[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.

On Appeal from the United States District Court
for the District of Columbia, No. 1:20-cv-03589
The Honorable James E. Boasberg

BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, AND THE BUSINESS ROUNDTABLE SUPPORTING DEFENDANT-APPELLEE AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), the undersigned counsel for *amici curiae* certifies the following:

(A) Parties and Amici.

Except for the Chamber of Commerce of the United States of America, Computer & Communications Industry Association, Business Roundtable, and the following, all parties and *amici* appearing before the district court and in this Court are listed in the Brief for Plaintiffs-Appellants and the Brief for Defendant-Appellee.

Amici Curiae: International Center for Law and Economics, Henry N. Butler, Richard A. Epstein, Thomas Hazlett, Justin (Gus) Hurwitz, Jonathan Klick, Thomas A. Lambert, Daniel Lyons, Geoffrey A. Manne, Alan J. Meese, Paul H. Rubin, Michael Sykuta, John Yun, Washington Legal Foundation, the Information Technology and Innovation Fund, and Shana Wallace.

(B) Ruling Under Review.

References to the ruling at issue appear in the Brief for Plaintiffs-Appellants and the Brief for Defendant-Appellee.

(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.

/s/ James M. Burnham
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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit organization organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held company owns ten percent or more of its stock.

Computer & Communications Industry Association (CCIA) is a trade association operating as a 501(c)(6) non-profit, non-stock corporation organized under the laws of Virginia. CCIA has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The Business Roundtable is a nonprofit organization organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns more than ten percent of its stock.

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RULE 29(d) CERTIFICATION

Pursuant to D.C. Cir. R. 29(d), *amici* certify that a separate brief is necessary because the *amici*, the Chamber of Commerce of the United States of America, Computer & Communications Industry Association, and the Business Roundtable, have a unique perspective and expertise on issues raised in this appeal, and seek to address only those issues for which that perspective and expertise is most relevant. *Amici* believe that a separate brief is required to offer this unique perspective and expertise.

/s/ James M. Burnham
James M. Burnham

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IDENTITY AND INTERESTS OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

Computer & Communications Industry Association (CCIA) represents more than 20 companies offering high-technology products and services. For 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that all parties to this appeal have consented to the filing of this brief, and that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at https://www.ccianet.org/members.

Business Roundtable is an association of over 200 chief executive officers of leading U.S. companies with 20 million employees and $9 trillion in annual revenues. The association was founded on the belief that businesses should play an active and effective role in the formation of public policy, and Business Roundtable participates in litigation as *amicus curiae* where important business interests are at stake.

Amici and their members have a substantial interest in this appeal for two reasons. First, *amici*'s members rely on the doctrine of laches as a defense against claims brought after unreasonable delays. The availability of that defense takes on increased importance in contexts like this one, where States seek to sanction businesses based on long-ago transactions that regulators approved at the time.

Second, one theory of antitrust liability advanced here seriously threatens the ability of businesses to freely and efficiently operate. Under federal antitrust law, refusal-to-deal liability can exist only when

a firm unilaterally terminates a prior profitable course of dealing and, even then, only when the refusal to continue dealing has no pro-competitive justification. Any other rule—and especially the *ad hoc* test the States propose—would deprive businesses of the certainty required to innovate in competitive markets, while subjecting them to costly antitrust litigation that will deter pro-competitive behavior and thus undermine consumer welfare.

ARGUMENT

Seeking injunctive relief under Section 16 of the Clayton Act, a coalition of 46 States, the District of Columbia, and the Territory of Guam (the States) asks this Court to fundamentally change the law in at least two respects. As a threshold matter, they seek a ruling that a federal court can *never*—not after 10 years, 20 years, or 200 years—apply laches to any State or Territory when it sues to enforce federal law or protect federal public rights. As a backup, they ask this Court to conjure a novel and constricted version of laches that would lead to much the same place. And while this case involves antitrust claims, the States' sweeping position would have much broader ramifications—threatening eternal liability across large swaths of the economy. That theory cannot be

squared with the Clayton Act's text, nor does it have anything to commend it as a policy matter.

On the merits, the States ask this Court to abandon the Supreme Court's holding in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), that entities have the right to not deal with competitors except in exceedingly narrow circumstances. This Court should decline. It should instead follow the Supreme Court and hold that a refusal-to-deal claim cannot survive a motion to dismiss where, as here, the parties have no prior course of profitable dealing or, even if such a course of dealing existed, the refusal serves some pro-competitive justification.

I. The Doctrine Of Laches Forecloses The States' Claims.

A. Laches Applies To State Actions Seeking Injunctive Relief Under Section 16 Of The Clayton Act.

For as long as courts have sat in equity, the doctrine of laches has protected parties from stale and prejudicial claims. *See Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 168 (1825) (Marshall, C.J.). The States nevertheless seek a wholesale exemption from this defense that would apply no matter how unreasonable the delay or how prejudicial its effect.

That is not a framework approved by Congress, sanctioned by history, or supported by sound policy.

1. Section 16 of the Clayton Act provides that "[a]ny person" may obtain an injunction to prevent threatened injury from an antitrust violation "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." 15 U.S.C. § 26. The States do not deny they qualify as "person[s]" under Section 16, and the Supreme Court's decision in *Georgia v. Evans* says as much. 316 U.S. 159, 162 (1942). Nor do they dispute that "the conditions and principles" governing the availability of an injunction in "courts of equity" include the defense of laches. The States are thus subject to the defense of laches as much as any other "person" who invokes the Clayton Act.

That should be the end of the matter, but the States invoke what is, in their view, *another* "settled principle of equity"—that laches provides no shield against suits by "sovereign States enforcing public rights." Br. 25. Whatever the merits of that principle, the States do not come here as "sovereign States enforcing public rights"; again, they come here as "persons" under Section 16—the only provision their complaint

invokes. *See* JA44. The *United States* has a cause of action as the sovereign to obtain injunctive relief, 15 U.S.C. § 4, but that provision does *not* deputize the States as parallel sovereign enforcers. Confirming as much, Congress *did* put the States on the same footing as the United States in another provision—subjecting damages actions when either sues as *parens patriae* to a four-year statute of limitations. *See id.* § 15b.

The States' theory of standing underscores their equivalence to other "persons" under the Clayton Act. The States have claimed standing not as *sovereigns*, but as *parens patriae*—"a form of third-person standing that allow[s] the sovereign to legally step into the shoes of individual citizens." *Chapman v. Tristar Prods., Inc.*, 940 F.3d 299, 305 (6th Cir. 2019); *see* D. Ct. Dkt. 122 at 5; JA234-37. The States cannot have it both ways. They cannot bring a claim on their citizens' behalf that is, in turn, free from the equitable restrictions those citizens themselves would face had they sued as "persons" under Section 16.

The Clayton Act's history is no better for the States than its text. Congress passed the Clayton Act after two decades of the Sherman Act omitting a cause of action for States or private parties. *See Minnesota v. N. Sec. Co.*, 194 U.S. 48, 70-71 (1904). When Congress in 1914 decided

to create such a cause of action via the Clayton Act, it *rejected* an amendment that would have deputized state attorneys general to bring suit "in the name of the United States." 51 Cong. Rec. S14519-27 (daily ed. Sept. 1, 1914); *see Evans*, 316 U.S. at 162 n.1. "'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'" *Rothe Dev., Inc. v. U.S. Dep't of Def.*, 836 F.3d 57, 68 (D.C. Cir. 2016).

The United States has long agreed, taking the position that "the States … do not stand on equal footing with the United States as enforcers of the federal antitrust laws." Mem. *Amicus Curiae* of the United States at 4, *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132 (D.D.C. 2002) (No. 98-1233), https://bit.ly/3fJDlVw. Specifically, "[i]n pursuing injunctive relief" under the Clayton Act, "the States appear before the Court as private parties, not as sovereign law enforcers." *Id.* The United States has not retreated from this position. It filed an *amicus* brief in support of the States here, but its support on the vital issue of laches is confined to deafening silence.

Even the States themselves—in a recent letter signed by the attorneys general for nearly every jurisdiction suing here—have acknowledged they do not stand "on equal footing with federal enforcers in deciding where, when, and how to prosecute cases" for federal antitrust violations. Letter from Nat'l Ass'n of Att'ys Gen. to Sen. Klobuchar *et al.* (June 18, 2021), https://bit.ly/3D31Po8. In that context, the States urged Congress to amend 28 U.S.C. § 1407(g) to exempt them from the ordinary venue rules governing multidistrict litigation so that they, like the federal government, could "pursue relief without undue delay and distractions caused by the particularized interests of private plaintiffs." *Id.* But that plea to Congress just underscores that *current* law treats the United States differently from state plaintiffs when it comes to antitrust litigation.

2. In the face of all this, the States turn to policy arguments. The States do not identify a single appellate decision in the Clayton Act's century-plus history approving of injunctions under Section 16 without overcoming laches, *see* Br. 22-28; JA263, and instead ask this Court to innovate based on pleas about the historic role of States in enforcing antitrust laws. Setting aside that policy pleas cannot overcome statutory

text, this particular request is misplaced on its own terms. States obviously play an important role in protecting the public good, including in antitrust. States are free to sue as sovereigns to enforce their *own* antitrust laws. *See, e.g.*, *State v. LG Elecs., Inc.*, 375 P.3d 636, 638 (Wash. 2016). States may even sue to enforce *federal* antitrust laws, including by filing suit under Section 16. *See, e.g.*, *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 447 (1945). But what they cannot do is bring whatever equitable claim they choose free from the constraints of equity.

Nor does the broader policy calculus favor the States. Far from yielding an unalloyed good for consumers, unleashing more than 50 governments to file antitrust claims based on ancient conduct would upend the national economy. It would subject every business transaction—no matter how uncontroversial or pro-competitive—to the eternal threat of litigation based on political, cultural, and business trends decades after the deal has closed. That is a recipe for uncertainty and inefficiency, all to the detriment of consumers.

a. Timeliness defenses, laches included, play a fundamental role in our legal system and our economy by providing certainty to businesses in conducting their affairs. In the words of Chief Justice Marshall, it

"would be utterly repugnant to the genius of our laws" if an action for financial sanctions could "be brought at any distance of time." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805). The same could be said about an action seeking the equitable remedies available under the Clayton Act, at least some of which are orders of magnitude more severe, such as the divestiture of long-ago-acquired companies that the States seek here. JA114. Businesses, their shareholders, and their customers deserve to know that decades-old transactions will not be unwound by a state or territorial government's belated trip to the courthouse. The insecurity of knowing that the structure of an established enterprise is forever subject to judicial revision would cast a cloud over all business dealings down the line.

The States' contrary approach would inject deep uncertainty and impose substantial costs for all businesses engaged in conduct potentially subject to the Sherman Act—not just the companies that are actually targeted by stale claims. Clear rules allow "private parties to plan their affairs," while the opaque standard the States advocate would yield the "quixotic results" that flow from "vague standards, inconsistently applied." Phillip Areeda, *Monopolization, Mergers, and Markets: A*

Century Past and the Future, 75 Cal. L. Rev. 959, 970 (1987). Maintaining a state of readiness for potential claims that arise from every prior transaction in a company's long history would require maintaining greater financial reserves, avoiding certain transactions, or purchasing insurance policies for ever-higher prices. Those costs would not be borne by billionaires; they would fall on consumers via increased prices and abandoned transactions that would have otherwise enhanced efficiency and consumer welfare. And those costs would proliferate across the country, given the antitrust laws' liberal venue provision. *See* 15 U.S.C. § 22 (permitting suit "in any district wherein [a corporation] may be found or transacts business").

Consider the tumult that would accompany a State or Territory suddenly challenging transactions like Bristol Myers-Squibb (1989), Atlantic Richfield-Sinclair Oil (1969), or perhaps the merger of multiple concerns into Edison General Electric Company (1889). Regardless of whether such a challenge ultimately succeeded, the litigation would impose significant burdens on the parties and untold costs on the economy. Just consider the difficulties of this case, where the States seek to unwind federally pre-cleared transactions from between eight and ten

years ago (Whatsapp and Instagram) that were worth billions of dollars and that have served as the foundation for countless developments in Facebook's business and the tech sector more broadly.

b. Beyond providing much-needed certainty to businesses, defenses like laches promote effective enforcement of the law. For starters, they focus agencies' attention on fresh cases and ongoing misconduct. Removing any requirement to timely file suit would invite delay, distract from enforcing against current conduct, massively expand the scope of potential enforcement against companies caught up in contemporary political maelstroms, and enable enforcers to capitalize on shifts in the law that postdate the underlying conduct by decades or more. Timeliness defenses provide one bulwark against these problematic practices. They confine enforcement to current harms rather than everything a company has ever done. They support stability in the law and minimize the retroactive imposition of liability when the law evolves. And they provide the certainty needed to build a business by closing the door to challenging transactions after a reasonable amount of time has passed.

Requiring that plaintiffs assert their rights soon after their injury arises also maximizes the odds that the legal process will be able to yield an effective remedy. Timely litigation increases the possibility that injuries will be minimized, and gives defendants an incentive to take prompt remedial action. Timely suits maximize the law's deterrent effects by requiring that enforcement be undertaken against those who made the underlying decisions rather than their decades-later successors. And timely suits also avoid casting federal judges—"neither economic nor industry experts," *NCAA v. Alston*, 141 S. Ct. 2141, 2163 (2021)—in the impossible role of remedying decades-old antitrust violations intertwined with complex contemporary businesses.

More fundamentally, "even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation." *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944). A state enforcer could suspect a violation and yet postpone suit until it sees how the transaction turns out—even decades later after changes in law or fact make its claim more likely to succeed, or after some unrelated controversy enhances the popularity of an enforcement action against the defendant company. "[E]ssential fairness" demands some

limit on bringing suit. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974).

c. The States' approach also threatens to impose significant burdens on the courts. Not only would innumerable transactions suddenly be open to litigation (a problem of volume), but any one of those belated suits would present extraordinary evidentiary challenges (a problem of intensity). *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 320a, 320g (1978 & Suppl. 2021). By expanding the enforcement field from a reasonable time to eternity, dispensing with laches guarantees more enforcement actions concerning old conduct.

As the leading antitrust treatise explains: "Repose is especially valuable in antitrust, where tests of legality are often rather vague, where many business practices can be simultaneously efficient and beneficial to consumers but also challengeable as antitrust violations, where liability doctrines change and expand, where damages are punitively trebled," where "duplicate treble damages for the same offense may be threatened," where "relevant evidence may disappear over time," and where "liability depends not only on the parties' acts but also on many surrounding circumstances, including the behavior of rival firms

and general market conditions—matters that may be hard to reconstruct long afterwards." *Id.* ¶ 320a. For all these reasons, inviting actions that reach further and further back in time would create untold difficulties for district courts, enriching only the antitrust bar along the way.

This case illustrates the point. Here, the States are asking the courts to examine Facebook's "purpose" in "refusing to deal" with its competitors over a decade ago in 2011. Br. 64; *see id.* at 12; *see also infra* Pt. II. Reconstructing intent is always difficult, and it becomes exponentially more so as time slips away. Timeliness doctrines exist to mitigate that problem, "'promot[ing] justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Gabelli v. SEC*, 568 U.S. 442, 448 (2013); *see also Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2085 (2019) ("The passage of time means that testimony from those actually involved in the decisionmaking process is generally unavailable, and attempting to uncover their motivations invites rampant speculation.").

d. Finally, eliminating laches could cause uncertainty that reverberates far beyond this litigation. The Clayton Act aside, the U.S.

Code is littered with provisions that States can enforce with equitable remedies. *See, e.g.*, 15 U.S.C. § 1264(d) (Federal Hazardous Substances Act); 16 U.S.C. § 1540(g) (Endangered Species Act); 29 U.S.C. § 626 (Age Discrimination in Employment Act); 33 U.S.C. § 1365 (Clean Water Act); 42 U.S.C. § 2000e-5 (Title VII of the Civil Rights Act of 1964); *id.* § 6972 (Resource Conservation and Recovery Act); *id.* § 7604 (Clean Air Act); *id.* § 12117(a) (Americans with Disabilities Act (ADA)). Many of these statutes explicitly provide for state enforcement, *see, e.g.*, 16 U.S.C. §§ 1532(13), 1540(g), whereas others have been read to allow state *parens patriae* suits, *see, e.g.*, *EEOC v. Fed. Express Corp.*, 268 F. Supp. 2d 192, 196-99 (E.D.N.Y. 2003) (Title VII); *People ex rel. Vacco v. Mid Hudson Med. Grp., P.C.*, 877 F. Supp. 143, 146-49 (S.D.N.Y. 1995) (ADA). Eliminating laches whenever States bring cases in the public interest could open all of these statutes to late-in-the-day litigation against whichever companies the States choose to target. The States are open about their broad ambitions, declaring that laches is *always* "inapplicable to States seeking to protect public rights under state and federal laws—including" (but apparently not limited to) "federal antitrust laws." Br. 23.

Nor is it evident why the laches exemption urged here would stop with the States. If "suing 'for the benefit of the public'" is sufficient to blow through timeliness doctrines, *id.* at 25, then cities and towns could presumably join in challenging long-settled mergers (or pretty much anything else)—leaving businesses to face stale lawsuits from "the 2,300 district attorneys in this country." *Trump v. Vance*, 140 S. Ct. 2412, 2428 (2020). And given the Supreme Court's observation that "Indian tribes … still retain some elements of quasi-sovereign authority," *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 425 (1989) (cleaned up), they, too, could potentially avoid laches under the States' theory. *But see City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 217-21 (2005) (applying laches to preclude an untimely suit by a tribe).

The States also do not explain why their theory would not further extend to "private plaintiffs" who bring "suits in the public interest." Br. 26. The only response the States suggest is that they are "subject to the 'safeguards of the public-interest standards and expertness which presumably guide the government.'" *Id.* But that has nothing to do with whether laches should apply. Like any plaintiff, States sometimes have

strong incentives to challenge long-past business decisions. That does not make stale suits any more sensible or workable. The need for laches is as acute in this context as in any other—if not more so. *See* Areeda & Hovenkamp, *supra*, ¶ 320a.

The States' position would jeopardize other equitable doctrines, too. If the policy rationale for exempting States from laches is "'preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers,'" *Guar. Tr. Co. of N.Y. v. United States*, 304 U.S. 126, 132 (1938), presumably the States will soon seek to escape other equitable doctrines—like estoppel—as well. This Court should not take the first step towards unleashing 50-plus roving attorneys general on the national economy unencumbered by even the modest constraints of equity.

B. The District Court Properly Applied Laches Here.

The States eventually resort to arguing that, even if they are subject to laches as a *general* matter, that defense cannot apply *here*. But this back-up argument just repackages the same categorical exemption in different paper. If laches does not apply to the States here, it is hard to see when it ever would.

"Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961). The analysis begins—and sometimes ends—with delay, as "prejudice may arise from delay alone." *Russell v. Todd*, 309 U.S. 280, 287 (1940). And here, the States have yet to offer a substantial excuse for their decision to sit on their hands for nearly a decade. The States do not dispute that, when "Facebook announced its plans to purchase Instagram in April 2012, 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 (cleaned up). Nor do they deny that they "could easily have brought suit" way back then. JA282. Rather, the States merely suggest they could not have "responsibly" brought an action following the acquisition of WhatsApp in 2014 based on what "'some analysts' believed," Br. 42, without ever explaining *why* those very same beliefs nonetheless featured so prominently in the States' complaint. *See* JA86 (asserting that one analyst "laid out the case for the deal with remarkable clarity").

The States fare no better in trying to excuse their delay by asserting that (in hindsight) the 2012 and 2014 acquisitions at issue began an "ongoing" "course of conduct." Br. 40. The district court rightly saw this theory for what it is—a request to "write the statute of limitations for Section 7 damages actions out of the Clayton Act and similarly eliminate the laches defense that Congress expected to govern Section 16's cause of action for injunctive relief." JA271. Confirming the point, the States have yet to explain why their theory would not preclude laches whenever a company "continued" to "hold[]" the business that a State claims the company long ago acquired in violation of the antitrust laws. *Id.*

Turning to prejudice, the district court correctly found that "[t]he facts alleged in the Complaint … confirm the existence of economic prejudice" to Facebook. JA261; *see* JA261-63. The States do not, and cannot, dispute that on the face of their complaint, "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. And they do not contest that their complaint sought "divestiture" of those long-ago-

acquired companies based on long-ago acts alleged to have been anticompetitive at the time. JA114.[2]

The States nevertheless insist that Facebook should address these issues solely at the "remedy" stage, after suffering all the prejudices that the States' delay would inflict on its ability to defend the merits. Br. 32. But all the same reasons for applying laches to the States *generally* warrant applying laches to them here *specifically*. Requiring the "timely" filing of antitrust claims maximizes the benefits of enforcement (by "minimizing the social costs of any antitrust violation") and minimizes the costs of legal uncertainty (by providing "the parties repose for conduct that is lawful"). Areeda & Hovenkamp, *supra*, ¶ 320a. The States' requested *ad hoc* exemption from that rule is no more justified than their plea to abandon the rule entirely. If laches is generally available against the States—as it is, for the reasons detailed above—then the district court was surely correct to apply it here, where the States challenge conduct that was undertaken and completed a decade ago.

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[2] Nor may the States escape laches by arguing that Facebook's mere continued holding and operation of long-ago acquisitions constitutes an "[o]ngoing [v]iolation," as the district court ably explained. JA267-71.

II. Refusal-To-Deal Claims Cannot Survive The Pleading Stage Where There Is No Prior Course of Profitable Dealing Between The Parties, Nor Where There Are Pro-Competitive Justifications.

The States' position on the merits is just as dubious and dangerous as their view of laches. The States ask this Court to remake a pillar of antitrust law by applying a "flexible" approach involving "several factors" and "further factual development" to determine whether Facebook's refusal to deal with certain rivals constitutes an antitrust violation. Br. 63-64, 67. The Court should reject this expansive, outdated view of refusal-to-deal liability, which is contrary to clear Supreme Court precedent.

A. A Business's Unilateral Refusal To Deal May Support Antitrust Liability Only In Exceedingly Narrow Circumstances.

1. The right to choose the parties with whom one does business is an essential aspect of a free market. The Supreme Court has long held that the Sherman Act generally "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Enterprises have "no duty to aid competitors," *Trinko*, 540 U.S. at 411,

and "are free to choose" whether to deal with other businesses, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 448 (2009).

It is accordingly well settled that "antitrust law does not require monopolists to cooperate with rivals by selling them products that would help the rivals to compete." *Schor v. Abbott Labs.*, 457 F.3d 608, 610 (7th Cir. 2006) (Easterbrook, J.). And for good reason. Foremost, compelled dealing reduces the incentive—for monopolists and their rivals—to invest, innovate, and create useful new products. Firms sometimes attain "monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers." *Trinko*, 540 U.S. at 407. Forcing successful firms to "share the source of their advantage" is inconsistent with "the underlying purpose of antitrust law" because it lessens "the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Id.* at 407-08.

Not only that, but judicially compelled dealing often achieves little beyond simply "facilitat[ing] the supreme evil of antitrust: collusion." *Id.* at 408. Compelling a monopolist to share its monopoly leaves consumers "no better off" with "price and output" remaining "the same as they were." Areeda & Hovenkamp, *supra*, ¶ 771b. Courts can try to mitigate this

tendency by donning the hats of "central planners, identifying the proper price, quantity, and other terms of dealing," but that is a "role for which they are ill suited." *Trinko*, 540 U.S. at 408. This is all why "[t]here is no general duty to share" and "[c]ompulsory access, if it exists at all, is and should be very exceptional." Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 852 (1990).

2. In keeping with these insights into the relationship between market economics, the limits of judicial power, and consumer welfare, the Supreme Court has "been very cautious in recognizing" any "exceptions" to "'the right to refuse to deal with other firms.'" *Trinko*, 540 U.S. at 408. Those exceptions are essentially limited to the circumstances of *Aspen Skiing Company v. Aspen Highlands Skiing Corporation*, 472 U.S. 585 (1985). The defendant in *Aspen Skiing* owned three ski resorts in Aspen, Colorado, and had cooperated for years with the plaintiff, which owned a fourth, to sell a joint ticket to all four mountains. *Id.* at 593-94. One year, the defendant canceled that ticket, "refus[ing] to sell [the plaintiff] any lift tickets," even at "retail." *Id.* at 593. "[T]here were no valid business reasons for the refusal"; the defendant's *only* reason for

"forgo[ing] these short-run benefits" was "reducing competition … over the long run." *Id.* at 605, 608. In those unique circumstances, where the defendant "fail[ed] to offer *any* efficiency justification whatever for its" discontinuation of a prior profitable course of dealing, the Court concluded that a refusal-to-deal theory was viable. *Id.* at 608 (emphasis added).

As the Supreme Court later explained in *Trinko*, refusal-to-deal liability cannot attach unless at least two preconditions are satisfied: (1) the defendant has terminated a prior voluntary course of profitable dealing between the parties, and (2) no pro-competitive justification exists for the refusal. There, the Court observed that "the limited exception … in *Aspen Skiing*—which lies "at or near the outer boundary of § 2 liability"—makes sense only because "[t]he unilateral termination of a voluntary *(and thus presumably profitable)* course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." 540 U.S. at 409; *see linkLine*, 555 U.S. at 448 (describing *Aspen Skiing* as one of those "rare instances in which a dominant firm may incur antitrust liability for purely unilateral

conduct"). Absent termination of a prior profitable course of dealing, allegations based on a refusal to deal do not state a valid antitrust claim.

Even where a defendant has terminated a prior course of profitable dealing, refusal-to-deal liability cannot exist unless the refusal to continue dealing has no pro-competitive justification. That was true in *Aspen Skiing*, where "there were no valid business reasons for the refusal" to deal. 472 U.S. at 605, 608. This requirement is consistent with the "long recognized right" of a company to decline to deal with competitors. *Colgate*, 250 U.S. at 307. And it flows from the basic insight that "[n]o matter how essential a monopolist's resources may be, it is never obliged to sacrifice legitimate business objectives." Areeda & Hovenkamp, *supra*, ¶ 773e. The courts have thus recognized in this context that "the monopolist's conduct must be irrational *but for* its anticompetitive effect" before liability can attach. *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (Gorsuch, J.) (emphasis added).

This is an objective test that plaintiffs cannot circumvent by alleging anti-competitive intent. Courts have consistently recognized that intentions are irrelevant and what matters is whether a firm's

practices *objectively* harm competition. *See, e.g.*, *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) ("[I]f conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors … is irrelevant."); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 969-70 (10th Cir. 1994) (same); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1113 (1st Cir. 1989) (same). That is why *Trinko* rejected refusal-to-deal claims despite allegations that the defendant was engaged in "an anticompetitive scheme." 540 U.S. at 404, 407.

Consistent with this framework, both the Supreme Court and the Courts of Appeals have declined to find refusal-to-deal liability outside this narrow context, including at the motion-to-dismiss stage. *See id.* at 409-11; *see, e.g.*, *Novell, Inc.*, 731 F.3d at 1074-75; *St. Luke's Hosp. v. ProMedica Health Sys., Inc.*, 8 F.4th 479, 486-87 (6th Cir. 2021) (summarizing standard and collecting cases); *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1195 (10th Cir. 2009) (dismissing under Rule 12(b)(6) based on a valid business justification apparent from the complaint); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 52 (2d Cir. 2007) ("sole exception" to *Trinko*'s rule); *Covad Commc'ns Co. v. BellSouth*

Corp., 374 F.3d 1044, 1049 (11th Cir. 2004) (prior "course of dealing … requirement"); *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1295 (11th Cir. 2004) (business justification "[d]efense"); *see also Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 461, 463 (7th Cir. 2020) (allowing a complaint to proceed on the premise that it "plausibly alleged" both the termination of "a prior course of voluntary conduct" and made clear there were "'no procompetitive justifications' to be achieved," but incorrectly adopting a "balancing" test). And at least until today, the United States approved of that approach. *See* Br. for United States as *Amicus Curiae* at 6, *Viamedia,* 951 F.3d 429 (No. 18-2852) (acknowledging that "[its] position permits refusals to deal that are supported by valid business justifications"), https://bit.ly/35brq1F.

As the district court correctly recognized, this framework disposes of the States' refusal-to-deal claims. *See* JA241-45. Here, (1) there was no prior course of profitable dealing between Facebook and the developers, and (2) Facebook's refusals to deal had obvious pro-competitive justifications. According to the States, Facebook allegedly decided to limit how developers could use their access to Facebook's free Platform to *support or create rival products and services.* Br. 6-8. The

States' refusal-to-deal claim is that Facebook limited access for developers seeking to export Facebook's data to rivals or otherwise replicate Facebook's core functions, diverting users *away* from Facebook, when the whole point of Platform was to enhance the user experience. JA62-63, 229-31. There was no prior course of profitable dealing, so this claim fails at the outset. *See* JA245. But even if a prior course of dealing had existed, this claim would *still* need to overcome the eminently pro-competitive business practice of not actively subsidizing competitors or distributing (for free) a competitor's offerings.

B. Dismissing Refusal-To-Deal Claims Wherever The Complaint Fails To Satisfy This Framework Provides Vital Certainty.

The States' proposal to replace this straightforward analysis with a "flexible," multi-factor inquiry involving discovery and trial, Br. 63, is not only inconsistent with precedent, but harmful for businesses and courts alike.

1. The Supreme Court has "repeatedly emphasized the importance of clear rules in antitrust law," and for good reason. *linkLine*, 555 U.S. at 452. Because "simple" and "[s]trong presumptions … guide businesses in planning their affairs by making it possible for counsel to

state that some things do not create risks of liability," Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 14 (1984), the Court has stressed that "antitrust rules 'must be clear enough for lawyers to explain them to clients,'" *linkLine*, 555 U.S. at 453.

That is especially true when it comes to refusals to deal. Where, as here, "most examples of a category of conduct are competitive, the rules of litigation should be 'stacked'" so that "errors on the side of excusing questionable practices are preferable." Easterbrook, *supra*, at 15. That way, such rules "do not ensnare many of these practices just to make sure that the few anticompetitive ones are caught." *Id.* It is better to "err on the side of firm independence—given its demonstrated value to the competitive process and consumer welfare—than on the other side where we face the risk of inducing collusion and inviting judicial central planning." *Novell, Inc.*, 731 F.3d at 1076; *see also NCAA*, 141 S. Ct. at 2163 ("[A]ntitrust courts must give wide berth to business judgments before finding liability.").

The States' open-ended approach, by contrast, fails to provide businesses with clarity and predictability, amounting to "an invitation to ad hoc balancing with no explicit or commonly understood algorithm." A.

Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 Antitrust L.J. 375, 380 (2006). Practically speaking, the States' amorphous test will force risk-averse companies to the bargaining table, as they cannot assess in advance the extensive cost and distraction of refusal-to-deal litigation, or the prospects of ultimate victory under the States' opaque inquiry. The specter of interminable litigation and uncertain liability will distort market choices by pressuring companies to continue dealing—while distorting their practices to limit the negative fallout of such law-driven business decisions—all resulting in foregone efficiencies and diminished consumer welfare. That is antithetical to the goals of antitrust law.

2. Permitting dismissal of complaints that fail to satisfy this framework also avoids costly litigation over futile claims. Where, as here, a complaint fails to allege a prior course of dealing or—where such a course exists—fails to allege facts showing that the conduct lacks any pro-competitive justification, courts should dismiss. That avoids the wasteful alternative of a doomed claim imposing expensive and ultimately pointless antitrust discovery on the parties.

The Supreme Court has already held as much, directing that "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should … be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007). Once an antitrust case proceeds past a motion to dismiss to the discovery phase, it is usually too late. Nearly 40 years ago, it was clear that "the costs of modern federal antitrust litigation … counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984). Since then, the burdens of litigating antitrust cases have continued to skyrocket, particularly with the advent of electronic discovery and the measurement of document productions in terabytes rather than boxes. Moreover, refusal-to-deal claims may be brought as class actions, further multiplying the discovery burdens.

It is this precise context—a narrow doctrine at the outer bounds of liability, with the potential for massive discovery that could compel businesses to settle meritless claims—that calls out for enforcement of

the "practical significance" of Rule 8's pleading requirement. *Twombly*, 550 U.S. at 557. The only appropriate rule for unilateral refusals to deal is to require dismissal under Rule 12 when a plausible business justification appears on the face of the complaint. Adopting that sensible rule would enable businesses to avoid the extraordinary burdens of unjustified antitrust discovery while exercising their lawful freedom to choose those with whom to deal.

CONCLUSION

The district court's judgment should be affirmed.

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Respectfully Submitted,

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The undersigned certifies that, on this 28th day of March 2022, a true and correct copy of the foregoing was served via the Electronic Case Filing (ECF), which will send notice of such filing to all registered users of the CM/ECF system.

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