to the example set forth by *Terminal Railroad*.¹⁸⁴

Courts frequently quote *Terminal Railroad*, holding that access to an essential facility must be afforded "upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be."¹⁸⁵ In *Terminal Railroad*, the

¹⁷⁸ See INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 341.

¹⁷⁹ See *id.* at 332.

¹⁸⁰ Kotapati et al., *supra* note 5, at 18.

¹⁸¹ See *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544–45 (4th Cir. 1991) (interpreting the third element of the essential facilities doctrine under the Seventh Circuit's definition to include a reasonable standard of access factor).

¹⁸² See *id.*

¹⁸³ *United States v. Am. Tel. & Tel. Co.*, 524 F. Supp. 1336, 1352–53 (D.D.C. 1981).

It may be helpful at the outset to state the applicable legal standard. Any company which controls an "essential facility" or a "strategic bottleneck" in the market violates the antitrust laws if it fails to make access to that facility available to its competitors on fair and reasonable terms that do not disadvantage them.

Id.

¹⁸⁴ *Id.* at 1353 (quoting *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 411 (1912)).

¹⁸⁵ *Terminal R.R. Ass'n*, 224 U.S. at 411.

Court created an “equal plane” amongst competitors by granting Terminal Company members and non-members the same terms of railroad connection access.¹⁸⁶ An “equal plane” entailed abolishing the arbitrary hauling charges imposed on non-Terminal Company members because once free of such charges, independent railroads were better able to compete with Terminal Company members.¹⁸⁷

With respect to Apple, imposing a thirty percent commission on its competitors’ IAP revenue would seem to make it much more difficult for developers to compete with Apple’s rival apps. Given that compliance with IAP commissions is required to remain on the App Store, it appears that Apple’s competitors are not afforded access on “fair and reasonable terms that do not disadvantage them.”¹⁸⁸ Therefore, charging such commissions could constitute an unreasonable denial of access to an essential facility.

3. Feasibly of Providing Access

Finally, as evidenced by its current operations, it is certainly feasible for Apple to allow all apps onto its marketplace. While Apple can argue that it cannot financially operate the App Store without IAP commissions, Apple would only be prohibited from collecting IAP commissions from its competitors. Additionally, granting competitors access does not mean eliminating all App Store-related charges. In *Terminal Railroad*, the Court required terms of access placing “every such company upon as nearly an equal plane as may be with respect to *expenses* and charges as that occupied by the proprietary companies.”¹⁸⁹ The essential facilities doctrine’s aim is to create equal or reasonable access amongst competitors, so if Apple incurs expenses operating the App Store, such expenses could be shared amongst competing app developers.

Also, Apple has recently showed its ability to adjust the App Store Guidelines and IAP commission requirements by reducing IAP commission to fifteen percent for certain developers and eliminating the commission for others.¹⁹⁰

¹⁸⁶ *See id.*

¹⁸⁷ *See id.* at 410–11.

¹⁸⁸ *Am. Tel. & Tel. Co.*, 524 F. Supp. at 1352–53.

It may be helpful at the outset to state the applicable legal standard. Any company which controls an “essential facility” or a “strategic bottleneck” in the market violates the antitrust laws if it fails to make access to that facility available to its competitors on fair and reasonable terms that do not disadvantage them.

Id.

¹⁸⁹ *Terminal R.R. Ass’n*, 224 U.S. at 411 (emphasis added).

¹⁹⁰ Kif Leswing, *Apple Will Cut App Store Commissions by Half to 15% for Small App Makers*, CNBC (Nov. 18, 2020, 11:57 AM), <http://www.cnbc.com/2020/11/18/apple-will-cut-app-store-fees-by-half-to-15percent-for-small-developers.html> [<http://perma.cc/8XKN-4VTG>] (reducing IAP commission for “small developers”); Mark Gurman & Vlad Savov,

B. Satisfying *Trinko*'s Requirements

To ensure enforcement at the highest level, any essential facilities doctrine analysis must consider *Trinko*'s dicta. The Court believed several factors made the essential facilities doctrine inappropriate in *Trinko*. As stated above, under *Trinko*, the essential facilities doctrine could only be appropriate if: 1) the defendant refuses to provide a service that it publicly provides *voluntarily* as part of its normal business operations; 2) there is no regulatory scheme compelling access to the essential facility and aimed at curbing anticompetitive behavior in that market; 3) there is a low risk of "false positives"; and 4) the Court can effectively and efficiently enforce any ordered sharing requirements.¹⁹¹

The first factor relates to the business operations of the would-be defendant. In *Trinko*, the Court believed that the essential facilities doctrine was not appropriate in this instance because Verizon had not ceased a previously voluntarily business operation.¹⁹² The first factor relates to the business operations of the would-be defendant. Before the Act's obligation, Verizon's standard business operations did not include sharing its exchange network with competitors. So, Verizon's later regulatory lapses could not be construed to convey anticompetitive intent.¹⁹³

Apple's regular business operations include operating the App Store, so its motivation in any later refusals to deal can be more easily interpreted. In fact, the company does not hide its motivations for denying App Store access to certain competitors. Apple has even stated that some denials are "business" motivated. For example, with the launch of *Apple Arcade* approaching, Apple denied App Store access to those companies that would theoretically compete with *Apple Arcade*, such as Steam Link.¹⁹⁴ Given that Apple's current business operations and subsequent App Store denials can convey a lot more about its "dreams of monopoly," it seems that an antitrust lawsuit against the company would survive this part of the *Trinko* analysis.¹⁹⁵

Apple to Let Media Apps Avoid 30% Fee After Global Scrutiny, BLOOMBERG (Sept. 2, 2021, 7:03 AM), <http://www.bloomberg.com/news/articles/2021-09-02/apple-to-let-app-makers-point-users-to-web-to-pay-for-services#:~:text=Apple's%20historic%20resoluteness%20about%20maintaining,to%20%241%20million%20a%20year> [http://perma.cc/897V-PZBT] (allowing media apps to avoid thirty percent commission entirely).

¹⁹¹ See *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 409–16 (2004).

¹⁹² See *id.* at 409.

¹⁹³ See *id.*

¹⁹⁴ See Statt, *supra* note 25.

¹⁹⁵ *Trinko*, 540 U.S. at 409 ("Verizon's reluctance to interconnect at the cost-based rate of compensation available under § 251(c)(3) tells us nothing about dreams of monopoly.").

With regard to IAP commissions, Apple's recent conduct of charging different commission rates for certain developers would seem to create an argument that the company's selectiveness could constitute a refusal to provide a service that it normally provides: App Store access at a lowered commission rate.¹⁹⁶

Second, unlike *Trinko*, where Verizon was subject to government regulation and compelled to share its network exchange, the App Store, and "big tech" in general, remain largely unregulated.¹⁹⁷ Without a regulatory structure to compel App Store access and curb anticompetitive behavior, competitors can only ask the Court to perform "antitrust function."

The third analysis factor focused on the difficulty of defining alleged exclusionary conduct. In *Trinko*, the complaints centered around Verizon's alleged lack of alacrity in dealing, as opposed to an outright refusal to deal.¹⁹⁸ Certainly, it is easier for the Court to find exclusionary conduct when a defendant completely refuses to deal, as the defendant's motives are more apparent, rather than when the defendant lacks enthusiasm in dealing.

With Apple, it is not the quality of App Store services questioned, but rather the terms and policies related to App Store access. As touched upon in the above paragraphs, Apple's past denials of App Store access have been inspired by its motivation to have its own apps succeed.¹⁹⁹ If the courts were to focus only on the instances in which Apple denies a competitor access to the App Store or significantly inhibits a competitor's ability to compete through inherently disadvantageous App Store Guidelines, the risk of false condemnations should become considerably lower.

Finally, the Court must be able to effectively and efficiently enforce any ordered sharing requirements. Effective enforcement in *Trinko* would have required detailed and continual supervision on a day-to-day basis, and therefore, sharing requirements could not be enforced.²⁰⁰ It is far easier for

¹⁹⁶ See sources cited *supra* note 190.

¹⁹⁷ See Savitz, *supra* note 19; see also *Trinko*, 540 U.S. at 404–05.

¹⁹⁸ *Trinko*, 540 U.S. at 404–05.

¹⁹⁹ See Statt, *supra* note 25.

²⁰⁰ *Trinko*, 540 U.S. 398, 414–15 (quoting Areeda, *supra* note 167, at 853).

Effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree. We think that Professor Areeda got it exactly right: "No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency."

Id.

the Court to effectively enforce sharing requirements when there has been an outright denial of access, as sharing only requires a competitor to resume previous dealings. For example, in *Otter Tail*, the Court was able to order Otter Tail to resume distributing wholesale power to the municipalities.²⁰¹

The Court should have no issue ordering the reinstatement of those apps that have been completely denied access to the App Store on a discriminatory basis. An order of this nature would be similar to that in *Lorain Journal*, where the Court prohibited the newspaper from refusing to publish any advertisements on a discriminatory basis.²⁰² When the App Store policies themselves are at issue, effective enforcement becomes more complex. The Court would potentially be asked to answer many questions regarding what the App Store policies should be. For example, in dealing with the IAP commission system, Apple may ask the Court what IAP commission percentage would be acceptable. In facing these questions, the Court should fall back on the principles of *Terminal Railroad*. In *Terminal Railroad*, the Court's order did not seek to set the price for "hauling charges," instead, it intended to put all competitors on an "equal plane."²⁰³

Here, an "equal plane" could be created by comparing Apple's competitors' App Store access terms with those terms Apple provides for itself and minimizing the differences in access for Apple apps and non-Apple apps. The Court could effectively enforce any ordered sharing requirements by removing any App Store policies that put Apple at an inherent advantage over its competitors. Whether that includes a removal or a reduction in the current IAP Commission, could be decided amongst the developers and Apple themselves.

On this basis, the App Store seems to be able to quell all of *Trinko's* concerns. Given that the Apple App Store could survive both a Seventh Circuit and a *Trinko* analysis, it seems that it is just a matter of time until a successful essential facilities claim is asserted against Apple.

CONCLUSION

The essential facilities doctrine likely remains a viable tool within antitrust law. While *Trinko's* essential facilities dicta may deter potential plaintiffs from asserting it, *Trinko* should only be read to limit the circumstances in which it can be applied.

²⁰¹ See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 366, 382 (1973).

²⁰² See *Lorain J. Co. v. United States*, 342 U.S. 143, 150, 157 (1951).

²⁰³ See *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 408, 411 (1912).

At this point in time, the Apple App Store appears to fit the mold of an essential facilities doctrine case. So, whether it be Congress or subsequent Supreme Court rulings, future antitrust proceedings could likely see a successful essential facilities doctrine case made against Apple.