ORAL ARGUMENT NOT YET SCHEDULED

No. 21-7078

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK, *et al.*,

Plaintiffs-Appellants,

v.

FACEBOOK, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the District of Columbia,
No. 1:20-cv-03589-JEB (Hon. James E. Boasberg)

BRIEF FOR DEFENDANT-APPELLEE FACEBOOK, INC.

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March 14, 2022

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Defendant-Appellee certifies as follows:

A. Parties and *Amici*

Appellants in this Court and Plaintiffs in the district court are 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, Commonwealth of Pennsylvania, Commonwealth of Virginia, State of New Hampshire, State of New Jersey, State of New Mexico, State of North Dakota, State of Oklahoma, State of Oregon, State of Rhode Island, State of Texas, State of Utah, State of Vermont, State of Washington, State of West Virginia, State of Wisconsin, and State of Wyoming.

Appellee in this Court and Defendant in the district court is Facebook, Inc. (now Meta Platforms, Inc.).

After Appellants filed their opening brief on January 14, 2022 (Doc. 1930765), the following entities and individuals appeared in this Court as *amici curiae* for Appellants:

- United States of America;
- American Antitrust Institute;
- Committee to Support the Antitrust Laws;
- Daron Acemoglu, Cristina Caffarra, Gregory S. Crawford, Tomaso Duso, Florian Ederer, Massimo Motta, Martin Peitz, Thomas Philippon, Nancy L. Rose, Robert Seamans, Hal J. Singer, Marshall Steinbaum, Joseph Stiglitz, Ted Tatos, Tommaso Valletti, and Luigi Zingales; and
- Lloyd Constantine, Harry First, Aaron Edlin, Andrew Chin, Andrew I. Gavil, Andrew Rossner, Anne Schneider, Barak Richman, Barak Y. Orbach, Charles G. Brown, Christopher L. Sagers, Dan Drachler, Darren Bush, Don Allen Resnikoff, Edward Cavanagh, Fox Eleanor, Ellen Cooper, George Sampson, James Tierney, Jeffrey L. Harrison, John B. Kirkwood, Joshua P. Davis, Kevin J. O'Connor, Marina L. Lao, Maurice Eitel Stucke, Norman W. Hawker, Pamela Jones Harbour, Paul F. Novak, Peter C. Carstensen, Rebecca Haw Allensworth, Robert Abrams, Robert H. Lande, Samuel N. Weinstein, Steven M. Rutstein, Susan Beth Farmer, Tam B. Ormiston, Thomas Greaney, Thomas J. Horton, and Warren S. Grimes.

B. Rulings Under Review

The States appeal the Memorandum Opinion of the Honorable James E. Boasberg (Dkt. 137) (JA217-83) and accompanying Order (Dkt. 136) (JA216), both dated June 28, 2021, granting Defendant-Appellee Facebook, Inc.'s motion to dismiss and dismissing the case without leave to amend. The Memorandum Opinion ("Op.") is reported at 549 F. Supp. 3d 6.

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

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Defendant-Appellee Meta Platforms, Inc. (formerly known as Facebook, Inc.) submits the following corporate disclosure statement: Meta Platforms, Inc. has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock. Meta Platforms, Inc.'s general nature and purpose is to build useful and engaging products that enable people to connect and share through mobile devices, personal computers, virtual reality headsets, and in-home devices. Meta Platforms, Inc. generates substantially all its revenues from selling advertising placements.

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Page

CASES

* Authorities principally relied upon are designated by an asterisk (*).

STATUTES AND RULES

LEGISLATIVE MATERIALS

OTHER MATERIALS

GLOSSARY

API	Application Programming Interface
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*
DOJ	U.S. Department of Justice
FTC	Federal Trade Commission
FTC Dkt.	District Court Docket in *FTC v. Meta Platforms, Inc.*, No. 1:20-cv-03590 (D.D.C.)
NEPA	National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*
Op.	Memorandum Opinion, *State of New York, et al. v. Facebook, Inc.*, No. 1:20-cv-03589-JEB (D.D.C. June 28, 2021) (Dkt. 137) (JA217-83)

INTRODUCTION

State Attorneys General brought a three-count antitrust complaint against Facebook (now Meta Platforms, Inc.),[1] based on conduct that ceased years ago. Two of the counts (under § 7 of the Clayton Act) depend entirely – and one count (under § 2 of the Sherman Act) depends in part – on the claim that the acquisitions of Instagram (in 2012) and WhatsApp (in 2014) violated the antitrust laws at the time they were completed. The remaining allegations supporting the § 2 claim relate to Facebook's management of its "Platform," a changing set of application programming interfaces used by developers seeking to take advantage of access to Facebook's network of users. The conduct supporting that aspect of the States' complaint took place no later than 2016 (most earlier), and the States acknowledged that "Facebook announced the retraction" of the challenged Platform policy in 2018. Dkt. 122, at 13.

The district court correctly dismissed these stale claims. *First*, the States' acquisition challenges are untimely. The States seek injunctive relief as "person[s]" under § 16 of the Clayton Act; because Congress did not designate the states as sovereign enforcers of *federal* antitrust law, they, like all non-federal parties, may

[1] Because the events at issue took place long before the name change, we refer to the company as "Facebook."

not unreasonably delay bringing claims. Where, as here, they do so to the defendant's evident prejudice, their claims are barred by laches.

Second, the district court also correctly determined that the written Platform policies (no longer in effect) were lawful under Supreme Court precedent. Facebook had the right to refuse to help firms that sought to use Facebook's data in ways that threatened to reduce users' engagement with Facebook. The resulting "condition" on access to Platform involved no illegitimate interference with developers' independent efforts to compete with Facebook or to deal with Facebook's competitors. The complaint's allegations regarding seven challenged applications of the policy (five in 2013, two in 2015-2016) likewise do not squeeze into any narrow exception that remains to the general no-duty-to-deal rule affirmed in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). And, in any event, the district court correctly held that claims regarding long-ago applications of the former policy stated no cognizable claim because the States did not allege that injunctive relief could plausibly remedy discrete incidents that occurred and ended years ago.

The States' arguments on appeal cast no doubt on the district court's decision to dismiss these claims. This Court should affirm.

STATEMENT OF THE ISSUES

1. Whether laches bars the States' antitrust claims seeking equitable relief based on acquisitions that occurred more than four years prior to filing.

2. Whether the district court correctly dismissed as legally deficient the States' antitrust claim relating to Facebook's Platform policies and enforcement.

STATUTES

Except for the statutory provisions set forth in the addendum to this brief, all pertinent statutes have been reproduced in the addendum to Appellants' opening brief.

STATEMENT OF THE CASE

I. Facebook's Business

Facebook offers millions of U.S. consumers access to free, innovative products that provide "an important forum" for communicating, including by sharing and consuming content such as messages, "photos and videos." JA45 (¶¶ 1-2). Rather than charge for these services, Facebook sells advertising. JA56 (¶ 48). Facebook's success therefore depends on offering a compelling experience that "convinces users to spend [time] engaging on Facebook services." JA45 (¶ 3). Facebook operates in constant "fear that the company has fallen behind in important new segments and that emerging firms" are "competitive with Facebook and could be very disruptive" to its business. JA46 (¶ 5) (quotation omitted).

Facebook succeeds when consumers are "enamored with the platform." JA59 (¶ 63). That requires Facebook to invest continuously in developing "innovative features" that "make Facebook a more desirable place for users to connect and share." JA61 (¶¶ 73-74) (quotation omitted). Any app "could deploy an attractive new feature" and thereby "grow quickly" and "displace Facebook." JA68 (¶ 101). In the years since Facebook started in a dorm room, scores of services competing for user time and attention have emerged and grown, including iMessage, Snapchat, TikTok, Twitter, and YouTube – to name just a few. JA52-53, 64 (¶¶ 35, 37, 85).

II. Facebook's Acquisitions

A. Instagram

In April 2012, Facebook announced an agreement to acquire Instagram, then "a young photo-sharing startup." JA70 (¶¶ 107, 109). It was available on a single mobile operating system – Apple's iOS, "not Android," *id.* (¶ 110) – and it had "no revenue stream," JA74 (¶ 122). However, it offered an "innovative approach to sharing and editing photos taken on rapidly proliferating mobile phones." JA70 (¶ 107). Facebook wanted to improve its products and services in both respects – "photos and in the transition to mobile" – and agreed to acquire Instagram for approximately $1 billion. *Id.* (¶ 108).

The purchase price fell within the Hart-Scott-Rodino Act's reporting requirements, triggering Federal Trade Commission ("FTC") review "prior to closing to assess whether it posed anticompetitive concerns." JA225 (Op. 9). The FTC's review was searching – it took "the rare step" of issuing a "second request" for "additional information" – but the agency ultimately voted "5-0 to allow [the acquisition] to proceed without any challenge or conditions." *Id.* Facebook has undertaken significant steps to "integrate" Instagram into its business. JA72 (¶ 115). And Facebook has implemented measures to grow Instagram from a photo-sharing app "still essentially in its infancy," JA71, 74 (¶¶ 112, 125), to one with dozens of features and hundreds of millions of global users.

B. WhatsApp

In February 2014, Facebook agreed to acquire WhatsApp for approximately $19 billion. JA85 (¶ 166). At the time, WhatsApp – a "messaging service" with limited traction in the United States, where growth had been "slower than in other parts of the world" – charged iOS users a "download fee" and Android users a "subscription" fee. JA82-83 (¶¶ 157-158). Once again, the transaction size required a Hart-Scott-Rodino filing and FTC "pre-merger review," but, "once again," the FTC "did not block it." JA227 (Op. 11). Since closing the acquisition in 2014, Facebook has invested significant resources in WhatsApp, including to combine "user data across the services." JA87 (¶ 177).

III. Facebook's Platform Policies

In 2007, Facebook launched "Platform," which provided access to free tools "that enabled developers to build applications" capable of operating within Facebook's then-desktop-only website. JA62-63, 90-91 (¶¶ 80, 190). These tools, called application programming interfaces ("APIs"), allowed third-party developers to request access to Facebook users' data – which users could choose to provide – to build new ways to connect and share on "the Facebook site." *Id.* (¶¶ 80, 188-191).

"In its earliest iteration, Platform was focused on allowing developers to build . . . apps that were displayed within the Facebook website." JA90 (¶ 190). Subsequently, Facebook "created new tools that allowed free-standing apps and websites to interconnect with Facebook, . . . culminating in the 2010 launch of 'Open Graph.'" JA91 (¶ 191). Many apps used Facebook's tools "to enable social features" – for example, a user could post an article to her "Facebook profile directly from the ESPN.com website." *Id.* (¶ 193). And third-party developers "were also able to use the Facebook Platform to boost their apps' growth and engagement." JA92-93 (¶ 197).

Almost immediately, Facebook began clarifying and limiting the terms of Platform access to restrict uses that could harm Facebook's own business. JA93 (¶ 199). In 2011, allegedly out of concern about the threat posed by the newly

launched Google+ service, Facebook adopted a policy limiting "competing social platforms" and "any apps that linked or integrated with competing social platforms" from accessing Open Graph. *Id.* The States claim that such "bridg[ing]" of networks would have made it easier for Facebook users to leave Facebook for alternatives. *Id.*

In 2013, Facebook "amended its Platform policy" again to limit access by "applications that 'replicat[e] [Facebook's] core functionality.'" *Id.* (¶ 201). That policy – which was properly before the district court – stated, in relevant part: "*You may not use Facebook Platform* to promote, or to export user data to, a product or service that replicates a core Facebook product or service without our permission." FTC Dkt. 56-6, No. 1:20-cv-03590 (emphasis added). As the district court emphasized (and the States do not contest), these policies never "restrict[ed] [how] freestanding apps and sites" operated off Facebook – rather, they limited the manner in which third-party apps could *use Facebook's* Platform tools and data to compete directly with Facebook. JA230-31 (Op. 14-15); *see also* DOJ Br. 16 (not contesting district court's understanding that Platform policies "did not prevent app developers from dealing with rivals outside of Facebook's platform").[2]

[2] Such restrictions are pervasive in the industry. *See*, *e.g.*, eBay Developers Program, *eBay Developers Program Terms of Use and API License Agreement* (prohibiting use of "eBay Content" to "design, build, promote or augment any service competitive to eBay Services"), https://developer.ebay.com/products/

By 2013, "[o]ver 10 million apps and websites had integrated with Facebook." JA92 (¶ 194). Of those, the States identified seven that were affected by application of the Facebook policies prohibiting third parties from using Platform access to export data for certain uses off Facebook. Five of these policy applications occurred in 2013 – Voxer, Vine, MessageMe, Path, and Circle, *see* JA96-98 (¶¶ 210, 213, 215, 218-219); one occurred in 2015 – Tsū, *see* JA99-100 (¶ 223); and one in 2015-2016 – Phhhoto, *see* JA101 (¶¶ 226-228); JA230 (Op. 14).

In 2018, Facebook "terminated" the Platform policies, and there is no allegation that they have been restored or have even been under consideration for restoration since. JA231 (Op. 15).

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license; Etsy, *API Terms of Use* ("[y]ou may not . . . [t]ry to replicate Etsy [or] duplicate Etsy content"), https://www.etsy.com/developers/terms-of-use; Flickr, *Flickr APIs Terms of Use* ("You shall not . . . [u]se Flickr APIs for any application that replicates or attempts to replace the essential user experience of Flickr.com."), https://www.flickr.com/help/terms/api; Slack, *Slack API Terms of Service* ("you will not . . . access our APIs or documentation in order to replicate or compete with the Services"), https://slack.com/terms-of-service/api. The fact that such policies have been posted on these companies' publicly available websites is subject to judicial notice. *See United States v. Hunt*, 843 F.3d 1022, 1031 (D.C. Cir. 2016) (sua sponte taking judicial notice of contents of website "whose accuracy could not reasonably be questioned for the relevant purpose") (cleaned up); *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156, 167 (S.D.N.Y. 2015) ("[A] court may take judicial notice of information publicly announced on a party's website, as long as the website's authenticity is not in dispute and it is capable of accurate and ready determination.") (quotation omitted); 29 Am. Jur. 2d *Evidence* § 95 (same).

IV. Procedural History

A. The States and the FTC File Suit

On December 9, 2020, the States filed a three-count lawsuit challenging the acquisitions of Instagram and WhatsApp under § 7 of the Clayton Act and alleging that Facebook's conduct constituted unlawful monopolization in violation of § 2 of the Sherman Act. JA40-162 (Compl.). The States sued "under Section 16 of the Clayton Act," JA44 (Compl. at 5), which permits "[a]ny person" – including states acting as *parens patriae* on behalf of their citizens – to seek "injunctive relief," 15 U.S.C. § 26. The States sought relief including "divestiture." JA114 (¶ 277(8)).

The FTC "filed a very similar suit against Facebook on the same day." JA232 (Op. 16). The FTC, however, filed a single-count complaint under § 13(b) of the Federal Trade Commission Act, *see* 15 U.S.C. § 53(b), alleging a violation of § 2 of the Sherman Act. JA163 (FTC Compl.). Although not consolidated, the two actions proceeded as related cases. *See* D.D.C. LcvR 40.5(c)(2).

B. The District Court Grants Facebook's Motion To Dismiss

Facebook moved to dismiss both complaints for failure to state a claim. The district court (Boasberg, J.) granted Facebook's motion to dismiss the States' case on two grounds (without reaching several of Facebook's other arguments).[3]

[3] The same day, the district court (Boasberg, J.) also granted Facebook's motion to dismiss the FTC's complaint, with leave to amend. *See FTC v.*

The district court held that laches barred the States' challenges to the Instagram and WhatsApp acquisitions. The court rejected the States' argument that they are not subject to laches when suing as "[a]ny person" under § 16 as unsupported by precedent and contrary to "the history and purpose of Section 16." JA263-67 (Op. 47-51). The court explained that federal antitrust law's four-year statute of limitations provides a "generous" guideline for laches, noting that it was "aware of no case, and the States provide none, in which a plaintiff other than the United States . . . was awarded equitable relief after such long post-acquisition delays in filing suit." JA259 (Op. 43). And the court found that granting injunctive relief would prejudice Facebook, as a matter of both legal presumption and the facts alleged. JA261-62 (Op. 45-46).

The district court further held that Facebook's Platform policies did not constitute an unlawful refusal to deal because the policies amounted to no more than an announcement of terms on which Facebook would (and would not) provide Platform access. JA244-46 (Op. 28-30). As for the States' allegations concerning specific Platform access denials, these were either categorically lawful (for

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Facebook, Inc., --- F. Supp. 3d ---, 2021 WL 2643627, at *23 (D.D.C. June 28, 2021). The FTC filed an amended complaint on August 19, 2021; the district court denied Facebook's motion to dismiss the amended complaint on January 11, 2022, but clarified that the FTC's "allegations surrounding Facebook's . . . Platform policies" would *not* be allowed "to move forward." *FTC v. Facebook, Inc.*, --- F. Supp. 3d ---, 2022 WL 103308, at *1 (D.D.C. Jan. 11, 2022).

competitors that never had such access) or too far in the past for any injunctive remedy. JA247-51 (Op. 31-35). The court also explained that the States had not alleged facts supporting their alternative "conditional dealing" theory of harm because the States alleged only that Facebook placed restrictions on the use of Facebook's own data and Platform, not that Facebook interfered with rivals' independent dealings with anyone else. JA251-56 (Op. 35-40).

SUMMARY OF ARGUMENT

I. The district court correctly ruled that the States, which brought their claims as "person[s]" under § 16 of the Clayton Act, 15 U.S.C. § 26, are subject to laches. Congress specified that § 16 claims are subject to equitable limits – which include laches – and it did not exempt any person, including states, from these limitations. The States' assertion that they are sovereign enforcers of *federal* antitrust law is contrary to Supreme Court precedent demonstrating that claims brought by a state under § 16 are treated as those brought by other "person[s]" bringing such claims. *See California v. American Stores Co.*, 495 U.S. 271 (1990). As the district court held, "[i]f laches is to mean anything, it must apply on these facts, even in a suit brought by states." JA218 (Op. 2).

II. The States' challenges to Facebook's Platform-related conduct fail under settled antitrust law. The district court correctly held that the States' allegations – that Facebook limited apps' access to Platform in an effort to prevent

apps from using such access to damage Facebook's business – fall in the heartland of the rule that even an alleged monopolist has no obligation to give competitors access to its assets and infrastructure, except in narrow circumstances not present here. *See Trinko*, 540 U.S. at 407-09.

The States get no further by challenging a handful of instances in which Facebook allegedly limited an application's free access to Facebook data. In none of those instances does the complaint plead facts that could plausibly make out a claim of anticompetitive profit sacrifice under *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). And, as the district court correctly ruled, the States cannot pursue their § 2 claim on this basis because equitable relief is not available for this long-ago conduct. Relatedly, application of laches provides an additional and alternative reason to bar these stale claims based on conduct that ended more than four years before the action was filed.

STANDARD OF REVIEW

For laches, this Court reviews de novo whether the district court applied the correct "legal standard." *Daingerfield Island Protective Soc'y v. Lujan*, 920 F.2d 32, 38 (D.C. Cir. 1990). A district court has "considerable discretion on the question of how to apply the equitable principles of laches to the undisputed facts." *Pro-Football, Inc. v. Harjo*, 565 F.3d 880, 883 (D.C. Cir. 2009). This Court should review the district court's application of the equitable standard to the facts

alleged – taken as true on a motion to dismiss – for abuse of discretion because "the material facts are not in dispute." *Id.*; *cf. Menominee Indian Tribe of Wisconsin v. United States*, 614 F.3d 519, 531 (D.C. Cir. 2010). The district court's order dismissing the § 2 claim as a matter of law is reviewed de novo. *See* States Br. 18.

ARGUMENT

I. The District Court Properly Held That Laches Bars The States' Claims

A. Laches Applies to the States Suing Under § 16

1. When states sue under § 16 of the Clayton Act, they sue as "[a]ny person" – not as sovereign law enforcers – and therefore are subject to laches. JA263-67 (Op. 47-51). Although the States are (of course) "governmental actor[s]," they are "considered . . . private part[ies] when seeking an injunction pursuant to the Clayton Act." *New York v. Kraft Gen. Foods, Inc.*, 862 F. Supp. 1030, 1033 (S.D.N.Y.) (citing *American Stores*, 495 U.S. at 295), *aff'd*, 14 F.3d 590 (2d Cir. 1993) (table). Section 16 directs that injunctive relief is available "under the same conditions and principles" that govern before "courts of equity," 15 U.S.C. § 26, without exceptions for particular § 16 plaintiffs. One such principle is that laches bars untimely § 16 claims. *See*, *e.g.*, *Midwestern Mach. Co. v. Northwest Airlines, Inc.*, 392 F.3d 265, 277 (8th Cir. 2004).

As the district court reasoned, this is by the design of Congress, which prescribes who may sue to vindicate federal statutory rights. JA264-65 (Op. 48-49). As originally enacted, the Sherman Act permitted only federal enforcement actions. *See Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917). When Congress subsequently amended federal antitrust law to permit private lawsuits, it declined to adopt an amendment that would have allowed "the attorney general of any State . . . [to] bring suit in the name of the United States to enforce any of the antitrust laws." 51 Cong. Rec. 14,514 (Sept. 1, 1914); *see id.* at 14,514-27. States – whether suing in their proprietary capacity or, as here, in their *parens patriae* capacity – seek injunctive relief under § 16 as "person[s]." *See Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 447 (1945).

Consistent with this history, the Department of Justice ("DOJ") has previously explained that states are neither sovereign enforcers of federal antitrust law nor exempt from § 16's limits. *See* Mem. Amicus Curiae of United States at 4, *New York v. Microsoft Corp.*, No. 98-1233 (D.D.C. Apr. 15, 2002) ("U.S. *Microsoft* Mem.") ("In pursuing injunctive relief, . . . the States appear before the Court as private parties, not as sovereign law enforcers."), https://bit.ly/3fJDlVw. And DOJ does not challenge the laches holding here.

American Stores strongly supports the district court's holding that laches applies. JA263-64 (Op. 47-48). In that case, California challenged a

consummated merger under § 16; the court of appeals held that divestiture was unavailable to parties suing under § 16, including California. *See American Stores*, 495 U.S. at 278. The Supreme Court reversed on the ground that California (or any other private plaintiff) may obtain divestiture under § 16, clarifying, however, that "equitable defenses such as laches . . . may protect consummated transactions from belated attacks by private parties when it would not be too late for the [federal] Government to vindicate the public interest." *Id.* at 295-96. Given this statement by the Court in the context of a suit brought by California, there is no force to the States' assertion (at 27) that "[o]nly Justice Kennedy's concurrence" "suggested" that laches might apply to a state suing as a private party under § 16. *See* JA264 (Op. 48) ("It is difficult to come away from these opinions with the impression that any Justice thought that *parens patriae* suits under Section 16 are immune from a laches defense.").

2. The States contend (at 22) that they, "[l]ike all sovereign law enforcers," are "exempt" from laches. But, as the United States has explained, "state authority to seek injunctive relief under Section 16 of the Clayton Act is not based upon the sovereign interest in law enforcement." U.S. *Microsoft* Mem. 7. The States instead proceed as *parens patriae*, standing in for private citizens. *See Pennsylvania R.R.*, 324 U.S. at 447. States "suing *parens patriae*" pursue "a quasi-sovereign interest." *Pennsylvania v. Kleppe*, 533 F.2d 668, 673 (D.C. Cir. 1976).

And "quasisovereign" and sovereign interests are not the same. *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 258 (1972). The former "stand apart" from and are "not sovereign interests," which include a government's "sovereign power" to "enforce a legal code" that *it* promulgates. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601-02 (1982).

This distinction forecloses the States' arguments (at 22) that laches does not apply to them when they sue under § 16. Sovereigns can be subject to laches when acting in a non-sovereign capacity. *See*, *e.g.*, *Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943). And *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126 (1938), which the States invoke (at 18, 19, 22, 23), is in accord. There, the Supreme Court explained that a "domestic sovereign" enforcing domestic law is not subject to laches. 304 U.S. at 132-33. But a foreign sovereign suing under U.S. law does not benefit from the rule – which can exempt a sovereign from both "the consequences of its laches" and "the operation of statutes of limitations," *id.* at 132 – because it is not a sovereign enforcer of those laws. *See id.* at 135-36. The same is true for states when they seek to enforce federal antitrust law.

The distinction between sovereign and quasi-sovereign interests carries particular weight here. The Supreme Court has reasoned, in a suit by Illinois seeking damages, that states proceeding *parens patriae* – as they do when seeking injunctive relief under § 16 – "simply" take advantage of a "procedural device" to

sue "on behalf of their citizens[ ] to enforce *existing* rights of recovery." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 733 n.14 (1977) (emphasis added). A private right is not "existing," and therefore cannot be enforced by a state, if it is untimely. *See also Puerto Rico v. Carpenter Co.*, 442 F. Supp. 3d 464, 474 (D.P.R. 2020) (applying laches).

Furthermore, a state's obligation to establish that its citizenry has suffered sufficient injury to establish *parens patriae* standing underscores that a state does not sue as a sovereign law enforcer. A federal antitrust enforcer always has standing to prosecute a legal violation. *See Georgia v. Evans*, 316 U.S. 159, 161-62 (1942). By contrast, a state – which has no sovereign interest in the enforcement of *federal* law – must separately establish its right to pursue an action. *See Pennsylvania R.R.*, 324 U.S. at 447, 450-51; *see also Alfred L. Snapp*, 458 U.S. at 601-02, 607.[4]

Congress, moreover, rejected the logic of the States' position by subjecting *parens patriae* lawsuits seeking damages to a four-year statute of limitations, just like private suits, but unlike suits by the federal government. *See* 15 U.S.C. §§ 15b, 15c(a)(1). The States offer no reason why Congress would subject damages claims pursued by states as *parens patriae* to a statute of limitations but

[4] *See also In re Packaged Seafood Prods. Antitrust Litig.*, 338 F. Supp. 3d 1079, 1095-97 (S.D. Cal. 2018); *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 152 (D.D.C. 2002).

immunize injunctive claims seeking dramatic relief, such as divestiture, from laches. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.") (cleaned up).

3. The States cite (at 23-24) several cases, but only one – *Massachusetts ex rel. Bellotti v. Russell Stover Candies, Inc.*, 541 F. Supp. 143 (D. Mass. 1982) – is a federal antitrust case, and it carries no weight following the Supreme Court's later *American Stores* decision. The district court in *Russell Stover* found that Massachusetts proceeded under § 16 "in its sovereign capacity," *id.* at 145, which is inconsistent with the Supreme Court's view in *American Stores*, *see* 495 U.S. at 287 ("§ 16 filled a gap in the Sherman Act by authorizing equitable relief in private actions").[5] The States' only other antitrust case – *Washington v. LG Electronics, Inc.*, 375 P.3d 636 (Wash. 2016) – concerned a state's enforcement of its *own* state antitrust laws as to which the state *is* a sovereign enforcer.[6]

[5] Cases in which states brought *timely* federal claims do not address laches. *See* Former Enforcers Br. 4-9. For example, *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 225 n.21 (S.D.N.Y. 2020), *cited in* Former Enforcers Br. 9, recognized states' ability to sue under § 16 to enjoin a merger before closing.

[6] The other cases cited by *amici*, *see* Former Enforcers Br. 14 n.35, likewise involve states acting as sovereign enforcers of state law. *See Capruso v. Village of Kings Point*, 16 N.E.3d 527, 532-33 (N.Y. 2014) (public-trust doctrine); *State ex. rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 33 (Iowa 2013) (consumer-fraud law).

The States' other cases (at 23-24) reinforce the distinction between sovereign law enforcement and a suit that a state pursues as a private plaintiff under § 16. In *United States v. Mottolo*, 605 F. Supp. 898, 909 (D.N.H. 1985), the district court declined to apply laches to "the State's federally-created claim" brought "in its sovereign capacity" under CERCLA, which provides that either "the United States Government *or a State*" that incurs waste-remediation costs can seek recovery under the law's liability provision, 42 U.S.C. § 9607(a)(4)(A) (emphasis added). In *United States v. Letter from Alexander Hamilton*, 15 F.4th 515, 523, 526 (1st Cir. 2021), *cert. denied*, No. 21-990 (U.S. Mar. 7, 2022), the Commonwealth of Massachusetts sought to enforce its own public-records law. And in *Illinois v. Kentucky*, 500 U.S. 380, 388 (1991), the states were asserting inherent sovereign rights as to their territorial boundaries. By contrast, courts have applied laches against states where they do not proceed as sovereign enforcers of their own laws. *See*, *e.g.*, *Carpenter*, 442 F. Supp. 3d at 474; *Nebraska ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Comm'n*, 834 F. Supp. 1205, 1215-16 (D. Neb. 1993), *aff'd*, 26 F.3d 77 (8th Cir. 1994).

4. The States' argument (at 24-25) that laches cannot apply when they sue "to protect public rights," "regardless of the claim pursued," cannot be squared with *Guaranty Trust*, which explained that laches can run against even the "domestic sovereign" if consistent with "the nature of the suitor or of the claim

which it asserts." 304 U.S. at 134-35. The States' argument also "proves too much," as the district court reasoned. JA266 (Op. 50). Congress intended for private § 16 lawsuits to "advance the public interest," *IT&T Corp. v. General Tel. & Elecs. Corp.*, 518 F.2d 913, 940 (9th Cir. 1975), *disapproved of on other grounds by American Stores*, yet those lawsuits are subject to laches, *see id.* at 926.

Nor do the States support their assertion that the Court should require a legislative "clear statement" before applying ordinary equitable limits to claims under § 16. This is nothing like a law that might be interpreted to "alter the balance between federal and state power and the power of the Government over private property." *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-50 (2020); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (calling for a clear statement before presuming that Congress intended federal law to override "a state constitutional provision"). Rather, the background presumption here – consistent with established principles of federalism – is that one government is not a sovereign enforcer of another's laws. *See Guaranty Tr.*, 304 U.S. at 132-36. And, as noted above, the conclusion that laches applies to claims for injunctive relief is fully consistent with Congress's express provision of a statute of limitations for states' *parens patriae* damages claims.

B. The District Court Properly Applied Laches

The district court correctly acted within its discretion in determining that laches bars the acquisition claims. "[T]he States' long delays were unreasonable and unjustified as a matter of law," JA260 (Op. 44), and the "prejudice to Facebook, were equitable relief to be awarded now, is also apparent," JA261 (Op. 45). The States' challenge to the first determination is both forfeited and meritless; their challenge to the second cannot be squared with the law or their allegations.

1. The district court correctly found that the States unreasonably delayed bringing their claims

a. The States forfeited any challenge to the district court's determination that their delay was unjustified by failing to contest this issue below. *See United States v. Stover*, 329 F.3d 859, 872 (D.C. Cir. 2003) (per curiam). Facebook argued that the complaint's allegations "establish delay far more inexcusable than the much shorter lags" that had, in prior cases, "required dismissal under the doctrine of laches." Dkt. 114-1, at 11. But the States responded only that "the passage of time made clear the *continuing* anticompetitive effects of the Instagram and WhatsApp acquisitions," Dkt. 122, at 13 (emphasis added), *not* that the facts supporting their claims were not evident years earlier.

The district court noted the States' silence on this point. *See* JA268 (Op. 52) ("Plaintiffs do not contend . . . that they lacked notice of the threatened injury . . . on which their . . . claim is based at the time the acquisitions were announced or

consummated.") (cleaned up). That alone precludes the States' argument (at 36) that it was "reasonabl[e]" for the States to file suit when the "[a]nticompetitive effects" of the challenged conduct "became clear." It likewise bars their unsupported assertion (at 37) that supposed "misrepresentations" by Facebook "hindered the States[]" from suing.

b. In any event, the States do not justify their delay in challenging Facebook's acquisitions. "When evaluating the reasonableness of a delay, the evaluation period begins when the plaintiff knew (or should have known) of the allegedly [unlawful] conduct." *Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1226-27 (9th Cir. 2012). And "the four-year statute of limitations in 15 U.S.C. § 15b furnishes a guideline for the computation of the laches period" under federal antitrust law. *Samsung Elecs. Co. v. Panasonic Corp.*, 747 F.3d 1199, 1205 (9th Cir. 2014) (quotation omitted). Moreover, in the case of mergers, even very brief delay – of weeks or months, not years – may preclude divestiture. *See Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1235 (8th Cir. 2010); *Taleff v. Southwest Airlines Co.*, 828 F. Supp. 2d 1118, 1124-25 (N.D. Cal. 2011), *aff'd*, 554 F. App'x 598 (9th Cir. 2014).

Those principles establish the unreasonableness of the States' delay. The States allege that Facebook had a monopoly no later than 2011. JA60 (¶ 68). Instagram was, the States claim, "a significant and growing competitor" in 2012.

JA111 (¶ 264). And, as the district court noted, the FTC "conducted a highly publicized, four-month-long investigation to determine whether the proposed acquisition . . . would violate Section 7 of the Clayton Act." JA260 (Op. 44) (cleaned up). The WhatsApp acquisition in 2014 was likewise subject to high-profile review; moreover, the States allege that Facebook paid $19 *billion* for WhatsApp two years after the acquisition of Instagram should have (by their own account) put the States on guard. JA85 (¶ 166). The States point to no allegation explaining why they waited to challenge these acquisitions. *See Midwestern Mach.*, 392 F.3d at 272 ("Mergers occur in the public eye and at a reasonably certain date."). Nor do the States identify any § 16 case permitting a comparable delay in challenging alleged anticompetitive conduct – 8 years for Instagram, 6 years for WhatsApp – and we are aware of none.[7]

The district court also correctly rejected the States' argument (at 40) that their suit is timely because they challenge a "course of conduct" that "remains ongoing," explaining that laches turns on claim *accrual*. JA268 (Op. 52). Even

[7] Another federal court dismissed indistinguishable claims on laches grounds. *See Reveal Chat Holdco, LLC v. Facebook, Inc.*, 471 F. Supp. 3d 981, 990-92 (N.D. Cal. 2020); *Reveal Chat Holdco LLC v. Facebook, Inc.*, 2021 WL 1615349, at *5 (N.D. Cal. Apr. 26, 2021). The Ninth Circuit affirmed in part the dismissal of the plaintiffs' claims and dismissed the plaintiffs' appeal of the laches ruling for lack of standing. *See Reveal Chat HoldCo LLC v. Meta Platforms, Inc.*, 2022 WL 595696 (9th Cir. Feb. 28, 2022).

leaving aside that the States alleged no ongoing conduct – the (lawful) Platform policies were withdrawn in 2018, and the last challenged incident of enforcement was outside the limitations period altogether – the States did not dispute below and do not dispute now that their claims *accrued* long before December 2016.[8]

2. The district court correctly found that the States' unreasonable delay would prejudice Facebook

a. The district court correctly held that prejudice is manifest on the face of the complaint. JA261-63 (Op. 45-47). The States' multi-year delay itself creates a "presumption of prejudice" because firms need repose to make business decisions. *IT&T*, 518 F.2d at 926; *see also Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1057 (5th Cir. 1982) ("In an antitrust case, . . . if the plaintiff's claim is brought outside the analogous limitations period, the bare fact of delay creates a rebuttable presumption of prejudice to the defendant.") (quotation omitted); *cf. Kehoe Component Sales Inc. v. Best Lighting Prods., Inc.*, 796 F.3d 576, 584-85 (6th Cir. 2015) (explaining that "a delay beyond the analogous limitations period" for Lanham Act claims "is presumptively prejudicial and unreasonable").

[8] The States effectively abandon their claims under § 7 of the Clayton Act, which challenge the acquisitions of Instagram (Count II) and WhatsApp (Count III). The States' acknowledgement (at 40) that those acquisitions are not "subject to challenge now" other than as part of a "course of conduct" undermines any argument that their Clayton Act claims are timely.

Moreover, as this Court has noted, "if the delay is lengthy" – as it was here – then "a lesser showing of prejudice is required." *Pro-Football*, 565 F.3d at 884-85; *see also Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 824 (7th Cir. 1999) (same). The States have not seriously attempted to rebut the presumption with factual allegations. And the only case they cite on this issue (at 31) is inapposite: *Daingerfield* reversed a decision applying laches against a NEPA claim brought before the facility at issue had been constructed. *See* 920 F.2d at 34, 40. The case does not address whether a presumption applies in the antitrust context.

b. The district court also correctly found that the States alleged facts making apparent that Facebook would suffer severe prejudice were the States' belated claims to proceed. JA262-63 (Op. 46-47). "Economic prejudice arises from investment in and development of [an asset], and the continued commercial use and economic promotion of [the asset] over a prolonged period adds weight to the evidence of prejudice." *Bridgestone/Firestone Rsch., Inc. v. Automobile Club de L'Ouest de la France*, 245 F.3d 1359, 1363 (Fed. Cir. 2001) (applying laches to bar trademark challenge).

Such prejudice is apparent on the pleadings. Where companies have "already combined their . . . operations and . . . function as one corporate entity," there "would be obvious hardship for the defendants, their employees, and their customers if the court were to order a forced divestiture." *Taleff*, 828 F. Supp. 2d

at 1124 (cleaned up); *see also* JA262-63 (Op. 46-47) (finding that "[e]quitable relief would similarly prejudice Facebook's shareholders"). Belated antitrust challenges seeking divestiture – the principal remedy sought here – are therefore barred by laches precisely because of the obvious difficulty of "unscrambling the egg." *See*, *e.g.*, *Ginsburg*, 623 F.3d at 1235-36; *Midwestern Mach.*, 392 F.3d at 277; *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1173 (C.D. Cal. 2000).[9]

The States' allegations make clear that Facebook spent years working to "integrate" Instagram, JA72 (¶ 115), and "combined" WhatsApp data "across all Facebook products," JA87 (¶ 177). The States also allege that Facebook modified its products and services following the acquisitions. JA74-75, 87 (¶¶ 124, 127, 176-177). The States cannot pretend that the growth of Instagram and WhatsApp in the many years since Facebook acquired them occurred without corresponding investment and promotion: as the States acknowledge, when Instagram was

[9] The only antitrust case the States cite (at 38), *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 718 (4th Cir. 2021), was commenced within four years of the merger at issue and turned on a claim that the unlawful conduct – termination of a supply agreement – did not occur until two years after the merger. The Fourth Circuit distinguished those facts from laches cases in which plaintiffs "'were on notice of all material facts.'" *Id.* at 717 (quoting *Federal Home Loan Bank Bd. v. Elliott*, 386 F.2d 42, 54 (9th Cir. 1967)). Because the plaintiff's delay was not unreasonable, the court did not address prejudice. *See id.* at 719.

acquired it "had no revenue stream," JA74 (¶ 122), and WhatsApp's revenue "for the first six months of 2014 . . . was just under $16 million," JA82 (¶ 157).

"According to the States, for the last five-plus years Facebook has made business decisions and allocated firm resources based on holding Instagram and WhatsApp, and it has also integrated their offerings to some extent into its core business." JA261 (Op. 45). In light of its substantial investments and development of its business in reliance on those decisions, "common sense dictates that [Facebook] would suffer some economic hardship" if the States' claims were allowed to proceed. *Pro-Football, Inc. v. Harjo*, 567 F. Supp. 2d 46, 60 (D.D.C. 2008) (cleaned up), *aff'd*, 565 F.3d 880 (D.C. Cir. 2009).[10]

c. The States argue (at 19) that prejudice should not be decided on the pleadings, but this Court has previously affirmed an order granting a motion to dismiss untimely claims as barred by laches, *see Love v. Stevens*, 207 F.2d 32, 32 (D.C. Cir. 1953) (per curiam), as have other circuits, *see*, *e.g.*, *Zuckerman v. Metropolitan Museum of Art*, 928 F.3d 186, 190 (2d Cir. 2019) (affirming

[10] *See Elliott*, 386 F.2d at 54 (applying laches to a claim seeking post-merger divestiture); *see also CarrAmerica Realty Corp. v. Kaidanow*, 321 F.3d 165, 171-72 (D.C. Cir.) ("[t]he prejudice that can result from such delay is particularly unsettling when, as here, the claim affects the validity of stock which is central to a merger"), *opinion supplemented on other grounds*, 331 F.3d 999 (D.C. Cir. 2003) (per curiam).

dismissal); *McKinney v. Waterman S.S. Corp.*, 925 F.2d 1, 2-3 (1st Cir. 1991) (same).

The States point (at 19, 28) to *Menominee Indian Tribe*, which quoted the observation that "a complaint seldom will disclose undisputed facts clearly establishing the laches defense." But, as the district court noted, "'[s]eldom' . . . does not mean 'never.'" JA281 (Op. 65). Nor is *Menominee Indian Tribe* similar. There, laches could not be decided on the pleadings because the only prejudice to the defendant cited by the district court arose several months before the plaintiff's claim could "accrue." *Menominee Indian Tribe*, 614 F.3d at 532. Here, the complaint "disclose[s] undisputed facts clearly establishing" prejudice following the acquisitions – when the claims accrued – warranting application of laches on the pleadings. 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1277, at 643-44 (3d ed. 2004), *cited in Menominee Indian Tribe*, 614 F.3d at 532.

d. The States' remaining arguments – most of which they forfeited by failing to raise them before the district court – are meritless.

The States claim (at 29), without supporting authority, that they are entitled to "special" balancing "in the equitable analysis." The lone case the States cite has nothing to do with laches. *See Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (standing). And the district court *did* press its thumb on the scale and concluded

that, "[e]ven giving the States' interests significantly more weight than a private actor's would receive, . . . does not lead to a different result" given the delay and prejudice here. JA267 (Op. 51).

The States' argument (at 32-33) that the district court failed to consider the availability of injunctive relief short of divestiture likewise fails. To the extent the States dream up remedies like "firewalls," they did not pursue such arguments in the district court and, in any event, the prejudice from placing such restrictions on Facebook's business, while less severe than divestiture, is equally plain. *See* JA263 (Op. 47) ("Prejudice sufficient to trigger the rule of laches is manifest here.").

Moreover, the district court correctly explained that the "truly prospective relief" that the States sought (apart from divestiture) would not "'restore [the] competition' allegedly lost as a result" of the Instagram and WhatsApp acquisitions. JA274 (Op. 58) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961)).[11] As the court observed, "[c]ourts are . . . required . . . to decree relief effective to redress the violations." *Id.* The States do not explain how a boilerplate decree barring future anticompetitive conduct, *see* JA113

[11] The States invoke (at 32) *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam), where this Court held that antitrust defendants have a right to a remedies hearing if there are "disputed facts" as to "appropriate" relief. *Id.* at 101. That says nothing of whether particular relief is unavailable to antitrust plaintiffs as a matter of law. *See Ginsburg*, 623 F.3d at 1233 (affirming order dismissing merger challenge).

(¶ 277(2)), or requiring Facebook to report proposed acquisitions to the States in advance, *see* JA113-14 (¶ 277(3), (4)), does anything to address the competitive effects of *past* acquisitions.

The States' assertion (at 35) that there could be no prejudice because the FTC is litigating similar claims was not raised below – and is thus forfeited, *see Stover*, 329 F.3d at 872 – and also is incorrect. Actionable prejudice is evaluated within the context of the plaintiffs' lawsuit, not whether that lawsuit would cause sufficient incremental prejudice in light of other lawsuits. The States' argument would permit any private person to seek equitable relief using a pending federal government lawsuit as a shield against untimeliness. Neither law nor logic supports the argument that a massive lawsuit like this one, belatedly challenging nearly a decade's worth of business activity, causes no prejudice simply because other lawsuits are pending.

II. The District Court Properly Rejected The States' Platform Claims

The district court also properly dismissed the States' § 2 claim related to Facebook's operation of its Platform. The court first analyzed the terms governing developers' free access to Facebook's Platform and found them to have been lawful; it then found it unnecessary to analyze application-specific allegations because they were too stale to justify any equitable remedy. Those holdings were

correct. The States' allegations, even were they timely, do not state a claim under *Trinko*, *Aspen Skiing*, or any other relevant authority.

A. Facebook's Alleged Platform Conduct Was Lawful

The district court correctly ruled that *Trinko* bars the States' § 2 challenge to Facebook's alleged restrictions on app developers' Platform access. Facebook's alleged Platform policies – which the court reviewed in full, as they were incorporated by reference in the complaint – limited the way that developers could *use access to Platform* to support or create rival products and services. *See* Dkt. 114-1, at 28 (incorporating argument at FTC Dkt. 56-1, at 39, No. 1:20-cv-03590 (citing FTC Dkt. 56-6, No. 1:20-cv-03590 (full text of cited policy))). The court thus correctly understood Facebook's Platform policies as announcing a refusal to deal with (that is, a limit on Platform access for) app developers that either used Platform to export Facebook's data to rivals or otherwise duplicated and thereby displaced Facebook's core functions.

Those restrictions were lawful. *Trinko* holds that businesses generally have no duty to deal with rivals. It further makes clear that harm to a rival or potential rival in itself provides no basis for scrutinizing a refusal to deal because even a monopolist has no obligation to show solicitude for competitors. *See Trinko*, 540 U.S. at 411 (noting that there are "few . . . exceptions" to "the proposition that there is no duty to aid competitors"). Rather, a plaintiff cannot state a claim for

unlawful refusal to deal without alleging facts to show that the challenged refusal involved a short-term sacrifice of profits with the hope of charging monopoly prices later. *See id.* at 409; *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) ("[T]he monopolist's discontinuation of the preexisting course of dealing must suggest a willingness to forsake short-term profits to achieve an anti-competitive end.") (cleaned up). The States allege no such thing.

1. Developers' access to Platform was free; Facebook gained no direct revenue (and no profits) simply by providing such access. Rather, as the States allege, Facebook developed Platform with the goal of increasing user engagement *with Facebook*. JA62-63 (¶ 80). Third-party developers could benefit, too, but for the relationship to make sense for Facebook, it had to be "symbiotic," JA63 (¶ 80) – that is, mutually beneficial. Yet, as competition is defined by the States, rival apps compete by attracting users and user engagement *away* from Facebook. A developer's use of Platform to divert Facebook users or to reduce the time users spend using Facebook's service would be contrary to Facebook's business interest – and that is true irrespective of Facebook's alleged "power" in any market. No business wants to help rivals take away its customers – and that is why such restrictions are common among online services with no arguable "market power." *See supra* note 2.

Those undisputed facts foreclose the States' Platform claims. "Even a monopolist generally has no duty to share . . . its intellectual or physical property with a rival." *Novell*, 731 F.3d at 1074. "'[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.'" JA239 (Op. 23) (quoting *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 454 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 2877 (2021)). Reluctance to permit potentially parasitic uses of Platform "tells [the Court] nothing about dreams of monopoly." *Trinko*, 540 U.S. at 409.

The strict limits on duties to deal with rivals reflect core antitrust principles. When a company builds "an infrastructure that renders [it] uniquely suited to serve [its] customers," forcing the company "to share the source of [its] advantage" can undermine the incentives of the company and of its rivals "to invest in those economically beneficial facilities." *Id.* at 407-08. "Enforced sharing also requires antitrust courts to act as central planners, identifying the proper . . . terms of dealing – a role for which they are ill suited." *Id.* at 408. And forcing a company to deal with rivals "may facilitate the supreme evil of antitrust: collusion." *Id.*

Contrary to the arguments of the States (at 58-67) and DOJ (at 24-27), the claims here raise the precise concerns about competitive incentives that drove *Trinko*. The States allege that Facebook's Platform was "an innovative tool that

set it apart from other firms." JA62 (¶ 80); *see also* JA63 (¶ 81) (Facebook Connect became "one of the most popular ways to sign in to services across the internet as users took advantage of the efficiency"); *id.* (¶ 82) (Open Graph provided "a massive new distribution channel" for tens of thousands of websites). Facebook would have had far less incentive to develop such innovative tools if it could not place lawful restrictions on uses of those tools that would damage Facebook's business. The States fault Facebook for changing its policies over time, as its services and market conditions also changed. But any antitrust rule locking a firm into terms of dealing that no longer serve its interests would discourage the firm from dealing in the first place. *See Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986).

2. *Aspen Skiing*, far from supporting the States, illustrates why their claims are misguided. In that case, the Court upheld a jury verdict under § 2 where a monopolist had terminated a joint lift ticket and refused to sell lift tickets even at full retail price to its smaller rival. *Trinko* explained that *Aspen Skiing* "is at or near the outer boundary of § 2." *Trinko*, 540 U.S. at 409. As courts of appeals have held and as the district court explained, before any plaintiff can invoke *Aspen Skiing*'s limited exception to the no-duty-to-deal rule, the claim must satisfy a test "drawn from *Aspen Skiing*'s particular facts and aimed at sniffing out predation

while avoiding over-inclusiveness" that would chill procompetitive conduct. JA243 (Op. 27).

First, "there must be a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival." *Novell*, 731 F.3d at 1074; *see also Trinko*, 540 U.S. at 409. The existence of a specific course of dealing with an actual counterpart serves a critical screening function: *potential* business arrangements are unlimited. The termination of the long-established joint selling arrangements at issue in *Aspen Skiing* and in the Seventh Circuit's *Viamedia* decision provided the basis for scrutiny of challenged refusals to deal. As the district court noted, announcing the terms of future dealing does not alone entail the termination of any existing relationship. *See* JA245 (Op. 29).

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." *Novell*, 731 F.3d at 1075 (cleaned up). It is not enough simply to allege that the defendant terminated a voluntary course of dealing – on the contrary, it would seriously discourage efficient voluntary dealing if terminating *any* voluntary arrangement could justify antitrust scrutiny. *See Olympia Equip.*, 797 F.2d at 376. Rather, the monopolist must have sacrificed short-term profits, and the profit sacrifice must have been "irrational but for its anticompetitive effect." *Novell*, 731 F.3d at 1075; *see also* JA241-44 (Op. 25-28)

(discussing *Aspen Skiing*). This standard is "demanding," JA244 (Op. 28), requiring allegations that the conduct makes economic sense only if it would permit later recoupment of lost profits through the charging of monopoly prices. *See Novell*, 731 F.3d at 1076; *St. Luke's Hosp. v. ProMedica Health Sys., Inc.*, 8 F.4th 479, 486 (6th Cir. 2021) (same).

Contrary to the States' argument (at 66-67), the complaint fails to allege any irrational profit sacrifice. Facebook never charged for Platform access. Although the States allege that Facebook "benefited monetarily" from increased user engagement and, for a time, by sharing revenue "from in-app purchases," the States do not allege that Facebook sacrificed those benefits as a result of its Platform policy changes. Declining to assist developers who sought to use Facebook's free tools to divert users away from Facebook (or to assist Facebook's competitors to do so) suggests no profit sacrifice at all: it was not in Facebook's short- or long-term interest to let others use Facebook's own Platform to encourage users to *leave* Facebook.

The States are also wrong to argue (at 66) that changes to a prior "industry-wide course of dealing" are comparable to the termination of a specific, profitable joint selling arrangement like the four-hill ski pass in *Aspen Skiing*. The key fact in *Aspen Skiing*, emphasized in *Trinko*, was that the termination of the joint lift ticket for skiers effectively turned down paying customers at full price, resulting

in immediate losses for the defendant that could be explained only by the prospect of later recoupment. Such facts – analogous to the profit sacrifice associated with predatory pricing – warranted putting the burden on the defendant to provide a justification for its conduct (which the *Aspen Skiing* defendant could not do). *See Trinko*, 540 U.S. at 408-09; *Aspen Skiing*, 472 U.S. at 606-08, 610; *see also Viamedia*, 951 F.3d at 460.

By contrast, developers never paid Facebook for unrestricted access to Platform, and none of the alleged facts distinguishes Facebook's conduct from the way all businesses constantly adjust their strategies to address changing circumstances, particularly in new and highly innovative industries. *See FTC v. Qualcomm Inc.*, 969 F.3d 974, 994-95 (9th Cir. 2020). Facebook's alleged conduct does not suggest any predatory profit sacrifice that would warrant the demand for a justification.

The States and *amici* cannot cite a single case decided since *Trinko* that has upheld a refusal-to-deal claim based on the application of an announced policy similar to the Platform policies at issue here. Indeed, every court to address Facebook's Platform policies has upheld Facebook's conduct. *See Sambreel Holdings LLC v. Facebook, Inc.*, 906 F. Supp. 2d 1070, 1075 (S.D. Cal. 2012) ("Facebook has a right to control its own product, and to establish the terms with which . . . application developers . . . must comply in order to utilize this

product."); *Facebook, Inc. v. Power Ventures, Inc.*, 2010 WL 3291750, at *12-13 (N.D. Cal. July 20, 2010); *see also LiveUniverse, Inc. v. MySpace, Inc.*, 2007 WL 6865852, at *13 (C.D. Cal. June 4, 2007) (defendant's restriction on references to competing websites "may be viewed as merely preventing [plaintiff] from advertising its website free of charge on [defendant's] site" and was lawful), *aff'd*, 304 F. App'x 554 (9th Cir. 2008).

3. The same conclusion applies both to the Platform policy generally and to every specific refusal to deal the States allege. The district court declined to decide whether the specific alleged refusals to deal could thread the "narrow-eyed needle" for refusal-to-deal claims under *Aspen Skiing*. JA241, 247 (Op. 25, 31). None can, and the States do not argue otherwise on appeal. *See* States Br. 66-67 (pursuing refusal-to-deal theory based only on "Facebook's policies" and "reversal of an industry-wide course of dealing").

The conduct the States allege involving specific developers does not come close to *Aspen Skiing* or predatory termination of a profitable course of dealing. *See Novell*, 731 F.3d at 1075-76. The States' complaint refers to seven instances in which Facebook allegedly denied or limited an app's access to Platform. JA95-102 (¶¶ 207-231). For one (Vine), there is no allegation of any prior course of dealing between the app and Facebook. JA97 (¶ 214); JA245 (Op. 29). For the remaining six apps, there is no allegation plausibly showing that these relationships

were profitable for Facebook or even that Facebook lost *any* supposed benefit by limiting data access.

Facebook is not alleged to have received any revenue from these developers' Platform access. There is no allegation that it earned any revenue from "in-app purchases," and, while the complaint alleges that one app, Circle, was "a buyer of Facebook advertising," JA98 (¶ 219), there is no allegation that the separate advertising relationship was either profitable or terminated. There is certainly no allegation that any lost ad revenues from Circle outweighed the immediate risk of losing users and engagement from allowing Circle unlimited Platform access.

The States do not allege that restricting these apps' Platform access made sense only because there was a likelihood of recouping lost profits through later exercise of monopoly power. Indeed, the States do not allege that Facebook lost any profits by cutting off any of the apps at issue; so there was nothing to recoup. Furthermore, the restricted apps allegedly used Platform access to encourage consumers to use the developers' services *instead of* Facebook. *See* States Br. 66-67. Whether it has 90 or 9 percent of the market, every business would prefer to avoid that risk. *See supra* note 2.

4. DOJ argues (at 25) that this Court should reject *Trinko* because allegedly new "market realities" give license to adopt a new "legal analysis." DOJ makes no argument that the general rule articulated in *Trinko* does not apply here,

nor does it argue that the *Aspen Skiing* exception to *Trinko* applies. It merely argues (at 25-27) that *Trinko* is ill-suited to modern realities.

DOJ's invitation to shirk binding precedent is directed to the wrong tribunal – and is misguided even on its own terms. *Trinko* dealt squarely with relevant "market realities." The claim in *Trinko* arose from the allegation that Verizon "denied interconnection services to rivals in order to limit entry." 540 U.S. at 407. The Supreme Court upheld the defendant's right to refuse such access even though the rival allegedly had *no* alternative way to enter the market. *See id.* at 409-11; *Qualcomm*, 969 F.3d at 993; *Viamedia*, 951 F.3d at 454 (same); *see also Olympia Equip.*, 797 F.2d at 375-76 ("[A] firm with lawful monopoly power has no general duty . . . to extend a helping hand to new entrants . . . [or] help [rivals] . . . survive or expand."). DOJ (and the FTC) has for years told the Supreme Court and appellate courts – in cases decided on the pleadings – that "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."[12]

[12] Br. for United States and FTC as Amici Curiae at 15, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), https://www.justice.gov/sites/default/files/osg/briefs/2002/01/01/2002-0682.mer.ami.pdf; *see also* Br. for United States as Amicus Curiae at 17 n.10, *Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009), https://www.justice.gov/sites/default/files/osg/briefs/2008/01/01/2007-0512.mer.ami.pdf; Br. of United States as Amicus Curiae at 18-27, *FTC v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020), https://www.justice.gov/atr/case-

Moreover, as Facebook noted in the district court, the States neither alleged nor argued that access to Facebook's Platform was necessary for rivals to compete. *See* Dkt. 114-1, at 28 (incorporating argument at FTC Dkt. 56-1, at 37, No. 1:20-cv-03590). As the States allege, Facebook itself launched in a marketplace "then dominated by Myspace." JA60 (¶ 64). Yet Facebook grew without any access to Myspace and its network of millions of users – and of course without the platform Facebook had yet to build. The States allege no facts showing that rivals needed access to Platform to grow, and they and *amici* offer no argument for why Facebook had an obligation to help competitors seeking to displace Facebook.

B. Facebook's Alleged Policies Were Not Unlawful "Conditional Dealing"

The States cannot avoid the clear rules limiting duties to deal by recharacterizing conduct as "conditional dealing." To the extent their argument is not simply a repackaging of the claim that Facebook refused to deal with rivals, the States have alleged no unlawful "condition" in the terms of Facebook's dealing with developers that interfered with rivals' independent efforts to compete.

1. The States argue (at 59-62) that by refusing to deal with rivals – or with developers that used Platform to funnel data to rivals – Facebook

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document/file/1199191/download; Br. for United States as Amicus Curiae at 11-17, *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429 (7th Cir. 2020) (arguing expressly for a "no economic sense" test), https://www.justice.gov/atr/case-document/file/1110056/download.

"conditioned" Platform access on renouncing competition with Facebook. That argument is semantic, not substance. Whenever a defendant provides certain facilities to customers but not to competitors, such a refusal to deal can always be characterized as "conditional" on customers not competing. JA251-52 (Op. 35-36).

For this reason, DOJ's argument (at 15) that Facebook's alleged conduct is unlawful because its policies allegedly induced "app developers to change their behavior by limiting or discouraging them from dealing with Facebook's rivals or by deterring them from becoming rivals to Facebook themselves" flouts *Trinko* and the Supreme Court's subsequent decision in *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009). Those cases make clear that no firm has a general obligation to give rivals access to an input, even when, without that input, rivals have neither the ability (*Trinko*) nor incentive (*linkLine*) to compete. The *only* alleged competitive deterrent here, as DOJ recognizes (at 16-17), is Facebook's making clear that it would not provide certain tools to rivals.

2. The district court correctly held that the facts alleged do not state a claim for unlawful conditional dealing because the States do not allege that Facebook's terms of access to Platform interfered with any application developer's *independent* dealing with third parties. Facebook's Platform policies set the terms for how developers could use *Facebook's* tools. But developers always remained

free both to compete with Facebook and to collaborate with Facebook competitors without using Facebook's tools to do so.

This distinction between declining to assist rivals and affirmatively interfering with rivals' competitive efforts is fundamental. "Put simply if perhaps a little too simply, today a monopolist is much more likely to be held liable for failing to leave its rivals alone than for failing to come to their aid." *Novell*, 731 F.3d at 1072-73 (citing cases).

Both of the States' lead cases – *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), and *Microsoft* – are readily distinguishable because they involved "exclusive dealing," a strategy in which the defendant conditions its business with third parties on a promise by those third parties not to deal independently, using their *own resources*, with the defendant's rivals. Microsoft interfered with rivals through exclusive-dealing contracts with its customers that prevented them, without any legitimate purpose, from dealing with Microsoft's rivals. *See Microsoft*, 253 F.3d at 70-71. Lorain Journal likewise demanded exclusivity from customers, preventing them from placing advertising with a new radio rival. *See Lorain Journal*, 342 U.S. at 149. In both cases, the problem was forcing *customers* (not would-be rivals) to make a choice they would never need to make if not subject to monopoly power: to continue dealing with the monopolist, or to deal with rivals but sacrifice that necessary, monopolized input. That stands in contrast

to the States' allegations that Facebook declined to help rivals while leaving customers free to engage in independent dealings with those rivals.

DOJ's effort (at 16) to analogize Facebook's restrictions on exporting Facebook data to Microsoft's insistence that software developers use Microsoft's Java Virtual Machine as the default in their software fails for the same reason. This Court found that the requirement that software developers use Microsoft's tool as the default meant that developers would have no reason to include others' tools in the same software. *See Microsoft*, 253 F.3d at 75. By contrast, a developer whose app is successful on Facebook has every reason to adapt it for other platforms, and nothing in Facebook's policies discouraged it from doing so.

The States' remaining cases (at 61) are similarly far afield. *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013), involved an agreement between competitors not to compete – "'the supreme evil of antitrust,'" *id*. at 152 (quoting *Trinko*, 540 U.S. at 408) – rather than unilateral conduct by a single firm. Likewise, in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), the Supreme Court affirmed liability based on provisions in the defendant's "wheeling contracts . . . which it sa[id] relieve[d] it of any duty to wheel power to municipalities served at retail by Otter Tail at the time the contracts were made." *Id.* at 378; *see Trinko*, 540 U.S. at 410. Because Otter Tail controlled the only means to transmit power from the generator to the retail utility, *see Otter Tail*, 410 U.S. at 369, those provisions

constituted an agreement by the generator (Otter Tail's customer) not to deal with Otter Tail's competitors. Facebook's Platform policies are not alleged to have imposed any such prohibition.

3. The States cannot support any assertion that Facebook's Platform policies somehow crossed the line from controlling uses of Facebook's own facilities to imposing restrictions on others' independent conduct (the "assay . . . into the marketplace" distinguished in *Novell*, *see* DOJ Br. 15-16). The States rely (at 62) on paragraph 199 of the complaint, but all that is alleged there is that, "[i]n 2011, Facebook adopted a policy aimed at forbidding 'competing social platforms,' and any apps that linked or integrated with competing social platforms, from accessing its APIs." JA93 (¶ 199). On its face, this is an allegation that Facebook refused to deal with rivals and limited sharing of Facebook's valuable infrastructure with rivals "linked or integrated" through an app. DOJ acknowledges (at 16) that this distinction was crucial to the district court's decision, and it does not contest that "the challenged conditions did not prevent app developers from dealing with rivals outside of Facebook's platform."

The States' argument (at 50) that the district court erred in finding that the alleged restriction on "linking or integrating with competing social networks" was limited to apps operating within the Facebook site itself, *see* JA254-55 (Op. 38-39), has no force. In reaching that conclusion, the court relied on the text

of the relevant policy itself, which the States incorporated by reference in their complaint and which Facebook attached to its motions to dismiss. *Id*. The States did not below and do not now dispute that the actual text of the relevant policy is integral to their complaint and thus appropriate to consider on a motion to dismiss. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

Moreover, whether the challenged policies applied beyond apps operating within the Facebook website does not alter the legal analysis. The States allege only a refusal to allow apps to *use Facebook's Platform* to export Facebook data into rival products. JA93 (¶ 199); *see also* DOJ Br. 16-17 (arguing that Facebook allegedly "disincentivized" cross-platform and competing apps by declining to interconnect). That policy is lawful for the reasons above.

C. The States' "Course of Conduct" and "Intent" Arguments Cannot Undermine the Lawfulness of Facebook's Platform Policies

1. The States' assertion (at 55-58) that Facebook's alleged Platform policies remain actionable as part of an overall "scheme" or "course of conduct" is incorrect because a refusal to aid a competitor is simply not unlawful. Lawful conduct does not become suspect because a defendant allegedly engaged in other challenged conduct.

As the district court explained, refusals to deal that do not independently violate *Aspen Skiing* – and thus are "clearly legal" on their own – cannot be "thrown into the mix to bolster a plaintiff's antitrust case." JA246 (Op. 30).

"Otherwise, . . . monopolists might face liability for refusals to deal that are categorically protected from scrutiny" for sound reasons of antitrust policy. *Id.* (citing Daniel A. Crane, *Does Monopoly Broth Make Bad Soup?*, 76 Antitrust L.J. 663, 666-69 (2010); Douglas H. Ginsburg & Koren Wong-Ervin, *Challenging Consummated Mergers Under Section 2*, Geo. Mason Univ. L. & Econ. Paper No. 20-14 (May 2020), https://bit.ly/3wPRpnx). "Any other result would recreate the negative policy consequences that the no-duty-to-deal rule is meant to avoid," JA280 (Op. 64), and would contradict the Supreme Court's separate analysis of the claims in *linkLine*, which rejected § 2 plaintiffs' attempt to "alchemize . . . a new form of antitrust liability" by "join[ing] [one] claim that cannot succeed with" another, 555 U.S. at 457.

The States cite (at 55-56) *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), but that case involved the aggregation of multiple firms' market shares to determine the market-wide impact of a conspiracy "to monopolize the vanadium market." *Id.* at 697-98. The case "does not stand for the unworkable proposition that business conduct that does not offend the antitrust laws may violate the Sherman Act once it is combined with other lawful business conduct." *Eatoni Ergonomics, Inc. v. Research In Motion Corp.*, 826 F. Supp. 2d 705, 710 (S.D.N.Y. 2011), *aff'd*, 486 F. App'x 186 (2d Cir. 2012). Nor do *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc), or *City of Anaheim*

v. Southern California Edison Co., 955 F.2d 1373 (9th Cir. 1992), hold that categorically lawful conduct can become the basis of liability if combined with any other conduct. *City of Anaheim* even clarified that liability cannot follow from "perfectly legal acts." 955 F.2d at 1376; *see also LePage's*, 324 F.3d at 162 (aggregating the "anticompetitive effect" of "exclusionary practices" already determined unlawful).

The States assert (at 67-69) that they should be allowed to proceed past the pleadings because "applying old doctrines to new digital platforms is rarely straightforward." But *Trinko* itself was an antitrust case involving new developments in communications markets – a closer analog to the technological context here than downhill skiing – and it was resolved on the pleadings (at DOJ's urging). Every federal-court plaintiff must plead facts stating plausible claims. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548 (2007).

DOJ similarly argues (at 21-22) that the economic rationality of a refusal to deal "generally" cannot be assessed "at the pleadings stage." But DOJ's stated position now contrasts with its positions in *Trinko*, *Twombly*, and *linkLine* – all antitrust cases in which DOJ urged dismissal on the pleadings.[13] Facebook bears

[13] Br. for United States as Amicus Curiae at 26, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), https://www.justice.gov/sites/default/files/osg/briefs/2006/01/01/2005-1126.mer.ami.pdf; *see also supra* note 12.

no burden at the pleading stage to justify its conduct; it is incumbent on the States to plead *facts* establishing a plausible claim akin to that in *Aspen Skiing*.

DOJ's related contention (at 20) that every refusal to deal by a monopolist justifies "fact-intensive analysis" is also at odds with Supreme Court precedent. As the district court recognized, the general rule against imposing duties to deal under the antitrust laws does not rest on the view that forced dealing can never assist would-be competitors – of course it can. *See* JA240 (Op. 24). The rule rather rests on the understanding that *independent* rivalry, and the incentives to invest and innovate that the hope of competitive success creates, are far more important to competition and consumers. Those incentives are undermined not only by expansion of duties to deal, but also by subjecting businesses to the extraordinary burdens of antitrust litigation – with its costs in time, money, and attention, and its risks of false positives. That is why *Trinko* was resolved on the pleadings. *See* 540 U.S. at 414 (discussing risk of false positives); *see also Twombly*, 550 U.S. at 558-59 (discussing costs of federal antitrust litigation).

2. The States are likewise wrong to argue (at 64-65) that a plaintiff may state a claim by alleging that an otherwise-lawful refusal to deal was combined with "anticompetitive purpose," "malice," or a "scheme."

The choice not to deal with rivals remains permissible "even if it is motivated, as Verizon's was in *Trinko*, by a desire 'to limit entry' by new firms or impede the

growth of existing ones." JA244 (Op. 28) (quoting *Trinko*, 540 U.S. at 407); *see also Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1184 (9th Cir. 2016) (rejecting argument that refusal to deal is unlawful because it was motivated by "intent to foreclose competition"). The States' focus on motive – and their erroneous claim that anticompetitive motive *alone* suffices to transform lawful conduct into a § 2 violation – cannot be reconciled with antitrust law. The antitrust inquiry turns on "the effect of [the alleged] conduct, not upon the intent behind it." *Microsoft*, 253 F.3d at 59. Motive is particularly irrelevant in refusal-to-deal cases: the reasons an alleged monopolist may have for refusing to aid rivals are beside the point if there is no duty to do so in the first place.

The States are seeking to overturn settled law. In *Trinko*, for instance, the complaint alleged that Verizon's refusal to let competitive local phone carriers interconnect with its infrastructure was "an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive [carriers], thus impeding the competitive [carriers'] ability to enter and compete in the market for local telephone service." 540 U.S. at 404. The Supreme Court upheld Verizon's choice and dismissed the complaint. And in *linkLine*, AT&T's *motive* for its alleged "price squeeze," *see* 555 U.S. at 443-44, did not enter the Court's analysis at all: the Court upheld AT&T's alleged conduct and dismissed the complaint because AT&T had the right (under *Trinko*) to set the terms on which it sold access

to rivals and the right (under *Brooke Group*) to set any above-cost price at retail. *Id.* at 457; *see Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993).

D. The District Court Correctly Found That No Remedy Is Available for Facebook's Past Policy Enforcement

The district court correctly found that there was no remedy available for any injury from seven alleged restrictions of Platform access that occurred in 2013 (five) and 2015-2016 (two). JA247-51 (Op. 31-35). The States sought only injunctive relief, which cannot be granted for these stale claims.

1. As the district court held, a "preventive" injunction is unavailable because the States alleged no facts that could plausibly demonstrate that the alleged harms were "'likely to occur again.'" JA248-49 (Op. 32-33) (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). And a "reparative" injunction "aimed at prevent[ing] the future harmful effects of past acts," JA247 (Op. 31) (quotation omitted), is unavailable for an even more fundamental reason: an injunction "'would have no remedial effect whatsoever,'" because the court "cannot turn back the clock to 2013, 2014, or 2015 and order Facebook to provide API access" to any developer restricted at that time. JA250 (Op. 34) (quoting *In re G-Fees Antitrust Litig.*, 584 F. Supp. 2d 26, 35 (D.D.C. 2008)). Alleged "past wrongs," like Facebook's alleged restrictions, generally cannot support "the grant of an injunction," even when the allegedly unlawful

conduct ceased much more recently than five years ago. *Qualcomm*, 969 F.3d at 1005 (cleaned up). "The usual remedy" for past wrongs "is damages," which the States do not seek. JA250 (Op. 34) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)).

The States argue (at 44-45) that the district court erred in determining – improperly from the FTC's complaint, the States say – that Facebook ended the challenged policies in 2018. But the court determined that the challenged policies ended in 2018 based on the *States'* own opposition brief and exhibits that the *States* provided. *See* JA231 (Op. 15) (citing Dkt. 121-7 and Dkt. 122, at 13 (States' opposition brief) (noting "the retraction of this [challenged] policy" in 2018)). The court was right to rely on these exhibits and the actual policies over the States' ungrounded and conclusory allegations of ongoing conduct. *See Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004).

The States' complaint nowhere alleges that Facebook continued the challenged policy after it was "retracted" in 2018 or that Facebook ever even contemplated restoring it. And the States did not seek leave to amend their complaint in light of the district court's decision, which they could have done if the court had misapprehended material facts. *See also Cohen v. Capital One Funding, LLC*, 489 F. Supp. 3d 33, 46 (E.D.N.Y. 2020) (courts need not "blind themselves to integral documents that plainly undermine, or even flatly contradict, the

allegations based on those very documents"); *cf. Covad Commc'ns Co. v. Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005) (similar).

The States speculate (at 46-47) that, even if the challenged conduct is long past, Facebook might one day revive its Platform restrictions. That does not provide a basis for injunctive relief. As *Lyons* holds and DOJ concedes (at 28), a plaintiff must "demonstrate a significant threat of injury" from a "violation likely to continue or recur." *See Lyons*, 461 U.S. at 102-03, 109-10. The district court was right to dismiss the States' claim on the pleadings because the States alleged no *facts* that could support a claim that the policies themselves (which are lawful) are imminently likely to be implemented or that there is an imminent threat of denial of access to specific rivals that might be even conceivably unlawful. The States thus failed to meet their burden to "'substantiate the claim'" for injunctive relief with "well-pleaded allegations [of fact] 'that the harm is likely to occur again.'" JA249 (Op. 33) (quoting *Wisconsin Gas*, 758 F.2d at 674) (cleaned up); *see Reveal Chat*, 2022 WL 595696, at *1 (dismissing similar claims).

The States' argument (at 47-49) that an injunction could eliminate the ongoing consequences of past conduct fails to respond to the barrier the district court identified: the impossible problem, after more than half a decade, of separating (and then redressing) any ongoing consequences of specific Platform

policy applications found to have been wrongful from the consequences of intervening events. JA249-50 (Op. 33-34).

The States hardly attempt to show that a speculative remedy might redress the claimed relevant injury – here, the purported harm to the States' citizens' current economic well-being from Facebook's long-past Platform restrictions. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 (1992) (plurality) (finding no standing where requested injunction's ability to redress the claimed injury was "entirely conjectural"); *Ginsburg*, 623 F.3d at 1233 (rejecting claim where requested remedy would be improper regardless of liability).

2. For related reasons, the district court's dismissal of the Platform-based claims can be affirmed on the ground that, like the acquisition-related claims, they are barred by laches.[14] All of the alleged Platform-related *conduct* took place outside the four-year limitations period – the latest alleged instance of Platform restrictions occurred in mid-2016 – and the States offer no reason why they delayed in pursuing any challenge to well-publicized Platform policies that, they say, Facebook instituted no later than 2013.

The States allege that Facebook spent years developing its Platform to make its products more engaging. JA48 (¶ 14). The States do not dispute that Facebook

[14] This Court can affirm on this alternative ground even though the district court did not decide the issue. *See Skinner v. United States Dep't of Justice*, 584 F.3d 1093, 1100 (D.C. Cir. 2009).

developed its strategies from 2011 onward in reliance on maintaining its Platform for the benefit of *its* customers and business, not as a free resource for rivals. Subjecting Facebook to an equitable remedy now for these long-ago applications of the policies would be presumptively prejudicial. *See IT&T*, 518 F.2d at 926.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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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 32(a)(7)(B)(i) 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 12,938 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).

/s/ *Mark C. Hansen*
Mark C. Hansen

March 14, 2022

ADDENDUM

TABLE OF CONTENTS

15 U.S.C. § 15b

§ 15b. Limitation of actions

Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

15 U.S.C. § 15c

§ 15c. Actions by State attorneys general

(a) Parens patriae; monetary relief; damages; prejudgment interest

(1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that, on March 14, 2022, I caused to be filed electronically the Brief for Defendant-Appellee Facebook, Inc. with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Mark C. Hansen*
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