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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN JOSE DIVISION**

16 FEDERAL TRADE COMMISSION,

17 *Plaintiff,*

18 v.

19 META PLATFORMS, INC., AND
20 WITHIN UNLIMITED, INC.,

21 *Defendants.*

Case No. 5:22-cv-04325-EJD-SVK

**NOTICE OF MOTION AND MOTION OF
THE STATES OF NEW YORK, ALASKA,
CALIFORNIA, CONNECTICUT, DELAWARE,
HAWAII, IDAHO, ILLINOIS, MARYLAND,
MASSACHUSETTS, MINNESOTA,
MISSISSIPPI, MONTANA, NEBRASKA,
NEVADA, NEW JERSEY, NEW MEXICO,
NORTH CAROLINA, NORTH DAKOTA,
OREGON, RHODE ISLAND, UTAH, AND
WASHINGTON, THE DISTRICT OF
COLUMBIA, AND THE TERRITORY
OF GUAM FOR LEAVE TO FILE AN
AMICUS CURIAE BRIEF**

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that the States of New York, Alaska, California, Connecticut,
3 Delaware, Hawaii, Idaho, Illinois, Maryland, Massachusetts, Minnesota, Mississippi, Montana,
4 Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island,
5 Utah, and Washington, the District of Columbia, and the Territory of Guam (“Amici States”) hereby
6 move this Court to file an amicus curiae brief in support of plaintiff Federal Trade Commission’s
7 motion for a preliminary injunction.

8 This motion seeks leave for the Amici States to file the proposed amicus brief that is attached
9 as an exhibit to this motion. The FTC consents to the filing of the amicus brief. The defendants
10 indicated that they oppose the filing as purportedly untimely.

11 The Amici States’ filing is timely because this Court has no established deadline for amicus
12 briefs. Accordingly, the Amici States followed the default schedule in the Federal Rules of Appel-
13 late Procedure and the Rules of the U.S. Supreme Court, filing their amicus brief seven days after
14 the principal brief of the party being supported was filed. *See* Fed. R. App. P. 29(a)(6); U.S. Sup.
15 Ct. R. 37(3)(a). This schedule gives the defendants ample time to review and, as needed, respond
16 to, the States’ brief, twelve-page amicus brief before filing their opposition brief, which is due seven
17 days from today.

18 As this Court has repeatedly recognized, courts have broad discretion to permit amicus
19 briefs, and generally have exercised “great liberality” in permitting such briefs. *See California ex*
20 *rel. Becerra v. United States Dep’t of the Interior*, 381 F. Supp. 3d 1153, 1164 (N.D. Cal. 2019)
21 (quotation marks omitted). In particular, courts “frequently welcome amicus briefs from non-parties
22 concerning legal issues that have potential ramifications beyond the parties directly involved or if
23 the amicus has unique information or perspective that can help the court beyond the help that the
24 lawyers for the parties are able to provide.” *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*,
25 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (quotation marks omitted).

26 The liberality with which courts permit amicus briefs is especially great for States. Under
27 both the Federal Rules of Appellate Procedure and the Rules of the U.S. Supreme Court, States may
28 file amicus briefs even without leave of court or consent of the parties. *See* Fed. R. App. P.

1 29(a)(2); U.S. Sup. Ct. R. 37(4). Although this Court has no express rule regarding amicus
2 participation, it too has permitted States to file amicus briefs, recognizing that States and their
3 respective constituents often have an interest in, and a useful perspective on, the issues presented
4 in cases to which they are not parties. *See, e.g., Levin Richmond Terminal Corp. v. City of Richmond*,
5 482 F. Supp. 3d 944, 951 n.1 (N.D. Cal. 2020) (granting leave for two States to file amicus briefs).
6 The Amici States plainly have interests in, and useful perspectives to add, in this case.

7 *First*, this case—and the pending preliminary injunction motion in particular—will have a
8 substantial effect on the public interest, beyond the parties themselves. Whether Meta Platforms is
9 permitted to acquire Within Unlimited before the lawfulness of the acquisition is fully litigated
10 will affect competition, innovation, and consumer welfare in each of the Amici States’ jurisdictions.
11 As explained in greater detail in the Amici States’ proposed amicus brief, Meta’s proposed acquisi-
12 tion of Within fits neatly into a pattern of recent acquisitions by Meta that have substantially harmed
13 competition, innovation, and consumers, in large part by facilitating Meta’s rapid rise to dominance
14 of digital spaces like the virtual reality space at issue in this case. And these potential harms are
15 of critical interest to the Amici States, which depend on the economic dynamism that competition
16 and innovation promote, and are tasked with protecting competition and consumers within their
17 respective jurisdictions. This case is also likely to affect the future direction of antitrust law
18 governing potential competition, and the Amici States have an interest in sharing their informed
19 views on that matter of public interest. As the Ninth Circuit and this Court have recognized,
20 “assisting in a case of general public interest” like this one is a “classic role” for amici, including
21 States. *See Funbus Sys., Inc. v. California Pub. Utils. Comm’n*, 801 F.2d 1120, 1125 (9th Cir.
22 1986); *accord Levin Richmond*, 482 F. Supp. 3d at 951 n.1.

23 *Second*, as co-enforcers of the federal antitrust laws and enforcers of their own state antitrust
24 laws, the Amici States have unique perspectives and experience to bring to bear in this case. The
25 Amici States have long been at the forefront of efforts to investigate and address digital platforms’
26 potential harms to competition. And the Amici States have continued that role recently in a number
27
28

1 of investigations and enforcement actions involving Meta and other digital platforms.¹ As explained
2 further in the Amici States’ proposed amicus brief, the Amici States’ experience has shown the
3 potential dangers of Meta’s unchecked acquisitions, both in direct harms to competition, and in
4 freeing Meta to exploit user data, eliminate privacy protections, and degrade user experience. The
5 Amici States should be permitted to file their amicus brief to share their experiences with such
6 dangers.

7 For all these reasons, the Court should GRANT the Amici States’ motion.

8 Dated: New York, New York
9 November 7, 2022

Respectfully submitted,
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25 ¹ See, e.g., *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (en banc); *Massachusetts*
26 *v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004); *New York v. Meta Platforms, Inc.*, No. 21-7078
27 (D.C. Cir.) (pending); *Colorado v. Google LLC*, No. 20-cv-3715 (D.D.C.) (pending); *Utah v. Google*
28 *LLC*, No. 21-cv-5227 (N.D. Cal.) (pending).

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EXHIBIT 1

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10 **UNITED STATES DISTRICT COURT**
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18 *Defendants.*

Case No. 5:22-cv-04325-EJD-SVK

**[PROPOSED] BRIEF FOR THE STATES
OF NEW YORK, ALASKA, CALIFORNIA,
CONNECTICUT, DELAWARE, HAWAII,
IDAHO, ILLINOIS, MARYLAND,
MASSACHUSETTS, MINNESOTA,
MISSISSIPPI, MONTANA, NEBRASKA,
NEVADA, NEW JERSEY, NEW MEXICO,
NORTH CAROLINA, NORTH DAKOTA,
OREGON, RHODE ISLAND, UTAH, AND
WASHINGTON, THE DISTRICT OF
COLUMBIA, AND THE TERRITORY
OF GUAM AS AMICI CURIAE IN
SUPPORT OF PLAINTIFF’S MOTION
FOR A PRELIMINARY INJUNCTION**

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20
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27
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Cases	Page(s)
<i>Brown Shoe Co. v. United States</i> , 370 U.S. 294 (1962).....	12
<i>FTC v. Procter & Gamble Co.</i> , 386 U.S. 568 (1967).....	12
<i>FTC v. Warner Commc’ns Inc.</i> , 742 F.2d 1156 (9th Cir. 1984)	3
<i>In re Google Digital Advert. Antitrust Litig.</i> , Nos. 21-md-3010, 21-cv-6841, 2022 WL 4226932 (S.D.N.Y. Sept. 13, 2022).....	2
<i>Massachusetts v. Microsoft Corp.</i> , 373 F.3d 1199 (D.C. Cir. 2004).....	1
<i>New York v. Facebook, Inc.</i> , 549 F. Supp. 3d 6 (D.D.C. 2021).....	4
<i>United States v. Marine Bancorporation, Inc.</i> , 418 U.S. 602 (1974).....	11-12
<i>United States v. Microsoft</i> , 253 F.3d 34 (D.C. Cir. 2001).....	1
Laws	
15 U.S.C.	
§ 18.....	10
§ 45.....	10
§ 53.....	3
Miscellaneous Authorities	
Ben Lang, <i>FTC Sues to Block Meta’s Acquisition of Top VR Fitness App Developer</i> , Road to VR (July 27, 2022), https://www.roadtovr.com/meta-supernatural-within-acquisition-price-ftc-scrutiny-report/	9
C. Scott Hemphill & Tim Wu, <i>Nascent Competitors</i> , 168 U. Pa. L. Rev. 1879 (2020), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9715&context=pen_n_law_review	6
Colleen Cunningham et al., <i>Killer Acquisitions</i> , 129 J. Pol. Econ. 649 (2021), https://www.journals.uchicago.edu/doi/epdf/10.1086/712506	6

Miscellaneous Authorities

Page(s)

1

2 Comments from Att’ys Gen. in Response to Request for Information on Merger
3 Enforcement (Apr. 21, 2022), [https://www.naag.org/wp-](https://www.naag.org/wp-content/uploads/2022/08/Public-Comments-of-23-State-Attorneys-General-.pdf)
4 [content/uploads/2022/08/Public-Comments-of-23-State-Attorneys-General-.pdf](https://www.naag.org/wp-content/uploads/2022/08/Public-Comments-of-23-State-Attorneys-General-.pdf) 2

5 Cristina Caffarra et al., “*How Tech Rolls*”: *Potential Competition and “Reverse”*
6 *Killer Acquisitions*, Ctr. for Econ. Pol’y Rsch. (May 11, 2020),
7 [https://new.cepr.org/voxeu/blogs-and-reviews/how-tech-rolls-potential-](https://new.cepr.org/voxeu/blogs-and-reviews/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions)
8 [competition-and-reverse-killer-acquisitions](https://new.cepr.org/voxeu/blogs-and-reviews/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions) 6

9 Federal Trade Comm’n, *Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study* (Sept. 2021),
10 [https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-](https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf)
11 [technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf](https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf) 5

12 Jon Fingas, ‘*Beat Saber*’ Now Has an Official Song Designed to Keep You Fit, Engadget
13 (Apr. 12, 2020), <https://www.engadget.com/beat-saber-fitbeat-024917974.html> 9-10

14 *Meta Platforms, Inc. (META) CEO Mark Zuckerberg on Q2 2022 Results -*
15 *Earnings Call Transcript*, Seeking Alpha (July 29, 2022),
16 [https://seekingalpha.com/article/4527416-meta-platforms-inc-meta-ceo-mark-](https://seekingalpha.com/article/4527416-meta-platforms-inc-meta-ceo-mark-zuckerberg-on-q2-2022-results-earnings-call-transcript)
17 [zuckerberg-on-q2-2022-results-earnings-call-transcript](https://seekingalpha.com/article/4527416-meta-platforms-inc-meta-ceo-mark-zuckerberg-on-q2-2022-results-earnings-call-transcript) 10

18 Nancy Schimelpfening, *I Tried It: ‘Supernatural’ VR Workout on Oculus Quest*,
19 *Healthline* (Mar. 4, 2021), [https://www.healthline.com/health-news/i-tried-it-](https://www.healthline.com/health-news/i-tried-it-supernatural-vr-workout-on-oculus-quest#Supernatural-vs.-Beat-Saber)
20 [supernatural-vr-workout-on-oculus-quest#Supernatural-vs.-Beat-Saber](https://www.healthline.com/health-news/i-tried-it-supernatural-vr-workout-on-oculus-quest#Supernatural-vs.-Beat-Saber) 10

21 Press Release, Eur. Comm’n, *Mergers: Commission Fines Facebook €110 Million for*
22 *Providing Misleading Information About WhatsApp Takeover* (May 18, 2017),
23 https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369 7

24 Simple Investing, *Meta: The Metaverse Is Becoming a Reality*, Seeking Alpha (Oct. 22, 2022),
25 <https://seekingalpha.com/article/4548312-meta-metaverse-becoming-reality> 10

26 Stigler Comm. on Digit. Platforms, *Final Report* (Sept. 2019),
27 [https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---](https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf)
28 [committee-report---stigler-center.pdf](https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf) 5

Tim Bajarin, *Could Fitness Be the Killer App for the Metaverse? Or Is It Gaming? Or*
Both?, *Forbes* (Dec. 24, 2021),
[https://www.forbes.com/sites/timbajarin/2021/12/24/could-fitness-be-the-killer-](https://www.forbes.com/sites/timbajarin/2021/12/24/could-fitness-be-the-killer-app-for-the-metaverse-or-is-it-gaming-or-both/?sh=294291b1146f)
[app-for-the-metaverse-or-is-it-gaming-or-both/?sh=294291b1146f](https://www.forbes.com/sites/timbajarin/2021/12/24/could-fitness-be-the-killer-app-for-the-metaverse-or-is-it-gaming-or-both/?sh=294291b1146f) 9

Tim Wu & Stuart A. Thompson, *The Roots of Big Tech Run Disturbingly Deep*,
N.Y. Times (June 7, 2019),
[https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-](https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html)
[mergers-acquisitions-antitrust.html](https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html) 7

Within (VR/AR), *Summary*, Crunchbase,
<https://www.crunchbase.com/organization/vrse/companyfinancials> 9

Miscellaneous Authorities

Page(s)

Workout Near, Go Far: Stay Fit with ‘Supernatural,’ the Daily Fitness Adventure Out Now on Oculus Quest, Meta Quest: Oculus Blog (Apr. 23, 2020), <https://www.oculus.com/blog/workout-near-go-far-stay-fit-with-supernatural-the-daily-fitness-adventure-out-now-on-oculus-quest/>.....10

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INTRODUCTION AND INTEREST OF AMICI

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2 The States of New York, Alaska, California, Connecticut, Delaware, Hawaii, Idaho, Illinois,
3 Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New
4 Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Utah, and Washington, the District
5 of Columbia, and the Territory of Guam (“Amici States”) file this amicus brief in support of the
6 Federal Trade Commission’s motion for a preliminary injunction against Meta Platforms’ proposed
7 acquisition of Within Unlimited. As co-enforcers of the federal antitrust laws and enforcers of their
8 own state antitrust laws, the Amici States have unique experience and interest in promoting the
9 competition, innovation, and economic dynamism that are key drivers of the Amici States’ econo-
10 mies, and in protecting their citizens from anticompetitive harms, including those arising from
11 acquisitions that eliminate potential competition. The Amici States file this brief to protect busi-
12 nesses and consumers in their States from harm that may result if the FTC is denied the opportunity
13 to fully adjudicate the lawfulness of Meta’s acquisition of Within before the acquisition takes place.

14 The Amici States’ experience demonstrates that the equities and the public interest favor a
15 preliminary injunction of Meta’s acquisition of Within. The proposed acquisition fits neatly into a
16 pattern of recent acquisitions by Meta that have facilitated its rapid rise to dominance of digital
17 spaces, including the virtual reality space at issue in this case, and that have substantially harmed
18 competition, innovation, and consumers. The Amici States’ experience also demonstrates that the FTC
19 is likely to prevail on the merits because Meta’s acquisition of Within may substantially lessen
20 competition and tend to create a monopoly by eliminating both perceived and actual potential
21 competition.

22 The Amici States have long been at the forefront of efforts to investigate and address the
23 potential harms to competition raised by digital platforms. More than two decades ago, a bipartisan
24 coalition of States, coordinating with the United States, filed an antitrust complaint against an early
25 dominant tech player, Microsoft, resulting in a landmark decision and a remedial decree requiring
26 Microsoft to take numerous actions to promote competition in the market for personal computer
27 operating systems. *See United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (en banc); *Massa-*
28 *chusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

1 The Amici States have since continued their leading role in investigating the potential
 2 anticompetitive effects of digital platforms' actions and in taking enforcement action when necessary.
 3 For example, a bipartisan coalition of States, coordinating with the FTC, are currently litigating an
 4 antitrust case arising from defendant Meta's acquisitions and monopolization in the personal social
 5 networking market. In that case, the States' and FTC's investigations have revealed that Meta
 6 (previously Facebook) engaged in a strategy to cement its monopoly by "buying or burying" nascent
 7 and potential competitors, which chilled innovation and deterred investment in social networking
 8 alternatives, and freed Meta to weaken user privacy and data protection and to allow misinforma-
 9 tion and violent or otherwise objectionable content to proliferate on its platform.¹ States are also
 10 litigating antitrust enforcement actions against other digital platforms, like Google, related to harms
 11 that these platforms have allegedly caused to competition, innovation, and, ultimately, to consumers.²
 12 And earlier this year, the Attorneys General of a bipartisan coalition of States submitted public
 13 comments to the FTC and the U.S. Department of Justice, urging robust merger enforcement to
 14 protect potential competition.³

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 19 ¹ See, e.g., Compl. ¶¶ 4-8, *New York v. Facebook, Inc.*, No. 20-cv-3589 (D.D.C. Dec. 21,
 20 2020), ECF No. 53-1 ("*New York Compl.*"); accord Am. Compl. ¶¶ 11, 66, 105, 127, 129, 217,
 21 233, 240, *FTC v. Meta Platforms, Inc.*, No. 20-cv-3590 (D.D.C. Sept. 8, 2021), ECF No. 82 ("*FTC*
 22 *Am. Compl.*").

23 ² See, e.g., *In re Google Digital Advert. Antitrust Litig.*, Nos. 21-md-3010, 21-cv-6841,
 24 2022 WL 4226932 (S.D.N.Y. Sept. 13, 2022) (largely denying Google's motion to dismiss); Compl.
 25 *Colorado v. Google LLC*, No. 20-cv-3715 (D.D.C. Jan. 4, 2021), ECF No. 60; First Am. Compl.
 26 *Utah v. Google LLC*, No. 21-cv-5227 (N.D. Cal. Nov. 1, 2021), ECF No. 188.

27 ³ Comments from Att'ys Gen. in Response to Request for Information on Merger Enforce-
 28 ment (Apr. 21, 2022) ([internet](#)). (For sources available on the internet, full URLs appear in the
 Table of Authorities. All URLs were last visited on November 7, 2022.)

ARGUMENT

Section 13(b) of the FTC Act empowers courts to issue interim injunctive relief to preserve the status quo while the FTC decides the legality of an acquisition in an adjudicatory agency proceeding. *See* 15 U.S.C. § 53(b). In evaluating such interim relief, the court does not decide the merits, but rather whether preliminary relief is in the public interest, as determined by the equities and the FTC’s likelihood of success on the merits. *See id.* Here, the Amici States’ experience demonstrates that the equities strongly favor a preliminary injunction, and that the FTC is likely to prevail on the merits.⁴

I. The Amici States’ Experience Demonstrates That the Equities and Public Interest Favor a Preliminary Injunction of Meta’s Acquisition of Within.

A. A Preliminary Injunction Is Necessary to Preserve the Status Quo While the FTC Undertakes a Full Adjudication of Meta’s Acquisition of Within.

The FTC’s requested preliminary injunction is necessary to preserve the status quo until the FTC adjudicates whether Meta’s acquisition of Within is lawful. As the Ninth Circuit has emphasized, at this preliminary stage, an injunction to preserve the status quo is appropriate so long as the FTC raises questions serious enough to provide “fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.” *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984) (quotation marks omitted). The FTC has satisfied that standard here. The experience of the Amici States, discussed further below, supports the FTC’s view that Meta’s proposed acquisition of Within threatens to substantially harm competition in the emerging virtual reality space. Particularly in light of the historical pattern of anticompetitive acquisitions by Meta, it is crucial that the FTC be permitted to undertake a thorough, careful review of Meta’s proposed acquisition of Within before it is allowed to go forward.

⁴ For many of the same reasons that the FTC’s motion for a preliminary injunction should be granted, Meta’s pending motion to dismiss the FTC’s complaint (ECF No. 108) is meritless and should be denied.

1 Moreover, the States’ past enforcement efforts underscore that Meta’s acquisition of Within
2 should be preliminarily enjoined now, before the damage is done. If the preliminary injunction is
3 not granted, the acquisition will proceed, and Meta will be able to access Within’s confidential
4 strategic information and to begin integrating the firms. Immediate harms to competition and
5 innovation may result. And Meta will likely argue in any future related antitrust challenge—as it
6 successfully argued in the district court in the States’ pending antitrust case against Meta—that it
7 will be too late to unwind any competitive harms that result from the acquisition of Within once
8 the acquisition has closed.⁵ Accordingly, the public interest strongly supports a preliminary injunc-
9 tion to preserve the status quo while the FTC’s adjudication proceeds.

10 **B. State Enforcement Efforts Underscore the Dangers That Acquisitions by**
11 **Digital Platforms Like Meta May Pose to Competition and Innovation.**

12 In recent years, it has become increasingly clear to the Amici States through their investiga-
13 tions and enforcement actions that digital markets are especially prone to threats to competition,
14 innovation, and consumers. Digital platforms like Meta’s, which facilitate interactions and trans-
15 actions between users in a digital space, can amass market power across multiple complementary
16 markets and features, allowing them to dominate entire digital realms, as Meta has dominated the
17 personal social networking space and now increasingly dominates the virtual reality space at issue
18 here. Meta’s dominance has allowed it to become a gatekeeper, giving it power to dictate the terms
19 of access to its digital spaces for other firms and for consumers. Wielding such market power, Meta
20 has thrived by exploiting users’ data, both to keep users engaged with its products and to sell profit-
21 able targeted advertising. Meta’s digital platforms share a distinctive set of features that can help
22 entrench dominance.

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25 ⁵ See *New York v. Facebook, Inc.*, 549 F. Supp. 3d 6, 29-31, 35-38 (D.D.C. 2021). Although
26 the district court dismissed the States’ complaint against Meta largely on the basis of timeliness
27 considerations, the States’ appeal is pending in the D.C. Circuit. See *New York v. Meta Platforms,*
28 *Inc.*, No. 21-7078 (D.C. Cir.). The FTC’s parallel action also remains pending in the district court.
See FTC v. Meta Platforms, Inc., No. 20-cv-3590 (D.D.C.).

1 First, Meta’s digital platforms exhibit strong *network effects*. The more users its platforms
2 have, the more appealing they become for other users to join and use. Such network effects pose a
3 substantial barrier to entry for potential competitors because users do not want to switch to new
4 platforms that do not have as many other users.

5 Second, and relatedly, Meta’s digital platforms exhibit strong *economies of both scale and*
6 *scope*. The platforms benefit from growing by adding more users (scale) and by expanding into
7 features that complement those the platform already offers (scope). The additional users and features
8 increase network effects, provide more data to the platform, and can increase entry barriers that
9 rivals must overcome.

10 Third, Meta’s digital platforms exhibit *close-to-zero marginal costs* to reach new users. A
11 new user can join and use an established platform like Meta’s Facebook platform at virtually no
12 cost to the platform. Thus, once a platform establishes strong network effects, it is well positioned
13 to grow rapidly into a dominant, gatekeeper position, and to amplify barriers to entry for new
14 competitors.⁶

15 It also has become increasingly clear to the Amici States that digital platforms like Meta’s
16 have often cemented market dominance in large part through acquisitions. A recent FTC study of
17 acquisitions of \$1 million or more revealed that, from 2010 to 2019, five leading digital platforms
18 (Amazon, Apple, Facebook/Meta, Google/Alphabet, and Microsoft) bought some 616 companies.
19 In many cases, the platforms acquired relatively small, young companies.⁷

20 And as leading economists have emphasized, such acquisitions by digital platforms like
21 Meta may present serious threats to the public interest by empowering already dominant incumbents
22 to eliminate nascent or potential competition, and to discontinue innovation by the platform, the
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27 ⁶ See generally Stigler Comm. on Digit. Platforms, Final Report (Sept. 2019) ([internet](#)).

28 ⁷ FTC, *Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An*
FTC Study 13, 36-37 (Sept. 2021) ([internet](#)).

1 target firm, or both.⁸ Indeed, sophisticated incumbent companies sitting at the center of a digital
2 ecosystem, like Meta in virtual reality, are uniquely positioned to quickly identify acquisition targets
3 that threaten their dominant positions.⁹

4 The Amici States’ experience shows that Meta’s prior acquisitions have harmed competition
5 in a variety of ways—underscoring that the FTC should be allowed to adjudicate the lawfulness
6 of Meta’s current acquisition of Within before the acquisition is completed and potentially harms
7 competition. Meta’s past acquisitions have sometimes eliminated nascent existing competitors
8 operating in the same core space as the platform. For instance, Meta acquired Instagram, a growing
9 social networking competitor, for a hefty premium of \$1 billion.¹⁰ It has since become clear to the
10 States that this acquisition harmed competition by helping Meta eliminate an emerging competitor
11 and entrench its market power over personal social networking services. In fact, as the States learned
12 from their investigation, Meta CEO Mark Zuckerberg acknowledged at the time of the Instagram
13 acquisition that a rationale for the acquisition was to “neutralize” a nascent competitor.¹¹

14 At other times, by acquiring complementary businesses that were operating outside of the
15 platform’s core functionality, Meta has eliminated *potential* competition. For example, Meta acquired
16 leading messaging app WhatsApp for an extraordinary sum of nearly \$19 billion in an effort to
17 prevent WhatsApp from exploiting its large user base to become a competitor of Meta in social
18 networking.¹² Meta also acquired at least one firm—Onavo, which facilitated analysis of app usage
19 data—for the purpose of allowing Meta to identify more emerging competitive threats to eliminate,

21 ⁸ See, e.g., Colleen Cunningham et al., *Killer Acquisitions*, 129 J. Pol. Econ. 649 (2021)
22 ([internet](#)); Cristina Caffarra et al., “*How Tech Rolls*”: *Potential Competition and “Reverse” Killer*
23 *Acquisitions*, Ctr. for Econ. Pol’y Rsch. (May 11, 2020) ([internet](#)).

24 ⁹ See C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. Pa. L. Rev. 1879, 1905-
25 06 (2020) ([internet](#)).

26 ¹⁰ See *New York Compl.*, *supra*, ¶¶ 107-128; *accord FTC Am. Compl.*, *supra*, ¶¶ 80-106.

27 ¹¹ See *New York Compl.*, *supra*, ¶¶ 102, 114-116 (quotation marks omitted); *accord FTC*
28 *Am. Compl.*, *supra*, ¶¶ 89-107.

¹² See *New York Compl.*, *supra*, ¶¶ 149-175; *accord FTC Am. Compl.*, *supra*, ¶¶ 107-129.

1 and to preclude existing rivals from having access to the same capabilities.¹³ In acquiring comple-
2 mentary businesses outside its core functionality, Meta cemented its dominance by adding to its
3 network effects and economies of scale and scope—thereby generating valuable new user engage-
4 ment and data for the platform. For instance, after acquiring WhatsApp, Meta exploited WhatsApp’s
5 user data to benefit Meta’s core platform.¹⁴

6 Meta’s acquisitions also have suppressed innovation. For example, after Meta acquired
7 Instagram, it terminated work on its own innovative alternative: Facebook Camera.¹⁵ In other cases,
8 Meta has shut down the services of innovative acquired firms altogether, having accomplished its
9 goal of eliminating a nascent or potential competitor or denying the firm to an existing rival.¹⁶ In
10 fact, Meta has reportedly shut down nearly half of its acquisitions.¹⁷

11 But, because Meta’s pattern of anticompetitive acquisitions was not clear until recently, the
12 States did not challenge their lawfulness until later, when anticompetitive effects were already
13 substantial. That history highlights the need to permit the FTC’s thorough adjudication of Meta’s
14 latest proposed acquisition now, *before* the acquisition proceeds.

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20 ¹³ See *New York Compl.*, *supra*, ¶¶ 137-148; *accord FTC Am. Compl.*, *supra*, ¶¶ 69-74.

21 ¹⁴ See *New York Compl.*, *supra*, ¶¶ 176-178; *accord FTC Am. Compl.*, *supra*, ¶¶ 127, 153.
22 In fact, Meta exploited WhatsApp’s data despite promising regulators responsible for reviewing
23 the acquisition that it would not do so. Meta was ultimately fined €110 million for misleading the
24 regulators. See Press Release, Eur. Comm’n, *Mergers: Commission Fines Facebook €110 Million*
25 *for Providing Misleading Information About WhatsApp Takeover* (May 18, 2017) ([internet](#)).

26 ¹⁵ *New York Compl.* ¶ 124; *accord FTC Am. Compl.*, *supra*, ¶¶ 84-85, 98-99.

27 ¹⁶ See, e.g., *New York Compl.*, *supra*, ¶ 184; *accord FTC Am. Compl.*, *supra*, ¶¶ 74-76.

28 ¹⁷ Tim Wu & Stuart A. Thompson, *The Roots of Big Tech Run Disturbingly Deep*, N.Y.
Times (June 7, 2019) ([internet](#)).

1 **C. Meta’s Acquisition of Within Poses Dangers to Competition and Innovation.**

2 Having achieved dominance in personal social networking, Meta has turned its attention to
3 the rapidly growing virtual reality space. Meta has acknowledged that its strategy is to “us[e]
4 acquisitions opportunistically” to bolster its position as a leading virtual reality company, just as
5 it previously used acquisitions as part of its strategy to dominate personal social networking.¹⁸

6 The need to allow the FTC to adjudicate the lawfulness of Meta’s acquisition of Within now,
7 before the acquisition goes forward, is underscored by Meta’s recent moves toward a dominant
8 position in each part of the virtual reality space—largely through acquisitions. Meta has moved
9 toward a dominant position in (1) the headset used to access the virtual reality environment, with
10 its Meta Quest 2, the leading virtual reality headset in the United States; (2) the apps, with number
11 one game Beat Saber and many other popular titles; and (3) app distribution, with the Quest Store,
12 the leading virtual reality app store.¹⁹ As it previously did in the social networking space, Meta
13 has used serial acquisitions to move toward dominance in the virtual reality space—as in its
14 acquisitions of the Oculus headset manufacturer that provided the basis for Meta’s market-leading
15 Quest 2, and the Beat Saber game studio and numerous other app studios.²⁰ The appendix to this
16 brief lists seventeen publicly disclosed virtual reality–related acquisitions by Meta, largely in the
17 last two years.

18 By purchasing Within, the creator of the app Supernatural, Meta seeks to expand its
19 developing virtual reality dominance into the fast-growing and highly concentrated market for
20 virtual reality dedicated fitness apps—i.e., apps designed to allow users to exercise through a struc-
21 tured workout in their own homes.²¹ Virtual reality fitness is, in the words of Within’s founder and
22 CEO, a “killer use case” for virtual reality; it has been driving many new users to buy Meta’s virtual
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26 ¹⁸ Am. Compl. for a Prelim. Inj. (Am. Compl.) ¶ 7 (Oct. 7, 2022), ECF No. 101-1.

27 ¹⁹ *See id.* ¶¶ 2-5.

28 ²⁰ *See, e.g., id.* ¶¶ 3-4.

²¹ *See id.* ¶ 35.

1 reality headsets and to begin using virtual reality products.²² Meta is poised to, and perceived as
2 likely to, enter the virtual reality dedicated fitness market independently by introducing its own
3 competing app.²³ But, instead, Meta now proposes to buy the leading existing virtual reality dedi-
4 cated fitness app, Supernatural, to eliminate the need for competition and innovation.²⁴

5 The Amici States' enforcement experience strongly suggests that Meta's acquisition of
6 Within threatens harms to competition and the public interest similar to the harms from Meta's
7 past efforts to use acquisitions to entrench market dominance in the personal social networking
8 market. By purchasing Within, Meta will have bought a dominant position in the rapidly growing
9 dedicated fitness segment of the virtual reality space, and removed competitive rivalry between
10 Within and Meta and related incentives for Within to take risks, innovate, and introduce new
11 products, features, and experiences. At the same time, Meta will have helped cement its dominance
12 in the virtual reality space as a whole, by bringing new, fitness-focused users into Meta's suite of
13 virtual reality products. Thus, the acquisition will raise entry barriers for other potential competitors
14 in the virtual reality space. Meta's reported willingness to pay over \$400 million for the acquisition
15 of Within, several times the total funding Within received over its entire corporate existence,
16 suggests that Meta is willing to pay a large premium to lock in its dominance²⁵—just as Meta was
17 willing to pay large premiums for the same purpose when it previously acquired Instagram and
18 WhatsApp (see *supra* at 6). The equities therefore strongly support a preliminary injunction to
19 preserve the status quo while the FTC's challenge to the acquisition proceeds.

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23 ²² See *id.* ¶¶ 8, 71 (quotation marks omitted); see also Tim Bjarin, *Could Fitness Be the*
24 *Killer App for the Metaverse? Or Is It Gaming? Or Both?*, Forbes (Dec. 24, 2021) ([internet](#)).

25 ²³ See, e.g., Am. Compl. ¶¶ 68, 79, 93; Jon Fingas, *'Beat Saber' Now Has an Official Song*
26 *Designed to Keep You Fit*, Engadget (Apr. 12, 2020) ([internet](#)).

27 ²⁴ See Am. Compl. ¶¶ 8, 11.

28 ²⁵ See Ben Lang, *FTC Sues to Block Meta's Acquisition of Top VR Fitness App Developer*,
Road to VR (July 27, 2022) ([internet](#)); Within (VR/AR), *Summary*, Crunchbase ([internet](#)).

II. The FTC Is Likely to Prevail on the Merits Because Meta’s Acquisition of Within Likely Would Substantially Lessen Competition.

The FTC is likely to prevail on the merits because Meta’s acquisition of Within likely would substantially lessen competition and tend to create a monopoly in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.

Based on their experience, the Amici States agree with the FTC that Meta’s acquisition of Within likely would eliminate both perceived and actual potential competition in violation of the antitrust laws. Meta has strong incentives to fortify its dominance in the virtual reality space by expanding into the dedicated fitness market. Moreover, while Meta does not currently have its own virtual reality dedicated fitness app, the company’s already dominant position and ongoing massive investments in virtual reality and related technologies—totaling more than \$25 billion since 2020²⁶—give Meta ideal means to develop a competing dedicated fitness app, particularly by adapting its existing leading virtual reality app, Beat Saber, which already has a fitness dimension.²⁷

Indeed, Meta is already innovating to position itself to enter the virtual reality dedicated fitness market to compete against Supernatural. It has (1) released FitBeat, a Beat Saber audio track designed to keep users fit; (2) launched a fitness advertising campaign around Beat Saber’s expanded music; and (3) promoted fitness using, for example, Oculus Move, a tool that tracks active time and calories burned.²⁸ For its part, Within responded to Meta’s perceived likely entry by differentiating its Supernatural app with (1) music; (2) wide-ranging fitness movement; and (3) trainer-coaches and expert-choreographed work-out routines.²⁹ Thus, Meta and Within are currently inno-

²⁶ See *Meta Platforms, Inc. (META) CEO Mark Zuckerberg on Q2 2022 Results - Earnings Call Transcript*, Seeking Alpha (July 29, 2022) ([internet](#)); Simple Investing, *Meta: The Metaverse Is Becoming a Reality*, Seeking Alpha (Oct. 22, 2022) ([internet](#)).

²⁷ See Am. Compl. ¶ 68.

²⁸ See Fingas, *supra*; Am. Compl. ¶ 64.

²⁹ See, e.g., Nancy Schimelpfening, *I Tried It: ‘Supernatural’ VR Workout on Oculus Quest*, Healthline (Mar. 4, 2021) ([internet](#)); *Workout Near, Go Far: Stay Fit with ‘Supernatural,’ the Daily Fitness Adventure Out Now on Oculus Quest*, Meta Quest: Oculus Blog (Apr. 23, 2020) ([internet](#)).

1 vating against each other in anticipation of Meta’s market entry. Meta’s proposed acquisition of
2 Within would eliminate not only this present rivalrous innovation, but also the resulting direct
3 product competition between Meta, Within, and other industry participants if Meta enters the dedi-
4 cated fitness market.

5 Meta is therefore a powerful *actual* potential competitor in the market for virtual reality
6 dedicated fitness apps, already innovating actively, and well positioned to enter the market through
7 internal expansion or by purchasing a nondominant app. Similarly, Meta is a powerful *perceived*
8 potential competitor, which existing market participants view as likely to enter the market for virtual
9 reality dedicated fitness apps.

10 Meta’s acquisition of Within is precisely the sort of acquisition that the Supreme Court has
11 recognized as likely to eliminate potential competition in violation of Section 7. As the Supreme
12 Court has explained, the factors pertinent to any potential competition case include “[1] the econo-
13 mic feasibility and likelihood of de novo entry, [2] the capabilities and expansion history of the
14 acquiring firm, and [3] the performance as well as the structural characteristics of the target market.”
15 *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 642 (1974). As the Amici States’
16 experience with Meta and other digital platforms makes clear, all of these factors suggest that
17 Meta’s acquisition of Within would unlawfully eliminate potential competition. As a platform that
18 increasingly dominates and seeks to entrench dominance in the virtual reality space, Meta has a
19 highly feasible and likely route to de novo entry into a complementary virtual reality market (dedi-
20 cated fitness apps), especially given its existing Beat Saber app. Meta’s capabilities are also much
21 greater and its expansion history is much more aggressive than typical entrants. And the virtual
22 reality space is hospitable to dominant platforms like Meta because of network effects and economies
23 of scale and scope, magnifying the risk that the already highly concentrated fitness app segment
24 will become more concentrated by Meta’s acquisition, rather than benefitting from deconcentrat-
25 ing effects of Meta’s independent entry.

26 Although Meta’s motion to dismiss asserts that antitrust claims based on eliminating poten-
27 tial competition are rare, the Supreme Court has blocked an acquisition that eliminates potential
28 competition in a situation that closely parallels the situation here. In *FTC v. Procter & Gamble Co.*,

1 the Supreme Court blocked dominant household products supplier Procter & Gamble’s acquisition
2 of Clorox, the leading manufacturer of a complementary household product, bleach—even though
3 Procter & Gamble was not at the time a competitor in the market for bleach. *See* 386 U.S. 568,
4 568-72, 580 (1967). The Court did so because Procter & Gamble was a powerful potential competi-
5 tor to Clorox in the bleach market, just as Meta is a powerful potential competitor to Within here.
6 As the Court explained, Procter & Gamble “was engaged in a vigorous program of diversifying into
7 product lines closely related to its basic products.” *Id.* at 580. So too here, Meta has been diversify-
8 ing its virtual reality products. And the Court further explained that Procter & Gamble had recently
9 launched a new cleaner in a market adjacent to the bleach market. Bleach was thus “a natural avenue
10 of diversification” for Procter & Gamble since it was “complementary to Procter’s products” and
11 already “sold to the same customers through the same channels” as Procter & Gamble’s existing
12 products. *Id.* Here, a virtual reality dedicated fitness app would be complementary to Meta’s other
13 virtual reality products and would be sold to virtual reality users through the same channels as
14 existing Meta products, like Beat Saber. Meta’s acquisition of Within is thus a formidable threat
15 to potential competition for the same reasons as the Procter & Gamble acquisition of Clorox that
16 the Supreme Court found unlawful.

17 Moreover, contrary to Meta’s suggestion in its motion to dismiss, Meta’s entry as a leading
18 competitor need not be certain in order for the FTC to have a Section 7 claim. In enacting that
19 provision, Congress aimed to address threats to competition while they were “still in [their]
20 incipency,” before market power was cemented. *See Brown Shoe Co. v. United States*, 370 U.S.
21 294, 317-18 & n.32 (1962). Congress therefore was concerned “with probabilities, not certainties,”
22 and prohibited any acquisitions the effect of which ““*may*” be substantially to lessen competition
23 or to tend to create a monopoly. *See id.* at 323 (quoting Section 7). That standard recognizes that
24 “[u]nequivocal proof that an acquiring firm actually would have entered de novo but for a merger
25 is rarely available.” *See Marine Bancorporation*, 418 U.S. at 624. Meta’s acquisition of Within
26 may substantially lessen competition or tend to create a monopoly; thus, it should be preliminarily
27 enjoined.

1 **CONCLUSION**

2 The Court should grant the preliminary injunction sought by the FTC.

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Appendix: Virtual Reality–Related Acquisitions by Meta*

Hardware & Technology Acquisitions			Application & Studio Acquisitions		
1.	2014	Oculus: VR headset manufacturer.	1.	2019	Beat Games: creator of Beat Saber.
2.	2016	Zurich Eye: visual navigation for machines.	2.	2020	Sanzaru Games: creator of fantasy combat game Asgard’s Wrath.
3.	2019	CTRL-Labs: wristbands that monitor motor neurons for movement.	3.	2020	Ready at Dawn Studios: creator of zero-gravity adventure game Lone Echo II, and online team sports game Echo VR.
4.	2019	Scape Technologies: visual positioning technology helping machines to understand their surroundings.	4.	2021	Downpour Interactive: creator of team-based combat game Onward.
5.	2020	Mapillary: spatial mapping and imaging.	5.	2021	Bigbox VR: creator of multiplayer combat game Population: One.
6.	2020	Lemnis Technologies: lens technology.	6.	2021	Unit 2 Games: creator of a collaborative platform for creating and playing users’ own games, Crayta.
7.	2021	ImagineOptix: lenses for VR headsets.	7.	2021	Twisted Pixel Games: creator of various virtual reality games, including combat and mystery thriller games.
8.	2022	Lofelt: technology that replicates touch in a virtual setting.	8.	2022	Camouflaj: creator of Marvel comic-based game Iron Man VR
			9.	2022	Armature Studio: creator of virtual reality combat game Resident Evil 4.

1 *Sources:

2 Alejandro Medellin, *How Meta Plans to Dominate the Metaverse: Buy Everything in Sight,*
3 Input (Dec. 22, 2021), [https://www.inputmag.com/tech/how-meta-plans-dominate-metaverse-buy-](https://www.inputmag.com/tech/how-meta-plans-dominate-metaverse-buy-every-vr-company)
4 [every-vr-company](https://www.inputmag.com/tech/how-meta-plans-dominate-metaverse-buy-every-vr-company).

5 Jasmine Teng, *Metaverse Shopping Spree: What Facebook's VR Acquisitions Tell Us About*
6 *Its Future*, Quartz (Nov. 9, 2021), [https://qz.com/2086381/what-facebooks-vr-acquisitions-tell-us-](https://qz.com/2086381/what-facebooks-vr-acquisitions-tell-us-about-metas-future/)
7 [about-metas-future/](https://qz.com/2086381/what-facebooks-vr-acquisitions-tell-us-about-metas-future/).

8 Nick Statt, *Meta Acquires Three New VR Game Developers for Oculus Studios*, Protocol
9 (Oct. 11, 2022), <https://www.protocol.com/bulletins/meta-oculus-studios-game-developer>.

10 Peter Kafka, *Facebook Is Quietly Buying Up the Metaverse: Can Mark Zuckerberg M&A*
11 *a New Monopoly?*, Vox (Nov. 11, 2021), [https://www.vox.com/recode/22776461/facebook-meta-](https://www.vox.com/recode/22776461/facebook-meta-metaverse-monopoly)
12 [metaverse-monopoly](https://www.vox.com/recode/22776461/facebook-meta-metaverse-monopoly).

13 Salvador Rodriguez, *Meta Acquires Berlin Startup to Boost Virtual Reality Ambitions*
14 (Sept. 2, 2022), [https://www.wsj.com/articles/meta-acquires-berlin-startup-to-boost-virtual-reality-](https://www.wsj.com/articles/meta-acquires-berlin-startup-to-boost-virtual-reality-ambitions-11662147631)
15 [ambitions-11662147631](https://www.wsj.com/articles/meta-acquires-berlin-startup-to-boost-virtual-reality-ambitions-11662147631).

16 Staff of Subcomm. on Antitrust, Com. & Admin. L. of the H. Comm. on the
17 Judiciary, 116th Cong. Investigation of Competition in Digital Markets 11, 423-30 (2020),
18 [https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=44](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519)
19 [93-519](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519).

EXHIBIT 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

META PLATFORMS, INC., AND
WITHIN UNLIMITED, INC.,

Defendants.

Case No. 5:22-cv-04325-EJD-SVK

**[PROPOSED] ORDER GRANTING MOTION
OF THE STATES OF NEW YORK, ALASKA,
CALIFORNIA, CONNECTICUT, DELAWARE,
HAWAII, IDAHO, ILLINOIS, MARYLAND,
MASSACHUSETTS, MINNESOTA,
MISSISSIPPI, MONTANA, NEBRASKA,
NEVADA, NEW JERSEY, NEW MEXICO,
NORTH CAROLINA, NORTH DAKOTA,
OREGON, RHODE ISLAND, UTAH, AND
WASHINGTON, THE DISTRICT OF
COLUMBIA, AND THE TERRITORY
OF GUAM FOR LEAVE TO FILE AN
AMICUS CURIAE BRIEF**

Having considered the Amici States' Motion for Leave to File an Amicus Curiae Brief and having given the parties notice and an opportunity to be heard, the Court hereby GRANTS the Motion and ORDERS that the Amici States' amicus brief is accepted as filed.

IT IS SO ORDERED.

Dated: _____, 2022

By: _____
Hon. Edward J. Davila
United States District Judge