No.

In the Supreme Court of the United States

SAP SE, ET AL., PETITIONERS

v.

TERADATA CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the rule of reason properly governs tying claims under Section 1 of the Sherman Act, 15 U.S.C. 1, concerning software products that are technologically integrated—including where, as here, the tied product is sold separately from the tying product.

2. Whether the Court's precedents applying a per se rule to analyze the lawfulness of tying arrangements under Section 1 of the Sherman Act should be overruled.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are SAP SE; SAP America, Inc.; and SAP Labs LLC. SAP SE has no parent corporation, and no publicly held company owns 10% or more of its stock. SAP America, Inc., and SAP Labs LLC are wholly owned subsidiaries of SAP SE.

Respondents are Teradata Corporation; Teradata US, Inc.; and Teradata Operations, Inc.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

Teradata Corporation v. *SAP SE*, Civ. No. 18-3670 (Nov. 8, 2021)

United States Court of Appeals (Fed. Cir.):

Teradata Corporation v. *SAP SE*, No. 22-1286 (Aug. 1, 2023)

United States Court of Appeals (9th Cir.):

Teradata Corporation v. *SAP SE*, No. 23-16065 (Dec. 19, 2024)

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PETITION FOR A WRIT OF CERTIORARI

SAP SE; SAP America, Inc.; and SAP Labs LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 124 F.4th 555. The opinion of the district court (App., *infra*, 31a-125a) is reported at 570 F. Supp. 3d 810.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2024. A petition for rehearing was denied on March 4, 2025 (App., *infra*, 126a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Antitrust Act, 15 U.S.C. 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 3 of the Clayton Antitrust Act, 15 U.S.C. 14, provides in relevant part:

> It shall be unlawful * * * to lease or make a sale or contract for sale of goods * * * or fix a price * * * on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

STATEMENT

This case presents the Court with an opportunity to resolve some of the most consequential questions in federal antitrust law in the era of modern technology. Section 1 of the Sherman Act prohibits unreasonable restraints of trade. One type of practice subject to challenge under Section 1 is a tying arrangement, where a seller makes a product available only to consumers who also buy a second product. The default rule applied to determine the legality of a challenged practice under Section 1 is the rule of reason, under which the factfinder must balance the procompetitive benefits and anticompetitive effects of the practice. But in the 1940s and 1950s, the Court held that tying arrangements should be treated as per se unlawful under Section 1, reasoning that they "serve hardly any purpose beyond the suppression of competition." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 6 (1958) (citation omitted); see *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947). The per se standard articulated in those decisions also applies to tying claims, like here, that invoke Section 3 of the Clayton Act. See, *e.g.*, *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2, 23 n.39 (1984).

Those decisions have long been criticized. Soon after the Court adopted the per se rule for tying arrangements, scholars began to cast doubt on the assumption that such arrangements lack procompetitive benefits. The Court has abandoned the per se rule in several other contexts. And over 40 years ago, in *Jefferson Parish*, the Court came within one vote of doing so for tying arrangements as well. A bare majority of the Court, however, adopted a modified version of the per se rule for tying arrangements in an effort to soften its effects.

In the landmark decision of *Microsoft Corp.* v. *United States*, 253 F.3d 34, cert. denied, 534 U.S. 952 (2001), the District of Columbia Circuit, sitting en banc, declined to apply a per se approach, and instead applied the rule of reason, to a tying claim challenging Microsoft's technological integration of its Windows operating system and its Internet Explorer web browser. The D.C. Circuit unanimously recognized that application of a per se rule to technologically integrated products might "chill innovation to the detriment of consumers by preventing firms from integrating into their products new functionality previously provided by standalone products." *Id.* at 89. The court further explained that courts lacked the "judicial experience" necessary to say that "a software firm's decisions to sell multiple functionalities as a package should be conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.* at 90-91 (internal quotation marks and citation omitted).

In the nearly 25 years since the D.C. Circuit's decision in *Microsoft*, this Court has not weighed in on the exceedingly important question of whether the rule of reason should govern tying claims concerning integrated software products. There is now a conflict among the courts of appeals over whether, assuming that the rule of reason should apply in some such circumstances, two software products should be considered "integrated" where the tied product is sold separately. The questions presented are, first, whether the rule of reason properly governs tying claims concerning integrated software products, including where the tied product is sold separately; and second, whether the Court's precedents applying a per se rule to tying claims should be overruled.

Petitioners are affiliated companies that develop business-planning software products. After previously relying on third-party databases for use with their suite of business-planning applications, petitioners developed their own database, which performs both transactional and analytical functions, and integrated it technologically with their applications. As a result, consumers could not buy petitioners' suite of applications without also buying petitioners' database. Respondents, which market their own business-analytics database, filed suit against petitioners, alleging, as relevant here, that petitioners had violated Section 1 of the Sherman Act and Section 3 of the Clayton Act by unlawfully tying sales of their suite of applications to their database.

The district court granted summary judgment for petitioners. It held that the rule of reason should govern respondents' tying claims because the integration of petitioners' software products was the sort of novel business practice that should not be presumed anticompetitive without extensive inquiry. The court further determined that petitioners prevailed under the rule of reason.

The Ninth Circuit reversed. Unlike the district court, the Ninth Circuit declined to apply the rule of reason. It agreed with petitioners that the rule of reason should apply to tying arrangements involving some integrated software products. But it held that the modified per se approach should apply where, as here, the tied product was sold separately from the tying product.

That decision cannot be reconciled with the D.C. Circuit's decision in *Microsoft*, where the court applied the rule of reason even though Microsoft made Internet Explorer available separately from Windows. The resulting conflict tees up not only the question of when two software products are "integrated," such that the rule of reason should govern any tying claim, but also the lingering question of whether any per se rule should ever apply to tying arrangements.

On the first question, the Ninth Circuit departed from the D.C. Circuit, and erred under the best reading of this Court's existing precedents, by applying the modified per se approach in the context of technologically integrated software products. And on the second question, as members of this Court, the federal government, and commentators alike have recognized, there is little basis for applying a per se rule to tying arrangements, given the potential for such arrangements to benefit consumers. The question of the appropriate standard for assessing tying claims—whether in general or with particular respect to integrated software products—is exceedingly important, and this case is an ideal vehicle for resolving it. The petition for a writ of certiorari should be granted.

A. Background

1. Section 1 of the Sherman Antitrust Act provides that "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce * * * is declared to be illegal." 15 U.S.C. 1. This Court has long interpreted that provision to prohibit only restraints of trade that are "unreasonable." See *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997). As the Court has explained, "restraint of trade" "refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances." *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 731 (1988). Because the concept of an impermissible "restraint of trade" "invokes the common law itself," Congress is understood to have charged the courts with ensuring that antitrust law "evolves with new circumstances and new wisdom." *Id.* at 732.

That responsibility requires courts to apply a "functional" analysis. See *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 46 (1977). Specifically, the Sherman Act tasks courts with "distinguish[ing] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Ohio* v. *American Express Co.*, 585 U.S. 529, 541 (2018) (citation omitted). And because the Sherman Act "aims at substance," "[r]ealities must dominate" the analysis of whether a particular arrangement constitutes an unreasonable restraint of trade. *GTE Sylvania*, 433 U.S. at 47 (citation omitted).

2. To determine whether a given restraint rises to the level of an unreasonable restraint of trade, courts apply one of two basic approaches: the rule of reason and the per se rule.

The rule of reason is the "prevailing standard of analysis" that governs nearly all challenged restraints. *GTE Sylvania*, 433 U.S. at 49. It requires a court to scrutinize the "history, nature, and effect" of the restraint, *Khan*, 522 U.S. at 10, using a "three-step, burden-shifting framework," *American Express*, 585 U.S. at 541. At the first step, the plaintiff must "prove that the challenged restraint has a substantial anticompetitive effect." *Ibid.* Such proof can be direct (*i.e.*, proof of "reduced output, increased prices, or decreased quality in the relevant market") or indirect (*i.e.*, proof of "market power plus some evidence that the challenged restraint harms competition"). *Id.* at 542. If the plaintiff successfully proves anticompetitive effect at the first step, at the second step, "the burden shifts to the defendant to show a procompetitive rationale for the restraint." *Id.* at 541. If the defendant satisfies that burden, "the burden shifts back to the plaintiff" at the third step "to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.* at 542.

The per se rule differs from the rule of reason in that it forgoes any comparative assessment of the procompetitive benefits and anticompetitive effects of a challenged restraint. As the Court has explained, where courts have "considerable experience" with a particular type of restraint, they can "predict with confidence" that the restraint is "manifestly anticompetitive," "lack[s] any redeeming virtue," and "would be invalidated in all or almost all instances under the rule of reason." *Leegin*

Creative Leather Products, Inc. v. *PSKS, Inc.*, 551 U.S. 877, 886-887 (2007). In those circumstances, courts will treat the challenged restraint as "unlawful *per se*"—that is, "necessarily illegal." *Id.* at 886 (citation omitted).

This Court has long applied a "presumption in favor of a rule-of-reason standard" and held that any "departure from that standard must be justified by demonstrable economic effect." *Business Electronics*, 485 U.S. at 726. Per se treatment applies only where a restraint "always or almost always tend[s] to restrict competition and decrease output." *Leegin*, 551 U.S. at 886 (citation omitted). It cannot be based merely on "formalistic line drawing," *GTE Sylvania*, 433 U.S. at 58-59, and it is inappropriate where the anticompetitive "economic impact" of a given restraint is not "immediately obvious," *Leegin*, 551 U.S. at 887 (citation omitted).

As a result, the "group of restraints" appropriately subject to per se treatment is "small." *American Express*, 585 U.S. at 540. For example, bid-rigging is unlawful per se, as "[d]ecades of empirical evidence" show that it drives up prices and lacks procompetitive justification. Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 Iowa L. Rev. 1207, 1258 (2008). Likewise, horizontal price fixing is per se illegal. See *Leegin*, 551 U.S. at 886. More broadly, "[t]ypically only 'horizontal' restraints—restraints 'imposed by agreement between competitors'—qualify as unreasonable *per se*." *American Express*, 585 U.S. at 540-541 (citation omitted). By contrast, "vertical" restraints—that is, those "imposed by agreement between firms at different levels of distribution"—are usually analyzed under the rule of reason. *Id.* at 541 (citation omitted).

3. This case involves an alleged restraint of trade known as a tying arrangement. Tying occurs when a seller makes a product available only to consumers who

also purchase a second product from the seller. See, *e.g.*, 9 Phillip E. Areeda & Herbert Hovenkamp, *An Analysis of Antitrust Principles and Their Application* § 1700, at 4 (4th ed. 2018) (Areeda & Hovenkamp). The first product, available only with the purchase of the second, is referred to as the "tying" product; the second product is referred to as the "tied" product. See *ibid.*

Historically, this Court treated tying arrangements as per se unlawful, "consistently assum[ing] that '[they] serve hardly any purpose beyond the suppression of competition.'" *Illinois Tool Works Inc.* v. *Independent Ink, Inc.*, 547 U.S. 28, 35 (2006) (quoting *Standard Oil Co.* v. *United States*, 337 U.S. 293, 305 (1949)). But over time, the Court's "strong disapproval of tying arrangements has substantially diminished." *Ibid.* Instead, the Court's decisions have grown to "[r]eflect[] a changing view of tying arrangements," recognizing that they "may well be procompetitive." *Id.* at 35-36.

In *Jefferson Parish*, the Court modified the per se rule as applied to tying arrangements. There, the Court affirmed that "certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable '*per se*.'" 466 U.S. at 9. At the same time, the Court held that "not every refusal to sell two products separately can be said to restrain competition." *Id.* at 11. The Court thus held that a court should treat a tie as per se invalid only where the defendant sells "separate products"; has market power in the market for the tying product; will not sell the tying product without the tied product; and could injure competition in the tied product's market. See *id.* at 16, 18, 25-26; see also Areeda & Hovenkamp § 1702.

B. Facts And Procedural History

1. a. Petitioners develop what are known as "enterprise resource planning," or ERP, applications. ERP applications are used by organizations to manage day-to-day business activities, including financing, accounting, human resources, and project management. ERP applications traditionally run on "transactional" databases, which serve as the applications' data repositories. App., *infra*, 2a; C.A. App. 11418-11419, 10173.

In addition to ERP applications, many businesses use analytical applications to evaluate their operations more broadly. Analytical applications facilitate specialized or complex reporting or analysis of multiple business activities. They run on "analytical" databases, which aggregate large amounts of data from multiple sources, including transactional databases, often from across an organization. Respondents make and sell a type of analytical database known as an "enterprise data warehouse." App., *infra*, 2a, 33a-34a; C.A. App. 10173, 10486, 10516-10517.

Traditionally, petitioners' ERP applications ran on transactional databases made by other companies. In 2006, however, petitioners began to develop their own proprietary database. Petitioners' competitors in the ERP market had begun developing their own databases in the 1990s because of the efficiencies that become available when ERP applications are designed to run only on specific databases. App., *infra*, 33a-35a; C.A. App. 9712-9713, 10174-10176, 10399-10400, 10406, 16236.

b. In 2008, while development of petitioners' database was ongoing, petitioners and respondents entered into a partnership known as the "Bridge Project." The goal of the Bridge Project was to improve the ability of petitioners' customers to use respondents' database in conjunction with petitioners' product stack. Petitioners and respondents jointly developed modifications to petitioners' product stack that would allow the transactional database (which also supported petitioners' ERP applications) to translate between respondents' analytical database and other components of petitioners' product stack. App., *infra*, 34a-35a; C.A. App. 10574, 14317-14318.

In 2010, petitioners' efforts to develop their own database came to fruition. The database was called HANA (short for "high-performance analytic appliance"), and it was one of the first "translytical" databases—that is, a database capable of supporting both transactional and analytical applications. Petitioners launched HANA in 2011; two months later, petitioners terminated the Bridge Project. App., *infra*, 3a, 35a; C.A. App. 11387, 11406; SAP SE, *What is SAP HANA?* (last visited June 2, 2025) <tinyurl.com/hanais>.

c. In 2015, petitioners released S/4HANA, an updated version of petitioners' suite of ERP applications. S/4HANA was designed to run only on the HANA database, which had three technological implications relevant here. *First*, the integrated design simplified the structure of S/4HANA, making its development faster and cheaper. *Second*, the integrated design allowed petitioners to push calculations from their applications down into the HANA database, where they could be performed more efficiently. *Third*, the design allowed the HANA database to run analytics on the ERP data in real time. App., *infra*, 3a, 95a; C.A. App. 10216, 10225.

Petitioners combined S/4HANA and the HANA database into a single sales offering with two licensing tiers. Customers could purchase a "full-use" license, which allowed the direct export of S/4HANA application data from HANA to separate analytical databases, such as respondents'. Customers could also purchase a less expensive "runtime" license, which did not allow for the direct export of data. A runtime license permitted customers to access data from S/4HANA applications only in a limited manner, making the use of separate analytical databases less efficient than it would be with a full-use license. App., *infra*, 3a, 35a; C.A. App. 13900, 20218-20221.

2. On June 19, 2018, respondents filed suit against petitioners in the United States District Court for the Northern District of California. App., *infra*, 35a. As relevant here, respondents alleged that petitioners had unlawfully tied S/4HANA to the HANA database, in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act, 15 U.S.C. 1 & 14. C.A. App. 822-824. Respondents also brought other claims under federal and state law, and petitioners filed counterclaims for patent infringement.[1]

3. Following discovery, petitioners sought summary judgment on respondents' tying claims. The district court granted the motion. App., *infra*, 31a-125a.

The district court held that the rule of reason governed respondents' tying claims. App., *infra*, 94a-96a. The court relied on Ninth Circuit precedent warning that per se treatment is improper for "[n]ovel business practices"—"especially in technology markets"—given that courts and economists cannot accurately predict whether a new practice is anticompetitive without considering its procompetitive justifications. *Id.* at 94a-95a (quoting *Federal Trade Commission* v. *Qualcomm Inc.*, 969 F.3d 974, 990-991 (9th Cir. 2020) (citing *Microsoft*, 253 F.3d at 91)).

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[1] The only remaining claims other than those at issue here are respondents' state-law trade-secrets claim and two of petitioners' patent-infringement counterclaims. Respondents withdrew their federal trade-secrets claim, their copyright claim, and their claim under Section 2 of the Sherman Act. See App., *infra*, 39a; C.A. App. 818-826; D. Ct. Dkt. 252. Petitioners withdrew one patent-infringement counterclaim; the district court dismissed another and transferred a third. See App., *infra*, 119a; D. Ct. Dkt. 363, 418.

The district court also relied on the principle that per se treatment is appropriate only when "judicial 'experience'" has established that a given business practice presents "so little redeeming virtue," and "so very little loss to society from its ban," that evaluating its anticompetitive effects in every case is unnecessary. App., *infra*, 95a-96a (quoting *Microsoft*, 253 F.3d at 90-91, 94). That could not be said of the alleged tie at issue here, the district court explained, because petitioners' "design of S/4HANA to run on HANA" involved procompetitive justifications: namely, "efficiency gains such as improved performance and functionality." *Id.* at 95a.

The district court ultimately concluded, however, that petitioners were entitled to judgment as a matter of law under either the rule of reason or a modified per se approach. The district court had deemed inadmissible the opinion of respondents' expert insofar as it defined the tying and tied markets. App., *infra*, 60a-78a. The court concluded that the failure to define the tied market doomed respondents' claims under the rule of reason, and the failure to define the tying market doomed their claims under the modified per se approach. *Id.* at 96a-97a.

4. Respondents initially appealed to the Federal Circuit, which transferred the case to the Ninth Circuit. App., *infra*, 5a. On the merits, the Ninth Circuit reversed the district court's grant of summary judgment and remanded the case for further proceedings. *Id.* at 1a-30a.

After concluding that the opinion of respondents' expert was admissible, the court of appeals turned to respondents' tying claims, beginning with the crucial question of whether "the per se approach or the rule of reason" applied. App., *infra*, 20a. The court held that the modified per se approach, and not the rule of reason, should apply. *Id.* at 21a-23a. The court reasoned that tying arrangements "are different" from "classic" vertical restraints—

those involving "multiple firms"—such that nothing could be drawn from this Court's observation that "nearly every * * * vertical restraint" should be assessed under the rule of reason. *Id.* at 20a-21a (quoting *Ohio* v. *American Express Co.*, 585 U.S. 529, 541 (2018)). Instead, the court concluded that it was bound to apply the "long-settled" modified per se approach for tying arrangements. *Id.* at 22a.

In so doing, the court of appeals declined to apply a "narrow exception to the per se rule" for technologically integrated software products, which the court had previously recognized in *Epic Games, Inc.* v. *Apple, Inc.*, 67 F.4th 946 (2023). App., *infra*, 22a. The court determined that S/4HANA and HANA were not "technologically or physically integrated," because HANA is "a standalone [analytical database] product that [petitioners] can and do[] sell independently of S/4HANA." *Id.* at 23a. The court suggested that petitioners' arrangement was "more akin to standard contractual tie cases, which courts regularly evaluate under the per se framework." *Ibid.*

The court of appeals noted its "appreciat[ion]" for the "concern that the per se rule for ties, especially as applied to software markets, sits uneasily with the rationale courts have articulated for the per se rule in other contexts." App., *infra*, 23a. The court also acknowledged the risk that inappropriate per se condemnation may "dampen[] innovation and undermin[e] the very competitive process that antitrust law is meant to protect." *Ibid.* (citation omitted). But the court of appeals stressed that this Court "has made clear" that "certain tying arrangements * * * are unreasonable per se." *Ibid.* (internal quotation marks and citation omitted).

Having held that the modified per se approach applied, the court of appeals concluded that, regardless of which standard applied, the testimony of respondents' expert had created triable questions of fact precluding summary judgment, both as to whether petitioner had "power in the tying market" (which is relevant to a per se analysis) and as to whether "the tie has substantial anti-competitive effects in the tied market" (which is relevant to a rule-of-reason analysis). App., *infra*, 24a. Accordingly, the court of appeals reversed the district court's grant of summary judgment as to respondents' tying claims and remanded for further proceedings. *Id.* at 2a.

5. Petitioners sought rehearing en banc, which was denied without recorded dissent. App., *infra*, 126a.

REASONS FOR GRANTING THE PETITION

This case presents two questions of antitrust law of paramount importance in the world of modern technology: first, whether the rule of reason governs tying claims concerning integrated software products, including where the tied product is sold separately, and second, whether the Court's precedents applying a per se rule to tying claims should be overruled. In the decision below, the Ninth Circuit declined to apply the rule of reason to integrated software products where the tied product is sold separately. That decision conflicts with the D.C. Circuit's landmark decision in *United States* v. *Microsoft Corp.*, 253 F.3d 34, cert. denied, 534 U.S. 952 (2001). It also contravenes the proper understanding of this Court's existing precedents. And as members of this Court, the federal government, and commentators have long recognized, the Court's decisions holding that tying arrangements should be subject to a per se rule, instead of the ordinary rule of reason, are incorrect and should be abandoned. The questions presented are exceedingly important, and this case is an ideal vehicle for deciding them. The petition for a writ of certiorari should be granted.

A. The Decision Below Conflicts With The D.C. Circuit's Decision In *United States* v. *Microsoft*

In *Microsoft*, the D.C. Circuit declined to apply the modified per se approach of *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984), and instead applied the rule of reason, to determine whether Microsoft's integration of its operating system with its browser software constituted an unlawful tying arrangement under Section 1 of the Sherman Act. In the decision below, the Ninth Circuit purported to apply a framework under which the rule of reason would govern the antitrust analysis of some technologically integrated software products. But the Ninth Circuit held that the rule of reason would not govern where, as here, the products at issue were sold separately. In that respect, the Ninth Circuit's decision conflicts with *Microsoft*, and it tees up the question of whether a per se rule is ever appropriate for assessing whether the technological integration of two software products violates the Sherman Act.

1. The D.C. Circuit's decision in *Microsoft* arose from a broad antitrust enforcement action brought by the federal government and several States against Microsoft related to Microsoft's Windows operating system. See 253 F.3d at 47-48. As relevant here, the government alleged that Microsoft's contractual and technological bundling of Windows with Microsoft's Internet Explorer web browser constituted a tying arrangement that was per se unlawful under Section 1 of the Sherman Act. See *id.* at 34, 84. In particular, Microsoft had preloaded Internet Explorer in Windows; programmed it to share overlapping code with Windows; made it difficult to uninstall; and allowed it to override a user's choice of "default" browser in certain circumstances. See *id.* at 84-85. Apart from that integration, Microsoft had "always marketed and distributed Internet Explorer separately from Windows in several channels,"

including "retail sales, service kits for [independent software vendors], free downloads over the Internet, and bundling with other products produced both by Microsoft and by third-party [independent software vendors]." 84 F. Supp. 2d 9, 48 (D.D.C. 1999) (district court's findings of fact).

After a bench trial, the district court held that the technological integration of Internet Explorer and Windows constituted a tying arrangement that was per se unlawful. See 87 F. Supp. 2d 30, 47-51 (D.D.C. 2000) (district court's conclusions of law). But the D.C. Circuit reversed that holding. See 253 F.3d at 84-97. It instead held that "the rule of reason, rather than per se analysis, should govern the legality of tying arrangements involving platform software products" such as a computer operating system. *Id.* at 84.

In reaching that holding, the D.C. Circuit acknowledged that, under *Jefferson Parish*, "*certain* tying arrangements [that] pose an unacceptable risk of stifling competition and therefore are unreasonable '*per se*.'" 253 F.3d at 89 (quoting *Jefferson Parish*, 466 U.S. at 9). Specifically, the court reasoned, a tying arrangement is per se unlawful if the tying and tied goods are "separate products"; the defendant has market power in the tying product market; the defendant offers consumers no choice but to purchase the tied product with the tying product; and the tying arrangement forecloses a substantial volume of commerce. See *id.* at 85.

While recognizing that the modified per se approach generally governed tying arrangements, the D.C. Circuit agreed with Microsoft that application of that approach to integrated products might "chill innovation to the detriment of consumers by preventing firms from integrating into their products new functionality previously provided by standalone products." 253 F.3d at 89 (citation omitted); cf. *United States* v. *Microsoft Corp.*, 147 F.3d 935, 948 (D.C. Cir. 1998) (stating that "an 'integrated product' is most reasonably understood as a product that combines functionalities (which may also be marketed separately and operated together) in a way that offers advantages unavailable if the functionalities are bought separately and combined by the purchaser"). As the court explained, the modified per se approach is inherently "backward-looking" and thus a "systemically poor prox[y] for overall efficiency in the presence of new and innovative integration." 253 F.3d at 89. In addition, "[i]f integration has efficiency benefits, these may be ignored." *Ibid.* Accordingly, "one cannot be sure beneficial integration will be protected" under the modified per se approach, potentially depriving "newly integrated products" of "a fair shake" and "mak[ing] consumers worse off." *Ibid.*

In light of those concerns, the D.C. Circuit proceeded to analyze whether the "integration of additional software functionality into an [operating system]" should qualify as one of the "certain" types of tying arrangements that triggered the modified per se approach. 253 F.3d at 89. The court ultimately held that the rule of reason, and not the modified per se approach, should apply. See *id.* at 89-95.

As the D.C. Circuit explained, none of this Court's tying decisions involved a situation in which "the tied good [was] physically and technologically integrated with the tying good" or in which, as Microsoft argued, "their tie improved the value of the tying product to users *and* to makers of complementary goods." 253 F.3d at 90. As a result, the D.C. Circuit concluded that "judicial experience provide[d] little basis for believing that * * * a software firm's decisions to sell multiple functionalities as a package should be conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.* at 90-91 (internal quotation marks and citation omitted).

The D.C. Circuit also expressed concern about the risk that a per se rule would "stunt valuable innovation." 253 F.3d at 92. To begin with, under *Jefferson Parish*, "the first firm to merge previously distinct functionalities" or "to eliminate entirely the need for a second function" would "risk[] being condemned as having tied two separate products," because "at the moment of integration there w[ould] appear to be a robust 'distinct' market for the tied product." *Ibid.* In addition, "because of the pervasively innovative character of platform software markets, tying in such markets may produce efficiencies that courts have not previously encountered and thus the Supreme Court had not factored into the per se rule as originally conceived." *Id.* at 93.

For those reasons, the D.C. Circuit could not "comfortably say that bundling in platform software markets ha[d] so little redeeming virtue, and that there would be so very little loss to society from its ban, that an inquiry into its costs in the individual case can be considered unnecessary." 253 F.3d at 94 (internal quotation marks, citation, and alteration omitted). Although the court recognized that its reasoning "appear[ed] to have broader force," it declined to "speak to facts outside the record" or to "find[] the per se rule inapplicable to software markets generally." *Id.* at 95.

2. Before the decision below, the Ninth Circuit appeared to hew to the D.C. Circuit's understanding of how the modified per se approach should apply in the context of alleged tying arrangements involving integrated software products. The Ninth Circuit had recognized that "novel business practices—*especially* in technology markets—should not be 'conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as

to the precise harm they have caused or the business excuse for their use.'" *Federal Trade Commission* v. *Qualcomm Inc.*, 969 F.3d 974, 990-991 (2020) (quoting *Microsoft*, 253 F.3d at 91). And in *Epic Games, Inc.* v. *Apple, Inc.*, 67 F.4th 946 (2023), cert. denied, 144 S. Ct. 681 & 682 (2024), the Ninth Circuit held that "per se condemnation is inappropriate for ties 'involv[ing] software that serves as a platform for third-party applications.'" *Id.* at 997 (alteration in original) (quoting *Microsoft*, 253 F.3d at 89).

In the decision below, the Ninth Circuit purported to follow those precedents by applying a framework under which the rule of reason would apply when "(1) a tie involves software that serves as a platform for third-party applications, (2) the tied good is technologically integrated with the tying good, and (3) the tie presents purported procompetitive benefits that could not be achieved by adopting quality standards for third-party suppliers of the tied good." App., *infra*, 22a (internal quotation marks, citation, and alteration omitted). But the court proceeded to hold that petitioners' products—S/4HANA and the HANA database—were "not technologically or physically integrated" because HANA is a "standalone [analytical database] product" that petitioners "can and do[] sell independently." *Id.* at 23a. The court thus declined to apply the rule of reason to respondents' tying claims. *Ibid.*

That reasoning conflicts with the D.C. Circuit's reasoning in *Microsoft*. As already explained, Microsoft had "always marketed and distributed Internet Explorer separately from Windows in several channels." *Microsoft*, 84 F. Supp. 2d at 48. Indeed, Microsoft had "created standalone versions of Internet Explorer that run on operating systems" other than Windows. *Ibid.*; see *Microsoft*, 147 F.3d at 946-947 (concluding that Windows and Internet Explorer constituted "integrated" products under an earlier consent decree even though Microsoft marketed and distributed Internet Explorer separately from Windows). The D.C. Circuit, however, still held that the rule of reason should govern whether the integration of Internet Explorer and Windows constituted an impermissible restraint of trade. If the rule from the decision below had been applied in *Microsoft*, the bundle at issue there would have been subject to per se treatment. The Ninth and D.C. Circuit's decisions are thus irreconcilable.

3. The conflict between the Ninth and D.C. Circuits does not merely present the Court with a narrow question concerning the circumstances under which two software products qualify as "integrated" for purposes of determining whether the modified per se approach applies. That is because the Court has never decided the crucial question underlying the conflict: namely, whether the modified per se approach or the rule of reason should apply to integrated software products. This case presents the Court with an opportunity to weigh in on that exceedingly consequential and foundational question.

It would be artificial to resolve the conflict here without resolving the underlying question whether integrated software products should ever be subject to per se treatment. If the correct answer to that question is no, then so holding would preempt the need to resolve the conflict. The same is true if a per se rule should *always* apply to such integrations.

As we will now explain, the Ninth Circuit erred by declining to apply the rule of reason to the integrated software product at issue here. The Court should therefore grant certiorari to decide whether the rule of reason, instead of a per se rule, should apply to tying claims involving integrated software products.

B. The Decision Below Is Incorrect

In the decision below, the Ninth Circuit applied the modified per se approach, and not the rule of reason, to assess whether petitioners' integration of two software products violated Section 1 of the Sherman Act. That decision was incorrect. Under this Court's existing precedents, tying arrangements involving integrated software products should not be counted among the "certain" tying arrangements deemed per se unlawful. If the Court were to disagree, however, it should take this opportunity to revisit its precedents holding that tying arrangements are subject to a per se approach. There is no serious argument that the rule is economically justified, and the reasons the Court historically has given for per se treatment no longer withstand scrutiny.

1. The Court's Existing Precedents Require Application Of The Rule Of Reason To Integrated Software Products

This Court's existing precedents are best understood to require application of the rule of reason to tying claims involving integrated software products—including where, as here, the tied product is sold separately from the tying product.

a. In *Jefferson Parish*, this Court clarified, and highlighted the limited scope of, the per se rule for tying claims. The Court explained that only "certain" alleged ties pose the requisite "unacceptable risk of stifling competition." 466 U.S. at 9. And the Court acknowledged that "every refusal to sell two products separately cannot be said to restrain competition." *Id.* at 11. To the contrary, the Court noted, ties are "often" procompetitive, given that "[b]uyers often find package sales attractive." *Id.* at 12. The Court explained that "a seller's decision to offer such packages can merely be an attempt to compete effectively"—"conduct that is entirely consistent with the Sherman Act." *Ibid.*

Under this Court's antitrust precedents more generally, per se treatment is appropriate only for restraints that are "manifestly anticompetitive," such that a court could "predict with confidence" that the arrangement "would be invalidated in all or almost all instances under the rule of reason." *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 886-887 (2007) (citation omitted). The rule of reason is the default rule for analyzing alleged restraints challenged under the antitrust laws, and a "demonstrable economic effect" is required to depart from the "presumption" in favor of that rule. *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988).

As the D.C. Circuit correctly observed in *Microsoft*, application of the modified per se approach to bundling is inappropriate in "technologically dynamic markets where product development is especially unlikely to follow an easily foreseen linear pattern." *Microsoft*, 253 F.3d at 94. Tying in those markets "may produce efficiencies that courts have not previously encountered and thus the Supreme Court had not factored into the per se rule as originally conceived." *Id.* at 93. More fundamentally, the very concept of tying is a poor fit for claims involving technological integration, which involve "compatibility or interconnection requirements" that force a purchase of two products from the same supplier and are thus "more appropriately analyzed as exclusionary practices." Areeda & Hovenkamp § 1701d. As that leading antitrust treatise states, "per se condemnation for this category of ties is never appropriate." *Ibid.* Indeed, bundling can increase output, which decreases the per-unit cost of production and benefits consumers. See Erik Hovenkamp & Herbert Hovenkamp, *Tying Arrangements and Antitrust Harm*, 52 Ariz. L. Rev. 925, 952-956 (2010) (Hovenkamp & Hovenkamp).

In light of those economic realities and this Court's other precedents concerning the per se rule, *Jefferson Parish* is best understood not to apply to technologically integrated software products. The integration of software products will frequently represent an effort to "compete effectively," rather than to stifle competition. *Jefferson Parish*, 466 U.S. at 12. And innovation through technological integration will often benefit consumers. There is no reason to believe that the Court in *Jefferson Parish* intended to condemn all such integrations as illegal tying arrangements as long as the seller has market power.

b. In applying a per se rule, the Ninth Circuit committed numerous analytical errors.

To begin with, the Ninth Circuit proceeded on the mistaken assumption that tying arrangements are not properly considered to be vertical restraints, the "classic" versions of which involve "multiple firms." See App., *infra*, 21a. Tying is routinely described as a vertical restraint. See, *e.g.*, Areeda & Hovenkamp § 395; American Bar Association, 1 *Antitrust Law Developments* 174 (9th ed. 2022). It matters not "whether the packaged product is produced by one or more firms"; what matters instead is "whether the function of the aggregation is to create a better product and allow the seller to compete more effectively on the merits." U.S. Br. at 10 n.12, *Jefferson Parish*, *supra* (No. 82-1031) (Feb. 15, 1983).

In addition, the Ninth Circuit failed to grapple with the analytical tension caused by applying a per se rule, which relies on economic and judicial experience, to novel business practices. See App., *infra*, 23a. Instead, the court merely quoted this Court's statement in *Jefferson Parish* that "[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements * * * are unreasonable 'per se.'" *Ibid.* (citation omitted) (brackets in original). That is precisely the kind of "formalistic line drawing" in which this Court has declined to engage. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977).

The Ninth Circuit further erred by holding that an integrated software product cannot qualify as "integrated" where the tied product is sold separately. App., *infra*, 22a-23a. The court provided no valid basis to believe that the potential benefits to consumers from technological integration are reduced in those circumstances.

The Ninth Circuit therefore erred by applying the modified per se approach to analyze the lawfulness of petitioners' integration of S/4HANA and its HANA database. In the context of such an integrated software product, the Ninth Circuit should have applied the rule of reason, as the district court correctly did.

2. In The Alternative, The Court Should Revisit The Appropriate Approach For Analyzing Tying Claims

In light of the practical importance of integrating technological products in the modern era, the time has also come for the Court to revisit its precedents holding that tying arrangements should be subject to a per se rule. Those precedents have been increasingly undermined over time, and the Court's effort to reshape the per se rule in *Jefferson Parish* has not remedied its flaws.

a. As courts and observers alike have long recognized, tying arrangements do not meet this Court's standards for membership in the small class of restraints worthy of per se condemnation. "[S]oon after" this Court first "enunciated the per se rule for tying liability[,] * * * new economic research began to cast doubt on the assumption, voiced by the Court when it established the rule, that tying agreements serve hardly any purpose beyond the suppression of competition." *Microsoft*, 253 F.3d at 86 (internal quotation marks and citations omitted). To the contrary, many tying arrangements "simply do not threaten competition" and "are valuable * * * to consumers." Robert H. Bork, *The Antitrust Paradox: A Policy at War With Itself* 396-397 (Bork Publ'g 2021) (1978). The problems with the per se rule are exacerbated by the difficulty involved in differentiating a tying arrangement from other conditions of sale. See *id.* at 386-387.

Scholars generally agree that "the per se rule against tying simply has no economic foundation." Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 Antitrust L.J. 469, 470 (2001); see David S. Evans, *Untying the Knot: The Case For Overruling Jefferson Parish* (2006) <tinyurl.com/evansjeffersonparish> (identifying "virtually no support for treating tying as per se unlawful by firms with market power" based on a review of over 100 papers). The government, too, has previously agreed that, in light of "the views of the many legal scholars, commentators, economists, and others," applying the per se approach to allegations of tying is "misguided." Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* 89-90 (2008) <tinyurl.com/competitionandmonopoly>; but see Department of Justice, Press Release, *Justice Department Withdraws Report on Antitrust Monopoly Law* (May 11, 2009) <tinyurl.com/varneydojpressrelease>.

b. Confronted with the foregoing problems in *Jefferson Parish*, this Court recognized a need at least to relax the per se rule as applied to tying arrangements. But 40 years of courts' efforts to apply *Jefferson Parish*'s modified per se approach demonstrate that it offers only "the worst of both worlds," in that it imposes "the cost of the rule of reason without its precision," ignoring the competitive effects of a challenged arrangement. Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 Iowa L. Rev. 1207, 1250 (2008) (Lemley & Leslie).

As scholars have recognized, the modified per se approach suffers from inevitable incoherence, because it represented an "attempt to address some of the problems with the per se standard, but not completely abandon precedent." Amy Sindik, *Big Tech and Tying Arrangements: Are Antitrust Revisions Needed?*, 28 Commc'n L. & Pol'y 47, 62 (2023) (Sindik); see, *e.g.*, Matthew Hodgson, Comment, *No Such Thing as Partial Per Se: Why* Jefferson Parish *v.* Hyde *Should Be Abolished in Favor of a Rule of Reason Standard for Tying Arrangements*, 3 Bus. Entrepreneurship & Tax L. Rev. 313, 321 (2019). Indeed, the rule is perhaps best understood as a compromise designed to garner a fifth vote within a closely divided Court. See Sindik 61. While Justice O'Connor and three of other members of the Court would have decisively abandoned the per se rule and applied the rule of reason to tying arrangements, Justice Stevens proposed a way to respect stare decisis while mitigating some of the problems posed by the application of the per se rule. See *ibid.* (discussing Memorandum from Scott McIntosh to Justice Blackmun (Mar. 5, 1984)); compare *Jefferson Parish*, 466 U.S. at 9-32, with *id.* at 33-47 (O'Connor, J., concurring in the judgment). That approach ultimately won the critical vote of Justice Blackmun. See Sindik 61.

The Court in *Jefferson Parish* was closely divided over whether to retain the per se rule in any form, in light of the growing consensus that per se treatment for tying arrangements lacks an economic rationale. And no economic rationale has since emerged. Accordingly, there can be no serious argument that adopting the rule of reason for tying claims would disturb reliance interests. Moreover, as this Court has explained, "[s]tare decisis is not as significant" where the question concerns the interpretation of the Sherman Act, which has long been understood as a "common-law statute" that should "evolve to meet the dynamics of present economic conditions." *Leegin*, 551 U.S. at 899. In accordance with that understanding, the Court has departed from precedent applying a per se rule in several other contexts where the economic rationale for applying it had been undermined over time. See, *e.g.*, *id.* at 889-900, 907; *State Oil Co.* v. *Khan*, 522 U.S. 3, 7 (1997); *GTE Sylvania*, 433 U.S. at 58. Here, too, the Court should recognize that a departure from precedent applying a per se rule is justified.

Even if "the rule of reason approach * * * would be a more sensible way to approach all tying cases," lower courts remain bound to "point[] out the problems [they] see and then attempt[] to apply the law as it stands as best [they] can" until this Court acts. *Reifert* v. *South Central Wisconsin MLS Corp.*, 450 F.3d 312, 323 (7th Cir. 2006) (Wood, J., concurring in the judgment). The time for this Court to act has come. In addition to granting review on the first question presented, the Court should grant the second question and decide whether to abandon the per se rule for tying arrangements.

C. The Questions Presented Are Exceptionally Important And Warrant The Court's Review In This Case

The questions presented are of profound importance to antitrust law, technological innovation, and American industry. Failure to resolve them would bless the Ninth's Circuit's overinclusive per se standard and presumptively expose broad swaths of beneficial conduct to liability—and to treble damages.

1. Innovation is fundamental to the American economy. Our economy is "the envy of the developed world," having "rapidly outstripp[ed] almost all advanced economies." Valentina Romei et al., *Why America's Economy Is Soaring Ahead of Its Rivals*, Financial Times (Dec. 3, 2024) <tinyurl.com/techsectorecon> (Romei). And our Nation's "impressive strength in tech is the difference": "Americans are striving for innovation productivity" and dominate global spending on research and development. *Ibid.*; see Tom Fairless & David Luhnow, *The Tech Industry Is Huge—And Europe's Share of It Is Very Small*, Wall. St. J. (May 19, 2025) <tinyurl.com/fairlessluhnow-tech> (listing "suffocating regulations" as among the "obstacles to tech growth" in Europe).

Left undisturbed, the Ninth Circuit's decision expands the modified per se approach to cover tying claims about integrated software products—beyond where its scope has been understood to be for nearly 25 years. That expansion threatens American innovation without benefiting consumers. Companies that spend more on research and development have strong incentives to create only those tying arrangements that are economically beneficial. See Hovenkamp & Hovenkamp 952-956. Tying arrangements increase outputs for both the tied and tying products, which decreases per-unit costs of production and the overall cost of innovation, costing consumers little if anything. See *id.* at 954-955. Under a per se approach, however, "many courts do not sufficiently consider the likely (or actual) competitive effects of a challenged tie." Lemley & Leslie 1251. Courts instead "condemn tying arrangements that are likely to have no anticompetitive effects simply because the particular tie-in satisfies the elements of tying's so-called per se test." *Ibid.*

That is all the more problematic in the Ninth Circuit, which is the home of Silicon Valley. With its "famed network of mentors, innovators and investors," Silicon Valley has few if any geographic rivals in the American innovation economy. See Romei. It is "home to numerous high-growth startups that evolved into global players," including Salesforce, LinkedIn, and Twitter, and "a cluster of AI startups," including OpenAI and Anthropic. Kenji Kushida, *The Silicon Valley Model And Technological Trajectories In Context*, Carnegie Endowment for International Peace (Jan. 9, 2024) <tinyurl.com/siliconvalley-model>.

Having bred success in innovation, however, Silicon Valley has likewise attracted antitrust litigants. In the three years between 2021 and 2023, more antitrust cases were filed in the Northern District of California than any other district (165 cases, or 10% of all antitrust cases nationwide). See Lex Machina, *Antitrust Litigation Report* 11 (2024). Likewise, more antitrust appeals were docketed in the Ninth Circuit than any other circuit (104 appeals, or 25% of all antitrust appeals). See *id.* at 12.

The imposition of antitrust liability for technological tying arrangements under a per se rule throttles Silicon Valley's ability to innovate. A per se rule condemns even tying arrangements with net procompetitive effects. See App., *infra*, 6a-7a. And the risk of antitrust liability is not something tech companies can ignore. To the contrary, the availability of treble damages under the Sherman Act creates "a special temptation for the institution of vexatious litigation," and antitrust litigation is notorious for its "great deal of expensive and time consuming discovery." U.S. Br. at 16, *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992) (No. 90-1029) (May 22, 1991) (citation omitted); see Areeda & Hovenkamp § 656(c). The Ninth Circuit's decision thus threatens to hamper the most dynamic part of the American economy, which ultimately harms businesses and consumers alike.

2. This case is an ideal vehicle in which to decide the questions presented. The district court and the court of appeals both reached the question whether the rule of reason should govern the tying claims in this case. The district court, applying *Microsoft*, held that the rule of reason should apply. But the court of appeals held that the modified per se approach should apply. What is more, this case arises in the posture of summary judgment, which plays a "critical role * * * in antitrust litigation." U.S. Br. at 16, *Eastman Kodak*, *supra*. The Court routinely addresses antitrust questions at that stage. See, *e.g.*, *Illinois Tool Works Inc.* v. *Independent Ink, Inc.*, 547 U.S. 28, 32-33 (2006); *State Oil*, 522 U.S. at 9; *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 578-582 (1986). It should do so here as well.

* * * * *

This Court's attention to antitrust liability for tying arrangements is badly needed in today's world of modern technology. The Court's precedents applying a per se rule have long been questioned. And even as modified in *Jefferson Parish*, the per se rule poses an unnecessary hurdle to American innovation, particularly with respect to technologically integrated products. There is now a conflict over how the modified per se approach should apply to integrated software products, and this case is an ideal vehicle for resolving that conflict and the broader question of the appropriate standard. The Court should grant the petition and take this opportunity to bring the tying doctrine into the 21st century.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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