ORAL ARGUMENT NOT YET SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 21-7078

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 in Case No. 1:20-cv-03589-JEB, Honorable James E. Boasberg, U.S. District Judge

CORRECTED BRIEF OF WASHINGTON LEGAL FOUNDATION AND INFORMATION TECHNOLOGY & INNOVATION FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amici curiae* certify as follows:

A. Parties and *Amici Curiae*

All parties appearing in this court are listed in the Brief for Plaintiffs-Appellants. *Amici curiae* on this brief are the Washington Legal Foundation and the Information Technology and Innovation Foundation.

B. Rulings Under Review

References to the rulings at issue in the appeal are listed in the Brief for Plaintiffs-Appellants.

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.

Dated: April 12, 2022

/s/ *Zachary D. Tripp*
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DISCLOSURE STATEMENT

Pursuant to Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, and consistent with D.C. Cir. Rule 26.1, *amici curiae* state that Washington Legal Foundation and the Information Technology and Innovation Foundation are each nonpartisan, nonprofit organizations with no parent corporation and no publicly held corporation owning 10% or more of their stock or other interest in either organization.

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INTEREST OF *AMICI CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus curiae* in important antitrust cases. *See, e.g.*, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019); *FTC v. Actavis Inc.*, 570 U.S. 136 (2013); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

The Information Technology and Innovation Foundation (ITIF) is an independent nonprofit, nonpartisan think tank that formulates, evaluates, and promotes policies that spur innovation and progress. ITIF believes that technological innovation, particularly in information technology, is at the heart of America's economic prosperity. ITIF often appears as *amicus curiae* in technology-related cases. *See, e.g.*, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

The central aim of antitrust law is to ensure free-market competition and provide consumers with better goods and services at

[1] No party's counsel authored any part of this brief. No one, apart from *amici* and their counsel, contributed money intended to fund the brief's preparation or submission. All parties consented to *amici*'s filing this brief.

lower prices. The district court's decision promotes these goals, as it dismissed the plaintiff States' Section 2 claim based on Facebook's policy to prevent competitors from using its Platform for free to harm Facebook's core business. The States and the Department of Justice (DOJ) argue for reversal by seeking a broad expansion of refusal-to-deal liability. Their proposals would erode the procompetitive aims of antitrust law and would force courts into the role of central planners where they are least equipped to perform that role—in cutting-edge and fast-moving technological environments.

SUMMARY OF ARGUMENT

Antitrust law broadly honors the right of a business to refuse to cooperate with its competitors. Indeed, cooperation among competitors can be a red flag, as collusion is the "supreme evil of antitrust." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). Exceptions are accordingly rare: the Supreme Court has recognized that a monopolist may be unable to end a preexisting and profitable relationship with a competitor when that decision is explicable only as a plan to harm competition itself. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 607–09 (1985). But that exception has always stood on shaky ground. *Aspen* was sharply criticized. *See*, *e.g.*, Herbert Hovenkamp, *The Monopolization Offense*, 61 Ohio St. L.J. 1035, 1044 (2000). And in *Trinko,* the Supreme Court carefully cabined *Aspen* as a "limited exception" that lies "at or near the outer boundary of [Sherman Act] § 2 liability" and that must be applied with "cautio[n]." *Trinko*, 540 U.S. at 408–09. Lower courts have correctly followed *Trinko* and refrained from expanding *Aspen* beyond its unique facts.

The district court properly understood the *Aspen/Trinko* framework and correctly dismissed the States' Section 2 claim challenging Facebook's Platform policy. Under that policy, Facebook limited Platform access for app developers who would use the Platform to replicate Facebook's core functions or export Facebook's data to rivals. That policy was forward-looking and, as relevant here, did not terminate an existing venture with a rival (much less a profitable one). Because Platform access was free to app developers, Facebook could not have been forsaking short-term profits to achieve anticompetitive ends. Facebook's rational business justification was self-evident. It did not want to help rivals replicate its core functions, nor did it want to share its intellectual property with its rivals. And it certainly did not want to do either thing for free. That is rational competition, not unlawful anticompetitive behavior, as the district court correctly concluded.

To reach a contrary result, the States and DOJ ask this Court to treat *Aspen* as a "flexible" test, *e.g.*, States Br. 63, apparently satisfied by a refusal to deal coupled with mere allegations of a purpose to harm competitors. This Court should decline that effort to radically expand refusal-to-deal liability, which *Trinko* so carefully limited.

First, the States' argument that *Aspen* provides a "flexible" and open-ended test conflicts with *Trinko*, which foreclosed a general duty to deal and emphasized that *Aspen*'s refusal-to-deal exception was "limited." 540 U.S. at 409. The Supreme Court has never endorsed a duty to deal with competitors *for free* and, to the contrary, emphasized that *Aspen* involved a defendant that refused to deal at retail prices. *Id.*

The prior course of dealing is also a critical part of that exception, not just a factor that may be disregarded. Without a prior course of dealing, there is no evidence that a particular arrangement would be profitable, no reason to infer that the monopolist's otherwise lawful refusal was unjustified, and no prior terms to guide the court in determining what terms to impose on the competitors. Not only would courts become "central planners"—something antitrust law seeks to avoid, *see id*. at 408—but, worse, they would be centrally planning on a blank slate. And a subjective motivation to harm competitors cannot differentiate lawful from unlawful conduct, as harming competitors is the essence of competition. What is needed is conduct with the effect of harming competition itself, which is absent here.

Second, the fast-moving and ever-changing market here is particularly unsuited to imposing novel duties to deal, making the proposed expansions of *Aspen* even more problematic. The market for social media services, like other online services, is highly disruptive, with extraordinarily low barriers to entry and rapid changes from constant innovation and competition. For example, Facebook has long faced competition from companies like Twitter; Snapchat quickly rose to prominence; and now TikTok has emerged. Facebook has responded with innovations of its own, developing a new platform called the metaverse, focused on 3D social experiences. In this industry, competition is vigorous, disruptive, and only a click away: A user can shift from Facebook to a competitor simply by opening a different app or website.

Judicial creation of a novel duty to deal in this fast-changing and highly competitive industry would threaten to harm competition and consumers. It would discourage growth and create a powerful incentive to free-ride on others' success. It would force courts to act as central planners by crafting the terms on which competitors must deal with one another. By the time courts arrive at their preferred terms, the fast-moving industry likely will have already morphed, rendering the intrusion obsolete or misplaced. And courts could not limit an expanded duty to deal to the social media space, because any new antitrust duty would reach economy-wide. This Court should refrain from breaking so much new ground, and instead should affirm the district court's thoughtful judgment.

ARGUMENT

I. The District Court Properly Dismissed the States' Section 2 Claim

A. The District Court Correctly Applied the *Aspen/Trinko* Framework

Businesses are as a rule "free to choose the parties with whom they will deal." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 448 (2009); *see also United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (a trader may "freely . . . exercise his own independent discretion as to parties with whom he will deal" and "announce in advance the circumstances under which he will refuse to sell"). Exceptions are "rare." *linkLine*, 555 U.S. at 448. A plaintiff cannot survive a motion to dismiss merely by grousing about what it thinks the dominant business could have done differently. Rather, it must plausibly allege that the refusal to deal would, absent monopoly power, be an irrational business decision.

In a thorough and well-supported order, the district court correctly held that the States' antitrust claim fails this demanding standard. Facebook provides a free Platform for reaching its users, and its policy was to deny access to app developers who would use the Platform to replicate Facebook's core functions or export Facebook's data to rivals. (JA230–31, 254–55). Facebook's decision not to offer its competitive advantage to rivals for free cannot support a Section 2 claim for many reasons.

First, there can be no Section 2 liability for declining to deal with a competitor *for free*, particularly based on those minimal restrictions. Preventing free-riding is an inherently justified business decision. *See Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 377–78 (7th Cir.

1986) ("Olympia had no right under antitrust law to take a free ride on its competitor's sales force.").

"[A] company—even a monopolist company—that expends time and money to create a valuable product does not violate the antitrust laws when it declines to provide that product to its competitors for free." *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1298 (11th Cir. 2004); *see also id.* at 1296 (Section 2 does not require one "to give its product freely to its competitors"); Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 772c2 (5th ed. 2020) (Areeda & Hovenkamp) (*Aspen* "certainly does not hold that a monopolist must make its goods, services, or facilities available at a competitive rather than at a monopolistic price," as it "generally assumed that an otherwise lawful monopolist does not violate the statute by charging a monopoly price"). And the justification for denying free access is even stronger when the competitor would use its access to replicate the company's core functionality or export proprietary data to rivals. It is obviously rational for a company to decline to cooperate for free with a rival that will abuse that cooperation by hurting the company itself.

Many courts have recognized that protecting intellectual property, including trade secrets, is a valid justification for declining to do business with a rival, thus precluding Section 2 liability. *See Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1181–89 (1st Cir. 1994), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (author's desire to exclude others from using its copyrighted work "is a presumptively valid business justification"); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1363 (Fed. Cir. 1999) (owner of proprietary information "has no obligation to provide it, whether to a competitor, customer, or supplier"); *see also SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827, 841–43 (10th Cir. 2016); *Serv. & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680, 686 (4th Cir. 1992); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 285 (2d Cir. 1979).

Second, as the district court explained, the lack of a prior course of dealing is fatal.[2] *See* Areeda & Hovenkamp ¶ 772e ("The [*Aspen*] Court did not impose a prospective duty to deal where no such dealing had

[2] The States alleged a prior course of dealing as to seven particular companies, but the district court correctly dismissed those claims because injunctive relief is unavailable for events that occurred over five years ago. (JA247-51).

occurred previously, and there is no reason for thinking it would have done so."). Several courts have held that a prior course of dealing is a prerequisite to refusal-to-deal liability. The district court relied on *FTC v. Qualcomm Inc.*, 969 F.3d 974, 993 (9th Cir. 2020), and *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1074 (10th Cir. 2013) (Gorsuch, J.) ("[T]here must be a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival."). Relying on *Trinko*, this Court articulated the same rule in *Covad Communications Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 673 (D.C. Cir. 2005), and affirmed the dismissal of a refusal-to-deal claim in which the plaintiff did not allege the defendant "had at one time voluntarily dealt with" the plaintiff or that "it would ever have been in [the defendant's] interest to have done so." Many other cases adopt the same rule.[3]

[3] *In re Elevator Antitrust Litig.*, 502 F.3d 47, 53 (2d. Cir. 2007) (dismissing for lack of a prior course of dealing—the "sole exception" to the right to refuse to deal); *ASAP Paging Inc. v. CenturyTel of San Marcos Inc.*, 137 F. App'x 694, 698 (5th Cir. 2005) (similar); *Covad Commc'ns Co. v. BellSouth Corp.*, 374 F.3d 1044, 1049 (11th Cir. 2004) ("*Trinko* now effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim under *Aspen*."); *see also N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc.*, 323 F. Supp. 2d 559, 571 (S.D.N.Y. 2004) (dismissing claim with "no history of

That makes sense. Without a prior business relationship, there can be no basis to infer that a particular course of dealing would be profitable. *See Trinko*, 540 U.S. at 409 (describing the prior voluntary course of dealing as "*presumably profitable*," and the termination as "suggest[ing] a willingness to forsake short-term profits to achieve an anticompetitive end"). Without a prior course of dealing, a mere refusal to deal also would not reflect a "decision by a monopolist to make an important change in the character of the market." *Aspen*, 472 U.S. at 604. Rather, non-dealing would simply replicate the preexisting status quo that the companies were not working together. The preexisting course of dealing is necessary to identify a particular *action* that altered the market by harming competition itself.

Even if there were some extraordinarily rare situation in which a refusal to deal with a new counterparty could trigger Section 2 liability, this would not be it. Facebook's policy was anything but "arbitrary," *see* Areeda & Hovenkamp ¶ 770a, because Facebook had self-evident business justifications: it declined to give free access to developers who

cooperation" that could "shed[ ] … light upon the motivation of its refusal to deal").

would use Facebook's Platform to replicate Facebook's core functionality or to use Facebook's proprietary data to help Facebook's competitors. (JA230–31, 254–55). That is not refusing to engage in a presumptively profitable course of dealing, as in *Aspen*. It is rational and appropriate to refuse business that is inherently non-profitable and instead presumptively damaging.

The district court also correctly rejected the States' effort to reframe the policy as a form of "conditional dealing." (JA251). In *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the Supreme Court held that it was unlawful for a monopolist newspaper to refuse to sell advertising to any company that also purchased advertising from a local radio station that the newspaper viewed as a competitor. But this case is different. Facebook did not condition access to the Platform on a guarantee that developers refuse to provide apps to or otherwise access competing social networks. (JA252–55). Developers were free to use and interact with other social networks all they wanted; the policy merely limited what apps could do *on Facebook's own platform* (or when exporting data from *Facebook's own platform*). (JA230–31, 254–55). Such a "focused prohibition on the use of a monopolist's own facilities" cannot limit opportunities for competitors to enter or remain in the market, and so the claim—even re-packaged as "conditional dealing"—fails. (JA255–56).

The States also rely on *United States v. Microsoft Corp.*, 253 F.3d 34, 74–76 (D.C. Cir. 2001), and, specifically, Microsoft's exclusionary conduct relating to its version of the Java Virtual Machine. *See* States Br. 65–66; DOJ Br. 16–17. But the States' argument fails for the same reasons as above. *Microsoft* (like *Lorain*) involved exclusive dealing. *See Microsoft*, 253 F.3d at 75 (explaining that Microsoft "conditioned receipt of Windows technical information upon" vendors' "agreement to promote Microsoft's [Java technology] exclusively"). Facebook's policy did not condition access on exclusivity.

B. The States' and DOJ's Counterarguments Lack Merit

1. *Aspen* Is a Limited Exception, Not a Broad and Amorphous Duty-to-Deal Standard

The States and DOJ argue that this Court should adopt a "flexible" test and that the district court erred in treating *Aspen* and *Trinko* as "rigid." States Br. 63; DOJ Br. 5, 7, 19 (rejecting a "rigid checklist" and advocating a "flexible, fact-specific burden-shifting approach"). For the States and DOJ, it appears sufficient for the plaintiff to allege a refusal to deal coupled with an "anticompetitive purpose," which apparently can be exhibited by myriad factors beyond the three in *Aspen*. States Br. 64; DOJ Br. 21, 24. That freewheeling characterization of refusal-to-deal liability, however, cannot be squared with *Aspen* and much less with *Trinko*'s clarification that *Aspen* is a "limited" exception that should be applied with caution.

In *Aspen*, the Court began by reaffirming that antitrust law places a "high value" on a business's "right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." 472 U.S. at 601 & n.27 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)). The Court ultimately held that that important right was "not unqualified," however, and approved a jury instruction that a refusal to deal could violate Section 2 only if no "valid business reasons exist for that refusal." *Id.* at 601, 604–05. It found the record supported the jury's finding that the defendant sacrificed short-term profit for anticompetitive ends in the unusual circumstances of that case, where the defendant unilaterally halted a preexisting arrangement with a competitor and then refused to provide access (sale of lift tickets) even at retail prices. Even then, the Court upheld liability only because the defendant "fail[ed] to offer any efficiency justification whatever for its pattern of conduct," even though it was "pressed" to do so. *Id.* at 608–09.

Aspen can and should be read narrowly. The facts were peculiar and the Court did not appear to "consider the implications for other situations." Areeda & Hovenkamp ¶ 772c2; *see also id.* ("The [*Aspen*] Court . . . surely did not intend to legislate on so grand a scale as to subject [various business judgments] to a jury's policy decision"); *id.* (*Aspen*'s "own formulation is itself qualified in several ways"). *Aspen* was also roundly criticized by leading scholars. *See* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 848–51 (1989); Michael Jacobs, *Introduction: Hail or Farewell? The Aspen Case 20 Years Later*, 73 Antitrust L.J. 59, 64 (2005). Lower courts reacted by treating *Aspen* as anomalous and limited to its facts. *See Olympia Equip.*, 797 F.2d at 379 (*Aspen* "is narrowly written").

Crucially, the Supreme Court subsequently confirmed that the commentators were correct and that *Aspen* must be read narrowly and applied with caution. In *Trinko*, AT&T customers sued Verizon (AT&T's rival), alleging that Verizon failed provide AT&T with access to its telephone systems in a reasonable manner, impairing AT&T's ability to provide competitive services. 540 U.S. at 402–05. The class challenged this conduct as exclusionary in violation of Section 2. *Id.* The Supreme Court rejected the claim.

First, the Court reaffirmed that monopolists do not have a general duty to deal and explained that it has been "cautious in recognizing . . . exceptions [to that rule], because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." *Id.* at 408. Compelled sharing, the Court explained, can (1) "lessen the incentive for the monopolist, the rival, or both to invest in . . . economically beneficial facilities"; (2) require courts "to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited"; and (3) "facilitate the supreme evil of antitrust: collusion." *Id.*

Second, the Court emphasized that the *Aspen* exception "is at or near the outer boundary of § 2 liability." *Id.* at 409. It explained that *Aspen* turned on its unusual facts, including the "unilateral termination of a voluntary *(and thus presumably profitable)* course of dealing [that] suggested a willingness to forsake short-term profits to achieve an anticompetitive end," as well as the refusal to sell "*even if compensated* *at retail price*." *Id.* The Court in turn found that the facts of *Trinko* fell outside that limited exception: Because the complaint "[did] not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion," Verizon's refusal to sell at a "cost-based rate of compensation" was not probative of anticompetitive behavior. *Id.*

Trinko thus sharply cabined *Aspen* and precluded its expansion beyond the identified factors. *See St. Luke's Hosp. v. ProMedica Health Sys., Inc.*, 8 F.4th 479, 487 (6th Cir. 2021) (answering "no" to any of the three *Aspen* inquiries "signals that the antitrust laws do not apply"); *In re Adderall XR Antitrust Litig.*, 754 F.3d 128, 135 (2d Cir. 2014) (*Trinko* "usefully highlights the distinctions that made *Aspen Skiing* the rare case"); Areeda & Hovenkamp ¶ 772a (*Trinko* "undermined or at least severely qualified almost everything that *Aspen* gave."); Jacobs, *supra*, at 63 (*Trinko* "intended to rein in *Aspen* and set clear limits to Section 2 liability").

Applying a "flexible" refusal-to-deal test unmoored to *Aspen* and *Trinko* would thus transform that "limited" exception into an amorphous and broad one that would threaten to swallow the general rule that businesses are "free to choose the parties with whom they will deal." *linkLine*, 555 U.S. at 448. Indeed, the States and DOJ fail to identify limiting principles for when a refusal-to-deal claim would be foreclosed and, in particular, when such a claim would fail at the pleading stage.

2. The Lack of a Prior Course of Dealing Is Fatal

The States and DOJ also provide no sound basis for allowing the States' Section 2 claim to proceed absent a prior course of dealing. After *Trinko*, circuit courts have widely accepted that a prior course of dealing is necessary, particularly given *Trinko* placing *Aspen* at the "outer boundary" of Section 2, where it has no room to grow. *See supra* note 3 (collecting cases). The district court correctly relied on that line of cases, and the States and DOJ make no effort to distinguish *Qualcomm* or *Novell* on the merits, nor do they address the other cases cited above.[4]

DOJ relies on *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377–78 (1973), but that decision does not support imposition of a

[4] The States and DOJ note that *Qualcomm* and *Novell* were decided after trials. States Br. 68; DOJ Br. 23. But an antitrust case can survive the pleading stage only if the allegations, taken as true, plausibly suggest that the plaintiff would establish liability at trial. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). *Qualcomm* and *Novell* reject the theory that a refusal to deal, coupled with mere subjective intent, can establish liability.

freestanding antitrust duty to deal with no prior course of dealing, and much less in circumstances like these. In *Otter Tail*, a monopolist utility distributed electricity and each town service area could "accommodate only one distribution system, making each town a natural monopoly market for the distribution and sale of electric power at retail." *Id.* at 369. The Supreme Court upheld liability where the monopolist "refused to supply or 'wheel' power to municipalities that undertook to operate their own retail distribution facilities rather than franchising Otter Tail to sell directly to consumers." Areeda & Hovenkamp ¶ 772b3. *Otter Tail* is thus similar to *Lorain Journal*, as the defendant effectively required that its customers and potential customers do no business with its competitors. Here, by contrast, app developers were free to develop apps for both Facebook and competing social networks. Moreover, *Otter Tail* turned on a Section 1 violation, as its restrictive contracts were "in reality, territorial allocation schemes" that constituted "per se violations of the Sherman Act." 410 U.S. at 378. No such conduct is alleged here. *See also* Areeda & Hovenkamp ¶ 772b3 (noting the "peculiarities" of *Otter Tail*).[5]

[5] DOJ relies on *FTC v. Vyera Pharm., LLC*, 479 F. Supp. 3d 31, 49–50 (S.D.N.Y. 2020), but that case involved a regulatory duty to deal. The defendants held a government-issued monopoly (a drug patent) but

The States suggest that Facebook's announcement that it was narrowing its terms of service is a close-enough substitute for the requisite prior course of dealing. States Br. 66. But there is no support in *Trinko* (or *Aspen*) for such a rule. Numerous courts have required a prior course of dealing with a particular counterparty, *see supra* at 9, and the States identify no court that has allowed a refusal-to-deal claim based merely on an announcement that a company was narrowing its terms of service for how it would interact with new counterparties.

Moreover, the announcement does not fulfill the key purpose of the prior-dealing requirement: to establish that the company had decided to embark on a specific and "*presumptively profitable*" course of dealing, and thus that halting that it could suggest a willingness to sacrifice short-term profits for anticompetitive ends. *Trinko*, 540 U.S. at 409. A generalized prior policy of open access does not show that a company

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refused to sell samples to generic drug competitors—and even repurchased samples at inflated prices—to deny its competitors access to the drug that was, "*by regulation*, necessary for potential competitors to enter the market." *Id.* (emphasis added). The States and DOJ have not asserted that any statute or regulation makes it necessary for third-party developers to freely access Facebook to develop competing social networks or to sell Facebook's proprietary data to competitors.

specifically considered that a competitor might exploit that access to replicate its core functions (or export proprietary data to rivals), and much less that the company had concluded that it was profitable to allow such access for free. There is a clear business justification for halting such access: it is inherently non-profitable (because the access is free) and instead presumptively harmful. Changes in terms of service are also commonplace, so treating them as a proxy for a prior course of dealing would not serve the critical function of limiting *Aspen* to "the outer boundary of [Sherman Act] § 2 liability. " *Trinko*, 540 U.S. at 408–09.

3. The States and DOJ Improperly Focus on "Purpose"

The States and DOJ focus on Facebook's alleged "intent" and "purposes" as a basis for Section 2 liability. States Br. 64–65; DOJ Br. 20–21 (arguing that "where a monopolist's predatory purpose is evident from other facts, prior dealing is unnecessary"). But subjective intent cannot transform an otherwise lawful refusal to deal into an actionable Section 2 claim. "[C]ompetition is the process of trying to prevail over rivals, even to the point of destroying them. An aggressive state of mind is fully consistent with antitrust objectives when the behavior is proper." Areeda & Hovenkamp ¶ 1506; *see id.* (noting that a "document calling for 'hitting,' 'getting,' 'targeting,' or even 'smashing' rivals may merely call for competition").

This Court has thus "focus[ed] . . . upon the effect" of the alleged anticompetitive conduct, "not upon the intent behind it." *Microsoft*, 253 F.3d at 59. Other courts have similarly cautioned against relying on evidence of subjective intent to harm competitors precisely because it reflects competition. *See, e.g.*, *Novell*, 731 F.3d at 1078 (rejecting the view that "intent to harm a competitor alone" can be "the marker of antitrust liability," and explaining that "[t]he process of firms . . . competing rather than colluding normally promotes competition and consumer gains—and the intent to undo a competitor in this process should hardly surprise"); *Qualcomm*, 969 F.3d at 994 n.15 (reversing the district court for "conflat[ing] the desire to maximize profits with an intent to 'destroy competition itself'"); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401–02 (7th Cir. 1989) (Easterbrook, J.) ("Firms 'intend' . . . to crush their rivals if they can," and thus cautioning against using "the vigorous, nasty pursuit of sales as evidence of a forbidden 'intent'" because of the risk of penalizing competition).

II. Antitrust Policy Weighs Against Novel Judicial Intervention

The district court's decision not only is correct, but also it properly accommodates serious concerns about antitrust policy in the fast-moving realm of social media platforms and other online services. In this realm, firms are constantly innovating. Breaking from *Trinko* to create new duties to deal in this area—particularly to deal with competitors for free—would threaten innovation in the industry more broadly.

In fast-changing industries, antitrust error is a serious concern. *Trinko*, 540 U.S. at 408, 414 (noting that in "highly technical" and "constantly changing" industries, antitrust error concerns are at their apex); *Qualcomm*, 969 F.3d at 990–91 (courts should be "especially" cautious of § 2 claims "in technology markets" where "innovation" "is essential to economic growth"); Alan Devlin, *Antitrust As Regulation*, 49 San Diego L. Rev. 823, 842, 868 (2012) ("[H]igh-technology markets display unique difficulties" for antitrust, and "[t]he cost of false positives . . . is especially grave in technology markets, given the inestimable social benefits of innovation"); David McGowan, *Between Logic and Experience: Error Costs and United States v. Microsoft Corp.*, 20 Berkeley Tech. L.J. 1185, 1189–90 (2005) (in new markets, a "mistaken condemnation of competitive conduct is costlier than mistaken acquittals of anticompetitive conduct”).

Those risks are at their pinnacle here. The “new economy” is characterized by “modest capital requirements” and “quick and frequent entry and exit.” Richard A. Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 925–26 (2001). The facility for entry—the internet—is effectively free and accessible to all. The investment to design and code a new app tends to be far lower than the cost of entry into other industries.[6] Companies no longer even need to invest in purchasing and maintaining servers to host and operate their applications. They can simply rely on on-demand cloud computing platforms like Amazon Web Services (AWS), further minimizing the initial investment.[7] And a startup can compete not merely by directly competing with an

[6] *See* Abdo Riani, *3 Big Factors That Influence The Quality And Cost Of Your Startup App*, Forbes (Feb. 6, 2020) (“[T]he median app development cost ranges between $40,000 and up to $730,000.”).

[7] Satta Sarmah Hightower, *How Startups Can Grow Faster With The Cloud*, Forbes (Sept. 29, 2021) (“[S]everal services and tools are emerging—including Build on AWS, a new feature within the AWS Activate Console—that streamline the process [of app development] and help bring big ideas to market quickly.”).

incumbent, but also by developing a new and disruptive alternative that transforms the playing field.

The specific market here highlights these dynamics. Not long ago, Facebook overtook MySpace, not through price competition, but through disruptive innovation. Facebook has always faced competition from various other platforms, including Twitter and SnapChat, which resemble Facebook in some ways but not others. And new social media platforms are constantly arising and evolving, including TikTok, which has quickly grown from being essentially unknown to the most visited site in the world.[8] And Facebook recently announced the metaverse, a network of 3D virtual worlds focused on social connections, thus further disrupting the industry and opening yet new landscapes for competition.[9]

These features make the market fundamentally different from the static market in *Aspen*. In *Aspen*, the market was for "downhill skiing

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[8] Khristopher J. Brooks, *TikTok tops Google as the most visited website on the internet*, CBS News (Dec. 23, 2021), *available at https://www.cbsnews.com/news/tiktok-google-facebook-social-media-internet.*

[9] *See* Christopher Mims, *Facebook Joins a Crowded Field in the Race to Build the 'Metaverse.' We All Have a Stake in the Outcome*, Wall St. J. (Oct. 29, 2021).

services in Aspen, Colorado," and consisted of the four local ski resorts. 472 U.S. at 587–88. Building a new fifth resort was not an option: the supply of "appropriate topographical conditions" in the area was inherently limited, and any new development would face "regulatory obstacles" due to the environmental impact. *Id.* at 588. An app developer, however, can metaphorically build a new mountain (and another and another) at virtually no cost and with no regulatory obstacles. The enterprising app developer can also construct completely new and different experiences that users enjoy more and that rapidly draw customers away from an incumbent. That wide-open and ever-changing competitive landscape thus warrants considerable caution when faced with a request to radically expand refusal-to-deal liability. Posner, *supra*, at 936, 943 (explaining that "cases in the new economy present unusually difficult questions of fact because of the technical complexity of the products and services produced by new-economy industries," and recommending "caution" in antitrust intervention); Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 Harv. J.L. & Pub. Pol'y 171, 173 (2011) ("Applying antitrust laws to innovative companies in dynamic markets has always been a perilous proposition, and despite significant advances in economics and jurisprudence, it remains so.").

First, in the online sector, it can be particularly difficult to define the relevant markets. Angelos Vlazakis & Angeliki Varela, *Amazon's Antitrust Fair Play, A Transatlantic Evaluation*, 41 N. Ill. U. L. Rev. 64, 71 (2020) ("[D]efining markets in the digital age is hardly an easy task."); Joshua D. Wright & Murat C. Mungan, *The Easterbrook Theorem: An Application to Digital Markets*, 130 Yale L.J. Forum 622, 646 (2021). Although market definition was not at issue—because the Section 2 claim fails even on the States' own market definition—their definition of the market as "personal social networking services" is ill-defined and may not adequately capture the many, interconnected markets in which Facebook and other app developers operate. In any event, that market is itself constantly in flux and subject to disruptive innovation at any time.

Second, in fast-changing environments, it is hard to discern whether unilateral behavior is anticompetitive. For example, emerging companies often make a rational decision to forsake short-term profits hoping to obtain far larger long-term gains. Amazon and Facebook are prime examples. Firms often compete through innovation rather than reducing costs of production and lowering prices for consumers; Facebook and many other online services are provided for free. Thus, the traditional price-oriented theory on which antitrust law is based may not capture market realities. *See* Herbert Hovenkamp, *Antitrust and the Movement of Technology*, 19 Geo. Mason L. Rev. 1119, 1120 (2012) ("[P]redicting and managing competitive processes in highly innovative industries is much more difficult than in markets where technology is very largely constant and most movements affect only the output and price of a set of unchanging products.").

Third, there is significant lag between when a firm engages in an allegedly anticompetitive refusal to deal and when any judicial decree would be entered. Particularly in a case for injunctive relief, as here, the court may therefore be crafting a prospective remedy based on a world already in the rear-view mirror. And even if the court could pinpoint the appropriate terms for a prospective arrangement, future changes in technology could quickly render those terms obsolete. *See Microsoft*, 253 F.3d at 49 ("[J]ust over six years have passed since Microsoft engaged in the first conduct plaintiffs allege to be anticompetitive. As the record in this case indicates, six years seems like an eternity in the computer industry."); Posner, *supra*, at 939 ("[A]n antitrust case involving a new-economy firm may drag on for so long relative to the changing conditions of the industry as to become irrelevant, ineffectual.").

DOJ seeks to justify this intrusion by emphasizing "network effects," contending that they create high barriers to entry. DOJ Br. 8–10. But even with any network effects, the industry is still rapidly evolving, thus creating the problems above. *See* Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. Chi. L. Rev. 1, 7 (2001) ("The [network effects] issue is particularly complex because, in network industries characterized by rapid innovation, both forces may be operating and can be difficult to isolate."). Moreover, DOJ overlooks that smaller networks can be attractive and grow quickly precisely because they are smaller and more exclusive—or have different demographics. For example, Snapchat and then TikTok both started by focusing on younger users and quickly expanded to become major competitors to Facebook, despite any advantages of "network effects."[10] What has proven to be far more important is disruptive innovation.

[10] Georgia Wells, *TikTok Wants to Grow Up, but Finds It Tough to Keep Kids Out*, Wall St. J. (Feb. 16, 2020).

DOJ argues that courts will not have to act as central planners because "the norm on Facebook's platform is sharing—not exclusion." DOJ Br. 26. But the problem with judicial "central planning" is not just deciding whether sharing will occur, but also determining what the terms of the sharing will be. And here, that is unknown. Among other things, Facebook has not set a price for allowing competitors to access its Platform to replicate its core functionality, so a court would lack real-world guidance in setting that key term. *See* Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak Are Misguided*, 68 Antitrust L.J. 659, 677 (2001) ("[T]he Court is wary of imposing an antitrust duty to deal where it might be imposing high costs by forcing firms to deal or by inventing price terms in a new setting.").

More fundamentally, the States' request is directed at the wrong forum. The States are asking this Court to recognize a freewheeling and flexible duty to deal when the Supreme Court has tightly limited such liability as generally inconsistent with the antitrust laws. Moreover, any new judicially created duty to deal would apply to all industries, not just social media, and thus could have ramifications economy-wide. The proper body for considering whether to radically transform American antitrust law in this way is Congress, not this Court.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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CERTIFICATE REGARDING SEPARATE BRIEF

Under D.C. Circuit Rule 29(d), I certify that this separate brief is necessary because it provides unique insights into antitrust doctrine and its application to technological industries. To my knowledge, no other *amici* has addressed the same arguments from the same perspective and with the same expertise.

Dated: April 12, 2022

/s/ *Zachary D. Tripp*
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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,270 words.

2. This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it was prepared in Microsoft Office Word, using a 14-point proportionally spaced Century Schoolbook font.

Dated: April 12, 2022

/s/ *Zachary D. Tripp*
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CERTIFICATE OF SERVICE

I certify that on April 12, 2022, I filed the foregoing brief of *amici curiae* through this Court's CM/ECF system, which will serve notice of electronic filing on all counsel for the parties.

Dated: April 12, 2022

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