21-7078

United States Court of Appeals for the District of Columbia Circuit

STATE OF NEW YORK; DISTRICT OF COLUMBIA; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF FLORIDA; STATE OF IOWA; STATE OF NEBRASKA; STATE OF NORTH CAROLINA; STATE OF OHIO; STATE OF TENNESSEE; STATE OF ALASKA; STATE OF ARIZONA; STATE OF ARKANSAS; STATE OF CONNECTICUT; STATE OF DELAWARE; TERRITORY OF GUAM; STATE OF HAWAII; STATE OF IDAHO; STATE OF ILLINOIS; STATE OF INDIANA; STATE OF KANSAS; COMMONWEALTH OF KENTUCKY; STATE OF LOUISIANA; STATE OF MAINE; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEVADA; STATE OF NEW HAMPSHIRE; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NORTH DAKOTA; STATE OF OKLAHOMA; STATE OF OREGON; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF TEXAS; STATE OF UTAH; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; STATE OF WASHINGTON; STATE OF WEST VIRGINIA; STATE OF WISCONSIN; AND STATE OF WYOMING,

Plaintiffs-Appellants,

v.

FACEBOOK, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

CORRECTED BRIEF FOR THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici Curiae

Except for the following, all parties, intervenors, and amici appearing before the decision below and in this court are listed in the Brief for Appellants.

B. Rulings Under Review

References to the rulings at issue appear in this brief and the Brief for Appellants.

C. Related Cases

The cases now pending before the Court were not previously before this Court or any other court. Counsel is not aware of any related cases pending before this Court, although there is one related case, *FTC v. Facebook, Inc.*, No. 20-3590 (D.D.C.), pending in the district court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, *amicus curiae* the Committee to Support the Antitrust Laws states that it is a nonprofit corporation and no entity has any ownership interest in it. Founded in 1986, COSAL is an independent corporation devoted to preventing, remediating, and deterring anticompetitive conduct. *See* https://www.cosal.org/about.

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STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). Founded in 1986, the Committee to Support the Antitrust Laws (COSAL)[1] is an independent, nonprofit corporation devoted to preventing, remediating, and deterring anticompetitive conduct. *See* COSAL, https://www.cosal.org/about. COSAL advocates for the enactment, preservation, and enforcement of a strong body of antitrust laws, which it accomplishes through legislative efforts, public policy debates, and by serving as *amicus curiae*.[2]

Our Nation has witnessed an unprecedented concentration of market power among large technology platforms—among them,

[1] Amicus COSAL states that no counsel for any party has authored this brief in whole or in part and no party, party's counsel, or any other person or entity—other than COSAL—has contributed money to fund its preparation or submission.

[2] All parties have consented to the filing of this brief.

Appellee Facebook, Inc. ("Facebook")—that are omnipresent in everyday Americans' lives. The application of existing antitrust laws to emerging technologies can at times be a complex endeavor, but Appellants' claims against Facebook are straight forward and well-recognized.

Facebook is a monopolist in the market for personal social networks. Facebook has engaged in a long-running, unitary scheme to suppress competition in the personal social network market, with two mutually reinforcing components long condemned by this Nation's antitrust laws: (1) the imposition of exclusionary contracting practices—the practical effects of which prohibit nascent rivals from challenging Facebook's dominance, and (2) anticompetitively motivated acquisitions (sometimes for exorbitant sums) of any actual or would-be rivals whose market offerings rose to a level that were perceived as threats to Facebook's entrenched position. As Facebook, founder Mark Zuckerberg has directed in the latter regard, "it is better to buy than compete." A164.

The decision below nonetheless dismissed Appellants' case by balkanizing Facebook's scheme into its constituent parts—ultimately dismissing Appellants' claims, *inter alia*, because it found that

Facebook's restraints did not run afoul of the antitrust laws under exclusive dealing jurisprudence[3] and that Appellants' challenge of Facebook's anticompetitive acquisitions was time barred. But when properly evaluated, the practical exclusionary effects of Facebook's contracting practices are—as the decision below recognized in related contexts—"common sense."

The restraints at issue suppressed rival social networks' ability to attract additional users and increase user engagement, which are critical to the survival of nascent social network rivals. The district court found no antitrust violation because application developers were not *technically and expressly forbidden* from working with rival social networking applications, even if market realities dictated that Facebook's restraints effectively blocked application developers from doing so given their practical, real-world effects. Relatedly, the district court applied an incorrect total foreclosure requirement to Appellants'

[3] As discussed below, Appellants did not strictly proceed on an exclusive dealing theory. *See* note 3, *infra*. This brief accepts the label and endeavors to show that the claims survive under an exclusive dealing mode of analysis; however, this does not foreclose any conclusion, advanced by either Appellants or other *amici*, that the same challenged conduct is unlawful under alternative modes of analysis.

claim, concluding that so long as Facebook left *some* avenues for rival social network open, it did not matter how important or how numerous the avenues Facebook had cut off may be.

This was legal error. Application of the laches doctrine to Appellants' federal antitrust claims was also error. Although Facebook's anticompetitive conduct began some years back, the conduct in support of its unitary buy-or-bury scheme, and the schemes effects, have continued into more recent periods. Laches has no place here.

At a time when many commentators believe that we are at a tipping point for reining in large technology platforms, the district court's decision undermines the ability of the Nation's antitrust laws to do just that. The misapplication of precedent by the decision below, if affirmed, could have an adverse ripple effect not just across enforcement actions against other large technology companies, but also across antitrust enforcement actions more generally. For these reasons, COSAL has a strong interest in the outcome of this important appeal.

ARGUMENT

I. The Decision Below's Analysis of Facebook's Platform Policies Was Impermissibly Narrow and Overly Restrictive.

A. The Decision Below Improperly Confined Its Analysis to the Terms of Facebook's Platform Policies and Ignored Their Practical Anticompetitive Effects and Market Realities.

It is well settled that courts are to look beyond a restraint's express terms in evaluating its exclusionary potential, and to engage not just with its explicit provisions but also with its "practical effect." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 282 (3d Cir. 2012) ("the law is clear that an express exclusivity requirement is not necessary"); *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1374 (10th Cir. 1979) ("The agreement need not specifically require the [market participant] to forgo other [competitive options] if the practical effect is the same."). On this score, a court's inquiry "should be understood as inviting a specific factual inquiry about whether the defendant has illegitimately constrained [market] choices." P. Areeda & H. Hovenkamp, Antitrust Law ¶ 1752e (5th ed. 2020). Because the "means of illicit exclusion, like the means of legitimate competition, are myriad," *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir.

2001), this factual inquiry favors substance over form, *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 189 (3d Cir. 2005) ("Antitrust policy requires the courts to seek the economic substance of an arrangement, not merely its form.") (internal citation and quotation omitted).

Appellants below alleged a claim for unlawful monopoly maintenance under Section 2 of the Sherman Act, which included, *inter alia*, restrictive dealing arrangements between Facebook and application developers,[4] referred to as Facebook's "platform policies." Of particular import, this included allegations that Facebook not only selectively denied application developers access to Facebook's platform, but also took actions that disincentivized application makers either from developing competitive options on rival personal service networks or from developing into rival personal service networks themselves.

[4] Appellants pleaded a web of interrelated anticompetitive conduct, some of which Appellants characterized as conditional dealing, relying on the Supreme Court's decision in *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951). The decision below did not strictly accept the conditional dealing label, describing *Lorain Journal* as involving "a very special form of exclusive dealing, namely, a refusal to sell to end-user customers who purchase[d] from the monopolist's competitor[]."A252 (internal citation omitted). *Amicus* here adopts the exclusive dealing framework, but the underlying conduct is unlawful under either label, as courts evaluating restraints of trade look to their substance over their form.

A93-95, 101-102, 392-394.

In evaluating Facebook's platform conduct under an exclusive dealing rubric, the decision below recognized that if "Facebook had in fact interfered . . . with the ability of competing social-networking services to make agreements with app developers, it could plausibly have violated Section 2," as that conduct could have kept "user engagement with competing social-networking services 'below the critical level necessary for any rival to pose a real threat to [its] market share.'" A253–-54 (quoting *Dentsply*, 339 F.3d at 191). But then, relying exclusively on *the text* (not the effects) of *one* of Facebook's policies (and disregarding Appellants' contrary allegations concerning the policies'; express or implicit terms, their implementation, and their effects), the decision below concluded that the policy in question only "limited what apps hosted and used on Facebook's own site could do; it did not purport to restrict freestanding apps and sites from linking to or integrating with other social networks." A230. In the district court's view (and contrary to the Appellants' allegations), because "freestanding" versions of "Apps on Facebook" could still "integrate with other social networks," rival personal social networks were not precluded from freely making

deals with application developers.

This conclusion demonstrates the district court's failure to grapple with the practical effects of Facebook's platform restraints. Indeed, the decision below not only fails to address the practical effects of the challenged restraint, it goes further when it states its intent to "disregard [any] allegation [that was] inconsistent with the actual text of" Facebook's platform policy. A254.[5] By focusing exclusively on what it believes to be the text of one of the challenged restraints and disavowing any inquiry beyond that text, the decision below at least implicitly concludes (contrary to precedent) that the absence of an explicit exclusivity requirement *is dispositive*. Put another way, the decision below did not just overlook the practical effects of the restraint, it voiced its intent to *never consider them* unless they were expressly provided for in the restraint's text. This was error. *E.g.*, *ZF Meritor*, 696 F.3d at 282; *Dentsply*, 399 F.3d at 189; *Perington*, 631 F.2d at 1374; *see also Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) ("In cases such as this, plaintiffs should be given the full benefit

[5] The policy the decision below focused on provided that "Apps on Facebook may not integrate with, link to, promote, distribute, or redirect to any app on any other competing social platform." A254.

of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.").

Consider, for example, a chess application that allows users to compete against one another. Under the express terms of Facebook's platform policies, users accessing that application through Facebook would not be permitted to compete against users accessing that application through other personal social networks—like the now-defunct Google+. The chess application, when accessed through Facebook, could not allow Facebook users to "integrate" with users accessing the application through another personal social network. The decision below saw no problem here as it viewed the express terms of the policy as not explicitly forbidding application developers from working with rival personal social networks in all manners, even if it forbids cross-social-network functionality within an application.

But Facebook's platform policies *do* foreclose users of a given application on rival personal social networks from interacting with users accessing the same application on Facebook, which may well be the lion's share of users, given Facebook's dominant market position.[6]

[6] In a related opinion, the district court upheld allegations that

As a practical matter—and as the decision below recognized in other contexts as being "consistent with common sense"—"a personal social networking service's attractiveness to users, and therefore its competitive significance, is related to its number of users and how intensively its users engage with the service." *Fed. Trade Comm'n v. Facebook, Inc.*, No. 20-cv-3590, 2022 WL 103308, at *7 (D.D.C. Jan. 11, 2022). The decision below likewise acknowledged that "network effects" cause a personal social network to be less competitively significant where it has fewer users, asking the question: "why would new users go to a social space that does not include their important contacts?"[7] By precluding users of applications on rival personal social networks from interacting with colleagues, friends, and family that access those applications through Facebook, Facebook capitalized on its entrenched

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Facebook possessed monopoly power. *Fed. Trade Comm'n*, 2022 WL 103308, at *8 ("Facebook maintained a dominant share of the U.S. personal social-networking market since 2011.").

[7] *See also, e.g.*, *Fed. Trade Comm'n*, 2022 WL 103308, *9 (Facebook executives proclaimed: "Why are we hard to compete with[?] Your friends are here. You have made a big investment in your Facebook network and identity."); *id.* at *9 (Facebook founder Mark Zuckerberg stated that: "Perhaps the most valuable thing about Facebook is that it is by far the world's most comprehensive directory of people and their connections[, which is] a huge structural advantage.") (alteration in original) (citation omitted).

user base to suppress the number of users accessing, and the level of engagement of users on, rival personal social networks. The decision below never engages with these or any other practical effects.

There are countless applications, like the hypothetical chess application, where the applications' value to consumers is directly tied to the amount of user engagement they achieve. Facebook's platform policies are exclusionary, in large part, because by limiting engagement of application users on rival personal social networks, they alter the *incentives* of market participants to make free choices and develop competing products. *See, e.g.*, *United States v. Verizon Commc'ns, Inc.*, 959 F. Supp. 2d 55, 57, 59, 61 (D.D.C. 2013) (regulatory intervention appropriate where restraints of trade would lessen telecom company's "incentive[s] to compete"); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 84-85 (D.D.C. 2011) ("anticompetitive effects" possible where firm "will not have the same incentives it has today to develop robust free and low-cost offerings that can compete with" its rivals).[8] To

[8] *See also, e.g.*, *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 894 (2007) ("A manufacturer with market power . . . might use [restraints] to give retailers an incentive not to sell the products of smaller rivals or new entrants."); *Castro v. Sanofi Pasteur, Inc.*, 134 F. Supp. 3d 820, 848 (D.N.J. 2015) (restraints can harm competition where

be sure, this Court has found unlawful anticompetitive harm in closely analogous circumstances. In *Microsoft*, the monopolist's restraint kept "rival browsers from gaining the critical mass of users necessary to attract developer attention away from Windows as the platform for software development" by "preventing [market participants] from taking actions that could increase rivals' share of usage." *Microsoft*, 253 F.3d at 60, 62. So too with Facebook's conduct in this case.

And there may well be other practical effects of Facebook's platform policy beyond these common-sense ones. Perhaps the costs and complexities of having to develop multiple versions of an application—a freestanding version that allows integration with competing personal social networks and another that does not allow integration (and so can be run on Facebook under its platform policies)—is cost-prohibitive for some or all application developers. Perhaps administering a trifurcated user base for different versions of an application (i.e., (1) freestanding, (2) Facebook operable, and (3) rival social network operable versions)

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they "diminish[] each competitor's incentives to compete"); *Meijer, Inc. v. Abbott Labs.*, 544 F. Supp. 2d 995, 1005 (N.D. Cal. 2008) (restraints can deter entry by "providing little incentive for competitors to develop products to compete with" a monopolist).

that dictates who can interact with whom is sufficiently burdensome to be prohibitive. These considerations may transform something that appears *technically permissible* under the express terms of Facebook's policy into something that is *de facto* prohibited based on real-world consequences, and so, in turn, forecloses competition.

Such concerns merit factual development. But the decision below, in dismissing this claim without the benefit of discovery, insulated Facebook from any measured, fact-based consideration of the practical effects of its conduct. On these grounds, reversal is appropriate.

B. The Decision Below Applied an Erroneous Total Foreclosure Standard When Evaluating Appellants' Claims Under an Exclusive Dealing Theory.

The decision below found no antitrust problem because (in its view) the express terms of one Facebook's challenged policies only prevented so-called "Canvas Apps" from integrating with rivals. A254–55 (Facebook's policy "did not prevent freestanding apps from linking to or interoperating with competitor social-media services"). While this interpretation of Facebook's policy ignores its practical effects, *see supra* at 5-12, it is an independent source of reversible error as it impermissibly applied a total foreclosure requirement to Appellants'

claim.

As this Court has recognized, foreclosure of market options need not be absolute to be actionable. *Microsoft*, 253 F.3d at 64 (rejecting argument that Microsoft's rival, Netscape, was not foreclosed because it was "not completely blocked from distributing its product"). Courts recognize that "it is not necessary that all competition be removed from the market. The test is not total foreclosure," *Dentsply*, 399 F.3d at 191, in large part because "even the foreclosure of 'one significant competitor' from the market may lead to higher prices and reduced output," *LePage's In. v. 3M*, 324 F.3d 141, 159 (3d Cir. 2003) (citation omitted). And as a leading treatise explains:

> A set of strategically planned exclusive dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its product or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay the dominant firm imposes on the smaller rival's growth.

Dentsply, 399 F.3d at 191 (quoting Herbert Hovenkamp, *Antitrust Law*, ¶ 1802c at 64 (2d ed. 2002)).

At the proof stage of the case, Appellants will have to show that Facebook's conduct resulted in some form of appreciable anticompetitive harm to the market, such as, but not limited to, substantial foreclosure.

E.g., *Standard Oil Co. v. United States,* 337 U.S. 293, 314 (1949) (foreclosure of 6.7 percent of the market constituted "a substantial share of the line of commerce affected"); *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1252 (3d Cir. 1975) (foreclosure of 14.7% "may well offend the limitations which the Clayton Act places on exclusive contracts"). But that is not this case's posture.

At the pleading stage of the case, it is sufficient for Appellants to allege, as they do, that Facebook has impeded rival social networks from increasing their number of users and the intensity of user engagement, suppressing their competitive relevance. That is all that is required. If they show anticompetitive effects, Appellants need not show market foreclosure at all, let alone total market foreclosure. *Microsoft*, 253 F.3d at 64; *Dentsply*, 399 F.3d at 191. Nor must they provide specific estimates of the measure of anticompetitive harm at the pleading stage. *E.I. du Pont de Nemours and Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 452 n.12 (4th Cir. 2011) (upholding complaint at pleading stage despite the lack of allegations of "a specific percentage of market foreclosure," as it "would be problematic" to reject an otherwise well-pleaded claim "solely on th[e] basis at the pre-discovery, motion-to-

dismiss stage, when [plaintiff] has insufficient information to calculate a precise" estimate of the anticompetitive effects of challenged conduct).

On these bases, too, the decision below should be reversed.

II. The Court Below's Reliance on the Doctrine of Laches is Misplaced in Light of Facebook's Ongoing Conduct and Its Effects.

The court below erred in holding that laches precluded Appellants from seeking equitable relief for Facebook's antitrust violations, because Appellants properly alleged a continuing violation of the alleged anticompetitive activity, which the court below was required to credit on a motion to dismiss.

Because Appellants' claims are equitable, timeliness considerations come into play, if at all, through the doctrine of laches. Insofar as laches analysis can be applied to Appellants, the elements of laches need to be evaluated, which requires analyzing delay and prejudice to Facebook based on Appellants' complaint[9]—not

[9] Laches is an equitable doctrine that bars a lawsuit if the plaintiff "unreasonably delays in filing a suit and as a result harms the defendant." *Midwest Terminals of Toledo Int'l, Inc. v. NLRB*, 783 F. App'x 1, 6 (D.C. Cir. 2019) (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002) and *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 47 (D.C. Cir. 2005)).

presumptions selected by the court. In analyzing delay, it is highly relevant whether anticompetitive conduct or effects continue, as where they do, so too does the harm they produces. For example, in *Smith v. eBay Corp.*, the court noted that if the plaintiffs' monopolization claims were based *solely* on eBay's acquisition of PayPal, they would be time barred; however, because the plaintiffs there alleged that eBay *continued to refine* its policy after the acquisition, the claims were timely. No. 10-cv-03825, 2012 WL 27718, at *4, *6 (N.D. Cal. Jan. 5, 2012)

Similarly, in *Free FreeHand Corp. v. Adobe Sys. Inc*, the court held that the plaintiffs had pled sufficient facts to establish the "new use" exception to the statute of limitations where they alleged that before Adobe acquired FreeHand, FreeHand was an actively developed and supported piece of software and a living breathing product. 852 F. Supp. 2d 1171, 1188 (N.D. Cal. 2012). After the merger was consummated, the plaintiffs alleged, Adobe "effectively crippled and killed FreeHand while scavenging its bones for features to incorporate into Illustrator." *Id.*[10]

[10] While Appellants' claims seek equitable relief, judicial treatment of continuing harm in damages cases can be instructive. *See, e.g.*, *In re Buspirone Patent & Antitrust Litig.*, 185 F. Supp. 2d 363, 378

Likewise, in *Optronic Technologies, Inc. v. Ningbo Sunny Electronic Co.*, the plaintiff brought claims for, *inter alia*, attempted monopolization and conspiracy to monopolize. 20 F.4th 466 (9th Cir. 2021). In 2016, the plaintiff entered into settlement and supply agreements with one of the defendants and that defendant agreed to supply the plaintiff on most favored customer terms. *Id.* at 487. The plaintiff alleged that the defendant nevertheless kept overcharging the plaintiff. *Id.* The other defendant stopped supplying the plaintiff that same year. *Id.* The Ninth Circuit held that even if the conspiracy had ended in 2016, the plaintiff "could still recover post-2016 damages because it continued to suffer economic harm from the harm to competition[.]" *Id.* The court found that the plaintiff's "antitrust post-2016 injuries arose directly from the change in market structure that

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(S.D.N.Y. 2002) ("if a party commits an initial unlawful act that allows it to maintain market control and overcharge customers for a period longer than four years, purchasers maintain a right of action for any overcharges paid within the four years prior to their filings."); *In re Evanston Nw. Healthcare Corp. Antitrust Litig.*, No. 07-cv-4446, 2016 U.S. Dist. LEXIS 122684, at *29 (N.D. Ill. Sep. 9, 2016) ("T]here can be no unfairness in preventing a monopolist that has established its dominant position by unlawful conduct from exercising that power in later years to extract an excessive price.") (citing *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 296 (2d Cir. 1979)).

resulted from the . . . successful" anticompetitive activity, specifically, that the plaintiff continued to suffer harm "because it lacked viable alternate[s] in the highly concentrated market." *Id.* Because the "antitrust plaintiff suffer[ed] continuing antitrust injuries from anticompetitive changes to market structure . . . recovery of damages [was] permitted, even after the last proven date of the violative conduct." *Id.* at 488. Although the *Optronics* court addressed continuing injury in the context of a damages claim, the principles of continuing harm caused by the defendants' change in market structure apply equally to Appellants' equitable claim.

As in *Smith v. eBay*, *Free FreeHand Corp.*, and *Optronic Techs.*, Appellants alleged that Facebook's anticompetitive activity—excluding rivals from access to its platform—had ongoing effects. *See* Brief for Appellants, ECF No. 1930765 at 7, 20. The decision below was required to "accept[] as true the factual allegations stated in the complaint and draw[] all inferences in favor of the nonmoving party." *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.D.C. 2014). Had it properly done so, it never would have (or could have) found laches.

Even if the Court properly found no continuing violation or effects

of the violation, which it did not, the Supreme Court has long held that "laches is not a defense against the sovereign." *Costello v. United States*, 365 U.S. 265, 281 (1961). This is because vigorous enforcement of the antitrust laws is critical "to vindicate a public right, particularly one so important as the enforcement of the antitrust laws." *Commonwealth of Mass. ex rel. Bellotti v. Russell Stover Candies, Inc.*, 541 F. Supp. 143, 144–45 (D. Mass. 1982) (granting motion to strike laches defense in antitrust case brought by Commonwealth of Massachusetts, as it was acting under the *parens patriae* doctrine, which "has been expanded to give a state standing and to allow it to recover damages to quasi-sovereign interests wholly apart from recoverable injuries to individuals within the state . . . includ[ing] the general economy of the state.").[11]

Indeed, in times when the federal government cannot—because of resource constraints, or will not—because of policy choices, vigorously enforce the antitrust laws, as well as times the federal government can and does do so, the States have been at the forefront of investigating

[11] *See* Brief for Appellants, ECF No. 1930765 at 22–28, elaborating on and providing additional support for this point.

and prosecuting anticompetitive conduct.[12] The decision below if upheld could curtail this important function of state enforcers.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Dated February 1, 2022 Respectfully submitted,

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[12] *See, e.g.*, *Hartford Fire Ins. Co. v. California,* 509 U.S. 764 (1993) (federal officials declined to proceed against conduct that later formed the basis for an action by States and private parties directed to an antitrust conspiracy in the insurance industry); *New York v. Actavis PLC*, 787 F.3d 638 (2d Cir. 2015) (affirming preliminary injunction in suit by New York alleging pharmaceutical company sought to perpetuate anticompetitive patent exclusivity through successive products), *cert. dismissed*, *Allergan PLC v. New York*, 136 S. Ct. 581 (2015); *California v. Am. Stores Co.*, 495 U.S. 271 (1990) (upholding California suit challenging a merger after the FTC declined to enjoin entire merger proceeding); *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995) (after federal enforcers declined to take action, New York challenged Nabisco's 1993 sale of its ready-to-eat cereal assets to Kraft); *New York v. St. Francis Hosp.*, 94 F. Supp. 2d 399 (S.D.N.Y. 2000) (granting State summary judgment against "virtual merger" by two local hospitals based on determination of unlawful price fixing and market allocation); *Wisconsin v. Kenosha Hosp. & Med. Ctr.*, No. 96-cv-1459, 1996 WL 784584 (E.D. Wis. Dec. 13, 1996) (after the FTC declined to proceed, hospital merger challenge was settled by state enforcers with remedial measures designed to restore competition).

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CERTIFICATE REGARDING SEPARATE BRIEF

Pursuant to D.C. Circuit Rule 29(d), I certify that this separate *amicus* brief is necessary because it provides unique insights regarding the application of antitrust and competition principles from the perspective of private enforcers of the antitrust laws and other *amici* are not advancing the same arguments from the same perspective.

/s/ David H. Weinstein

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)B) because, excluding the parts exempted by Fed. R. App. P. 32(f), the brief contains 4,303 words.

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(b) because the brief has been prepared in Microsoft Word, using 14-point Century Schoolbook font, a proportionally spaced typeface.

/s/ David H. Weinstein

CERTIFICATE OF SERVICE

I certify that on February 1, 2022, I caused the foregoing Corrected Brief of Amicus Curiae to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all counsel of the parties.

/s/ David H. Weinstein