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21-7078

United States Court of Appeals for the District of Columbia Circuit

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

Plaintiffs-Appellants,

v.

META PLATFORMS, INC.,

Defendant-Appellee.

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

REPLY BRIEF FOR APPELLANTS

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Dated: April 14, 2022

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GLOSSARY

API	application programming interface
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*
Dkt.	Docket in case number 20-cv-3589 (D.D.C.)
FTC	Federal Trade Commission
FTC Dkt.	Docket in case number 20-cv-3590 (D.D.C.)
NEPA	National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*

PRELIMINARY STATEMENT

Facebook has engaged in an unlawful course of conduct to, in CEO Mark Zuckerberg's words, "build a competitive moat" around its monopoly. (JA46.) Facebook's efforts to buy or bury nascent competitors continue to harm consumers, and the district court erred in dismissing the complaint of the forty-eight plaintiff States without discovery.

First, as Facebook acknowledges, laches does not apply against sovereigns suing to protect public rights. Facebook is wrong to contend that the States are not acting as sovereigns merely because they are enforcing federal law. It is not the statutory source of the States' claims, but their having sued to protect public rights, that makes laches inapplicable. And even if a laches defense were in theory available when the States sue under federal antitrust law to protect public rights, that defense would not apply here. The facts alleged do not prove unreasonable delay by the States or undue prejudice to Facebook, particularly when giving due weight in the equitable analysis to the States' vital role protecting the public interest.

Second, Facebook fails to rebut the States' showing that the district court made multiple independent errors in dismissing the portion of the

States' Sherman Act § 2 claim based on Facebook's exploitation of its platform to bury potential competitors. For one thing, Facebook has not shown that injunctive relief is unavailable, as the district court mistakenly assumed. The States alleged that Facebook's anticompetitive course of conduct is ongoing. And in any event, their allegations show that injunctive relief would meaningfully address Facebook's past anticompetitive conduct and its ongoing effects.

The district court erred in accepting Facebook's assertion that its conduct was exclusively a lawful refusal to deal. Facebook does not dispute that the States alleged a wide-ranging anticompetitive buy-or-bury course of conduct. Yet the district court did not address, as a whole, that misconduct and its reinforcing effects. The district court also failed to address substantial platform-related misconduct that cannot be construed as a refusal to deal, such as covertly degrading the functionality and distribution of rivals' content, and imposing conditions to induce third parties not to compete with Facebook or transact with Facebook's rivals. And because Facebook's attempts to justify its conduct as a mere refusal to deal depend on factual disputes that cannot be resolved against the plaintiffs at this stage, the district court erred in cutting off necessary fact development.

That fact development is particularly appropriate here, given the novelty of the digital ecosystem in which Facebook operates.

ARGUMENT

POINT I

LACHES DOES NOT BAR THE STATES' ACQUISITION-BASED CLAIMS

A. Laches Does Not Apply to States Suing to Protect Public Rights.

As the States explained in their opening brief (at 22-28), laches does not apply against States suing to protect the public rights advanced by government enforcement actions like this one. Facebook does not dispute this long-settled rule. Rather, it contends (Br. 13-20) that an exception permits the application of laches here because the States are suing under Section 16 of the Clayton Act and the States are supposedly equivalent to private parties when suing under that federal statute. That contention is meritless for two reasons.

First, it is not the statutory source of the States' claims, but the capacity in which they sue—to protect public rights—that makes laches inapplicable. The rule that laches does not apply against States is rooted in "the great public policy" that States, like the federal government,

should be allowed broad latitude when protecting public rights. *Guaranty Tr. Co. of N.Y. v. United States*, 304 U.S. 126, 132 (1938). Facebook does not contest that the States brought this suit to protect public rights.

It is immaterial that the States are suing under a federal law rather than their own state laws. The public policy that the States should be permitted to protect public rights applies regardless of the law the States seek to enforce. As one court explained in rejecting the same argument Facebook makes here, where a State suing as parens patriae is "protecting its citizens and economy from violations of the [federal] antitrust laws," it is "acting in its sovereign capacity . . . to vindicate the public interest" and thus is not subject to laches. *Massachusetts ex rel. Bellotti v. Russell Stover Candies, Inc.*, 541 F. Supp. 143, 144-45 (D. Mass. 1982). Similarly, a State sues "in its sovereign capacity," and therefore is not subject to laches, when the State enforces federal environmental law under CERCLA. *See, e.g.*, *United States v. Mottolo*, 605 F. Supp. 898, 909 (D.N.H. 1985). See also Opening Br. 23-24.[2]

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[2] Facebook is incorrect to suggest (at 19) that CERCLA is inapposite because CERCLA provides that a State can seek recovery. Like Clayton Act § 16, CERCLA permits any "person" to seek recovery, *see* 42 U.S.C.

Contrary to Facebook's contention, when the States sue as parens patriae, they are not simply "standing in for private citizens" (Br. 15). Instead, they sue to protect a public interest "apart from the interests of particular private parties." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 605, 607 (1982). Here, that public interest is the economic well-being of the community. *See id.* at 607. (JA49 (¶¶ 17-20).) The fact that such an interest has been labeled "quasi-sovereign" rather than simply "sovereign" in the standing context has no relevance to the laches analysis, which rests on the separate question of whether the States are protecting public rights—as they undisputedly are here. *See Guaranty Tr.*, 304 U.S. at 132.

Neither Facebook nor any of its amici identifies a single authority to the contrary. Facebook references cases (at 16) applying laches to sovereigns suing in a private or proprietary capacity, rather than to vindicate a public right. *See Clearfield Tr. Co. v. United States*, 318 U.S. 363, 369 (1943) (recovery of amount owed); *Guaranty Tr.*, 304 U.S. at 129 (similar).

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§§ 9607(a)(4)(A)-(B), 9659(a), and "person" is defined to include States, *id.* § 9601(21). CERCLA does not create an exclusive cause of action for States.

Moreover, in *Guaranty Trust*, the sovereign was a foreign entity: the Soviet Union. Because no public rights—much less those of Americans—were at issue in these cases, the public-policy considerations against applying laches were not present. *See* 304 U.S. at 135-36.

Facebook also relies (at 19) on *Puerto Rico v. Carpenter Co.*, 442 F. Supp. 3d 464 (D.P.R. 2020), and *Nebraska ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Commission*, 834 F. Supp. 1205 (D. Neb. 1993). But in those cases the sovereign plaintiffs did not dispute the threshold applicability of laches. Thus, the district courts applied laches without considering whether the doctrine applied in the first instance. And in the one appeal that ensued, the Eighth Circuit declined to address laches and affirmed only the district court's holding that Nebraska was subject to a statute of limitation that explicitly applied to States. *See* 26 F.3d 77, 81 (8th Cir. 1994).

Second, Section 16 of the Clayton Act underscores the inapplicability of laches against States suing under that statute. Section 16 entitles plaintiffs to injunctive relief "against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief . . . is granted by courts of equity."

15 U.S.C. § 26. It is undisputedly a settled rule of equity that laches does not apply against sovereign States enforcing public rights.

If Congress wanted to override States' longstanding sovereign protection from laches, it would have needed to use "exceedingly clear language." *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-50 (2020). Congress did not do so in Section 16. There is no merit to Facebook's attempt (at 20) to distinguish on their facts the cases applying this canon that were referenced in the States' opening brief. Countless cases in many contexts apply the canon to ensure that federal statutes are not read to impliedly "pre-empt the historic powers of the States"—like their protection from laches when suing to protect public rights. *See, e.g.*, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (quotation marks omitted).

Facebook misplaces its reliance (at 17-18) on laws not at issue in this case. Facebook notes that a provision permitting States to sue for damages for antitrust violations, 15 U.S.C. § 15c(a)(1), is subject to a statute of limitations, *id.* § 15b. But that is precisely the type of clear language that is needed to subject States to a time bar, and which Section 16 lacks. Moreover, the time bar in § 15b applies equally to the federal

government, which undisputedly is not subject to laches. *See id.* (applying limitations period to § 15a, which governs damage suits by the United States). Facebook also notes (at 14) that Congress declined to include in the Clayton Act a provision that would have allowed States to enforce any criminal or civil provision of the federal antitrust laws. But that is irrelevant when Congress did enact Section 16, which permits the civil enforcement by States here.[3]

Facebook also is wrong to assert (at 14-15) that *California v. American Stores Co.*, 495 U.S. 271 (1990), indicates that the States should be subject to laches when suing under Section 16. There, the Court merely observed in dicta that equitable defenses such as laches could apply in Section 16 challenges "by private parties." *Id.* at 296. No other Justice joined Justice Kennedy's concurrence suggesting that the state plaintiff

[3] Other statutory provisions underscore that Congress intended States to have a central role in enforcement of federal antitrust laws. For instance, whenever the U.S. Attorney General sues under the antitrust laws and has reason to believe any State would be entitled to sue based on substantially the same alleged violation, the State must be notified. 15 U.S.C. § 15f.

might be subject to laches. *See id.* at 298.[4] Facebook likewise is wrong to maintain (at 14-15) that the federal government has suggested States should be subject to laches when suing under Section 16. The amicus brief Facebook cites did not address laches.[5]

Finally, Facebook's amici ignore current realities when they speculate that recognizing the inapplicability of laches to States would harm businesses by enabling "eternal liability." Chamber Br. 3-4, 9-18. It is undisputed that States and the federal government have never been subject to laches when pursuing public rights under their own laws, and amici offer no evidence that abuses have occurred. That is because the States and the federal government are subject to the "safeguards of the public-interest standards" that consistently "guide the government when it is a plaintiff." *International Tel. & Tel. Corp. v. General Tel. & Elecs.*

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[4] Because *American Stores* made no laches holding, it could not have undermined *Russell Stover*'s holding that States are not subject to laches when protecting public rights under federal antitrust law, *see* 541 F. Supp. at 144-45. Facebook is incorrect in asserting otherwise (at 18).

[5] *See* Mem. Amicus Curiae of the United States, *New York v. Microsoft Corp.*, No. 98-cv-1233 (D.D.C. Apr. 15, 2002), https://tinyurl.com /9rjxj8jh.

Corp., 518 F.2d 913, 926-27 (9th Cir. 1975), *disapproved on other grounds by American Stores*, 495 U.S. 271.

B. Even If Laches Could Apply Against the States, the District Court Erred in Applying Laches Here.

Even if laches were in theory available in this type of case, laches would provide no basis for dismissal here. Facebook does not dispute that a defendant asserting laches bears the burden of proving both undue prejudice from the timing of the complaint and inexcusable delay in bringing suit. *Daingerfield Island Protective Soc'y v. Lujan*, 920 F.2d 32, 37 (D.C. Cir. 1990). Facebook also does not dispute that, because laches depends largely on factual questions, it generally provides no basis for dismissal on the complaint alone. *See Menominee Indian Tribe of Wisconsin v. United States*, 614 F.3d 519, 532 (D.C. Cir. 2010). In fact, the only case Facebook cites (at 27) where this Court affirmed a dismissal on the basis of laches is a seventy-year-old, one-paragraph decision with no reasoning. *See Love v. Stevens*, 207 F.2d 32 (D.C. Cir. 1953).[6]

[6] Facebook's out-of-circuit cases are readily distinguishable. *Zuckerman v. Metropolitan Museum of Art* concerned a seventy-year delay and prejudice that was "evident on the face of [the] complaint." 928 F.3d 186,

Moreover, contrary to Facebook's suggestion (at 28-29), ample authority demonstrates that the equitable laches analysis must give great weight to the States' role protecting the public interest. Indeed, the public interest is the "most important" factor to be considered. *Maryland-Nat'l Cap. Park & Plan. Comm'n v. U.S. Postal Serv.*, 487 F.2d 1029, 1042 (D.C. Cir. 1973). When "the public interest is involved, a federal court's equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Kansas v. Nebraska*, 574 U.S. 445, 456 (2015) (quotations marks omitted). And when the public interest is appropriately weighed in the equitable analysis, the complaint's allegations reveal no undue prejudice or unreasonable delay.[7]

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190 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 1269 (2020). And in *McKinney v. Waterman Steamship Corp.*, an unrebutted and unobjected-to affidavit proved laches. 925 F.2d 1, 4-5 (1st Cir. 1991).

[7] Facebook misplaces its reliance on a trial-court laches finding in *Reveal Chat Holdco LLC v. Facebook, Inc.*, 2021 WL 1615349, at *5 (N.D. Cal. Apr. 26, 2021), because private plaintiffs—not States—brought that case, and the Ninth Circuit in any event did not reach the laches issue on appeal, *see* 2022 WL 595696 (9th Cir. Feb. 28, 2022).

1. The district court improperly presumed prejudice.

The States' complaint demonstrates no undue prejudice. When Facebook asserts (at 25-27) that a divestiture remedy would be prejudicial because Facebook purportedly has invested in and integrated Instagram and WhatsApp, Facebook erroneously disregards the complaint's allegations that Facebook acquired Instagram and WhatsApp to stifle competition from them—and thus *did not* seriously invest in and integrate them. See Opening Br. 33-35. In evaluating a motion to dismiss, the Court must accept the complaint's allegations as true and "grant[] plaintiff[s] the benefit of all inferences that can be derived from the facts alleged." *Ralls Corp. v. Committee on Foreign Inv. in the U.S.*, 758 F.3d 296, 314-15 (D.C. Cir. 2014) (quotation marks omitted).

In any event, none of the allegations that Facebook identifies (at 26) supports Facebook's assertions of undue prejudice. For instance, the complaint makes clear that a pre-acquisition suggestion to integrate Instagram (JA72 (¶ 115)) [redacted] (JA367-368 (¶¶ 125-126).) An allegation that Facebook used WhatsApp data to promote Facebook's core platform likewise does

not demonstrate that undue prejudice would result from divestiture. Instead, the allegation underscores why laches should not apply here, by showing that Facebook's anticompetitive data usage contradicted its assurances at the time of the acquisition that it would *not* use WhatsApp data this way. (JA87 (¶¶ 176-177).)

Facebook is not aided by its reliance (at 25, 27) on *Pro-Football, Inc. v. Harjo*, 567 F. Supp. 2d 46, 60-61 (D.D.C. 2008), *aff'd in part*, 565 F.3d 880 (D.C. Cir. 2009), and *Bridgestone/Firestone Research, Inc. v. Automobile Club de l'Ouest de la France*, 245 F.3d 1359, 1362-63 (Fed. Cir. 2001). In those cases, decided on full evidentiary records, the party asserting laches *undisputedly* made a substantial investment that would be wholly wasted if the other party prevailed. Here, by contrast, the complaint provides no such undisputed proof of prejudice.

More fundamentally, any concern about purported burdens of divestiture should be addressed at the remedies stage, not at the motion-to-dismiss stage. At this juncture, no court has yet found liability, let alone begun to consider appropriate relief. Moreover, the States seek other, purely prospective relief—such as limitations and preconditions on Facebook's future acquisitions. Facebook has not explained why its arguments

about the costs of unwinding should matter to such forward-looking remedies. That fact distinguishes the out-of-circuit cases Facebook cites (*e.g.*, at 25-26), in which the *only* equitable relief the plaintiffs sought was divestiture. *See Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1233 (8th Cir. 2010); *Taleff v. Southwest Airlines Co.*, 828 F. Supp. 2d 1118, 1125 (N.D. Cal. 2011), *aff'd*, 554 F. App'x 598 (9th Cir. 2014); *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1160 (C.D. Cal. 2000). The district court thus erred in assuming prejudice based on assumptions about divestiture alone.

The FTC's pending, parallel claims for divestiture further underscore the lack of prejudice to Facebook. There is no merit to Facebook's concern that accepting the States' position would allow any private person to seek equitable relief using a pending federal government lawsuit "as a shield against untimeliness." Br. 30. The States' arguments here reflect their special role protecting public rights in parallel with the federal government.

Finally, Facebook has offered no authority from this circuit supporting the district court's erroneous presumption of prejudice or undermining this Court's repeated holding that "laches cannot rest simply on the

length of delay." *Daingerfield Island*, 920 F.2d at 37; *see Menominee Indian*, 614 F.3d at 532. Although *Daingerfield Island* involved a NEPA claim, as noted by Facebook (at 25), nothing in that case suggests that its holding does not apply equally to other claims. *See* 920 F.2d 32. In any event, the States rebutted any presumption of prejudice through the showings discussed above.

2. The district court improperly assumed unreasonable delay.

The States did not act unreasonably in filing suit only after Facebook's anticompetitive buy-or-bury course of conduct became clear. As the States explained (Opening Br. 36-38), they lacked sufficient information to file when Facebook acquired Instagram and WhatsApp, in part because Facebook *actively misrepresented* the anticompetitive intent and effects of its acquisitions at the time. Facebook has no substantive answer to this point. Nor does Facebook refute the States' observation (Opening Br. 39-40) that law enforcers should judiciously evaluate competitive concerns before initiating an enforcement action, and should not be stripped of their critical law-enforcement authority merely because they took the time to do so.

Facebook's own cited authority confirms that, even for private plaintiffs, waiting to file a complaint may be permissible where the time is "used to evaluate and prepare a complicated claim." *Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1227 (9th Cir. 2012) (quotation marks omitted). Facebook misses the mark in contending (at 23-24) that the States were required to challenge Facebook's ongoing buy-or-bury course of conduct when the course of conduct began. As the States explained (Opening Br. 36-39), they acted appropriately in challenging Facebook's course of conduct when subsequent disclosures and the cumulative impact of the conduct revealed its unlawfulness.[8] *See also Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 n.15 (1968) (violation inflicting "continuing and accumulating harm" continuously accrues).

Contrary to Facebook's assertions (at 21-22), the States argued below that the timing of their complaint was justified. The States explained below, as they do on appeal, that their complaint challenges an ongoing

[8] That is equally so for challenges under Clayton Act § 7 and Sherman Act § 2. Thus, Facebook is incorrect to suggest that the States are "effectively abandon[ing]" their Section 7 claims. Br. 24 n.8.

course of conduct. (*See* Dkt. 122, at 12-14.) And they also explained that the full basis for their antitrust claims only became clear after Facebook's course of conduct was well underway, when the cumulative effects of the ongoing course of conduct and the fact of Facebook's misrepresentations became apparent. (*See id.* at 13 (citing Compl. ¶¶ 174-180).)[9]

POINT II

THE STATES' COMPLAINT SUFFICIENTLY ALLEGED THEIR PLATFORM-BASED CLAIM

The district court erred in multiple independent ways when dismissing the portion of the States' Section 2 claim that is based on Facebook's exploitation of its platform to bury competitive threats.

A. Injunctive Relief Is Available to Remedy Facebook's Platform-Related Misconduct and That Misconduct's Ongoing Effects.

As the States demonstrated (Opening Br. 44-50), the district court failed to recognize that the complaint's allegations state a claim for

[9] Regardless, once a claim or defense "is properly presented"—as the States' claims plainly were below—"parties are not limited to the precise arguments they made below." *Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007) (quotation marks omitted).

injunctive relief. *See also* U.S. Amicus Br. 27-31. Although Facebook asserts that it ceased its unlawful policies in 2018, Facebook does not dispute that (1) the complaint alleges no such cessation; (2) injunctive relief remains available unless the circumstances make "absolutely clear" that unlawful conduct will not recur, *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); and (3) ongoing anticompetitive effects may justify injunctive relief to remedy purely past misconduct.

Facebook mischaracterizes the States' complaint in suggesting (*e.g.*, at 51, 54) that the States claim only a handful of instances where Facebook abused its platform control to harm potential rivals (JA95 (¶ 206)), all from a few years before the complaint was filed. The States' Section 2 claim challenges a wide-ranging buy-or-bury course of conduct that remains ongoing. (*See, e.g.*, JA45-46, 69, 110 (¶¶ 4-6, 104-105, 257-260).) That anticompetitive course of conduct can and should be enjoined.

Facebook misplaces its reliance (at 52) on a 2018 press release attached to the States' *motion-to-dismiss opposition*. On its motion, Facebook argued that it had ceased its platform policies—an assertion contrary to the complaint's allegations. The States included the release with their

opposition to show that Facebook had announced the cessation of one (but not all) of the platform policies, and that the announcement occurred only in response to public scrutiny following disclosure of documents reflecting Facebook's anticompetitive conduct. (Dkt. 122, at 13.) *See Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1133-34 (D.C. Cir. 2015) (explaining absurdities that would result from rule of automatic incorporation).

Facebook has no response to the States' showing (Opening Br. 44, 46-47) that ceasing a formal policy only to avoid law-enforcement scrutiny underscores the continuing need for an injunction—particularly where, as here, Facebook has a history of concealing its anticompetitive actions. Facebook's continued refusal to acknowledge its past misconduct further highlights the appropriateness of an injunction.

Facebook likewise does not refute the States' showing (Opening Br. 47-50) that, even if Facebook ceased all its unlawful policies and did not intend to reinstate them, injunctive relief still would be appropriate to "eliminat[e] the consequences" of its past unlawful conduct. *National Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 698 (1978). Facebook asserts (at 53-54) that a court cannot separate the consequences of Facebook's

unlawful platform conduct from the consequences of other events. But Facebook does not explain why that would be so, and it ignores courts' broad discretion and flexibility to craft injunctive relief in the public interest, *see Kansas*, 574 U.S. at 456, particularly under the antitrust laws, *see, e.g., Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 130-31 (1969); *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 480 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 2877 (2021).

Courts regularly approve injunctive relief to remedy effects of past anticompetitive conduct (and prevent new anticompetitive conduct), including in circumstances analogous to those here. For instance, in *Microsoft*, this Court approved wide-ranging injunctive relief to restore competition and protect it in the future, including requirements to pry open Microsoft's Windows monopoly and disclose APIs and other technology to permit interoperability with Microsoft's operating system. *See United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 164-93 (D.D.C. 2002), *aff'd sub nom. Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004). Similar relief would be available here. At a minimum, there is no basis for dismissal before an evidentiary hearing on the availability of such relief. *See United States v. Microsoft Corp.*, 253 F.3d 34, 101 (D.C. Cir. 2001).

Finally, there is no merit to Facebook's new defense (at 54-55) that laches bars the States' platform-based claim. As an initial matter, Facebook forfeited that defense by failing to raise it when moving to dismiss. (*See* Dkt. 123, at 8 (arguing only that laches bars "the States' *Acquisition* Challenges" (emphasis added)); Dkt. 114-1, at 8-12 (similar).) And even if the defense were not forfeited, it would be meritless for the same reasons it is meritless as to the acquisition-based claims. See *supra* at 3-17. Indeed, the argument for laches is especially weak as to the platform-based claim. For example, Facebook has made no allegations about prejudice resulting from the timing of the platform-based claim.

B. The District Court Disregarded Properly Pleaded Allegations Regarding Facebook's Platform Policy and Governing Law.

The district court erred in holding that Facebook's policy forbidding apps from linking or integrating with competitive threats was not actionable merely because the policy purportedly did not apply to *all* apps accessing Facebook's platform. Facebook does not dispute the States' showing (Opening Br. 52-53) that a policy need not bar all rivals "from all means of distribution" in order to violate Section 2. *Microsoft*, 253 F.3d at 64. Rather, any policy having "a significant effect in preserving [the

monopolist's] monopoly" may be unlawful. *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005). The States allege that Facebook's platform policies had exactly that effect. (*See, e.g.*, JA93, 95-102, 388-395 (¶¶ 199-200, 206-231).)

In any event, Facebook also does not dispute that the district court disregarded allegations from the complaint when holding that Facebook's policy did not apply to all apps. See Opening Br. 50-52. Although Facebook contends (at 45-46) that the district court properly considered the policy's text when construing it to apply only to "canvas" apps operating exclusively within the Facebook platform, that contention fails twice over. First, the purported policy text referring to "Apps on Facebook" on which the district court relied (JA254-255) is not in the States' complaint; nor is it attached to Facebook's motion to dismiss, as Facebook erroneously suggests.[10] Second, Facebook ignores the States' showing (Opening Br. 51-52) that the "Apps on Facebook" reference does not clearly limit the

[10] Facebook attached no policy to its motion to dismiss the States' complaint. (*See* Dkt. 114.) And Facebook attached only a *different* policy to its motion to dismiss the FTC's complaint; that policy does not include the no-linking-or-integrating provision and "Apps on Facebook" language at issue. (*See* FTC Dkt. 56-6.)

policy to canvas apps. While Facebook may seek to prove later that its policy was so limited, at the pleading stage, the district court was required to take as true the States' allegation that the policy applied to "any apps" accessing its platform (JA93 (¶ 199)) and to give the States "the benefit of all inferences" from their allegations, *Ralls*, 758 F.3d at 315 (quotation marks omitted). The district court erred in failing to do so.

C. The States Plausibly Alleged That Facebook's Platform-Related Misconduct Violates Sherman Act § 2.

1. The components of Facebook's unified course of conduct cannot be evaluated in isolation.

Facebook does not dispute that the district court failed to consider the platform-related misconduct alleged by the States within the broader context of Facebook's buy-or-bury course of conduct. The States' complaint alleges that Facebook's platform-related misconduct is part of a larger course of conduct wherein Facebook buys competitive threats or (where buying is not feasible or desirable) uses its platform control to bury them. The complaint further alleges that Facebook has used this strategy to entrench its dominance and "sen[d] a message" that Facebook will not tolerate challenges to its dominance. (JA102 (¶ 231).) The district court, however, erroneously failed to analyze the buy-or-bury course of conduct

as a whole. The district court thus missed the amplifying effect of Facebook's mutually reinforcing attacks on competition. See Opening Br. 55-58. *See also* U.S. Amicus Br. 8-13; Economists Amicus Br. in Supp. of Pls.-Appellants 6-25.

Facebook misses the point in contending (at 46-48) that its course of conduct cannot be unlawful unless each of the component parts of that conduct are unlawful. The States are not arguing that Facebook's platform conduct is only unlawful as part of a larger course of conduct; they are arguing that the unlawfulness of Facebook's platform conduct can only be fully understood in the context of the larger buy-or-bury course of conduct alleged in the complaint. The district court erred in "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).[11]

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[11] The alleged anticompetitive course of conduct also distinguishes this case from the out-of-circuit trial-court decisions that Facebook cites (at 37-38), which found unrelated, discrete antitrust allegations against Facebook or MySpace insufficient to support liability. Moreover, contrary to Facebook's suggestion, at least one court has allowed monopolization claims to proceed against Facebook for platform-related misconduct. *See Kickflip, Inc. v. Facebook, Inc.*, 999 F. Supp. 2d 677, 686-88 (D. Del. 2013).

2. Facebook engaged in misconduct that cannot be characterized as a lawful refusal to deal.

There are two main flaws in Facebook's argument that its platform conduct should be considered a lawful refusal to deal.

First, the platform-related misconduct that the States alleged cannot be characterized as a refusal to deal. As an initial matter, Facebook does not dispute that the States alleged substantial efforts by Facebook to protect its monopoly through affirmative actions to harm potential rivals. See Opening Br. 59. For instance, the States alleged that Facebook exploited its platform control to covertly degrade the functionality and distribution of content linked to potential rival Phhhoto. Neither the district court nor Facebook has explained how such allegations could be characterized as a refusal to deal, or how they fail to state a monopolization claim. That fact alone requires reversal.

Facebook's leveraging of its platform to induce app developers to refrain from actions that might pose a competitive threat also cannot be dismissed as a mere refusal to deal. That anticompetitive conditioning parallels the conditions on access to an operating system platform that this Court, in *Microsoft*, held to violate Section 2. *See* 253 F.3d 34. Conditions like these are not mere refusals to deal. They go beyond a unilateral

decision not to transact with others, and instead impose constraints that alter the conduct of other firms—for instance, by discouraging or limiting those firms from dealing with competitors, or taking their own actions to compete. Facebook's conditions thus impose different harms to competition from those of a mere refusal to deal. *See* U.S. Amicus Br. 14-19.

There is no merit to Facebook's attempt (at 43-44) to distinguish *Microsoft* and *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), on the basis that, in those cases, the defendants imposed conditions through "exclusive-dealing" arrangements that prohibited customers from transacting with the defendants' competitors. As the States showed (Opening Br. 59-61), those arrangements worked similarly to Facebook's policies, which prohibit app developers from integrating with competing platforms or competing themselves.

Facebook is incorrect in suggesting (at 44) that its conditions were not really conditions because app developers could still adapt their products for another platform. The complaint provides no basis to assume that such adaptation would be feasible, much less cost-efficient. *See Microsoft*, 253 F.3d at 64 (monopolist may not block rivals from "cost-efficient" means of distribution). Indeed, the complaint specifically alleges

a lack of viable platform alternatives. (*See, e.g.*, JA53-55, 60-61, 353-354 (¶¶ 38-46, 66-72).)

Second, the States plausibly alleged that Facebook's platform policies violate Section 2 even if those policies are construed as a refusal to deal. The States allege that Facebook's policy of squashing nascent competitive threats as soon as they are perceived to pose a threat exhibits precisely the predatory purpose and effect that violates Section 2. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-05 (1985). Facebook has no answer to this Court's warning that such conduct by a monopolist targeting nascent competition is "'inimical to the purpose of the Sherman Act'"—particularly in markets that, like the personal social networking market, are characterized by substantial barriers to entry resulting from network effects. See Opening Br. 65-66 (quoting *Microsoft*, 253 F.3d at 79).

Facebook recognizes that a refusal to deal may be unlawful where a monopolist discontinues a preexisting, profitable "'course of dealing'" and the discontinuation "'suggest[s] a willingness to forsake short-term profits to achieve an anti-competitive end.'" Br. 35-36 (quoting *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1074-75 (10th Cir. 2013)). Putting aside

that neither *Aspen Skiing* nor any authority in this circuit establishes any "checklist" requiring particular conduct to make a refusal to deal unlawful (U.S. Amicus Br. 19-24), the States' allegations satisfy Facebook's own standard.

The States allege that once Facebook gained sufficient market power, Facebook discontinued its longstanding policy of broadly opening its platform to app developers, and it closed its platform to apps that Facebook came to view as competitive threats. In doing so, Facebook showed a willingness to sacrifice the profitable data and user engagement it gained from the potentially competing apps in the short-term, in order to stifle competition and reap monopoly gains in the long term. See Opening Br. 6-7, 11-13, 66-67.[12]

Contrary to Facebook's claims (at 36), its industry-wide reversal is not meaningfully distinguishable from the single-firm reversal at issue in *Aspen Skiing*. Facebook's closing of its platform to apps posing a

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[12] Facebook's assertions (*e.g.*, at 30, 32, 36) that the competing apps received "free" access to Facebook's platform are inconsistent with the complaint, which makes clear that the apps paid for their access by providing Facebook with valuable user data and features, and, for some time, a 30% revenue share for in-app purchases. (*See, e.g.*, JA62-63, 92 (¶¶ 80-82, 195-196).)

competitive threat was underpinned by the same predatory intent and has had similar anticompetitive effects to the reversal in *Aspen Skiing*. Facebook's reversal is thus similarly unlawful. Indeed, the Supreme Court has recognized the potential unlawfulness of an industry-wide reversal in another monopolization case. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 458, 483 (1992).

Facebook also errs in discounting (at 38-39) the specific cutoffs of potential competitor apps that the States alleged. The States alleged that, for all these apps, short-term profits from data and engagement "took a backseat to the long-term benefits of keeping Facebook's moat wide and its monopoly intact." (*See, e.g.*, JA90, 102 (¶¶ 186, 231).) There was no reason for the States to repeat their generally applicable allegations as to each app.

Facebook likewise mischaracterizes (at 49-51) the States' argument regarding Facebook's anticompetitive purpose. The States do not argue that Facebook's platform-related misconduct is unlawful merely because Facebook had an anticompetitive purpose; they allege extensive anticompetitive effects as well, as the district court acknowledged (JA249). The additional allegations of Facebook's anticompetitive purpose, which include

numerous direct quotes from Facebook's leadership, simply underscore that Facebook has been engaged in a predatory scheme, rather than a mere lawful refusal to deal. *See Aspen Skiing*, 472 U.S. at 605, 608 n.39 (predation may be supported by evidence of intent "to drive others from the market" by means other than competition on the merits, which "may be in the form of statements made by the officers or agents of the company" (quotation marks omitted)).

Facebook misplaces its reliance (*e.g.*, at 31-34, 42) on *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) and *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009), which concerned an industry where a specialized regulatory structure made antitrust scrutiny of access denials unnecessary. As *Trinko* emphasized, courts "must always be attuned to the particular structure and circumstances of the industry," and the telecommunications industry at issue in those cases had a specialized "regulatory structure designed to deter and remedy anticompetitive harm." 540 U.S. at 411-12; *see linkLine*, 555 U.S. at 442-43; *id.* at 458-59 (Breyer, J., concurring). In that context, the courts concluded that the existing regulatory structure's "extensive provision for access" to the defendants'

networks made it "unnecessary to impose a judicial doctrine of forced access" through antitrust scrutiny of the defendants' refusal to deal. *Trinko*, 540 U.S. at 410-11. Here, by contrast, there is no specialized regulatory structure governing access to Facebook's platform that would make antitrust scrutiny unnecessary.

Facebook is wrong to rely on speculation (at 33-34) regarding possible negative effects of "forced sharing" on its incentives for innovation and investment. For one thing, Facebook's desire to maximize its own incentives for innovation and investment cannot excuse unlawful conduct—particularly on a motion to dismiss. In any event, Facebook offers no evidence that it would not have sufficient incentives to innovate and invest if it were enjoined from implementing a predatory policy to cut off apps it previously welcomed when they are deemed to pose a threat to Facebook's monopoly. The threat of antitrust enforcement might well increase Facebook's innovation and investment by forcing it to compete on the merits, rather than through exploitation of monopoly power. And, as the complaint makes clear, app developers plainly would have greater incentives for innovation and investment if antitrust enforcement protected apps from being arbitrarily cut off from Facebook's platform

upon incurring the "wrath of Mark." (*See, e.g.*, JA46, 106-107, 389, 394-395 (¶¶ 6, 211-212, 229-231, 246-247).)

Facebook's observation (at 7 n.2) that some other online services have policies purportedly analogous to one of its policies is beside the point. Facebook admits that those services have "no arguable 'market power'" (Br. 32), and "[b]ehavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist," *Dentsply*, 399 F.3d at 187. Regardless, Facebook has not pointed to any judicial determination that these other policies are lawful standing alone—much less as part of a broader anticompetitive course of conduct like Facebook's.

Finally, any doubts about how to understand Facebook's conduct and its effect on competition cannot be decided against the States at the pleading stage, when the States receive "the benefit of all inferences" from their allegations, *Ralls*, 758 F.3d at 315 (quotation marks omitted). Facebook has not shown that its conduct was exclusively lawful based on the complaint alone. Although Facebook notes (at 48-49) that there are antitrust cases that can be decided on the pleadings, this is not one of them. The particular defenses here—such as whether Facebook engaged

exclusively in conduct that must be characterized as a refusal to deal and was non-predatory—"depend[] upon . . . question[s] of fact," and thus are "not cognizable in support of a motion to dismiss." *See Covad Commc'ns Co. v. Bell Atl. Corp.*, 398 F.3d 666, 676 (D.C. Cir. 2005).

Indeed, the need for fact development is particularly acute here, where Facebook's own amici underscore that this case involves a digital market "fundamentally different" from the markets in past cases (Wash. Legal Found. Br. 25) and "novel conduct" the competitive effects of which often are not initially clear (Sidak & Teece Br. 7).

CONCLUSION

The Court should reverse and remand for further proceedings.

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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 28.1(e) because it contains 6,500 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 and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook and 14-point font.

Dated: New York, NY
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In compliance with Circuit Rule 47.1(d)(2), I(2), on April 14, 2022, I served public and sealed copies of the brief by electronic mail on consent to:

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