[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.

META PLATFORMS, 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 OF FORMER FEDERAL ANTITRUST ENFORCERS AS *AMICI CURIAE* IN SUPPORT OF META PLATFORMS AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

A. Parties and Amici

The parties to this case are identified in the brief of Plaintiffs-Appellants. In the time since Plaintiffs-Appellants' brief was filed, the caption in this case has been corrected to reflect the corporate name change of Defendant-Appellee Meta Platforms, Inc., formerly known as Facebook, Inc. As of March 27, 2022, the *amici curiae* who have appeared in this Court are: the United States of America; the American Antitrust Institute; the Committee to Support the Antitrust Laws; several individual *amici* identified in the Brief of Economists as Amici Curiae In Support of Plaintiffs-Appellants; and several individual *amici* identified in the Brief of Former State Antitrust Enforcement Officials and Antitrust Law Professors as Amici Curiae In Support of Appellants. Here, James Cooper, Luke Froeb, David Gelfand, Abbott B. Lipsky, Jr., Bilal Sayyed, and Gregory Werden appear as *amici curiae* in support of Meta Platforms, Inc.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Plaintiffs-Appellants.

C. Related Cases

A list of related cases appears in the Brief for Plaintiffs-Appellants.

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INTEREST AND STATEMENT OF *AMICI CURIAE*[1]

Amici curiae James Cooper, Luke Froeb, David Gelfand, Abbott B. Lipsky, Jr., Bilal Sayyed, and Gregory Werden are former government officials charged with enforcing the federal antitrust laws. As former government officials, *amici* have a strong interest in the consistent enforcement and predictable construction of the Sherman Act and other antitrust statutes so as to promote competition and innovation throughout the U.S. economy. *Amici* submit this brief in their individual capacities. The views expressed herein do not necessarily reflect the views of any entity with which they are affiliated, or of any client. Additional information concerning each of the *amici* is set forth in an Addendum to this brief.

Pursuant to Circuit Rule 29(d), *amici* respectfully submit this separate amicus brief in order to respond particularly to the amicus brief submitted by the United States of America in support of Plaintiffs-Appellants. As former federal officials responsible for enforcing the Nation's antitrust laws, and having an interest in the consistent enforcement and application of those laws, *amici* are uniquely positioned to address the United States' submission.

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[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no party's counsel has authored this brief in whole or in part, or contributed money to fund its preparation or submission, and that no person other than *amici* or their counsel contributed money intended to fund its preparation or submission. Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal antitrust law provides a powerful tool for protecting free competitive enterprise in the Nation's markets. Due to careful antitrust enforcement, the United States is home to an unusually dynamic and innovative business environment. It is especially important to ensure the proper application of antitrust principles in cases involving new technology markets, where novel products and business models—innovations that are "essential to economic growth and social welfare"—are sometimes erroneously treated as anticompetitive, thereby impairing "consumer benefits." *FTC v. Qualcomm*, 969 F.3d 974, 991 (9th Cir. 2020) (citation omitted).

This case concerns monopolization claims leveled against Facebook, Inc. (now Meta Platforms, Inc.)—a leading provider of online services. Whatever the merits of the Plaintiffs' market definition, Facebook operates in one of the most rapidly evolving corners of the global economy. "At the time of the last great antitrust battle in [this] courthouse—between the United States and Microsoft," Facebook's founder Mark Zuckerberg "was still in high school." *FTC v. Facebook, Inc.*, ___ F. Supp. 3d ___, 2021 WL 2643627, at *1 (D.D.C. June 28, 2021). When Facebook launched from Zuckerberg's college dorm room in 2004, it was competing with many other social-media businesses, including Myspace, a company widely believed to have a durable monopoly in online social networking.[2] Today, commentators ask whether Myspace is "dead" or "still exist[s],"[3] and Facebook is challenged by different rivals like TikTok, which was the most popular domain of 2021 (surpassing both Google and Facebook)[4] and the most downloaded app (surpassing Instagram).[5] TikTok went live in 2016—after both of the acquisitions challenged in this case—and grew to over 1 billion users worldwide in less than five years. It took Facebook and YouTube eight years to hit the same mark.[6] Facebook clearly operates in a highly dynamic market environment.

Plaintiffs contend that Facebook violated Section 2 of the Sherman Act and Section 7 of the Clayton Act by acquiring two companies and "adopting policies preventing interoperability between Facebook and certain other app[lications] that it saw as threats, thereby impeding their growth into viable competitors." A217. The

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[2] *See, e.g.*, Victor Keegan, *Will MySpace Ever Lose Its Monopoly?*, The Guardian (Feb. 8, 2007), https://www.theguardian.com/technology/2007/feb/08/business.comment (Myspace's "massive user base will help maintain its dominance").

[3] *E.g.*, Elise Moreau, *Is Myspace Dead Or Does It Still Exist?*, Lifewire (Jan. 21, 2022), https://www.lifewire.com/is-myspace-dead-3486012.

[4] Joseph Pisani, *TikTok Was the Internet's Most Visited Site in 2021, Even Beating Google*, Wall St. J. (Dec. 22, 2021), https://on.wsj.com/3tlB8Yn.

[5] *See* Kourtnee Jackson, *TikTok Dominated 2021 as the Year's Hottest App*, CNET (Dec. 30, 2021), https://cnet.co/3JpTI7d.

[6] *See* Sara Fischer, *TikTok Hits 1 Billion Users*, Axios (Sept. 28, 2021), https://bit.ly/3CWGyMS.

district court carefully evaluated these allegations and properly concluded that they failed to state a claim, first because the acquisitions happened years ago, and any attacks on them are now barred by laches, and second because Facebook's policy of "preventing interoperability with competing apps fails to state a claim under current antitrust law, as there is nothing unlawful about having such a policy." A218.

Amici submit this brief in response to the amicus brief submitted by the United States, which argues (at 5) that the district court "erroneously treated Facebook's alleged use of anticompetitive conditions in deals with app developers as unconditional, unilateral refusals to deal," and wrongly "disaggregated [plaintiffs' monopolization] claim into parts" rather than "evaluating the course of conduct alleged in the monopolization claim as a whole." Those arguments are unsound.

First, businesses generally have no duty to share their platforms or facilities with rivals. *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) ("*Trinko*"). That rule is grounded in several important policy concerns, the most important of which is that any duty to assist rivals could "lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Id.* *Trinko's* policy foundation sits comfortably with Facebook's argument that, monopolist or not, it is entitled to determine the rules for its own platform, including terms for developer agreements that restrict the ways in which developers can use Facebook's own services to support apps that would compete against Facebook.

Facebook's discretion is not unlimited, but Plaintiffs have not alleged any conduct that comes close to the line. Plaintiffs complain that Facebook refused to let developers use Facebook APIs in apps that would "integrate, link to, promote, distribute, or redirect to any app on any other competing social platform" (A230) or "replicat[e] [Facebook's] core functionality." (A93-94 (¶¶ 201-202)). These are not unusual restrictions: Such "do not use my tools to compete against me" provisions are (for good reason) pervasive in the digital economy. *See* Br. for Defendant-Appellee Facebook, Inc. 7-8 n.2. They are not a form of "conditional dealing" distinct from the kind of refusal-to-deal allegations governed by *Trinko*. They are best understood as a unilateral policy not to permit Facebook's tools to be used for any purpose other than to advance *Facebook's competitive position.* This case would be different if Facebook interfered with developers' *independent* efforts to promote the interests of Facebook's rivals. But there is no such claim here. The district court correctly rejected this "conditional dealing" argument, which would undermine *Trinko* and its salutary policies.

Second, the United States mischaracterizes the district court's evaluation of Plaintiffs' claims by asserting (at 8) that the district court "[d]isaggregat[ed] plaintiffs' monopolization claim," thereby "imped[ing] the court's ability to assess the market realities presented by this case." But the district court simply followed the rule of *United States v. Microsoft*, 253 F.3d 34, 78 (D.C. Cir. 2001), in which this Court held that a monopolization claim arising from a defendant's aggregated "course of conduct" may not be based on acts that "are not in themselves unlawful." As the United States itself acknowledges (U.S. Br. 11), the district court found that most of the alleged conduct does not state a viable claim because it is lawful under *Trinko*. That faithful application of *Microsoft* was entirely correct.

The United States contends (at 11) that the district court erred by "forgoing cumulative consideration" of Facebook's conduct. Yet "cumulative consideration" of acts that are lawful cannot make those acts unlawful in the aggregate. Properly understood, a "course of conduct" argument may take into account all of the facts and circumstances *that reasonably indicate an antitrust violation*. But first the court must determine *which* facts and circumstances indicate an antitrust violation under the governing law. Conduct that is lawful for policy reasons is properly excluded from this determination. The United States' effort to treat "cumulative" refusals to deal as unlawful is designed to circumvent *Trinko*, and should be rejected.

Plaintiffs' effort to revive their claims on a course-of-conduct theory is inappropriate for another reason. Plaintiffs' claims are subject to the doctrine of laches, and the acquisitions they challenge occurred long ago. Plaintiffs' course-of-conduct theory would evade that rule, and would—if permitted by this Court—undermine longstanding principles of repose.

The district court's judgment should be affirmed.

ARGUMENT

I. *TRINKO* GOVERNS PLAINTIFFS' PLATFORM ALLEGATIONS AGAINST FACEBOOK

In *Trinko*, the Supreme Court reaffirmed the "long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Trinko*, 540 U.S. at 408 (alteration in original and citation omitted). Thus, under the Sherman Act, a business generally has "no duty to aid competitors." *Id.* at 411. That is true even when the firm has monopoly power. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1985). Plaintiffs' case—and the United States' arguments supporting it—cannot be squared with this fundamental principle.

Section 2 of the Sherman Act does not prohibit the mere "possession of monopoly power in [a] relevant market," *Trinko*, 540 U.S. at 407, but rather proscribes "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident," *id.* (citation omitted). Firms may permissibly "acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers." *Id.*

At the center of this case is a product that—by Plaintiffs' own admission—succeeded in the marketplace on the basis of its superior quality. As Plaintiffs allege, Facebook's core social-networking product ("Facebook Blue") became the "dominant personal networking service" in the United States because it "offer[ed] users what they then desired but were not getting from other social networking sites": namely, "innovative features ... , a higher-quality user experience, and better privacy protections than were available on Myspace." A60-61. Thus, Facebook developed a platform for social engagement that was admittedly innovative and "uniquely suited" to serve Facebook's customers. *Trinko*, 540 U.S. at 407. Under *Trinko*, such conduct is "not only not unlawful"; it reflects the proper and desirable working of the "free-market system." *Id.*

Having allegedly acquired a dominant position through its own innovative platform, Facebook has no legal duty to "share the source of [its] advantage" with rivals. *Id.* Such a duty would "lessen the incentive for the monopolist, the rival, or both to invest in [such] economically beneficial facilities." *Id.* at 408. The ability of a market-dominant actor to capitalize on its market dominance is part of what "induces [the] risk taking that produces innovation and economic growth." *Id.* at 407. Had Facebook believed that it would be forced to share its innovations with its competitors, it might well have been deterred from innovating in the first place. *See Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1073 (10th Cir. 2013) (Gorsuch, J.).

And had Facebook's competitors believed Facebook had such a duty, they too would have been disincentivized from innovating on their own, "knowing [they] could just demand the right to piggyback on [their] larger rival." *Id.* (citing Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 300-06 (2003); A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals To Deal*, 20 Berkeley Tech. L.J. 1247, 1254 (2005)). The Sherman Act imposes no such duty. Rather, it is intended to facilitate innovation and consumer welfare through *competition*; compelled cooperation among rivals is necessarily "in some tension with the underlying purpose of antitrust law." *Trinko*, 540 U.S. at 407-08. As the rapid success of TikTok exemplifies, competition without forced cooperation works.

To be sure, a firm's "right to refuse to deal with other firms" is "not unqualified." *Id.* at 408 (quoting *Aspen Skiing*, 472 U.S. at 601). "[A]t or near the outer boundary of § 2 liability" is the rule that the "unilateral termination of a voluntary (and thus presumably profitable) course of dealing" may constitute an anticompetitive practice where it "suggest[s] a willingness to forsake short-term profits to achieve an anticompetitive end." *Id.* at 409 (citing *Aspen Skiing*, 540 U.S. at 608). But that "limited exception" does not apply unless a defendant has previously engaged in a voluntary "course of dealing" with a rival. *Id.* at 409. Thus, as the district court found, "Facebook's general policy of withholding API access [to the Facebook platform] from competitors . . . was plainly lawful to the extent it covered rivals with which it had no previous, voluntary course of dealing." A245.

Facebook allegedly did terminate preexisting, voluntary courses of dealing with a few rivals—but those allegations concern acts that took place prior to 2016, and the district court held that Plaintiffs' "five-year delay . . . is fatal to their claim for equitable relief under Section 16 of the Clayton Act." A247. Even if laches did not apply, however, those terminations were lawful because they did not indicate "a willingness to forsake . . . profits" by Facebook. *Aspen Skiing*, 540 U.S. at 608. That much should be obvious, because the point of giving third-party developers *free* access to an API on the user side of a platform is to increase engagement with the platform, and thereby increase advertising revenues on the advertiser side. If a developer uses the API to *decrease* user engagement with the platform, then such conduct is profit-reducing for the platform, and termination of (again, free) API access is therefore profit-enhancing—not profit-sacrificing. That is true whether a platform has market power or not, which is why such restrictions are ubiquitous.

A. This Court Should Reject The United States' Effort To Treat This Refusal-To-Deal Case As A "Conditional Dealing" Case

Plaintiffs and the United States try to dodge this established legal framework by describing *Trinko* as applying only to "unilateral refusals to deal with rivals," i.e., "outright refus[al] to provide a rival a requested product or service," U.S. Br. 14. They characterize the allegations here as targeting "Facebook's use of *restrictive* *conditions* in deals with app developers," which are supposedly "fundamentally different from challenges to unilateral refusals to deal." *Id.* at 15 (emphasis added). But this distinction between "unilateral refusals to deal" and "conditional refusals to deal" is unfounded. *Trinko* is not limited to situations in which the monopolist says: "I will not deal with you under any circumstances whatsoever." That would be an absurdly narrow rule. As the Supreme Court has explained, it follows from *Trinko* that "a firm with no duty to deal . . . has no obligation to deal *under terms and conditions* favorable to its competitors." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 450-51 (2009) (emphasis added). That principle controls. Facebook declined to deal with developers under conditions favorable to its competitors—*i.e.*, allowing Facebook's APIs to be used for the benefit of those competitors—and unfavorable to Facebook. It had the right to do so. Any other rule would allow rivals to circumvent a unilateral refusal to deal by hiding behind a third party using APIs for authorized purposes.

The United States contends (at 18) that "even in cases like *linkLine*, where the complaints can be reframed as challenges to certain conditions (high wholesale prices), they cannot be reframed as challenges to conditions directly restricting forms of rivalry." That is incorrect. In *linkLine*, the plaintiffs specifically alleged that the defendants adopted price terms "in order to stifle, impede and exclude competition from [rivals]." Respondents' Br. 5, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009) (No. 07-512), 2008 WL 4606588 (quoting complaint). The question was whether the alleged anticompetitive "price squeeze [was] merely another term of the deal governed by the Supreme Court's analysis in *Trinko*, or whether it [was] something else." *linkLine Commc'ns, Inc. v. SBC California, Inc.*, 503 F.3d 876, 881 (9th Cir. 2007). The Ninth Circuit held that the defendants' wholesale price terms—designed to "impede and exclude competition . . . from retail rivals"—fell outside of *Trinko*. *Id.* at 879, 884. The Supreme Court, however, reversed because "businesses are free to choose the parties with whom they will deal, *as well as the prices, terms, and conditions of that dealing*." *linkLine*, 555 U.S. at 448 (emphasis added) (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). The United States' effort to distinguish *linkLine* fails.

The United States also attempts to escape *Trinko* by analogizing this case to the exclusive-dealing arrangements in *Lorain Journal Co. v. United States*, 342 U.S. 143, 148 (1951), and *Microsoft*, 253 F.3d at 75. But the district court recognized that those cases are about something else entirely, namely situations in which a market-dominant firm refuses altogether to "sell to end-user customers who purchase[d] from the monopolist's competitor." A252 (quoting Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 Antitrust L.J. 749, 766 n.75 (1995)). Such exclusive (or conditional) dealing arrangements are different from what is alleged here, because they impose conditions that transcend the relationship between a party and the alleged monopolist, and directly limit what that party may do with others, including the monopolist's rival. Such arrangements exhibit boycott-like effects, as both *Lorain Journal* and *Microsoft* recognized.

Lorain Journal involved an Ohio newspaper with a dominant position in the local advertising market that refused to run advertisements for firms that also purchased advertisements on a competing advertising platform, the local radio station, for the purpose of "destroy[ing] the broadcasting company." *Lorain Journal*, 342 U.S. at 148-49. The Supreme Court held that the newspaper publisher's "attempt to regain its monopoly" over local advertising "by forcing advertisers to boycott a competing radio station" violated Section 2. *Id.* at 152.

Microsoft involved a similar compelled boycott. The district court found that Microsoft had entered into exclusive-dealing arrangements with numerous customers by which the customer's "receipt of [Microsoft] Windows technical information" depended on the customer's "agreement to promote Microsoft's [product] exclusively" by "mak[ing] Microsoft's [product] the default in the software they developed." *Microsoft*, 253 F.3d at 75. This "seriously impeded distribution of" a competing product marketed by Sun, and this Court held that it violated the Sherman Act. *Id.* at 76.

Here, by contrast, Plaintiffs did not plead that Facebook led a compelled boycott of rivals as in *Lorain Journal* and *Microsoft*. *See* A254-56. The gravamen of what is challenged involves terms of service under which Facebook is willing to deal with developers, which in part limit what developers *may do with Facebook's platform tools*. That is starkly different from conditions imposed upon developers effectively forcing them to boycott Facebook's rivals.

The United States does not challenge the district court's conclusion on this issue. Rather, it insists that Facebook's amendment of "its conditions of dealing in 2011 to prevent 'apps that linked or integrated with competing social platforms[ ] from accessing its APIs' as a deterrent for building cross-platform apps," U.S. Br. 16 (quoting A93 (¶ 199)), is itself anticompetitive because it prevented the emergence of apps that would have made Facebook users "less reliant on Facebook." *Id.* at 17. In other words, the United States' position is that Facebook had a legal duty to permit the use of its developer tools to draw users away from Facebook to the benefit of Facebook's rivals.

That assertion is without merit. As the district court explained, "by rough analogy," the United States' position suggests that in *Lorain Journal* the newspaper could have been properly forced to "carry advertisements" for its rival radio station on its publishing platform. A255. There is a world of difference between prohibiting private businesses from compelling boycotts of rivals and requiring private businesses to make their platforms and facilities available for the benefit of their rivals. That critical distinction is why this is not a "*Lorain Journal*-type case[ ] involving exclusivity imposed on end-users or customers, where a presumption of illegality is appropriate." Glazer & Lipsky, *Unilateral Refusals to Deal*, 63 Antitrust L.J. at 783; *see also Trinko*, 540 U.S. at 407.

In short, when an antitrust claim implies a duty to provide affirmative assistance to rivals, *Trinko* and its progeny provide a simple, straightforward rule: A monopolist may decline direct requests for assistance from rivals and may likewise decline to provide indirect assistance by virtue of the terms under which third parties—users, developers, etc.—use the tools and services that the platform provides. The monopolist may not require third parties to abandon their dealings with rivals, as in *Lorain Journal* and similar cases. However, as long as a firm's terms of service regulate only its own tools and services, those restrictions' effect on the cost or convenience of the third parties' dealing with rivals do not take the case outside of *Trinko*. The United States' call to ignore *Trinko* in these circumstances—involving terms of dealing that are the result of a unilateral decision not to give rivals favorable access to Facebook's own platform—invites legal error.

B. There Is No Policy Reason To Depart From *Trinko* Here

The United States also argues (at 24) that this Court should disregard *Trinko* because "Facebook's network ... is materially different from the physical telephone network in *Trinko*." Among other things, the United States contends (at 25-26) that *Trinko*'s "concern that forced sharing of network connections would inhibit 'the incentive ... to invest in these economically beneficial facilities' ... applies quite differently here" because Facebook's allegedly "restrictive conditions limited [Facebook's users' and app developers'] potential gain" from "build[ing] network connections" on the Facebook platform.

That argument misunderstands *Trinko*. In *Trinko*, the United States itself argued that "the Sherman Act does not impose a duty to sell to rivals in an evenhanded fashion unless the refusal is predatory or exclusionary, *i.e.*, unless the refusal represents a *sacrifice* of profit or goodwill that makes sense only because it has the effect of injuring competition."[7] That coincides with *Trinko*'s underlying principle that competitors should be encouraged to invest in their *own* innovative products, not "just demand the right to piggyback on" existing products. *Novell*, 731 F.3d at 1073. The notion that competitive energies should be redirected by forcing a defendant to allow rivals and potential rivals to "gain" from "build[ing] network connections" on the defendant's existing platforms is starkly at odds with that core principle and directly contrary to what the United States advocated for in *Trinko*. Just as in this case, the rivals in *Trinko* surely would have appreciated the opportunity

[7] *Amici Curiae* United States & FTC Br. 15, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682), 2002 WL 32354606.

to "gain" from using Verizon's existing facilities to build their own "network connections." Yet the "proper focus of section 2 isn't on protecting competitors but on protecting the process of competition." *Id.* at 1072.

The United States next asserts (at 26) that *Trinko*'s concern that compelled sharing "requires antitrust courts to act as central planners" is inapplicable because "here, unlike in *Trinko*, the norm on Facebook's platform is sharing—not exclusion." It certainly is true that Facebook is built to "enable people to connect and share with friends and family."[8] But that does not mean that Facebook's platform is built to be shared with rivals. Facebook's platform is a business product belonging to *Facebook*; as the owner of its platform, Facebook may make determinations about how users and third parties interact on and with its platform. *See Sambreel Holdings LLC v. Facebook, Inc.*, 906 F. Supp. 2d 1070, 1075 (S.D. Cal. 2012). A court order dictating the precise contours of the terms of access and use on Facebook's platform presents exactly the kind of "central planning" concerns that animate *Trinko*. The ongoing evolution of the social-media landscape is rapid, dynamic, and complex, and judicial decrees regulating the finer points of social-media platforms' terms and conditions are more likely to harm innovation than to enable it. *See FTC v. Qualcomm*, 969 F.3d 974, 991 (9th Cir. 2020) (describing how

[8] Meta Platforms, Inc., Form 10-K Annual Report 2021 at 7, https://bit.ly/3ImDjzj.

courts are "likely to decide cases wrongly in rapidly changing dynamic markets") (citation omitted).

The United States' appeal (at 24) to "distinct market realities" as a basis for ignoring *Trinko* lacks merit. If anything, *Trinko* described market realities—local landline telephone networks—that were more entrenched and far less susceptible to challenge than the dynamic industry at issue here. The core holding of *Trinko* thus applies *a fortiori* to this case, which involves a rapidly and continuously changing market.

C. The District Court Correctly Applied *Trinko*

The United States asserts further (at 19) that the district court misapplied *Trinko* and *Aspen Skiing* by imposing a "rigid test for analyzing refusals to deal under Section 2." The district court held that a unilateral refusal to deal may be held unlawful only where it is "enforced (i) against a rival with which the monopolist had a previous course of dealing; (ii) while the monopolist kept dealing with others in the market; (iii) at a short-term profit loss, with no conceivable rationale other than driving a competitor out of business in the long run." A246. And here, as explained above, the district court found that Facebook's conduct was lawful because nearly all of its refusals to deal concerned rivals with which Facebook had no previous course of dealing. A245. The few allegations in the complaint pertaining to the termination of existing courses of dealing were not backed by any allegations that

Facebook's conduct resulted in anticompetitive profit losses for Facebook. *See supra* at 10. To the contrary, declining to continue offering free access to APIs to rivals to make users "less reliant on Facebook," U.S. Br. 17, is the opposite of incurring a "short term profit loss." *See, e.g.*, *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1197 (10th Cir. 2009) (no Section 2 liability where defendant "expects to increase (not forsake) short-term profits" by cutting off course of dealing with third party).

The United States faults the district court (at 20) for applying a "checklist" approach to evaluating Plaintiffs' refusal-to-deal claims. It contends (at 24) that "the particular factors" discussed in the decision below are "not exhaustive," and asserts that every refusal-to-deal case should be subject to a "fact-bound," "context-specific analysis." But the factors identified by the district court are the same factors identified in *Trinko* and routinely applied in the same multifactor formulation by courts across the country. *See Trinko*, 540 U.S. at 409-10; *St. Luke's Hospital v. ProMedica Health Sys., Inc.*, 8 F.4th 479, 486-87 (6th Cir. 2021); *Qualcomm*, 969 F.3d at 993-94; *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827, 843 (10th Cir. 2016); *Duty Free Americas, Inc. v. Estee Lauder Cos.*, 797 F.3d 1248, 1266-67 (11th Cir. 2015); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 53 (2d Cir. 2007); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 316 (3d Cir. 2007). The United States' call for an entirely standardless, free-form analysis of refusal-to-deal claims contravenes the approach taken by courts nationwide since *Trinko*. This Court should reject it.

II. THE DISTRICT COURT CORRECTLY ANALYZED PLAINTIFFS' MONOPOLIZATION ALLEGATIONS AS A WHOLE

A. Plaintiffs' And The United States' "Course Of Conduct" Theory Would Wrongly Punish Lawful Conduct

The United States' disagreement with *Trinko* does not end there. It contends that the district court erred by "disaggregating" and "forgoing cumulative consideration of plaintiffs' monopolization claim," thereby overlooking certain "synergistic anticompetitive effects." U.S. Br. 8, 11. This mischaracterizes the district court's decision and is yet another attempt to escape *Trinko*.

On the first point, the district court acknowledged that if a monopolist "embark[ed] on a concerted scheme of serial refusals to deal with rivals, that scheme or 'course of conduct' could amount to a[n] . . . independent violation of the Sherman Act." A245 (citing *Microsoft*, 253 F.3d at 34, 78). But the district court correctly noted that "to be actionable" such a "course of conduct" would "have to be made up of refusals that were themselves independent violations of the [three-part] *Aspen Skiing* test" discussed above. A245-46 (citations omitted). And because the platform allegations failed to meet that test, Plaintiffs "cannot get anywhere by reframing Facebook's adoption of a policy refusing to deal with all competitors as the execution of an unlawful scheme of monopoly maintenance." A246. The district court did not improperly "disaggregate" Plaintiffs' monopolization claim. Instead, it properly recognized that Plaintiffs' platform allegations could not support liability under a "course of conduct" analysis.

That conclusion must be correct if *Trinko* is to have any teeth. *Trinko* makes clear that a firm's refusal to deal with competitors is lawful per se, unless the refusal falls within the narrow *Aspen Skiing* exception. *See* 540 U.S. at 409-10; *Novell*, 731 F.3d at 1073. A firm that lawfully refuses to deal with one competitor, a second competitor, and then a third has engaged in a course of lawful conduct. The aggregation of those lawful refusals to deal cannot transform the firm's course of conduct into something proscribed by the Sherman Act.

To be sure, a "course of conduct" theory may provide a source of Section 2 liability. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). But such a "synergistic" analysis is appropriate only when a defendant uses a variety of potentially unlawful anticompetitive tactics that, in sum, "foreclose[ ] a significant share of the relevant market." Daniel A. Crane, *Does Monopoly Broth Make Bad Soup?*, 76 Antitrust L.J. 663, 663-64, 670 (2010). Importantly, "the aggregation should occur only after each form of conduct has been adjudged prima facie exclusionary." *Id.* at 671.

In this case, however, "course of conduct" or "synergy" theories are inappropriate because the individual acts complained of are lawful under *Trinko*.

Synergistic theories may be apt where a Plaintiff must aggregate a series of potentially unlawful acts in order to prove an overarching anticompetitive effect that is unlawful under Section 2. Here, however, Plaintiffs rely on allegedly anticompetitive conduct that is, as a matter of policy under *Trinko*, not considered anticompetitive. Courts consistently reject efforts to tie together qualitatively benign instances of conduct in order to create an anticompetitive whole greater than the sum of its parts. *See, e.g.*, *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) (describing as "unworkable [the] 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"); *Simon & Simon, PC v. Align Tech., Inc.*, No. 19-506, 2020 WL 1975139, at *7-8 (D. Del. Apr. 24, 2020) (rejecting plaintiff's "characterization of [defendant's] otherwise non-actionable refusals to deal as a[n] [anticompetitive] 'scheme'"). A proper "course of conduct" analysis must exclude all conduct that is lawful per se. The district court correctly held that lawful refusals to deal may not form any part of the basis for a "course of conduct" theory of liability. A245-46. That conclusion is necessary to give effect to *Trinko*.

B. The District Court's Decision Properly Follows This Court's Analysis In *United States v. Microsoft*

In *Microsoft*, this Court analyzed a "course of conduct" theory of Section 2 liability arising from a wide range of disparate anticompetitive conduct allegedly undertaken by Microsoft. The district court there held Microsoft liable for several freestanding patterns of anticompetitive conduct, including: the "way in which it integrated [Internet Explorer] into Windows"; its "various dealings" with competitors and customers (including licensing restrictions and exclusive-dealing arrangements); its "efforts to contain and subvert Java technologies"; and "its course of conduct as a whole." *Microsoft*, 253 F.3d at 58. This Court analyzed the district court's treatment of each piece of the whole, affirming some findings of anticompetitive conduct and reversing others. *Id.* at 59-78. Only *after* it had evaluated the lawfulness of "Microsoft's specific acts" did this Court turn to the question whether "Microsoft was liable under § 2 based upon its general 'course of conduct.'" *Id.* at 78. Thus, this Court disaggregated the allegations before inquiring whether, upon reassembly, they could establish "course of conduct" liability.

At that second step, this Court recognized that "course of conduct" liability could attach only where there is a "series of acts, each of which harms competition only slightly but the cumulative *effect* of which is significant enough to form an independent basis of liability." *Id.* (emphasis added). But the district court had included only "summarizing conclusions" about Microsoft's conduct in finding course-of-conduct liability, rather than referring to "specific acts." *Id.* Indeed, the "only specific acts to which the [district] court refer[red] [were] Microsoft's expenditures in promoting its browser," a set of acts that this Court had concluded were "not *in themselves* unlawful." *Id.* (emphasis added). This Court thus excluded from its "course of conduct" analysis those acts that were "in themselves" lawful. Because the foundation for the district court's course-of-conduct findings was a set of *lawful* acts, and because the district court "identifie[d] no other specific acts as a basis for 'course of conduct' liability," this Court reversed. *Id.*

The district court below correctly followed *Microsoft*'s analytical framework. Both cases involve alleged monopolists in markets with network effects (in *Microsoft*, operating systems; here, social-media platforms) and actions allegedly aimed at competitors seeking interoperability with the monopolist's platform pursuant to an alleged master plan for suppressing competition.

The district court properly evaluated the individual allegations here to ascertain whether they suitably stated a claim on their own or as a whole. It found they did not because all of the allegations relating to acts that might have exhibited a *prima facie* exclusionary effect—specifically, Facebook's acquisition of WhatsApp and Instagram, and its refusal to deal with particular third parties with which it had a previous course of dealing—were barred by laches. A247, A259. The only remaining allegations concerned unilateral refusals to deal, which are not unlawful. *See* A244-45. Accordingly, Plaintiffs' "course-of-conduct" theory fails under the rule laid down in *Microsoft*. *See* 253 F.3d at 78 (no course-of-conduct liability where the only relevant acts are "not in themselves unlawful").

C. Plaintiffs' Attempted Use Of A "Course Of Conduct" Theory To Evade Laches Undermines Settled Antitrust Law

Finally, this Court should reject the United States' and Plaintiffs' effort to use a "course of conduct" theory to evade laches. Plaintiffs' position that laches does not bar antitrust claims challenging Facebook's nearly decade-old acquisitions of Instagram and WhatsApp because those acquisitions are part of a continuing "course of conduct" finds no support in the law, and the district court rightly rejected it. This Court should decline to allow antitrust plaintiffs to circumvent timeliness bars to challenges of long-consummated transactions merely by labeling them as part of some broader "course of conduct." Such an exception would eliminate any prospect of repose for transactions that occurred well in the past.

Like the antitrust statute of limitations, the doctrine of laches serves as a guarantee of repose when equitable remedies are sought for conduct challenged as anticompetitive. Because "assessing antitrust consequences is often difficult, and reasonable minds might differ" about whether a particular acquisition is lawful, "[i]t is especially important that antitrust challenges be timely made, thus minimizing the social costs of any antitrust violation but giving the parties repose for conduct that is lawful." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 320a (4th ed. 2013).

In the context of antitrust challenges to a prior merger or acquisition, courts have held that such claims—whether in law or equity—are timely only if brought close in time to the transaction itself. Because "a merger is a discrete act, not an ongoing scheme," the continuing-violation exception to the Clayton Act's four-year statute of limitations does not apply to challenges to a merger or acquisition. *Midwestern Machinery v. Northwest Airlines, Inc.*, 392 F.3d 265, 271 (8th Cir. 2004). And where (as here), prior acquisitions are challenged under Section 16 of the Clayton Act, courts find that laches bars such injunctive relief claims even when the claim is brought *within* the four-year statute of limitations period that applies for purposes of damages claims. *See, e.g.*, *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1235 (8th Cir. 2010) (laches barred Section 16 claim seeking divestiture of merger brought two months after announcement of the acquisition and less than two weeks before closing); *Kloth v. Microsoft Corp.*, 444 F.3d 312 (4th Cir. 2006). These limitations protect the reliance interests that build up around completed acquisitions against stale antitrust challenges.

The district court correctly concluded that laches bars Plaintiffs' acquisition claims, particularly given (i) the allegations that Facebook already had a monopoly in 2011 (before either acquisition), (ii) the highly public nature and FTC review of both acquisitions; and (iii) the significant prejudice that would result from the divestiture. Per Plaintiffs' own allegations, these alleged effects should have been evident at the time of these acquisitions. But more importantly, Section 16 exists to allow "[a]ny person, firm, corporation, or association," to maintain a federal suit for injunctive relief *before* the effects, or damages are incurred, *i.e.*, as soon as loss or damages is "threatened." 15 U.S.C. § 26. The timeliness of antitrust claims turns not on the timing of the *effects* of the challenged conduct but on the timing of the *conduct itself*. *See, e.g.*, *Midwestern Machinery*, 392 F.3d at 278; *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467 (6th Cir. 1996) (accrual inquiry must focus on "the defendant's overt acts, as opposed to the effects of the overt acts").

It is therefore of no consequence (as the district court held) that Plaintiffs have asserted that these stale acquisitions are part of a "course of conduct" that "remains ongoing." The accrual of antitrust claims depends on the timing of the defendant's acts. *See Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 401 U.S. 321, 338-39 (1971); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 190 (1997). That standard ensures that defendants are held responsible for anticompetitive wrongs but also afforded repose for challenges to historical conduct. Allowing laches to be so easily circumvented in circumstances like these would undermine the principles of repose contemplated by the Clayton Act, opening the door to suits challenging past acquisitions indefinitely, so long as a plaintiff claims that those prior, completed acts are part of a "continuing course of conduct." That is an especially unjust result where, as here, Plaintiffs' "course of conduct" theory is itself fatally flawed because it rests on an aggregation of entirely lawful acts. This Court should reject Plaintiffs' effort to circumvent time-honored antitrust principles of repose through a misguided "course of conduct" theory.

CONCLUSION

The district court's judgment should be affirmed.

Dated: March 28, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) and Circuit Rule 32(e)(3) because it contains 6,494 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface of Federal Rules of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14-point Times New Roman font.

Dated: March 28, 2022

/s/*Richard P. Bress*
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CERTIFICATE OF SERVICE

I certify that on March 28, 2022, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users.

/s/*Richard P. Bress*
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ADDENDUM

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James Cooper is the former Deputy Director of the FTC's Bureau of Consumer Protection (2018-2019). He previously served as the Deputy Director (2005-2008) and Acting Director (2008-2009) of the FTC's Office of Policy Planning, and as an advisor to FTC Commissioner William E. Kovacic. He is currently an associate professor of law at George Mason University, where his research focuses on competition policy, as well as the law and economics of privacy and data security.

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Gregory Werden served for 42 years as an economist in the U.S. Department of Justice's Antitrust Division, where he made extensive contributions to the Department's Merger Guidelines and appellate litigation. In October 2018, he was honored with the Attorney General's Mary C. Lawton Lifetime Service Award.