No. 22-CV-657

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,

APPELLANT,

v.

AMAZON.COM, INC.,

APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR *AMICUS CURIAE* OPEN MARKETS INSTITUTE IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Rules of the District of Columbia Court of Appeals 26.1, the Open Markets Institute states that it is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

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INTEREST OF *AMICUS CURIAE*[1]

The Open Markets Institute is a non-profit organization dedicated to promoting fair competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

SUMMARY OF ARGUMENT

The District of Columbia accused Amazon of employing contractual restraints to perpetuate its dominance of online commerce. Through most-favored nation clauses and minimum margin clauses, Amazon restricts the ability of its millions of third-party sellers and suppliers to offer goods for lower prices on their own sites and rival platforms. Even when sellers and suppliers incur lower costs through direct sales and are charged lower commissions and fees on rival platforms, Amazon prohibits them from engaging in fair, cost-based discounting.[2]

[1] The parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus* curiae and its counsel made a monetary contribution to its preparation or submission. The parties consented to the filing of this *amicus* brief.

[2] In contrast to fair price discounting tied to a "lower cost structure," predatory pricing involves the predator running losses to discipline or eliminate rivals.

What they charge on Amazon can be no higher than what they charge on alternative channels, notwithstanding Amazon's inflated fees. Employing these methods, Amazon reinforced its monopoly power, marginalized rivals, and robbed trading partners of pricing autonomy. As a result, Amazon preserved its ability to collect an effective toll as high as 40% on a third-party sale made on its platform and to raise prices for consumers.

Despite being presented detailed allegations of Amazon's power and unfair competitive conduct, the Superior Court dismissed the District of Columbia's amended complaint. The court, among other errors, held that only a firm with a 100% share of a market has monopoly power. This is not the law. Courts have found that firms with 60% or 70% of the market can have monopoly power and are thereby subject to special rules under the antitrust laws. As a monopolist, Amazon's use of MFN clauses and minimum margin requirements raise special antitrust concerns—the impairment of fair competition, exclusion, and coercion—that would be greatly diminished if Amazon were not dominant.

Monopolistic corporations are exceptional on account of their power in a market. The law singles them out for special scrutiny. The District of Columbia Code prohibits monopolization, attempted monopolization, and conspiracies to

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Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-23 (1993).

monopolize. D.C. Code § 28-4503. This provision closely parallels the federal analog—Section 2 of the Sherman Act. 15 U.S.C. § 2. In applying the Sherman Act, the federal courts apply greater antitrust scrutiny to monopolistic corporations than to other firms and subject them to special rules that do not apply to non-monopolists.

The use of most-favored nation (MFN) and related contracts such as minimum margin clauses by a monopolist can inflict a range of harms on consumers, competitors, and trading partners. Under a most-favored nation clause, for example, a distributor requires a manufacturer not to offer lower wholesale prices to rival distributors. A monopolistic platform like Amazon requires sellers not to offer lower prices on rival platforms or their very own sites even when these alternatives have lower commissions, fees, and other costs. Similarly, a minimum margin requirement, by requiring the supplier to compensate the distributor for any reduction in margins on the sale of the supplier's goods, deters cost-based discounting on rival platforms. When used by a monopolistic corporation, these contracts can maintain monopoly-level prices, exclude rivals, and coerce trading partners.

ARGUMENT

I. The Courts Subject Monopolists to Special Antitrust Scrutiny

Monopolistic corporations are exceptional on account of their power. The law singles them out for special scrutiny. The District of Columbia Code declares, "It shall be unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce, all or any part of which is within the District of Columbia." D.C. Code § 28-4503. This provision closely parallels the federal analog—Section 2 of the Sherman Act. 15 U.S.C. § 2. In applying the Sherman Act, the federal courts apply greater antitrust scrutiny to monopolistic corporations than to other firms.[3] They have recognized that monopolists' great power, regardless of how it was obtained, gives them extraordinary capacity to unfairly exclude rivals. Accordingly, monopolists are subject to special restrictions that do not apply to non-monopolists.

The Supreme Court has recognized the extraordinary power of monopolistic firms. The Court observed that monopoly "carries with it an opportunity for abuse." *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932). Monopoly comes with "the existence of power 'to exclude competition when it is desired to do so.'"

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[3] Under the District of Columbia code, "a court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes." D.C. Code § 28-4515.

United States v. Griffith, 334 U.S. 100, 107 (1948) (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946)).

On account of their power, monopolists face special restrictions under the antitrust laws. They cannot use their monopoly power as a competitive weapon.[4] For instance, the Court ruled that a monopolistic local newspaper "violate[d] the 'attempt to monopolize' clause of § 2 [of the Sherman Act] when it use[d] its monopoly to destroy competition." *Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951). The antitrust laws prohibit "the use of monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482-83 (1992) (quoting *Griffith*, 334 U.S. at 107).

Justice Scalia recognized the practical import of the antitrust distinction between monopolists and non-monopolists. In a dissent, he wrote:

> Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of

[4] In a 1966 decision, the Supreme Court announced the current test for monopolization. The Court held, "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

> concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist. *Kodak*, 504 U.S. at 488 (Scalia, J., dissenting).

In other words, conduct that is innocuous or even beneficial to the public when undertaken by a non-monopolist can be unfairly exclusionary and illegal when done by a monopolist.

The federal courts of appeals have affirmed and applied the distinction between monopolists and non-monopolists. Monopolists face greater scrutiny and special restrictions under the antitrust laws.

The D.C. Circuit distinguished monopolists from non-monopolists in its landmark decision in *United States v. Microsoft Corp*. 253 F.3d 34 (D.C. Cir. 2001) (per curiam). The court articulated the legal standards for exclusive dealing under Section 1 (applies to all firms) and Section 2 (applies only to monopolists or near-monopolists) of the Sherman Act. The court concluded that a degree of market foreclosure that is not sufficient to establish Section 1 liability can nonetheless be sufficient to establish liability under Section 2. The Court wrote that "a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation." *Id.* at 70. The

court further noted that a monopolist's product design choices are subject to antitrust scrutiny, while implying those of a non-monopolist are not. *Id.* at 65.

A trio of federal appellate decisions over the past 20 years stressed the special rules that apply to monopolists. In 2003, the Third Circuit held that "a monopolist is *not* free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior." *LePage's Inc. v. 3M*, 324 F.3d 141, 151-52 (3d Cir. 2003) (en banc) (emphasis added). The court repeated this point two years later. *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005). The Fourth Circuit echoed the monopolist versus non-monopolist distinction in 2011: "Conduct that might otherwise be lawful may be impermissibly exclusionary under antitrust law when practiced by a monopolist." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 441 (4th Cir. 2011).

In its decision in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), the Second Circuit noted the differential antitrust treatment of monopolists and non-monopolists. The court wrote that "certain actions may violate s 2 when taken by a monopolist even though they would be perfectly legitimate in the hands of a firm lacking market control." *Id.* at 291 n.50. And it offered exclusive dealing as an example of such a practice: "Such conduct is illegal when taken by a monopolist because it tends to destroy competition, although in

the hands of a smaller market participant it might be considered harmless, or even honestly industrial." *Id.* at 274.

Other courts of appeals have also recognized legal restrictions that govern monopolistic firms. The Seventh Circuit wrote:

> There are kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency, are unlawful under s 2 if done by a monopolist[.] *Sargent-Welch Sci. Co. v. Ventron Corp.*, 567 F.2d 701, 711-12 (7th Cir. 1977).

In a similar spirit, the Ninth Circuit recognized that monopolists are "precluded from employing otherwise lawful practices that unnecessarily excluded competition" from a market. *Greyhound Computer Corp. v. Int'l Bus. Machines Corp.*, 559 F.2d 488, 498 (9th Cir. 1977).

II. Monopolists Can Use Most-Favored Nation Clauses and Similar Restraints to Maintain Unduly High Prices, Unfairly Exclude Rivals, and Coerce Trading Partners

The use of most-favored nation (MFN) and related contracts such as minimum margin clauses by a monopolist can inflict a range of harms on consumers, competitors, and trading partners. Under a most-favored nation clause, for example, a distributor requires a manufacturer not to offer lower wholesale

prices to rival distributors.[5] A monopolistic platform like Amazon requires sellers not to offer lower prices on rival platforms or their own sites even when these alternatives have lower commissions, fees, and other costs. Similarly, a minimum margin requirement, by requiring the supplier to compensate the distributor for any reduction in margins on the sale of the supplier's goods, deters discounting on rival platforms. When used by a monopolistic corporation, these contracts can maintain monopoly-level prices, exclude rivals, and coerce trading partners.

A monopolist platform's use of most-favored nation clauses unfairly raises prices for consumers.[6] By restricting cost-justified price discounting,[7] the

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[5] An MFN is not a prohibition on price discrimination. Specifically, it does not bar discriminatory discounts *in favor* of the distributor that imposes this restraint on trading partners.

The Robinson-Patman Act prohibits discriminatory price discounts on commodities to retailers and other distributors, unless they are justified by a lower cost of production or distribution to serve the party receiving the discriminatory benefit. 15 U.S.C. § 13. The law restricts the use of buyer power to obtain special concessions from suppliers. *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960). In contrast, a monopolist's use of most-favored nation clauses with sellers or suppliers represents the use of buyer power as a competitive weapon.

[6] For the sake of simplicity, this brief will focus on MFN clauses but the effects of minimum margin requirements are similar. When employed by monopolists, both contracts discourage fair price discounting, impede the growth of lower-cost competitors to the monopolist, and deprive the monopolist's trading partners of pricing discretion.

[7] In contrast to fair price discounting tied to a "lower cost structure," predatory pricing involves the predator running losses to discipline or eliminate rivals.

monopolist preserves high prices and high margins for goods sold on its site. Because of the MFN, sellers cannot offer lower prices on their own website and rival platforms even when these channels feature lower costs, without also lowering their prices on the monopolistic platform as well. This strongly discourages them from discounting on their own site or rival platforms. If they discount on these sites, they also must reduce prices by an equal or greater amount on the monopolist's site, notwithstanding its higher fees and commissions. By requiring discounting on its site despite its high costs, the monopolist indirectly deters discounting everywhere and elevates prices for goods in general. Jonathan B. Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, Antitrust, Spring 2013, at 23.

Empirical research confirms that MFNs, especially when used by dominant firms, hurt consumers. Several European nations restricted the use of MFNs by online travel agencies offering hotel rooms. Several studies have reviewed the effects of these policy changes. They generally found that the legal restrictions on MFNs led to lower room rates. Matthias Hunhold et al., *Evaluation of Best Price Clauses in Online Hotel Booking*, 61 Int'l J. Indus. Org. 542 (2018); Andrea Mantovani, et al., *Online Platform Price Parity Clauses: Evidence from the EU*

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-23 (1993).

Booking.com Case, 131 Eur. Econ. Rev. 103625 (2021); Thomas Larrieu, *Pricing Strategies in Online Market Places and Price Parity Agreements: Evidence from the Hotel Industry* (2019); Sean F. Ennis, et al., *Price Parity Clauses for Hotel Room Booking: Empirical Evidence from Regulatory Change* (2020).

The monopolist's MFN clauses also impede the growth of lower cost rivals and shore up its own power. Rivals to the monopolists that have a legitimate cost advantage, such as more efficient operations, or those willing to accept lower profit margins on sales transactions cannot reap the rewards. Under the MFN, sellers on these lower-cost rivals must charge the same or higher price on the lower-cost platform. The MFN blunts their incentive to shift business to rivals of the monopolist. Through MFNs, monopolists use their power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." *Kodak*, 504 U.S. at 482-83.

Consider a hypothetical example of how a monopolist's use of MFNs marginalizes lower-cost competitors. Two platforms, A and B, allow third parties to market goods on the internet. Platform A has a dominant position and charges 30% in fees and commissions, whereas Platform B is a newcomer and charges only 10% in fees and commissions. Platform A requires sellers to accept an MFN clause that prevents them from offering their goods for a lower price on Platform B and other rival platforms. Even though Platform B features lower costs for sellers, they

cannot pass through the lower costs to consumers in the form of lower prices without also lowering their prices on Platform A. Uniform discounting across Platforms A and B may mean selling goods for a loss on Platform A, due to its 30% charge in fees and commissions. Alternatively, they can charge a price that covers their higher costs on Platform A and, due to the MFN, do the same on Platform B. In other words, the MFN forces sellers to add Platform A's higher fees "to the cost of their products when they sell them on all external platforms." *Frame-Wilson v. Amazon.com, Inc.*, 591 F. Supp. 3d 975, 991 (W.D. Wash. 2022). Due to the MFN imposed by the dominant Platform A, sellers must charge the same or higher price on Platform B, notwithstanding its lower costs of distribution.

When a monopolist uses MFN clauses, it coerces its trading partners. The monopolist has exceptional power that non-monopolists lack. Trading partners must do business with the monopolist. The alternative to doing business with the monopolist can be doing *no business* at all. Accordingly, "there is no market constraint on a monopolist's behavior." *LePage's*, 324 F.3d at 152. As a result, the monopolist can impose its terms and conditions, including MFN clauses, on customers and suppliers. *See, e.g.*, *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 285 (3d Cir. 2012) (finding that a monopolistic manufacturer coerced purchasers into accepting exclusive arrangements). In contrast, a non-monopolist faces effective rivals and has far less power to dictate terms.

Through MFN clauses, a monopolist uses its sheer power to rob trading partners of pricing autonomy. In the past, the Supreme Court recognized that control over pricing is a defining feature of being an independent business proprietor. *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 21 (1964). In the absence of an MFN, a seller could set prices based on differential costs across different platforms. For instance, they might charge a lower price for direct sales because they entail lower costs of storage and distribution relative to sales through the monopolistic platform. Due to the MFN, however, they cannot engage in such differential pricing based on costs. Instead, they are compelled to charge the same or higher price for direct sales than they do for sales on the monopolistic platform.

The principal justification for MFNs is theoretical and speculative. According to the benign view of MFNs, they prevent harmful free riding. For instance, in the absence of an MFN, consumers could visit the dominant platform's site to learn about products and purchase items for less on a rival site. Per this story, the dominant platform needs MFNs to protect its investment in a slick website and distribution system and preserve its future incentive to invest. This story, however, is only that—a story. Whether this type of free riding, by shoppers and ultimately rivals, occurs in the real world is uncertain because many customers value the convenience of one-stop shopping and will not all migrate to rival platforms in the absence of MFN clauses and the presence of fair price

competition. Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 Yale L.J. 2176, 2184-85 (2018).

III. The Superior Court Ignored Amazon's Monopoly Power

In its order dismissing the District of Columbia's amended complaint, the Superior Court disregarded the District of Columbia's allegations of Amazon's monopoly power. The court treated Amazon as a firm with little power in the online retail market. But this required ignoring both the factual allegations in the amended complaint and longstanding precedent on what constitutes monopoly power. The District of Columbia accused Amazon—and substantiated this accusation—of possessing monopoly power as defined by a long line of cases.

The Superior Court disregarded Amazon's alleged monopoly power. It stated that online sellers have effective alternatives to Amazon, writing, "If other online marketplaces charge lower fees than Defendant, including charging lower commission, sellers may simply choose not to sell on Defendant's marketplace." In the court's view, Amazon is an ordinary firm that faces effective competition from other online platforms.

In its amended complaint, the District of Columbia specifically alleged that Amazon is no ordinary firm—rather it is a monopolist. Amazon has a 50% to 70% share in the online retail market. Among online platforms open to third-party sellers, Amazon's share is even higher. Its two closest competitors in this market

(Walmart.com and eBay) are qualitatively smaller, with each having a 5% share. As the District of Columbia stated in its amended complaint, "Sixty-six percent of consumers start their search for new products on Amazon, and a staggering 74% go directly to Amazon when they are ready to buy a specific product." JA 16-17. Contrary to the Superior Court's bald assertion that "sellers may simply choose not to sell on Defendant's marketplace," JA 370, sellers must be on Amazon if they want to reach most online shoppers.

Amazon need not have a 100% share to possess monopoly power under the antitrust laws. Whereas the Superior Court held that Amazon's share in the relevant market is not high enough to confer monopoly power, case law holds that it is sufficient to establish monopoly power. *See Am. Tobacco*, 328 U.S. at 797 (affirming that two-thirds of market was sufficient to constitute monopoly); *Dentsply*, 399 F.3d at 188 (concluding that market share of 75% to 80% is "more than adequate to establish a *prima facie* case of power"). The Tenth Circuit concluded that a share of 47% could be enough to establish monopoly power. *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 969-70 (10th Cir. 1990).

The Second Circuit offered guidance on what constitutes monopoly power. The court wrote, "Sometimes, but not inevitably, it will be useful to suggest that a market share below 50% is rarely evidence of monopoly power, a share between

50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power." *Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc.*, 651 F.2d 122, 129 (2d Cir. 1981).

Furthermore, Amazon's market share is sufficient to satisfy the requirements for the District of Columbia's attempted monopolization claim. The Eleventh Circuit wrote that "a dangerous *probability* of achieving monopoly power may be established by a 50% share." *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 1000 (11th Cir. 1993) (emphasis in original). *See also Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) (holding Atlantic Richfield's "market share of 44 percent is sufficient as a matter of law to support a finding of market power, if entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing.").

Given that Amazon possesses monopoly power, it is not just another ordinary firm in the market. Under established federal antitrust principles, it is subject to special rules. Amazon's monopoly power carries with it "an opportunity for abuse." *Swift*, 286 U.S. at 116. As Justice Scalia wrote, "Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist." *Kodak*, 504 U.S. at 488 (Scalia, J., dissenting). As a monopolist, Amazon's use of MFN clauses and minimum margin requirements raise special

antitrust concerns—diminished price competition, exclusion, and coercion—that would not exist if Amazon were not dominant. The Superior Court, however, failed to grapple with Amazon's monopoly power and recognize the antitrust restrictions that come with such dominance.

CONCLUSION

For the foregoing reasons, the Court should reverse the Superior Court's dismissal of the District of Columbia's amended complaint and allow the District to take its claims to trial.

Respectfully submitted,

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