



International Center
for Law & Economics

ICLE Brief for D.C. Circuit in State of New York v Facebook
March 28, 2022

[Henry N. Butler](#), [Richard Epstein](#), [Thomas Hazlett](#), [Gus Hurwitz](#), [Jonathan Klick](#), [Thomas Lambert](#), [Dan Lyons](#), [Geoffrey A. Manne](#), [Alan J. Meese](#), [Paul Rubin](#), [Michael Sykuta](#) and [John M. Yun](#)

**United States Court of Appeals
for the District of Columbia Circuit**

**STATE OF NEW YORK, et al.,
Plaintiffs-Appellants,**

v.

**FACEBOOK, INC.,
Defendant-Appellee.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
No. 1:20-cv-03589-JEB (Hon. James E. Boasberg)**

**BRIEF OF INTERNATIONAL CENTER FOR
LAW AND ECONOMICS AND SCHOLARS OF LAW
AND ECONOMICS AS AMICUS CURIAE SUPPORTING
DEFENDANT-APPELLEE FACEBOOK, INC. AND AFFIRMANCE**

STATEMENT OF THE AMICUS CURIAE

Amici are leading scholars of economics, telecommunications, and/or antitrust. Their scholarship reflects years of experience and publications in these fields.

Amici's expertise and academic perspectives will aid the Court in deciding whether to affirm in three respects. First, *amici* provide an explanation of key economic concepts underpinning how economists understand the welfare effects of a monopolist's refusal to deal voluntarily with a competitor and why that supports affirmance here. *Second*, *amici* offer their perspective on the limited circumstances that might justify penalizing a monopolist's unilateral refusal to deal—and why this case is not one of them. *Third*, *amici* explain why the District Court's legal framework was correct and why a clear standard is necessary when analyzing alleged refusals to deal.

SUMMARY OF ARGUMENT

This brief addresses the broad consensus in the academic literature disfavoring a theory underlying plaintiff's case—"unilateral refusal to deal" doctrine. The States allege that Facebook restricted access to an input (Facebook's Platform) in order to prevent third parties from using that access to export Facebook data to competitors or compete directly with Facebook. But a unilateral refusal to deal involves more than an allegation that a monopolist refuses to enter into a business relationship with a rival.

Mainstream economists and competition law scholars are skeptical of imposing liability, even on a monopolist, based solely on its choice of business partners. The freedom of firms to choose their business partners is a fundamental tenet of the free market economy, and the mechanism by which markets produce the greatest welfare gains. Thus, cases compelling business dealings should be confined to particularly delineated circumstances.

In Part I below, *amici* describe why it is generally inefficient for courts to compel economic actors to deal with one another. Such "solutions" are generally unsound in theory and unworkable in practice, in that they ask judges to operate as regulators over the defendant's business.

In Part II, *amici* explain why *Aspen Skiing*—the Supreme Court's most prominent precedent permitting liability for a monopolist's unilateral refusal to deal—went too far and should not be expanded as the States' and some of their *amici* propose.

In Part III, *amici* explain that the District Court correctly held that the conduct at issue here does not constitute a refusal to deal under *Aspen Skiing*. A unilateral refusal to deal should trigger antitrust liability only where a monopolist turns down *more profitable* dealings with a competitor in an effort to drive that competitor's exit or to disable its ability to compete, thereby allowing the monopolist to recoup its losses by increasing prices in the future. But the States' allegations do not describe that scenario.

In Part IV, *amici* address that the District Court properly considered and dismissed the States' "conditional dealing" argument. The States' allegations are correctly addressed under the rubric of a refusal to deal—not exclusive dealing or otherwise. The States' desire to mold their allegations into different legal theories highlights why courts should use a strict, clear standard to analyze refusals to deal.

[Read the full brief here.](#)

[View Article](#)