



FOR IMMEDIATE RELEASE

March 28, 2022

Media Contact: Glenn Lammi | glammi@wlf.org | 202-588-0302

## WLF Urges D.C. Circuit Not To Expand Antitrust Duty To Deal With Competitors

(*State of New York v. Facebook, Inc.*)

**“The States’ novel theory of liability would erode the procompetitive aims of antitrust law and force courts into the improper role of central planners in matters of cutting-edge and fast-moving technological innovation.”**

—Cory Andrews, WLF General Counsel & Vice President of Litigation

WASHINGTON, DC—Washington Legal Foundation (WLF) today urged the U.S. Court of Appeals for the D.C. Circuit to affirm a federal trial court’s dismissal of antitrust claims against Facebook for denying its competitors the free use of its platform to harm Facebook’s core business. WLF was joined on the *amicus* brief by the Information Technology and Innovation Foundation (ITIF). The brief was prepared with the generous pro bono assistance of Zack Tripp and Mark Pinkert at Weil, Gotshal & Manges LLP.

The case arises from a suit by a group of 46 States (plus Guam and the District of Columbia) against Facebook for alleged violations of Section 2 of the FTC Act. Dismissing the States’ Section 2 claims, the U.S. District Court for the District of Columbia explained that under the Supreme Court’s *Aspen Skiing* framework, a business’s choice to announce that it will not help rivals and to prospectively decline to do so is categorically lawful. On appeal, the States ask the D.C. Circuit to treat *Aspen* as a “flexible” test that is apparently satisfied by a refusal to deal coupled with mere evidence of a purpose to “harm competitors.”

In its *amicus* brief urging affirmance, WLF asks the appeals court to decline the States’ effort to radically expand refusal-to-deal liability. First, the States’ argument that *Aspen* provides a “flexible” and open-ended test conflicts with *Verizon Communications v. Trinko*, which foreclosed a general duty to deal and emphasized that *Aspen*’s refusal-to-deal exception was “limited.” Second, the fast-moving and ever-changing market here is particularly unsuited to imposing novel duties to deal, making the States’ proposed expansion of *Aspen* even more problematic. Finally, judicial creation of a novel duty to deal with competitors 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.

*Celebrating its 45th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.*

###