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No. 22-CV-657

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,
Appellant,

v.

AMAZON.COM, INC.,
Appellee.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR AMICI CURIAE ANTITRUST LAW PROFESSORS AND ECONOMISTS SUPPORTING APPELLANT AND REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

* Authorities upon which *amici* chiefly rely are marked with asterisks.

Other Authorities

INTEREST OF AMICI

Amici are law professors and economists who specialize in antitrust law. They have no particular role or pecuniary interest in this litigation, apart from hoping to ensure that antitrust doctrine remains on sound legal footing. The name and affiliation of each of the amici appears below. Each has signed this brief in his or her individual capacity, and not on behalf of their university or any other affiliated entity. All parties have consented to the filing of this brief. The amici are:

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INTRODUCTION

The questions presented by this case implicate straightforward and widely accepted legal propositions—some of which have little to do with antitrust law. For example, the Superior Court's core error here involved a basic procedural mistake: It asked the District of Columbia to provide detailed pleading (or even proof) of facts that must instead be accepted as true at the motion-to-dismiss stage. As for antitrust doctrine, the District (and the United States' brief below) are both correct that (1) *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), is inapposite in cases (like this one) that involve a challenge to a written contract term, and (2) it does not matter if the same prices or market conditions *could* have resulted from "lawful, unchoreographed free-market behavior" when we already know that an agreement is involved. These errors are important and merit correction, but there is no new or controversial doctrinal ground to break in doing so.

More worrisome, however, is that the Superior Court's opinion seems to be driven by an undercurrent of doubt that is not about the existence of an agreement between Amazon and its counterparties, but rather about whether the District plausibly alleged that the contract terms at issue caused "anticompetitive effects." *See* JA 371. To be sure, the court's basis for dismissing Count I of the District's complaint is not entirely clear from the opinion—which was a written denial of a motion for reconsideration from a decision the court originally handed down orally.

But to the extent the Superior Court held that the complaint contained insufficient factual allegations of anticompetitive effects, that holding would be seriously wrong, both as a matter of procedure and of substance.

Procedurally speaking, although a plaintiff can (and here did) allege direct evidence of anticompetitive effects to make out a *prima facie* case under the rule of reason, it also suffices at the pleading stage to allege that (1) the defendant has market power and (2) the challenged restraint is of a kind that may harm competition. *See, e.g.*, *Ohio v Am. Express*, 138 S. Ct. 2274, 2284 (2018) ("Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition."). Notably, that low pleading bar does not even require alleging that those plausible anticompetitive harms outweigh the restraint's potential pro-competitive benefits—a matter that is left for later in the litigation and governed by the Rule of Reason's burden-shifting framework. The pleading standard makes sense because the Rule of Reason is a highly case-specific inquiry that requires "a fact-specific assessment of market power and market structure" alongside detailed evidence of the real-world effects of the challenged restraint. *Id.* (internal quotation marks omitted). And it is important that courts not prejudge that inquiry at the pleading stage because it is only by considering such detailed, case-by-case evidence in individual controversies that the courts will work out through experience whether and under what conditions different kinds of agreements will benefit or harm competition.

The Superior Court's holding is likewise incorrect on the substance. Economic scholarship has demonstrated that the challenged contract terms here can be anticompetitive in a variety of settings—and particularly so where a dominant online platform like Amazon is involved. That is true in the straightforward sense of causing consumers to pay higher prices. But that is not the only competitive harm these restraints cause. When they are wielded by dominant firms with market power, such contracts can also have the dynamic effect of preventing potential competition from new platforms or business models, because those potential entrants have no way to take market share from the dominant firm by underpricing it. These are very serious threats to healthy, competitive markets, and the Superior Court's skepticism about the District's pleading was thus wholly unwarranted.

Of course, Amazon will have the opportunity to prove to the ultimate factfinder that the challenged contract terms benefit competition, that they are not more restrictive than necessary to produce whatever pro-competitive benefits Amazon claims, and that those pro-competitive benefits outweigh whatever harms the District can prove up. But all of that is for the proof stage. This Court should make clear that the burden for a plaintiff at the pleading stage is to plead its case, not to rebut the defendant's—so that meritorious cases are not discarded where, as here, there is every reason to believe that the challenged restraints really can and did cause competitive harm.

ARGUMENT

I. This Case Does Not Implicate *Twombly*'s Concern About Parallel Conduct.

The Superior Court misunderstood the problem that *Twombly* addresses, and thus applied its discussion of "unchoreographed free-market behavior" to a question it is not logically equipped to answer.

The Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), arose from a unique problem in antitrust law about the inferences of agreement to be drawn from parallel conduct. One of the cardinal sins under the Sherman Act is a conspiracy among horizontal competitors to limit the competition among them—behavior that is so likely to harm competition that the law typically condemns it *per se*. One might therefore assume that parallel conduct in the market by firms that should be competing against each other is very good evidence of a fundamental antitrust violation—not the fire itself, perhaps, but at least highly suggestive smoke. *See, e.g.*, *Twombly*, 550 U.S. at 553 ("[A] showing of 'parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement.'") (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540-41 (1954)).

The problem, however, is that parallel conduct is also consistent with competition. In healthy, highly competitive markets, we expect firms to compete each other down to the same price level. And in less-healthy markets characterized by concentration and imperfect competition, microeconomics predicts that businesses will frequently be able to raise prices above the competitive level through "conscious parallelism," where "firms in a concentrated market recognize their shared economic interests and their interdependence with respect to price and output decisions," *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 227 (1993), without any actual agreement among them. Unfortunately, while this kind of "tacit" collusion is bad for consumers and leads to the same market inefficiencies as price fixing (at least in the short run), it is not illegal; it is just a (predictable) product of fully independent firms trying to maximize their own profits in a free market. Thus, to the extent that there is parallel conduct among firms and prices are above the competitive level, that conscious parallelism is not necessarily good evidence of an illicit agreement, but is certainly good evidence of imperfect competition, inefficient market outcomes, and consumer harm.

Accordingly, the Supreme Court in *Twombly* held that it would not permit a bare allegation of parallel conduct to support an inference of conspiracy at the pleading stage, even if it was "admissible circumstantial evidence" of an "agreement." *See* 550 U.S. at 553. As the Supreme Court would later put it, while such "parallel conduct [i]s consistent with an unlawful agreement," it is also fully "compatible with … lawful, unchoreographed free-market behavior." *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009). The Court was thus unwilling to allow antitrust cases to proceed to expensive discovery on bare allegations of parallelism, because that could routinely impose enormous costs on firms engaged in fully innocent and competitive behavior. *See Twombly*, 550 U.S. at 557-60. And so it adopted a rule that, "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action," in order to survive a motion to dismiss. *Id.* at 557. In other words, a plaintiff must plead not only parallel conduct, but also facts that "tend to exclude the possibility" that the conditions they are complaining about arose from innocent competition. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp*., 465 U.S. 752, 764 (1984)).

This was the rule the Superior Court was invoking when it emphasized its view that it was "equally likely" that "the prices" available on Amazon and other sellers were caused by "lawful, unchoreographed free-market behavior," as opposed to Amazon's contractual terms. JA 369-70. Indeed, the court expressly held that this rule was relevant even if, as the District argued, "[t]here is no question there is an agreement here." *Id.* According to the Superior Court, "in *Twombly*, the [lower] court found that the agreement could be explained by lawful, unchoreographed free-market behavior. And the Supreme Court said that it was okay for the court to have done that." JA 369 (citing *Iqbal*, 556 U.S. at 680). This is analytically unsound.

First, it is noteworthy that the Superior Court did not even correctly quote from *Iqbal*'s description of *Twombly* here, let alone from *Twombly* itself. The Supreme Court's discussion in *Iqbal* in fact says that the "**parallel conduct** [in *Twombly*] … did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful unchoreographed free-market behavior." *See* 556 U.S. at 680 (emphasis added). In contrast, the Superior Court asked whether "the **agreement** could be explained by lawful, unchoreographed free-market behavior." JA 369 (emphasis added). This is a critical error: On its face, *Twombly* is about whether "parallel conduct" implies an "illicit accord," not about the source of the "illicit accord" or "agreement" itself, nor about whether such an agreement could plausibly cause anticompetitive effects once it is established.

Indeed, correctly quoted, it is clear from the very language that the Superior Court was referencing that *Twombly* is inapplicable here, because the District did not attempt to plead the existence of an agreement (or anything else) through parallel conduct. Instead, it pled the agreement element of its Section 1 claim by proffering *written agreements* containing the disputed contract terms. When it pointed to the parallel prices on Amazon and other sellers' websites, it was only to plead—in combination with other facts—that (1) the agreements between Amazon and its counterparties were actually being implemented; and (2) the resulting prices exceeded the competitive price.

Critically, proving the latter fact has little to do with the agreement itself. As noted above, prices can be below, at, or above the competitive price for many reasons—including conscious parallelism—whether there are agreements in place among market participants or not. *See supra* pp.5-6. Thus, to plausibly plead that the market subject to the alleged restraint has supracompetitive pricing, plaintiffs must point to something other than the parallel pricing or the agreement themselves.

Here, the District plausibly alleged that the identical prices on Amazon and other websites were supracompetitive because sellers were charging the same prices on platforms other than Amazon even though they could sell their wares much more cheaply on those alternative platforms (including on their own websites). DC Br. 29-31. That behavior makes no sense in an unrestrained market. Absent a restraint, a seller who could save $2.00 by making a sale on a platform other than Amazon would have an incentive to charge, say, $1.00 less on those alternative sites, saving the consumer one dollar and saving the other dollar for itself every time a consumer chooses an alternative platform. Accordingly, and given that the agreement obviously exists (having been written down), it is more than plausible to infer—at the motion-to-dismiss stage—that these parallel prices are an effect of the agreement that is harming consumers.

What the antitrust plaintiff plausibly pled here was (1) an agreement; (2) an anticompetitive effect; and (3) a plausible, causal connection between them. And that is all that is necessary to state a *prima facie* case under the rule of reason. Critically, *Twombly* did not involve a plaintiff who could plausibly plead all three, but was instead about whether making an inference of the first fact is plausible when you have *nothing* more to suggest it than the other two—or, really, nothing more than parallel conduct, which may or may not even involve an anticompetitive effect. *See supra* pp.4-6. In such cases, competition as an alternative explanation for parallel conduct does undermine the inference that there was undiscovered collusion because it defeats the need to assume an *unknown* fact (*i.e.*, an agreement) in order to explain the more limited facts that the plaintiff can plausibly allege (*i.e.*, the parallel conduct). In contrast, the fact that parallel conduct could have been caused by competition does not undermine the *prima facie* case that a *known* agreement to restrain trade accomplished its design: All that shows is that the plaintiff and defendant will have competing causal stories—a contest that is not unique to antitrust law and not appropriate for resolution on a motion to dismiss.

II. The District Plausibly Alleged That Amazon's Contract Terms Caused Anticompetitive Effects.

Instead of *Twombly*, this case is governed by a different, longstanding rule of antitrust pleading. In addition to an agreement that restrains trade, an antitrust plaintiff must plead that the agreement actually creates an anticompetitive effect. That can be accomplished by pointing to direct evidence of anticompetitive effects in the market, like higher prices or lower output than would otherwise be expected. Or it can be accomplished through the indirect method, which requires showing both (1) that the defendant has market power, and (2) that the restraint could plausibly cause anticompetitive distortions when combined with that market power. *See Am. Express*, 138 S. Ct. at 2284.

The main obstacle to successfully pleading anticompetitive effects via the indirect method is the first requirement, establishing market power, which is not always easy to show. But as the cases cited by the Supreme Court in *American Express* make clear, the second requirement is not particularly onerous. In the Second Circuit's words:

> A plaintiff seeking to use market power as a proxy for adverse effect must show market power, plus *some* other ground for believing that the challenged behavior *could* harm competition in the market, such as the inherent anticompetitive nature of the defendant's behavior or the structure of the interbrand market.

Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 97 (2d Cir. 1998) (cited in *Am. Express*, 138 S. Ct. at 2284) (emphasis added). Further down the road of litigation, the plaintiff's burden will become more substantial: At the proof stage, the plaintiff must in fact "prove that the challenged restraint has a substantial anticompetitive effect that harms consumers," 138 S. Ct. at 2284, and will have to meet the defendant's contrary arguments with data that actually demonstrate the existence of the anticompetitive effect and the fact that it outweighs any cognizable pro-competitive benefits. *See, e.g.*, *PLS.Com*, *LLC v. Nat'l Assn. of Realtors*, 32 F.4th 824, 839 (9th Cir. 2022) ("[W]hether the alleged procompetitive benefits … outweigh its alleged anticompetitive effects is a factual question that the district court cannot resolve on the pleadings."). But the initial requirement to plead a *prima facie* case is much lighter: If the defendant has market power and the existence of the agreement (or other restraint) is clear, the remaining question (at the pleading stage) is only whether it is plausible that such a restraint could cause anticompetitive effects.

An example of this can be seen in cases about exclusivity contracts. It is generally understood that exclusive-dealing contracts are "often pro-competitive," but can also be anticompetitive if the defendant has market power and is foreclosing a substantial portion of the available buyers or suppliers that its competitors (or potential competitors) need access to in order to sell or make competing goods. *See, e.g.*, *Vazquez-Ramos v. Triple-S Salud, Inc.*, 55 F.4th 286, 290, 299 (1st Cir. 2022). Comprehensive rule of reason analysis of exclusivity contracts could potentially turn on a number of factors, including how easy it would be for other suppliers to enter the market and other case-specific aspects of the industry at issue. But for pleading purposes, it would suffice for the plaintiff to allege that the defendant has market power and that it presently has exclusive deals with a substantial share of the market. *See, e.g.*, *id.* at 299.

As we discuss below, it is plausible that the challenged contract terms here can cause anticompetitive effects when wielded by a firm like Amazon. But the Superior Court never analyzed the plausibility of anticompetitive effects because it never asked the right pleading-stage question. The Superior Court's opinion does not even ask whether Amazon has market power (it clearly does), let alone whether a firm like Amazon *could* cause anticompetitive effects by preventing its sellers from offering their wares at lower prices on competing sites or forcing its suppliers to guarantee Amazon a minimum profit margin. Instead, it asks whether the District's complaint precludes the possibility that the actual prices that are currently seen in the market might also be explained by competition. And that question is just not relevant to the pleading requirement under *either* the direct or indirect methods of demonstrating an anticompetitive effect at the motion-to-dismiss stage.

In our view, it is clear that the District adequately alleged anticompetitive effects using both methods. Begin with the direct method. Among other things, the District alleged that sellers are setting the same prices on their own websites as they do on Amazon, when they would earn more money *per sale* if they offered and made sales at a discounted price on other platforms, including their own websites. That factual allegation plausibly suggests that Amazon's contracts are causing sellers to act in ways that would otherwise be economically irrational—leading them to set supracompetitive prices and eliminating price competition among the different platforms that compete (or could compete in the future) against Amazon. That is direct evidence of a *plausible* anticompetitive effect, and while it may be possible to contest the "causal relationship" between the prices on lower-cost platforms and Amazon's contract terms, that contest must be left for later stages in the litigation. *See Vasquez-Ramos*, 55 F.4th at 295.

Rather than credit the District's plausible allegations, the Superior Court seemed to assume that "[i]f other online marketplaces charge lower fees than Defendant, including charging lower commission, sellers may simply choose not to sell on Defendant's marketplace." JA 370. This was doubly erroneous. First, it is contrary to the allegation of market power—which necessarily implies that Amazon's counterparties cannot just divert to substitutes when they find Amazon's prices or contractual terms unattractive. And, second, it simply refuses to credit the District's factual allegation that "other online marketplaces" *do* in fact "charg[e] lower commissions," and yet sellers remain stuck to Amazon and its restrictive contract terms—unable to abandon the dominant sales platform or to allow other platforms (including their own websites) to compete with Amazon on price. The truth of that purely factual allegation cannot be disputed at the motion-to-dismiss stage, and it plainly raises a plausible inference that Amazon's contract terms are causing an anticompetitive effect.

And yet, again, such direct evidence of anticompetitive effects was not necessary—it would have been enough if contract terms like Amazon's *could* generally cause anticompetitive effects, leaving a detailed analysis of the structure of this market and the economic data on actual effects for a later litigation stage. As we now explain, contract terms like these can indeed have anticompetitive effects, particularly in the hands of dominant platform like Amazon. And, when combined with plausible allegations of market power, that suffices to allow antitrust plaintiffs to proceed into discovery and to develop the data necessary to actually show that this plausible anticompetitive effect is coming to pass.

III. Most-Favored-Nations Clauses and Minimum Margin Agreements Can Cause Competitive Harm, Particularly When Deployed By Dominant Platforms.

Although—having failed to ask the right questions—the Superior Court did not deny that contract clauses like Amazon's can cause competitive harm, it is nonetheless important to emphasize that they can. Both common sense and economic analysis demonstrate the Amazon's contract terms can keep prices high and prevent entry by rival platforms hoping to compete with a dominant firm like

Amazon on price. Antitrust enforcement against these contracts is thus important, and the District's case should certainly be allowed to proceed past Amazon's motion to dismiss.

This case concerns two interrelated contractual terms, a "most-favored-nation clause" or "MFN," and a "minimum-margin agreement" or "MMA." The first requires third-party sellers on Amazon to agree that they will not sell their wares on the Amazon platform at prices that are "significantly higher" than those available elsewhere. The second requires businesses that supply Amazon with products for its own, Amazon-branded sales (*i.e.,* first-party suppliers) to guarantee that Amazon will recoup a minimum profit on those sales. The District of Columbia alleges (quite plausibly) that both terms are essentially price floors. The MFN prevents the third-party sellers from offering their goods for less than the Amazon price, even if they can sell on platforms other than Amazon at a lower cost to themselves. And the MMA essentially prevents first-party suppliers from selling their own wares at a discount to other vendors because, if those vendors pass on their savings to consumers and force Amazon to match a lower price, Amazon's loss of profits will be suffered by the supplier and not by Amazon. *See* DC Br. 5-11.

1. *MFNs*.

Broadly speaking, an MFN is an agreement between two counterparties that one will offer the other its best terms, and will not provide more attractive prices to other counterparties. For example, a department store could have an MFN with one of its clothing brands wherein the clothier promises that if its sells its jeans to another store at a lower price, it must provide the same discounted price to the first store, too.

Economists call this a "simple MFN" when it involves a deal between a seller and buyer that one or the other will always get the counterparty's best deal. This case involves a "platform MFN." "Platform MFNs differ from simple MFNs because they are agreements between sellers and platforms about the prices that sellers will charge buyers who purchase through rival platforms, not agreements between sellers and buyers about the prices that sellers will charge other buyers." *See* Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176, 2181 (2018). "The two types of MFNs nonetheless raise similar competitive concerns." *Id.*

Economic literature demonstrates that these clauses can cause competitive harm even though they appear at first blush to require more discount pricing rather than less. The problem is the effect of the MFN promise on the seller's optimal pricing strategy. If a seller has committed to an MFN with one or more of its large buyers, it effectively creates a larger penalty for offering a discount to anyone else—including a new entrant that wants to grow the market for the seller's goods by pursuing a discount-pricing model. The predicted result is thus that the presence of

MFNs will lead to higher prices and less effective competition. And that prediction is borne out in both formal economic modeling and empirical studies of the effects of MFNs in various industries. *See, e.g.*, Baker & Scott Morton, *supra* at 2179.[1]

Among other things, this insight indicates a major error in the Superior Court's complaint that Amazon's MFNs do not set any price floor or prohibit discounts on other sites—presumably because they are phrased as a prohibition against selling on Amazon at a "significantly higher" price than is offered elsewhere. Just like the above example, that may *sound* like a good thing because it nominally limits price hikes on Amazon, but it also has the obvious effect of discouraging sellers from offering lower prices elsewhere that it would have to offer on Amazon as well. Put another way, the restraining effect of an MFN is the same whether it is framed as a price ceiling (*i.e.* "you may not charge more on Amazon than you charge elsewhere") or as a price floor (*i.e.*, "you may not charge less elsewhere than you

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[1] For additional sources that compile economic studies and analyses on this issue, *see, e.g.*, Jonathan B. Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nations Provisions*, 27 ANTITRUST 20, 22-25 (2013); Steven C. Salop & Fiona Scott Morton, *Developing an Administrable MFN Enforcement Policy*, 27 ANTITRUST 15, 18-19 (2013); Steven C. Salop, *Practices that (Credibly) Facilitate Oligopoly Co-ordination*, in NEW DEVELOPMENTS IN THE ANALYSIS OF MARKET STRUCTURE 265, 273-79 (Joseph E. Stiglitz & G. Frank Mathewson eds., 1986); and Thomas E. Cooper, *Most-Favored-Customer Pricing and Tacit Collusion*, 17 RAND J. ECON 377, 380-86 (1986). For a contemporary empirical study confirming this effect, *see, e.g.*, Fiona Scott Morton, *The Strategic Response by Pharmaceutical Firms to the Medicaid Most-Favored-Customer Rules*, 28 RAND J. ECON. 269, 282-89 (1997).

charge on Amazon"). To the extent the Superior Court suggested otherwise, its view is economically unsound.

This is not to say that MFNs are all bad—or bad in every instance. Economists generally recognize that, under some circumstances, MFNs can benefit competition by preventing "showrooming" or free-riding,[2] as well as "protecting relationship-specific investments, discouraging holdouts, or reducing transaction and negotiation costs." Baker & Scott Morton, *supra* at 2183 n.21. But this just proves the point that case by case analysis is necessary to determine whether there is some specific reason to believe that such benefits could outweigh the anticompetitive effects in that particular instance. In other words, "when an MFN may create both anticompetitive effects and efficiencies, it is an empirical question whether it would be justified as procompetitive in any particular industry." *Id.* at 2185. And such detailed empirical questions are of course inappropriate for the motion-to-dismiss stage, where the prospect that MFNs can have anticompetitive effects when

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2 *See, e.g.*, Changsi Wang & Julian Wright, *Search Platforms*: *Showrooming and Price Parity Clauses*, 51 RAND J. ECON 32 (2020). "Showrooming" is a form of freeriding that occurs when buyers use a service—like the search engine on an online retail platform or advice from a knowledgeable local retailer—to find their preferred product, but then buy the item at a lower price from a retailer that has lower costs because it doesn't supply that valuable service. MFNs and other, similar contractual arrangements can help prevent that freeriding, particularly when used to protect smaller outlets that lack market power. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007).

combined with defendants' market power should suffice to permit further investigation of that precise question through discovery.

That is particularly true here because there is not only a robust literature on MFNs generally, but an increasingly robust literature on "platform MFNs" as well. Indeed, the leading formal economic model shows that an MFN imposed by a dominant selling platform like Amazon leads to both higher prices (for consumers) and higher fees (for the platform's sellers), while also discouraging entry by alternative platforms. Andre Boik & Kenneth S. Corts, *The Effects of Platform Most-Favored-Nation Clauses on Competition and Entry*, 59 J.L. & ECON. 105, 113-29 (2016); *see also* Justin P. Johnson, *The Agency Model and MFN Clauses*, 84 REV. ECON. STUD. 1151 (2017). And, again, this is borne out empirically. *See* Andrea Mantovani, Claudio A. Piga & Carlo Reggia, *Online platform price parity clauses: Evidence from the EU Booking.com case*, 131(C) EURO. ECON. REV. 103625 (2021).

In fact, in the case of a dominant platform like Amazon, it is particularly easy to see the dynamic anticompetitive effect that MFNs have by stifling potential competitors. If Amazon's platform is earning monopoly rents, one would expect to see new platforms enter and attempt to take share by offering lower fees to sellers and lower prices to end users. But that doesn't work in a market saturated with MFNs that Amazon's sellers have acceded to in order to keep their wares available on Amazon's dominant online marketplace. Instead, when a new, discount platform offers to cut its fee in order to allow the seller to cut its price to consumers, the seller has no way to say yes without breaking its agreement with Amazon—thereby risking that it will be deplatformed by an essential outlet for its wares. The result is that competing platforms with potentially alternative business models can be stymied before they can get off the ground. And that entails less competition (including future competition) over fees and commissions for sellers, as well as higher prices and fewer choices for consumers.

These are, in short, multiple plausible anticompetitive effects associated with an MFN like the one Amazon imposes. Combined with Amazon's manifest market power, this easily suffices to plead a *prima facie* case that Amazon's MFNs violate the Rule of Reason and make the Superior Court's grant of dismissal manifestly erroneous.

2. *MMAs*.

MMAs function in much the same way and so have similar predicted effects. As the District explains, Amazon enters into MMAs with the vendors who supply products for Amazon's own, first-party branded sales of goods like batteries and lightbulbs. DC Br. 6. And it uses MMAs to effectively require those vendors to give Amazon the best price it gives to any retailer that uses that supplier for its own branded goods and—to the extent the supplier sells its own branded version of the product—to keep its own prices high on other platforms. *See id.* at 10-11 (citing

JA 22-23, 27-28). That is because the MMA requires the vendor to guarantee Amazon a certain profit margin on its sales, and if Amazon has to lower its price to match a cheaper offer on another platform, the loss will come from the supplier and not from Amazon. The District thus proffered an allegation from one of Amazon's suppliers that "due to the minimum margin agreements, 'Amazon has asked him to ask [competing marketplaces Walmart and Target] to increase the prices they are charging' and that the supplier did so 'in order to avoid true-up payments' under the minimum margin agreement." JA 295. Accordingly, the MMA can be conceptualized as a kind of simple MFN between Amazon and the vendor that prevents the vendor from offering its products to Amazon's competitors (or directly to consumers) at a lower price than Amazon itself pays for supply (or offers to its consumers).

This plausibly harms competition and consumers in two ways. First, it causes harm by incentivizing Amazon's suppliers to coordinate prices among Amazon's competitors (including those suppliers themselves, if they sell directly to consumers) at the higher level that Amazon charges. Second, it causes an "exclusionary" harm because it can prevent Amazon's current or potential future competitors from offering a competing business model at all. As one scholarly article explains:

> An MFN can raise the costs of current or potential competitors by negotiating lower prices from suppliers of critical inputs. For example, suppose an entrant wishes to gain customers by charging a lower price (perhaps because it has no established brand name or installed base). It can

> profitably sell at a low price by undertaking selective contracting with suppliers willing to offer a discount in exchange for more volume or other favorable terms. If those suppliers also supply the incumbent, however, an MFN imposed by the incumbent would require the supplier to charge the same price to the entrant. This parity undermines the entrant's business model by preventing it from making an attractive offer to customers. The symmetry that MFNs impose on the marketplace thus can prevent new competition that would lower prices.

Baker & Scott Morton, *supra* at 2180. A similar effect is at work here.

In fact, the exclusionary effect is in some senses more direct with the MMA because it incentivizes the supplier to *make sure* that the potential entrant cannot "gain customers by charging a lower price." An MFN "imposed by the incumbent" would only "require the supplier to charge the same price to the entrant," but the MMA requires the supplier to make sure that the entrant does not underprice Amazon, even if the supplier provides product to the entrant at the same price. Indeed, an Amazon vendor who found that another online platform was forcing down Amazon's sales price would have an incentive to stop selling to that alternative platform entirely, because it would have to pay Amazon for every one of those lower-priced sales under the MMA. This, again, plausibly causes the twin anticompetitive effects of restricting entry and keeping prices high across competing platforms.

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In short, the economic literature suggests that MFNs in general—and platform MFNs in particular—have the capacity to cause anticompetitive effects when wielded by firms with market power. Accordingly, the District carried its burden at the motion-to-dismiss stage by plausibly pleading that Amazon has market power and imposes the contract terms at issue, before one even considers the direct evidence of anticompetitive effects that the District offered as well. That direct evidence only reinforces the plausibility of the District's case, and the Superior Court erred by preventing the District from taking that case into discovery and trial.

This Court should remedy that error so that it is not repeated. Among other things, the opportunity to develop the evidence about whether Amazon's contracts cause anticompetitive effects (and net anticompetitive harm) is important not only because those contracts may be harming consumers right now, but also because similar contracts imposed by other platforms could cause consumer harm in the future. Identifying cases where all the evidence is ultimately adequate (or, even, inadequate) to demonstrate that an MFN harms competition assists future antitrust plaintiffs and enforcement agencies by telling them what kinds of arrangements to watch out for and what kinds of evidence they will need to develop to show anticompetitive harm. In contrast, terminating these cases because of undue skepticism about the actual effects of MFNs like Amazon's is not only unsound as a matter of economics and a misapplication of the rule of reason at the pleading stage, but also a barrier to the robust and healthy development of antitrust law.

Respectfully submitted,

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January 30, 2023

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

    - An individual's social-security number
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    - Driver's license or non-driver's' license identification card number
    - Birth date
    - The name of an individual known to be a minor
    - Financial account numbers, except that a party or nonparty making the filing may include the following:

      (1) the acronym "SS#" where the individual's social-security number would have been included;
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      (4) the year of the individual's birth;
      (5) the minor's initials; and
      (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Eric F. Citron
Signature

22-CV-657
Case Number(s)

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing by using this Court's electronic filing system on January 31, 2023. I certify that on January 31, 2023, this brief was served through this Court's electronic filing system on counsel for appellant and counsel for appellee.

January 31, 2023

/s/ Eric F. Citron
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