No. 20-16472

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DREAMSTIME.COM, LLC,

Plaintiff-Appellant,

v.

GOOGLE LLC,

Defendant-Appellee.

On Appeal from the United States District Court for
the Northern District of California
The Honorable William H. Alsup (No. 3:18-cv-01910-WHA)

Brief of *Amicus Curiae* Open Markets Institute in Support of Plaintiff-Appellant

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Open Markets Institute states that it is a non-profit corporation and, as such, no entity has any ownership interest in it.

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INTEREST OF *AMICUS CURIAE*[1]

The Open Markets Institute (OMI) is a non-profit organization dedicated to promoting fair and 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 undermine fair competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

SUMMARY OF ARGUMENT

Google used its search engine bottleneck to marginalize stock photography company Dreamstime in order to boost its own Google Images. Although Dreamstime offers a vast repository of licensed, high-quality images available on fair prices and terms and became a leading stock photography provider, the company suffered a substantial loss of traffic and business because Google, starting in late 2015, relegated it to the back pages in organic search results and promoted Google Images, which presents and often misappropriates copyrighted images from companies like Dreamstime. In user search results for stock photography, Google even elevated "junk websites" offering few stock

[1] The parties consent to the filing of this brief. No counsel for any party authored this brief in whole or part. Apart from *amicus curiae*, no person contributed money intended to fund the brief's preparation and submission.

photographs—sites that offered little of value or relevance for a person searching for "stock photographs"—over Dreamstime. Google's demotion of Dreamstime in search results led to a dramatic decline in the number of visitors to Dreamstime's site over the course of 2015 and 2016. Google's conduct forced Dreamstime to purchase more advertisements on Google—and generate millions of dollars of additional revenue for Google—to compensate for its banishment to the largely unseen pages of search results. But, once again, Google thwarted Dreamstime's efforts and terminated Dreamstime's advertising campaigns on specious grounds.

Following this unfair and exclusionary conduct by Google, Dreamstime filed a complaint against the search giant in federal court in March 2018 and alleged that Google engaged in monopolization in violation of the Sherman Act, among other lawbreaking. Google functions as the "front door of the internet" and serves as a gateway for countless businesses. Majority Staff of House Subcomm. on Antitrust, Commercial & Admin. Law, 116th Cong., Investigation of Competition in Digital Markets 180 (2020) (hereinafter "House Report"). Accordingly, Google wields extraordinary power and, through its ordering of search results, can marginalize or eliminate rivals, such as Dreamstime, in a way that a non-monopolistic search engine cannot. Under well-established Sherman Act precedent, monopolists like Google cannot use their dominance to impede rivals and dependents like Dreamstime. Although Dreamstime presented compelling allegations that should

have been presented to the jury, the district court granted Google's motion to dismiss Dreamstime's antitrust claim in January 2019 reasoning that Dreamstime failed to allege harm to competition. In dismissing Dreamstime's meritorious suit, the court misinterpreted and misapplied the Sherman Act.

The Sherman Act bans monopolization, attempted monopolization, and conspiracies to monopolize.[2] The Sherman Act is "the Magna Carta of free enterprise." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) (Marshall, J.). Section 2 of the statute, "designed to curb the excesses of monopolists and near-monopolists, is the equivalent in our economic sphere of the guarantees of free and unhampered elections in the political sphere." *LePage's Inc. v. 3M*, 324 F.3d 141, 169 (3d Cir. 2003) (en banc). The Sherman Act prohibits actual and potential monopolists from pursuing "the willful acquisition or maintenance of that power." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). On account of their exceptional power, monopolists are subject to special antitrust rules. "[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

[2] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C. § 2.

constraint on a monopolist's behavior." *LePage's*, 324 F.3d at 151–52. Under the law, monopolists and aspiring monopolists cannot use their market dominance, superior financial power, or tortious or unethical practices to exclude and handicap rivals. In contrast, monopolists, in general, can compete through price cuts (so long as prices remain above cost), product improvements, and investment in plants and research and development.

First, the Sherman Act prohibits monopolists from using their market dominance to perpetuate or extend their power. The exercise of monopoly power in an exclusionary manner can take several forms. A monopolist can refuse to deal with rivals to handicap their ability to compete, or coerce trading partners into accepting terms that exclude or marginalize rivals. In a decision last year, the Seventh Circuit described these practices as "simple refusals to deal" and "conditional refusals to deal" respectively. *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 453 (7th Cir. 2020) (citations omitted).

Second, the Sherman Act prohibits monopolists from maintaining or acquiring their dominance through their superior financial power alone. An actual or aspiring monopolist *cannot* use its advantageous access to financial capital to price its products below the cost of production as a means of driving out rivals from the market. Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 Colum. L. Rev. 1695, 1717–18 (2013). Under the Supreme Court's current

interpretation of the Sherman Act, corporations cannot resort to below-cost pricing that threatens to create a dangerous probability of recouping this upfront loss through greater market power in the future. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24 (1993).

Third, the Sherman Act bars monopolists from using a panoply of tortious or unethical acts to acquire, preserve, or extend their power. Such acts can be a form of "cheap exclusion"—conduct that involves minimal or no cost to the monopolist and lacks any redeeming qualities. Susan A. Creighton et al., *Cheap Exclusion*, 72 Antitrust L. J. 975, 977, 989–90 (2005). Among other forms of tortious or unethical conduct, deception can be the basis for antitrust liability. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 176–78 (1965).

A monopolist that uses its dominance to advantage its own services and disadvantage rivals in adjacent markets can be liable for monopolization. This conduct involves the monopolist's use of existing market power in one market to obtain an advantage in a connected market. Importantly, the monopolist can be liable even if it does not eliminate rivals in the adjacent market. Using its monopoly power to give its affiliates a competitive advantage is sufficient to

trigger antitrust liability. *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997).

Applying the prohibition against monopoly maintenance or extension through the exercise of market power, the Supreme Court affirmed a finding of monopolization against a vertically integrated electric utility in a 1973 decision. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). The Court found that Otter Tail used its monopoly control over the transmission grid to foreclose municipal utilities in the distribution of electricity to customers and protect its own distribution monopolies. *Id.* at 377. Otter Tail specifically refused to transmit power over its monopolistic lines from generators to municipal utilities. *Id.* at 371. The Court affirmed the district court's decision against Otter Tail and held that the "[u]se of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of § 2 of the Sherman Act." *Id.* at 377.

Google's elevation of Google Images and demotion of Dreamstime (collectively self-preferencing) resembles the conduct that the Supreme Court condemned under the Sherman Act in *Otter Tail*. Indeed, the parallels between the conduct of Otter Tail and Google are striking. As Otter Tail did over electric transmission lines in sections of Minnesota, Google has a monopoly in online search. As with the transmission lines in *Otter Tail*, a search engine is not a facility that rivals can feasibly replicate, let alone on the necessary scale. Just as Otter Tail

used its transmission monopoly to favor its electric distribution operations over municipal rivals, Google used its search monopoly to advantage its affiliates and disadvantage rivals in adjacent markets.

Google's use of self-preferencing in search results is a form of illegal monopolization. As a monopolist, Google cannot engage in conduct that might be innocuous when undertaken by non-monopolistic firms. Its monopoly power in search allows it to decide the fate of thousands of firms that depend on it to attract visitors to their sites and sell their goods and services. Google accounts for nearly 90% of online search queries in the United States. House Report, *supra*, at 176 . When Google grants greater visibility to its own services and relegates competitors like Dreamstime to pages 4 and beyond of search results, it uses its monopoly power in search "to gain a competitive advantage." *Image Technical*, 125 F.3d at 1208 (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)). Google Images succeeded at the expense of rivals such as Dreamstime because of Google's "dominant economic power"—not on account of "superior service, lower costs, and improved efficiency." *Otter Tail*, 410 U.S. at 380. Google deployed its monopoly in search—not superior terms or service for customers—to gain a critical competitive advantage over Dreamstime.

ARGUMENT

I. The Sherman Act Prohibits Exclusionary, Predatory, and Other Unfair Practices That Establish, Maintain, or Extend a Monopoly

The Sherman Act prohibits monopolization, attempted monopolization, and conspiracies to monopolize.[3] Section 2 of the statute is "the provision of the antitrust laws designed to curb the excesses of monopolists and near-monopolists." *LePage's Inc. v. 3M*, 324 F.3d 141, 169 (3d Cir. 2003) (en banc). The law prohibits actual and potential monopolists from engaging in "the willful acquisition or maintenance of that power." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). *See also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S 585, 605 (1985) ("If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory.") (internal quotations omitted). As a leading antitrust scholar has written:

> Instead of forcing the parties and the lower courts to ramble through the wilds of economic theory, the legislative intent of section 2 of the Sherman

[3] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C. § 2. The Supreme Court described the grand vision of the antitrust laws as follows:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom

> Act is to proscribe specific "means which make it impossible for other persons to engage in fair competition." Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. Ill. L. Rev. 497, 535 (quoting 21 Cong. Rec. 3152 (1890)).

At the same time, the statute permits firms to compete through product improvements even if this conduct results in or maintains a monopoly. *Grinnell*, 384 U.S. at 570–71.

Members of Congress, in enacting the Sherman Act, recognized the distinction between growth through unfair methods versus growth through fair methods. They aimed to proscribe the former as monopolization and permit the latter as fair and beneficial competition on the merits. 21 Cong. Rec. 3151–52 (1890) (discussion among Senators Kenna, Edmunds, and Hoar on permissible versus impermissible acquisition of monopoly involving a hypothetical dealer of shorthorn cattle).[4]

> guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) (Marshall, J.).

[4] Senator Hoar stated, "I suppose, therefore, that the courts of the United States would say in the case put by the Senator from West Virginia that a man who merely by superior skill and intelligence, a breeder of horses or raiser of cattle, or manufacturer or artisan of any kind, got the whole business because nobody could do it as well as he could was not a monopolist, but that it involved something like the use of means which made it impossible for other persons to engage in fair

The Sherman Act, as interpreted by the courts, prohibits actual and would-be monopolists from using their market dominance, superior financial power, or tortious or unethical practices to exclude and handicap rivals. Importantly, conduct undertaken by a monopolist can be illegal even if the same conduct is benign when undertaken by a firm without monopolistic power. "[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*, 324 F.3d at 151–52. *See, e.g.*, *Greyhound Computer Corp., Inc. v. International Business Machines Corp.*, 559 F.2d 488, 498 (9th Cir. 1977) ("If the jury concluded IBM possessed monopoly power in the leasing of general purpose computers, IBM would be precluded from employing otherwise lawful practices that unnecessarily excluded competition from the submarket."). In a dissent, Justice Scalia made this same point: "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." *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting).

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competition, like the engrossing, the buying up of all other persons engaged in the same business." 21 Cong. Rec. 3152 (1890).

First, under the Sherman Act, monopolists are not permitted to use their market dominance to perpetuate or extend their power. The exercise of monopoly power in an exclusionary manner can take several forms. A monopolist can refuse to deal with rivals to handicap their ability to compete or coerce trading partners into accepting terms that exclude or marginalize rivals. In a decision last year, the Seventh Circuit described these practices as "simple refusals to deal" and "conditional refusals to deal" respectively. *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 453 (7th Cir. 2020).

Consider the limitations on a monopolist's freedom to deal. Monopolists cannot use their control of a critical input to cripple competition in their own market or an adjacent market. While firms have broad freedom to decide with whom to deal, this right is qualified in the case of a monopolist because of its extraordinary power in the market. *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951). In a venerable 1920 decision, the Supreme Court recognized a firm's general right to select its business partners but held this right prevails only "[i]n the absence of any purpose to create or maintain a monopoly . . ." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). A monopolist cannot refuse to deal with a rival as a means of excluding it from a market. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610–11 (1985). For example, the Supreme Court ruled that a dominant local newspaper violated the Sherman Act by

coercing advertisers not to do business with a radio station. *Lorain Journal*, 342 U.S. at 150–54. In a 2004 decision, the Court again noted, "Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

The Sherman Act also restricts exclusive dealing by a monopolist—a "conditional refusal[] to deal." *Viamedia*, 951 F.3d at 453. A monopolist can impose exclusivity on customers, distributors, and suppliers and use its power to marginalize competitors. Steven C. Salop, *Economic Analysis of Exclusionary Vertical Conduct: Where Chicago Has Overshot the Mark*, *in* How the Chicago School Overshot the Mark 141, 150 (Robert Pitofsky ed., 2008). As such, a monopolist cannot use exclusivity with customers, distributors, or suppliers to foreclose or impair rivals and entrench its monopoly. *McWane, Inc. v. FTC*, 783 F.3d 814, 840–42 (11th Cir. 2015); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 286–89 (3d Cir. 2012); *United States v. Dentsply International, Inc.*, 399 F.3d 181, 191–97 (3d Cir. 2005). Through exclusivity with distributors, a monopolist can block or restrict rivals' access to customers and hinder them from competing on price and other dimensions. *See, e.g.*, *McWane*, 783 F.3d at 839 ("[T]he record evidence suggests that [McWane's exclusivity program] stunted the growth of Star—McWane's only rival in the domestic fittings market—and prevented it from

emerging as an effective competitor who could challenge McWane's supracompetitive prices.”).

Second, the Sherman Act prohibits monopolists from acquiring or maintaining their dominance through their superior financial power alone. An actual or aspiring monopolist *cannot* use its advantageous access to finance to price its products below the cost of production as a means of driving out rivals from the market. Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 Colum. L. Rev. 1695, 1717–18 (2013). Under the Supreme Court’s current interpretation of the Sherman Act, corporations cannot resort to below-cost pricing that threatens to create a dangerous probability of recouping this upfront loss through greater market power in the future. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24 (1993). *See, e.g.*, *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 950 (6th Cir. 2005) (“The trier of fact could reasonably find that Northwest recouped any losses from its predatory pricing quickly after Spirit left these routes. . . . [U]pon Spirit's exit, Northwest increased its prices on these routes to a multiple of seven from its prices during Spirit's presence.”).

Third, the Sherman Act bars monopolists from using a panoply of tortious or unethical acts to acquire, preserve, or extend their power. Such acts can be a form of “cheap exclusion”—conduct that involves minimal or no cost to the monopolist

and lacks any redeeming qualities. Susan A. Creighton et al., *Cheap Exclusion*, 72 Antitrust L. J. 975, 977, 989–90 (2005). A monopolist cannot acquire or extend its dominance by engaging in widespread industrial sabotage or other acts of property destruction. *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 787–88 (6th Cir. 2002). For example, the National Cash Register Company—a prominent monopolist a century ago—maintained its monopoly, in part, through acts of sabotage against the machines of rivals. Kenneth P. Brevoort & Howard P. Marvel, *Successful Monopolization Through Predation: The National Cash Register Company*, *in* Antitrust Law and Economics 85 (John B. Kirkwood ed., 2004). Among other forms of tortious or unethical exclusionary conduct, deception can be the basis for antitrust liability. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 176–78 (1965); *United States v. Microsoft Corp.*, 253 F.3d 34, 76–77 (D.C. Cir. 2001) (en banc).

Even as the Sherman Act prohibits monopolists from acquiring, maintaining, or extending their power through exclusionary, predatory, and other unfair methods, this law allows them to compete through non-predatory price cutting and product improvements. Monopolists are, in general, free to cut prices (so long as they remain above cost), improve their products, and invest in plants and research and development. *See Grinnell*, 384 U.S. at 570–71 (“The offense of monopoly

under [Section 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. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) (Hand, J.) ("A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry.").

II. Self-Preferencing by a Monopolist Can Violate the Sherman Act

A monopolist that uses its dominance to advantage itself and disadvantage rivals in adjacent markets can be liable for monopolization. This conduct involves the monopolist's use of existing market power in one market to obtain an advantage in a connected market. Importantly, the monopolist can be liable even if it does not eliminate rivals in the adjacent market. Using its monopoly power to give affiliates a competitive advantage is sufficient to trigger antitrust liability. Google employed its monopoly in search—not superior terms or service for customers—to gain a critical competitive edge over Dreamstime. Under the Sherman Act, this competition is unfair and "predatory," because Google sought

"to exclude rivals on some basis other than efficiency." *Aspen Skiing*, 472 U.S. at 605.[5]

A monopolist cannot use its dominance to handicap or cripple competition in one or more markets. The Supreme Court ruled that a dominant local newspaper violated the Sherman Act by pressuring advertisers not to do business with a radio station. *Lorain Journal*, 342 U.S. at 149–50. The newspaper refused to run the ads of businesses that also advertised on the radio station. *Id.* The Court found that this constituted monopolistic coercion of advertisers to exclude an emerging competitor:

> The most illuminating of these is the substantial monopoly which was enjoyed in Lorain by the publisher from 1933 to 1948, together with a 99% coverage of Lorain families. Those factors made the Journal an indispensable medium of advertising for many Lorain concerns. Accordingly, its publisher's refusals to print Lorain advertising for those using WEOL [the radio station] for like advertising often amounted to an effective prohibition of the use of WEOL for that purpose. *Id.* at 152–53.

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[5] The Sherman Act protects Dreamstime and other victims of Google's unfair competition. The Supreme Court wrote that that the "the statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982) (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)).

The monopolist newspaper used its power in the advertising market to cripple an emerging rival.

Applying the prohibition against monopoly maintenance or extension through the exercise of market power, the Supreme Court affirmed a finding of monopolization against a vertically integrated electric utility. Otter Tail Power Company was the only utility that could transmit electricity to many towns in Minnesota. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 370 (1973). The Court found that Otter Tail used its monopoly control over the transmission grid to foreclose municipal utilities in the distribution of electricity to customers and protect its own distribution monopolies. *Id.* at 377. Specifically, Otter Tail refused to transmit power over its monopolistic lines from generators to municipal utilities. *Id.* at 371. The Court affirmed the district court's decision against Otter Tail and held that the "[u]se of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of § 2 of the Sherman Act." *Id.* at 377. The Court distinguished such improper conduct from fair competition in which firms, including monopolists, succeed through "superior service, lower costs, and improved efficiency." *Id.* at 380.

A monopolist need not completely foreclose rivals to be liable under the Sherman Act. Using monopoly power to gain a competitive advantage over rivals is sufficient. This Court wrote that "the use of monopoly power," however lawfully

acquired, "'to foreclose competition, *to gain a competitive advantage*, or to destroy a competitor,'" is unlawful. *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997) (emphasis added) (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)). Other courts of appeals have also applied this standard in monopolization cases. In a 2005 decision, the Third Circuit ruled that "[t]he test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." *Dentsply*, 399 F.3d at 191. *See also ZF Meritor*, 696 F.3d at 283 ("'[T]otal foreclosure' is not required for an exclusive dealing arrangement to be unlawful."). The D.C. Circuit applied the same standard in affirming liability against Microsoft. *Microsoft*, 253 F.3d at 71. Reviewing the state of the law, the Eleventh Circuit, in a 2015 decision, observed, "Our sister circuits have found monopolists liable for anticompetitive conduct where, as here, the targeted rival gained market share—but less than it likely would have absent the conduct." *McWane*, 783 F.3d at 838.

The parallels between the conduct of Otter Tail and Google are striking. As Otter Tail did over electric transmission lines in sections of Minnesota, Google has a monopoly in online search. Majority Staff of House Subcomm. on Antitrust, Commercial & Admin. Law, 116th Cong., Investigation of Competition in Digital Markets 176 (2020) (hereinafter "House Report") ("Google overwhelmingly dominates the market for general online search. Publicly available data suggest the

firm captures over 87% of U.S. search and over 92% of queries worldwide."). As with the transmission lines in *Otter Tail*, a search engine is not a facility that rivals can feasibly replicate, let alone on the necessary scale. Just as Otter Tail used its transmission monopoly to confer an advantage on its distribution utility against municipal rivals, Google used its search monopoly to advantage its own services in an adjacent market and disadvantage rivals like Dreamstime. Dreamstime's dramatic loss of visitors to its site following Google's demotion of Dreamstime shows that Google's conduct was functionally equivalent to banishing Dreamstime from search results entirely. *See MetroNet Services Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132–33 (9th Cir. 2004) ("An offer to deal with a competitor only on unreasonable terms and conditions can amount to a practical refusal to deal.").[6] Like Otter Tail, Google, as a monopolistic search engine, has "the power to eliminate competition in a downstream market[.]" *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 543 (9th Cir. 1991).[7]

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[6] In a recent case involving an alleged improper refusal to deal, this Court concluded that "Aerotec [the plaintiff] did not like the business terms offered by Honeywell, especially after things began to change in 2007. But this 'business pattern' can hardly be characterized as so onerous as to be tantamount to the conduct in *Aspen Skiing*." *Aerotec International, Inc. v. Honeywell International, Inc.*, 836 F.3d 1171, 1184 (9th Cir. 2016).

[7] Dreamstime's allegations against Google involved a change to an existing course of dealing, like in *Otter Tail* and unlike in *Trinko*. *See Trinko*, 540 U.S. at 410 ("[T]he defendant [in *Otter Tail*] was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide

Google's self-preferencing and demotion of disfavored firms like Dreamstime in search results constitutes illegal monopolization. For Dreamstime and countless others, Google is an "indispensable medium" and a necessary channel for their success. *Lorain Journal*, 342 U.S. at 152. Functioning as "the front door of the internet," House Report, *supra*, at 180, Google wields extraordinary power and, through its ordering of search results, can marginalize or eliminate rivals in a way that a non-monopolistic search engine cannot. *See id.* at 181 ("Commenting on the stark asymmetry in the general search market, [David Heinemeier] Hansson stated that Yahoo, Bing, and DuckDuckGo all 'could drop [his software company Basecamp] from their listings tomorrow and we'd barely notice,' but '[w]e lose our listing in Google and we may go out of business.'").[8] When Google granted greater visibility in search results to its own Google Images and demoted firms like Dreamstime to pages 4 and beyond of search results, it used its monopoly power in search "to gain a competitive advantage." *Image*

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the same service to certain other customers. In the present case, by contrast, the services allegedly withheld are not otherwise marketed or available to the public.") (citations omitted).

[8] The experience of Basecamp appears to be representative of many other firms. The House Report stated, "One specialized search provider said 97.6% of its traffic comes from Google; another said that Google accounted for such an outsized share of traffic that 'we don't even track non-Google sources.'" House Report, *supra*, at 180.

Technical, 125 F.3d at 1208. Google Images succeeded at the expense of rivals such as Dreamstime because of Google's "dominant economic power"—as opposed to succeeding on account of "superior service, lower costs, and improved efficiency." *Otter Tail*, 410 U.S. at 380. Google employed its monopoly in search—not superior terms or service for customers—to gain a competitive advantage over Dreamstime in online image searches. Indeed, Google's targeting of Dreamstime is not exceptional but a favored tactic of the search monopolist when it seeks to promote its services in adjacent markets.[9] Under the Sherman Act, this competition is unfair and "predatory," because Google aimed "to exclude rivals on some basis other than efficiency." *Aspen Skiing*, 472 U.S. at 605.

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[9] The House Report found that Google routinely uses its search monopoly to elevate its own services and demote rivals. House Report, *supra*, at 187–92. Consider the European Commission's findings in its 2017 decision that Google's self-preferencing is an abuse of dominance:

> While competing comparison shopping services can appear only as generic search results and are prone to the ranking of their web pages in generic search results on Google's general search results pages being reduced ("demoted") by certain algorithms, Google's own comparison shopping service is prominently positioned, displayed in rich format and is never demoted by those algorithms. Google Search (Shopping) Commission Decision (non-confidential version), European Commission ¶ 344 (June 27, 2017).

CONCLUSION

This Court should reverse the district court's decision granting Google's motion to dismiss.

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Respectfully submitted,

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FOR THE NINTH CIRCUIT

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