No. 24-1324

In the

Supreme Court of the United States

SAP SE, et al.,
Petitioners,

v.

TERADATA CORPORATION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

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.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation (WLF) is a nonprofit public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears as amicus curiae to urge this Court to embrace the consumer welfare standard when applying federal antitrust laws. *Apple v. Pepper*, 587 U.S. 273 (2019); *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013).

INTRODUCTION AND SUMMARY OF ARGUMENT

"Buyers often find package sales attractive." *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984). With those words, this Court killed the reasoning for a per se rule against tying. And yet, per se liability has lingered on for forty years because this Court decided that it was "too late" to overrule its prior precedent in *International Salt Company v. United States*, 332 U.S. 392 (1947). *Jefferson Parish*, 466 U.S. at 9; *but see Cont'l Television, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 (1977) (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)). Rather than end *International Salt*'s per se rule, the *Jefferson Parish*

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* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission. Every party's counsel received timely notice of WLF's intent to file this brief.

Court announced a new standard: tying is still per se illegal—but only sometimes. 466 U.S. at 17-18.

The time has come to end this dance. Nobody really believes anymore, as Chief Justice Warren did in 1962, that tying is so "inherently anticompetitive" as to merit per se treatment. *Brown Shoe Co. v. United States*, 370 U.S. 294, 330 (1962) (discussing *Int'l Salt*). In fact, tying is efficiency-maximizing to the point where "[t]he great majority of ties are beneficial or at least benign." Erik Hovenkamp & Herbert Hovenkamp, *Tying Arrangements and Antitrust Harm*, 52 Ariz. L. Rev. 925, 927 (2010).

And yet the market lives with this half-hearted *Jefferson Parish* rule, even as the Court has gutted the underlying rationale for *International Salt*'s per se liability. *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 46 (2006) (patents no longer presumptively evidence of market power in tying cases).

This is hardly a workable standard. Outside the easiest cases, courts cannot distinguish competition from conduct so unsavory it must be per se illegal. "*Every* indicator of exclusion also is present with efficient competition. Both predators and efficient producers undercut rivals and gain market share." Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 Harv. J.L. & Pub. Pol'y 439, 443 (2008) (emphasis in original).

Even so, litigants and courts must brief and review tying cases under *both* a per se rule and the rule of reason. *E.g.*, Pet. App. 5a ("We evaluate that claim under two different analytical frameworks: the

per se rule and the rule of reason"); *Suture Express, Inc. v. Owens & Minor Distrib., Inc.*, 851 F.3d 1029, 1037 (10th Cir. 2017) ("[T]ying arrangements can be analyzed using a per se rule or a rule of reason"). If any kind of bundling ought to be impermissible, it's the smashing together of two standards of review every time someone alleges that single-sale conduct violates the Sherman Act.

Only this Court can finally and formally overrule *International Salt* and announce a new, nationwide standard for when a tie violates the antitrust laws. It should take this case and do so.

Of course, simply bayoneting a wounded *International Salt* is not enough. As anyone who dabbles in antitrust law knows, the distinction between tying and tied products can quickly get metaphysical. "[S]o long as the notion persists that there is some point in distinguishing one-product sales from two-product sales, so long will the law find itself face-to-face with the problem of how a tie-in sale can be [legally] distinguished from any sale." Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 386 (Kindle ed. 2020).

The Court should grant review, then, not only so that *International Salt* can be overruled, but so it can be replaced with a judicially policeable standard that reflects economic reality: only ties that restrict output violate the antitrust laws.

ARGUMENT

I. THE PETITION OFFERS THE COURT THE OPPORTUNITY TO FINALLY OVERRULE *INTERNATIONAL SALT*.

In 1947, this Court handed down *International Salt Company v. United States*, 332 U.S. 392. That case, and its progeny, hold that "[t]ying agreements serve hardly any purpose beyond the suppression of competition" and are illegal per se. *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305 (1949) (explaining *Int'l Salt*).

No serious antitrust scholar believes this. Pet. 26 (collecting research). Nor, in fact, does this Court, which has limited "the force of *International Salt*" from "broadly condemning tying arrangements," *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 9-10 (1958), to accepting that only "certain tying arrangements . . . are unreasonable 'per se.'" *Jefferson Parish*, 466 U.S. at 9. Even patented tying products, like that at issue in *International Salt*, no longer render a tie per se illegal, but are subject to a market power analysis. *Ill. Tool Works*, 547 U.S. at 46 (abrogating *Int'l Salt*'s presumption that patent-related ties are per se illegal).

If tying came before this Court as a matter of first impression, a "plaintiff seeking application of the per se rule" would no doubt fail to "present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 298 (1985). After all, tying is efficiency-maximizing to the point where "[t]he

great majority of ties are beneficial or at least benign." Hovenkamp & Hovenkamp, *Tying Arrangements and Antitrust Harm*, 52 Ariz. L. Rev. at 927.

It is certainly welcome news that the Court has conceded that "not all ties are bad." *United States v. Microsoft Corp.*, 253 F.3d 34, 87 (D.C. Cir. 2001); *cf.* Pet. 26. But the per se rule remains on the table because this Court has refused to overrule *International Salt*.

True, the wrong outcome is not reason enough to overrule precedent. But *International Salt*'s "underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 379 (2010) (Roberts, C.J., concurring); *cf. Jefferson Parish*, 466 U.S. at 16-18; *Ill. Tool Works*, 547 U.S. at 46. At this point, it is wiser to overrule the dysfunctional case.

In *Jefferson Parish*, the Court "tried to reconcile [its] archaic and misguided hostility towards tying with the plain fact that tying is a widely used and obviously efficient business practice." David S. Evans, *Untying the Knot: The Case for Overruling* Jefferson Parish, U.S. Dep't of Justice (July 2006); https://perma.cc/D72V-LQAJ. Now only "*certain* tying arrangements" are per se illegal. 466 U.S. at 9 (emphasis supplied). But that still requires courts to conduct a searching "inquiry into the validity of a tying arrangement," "focus[ing] on the market or markets in which the two products are sold." *Id.* at 18. "In other words . . . the tying per se rule incorporates an inquiry into market power." Pet. App. 21a.

This antitrust halfway house is untenable for two reasons.

First, a principal upshot of a per se rule is its simplicity. Faced with a business arrangement that is per se illegal, courts need not oversee fact-intensive battles-of-experts. Judges and juries can easily apply the rule "if sufficient evidence of X, then X is verboten." But in *Jefferson Parish*, "the Court announced that the per se rule may be applied only after the evaluation of the possible economic consequences of an arrangement—thus undercutting the simplicity that is the principal justification for the rule." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 10 (1984).

Nor has the *Jefferson Parish* mis-mash provided stability or assisted the lower courts in the orderly development of the law. *Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring) ("[I]f adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished"). The D.C. Circuit famously sidestepped per se illegality in its 2001 decision in *United States v. Microsoft*, all while insisting that its ruling not "be interpreted as setting a precedent for switching to the rule of reason every time a court identifies an efficiency justification for a tying arrangement." *Microsoft*, 253 F.3d at 95. That's not much direction for other courts to follow.

Second, the *Jefferson Parish* fix no more reflects economic reality than a true per se rule. "[I]t is not possible to distinguish between anti-competitive and pro-competitive tying based solely on whether [a] firm has mere market power in the tying

good." Evans, *Untying the Knot*. But that's part and parcel of the *Jefferson Parish* demand. *Ill. Tool Works*, 547 U.S. at 46 ("[I]n all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power"). So "[t]he law of tying arrangements [still] remains irrational," with litigants briefing both per se and rule of reason analyses, auguring "lengthy trials on baseless claims and with unpredictable outcomes." Bork, *The Antitrust Paradox* 457.

In 1984, this Court was asked to toss its tying precedents, but refused, saying it was "far too late in the history of our antitrust jurisprudence" to do so. *Jefferson Parish*, 466 U.S. at 9. But "*stare decisis* is not an end in itself." *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring). This is particularly so in the antitrust context, where "[t]his Court has viewed *stare decisis* as having less-than-usual force." *Kimble v. Marvel Entm't*, 576 U.S. 446, 461 (2015); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) ("*Stare decisis* is not as significant in this case, however, because the issue before us is the scope of the Sherman Act").

Sometimes to "'ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion,'" *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)), erroneous precedent must be jettisoned. *Cf. GTE Sylvania*, 433 U.S. at 58. So it is here.

International Salt's "reasoning was exceptionally weak"—to the point where it has been bypassed by the D.C. Circuit and undercut by this

Court's shift to a welfare-maximizing view of the Sherman Act. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022). The "decision has [also] had damaging consequences." *Id.* The mere risk of per se illegality has undoubtedly chilled innovation by deterring firms from engaging in tying arrangements—even when those bundles would advance consumer welfare and maximize profits. *See* Pet. 22-24 (emphasizing importance of "technologically integrated software products").

In sum, the "fundamentally misguided" "quality of the precedent's reasoning, the workability of the rule it established, and reliance on the decision, all weigh in favor of letting" the whole line of cases from *International Salt* to *Jefferson Parish* "go." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 407 (2024) (cleaned up).

II. AFTER OVERRULING *INTERNATIONAL SALT*, THE COURT SHOULD CLARIFY THAT ONLY OUTPUT-RESTRICTIVE TIES ARE ILLEGAL.

Once the Court has turned the ship around, it should not abandon lower courts to "set sail on a sea of doubt." *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898) (Taft, J.), *aff'd as modified,* 175 U.S. 211 (1899). It should announce that only tying arrangements that can be proven to reduce output violate the law.

The antitrust statutes should be interpreted not merely in the interest of market efficiency, but also judicial efficiency. Per se rules for vertical arrangements are judicially efficient, but not

economically, and so they must go. But they should not be replaced with a squishy rule of reason.

Consider the amorphousness of the modern rule of reason, which requires that courts look not only for "[d]irect evidence of anticompetitive effects . . . such as reduced output, increased prices, or decreased quality in the relevant market," but also for "[i]ndirect evidence" of such harm through "proof of market power plus some evidence that the challenged restraint harms competition." *Ohio v. Am. Express Co.*, 585 U.S. 529, 542 (2018).

Intangibles like "decreased quality" or reliance on "indirect evidence" are hardly suitable for reviewing bundled products—especially in bleeding-edge tech. Frank H. Easterbrook, *Comparative Advantage and Antitrust Law*, 75 Cal. L. Rev. 983, 986 (1987) ("Often it takes a decade or more to determine what a business practice really does"). As for rising prices, they are only sometimes evidence of wrongdoing. If "output is expanding at the same time prices are increasing," then "rising prices are equally consistent with growing product demand." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993). These are precisely the sort of questions for which "[w]e ought to be skeptical of judges' and juries' ability to give good answers." Easterbrook, *Comparative Advantage and Antitrust Law*, 75 Cal. L. Rev. at 984.

The Court's latest theory about the unlawfulness of tying, even as modified by *Jefferson Parish*, is that it is a "means of extending power from one market to another." Bork, *Antitrust Paradox* 382; *Ill. Tool Works*, 547 U.S. at 43 (holding that patented

ties are unlawful if "supported by proof of power in the relevant market"). But the familiar "market power" analysis is largely irrelevant in reviewing ties for consumer harm. Evans, *Untying the Knot*. This "transfer-of-power theory" should not continue as the foundation for successful Sherman Act claims against product bundling. Bork, *Antitrust Paradox* 382. After all, "[w]hat distinguishes exclusion from efficiency?" Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 Harv. J.L. & Pub. Pol'y at 443 (punctuation altered). "What happens in the *future*: exclusion leads to monopoly overcharges later, and efficiency does not." *Id*. (emphasis in original, capitalization altered).

Judge Bork long ago demonstrated that a "tying arrangement, whatever else it may accomplish, is obviously not a means of gaining two monopoly profits from a single monopoly." Bork, *Antitrust Paradox* 389. Rather, "[m]onopoly misallocates resources because the monopolist must restrict output to maximize net revenues." *Id*. at 391. The Court should hold that tying arrangements violate the antitrust laws only if they restrict output in the tying product's market—full stop.

And rather than try to predict whether a bundle *might* restrict output, a court should wait until real evidence exists of *actual* output restrictions. "Instead of making predictions that are impossible to test—and will injure consumers if wrong—wait to see what happens. If monopolistic [restrictions] happen later, prosecute then." Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 Colum. Bus. L. Rev. 345, 347 (2003).

This is a policeable line, one that the lower courts can faithfully and rigorously apply. Using output as the sole measure of wrongdoing will give courts a tangible metric, one less likely to cause lengthy battle-of-the-experts trials that eat up time and money that both courts and market competitors could be (efficiently) applying elsewhere.

CONCLUSION

International Salt should be overruled. Tying should be presumptively legal, absent evidence of output restriction. Only this Court can make that happen, so it should grant the writ.

Respectfully submitted,

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