ORAL ARGUMENT NOT YET SCHEDULED

No. 26-5028

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant,

v.

META PLATFORMS, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia
(Case No. 20-3590 – Hon. James E. Boasberg)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING DEFENDANT-APPELLEE AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Under D.C. Circuit Rule 28(a)(1), the undersigned counsel of record certifies:

A. Parties and Amici

All known parties and as-filed amici are listed in the Parties' relevant certificates.

B. Ruling Under Review

The ruling under review is the opinion and order of the district court in Case No. 20-3590, which is reported at 811 F. Supp. 3d 67 (D.D.C. 2025).

C. Related Cases

There are no related cases.

/s/ Zac Morgan
Zac Morgan
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STATEMENT ON AUTHORSHIP, MONETARY CONTRIBUTIONS, AND SEPARATE BRIEFING

No party's counsel authored any part of this brief and no one, other than Washington Legal Foundation and its counsel, contributed money intended to fund the brief's preparation and submission. Fed. R. App. P. 29(a)(4)(E).

WLF's brief is necessary to provide the Court with the organization's unique perspective about the flaws in the government's theory of ad load as a monopoly price, the dynamism of the social-media marketplace, and the First Amendment values that would be harmed by reversal.

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FTC	Federal Trade Commission
WLF	Washington Legal Foundation

INTEREST OF AMICUS CURIAE

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free markets, individual rights, and the rule of law. It often appears as amicus curiae to advocate against consumer welfare-minimizing interpretations of the antitrust laws. *E.g.*, *Apple v. Pepper*, 587 U.S. 273 (2019); *United States v. Google, LLC*, Case Nos. 26-5023, 26-5047, 26-5049 (D.C. Cir. filed Jan. 22, 2026).

INTRODUCTION AND SUMMARY OF ARGUMENT

A ready-fire-aim approach to antitrust enforcement does nothing good for consumers. That's why the Federal Trade Commission's injunctive powers are carefully limited—to avoid "undue risks of error and of deterring welfare-enhancing innovation." *United States v. Microsoft Corp.*, 253 F.3d 34, 89–90 (D.C. Cir. 2001) (en banc). A permanent injunction against an alleged monopolist may be obtained only after the FTC furnishes "proper proof" of an ongoing or future Sherman Act § 2 violation. 15 U.S.C. § 53(b) (vesting agency with power to seek injunctive relief when "any person, partnership, or corporation is violating, or is about to violate" the antitrust laws). The district court rightly concluded that the FTC failed to make that case.

For starters, even if you accept every particular of the Commission's legal theory (including its flawed definition of the relevant market), Meta's not an unlawful monopolist. Meta doesn't demand a dollar-price for access to Facebook or Instagram. So the Commission considers the quantity of ads in a user's feed as a proxy for price. Too many ads? There's your output restriction and monopoly pricing. Yet Meta tailors ad load to each individual user based on that consumer's tastes and limits—no user receives the same mix of ads. Op. 78–81. Some receive more. Some receive less. That means no two users pay the same "price." That's evidence of demand discipline, not satisfied monopoly.

But even if Meta *were* a monopolist, as Judge Bork observed long ago, a "monopolist must restrict output to maximize net revenues—but that proposition holds *only* if the monopolist is confined to charging a single price." Robert H. Bork, *The Antitrust Paradox* 391 (Bork Publ'g 2021) (emphasis supplied). But when a so-called monopolist can "charge the monopoly price to all who would pay it, and a series of lower prices to others, [it] would produce the same amount as a competitive industry"—

and no Sherman Act problem. *Id*. On the government's own terms, that's exactly what Meta's individually tailored ad-load-per-user does. That's reason alone to affirm the judgment below.

Of course, the Commission's market definition is wrong. The agency spends much of its brief claiming authority to enjoin a "monopoly" that dissolves during litigation. Not so—and not just as a matter of statutory interpretation. After all, social media is a dynamic marketplace with remarkably low barriers to entry. In the six years since the FTC brought this action, TikTok has emerged as Meta's "fiercest rival," YouTube has transformed itself into an equally sharp social media competitor, and Meta's market share has eroded. Op. 87–89. When a "monopoly" falls apart so swiftly, it compels the conclusion that the government has misidentified competitive conduct as unlawful exclusion. In a market so vulnerable to disruption, no firm (including Meta) could possibly have held the "substantial power over price" necessary to "injure competition." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 20 (1984).

As a last refuge, the Commission argues that the district court erred because it wrongfully placed TikTok and YouTube in the same market as Meta's platforms. But the government's narrowly defined market—limited to "friends and family" social media platforms—just doesn't reflect reality. It ignores the revealed preferences of the hundreds of millions of Americans who freely and regularly toggle between Meta's products and those of TikTok and YouTube. When TikTok suffers, Meta gains. Op. 50. When Meta falters, YouTube and TikTok take advantage. Op. 47. Low barriers to entry, low switching costs, instant interchangeability. The district court properly understood the market as social media generally, not a bespoke slice of it.

The downsides of adopting the Commission's position go beyond the confines of antitrust jurisprudence. Meta and its competitors don't make chairs or cars. Their relevant products furnish speech to hundreds of millions of Americans. And not just speech in the form of (doubtless important) cat videos. At least 40 percent of Facebook, Instagram, YouTube, and TikTok's adult users regularly use those platforms to get the news. *Social Media and News Fact Sheet*, Pew Rsch. Ctr. (Sept. 25, 2025); https://bit.ly/46arrPn. For Facebook and TikTok, that share crosses a majority. *Id*. No wonder campaigns and officeholders alike use these platforms to reach voters and constituents. Today, social media is where Americans seek out "that vital pulse of ideas and intelligence on which an informed and self-governing people depend." *Edwards v. Nat'l Audubon Soc'y*, 556 F.2d 113, 122 (2d Cir. 1977). And unnecessary antitrust enforcement will act like a prior restraint on tomorrow's social-media products. Constitutionally valuable innovation in online speech distribution will be chilled, leaving social-media users not just worse off as consumers, but as citizens.

ARGUMENT

I. META'S NO MONOPOLIST.

A. On the Commission's own terms, Meta's not harming consumer welfare.

Meta doesn't seek a traditional price from its social-media users—and neither do any of its main competitors. Meta (and TikTok and Snapchat and YouTube and others) all track usage, preferences, and user characteristics. They all run this data through a profiling algorithm that spits out a bespoke experience for each user. No Instagrammer or TikToker receives the identical content as any other.

In exchange, Meta and its fellows use those profiles to sell ads. And Meta personalizes the "ad load" for every user just as it individualizes recommendations for unsponsored content. Op. 78. Right away, that's a problem for the FTC—even before we get to market definition or market share. The Commission contends that in the absence of a dollar-figure price, it can suss out whether Meta is restricting output and charging a supracompetitive price via evidence of deteriorating platform quality. Too many ads bloating the feed, too much market power. Ads proxy for price. That's not really an administrable regime. Feed quality suffers from a far greater eye-of-the-beholder problem than traditional price analysis. What's more, since individual ad load is calibrated to personal tolerance and preference, that's evidence that Meta's ad load responds to market demand—not the instructions of a satisfied monopolist. Op. 78–81.

But *even if Meta did enjoy monopoly power,* the Commission's favorite metric shows that Meta doesn't charge a single monopoly-maximizing price. Ad load is dynamic and tailored to user preferences. No two users get the same ad load—so no two users pay the same price. And as Judge Bork aptly observed nearly a half-century ago, a "monopolist must restrict output to maximize net revenues—but that proposition holds *only* if the monopolist is confined to charging a single price." Bork, *Antitrust Paradox* 391 (emphasis supplied). But when a so-called monopolist can "charge the monopoly price to all who would pay it, and a series of lower prices to others, [it] would produce the same amount as a competitive industry. Under such circumstances, there would be no [harmful] misallocation of resources." *Id.*

Of course, that's exactly what Meta's personalized ad-load does—it's wildly different for each of the company's consumers and constantly fine-tuned to keep as many users on the app for as long as practicable. So even if we take the Commission's theory whole (and even assume Meta's somehow swallowing all available consumer surplus, which it's not, *infra* at 7–12), Meta's ad-load "pricing" may injure competitors, but it doesn't injure consumer welfare. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007) ("The purpose of the antitrust laws . . . is 'the protection of *competition*, not *competitors*'") (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (emphasis in original)). The district court can be affirmed on that basis alone.

B. The rapid disruption of the social-media market shows that Meta was never a § 2 monopoly.

The Commission spends much of its word-count arguing that 15 U.S.C. § 53(b) lets the agency secure injunctive relief against a "monopoly" that dissolves during litigation. FTC Br. 19–29. Judge

Boasberg's contrary interpretation, grounded in the statute's plain text, is doubtless correct. Under the FTC Act, the Commission can't obtain a permanent injunction unless it shows "proper proof" of a present-tense or future-tense injury—that a company "*is* violating, or *is* about to violate" Sherman Act § 2. 15 U.S.C. § 53(b) (emphasis supplied). That makes sense. Monopoly power that doesn't exist can't really be curtailed in equity.

But this Court doesn't need to adopt that reading to affirm. If a "monopoly" collapses under intense competition during relatively brief multiyear litigation, that means the firm's conduct was never an antitrust problem in the first place. "Competition is hardier than you think. The desire to make a buck leads people to undermine monopolistic practices." Frank H. Easterbrook, *Workable Antitrust Policy*, 84 Mich. L. Rev. 1696, 1701 (1986). Hundreds of millions of Americans making choices in a relatively free market always creates demand for superior value. In turn, that demand will be met by entrepreneurs and going concerns offering better quality, better pricing, or both. "Monopoly prices eventually attract entry" and sledgehammer monopoly power. Easterbrook, *Limits of Antitrust*, 63 Tex. L. Rev. at 2.

The key word there is *eventually*. "Information is costly, markets imperfect. Business executives may persist in deleterious practices for some time before the losses are high enough to provoke the managers' admission of defeat or to induce the firm's board to replace the managers." *Id.* at 24. So antitrust enforcement, when optimally wielded (no sure task), can sometimes "speed up the arrival of the long run." *Id.* at 2. But when an alleged monopoly crumbles during the short run without actual enforcement, it flushes out that the firm never wielded § 2 monopoly power to begin with. A "firm cannot possess monopoly power in a market unless that market is also protected by significant barriers to entry." *Microsoft*, 253 F.3d at 82.

In the six years since the FTC brought this action, TikTok has emerged as Meta's "fiercest rival," YouTube has transformed itself into an equally sharp social media competitor, and Meta's market share has eroded. Op. 87–89. That sure looks like a competitive marketplace with low barriers to entry—precisely the type of dynamic ecosystem most resistant to cornering by a hostile firm merging or acquiring its way to unwarranted dominance. Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 Geo. L.J. 305, 309–10 (1987) (danger of "large mergers" manifests only "in markets with high barriers to entry"). When a market is that vulnerable to swift disruption, it reveals that no firm selling within it wields the "substantial power over price" necessary to "injure competition[,] no matter how hard [it] tries." Easterbrook, *Limits of Antitrust*, 63 Tex. L. Rev. at 20 (tense altered). And when it comes to whether § 2 has been violated, Judge Easterbrook's pithy formulation holds true: "No power, no problem." *Limits of Antitrust*, 63 Tex. L. Rev. at 21.

The Commission's riposte is beguiling but wrong: shrink the market down until Meta's a giant among pygmies. The FTC argues that the proper market isn't social media writ large, but "personal social networking—that is, sharing content with friends and family." FTC Br. at 1. If that market sounds too bespoke to be a Sherman Act concern, that's because it is. As the district court painstakingly recounted, most Americans have stopped openly blasting out personal content to their online "friends and family." Instead, hundreds of millions of users choose to passively receive tailored social-media content across a variety of platforms and share the algorithmically recommended stuff they find interesting via private messaging. Op. 5–19.

And the record unmistakably shows that these services are interchangeable. When TikTok suffers, Meta gains. Op. 50. When Meta falters, YouTube and TikTok take advantage. Op. 47. That didn't happen by accident. It occurred because profit-seeking concerns responded to millions of revealed preferences. That's competition—not unlawful exclusion. *See Microsoft*, 253 F.3d at 49 ("In technologically dynamic markets," any "entrenchment may be temporary, because innovation may alter the field altogether").

Had Meta truly held long-run monopoly power at the time of the Commission's filing, it could have resisted those demand signals. Rather than designing expensive algorithms to push curated video content to every Facebook or Instagram user, Meta could have kept its products as relatively static places for people to post status updates and publicly share sepia-toned still images, content in the monopolist's knowledge that even if users wanted something else, there's nowhere to go. Instead, the company realized it was falling behind, monitored cross-elasticity with the YouTubes and TikToks of the marketplace, and vigorously tried to outmaneuver those rivals. That's no "harm [to] the competitive process and thereby [no] harm [to] consumers." *Microsoft*, 253 F.3d at 58 (emphasis omitted). Indeed, the market dynamics recounted in the district court's opinion are precisely the kind of entrepreneurial conduct that the Sherman Act lauds, not condemns.

II. STIFLING INNOVATION IN SOCIAL MEDIA MEANS STIFLING SPEECH.

The FTC's assault on beneficial competition would be bad enough if Meta merely sold some tangible good. But Meta doesn't sell office furniture or automobiles. Its platforms deliver speech. *Moody v. NetChoice*, 603 U.S. 707, 716–17 (2024) ("In constructing certain feeds, those platforms make choices about what third-party speech to display and how to display it"). And that speech isn't just cat videos or memes. Meta and its competitors are a principal source for millions of Americans seeking out "that vital pulse of ideas and intelligence on which an informed and self-governing people depend." *Edwards*, 556 F.2d at 122. The short-form videos that dominate Facebook, Instagram, and its rivals are a significant source of the news for adult Americans. *Social Media and News Fact Sheet*, Pew Rsch. Ctr. More than half of Facebook and TikTok's adult users—and over 40 percent of those users on YouTube and Instagram—regularly use the platform for that purpose. *Id*. And like it or not, the Nation's political debate often happens in video format on social media apps. Campaigns and officeholders alike seek to inform the electorate by going viral, scheduling media appearances designed to be clipped and widely shared.

Breaking up Meta or empaneling an FTC watchman to oversee its future conduct, Amended Complaint at 79, won't just unnecessarily penalize a company for fiercely competing in a dynamic market. It will chill innovation in a terribly important industry. There's no barrier to entry that stifles a competitive market quite like the chilling effect of overzealous antitrust enforcement. Frank H. Easterbrook, *Information and Antitrust*, 2000 U. Chi. Legal F. 1, 5 (2000) (noting the danger of government-imposed "barriers" to entry on "information products" where "entry is easy and the elasticity of supply high"). It will fundamentally reshape the future of how Americans receive news, follow current events, and participate in civil society. Reversal will inevitably deter further development and disruption throughout the social-media market, with a corresponding ossifying effect on those speech platforms which have become the Nation's "essential venues . . . to engage in a wide array of protected First Amendment activity on topics as diverse as human thought." *Packingham v. North Carolina*, 582 U.S. 98, 104–05 (2017) (internal quotation marks and citation omitted).

That loss of breakthrough innovation won't be seen or felt, of course, but Americans will be injured all the same. New ways to write, speak, and gather will never go from thought to rollout. The efficiency-maximizing merger will go unpursued. Startups that might dethrone TikTok will go unfunded. (That we must speak in generalities about all this is the point—if we knew what the next bleeding-edge advance in social media would be at the time of this writing, we'd be billionaires, not nonprofit attorneys.) Those invisible harms will have the same real-world effect as a prior restraint. Less publishing. Less association. Less speech.

It needn't be this way. As the district court correctly recounted, the social-media marketplace is a dynamic one, with hundreds of millions of Americans frictionlessly switching between innovation-maximizing competitors. The old warning works as well for federal antitrust enforcement as it does for amateur repair: if it ain't broke—don't fix it.

CONCLUSION

Meta vigorously competes in a free and thriving market. It has no monopoly and has never wielded one. And with no monopoly power, there's just no Sherman Act problem. The Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify:

(i) That this brief complies with the relevant length limitations set forth in the Rules. It contains 2,775 words.

(ii) That this brief complies with the format, typeface, and type-style requirements of Fed. R. App. P. 32(a)(4)–(6) because it has been prepared using Microsoft Office Word and is set in 14-point Century Schoolbook font.

(iii) That I electronically filed this brief with the Clerk via the CM/ECF system, which will serve all parties automatically.

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August 27, 2026