ORAL ARGUMENT NOT YET SCHEDULED

No. 21-7078

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

George L. Paul
Andrew Black
Jaclyn Phillips
Nathan Swire
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, D.C. 20005
Telephone: + 1 202 626 3600
Facsimile: + 1 202 639 9355

Rucha Phadtare
WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: + 1 212 819 8200
Facsimile: + 1 212 354 8113

Counsel for Amici Curiae

Dated: March 28, 2022

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for *amicus curiae* certifies as follows:

A. Parties and *Amici*

Except for the following, all parties, intervenors, and *amici* appearing before the District Court and in this Court are listed in the Brief for Defendant-Appellee Facebook, Inc.:

*Affiliations for identification purposes only

- International Center for Law and Economics
- Henry N. Butler – Henry G. Manne Chair in Law and Economics and Executive Director of the Law & Economics Center, Antonin Scalia Law School, George Mason University
- Richard A. Epstein – Laurence A. Tisch Professor of Law at New York University School of Law, the Peter and Kirstin Bedford Senior Lecturer at the Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law Emeritus at the University of Chicago
- Thomas Hazlett – H.H. Macaulay Endowed Professor of Economics and Director of the Information Economy Project, Clemson University
- Justin (Gus) Hurwitz – Professor of Law and Menard Director of the Nebraska Governance and Technology Center, University of Nebraska College of Law
- Jonathan Klick – Charles A. Heimbold, Jr. Professor of Law, University of Pennsylvania Carey Law School; Erasmus Chair of Empirical Legal Studies, Erasmus University Rotterdam

- Thomas A. Lambert – Wall Chair in Corporate Law and Governance and Professor of Law, University of Missouri Law School
- Daniel Lyons – Professor of Law, Boston College Law School
- Geoffrey A. Manne – President and Founder, International Center for Law & Economics, Distinguished Fellow Northwestern University Center on Law, Business & Economics
- Alan J. Meese – Ball Professor of Law, Co-Director, Center for the Study of Law and Markets, William & Mary Law School
- Paul H. Rubin – Samuel Candler Dobbs Professor of Economics Emeritus, Emory University
- Michael Sykuta – Associate Professor of Economics and Executive Director of Financial Research Institute, University of Missouri Division of Applied Social Sciences
- John Yun – Associate Professor of Law and Deputy Executive Director of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University

B. Rulings Under Review

References to the rulings at issue in the appeal are listed in the Brief for Defendant-Appellee Facebook, Inc.

C. Related Cases

FTC v. Meta Platforms, Inc., No. 1:20-cv-03590, pending before the United States District Court for the District of Columbia.

CORPORATE DISCLOSURE STATEMENT

The International Center for Law & Economics states that there is no parent corporation or any publicly held corporation that owns 10% or more of its stock.

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API Application Programming Interface

DOJ U.S. Department of Justice

FTC Federal Trade Commission

STATEMENT OF THE ISSUES

The *amici* will address the following issues:

1. Whether the District Court properly held that the Plaintiffs-Appellants ("States") failed to state a claim for monopolization under Section 2 of the Sherman Act because the District Court's decision is consistent with the economic and legal principles that firms should be able to choose with whom they deal.

2. Whether the District Court properly held that the States failed to state a claim for monopolization under Section 2 because the States' allegations regarding Facebook's Platform policies do not set forth actionable conduct pursuant to the Supreme Court's narrow finding in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

3. Whether the District Court properly held that the States cannot recast their allegations as "conditional dealing" or otherwise state a claim under an amorphous legal standard.

STATUTES

The relevant statute was reproduced in the addendum to Appellants' opening brief.

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.

STATEMENT REGARDING AUTHORSHIP, FINANCIAL CONTRIBUTIONS, AND CONSENT TO FILE

Under Federal Rule of Appellate Procedure 29(c), *amici curiae* state that no party's counsel authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel contributed money that was intended to fund preparing or submitting the brief.

Under Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this *amicus* brief.

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.

ARGUMENT

I. SOUND ECONOMIC REASONING SUPPORTS THE PREVAILING LEGAL RULE THAT EVEN DOMINANT FIRMS HAVE NO ANTITRUST DUTY TO DEAL WITH ACTUAL OR POTENTIAL RIVALS EXCEPT IN EXTREMELY NARROW CIRCUMSTANCES

A. Allowing economic actors to choose with whom they will deal furthers economic efficiency and promotes consumer welfare.

Economics and competition law scholars widely accept the fundamental precept that firms in a market system generally should be free to choose their own business partners because that leads to the greatest welfare gains. In other words, "competition is best served not by numerous firms sharing the same productive assets, but rather when firms each have and control their own production resources." Herbert J. Hovenkamp, *Unilateral Refusals to Deal, Vertical Integration, and the Essential Facility Doctrine*, Faculty Scholarship at Penn Law, 2008, at 35 ("Hovenkamp Paper").

Allowing a court or jury to decide whether a firm (even a monopolist)[1] should be compelled to enter a business relationship or share its property against its will upsets that fundamental precept. For this reason, scholars (and courts) are highly skeptical of attempts to curtail a firm's ability to choose its own business relationships. *See, e.g.*, Hovenkamp Paper, *supra* at 3 ("Forcing a firm to share its monopoly is inconsistent with antitrust basic goals[.]").

[1] The *amici* below do not know, and offer no opinion, as to whether Facebook is in fact a monopolist. *Amici* merely assume so for purposes of this analysis.

Further, forced dealing can stifle innovation by "discourag[ing] firms from developing their own alternative inputs." Phillip E. Areeda & Herbert J. Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 771b (4th and 5th Editions 2015–2021). Thus, compelled sharing of resources creates "tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407–408 (2004).

Moreover, any "doctrine that forces an owner to share his property or otherwise dictates the terms and conditions of exchange deprives the owner of an incentive to create the property." Dennis W. Carlton & Ken Heyer, *Extraction vs. Extension: The Basis for Formulating Antitrust Policy Towards Single-Firm Conduct*, Competition Pol'y Int'l 285, 296 (2008); Thom Lambert & Alden F. Abbott, *Recognizing the Limits of Antitrust: The Roberts Court Versus the Enforcement Agencies*, 11 J. Competition L. & Econ. 791, 805 (2015) (similar); Richard J. Gilbert & Carl Shapiro, *An Economic Analysis of Unilateral Refusals to License Intellectual Property*, 93 Proc. Nat'l Acad. Sci. 12749, 12754 (1996) (observing that forced dealing "can have profound adverse incentives for investment and for the creation of intellectual property").

The DOJ Antitrust Division expressed the same concerns in 2019 when it intervened on behalf of the *defendant* in an FTC enforcement action: "compelling monopolists to share the source of their advantage with rivals may lessen the incentive of all market participants to invest in economically beneficial facilities." Br. of U.S. as *Amicus Curiae* Supporting Appellant at 19, *FTC v. Qualcomm*, 969 F.3d 974 (9th Cir. 2020) (No. 19-16122), ECF No. 86 (internal quotations and ellipsis omitted) (citing *Trinko*, 540 U.S. at 408–409). The Ninth Circuit agreed, ruling in favor of the defendant and reversing the district court's ruling. *See FTC v. Qualcomm Inc.*, 969 F.3d 974, 1005 (9th Cir. 2020).

In short, private contracting generally advances efficiency and consumer welfare *because of* its voluntary nature, not despite it.

B. Imposing a duty to deal with one's rivals threatens to reduce market output and enhance decision and error costs.

The imposition of a duty to deal would contradict the intended aim of the antitrust laws: the "preserv[ation of] free and unfettered competition." *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). Moreover, courts are ill-equipped to identify refusals to deal that merit penalty and then remedy them. *See Trinko*, 540 U.S. at 408 ("Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited."). The difficulties in identifying anticompetitive unilateral refusals to deal are rivaled by the practical problems of enjoining them.

The facts alleged by the States illustrate the practical difficulties of regulating the choice of with whom parties deal. By 2013, Facebook had made its Platform available to more than 10 million apps and websites. *See* Facebook's Br. at 8 (citing JA92 at ¶ 194). The States, however, alleged only seven instances in which a third party was denied access to Facebook's Platform to access certain data for uses off of Facebook—in other words, the States alleged that 0.00007% of third parties that had access to Platform were given limited access in order to prevent the third party from competing against Facebook. JA230. Indisputably, Facebook was willing to provide its competitors access to its Platform as long as those competitors did not use Facebook's own data to compete directly against Facebook. This begs the question: how is a court to determine when terms unacceptable to a few rivals, or potential rivals, rise to the level of anticompetitive behavior?

The risk here is that, in general, a court's attempt to police anti-competitive behavior can itself create inefficiency. *See* Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 222–225 (1979) (explaining that any given legal regime for determining what behavior is predatory will carry risks of both over and under-identifying anti-competitive behavior, and that both types of error creates economic inefficiency); Lambert & Abbott, *supra* p. 6, at 805 ("[T]he sum of error costs and decision costs would be higher under a general rule requiring vertically integrated monopolists to deal in the upstream market with their downstream rivals.”).

Accordingly, many scholars agree that courts are not best situated to make these difficult determinations: “Anyone who thinks that judges would be good at detecting the few situations in which cooperation would do more good than harm has not studied the history of antitrust.” Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 Harv. J.L. & Pub. Pol’y 439, 442 (2008); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 590, 594–95 (1986); *Novell v. Microsoft Corp.*, 731 F.3d 1064, 1073 (10th Cir. 2013) (finding that “[i]f forced sharing were the order of the day, courts would have to pick and choose the applicable terms and conditions,” which is “a role in which [judges] haven’t always excelled in the past”).

Yet that is what “solving” a unilateral refusal to deal entails: “requir[ing] the court to assume the day-to-day controls characteristic of a regulatory agency.” *Trinko*, 540 U.S. at 415; *see* Lambert & Abbott, *supra* p. 6, at 805 (“A broad forced-sharing rule would also entail high decision costs.”). The DOJ noted the same problem in its *amicus* in the *Qualcomm* case. *See* Amicus of U.S., *supra* p. 6 at 19, 26–27. Even if a federal trial judge could discern the “right” (efficient) answer, the social media industry is, by its nature, a dynamic high-technology industry. The "right" answers change, and even those that work in the industry may disagree on what the new answers are.

Imposing duties to deal in digital markets will affect how firms compete with one another in both static and dynamic terms. A firm that avails itself of its dominant competitor's platform will need to maintain some level of compatibility with it to maintain the benefits of the interoperability. The competitor, therefore, will have less incentive to compete by offering new or improved core functionalities; instead, it will focus on repackaging or reselling the services already offered by the dominant firm. "A duty to deal mandate is likely to shift resources away from dynamic innovation (*e.g.*, trying to build a new, better service) to static competition (trying to obtain access to and repackage existing services)." Gus Hurwitz, *Digital Duty to Deal, Data Portability, and Interoperability*, 28 Global Antitrust Inst. Rep. Digital Economy 1024, 1056 (2020); *cf. See Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 550 (2002) (Breyer, J., concurring in part and dissenting in part) ("firms that share existing facilities do not compete in respect to the facilities that they share, any more than several grain producers who auction their grain at a single jointly owned market compete in respect to auction services.")

Here, the States ask that the courts "enjoin[] and restrain [Facebook] from continuing to engage in any anticompetitive conduct and from adopting *in the* *future any practice*, plan, program, or device *having a similar purpose* or effect to the anticompetitive actions set forth above." JA113 (¶ 277) (emphasis added). This could include setting static terms and conditions for mandating access and interoperability with Facebook for many years—regardless of how technology and social network services evolve.

Despite the DOJ's crisp remark that such a remedy would be simple—"conditions on API access simply could be enjoined," is that truly straightforward in a complex, rapidly evolving industry? *See* Br. of the United States as *Amicus Curiae* Supporting Plaintiffs-Appellants, *New York et al. v. Facebook, Inc.* (D.C. Cir. Jan. 28, 2022) (No. 21-7078) ("DOJ Amicus"). And what impact would that have on innovation and, ultimately, the users of these services?

In short, any regime in which courts create and enforce terms of a commercial interaction, that the court itself has compelled into existence, risks forcing the court into the difficult role of a regulator, increasing error and decision costs, and ultimately harming consumers.

II. PRECEDENT THAT SETS THE "OUTER BOUNDARY" OF ANTITRUST LIABILITY FOR FAILURE TO DEAL WITH ONE'S RIVALS LIKELY WENT TOO FAR AND SHOULD NOT BE EXPANDED AS THE STATES PROPOSE

The Supreme Court "ha[s] been very cautious in recognizing [refusal to deal] exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." *Trinko*, 540 U.S. at 408. Rightly so, because "*Aspen Skiing* is at or near the boundary of § 2 liability." *Id.* at 409.

Aspen Skiing imposed liability not simply because a monopolist refused to continue a previously established business relationship with a rival, but because the monopolist did so at the expense of a *profitable* arrangement. *See infra*, Part III (discussing the facts of *Aspen Skiing*). Arguments to limit *Aspen Skiing* to the context of its specific facts are pervasive in the literature. One scholar has argued for "a very narrow reading that *effectively removes it as a precedent* for future cases." Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why* Aspen *and* Kodak *are Misguided*, 68 Antitrust L.J. 659, 678 (2001) (emphasis added). Indeed, he goes further to state that *Aspen Skiing* must be given a "narrow construction" in order to prevent it from being taken as an endorsement of "plaintiffs successfully taking property from defendants," in what would be a "a dangerous direction for antitrust policy." *Id.* at 660, 676; *see also id.* at 676–678 (specific criticism of the economics of *Aspen Skiing*).

Other scholars have cast *Aspen Skiing* as a negation of property rights and free markets more generally. *See* Alan J. Meese, *Property,* Aspen*, and Refusals to Deal*, 73 Antitrust L.J. 81, 82 (2005) (observing that "the Court unduly qualified the defendant's property rights and did so in a way that enhanced the prospect of opportunistic free riding by venture partners"). Still others have noted that the "ill-considered" *Aspen Skiing* "failed to recognize a possible procompetitive explanation of the defendant's conduct and failed to identify evidence sufficient to support a plausible anticompetitive explanation." John E. Lopatka & William H. Page, *Bargaining and Monopolization: In Search of the "Boundary of Section 2 Liability" Between* Aspen *and* Trinko, 73 Antitrust L.J. 115, 118 (2005); *see also* Hovenkamp Paper, *supra* p. 5, at 18–22 (explaining how the ruling in *Aspen Skiing* invites judicial excess).

Professor Hovenkamp describes another fundamental problem of *Aspen Skiing*:

> [A]s a matter of principle, public utility style price regulation is not the antitrust solution to a failure of competition. But even then an antitrust order to deal creates a perverse incentive that runs counter to the entire principle of the antitrust laws that where the government has not prescribed regulation, competition is to be the norm.

Herbert J. Hovenkamp, *The Monopolization Offense*, 61 Ohio State L.J. 1035, 1044 (2000). As a result, "[a]ntitrust should never intervene in a market unless it can provide an incentive toward competition"—and *Aspen Skiing* "ha[s] not been able to meet this test." *Id.* at 1045.

It is no surprise, then, that few cases have followed *Aspen Skiing*—particularly after *Trinko*. 540 U.S. at 409; *see also* Hovenkamp, *The Monopolization Offense*, *supra* p. 13, at 1044–1045 (noting that "the courts have generally responded" to "problems" in the doctrine "by construing the *Aspen* and [*Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992)] cases narrowly"); Lindsey Edwards, Douglas Ginsburg, & Joshua Wright, *Section 2 Mangled: FTC v. Qualcomm on the Duty to Deal, Price Squeezes, and Exclusive Dealing*, 8 J. Antitrust Enforcement 335, 337 (2019) ("[Trinko] . . . clarified and narrowed *Aspen Skiing* and reinforced the importance of a company's right freely to decide with whom to transact."); Geoffrey Manne & Joshua Wright, *If Search Neutrality Is the Answer, What's the Question?*, 2012 Colum. Bus. L. Rev. 152, 192–193 (2012) (noting that *Trinko* limited a competitor's duty to deal under *Aspen Skiing* to "an extremely narrow set of circumstances" and that courts and antitrust agencies "have been reluctant to expand the duty.").

Indeed, commentators understandably concluded that *Aspen Skiing*'s liability theory was severely undermined after *Trinko* and *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009). Easterbrook, *supra* p. 9, at 441–442; Richard A. Epstein, *Judge Koh's Monopolization Mania: Her

Novel Antitrust Assault Against Qualcomm Is an Abuse of Antitrust Theory, 98 NEB. L. REV. 250 (2019) (stating that *Trinko* held that a duty to deal exists only in "exceptional circumstances" and that "[m]odern antitrust law has established a strong safe harbor of *per se legality* against the claim of illegal techniques toward monopolization"); *see also Qualcomm*, 969 F.3d at 994 (emphasizing that the Court in *Trinko* warned that "the *Aspen Skiing* exception should be applied only in rare circumstances").

Accordingly, because mainstream scholarship generally does not support compelled dealing, and *Aspen Skiing* provides, at best, the "outer boundary" for that doctrine, unilateral refusals to deal can give rise to liability only in very narrow circumstances that do not exist here.

Beyond a *per se* rule, many scholars agree that a refusal to deal should give rise to liability only rarely—at most, when a plaintiff can plausibly show that a defendant gave up a *more profitable* cooperative arrangement with a competitor in favor of a *less profitable* exclusion strategy that recouped its losses through the plaintiff's resultant inability to compete. For example, Ordover and Willig advocate for a test that "examines whether the actual strategic decisions adopted by a firm make business sense (*i.e.*, are profitable) irrespective of their effect on the economic viability of rivals, or whether these strategic decisions are only profitable because they destroy rivals' ability to compete and, thereby, enable the firm to earn additional monopoly profits in some relevant market." Janusz A. Ordover & Robert D. Willig, *Access and Bundling in High-Technology Markets*, *in* Competition, Innovation and the Microsoft Monopoly: Antitrust in the Digital Marketplace 103, 109 (J.A. Eisenach and T.M. Lenard eds., 1999). Other scholars agree. *See, e.g.*, Br. of Amici Curiae International Center For Law & Economics and Scholars of Law & Economics Supporting Appellee at 7, *FTC v. Qualcomm,* 969 F.3d 974 (9th Cir. 2020) (No. 19-16122), ECF No. 99 ("[A] duty to deal requires that the company gave up a profitable course of dealing with rivals and adopted a less profitable alternative.").

The DOJ has taken positions in accord with this view. For example, in an *amicus* brief filed in *Trinko*, the FTC and DOJ contended there is a safe harbor: "conduct is not exclusionary or predatory unless it would *make no economic sense* for the defendant but for its tendency to eliminate or lessen competition." Br. of U.S. and FTC as *Amici Curiae* Supporting Petitioner at 15, *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682) (emphasis added); *see also* Br. of U.S. as *Amicus Curiae* Supporting Neither Party at 6, *Viamedia, Inc. v. Comcast Corp.* (7th Cir. Nov. 8, 2018) (No. 18-2852), ECF No. 33 (urging "longstanding" position that § 2 "permits refusals to deal that are supported by valid business justifications"); Amicus of U.S. at 25, *Qualcomm, supra* p. 7 ("[N]o finding by the court suggests that *Qualcomm*'s decision to license in a profit-maximizing way was a scheme calculated to cause 'losses to drive rivals from the market or to discipline them,' as necessary under *Aspen Skiing*.").

Thus, the States' attempt to expand *Aspen Skiing* should be rejected because it would sharply cut against the prevailing scholarship to limit *Aspen Skiing* to particular circumstances where a defendant forgoes a profitable arrangement to lessen competition.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT FACEBOOK'S ALLEGED CONDUCT DID NOT COME WITHIN THE NARROW SET OF CIRCUMSTANCES IN *ASPEN SKIING*

The District Court recognized that the Supreme Court has imposed strenuous limits on authorities or rivals that seek to bring refusal to deal cases because "[t]he central principle that governs refusal-to-deal claims is that, as a general matter, a monopolist has 'the right to refuse to deal with other firms.'" JA239 (quoting *Trinko*, 540 U.S. at 408). The District Court correctly noted:

> "[M]onopolists are both expected and permitted to compete like any other firm," and "[p]art of competing like everyone else is the ability to make decisions about with whom and on what terms one will deal." *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 454 (7th Cir. 2020) (citations omitted). This general no-duty-to-deal rule holds even where a monopolist refuses to deal with its competitor merely "in order to limit entry," *Trinko*, 540 U.S. at 407—in other words, because it wants to prevent that rival from competing with it.

Id. (citing authority).

The States and certain of their amici seek to broaden Aspen Skiing in order to capture within it Facebook's Platform policies. Appellants' Br. at 63–64, 66–67; Br. of U.S. as *Amicus Curiae* Supporting Appellants at 18–28; Br. of *Amicus Curiae* the American Antitrust Institute in Support of Plaintiffs-Appellants, *New York et al. v. Facebook, Inc.* (D.C. Cir. Jan. 28, 2022) (No. 21-7078) ("AAI Amicus"). But—as the District Court recognized (JA241–242, 243–244)—liability for unilateral refusals to deal must only be found when the narrow circumstances in *Aspen Skiing* are present.

In *Novell*, the Tenth Circuit recognized that "[s]ince *Aspen,* the Supreme Court has refused to extend liability to various other refusal to deal scenarios, emphasizing that *Aspen* represents a 'limited exception' to the general rule of firm independence." *Novell*, 731 F.3d at 1074. The court then described that "at least two" factors must be present to "invoke *Aspen*'s limited exception" to "the general rule protecting unilateral conduct." *Id.*

First, "there must be a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival." *Novell*, 731 F.3d at 1074. Second, "the monopolist's discontinuation of the preexisting course of dealing must suggest a willingness to forsake short-term profits to achieve an anti-competitive end." *Id.* at 1075 (internal quotes omitted).

Even if these two factors are present, the court recognized that "firms routinely sacrifice short-term profits for lots of legitimate reasons that enhance consumer welfare." *Novell*, 731 F.3d at 1075. Therefore, the court made clear that even *more* is required—the refusal to deal must be "part of a larger anticompetitive enterprise" "to drive a rival from the market." *Id.* "Put simply, the monopolist's conduct *must be irrational but for its anticompetitive effect.*" *Id.* (emphasis added); *see also id.* at 1077 ("The point of the profit sacrifice test is to isolate conduct that has *no* possible efficiency justification." (emphasis in original)); Areeda & Hovenkamp, *supra* p. 6, ¶ 772d3 (stating that a unilateral refusal to deal must be "irrational" meaning "the defendant sacrificed an opportunity to make a profitable sale only because of the adverse impact the refusal would have on a rival").

The facts alleged here do not meet the exacting standard necessary to state a claim under *Aspen Skiing*. *First*, in *Aspen Skiing*, the parties had negotiated the joint arrangement annually for over a decade until the defendant's about-face. *Aspen Skiing*, 472 U.S. at 589–592. Here, by contrast, developers never paid Facebook for unrestricted access to Platform and Facebook's policies were unilateral and not aimed at a particular competitor. Facebook's Br. at 37; *see* JA92 (¶¶ 195–196); JA62–63 (¶ 80).

Second, as the States acknowledge, the social media sector experienced major industry-wide changes during the time period that is the subject of the

Complaint, *see* JA66–67, 68, 80 (¶¶ 92–97, 100, 149–150). Yet the States fail to allege how Facebook's policy updates to account for these changes were irrational. At most, the States allege that Facebook's updates to its Platform policies caused it to forego some "profitable business relationships," JA90, 92 (¶¶ 186, 195–196), but the States allege no facts indicating these policy changes were unprofitable to Facebook *overall*, even in the short term. Additionally, there are no allegations that it would have remained beneficial for Facebook to maintain its platform policies as competitors emerged. In other words, the States' allegations fail to show how updates to Facebook's policies were different from how all businesses conduct themselves to adapt to industry changes—particularly in an industry as dynamic as the one in which Facebook operates. *See Qualcomm*, 969 F.3d at 994–95.

Indeed, Facebook's ability to profit depends on its ability to gain (and keep) users. *See, e.g.*, Facebook Inc., Annual Report (Form 10-K) at 5, 7, 15–16 (Dec. 31, 2013) (describing Facebook's strategy and competitiveness as oriented on its ability to attract, connect, and engage users). Facebook's decision to prevent third parties from using free tools provided by Facebook to then divert users *away* from Facebook therefore demonstrates nothing more than Facebook's long and short-term interest in retaining its user-base. For example, the first material risk factor Facebook listed in its 2014 Form 10-K was that "[i]f we fail to retain existing users or add new users, or if our users decrease their level of engagement with our products, our revenue, financial results, and business may be significantly harmed." Facebook Inc., Annual Report (Form 10-K) at 9 (Dec. 31, 2014).

Third, in *Aspen Skiing*, the defendant would not accept the *face value* of its ski tickets from the plaintiff—strongly suggesting that the defendant engaged in less efficient behavior to hurt a rival. *See Trinko*, 540 U.S. at 409 ("[T]he defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent."); *id.* ("In *Aspen Skiing*, the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher."). The States do not allege that similar facts exist here. Their allegations instead make clear that when the actions of Facebook's competition were harmful, Facebook reacted as a rational competitor would.

The District Court also recognized that courts have generally deemed unilateral refusals to deal lawful—consistent with the general goal of antitrust law—i.e., to benefit consumers (rather than protect competitors). JA240–241. More specifically, and in line with the economic principles discussed above, forcing a firm to deal with a rival may have the detrimental effect of *harming* consumers by: (1) reducing incentive for firms to invest in and innovate goods, services, etc.; (2) allowing courts to define the conditions pursuant to which firms deal with each other; and (3) providing opportunities for collusion between competitors. *Id.*

While certain *amici* suggest that "[n]one of those policy concerns" are relevant here (AAI Amicus at 12-13), their reasoning illustrates why a departure from *Trinko* would be problematic. For instance, AAI suggests simply that "[i]nterconnection specifications freely and voluntarily given away to attract content are a far cry from the [OSS] services Verizon was forced to price and sell to rivals against its wishes." AAI Amicus at 13. But who determines if it is a "far cry" and when a firm must "freely and voluntarily" give something to its rival? Additionally, the DOJ implies that forced sharing here may not have detrimental effects on investment in innovation because developers may create value on Facebook. DOJ Amicus, *supra* p. 11, at 25–26. But the DOJ overlooks the key point discussed above—that Facebook depends on users to stay *on Facebook*—and therefore, it is rational not to aid competitors in using resources Facebook provides to urge users away from Facebook by creating a competing social media service. A finding to the contrary would encourage free-riding in a way that is in tension with these goals. *See* Meese, *supra* p. 13, at 82, 106, 109 (noting that in *Aspen*, "the Court failed to consider the very real possibility that the new agreement offered by the defendant was an effort to create a contractual property right that prevented the plaintiff from free riding on the defendant's promotional investments").

The facts alleged here do not fall within the narrow course-of-conduct in *Aspen Skiing*, underscoring the impropriety of vilifying Facebook's conduct. This view of Facebook's policies is consistent with the decisions upholding Facebook's platform policies. *See* Facebook's Br. at 37.

IV. THE DISTRICT COURT USED THE PROPER LEGAL FRAMEWORK TO ANALYZE THE STATES' PLATFORM POLICY CLAIMS

Implicitly rejecting the States' call for an amorphous standard of Section 2 liability, the District Court properly analyzed Facebook's conduct through the refusal to deal test derived from the particular facts at issue in *Aspen Skiing* and clarified by *Trinko*. JA244–246. The District Court also rejected the States' attempt to characterize their allegations as other types of antitrust violations, such as conditional dealing. *Id.* at 33–34. The District Court's analysis was proper.

A. The Complaint's allegations fall squarely within the refusal to deal legal framework.

The States attempt to evade the application of the strict test for refusals to deal by recasting their allegations as exclusive dealing. Exclusive dealing involves an agreement whereby an alleged monopolist requires a buyer to buy goods or services only from it (or a seller to sell certain goods only to the monopolist). *See* Areeda & Hovenkamp, *supra* p. 6, ¶ 1800. The conduct alleged here is not exclusive dealing.

The Complaint alleges that Facebook declined to make certain APIs available to rivals who sought to use that access to take Facebook's customers. JA93–94 (¶¶ 199–203). As noted above, that is permissible, rational, conduct under established Supreme Court precedent and many businesses, regardless of size, impose similar limits. The District Court decision is consistent with all of the federal courts of appeal that have considered this issue. *See Qualcomm*, 969 F.3d at 993–94; *Viamedia*, 951 F.3d at 455–60; *Novell,* 731 F.3d at 1075; *see also St. Luke's Hosp. v. ProMedica Health Sys., Inc.*, 8 F.4th 479, 486–87 (6th Cir. 2021) (citing Judge Boasberg's decision).

The States attempt to avoid precedent by claiming that Facebook has not just refused to deal with its competitors, but also imposed conditions on third-party developers and apps thereby creating an exclusivity arrangement. States' Br. at 60–61. This, however, is not what they alleged. The States did *not* allege that Facebook demanded or agreed that developers not work with rivals. They alleged that Facebook's refusal was intended to stop the use of its Platform to create new features that compete with Facebook. JA93–94 (¶ 202). This is a mischaracterization that relies on *Lorain Journal*, *Actavis*, and *Otter Tail*, each of which involved agreements with others purportedly designed to harm the plaintiffs. States' Br. at 59–60.

Here, the States do not allege that Facebook's terms of access to its Platform interfered with any application developer's *independent* dealing with third parties, which is required under a theory of conditional dealing. *Lorain Journal* and *Otter Tail* both involved claims of a monopolist demanding that third parties agree not to work with the monopolist's rivals. *Lorain Journal Co. v. United States* held that the newspaper's demands that its advertisers agree to boycott its rival was illegal. 342 U.S. 143, 152–155 (1951). It seems clear that it would have been legal for the newspaper simply to refuse to run ads for the rival radio station, particularly in light of *Trinko*. Here, there is no allegation that developers have agreed with Facebook not to develop products for rivals, and the alleged facts show the opposite: many developers that use the Platform deal with Facebook's rivals too.

Otter Tail Power Co. v. United States concerned a regulated utility's demand that its customer generators not deal with its competitors. 410 U.S. 366, 378 (1973). The decision, which predates *Trinko* by 31 years, is very narrow given that it involved a heavily regulated utility. *See, e.g.*, Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 848 (1989) ("Thus, the Court could airily require *Otter Tail* to deal but never burden itself with the administrative details, because the Federal Power Commission had the statutory authority and presumed expertness to regulate the prices and terms of dealing. *Otter Tail* is thus quite narrow."); *see also* Areeda & Hovenkamp, *supra* p.

6, ¶ 772 ("*Otter Tail* is quite distinguishable from the Supreme Court's subsequent *Trinko* decision, where federal and state regulators had all the power to issue and had issued the dealing orders that the plaintiff was requesting, as well as the power to remedy violations.").

Finally, *FTC v. Actavis, Inc.* is a case arising under Section 1 concerning allegations of an agreement between pharmaceutical manufacturers to delay entry of generic drugs—not a Section 2 case asserting a unilateral refusal to deal or other arrangement otherwise pertinent here. 570 U.S. 136, 152 (2013). *Actavis* is irrelevant to the allegations by the States.

These cases are not applicable to the conduct alleged in the Complaint. Saying the magic word that access is "conditioned" on an agreement not to compete does not transform a refusal to deal with competitors into anything more.

B. The Court should not adopt the States' pliable, vague standard for refusals to deal.

The States describe as "flexible" the standard to determine if there has been a potentially anticompetitive refusal (States' Br. at 63), ignoring the test articulated by *Trinko* and appellate courts that have since considered the issue. *Supra*, p. 24; *see also Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.) ("Rules that seek to embody every economic complexity and qualification may well . . . undercut[] the very economic ends they seek to serve.").

The States urge the Court to infer anticompetitive effect from Facebook's purported malice. *Id*. at 64. Their malleable approach should not be adopted here.

The States' focus on intent (States' Br. at 57, 64), disregards that antitrust liability is determined by competitive effects, not the purpose or intent behind the conduct. *See United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001). Evidence that a defendant *intended* to harm its rivals is insufficient to prove the requisite harm to competition: "[A]n act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition." *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993). Absent conduct consistent only with anticompetitive harm, an inference from the intent behind a monopolist's conduct is unjustified. "Indeed, [under most circumstances], the 'intent' to create a monopoly anticompetitively cannot be distinguished from the intent to do so competitively." Hovenkamp, *The Monopolization Offense*, *supra* p. 13, at 1039; *see also Novell*, 731 F.3d 1078 ("Were intent to harm a competitor alone the marker of antitrust liability, the law would risk retarding consumer welfare by deterring vigorous competition . . . .").

Similarly, in *Brooke Group*, the Supreme Court dismissed the relevance of intent evidence in establishing the crucial element of recoupment in predatory pricing: "No inference of recoupment is sustainable on this record, because no evidence suggests that [defendant]—*whatever its intent in [its allegedly predatory conduct] may have been*—was likely to obtain the power to raise [prices] above a competitive level." 509 U.S. at 232 (emphasis added). Despite evidence that the defendant was successful in bringing about the intended outcome of its scheme, its intent to bring it about—even coupled with the fact that it *did* come about—was insufficient to establish anticompetitive effect. *Id.* at 242–43. Because the alleged "means of recouping losses from predatory pricing [was] 'highly speculative,' competent evidence [was] necessary to allow a reasonable inference that [defendant's conduct] poses an authentic threat to competition." *Id.* (citation omitted).

In the absence of the ability to distinguish effects, intent evidence is likely only to exacerbate the risk of false positives—precisely the result the *Trinko* court sought to avoid. "Evidence of intent is not particularly probative of underlying economic realities of the sort that almost all antitrust laws are intended to punish and deter . . . . reliance on . . . statements of intent by economic actors threatens to undermine the economic foundations of antitrust jurisprudence, and thus the purpose of the antitrust laws." Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 Ariz. L. Rev. 609, 651, 654 (2005).

Regardless of how the States attempt to characterize the refusal, they cannot evade *Trinko*'s holding that even a monopolist has the right to refuse to deal or cooperate with its competitors and can even break off an ongoing relationship so long as the monopolist is not sacrificing benefits to itself when it does so. JA242–243 (citing *Trinko*, 540 U.S. at 408–09 & *Aspen Skiing*, 472 U.S. at 610–11).

CONCLUSION

In light of the economic and legal principles discussed above, the District Court's decision should be affirmed.

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Respectfully submitted,

WHITE & CASE

/s/ *George L. Paul*

George L. Paul
Andrew Black
Jaclyn Phillips
Nathan Swire
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, D.C. 20005
Telephone: + 1 202 626 3600
Facsimile: + 1 202 639 9355

Rucha Phadtare
WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: + 1 212 819 8200
Facsimile: + 1 212 354 8113

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g), that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), the brief contains 6,492 words.

I further certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared using Microsoft Word 2016 in a proportionally spaced typeface (Times New Roman, 14 point).

Dated: March 28, 2022
Washington, D.C.

/s/ *George L. Paul*
George L. Paul

CERTIFICATE OF SERVICE

I hereby certify that, on March 28, 2022, I caused to be filed electronically a copy of the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using this Court's CM/ECF system. Participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

/s/ *George L. Paul*
George L. Paul