No. 21-7078

IN THE 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.

FACEBOOK, INC.,

Defendant-Appellee.

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

BRIEF OF AMICUS CURIAE THE AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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January 28, 2022

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), amicus curiae certifies as follows:

A. Parties and Amici Curiae

Except for the following, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants:

The American Antitrust Institute

B. Rulings Under Review

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

C. Related Cases

The case now pending before this Court was not previously before this Court or any other court. One related case is identified in the Brief for Appellants.

/s/Randy M. Stutz
Randy M. Stutz

CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, amicus states:

The American Antitrust Institute is a non-profit, non-stock corporation. It has no parent corporation and no publicly held corporation has any ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

The American Antitrust Institute (AAI) is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. See http://www.antitrustinstitute.org.[2]

SUMMARY OF ARGUMENT

The district court rejected allegations by 46 states, the District of Columbia, and the Territory of Guam ("States") that Facebook, Inc. ("Facebook") unlawfully maintained monopoly power in the personal-social-networking market by implementing a two-prong "buy or bury" scheme. According to the complaint, Facebook acquired some of its potential rivals and intentionally injured others in a unified effort to eliminate the risk they would create future competition.

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[1] All parties consent to the filing of this amicus brief. Pursuant to Fed. R. App. P. 29(c)(5), amicus states no counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amicus or its counsel—has contributed money that was intended to fund preparing or submitting this brief.

[2] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions.

The complaint alleges numerous acts in furtherance of the alleged two-prong scheme, including actual and attempted exclusionary acquisitions, deception, discriminatory API-access policies, dealing on anticompetitive terms, and sabotaging rivals' products. Brief for Appellants ("App. Br.") at 7–13. The district court determined that neither prong of the alleged scheme, nor any of the acts allegedly in furtherance of each prong, stated a claim on which relief could be granted under Section 2 of the Sherman Act.

But the district court never analyzed the scheme as a whole. It improperly compartmentalized the prongs and then wiped the slate clean after scrutiny of each. Slip opinion ("Slip op.") at 21–40 ("bury"); *id*. at 40–58 ("buy"). It rejected the "buy" prong based on laches, an affirmative defense. *Id*. at 43. It rejected the "bury" prong because it believed it could not order injunctive relief. *Id*. at 31, 35.

The district court erred. It is clear from the district court's analysis—particularly its rejection of the "bury" prong based on an inability to award injunctive relief—that it did not evaluate the scheme correctly. The district court confused the scheme's means and ends, mistaking an alleged cause of the harm for the harm itself.

The States allege a campaign of conduct designed to discourage *nascent and future* competitors from entering or competing. Compl. ¶ 9 (eliminating "emergence and growth" of rivals); *id*. ¶ 10 ("forestall[ing]" competing services that

"might threaten" its dominance); *id*. ¶ 15 (conditioning developer API access "on their staying away" from Facebook's markets). To create that deterrent, the States allege Facebook sometimes had to revoke network access to *current* competitors when it was unable to purchase them. *Id*. ¶ 13. These revocations are part of the alleged *conduct*. They are means, not ends.

Apparently, the district court thought the States were seeking relief designed to redress injury to *current* competitors whose access was revoked. Slip op. at 3 (past "revocations of access" cannot be enjoined); *id*. at 33 (scheme alleges "unlawful revocations" and "there is nothing the court could order Facebook to do to remedy *that* specific injury."). But harm to current competitors whose access was revoked is the not the harm the States allege. The States allege "that specific injury" is a *means* of achieving the anticompetitive ends alleged in the scheme, not that it is the end itself. Properly viewed as a coordinated scheme, all the scheme's elements are designed with the common purpose of thwarting nascent and future competitors, not inducing the exit of current competitors. The alleged scheme's common purpose cannot be ignored; it is what makes the scheme a scheme.

I. Because the district court failed to evaluate the alleged scheme as a unified, coordinated campaign to thwart competition from nascent and future competitors, it erroneously relied on refusal-to-deal law and injuries to current competitors to decide this case. The alleged conduct the district court mislabeled a

refusal to deal is not a "refusal." Antitrust law has long distinguished between a monopolist's refusal to deal with rivals on any terms and its conditional dealing: a willingness to deal, but only on anticompetitive terms. According to the complaint, Facebook is willing and eager to deal with third-party content providers, but it requires in exchange that they refrain from specific actions that can lead to future competition. That is conditional dealing, and enjoining it would not obligate Facebook to aid competitors. None of the policy concerns raised by forced sharing are implicated by enjoining the alleged conduct.

II. Given that monopoly power was adequately pled, Facebook's motion to dismiss should have been denied because the States plausibly allege that Facebook implemented its discriminatory API-access policy and conditional dealing using deception. The relevant deception allegations—never squarely addressed by the district court—are that Facebook implemented an "open first–closed later" strategy, which economists have long recognized as a pernicious form of deceptive conduct in network markets. Compl. ¶¶ 14, 226; *see generally id*. ¶¶ 189, 191–96, 199–202, 205, 213–14, 217–21, 231.

As a matter of law, deceptive behavior can support a monopolization claim, and deception is categorically incapable of generating procompetitive benefits. Although deception allegations can raise factual questions about harm to competition at summary judgment or trial, those questions are not ripe on a motion to

dismiss. Where, as here, a dominant firm is plausibly alleged to have used an open first–closed later strategy in a network market, the inference that the conduct registered a competitive effect (and not merely harm to a competitor) is not only reasonable but inescapable.

III. The district court's myopic preoccupation with refusal-to-deal law and its failure to credit deception allegations also infected its analysis of whether injunctive relief is available. Its analysis is premised on a faulty distinction between "having" anticompetitive policies and "implementing them" via "particular acts." *Both* anticompetitive policies and acts satisfy the conduct element of Section 2 if they have anticompetitive effects. If anything, the fact that discriminatory access was implemented network-wide as a "policy" is inculpatory, not exculpatory. The policy allegations and Facebook's unpled 2018 policy statements bolster both the "closed late" and competitive-harm elements of the open first–closed later allegations. And regardless, deception is a "particular act." The district court thus ignored allegations that satisfy its incorrect test. The district court's failure to realize that an injunction can plausibly remedy ongoing competitive harm by reopening an unlawfully closed network is reversible error.

ARGUMENT

I. THE DISTRICT COURT FAILED TO EVALUATE THE COMPLAINT AS A WHOLE AND MISCLASSIFIED CONDITIONAL DEALING

The district court's constraining and ill-fitting reliance on refusal-to-deal law to analyze allegations of conditional dealing and discriminatory API-access policies is plain error. The States allege a campaign to build a "moat" to keep nascent and future competitors out of the market. Compl. ¶ 181. Properly evaluating the alleged scheme as a unified and coordinated effort to achieve *that* goal reveals that the States' allegations are rooted in shaping other firms' behavior, not in inducing them to exit the market. Facebook is willing to deal on anticompetitive terms; it is not unwilling to deal. The Supreme Court's *Trinko* decision therefore does not govern this case; its policy underpinnings have no application here.

A. The Complaint as a Whole Confirms the States Allege Conditional Dealing, Not a Refusal to Deal

"The duty" of the factfinder is "to look at the whole picture and not merely at the individual figures in it." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *LePage's, Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003); *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992). The district court did not report for duty.

The States allege a coordinated campaign to thwart nascent and future competitors from entering or expanding in the market. Viewing the "whole picture"

therefore means viewing each allegation not in a vacuum, but rather as part of an effort toward *that* alleged goal and *that* alleged harm. Viewed as conditional dealing pursuant to a unified scheme with a common goal of preventing competition from future rivals, the States' API-access denial allegations fit into the scheme; viewed as refusals to deal in isolation, they either contradict or countermand the common goal of the alleged scheme.

Consider the exclusionary acquisitions alleged to be part of the scheme. Because the alleged goal of the scheme is to deter other firms who might be contemplating competitive actions in the future, exclusionary acquisitions are particularly effective. Acquiring potential competitors gives a dominant firm complete control and the assurance they will not enter the market. It owns them. Yet in considering whether to view the States' access-denial allegations through the lens of conditional dealing or a refusal to deal, the district court never considered how they fit together with the States' acquisition allegations.

A refusal to deal with a competitor is the economic opposite of acquiring it. By refusing to deal, the monopolist has no relationship it can lever to shape the competitor's future entry decisions. Unencumbered, the stranded competitor is free to attempt to compete on its own, or if it chooses, to merge with another potential rival and become an even bigger competitive threat. For the monopolist,

surrendering influence over a competitor's choices would seem to be especially foolish if the goal is to shape those choices in the future.

Consider, too, the States' allegations that Facebook sabotaged its rivals' products. Compl. ¶ 205 ("Facebook has used its control over Facebook Platform to degrade the functionality and distribution of potential rivals' content"). This behavior is the quintessential example of what a refusal to deal is not. Sabotaging your rivals' products is a sign you care very much about the competitive threat your rivals pose; refusing to deal with them means you do not care at all. What kind of schizophrenic scheme would care so much and so little about the same rivals at the same time?

If the district court had viewed the alleged scheme as a "whole picture," it would have quickly realized that the States' API-access allegations make sense as conditional dealing allegations. Conditional dealing can give Facebook some assurance that potential competitors will not enter the market in the future. The allegations do not make sense as refusals to deal. Refusals to deal leave Facebook powerless to control the next moves of the competitive threats they allegedly seek to thwart.

B. The States Allege Facebook Deals on Anticompetitive Terms

The district court's error in mistaking conditional dealing allegations for refusal-to-deal allegations is evident from its misreading of Professor Hovenkamp's

article, from which it selectively quotes. Slip op. at 35–36 (quoting Herbert J. Hovenkamp, *FRAND and Antitrust*, 105 Cornell L. Rev. 1683, 1697 (2020). The article illustrates how to avoid two different errors: mistaking a refusal for a condition and mistaking a condition for a refusal.

When a complaint alleges that a dominant firm does not deal with another firm based on its *status* as a competitor, the claim alleges a refusal that should not be mistaken for a condition. The deal is not actually "conditional" because it would require the competing firm "to exit from the market in which it was competing" to accept the deal. *Id*. at 1697. A condition that requires exit is no condition at all. It is no different than refusing to deal outright.

When a complaint alleges that a dominant firm does not deal with another firm based on its *conduct* as a competitor, it alleges a condition that should not be mistaken for a refusal. As Professor Hovenkamp explains, "[conditional] dealing occurs when a firm deals under *different terms* with different contracting partners, such as competitors and noncompetitors." *Id*. (emphasis added). Conditional dealing is unlawful, he explains, when the defendant refuses to sell or license some interest unless the buyer agrees to terms that are anticompetitive. *Id*. at 1700. Thus, if the dominant firm causes an anticompetitive effect by inducing another firm to leave its market, it is refusing to deal. But if the dominant firm causes an anticompetitive effect by inducing another firm to stay in its market and behave in

anticompetitive ways, it is dealing conditionally. Conduct can meddle with competition because it implicates choices to undertake or forego future actions that, unlike status, are meaningfully within a firm's power to control.

Where a dominant firm's willingness to deal is contingent on the other firm accepting terms rather than exiting, the "proper focus" is on "the anticompetitive conduct that a willingness to deal may be inducing others to engage in." Dennis W. Carlton & Ken Heyer, *Appropriate Antitrust Policy Toward Single-Firm Conduct* 15, Economic Analysis Group, Antitrust Div., U.S. Dep't of Just. (Discussion Paper No. 08-2, March 2008). "[T]he appropriate antitrust analysis should be no different if the objectionable conduct is induced by a willingness to deal than if it is induced by the offer of a cash payment or any other form of consideration." *Id*. Focusing on the monopolist's anticompetitive terms of dealing matters because the terms can serve to inhibit the monopolist's rivals.

Here, even the district court's own characterization of the complaint demonstrates that the States allege Facebook conditioned API access to induce developers to inhibit rivals, not to induce developers to exit. *See, e.g.*, Slip op. at 38 ("The precise allegation here" is that Facebook aimed at withholding API access if apps '*linked or integrated with*' other social networking services" and "condition[ed] API access on *refraining* from *such dealings*."); *id*. at 14 (Facebook allegedly "limited what apps hosted and used on Facebook's own site could *do*.") (emphasis

added); *id*. at 13 (broader 2013 policy withheld API access from "apps that *competed by 'replicat[ing]* [Facebook's] core functionality'") (alterations in original; emphasis added).

Fairly read, the States allege that Facebook is inducing anticompetitive conduct by implicitly "paying" developers and complementors not to compete, using interoperability as currency. Third parties are being told that they may interoperate with the Facebook platform in exchange for agreeing not to partner with Facebook's social-networking rivals and foregoing social-networking entry themselves. That is an inducement of conduct, not an inducement of exit. Indeed, Facebook cannot afford to induce developer exit because it depends on the very same developers to provide content to its users. *See* Facebook, Inc., Annual Report 14 (Form 10-K) (Jan. 27, 2021) [hereinafter "Facebook 10-K"] (It would have a material and adverse business impact if the company is "unable to obtain or attract engaging third-party content" and "we fail to provide adequate customer service to … developers…").

Because the district court mistook conditional-dealing allegations for refusal-to-deal allegations, it relied heavily on *Verizon Commc'ns., Inc. v. Law Offices of Curtis V. Trinko, LLP*, which limits Section 2 liability for "a refusal to cooperate with rivals." 540 U.S. 398, 408 (2004). *Trinko* is inapposite. That case addresses "exceptions from the proposition that there is no duty to aid

competitors." *Id*. at 411. This case alleges inducements of conduct that interfere with rivals by distorting entry incentives—conduct that is part of a common scheme to thwart competition from nascent and future rivals.

C. Conditional Dealing Does Not Raise the Policy Concerns that Refusals to Deal Raise

Applying *Trinko* to conditional dealing is inappropriate because *Trinko* is grounded in explicit policy considerations that pertain to forced sharing. The Court was concerned that compelling a monopolist to aid a competitor by sharing its facilities could do three things. First, it could "lessen[] the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Id.* at 407–08. Second, it could "force[] courts to act as central planners, identifying the proper price, quantity, and other terms of dealing." *Id*. at 408. Third, it could "facilitate the supreme evil of antitrust: collusion." *Id*. None of those policy concerns bear on voluntary deals with anticompetitive terms.

First, there is no risk that a network owner like Facebook would stop investing in the APIs and related interconnection tools to which it is allegedly conditioning access unlawfully. Facebook considers the *inability* to connect developers and other content providers to its platform a material business risk. Facebook 10-K, *supra*, at 14. It needs to invest in seamless interconnection tools to attract desirable content for users because it made a strategic decision in its

formative years to compete as an "open" rather than a "closed" system. *See infra* Part II.C.

Second, the risk that a federal court would have to act as a central planner in setting terms of trade does not exist. Network operators such as Facebook create APIs for the very purpose of facilitating interconnection; accordingly, APIs are not commercially sold in quantities or for prices but rather are provided for free to achieve interoperability. Interconnection specifications freely and voluntarily given away to attract content are a far cry from the Operations Support System (OSS) services Verizon was forced to price and sell to rivals against its wishes and economic incentives under the decree of a federal statute. *Trinko*, 540 U.S. at 402–03.

Third, the risk of facilitating collusion is higher if Facebook is *not* prohibited from continuing the alleged conduct than if it is. If Facebook's alleged conditional dealing is not enjoined, developers and complementors will continue to receive a tacit invitation to collude: Facebook's promise of valuable network access in exchange for a commitment not to facilitate social-networking entry and to forego entry themselves.

Trinko does not fit this case because it is anchored in policies that counsel caution when impinging on firms' discretion in choosing the parties with whom

they deal. Those policies do not translate to firms' discretion to deal on anticompetitive terms after they make that choice.

II. THE DISTRICT COURT IGNORED ALLEGATIONS OF ANTICOMPETITIVE DECEPTION THAT CANNOT BE RESOLVED ON A MOTION TO DISMISS

The district court also committed reversible error by failing to properly credit the States' "open first–closed later" allegations. Those allegations are that Facebook achieved conditional dealing using deception, which this Court's precedent *assumes* will support a valid monopolization claim, provided it supports the inference of a competitive effect (and not merely harm to competitors). Allegations of an "open first–closed later" strategy in a market characterized by strong positive network effects, such that users benefit as others join, require that inference, particularly at the motion to dismiss stage.

A. An Open First–Closed Later Strategy Is Deceptive

An open first–closed later strategy is a well-chronicled form of deception in network markets. As Professor Shapiro has explained:

> [I]n a network industry, a firm might obtain a dominant position based in part on certain 'open' policies that induce reliance by complementary firms, and then later exploit that position by offering less favorable interconnections terms or by refusing to interconnect with them altogether. Indeed, such 'openness' can be crucial for a platform to become successful in the first place. But therein lies the danger: that a firm will employ an open policy in order to gain dominance and then impose less favorable interconnection terms once the dominance has been achieved.

Carl Shapiro, *Testimony Before the Antitrust Modernization Commission re Exclusionary Conduct* 15–16 (Sept. 2005), *available at* https://bit.ly/3fTuZLJ.

The strategy capitalizes on network externalities. In network markets, "[o]ne product or standard tends toward dominance," because "[o]nce a product or standard achieves wide acceptance, it becomes more or less entrenched." *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (2001) (citing Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 Am. Econ. Rev. 424, 424 (1985)); *see also* Carl Shapiro & Hal R. Varian, Information Rules: A Strategic Guide to the Network Economy 103–134, 184–86 (1999).

Customers of entrenched network products or standards are susceptible to lock-in and path dependence, particularly when the product or standard is information-based. Shapiro & Varian, *supra* at 184 ("In many markets involving the storage, manipulation or transmission of information, hard-core, tangible lock-in is substantial."); Spencer Waller, *Antitrust and Social Networking*, 90 N.C. L. Rev. 1787, 1786–90, 1791–92 (2012) (network effects and stored information give rise to significant lock-in on social networks)*; see also Microsoft*, 253 F.3d at 35.

Lock-in and path dependence in network markets are caused by high collective switching costs, which arise from the difficulty of coordinating a mass migration among users, developers and complementors from one network to another. Shapiro & Varian, *supra*, at 184–86. And information-based lock-in

increases over time. *Id.* at 122–23 ("[O]ne of the distinctive features of information-based lock-in is that it tends to be so durable: equipment wears out, reducing switching costs, but specialized databases live on and grow, enhancing lock-in over time.").

Consequently, competition in network markets for information-based products often manifests as competition "'for the field' rather than 'within the field.'" *Microsoft*, 253 F.3d at 49 (citation omitted). In the beginning, while the market remains contestable, firms vie to gain the early lead by offering especially attractive terms to induce users to join their network, hoping the early growth will stimulate positive network effects that tip the market toward their platform. Shapiro & Varian, *supra*, at 145 ("In the presence of lock-in, intense competition will force you to offer very attractive initial terms to customers.").

During this early phase, firms vying to win the field must make a strategic decision whether to compete as an open or closed "system." Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. Econ. Persp. 93, 103–105 (1994); Stanley M. Besen & Joseph Farrell, *Choosing How to Compete: Strategies and Tactics in Standardization*, 8 J. Econ. Persp. 117, 117–18 (1994). An open system relies primarily on standardization and interoperability to achieve network growth; a closed system relies primarily on unique or attractive product

features to achieve network growth. Katz & Shapiro, *supra*, at 103–105; Besen & Farrell, *supra*, at 117–18; Shapiro & Varian, *supra*, at 227–59.

Both strategies can successfully achieve the desired growth, but both also pose risks along the way. The owner of an open system needs access to desirable third-party products to continue attracting users; the owner of a closed system needs to create desirable products itself to do so. *Compare e.g.*, Facebook 10-K, *supra*, at 14 (discussing heavy reliance on obtaining and attracting third-party content and need to cater to developers), *with* Apple, Inc., Annual Report 6 (Form 10-K) (Oct. 29, 2020) (The Company "designs and develops nearly the entire solution for its products, including the hardware, operating system, numerous software applications and related services," and as a result "the Company must make significant investments in R&D").[3]

An open first–closed later strategy allows the owner of an open system to profit from dishonesty once lock-in materializes. By choosing not to honor its commitment, the owner can leverage the gap in time between making and keeping its promise. Doing so allows it to realize both the added growth from being open early and the added profits and control from being closed late. "One of the worst

[3] Apple competes as a closed system in some respects and an open system in others. It does not permit its hardware to interoperate with other firms' operating systems or its operating system to interoperate with other firms' hardware, but its App Store system is open insofar as it allows third-party developers to sell interoperable apps.

outcomes for consumers is to buy into a standard that is widely expected to be open, only to find it 'hijacked' later, after they are collectively locked in." Shapiro & Varian, *supra*, at 231.

B. Deception Has No Efficiencies as a Matter of Law

In any market-based transaction, deception "fundamentally" can do nothing but subvert the competitive process. Joseph Farrell et al., *Standard Setting, Patents, and Hold-Up*, 74 Antitrust L.J. 603, 609 (2007). At its core, the competitive process requires that "buyers negotiate with and/or choose among sellers." *Id*. "[T]his process is undermined if buyers are deceived or manipulated into a deal that they did not knowingly choose." *Id*.

When one party successfully deceives another party about the terms of a transaction, it can prevent the market from efficiently allocating current and future economic resources. The false information raises consumers' search costs, raises rivals' transaction costs, induces consumers to select wrong or inferior products, and retards or blocks innovation. *Id*. at 608; Maurice E. Stucke, *When a Monopolist Deceives*, 76 Antitrust L.J. 823, 824–25 (2010); Susan Creighton et al., *Cheap Exclusion*, 72 Antitrust L.J. 975, 987–993 (2005); Mark R. Patterson, *Coercion, Deception, and Other Demand-Increasing Practices in Antitrust Law*, 66 Antitrust L.J. 1 (1997).

At the same time, deception is categorically incapable of generating efficiencies; it can only generate *in*efficiencies. Farrell et al., *supra*, at 604; *see also* IIIB Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 782b, at 326 (3d ed. 2008). ("There is no redeeming virtue in deception … ."); Harry S. Gerla, *Federal Antitrust Law and the Flow of Consumer Information*, 42 Syracuse L. Rev. 1029, 1030 (1991) ("False or misleading information is deadweight economic loss, causing injury without any offsetting economic benefit.").

Consequently, courts frequently find that lies, misrepresentations, and deceit satisfy the anticompetitive conduct element of an antitrust offense. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) (spreading false information about rival product safety); *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965) (fraud on the patent office); *Microsoft*, 253 F.3d at 76–77 (deceiving developers about software compatibility with rival operating systems); *Carribb. Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998) (misrepresentations to advertisers and sham technical objections to broadcast license application); *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002) (misrepresentations and sabotaging rivals' product displays at point of sale); *Int'l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255 (8th Cir. 1980) (false, deceptive, and misleading advertising); *but see Retractable Techs.,*

Inc. v. Becton Dickinson & Co., 842 F.3d 883, 894-95 (5th Cir. 2016) (setting high bar for antitrust claims premised on false advertising alone).

When deception is the basis for a monopolization claim, the only question is whether it has *any* competitive effect at all—a fact question. Depending on the facts, deception may harm only competitors, not competition. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998) (antitrust laws govern conduct that "lies close to the heart of the competitive process," not practices merely "thought to be offensive to proper standards of business morality"); *Rambus Inc. v. FTC*, 522 F.3d 456, 466 (2008) (distinguishing a monopolist's deceit "where absent this conduct consumers would still receive the same product and the same amount of competition" from a monopolist's deceit causing "consumer injury [that] naturally flowed from a less competitive market"); *see also Retractable Techs.*, 842 F.3d at 894–95.

But when a monopolist's deception does have an effect on competition, the effect is categorically an anticompetitive effect that this Court *assumes* can support a monopolization claim. *Rambus*, 522 F.3d at 463 ("We assume without deciding" that if Rambus's deception would have led the market to adopt a different standard, it "was indeed anticompetitive" and "would support a monopolization claim"); *Caribb. Broad. Sys.,* 148 F.3d at 1087 (holding misrepresentations to be "well within [the] concept" of anticompetitive conduct as a matter of "fair inference"); *see Microsoft*, 253 F.3d at 77 (holding that false statements were exclusionary on

the basis of deception and reliance and they "unsurprisingly" had "no procompetitive explanation").

Section 2 cases predicated on deceptive acts therefore "hinge on whether the conduct impaired rivals in a manner tending to bring about or protect a defendant's monopoly power," or if the deceptive acts merely injures a competitor. *Rambus*, 522 F.3d at 464. In *Rambus*, the government lost on appeal after a trial for failing to prove harm to competition. *Id*. at 466. But it survived preliminary motions practice. *Id*. at 461. The same is true of every other Section 2 case where deception and competitive harm were plausibly alleged. *See* App. Br. at 68 (listing cases decided after full trials on which district court relied).

Here, the inference that the alleged open first–closed later strategy had a competitive effect is plausible on a motion to dismiss. It is required by the economic reality of network markets, which are prone to network externalities and systems competition.

C. An Open First–Closed Later Strategy in a Network Market Plausibly Affects Competition

On a motion to dismiss, where monopoly power in a network market has been adequately pled, the inference that an open first–closed later strategy harms market competition cannot be avoided. The inference is reasonably derived from the nature of systems competition in network markets. Systems competition determines how the competitive structure of network markets develops over time.

If, in its early stages, a network market first organizes around an open system, with standards and interoperability, the locus of competition moves from an early battle to win the field to a later battle for market share. Shapiro & Varian, *supra*, at 231 ("Instead of competing *for* the market, companies compete *within* the market, using the common standards."). Alternatively, if the market first organizes around a closed system, "incompatible technologies battle it out in the market in a high-stakes, winner-take-all battle." *Id*. at 261. Challengers to the incumbent try to offer a differentiated (and usually innovative) network product that will be sufficiently attractive to overcome collective switching costs and prompt a mass migration away from the incumbent network. *Id*. at 261. The presence or absence of an open system therefore dictates whether competition manifests as a battle for market share among interoperable complements or a systems battle among incompatible technologies.

The reasonable inference that an open first–closed later strategy distorts competition in a network market follows accordingly. Here, for example, Facebook reasonably could have failed to gain the early lead in the personal-social-networking market if it had truthfully divulged from the outset that it would close its open system once the market tipped in its favor. In that case the market necessarily would have either organized around an alternative network that made a genuine commitment to openness, or else a systems battle among Facebook and

other closed networks would have ensued. Even if Facebook would have won a hypothetical battle, users and developers still would be injured by the foregone competition to achieve that win. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 991–92 (D.C. Cir. 1977) ("[T]he public has an obvious interest in competition, 'even though that competition be an elimination bout.'") (citation omitted).

Moreover, it is also reasonable to infer that an open first–closed later strategy raises entry barriers in network markets. Openness facilitates entry by allowing third parties to bring valuable complements to market more readily. They can enter and grow without having to build an independent network and overcome collective switching costs.

Eventually, if the entrant expands and creates a sufficiently attractive package of complements, it might gain the incentive to launch an innovative *system* of its own, generating platform-level competition with the open network. *See* Facebook 10-K at 15 (It would have a material and adverse business impact if "our current or future products, such as our development tools and application programming interfaces that enable developers to build, grow, and monetize mobile and web applications, reduce user activity on our products by making it easier for our users to interact and share on third-party mobile and web applications.").

Facebook's warning to investors in its 10-K—that smaller rivals can gain a foothold by offering a complementary product on the Facebook platform and then

expand to create a rival *network*—is the usual pathway to competition for smaller firms seeking to take on vertically integrated or conglomerate firms. *See* Richard A. Posner, Antitrust Law 252 (2d ed. 2001) ("Piecemeal entry is the norm in most industries."); *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 513, (1969) (White, J., dissenting) (discussing challenges posed by multi-level entry).

An open first–closed later strategy induces reliance on that foothold and then closes it off, to the detriment of both users and complementors. At the same time, it softens innovation competition from closed systems, because it delays the onset of a systems battle until after the open system completes its deception by revealing that it has closed. The States need only plausibly allege that Facebook adopted an open first–closed later approach to API access to adequately plead conduct capable of distorting competition in a network market. They have done so.

III. THE DISTRICT COURT ERRED IN DETERMINING IT COULD NOT AWARD INJUNCTIVE RELIEF

The district court's misclassification of conditional dealing as a refusal to deal and its failure to credit the States' deception allegations infected its finding that injunctive relief is unavailable. But the district court also committed numerous other errors in reaching this conclusion. It drew a faulty distinction between "having" and "implementing" anticompetitive policies, overlooked "particular acts" and well-pleaded allegations of ongoing harm, and mistook inculpatory evidentiary allegations as exculpatory. Those errors also warrant reversal.

A. Both Anticompetitive Policies and Deception Are Actionable Under Section 2

The district court anchored its refusal-to-deal analysis in a faulty distinction between "having" and "implementing" a discriminatory API-access policy. Slip Op. 2–3. It held, "the mere act of announcing or maintaining a general no-dealing-with-competitors *policy* cannot, in and of itself, violate Section 2; rather, the analysis must focus on particular *acts*." *Id*. at 29 (emphasis in original); *id*. ("*Aspen Skiing* violations are 'visible and idiosyncratic event[s].'" (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 773e (4th and 5th Eds. 2015-2021)).

The court's distinction has no basis in antitrust law—even refusal-to-deal law. Having policies and performing acts are both illegal under Section 2 if they cause anticompetitive effects. *See, e.g.*, *Eastman Kodak Co. v Image Tech Servs. Inc.*, 504 U.S. 451, 458 (1992) (denying summary judgment on a challenge to "a policy of selling replacement parts" only to non-rivalrous service providers); *Monsanto Co. v. Spray-Rite Serv. Corp*., 465 U.S. 752, 762 (1984) ("The legality of arguably anticompetitive conduct" is judged by "'market impact'" and "economic effect."); *see Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 603 (1985).[4]

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[4] The district court's quotation from the Areeda & Hovenkamp treatise lends no support to its having/implementing distinction. The treatise says, "limit[ing] the

Regardless, *deception* is a "particular act." *See Novartis Corp. v. FTC*, 223 F.3d 783 (D.C. Cir. 2000); Fed. Trade Comm'n, Policy Statement on Deception (1983), *reprinted in* 4 Trade Reg. Rep.(CCH) ¶ 13,205 at 20,911-12 (defining deception as a "misrepresentation, omission or practice" that was "material" in that it was likely to mislead "others acting reasonably under the circumstances" and thereby affect their "conduct or decision[s]."). This Court has held that deception coupled with reliance, specifically, constitutes actionable anticompetitive conduct under Section 2. *Microsoft*, 253 F.3d at 76 (Cross-platform incompatibility, standing alone, was "no violation to be sure—but Microsoft deceived Java's developers … who relied upon Microsoft's public commitment," and "*this conduct* was exclusionary.") (emphasis added); *see also Broadcom Corp. v. Qualcomm Inc*., 501 F.3d 297, 314 (3d Cir. 2007) (An intentionally false promise, coupled with reliance, "qualifies as actionable anticompetitive conduct."). The district court thus ignored allegations that satisfy its incorrect test.

B. The Alleged Conduct Can be Enjoined

Bootstrapping from its faulty distinction, the district court determined that it could not enter an injunction because the "specific refusals" the States alleged

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'essential facility' doctrine to situations in which there was no business justification for the defendant's refusal to deal … serves to make the refusal to deal a visible and idiosyncratic event——that is, the refusal was profitable only because of the harm it inflicted on rivals."). Areeda & Hovenkamp, *supra* ¶ 773e.

occurred at least five years ago. Slip op. at 31. This logic fails for several reasons, *see* App. Br. at 44, but fundamentally because it rests on the same false foundation discussed above. The discriminatory API-access policies are "specific refusals" (or rather "specific conditions") and "particular acts" if they have anticompetitive effects.

The district court took judicial notice of unpled public statements by Facebook suggesting the company "terminated all of its policies regarding competitor API access" in 2018, Slip op. at 15, and it relied on the statements in construing the States to have alleged Facebook's conditional dealing ceased at that time. Slip op. at 32. But as the States point out, they do not allege that Facebook stopped conditional dealing or ended the challenged scheme in 2018, and the inference Facebook did so is improperly adverse to them on a motion to dismiss. *See* App. Br. at 45.

The district court's approach is also far too credulous. It treated "the text" of the policies as coextensive with "the ostensible scheme." Slip op. at 13, 32–33. Nobody should assume that sophisticated global conglomerates are "foolish enough to reduce their entire anticompetitive [schemes] to writing," especially in the four corners of written public announcements. *In re Wholesale Grocery Prod. Antitrust Litig.*, 752 F.3d 728, 734 (8th Cir. 2014). "[M]ost would-be monopolists…can be expected to display a bit more guile." *Id.*; *see also* App. Br. at 45

(noting policy suspensions were announced concurrent with imminent public disclosure of documents detailing anticompetitive conduct).

Properly credited as part of the deceptive open first–closed later strategy the States alleged, Facebook's 2018 statements bolster the "closed later" element of the strategy. They show that, at least as late as 2018, the network was in fact closed. And nothing in the complaint, the 2018 statements, or Facebook's Motion to Dismiss suggests Facebook has been dealing without anticompetitive conditions in the intervening years. That Facebook *said* it ended its policies in 2018 does not eliminate fact questions about what it *did* afterwards.

Moreover, the alleged fact that access-denials were implemented pursuant to policies should have been viewed as inculpatory, not exculpatory. The policy allegations bolster the showing that the deception had a widespread market effect, because the policies allegedly applied to all competitors of the dominant network. *See* Jonathan Baker, *Exclusion as a Core Competition Concern*, 78 Antitrust L.J. 527, 548 (2013) (The leading cases show exclusionary conduct is more readily found unreasonable "if the excluding firms have foreclosed competition from all actual or potential rivals.").

Unresolved temporal dimensions of conditional dealing and the alleged scheme as a whole are matters for summary judgment and trial. There was no

basis for the district court to reject, as a matter of law, the availability of injunctive relief to remedy ongoing harm by reopening an unlawfully closed system.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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CERTIFICATE REGARDING SEPARATE BRIEF

Pursuant to D.C. Circuit Rule 29(d), I certify that this separate amicus brief is necessary because it provides unique insights regarding the application of anti-trust and competition principles from a non-profit consumer antitrust organization and because other amici, who are not consumer antitrust organizations, do not address the same issues and do not have the same expertise.

/s/Randy M. Stutz
Randy M. Stutz

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f), the brief contains 6,499 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(b) because the brief has been prepared in Microsoft Word, using 14-point Times New Roman font, a proportionally spaced typeface.

/s/Randy M. Stutz
Randy M. Stutz

CERTIFICATE OF SERVICE

I certify that on January 28, 2022, I caused the foregoing Brief of Amicus Curiae to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all counsel for the parties.

/s/Randy M. Stutz
Randy M. Stutz