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 MICROSOFT CORPORATION AND META PLATFORMS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES

OTHER MATERIALS

INTEREST OF *AMICI CURIAE*[1]

Microsoft Corporation ("Microsoft") is a leading innovator in computer software, hardware, and security features; it has been creating software platforms and an array of business applications for more than 40 years. Microsoft's mission is to enable individuals and businesses throughout the world to realize their full potential by creating technology that transforms the ways people work, play, and communicate. Microsoft develops, manufactures, licenses, sells, and supports a wide range of programs, devices, and services, including Windows, Microsoft Azure, Microsoft 365, Surface, Xbox and Xbox Game Pass, and Bing, in addition to a variety of commercial and enterprise technologies powered by artificial intelligence. Microsoft invests billions of dollars in the research and development of new technologies, products, and services to compete in dynamic markets.

Meta Platforms, Inc. ("Meta") is a technology company, founded in 2004, whose mission is to give people the power to build communities and bring the world closer together. Meta develops and operates some of the world's most popular apps, including Facebook, Instagram, WhatsApp, and Messenger, which are used daily by people worldwide to connect, find communities, and grow businesses. Meta's products and services enable people to connect and share with friends, family, co-workers, and customers through

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* also represent that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before it was due.

mobile devices, personal computers, virtual reality headsets, and wearables.

Amici bring a unique and balanced perspective to the legal, economic, and technological issues in this case. *Amici* have experience selling platforms used by third-party developers; they also develop a variety of applications, often in competition with third-party developers, some of which run on their own platforms and some of which run on platforms of competing software companies. *Amici* accordingly have unique insight into both the importance of software innovation and the potential competitive concerns associated with leveraging of market power to foreclose competition.

The Ninth Circuit's determination that the software design at issue in this case is subject to scrutiny under the modified per se rule against tying cannot be reconciled with the D.C. Circuit's widely adopted approach in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam), or this Court's many precedents that recognize the potential procompetitive effects of arrangements that can be fairly characterized as tying. And it sits uneasily with the rule that product-design decisions are rarely the basis for liability under Section 2 of the Sherman Act. If allowed to stand, the Ninth Circuit's decision would chill efficient innovations that embody, rather than suppress, competition on the merits. The risk of inter-circuit confusion (and the corresponding specter of liability for conduct that benefits consumers) warrants this Court's prompt review.

INTRODUCTION AND SUMMARY OF ARGUMENT

Enterprise resource planning (ERP) software helps companies manage everyday business activities like finance, project management, and supply-chain operations.[2] ERP software operates on specialized databases that are designed to organize vast amounts of company transactions and data.

Petitioner SAP released a suite of ERP applications – called S/4HANA – that it designed to work with SAP's own "translytic" database, HANA. S/4HANA cannot operate with other databases because it must rely on HANA to perform required calculations, and it is accordingly sold with the necessary "runtime" licenses to HANA. These "runtime" licenses do not permit the user to employ HANA with third-party ERP software (unlike less-restrictive "full use" licenses, which users are permitted but not required to buy).

Respondent Teradata, which makes a different kind of database product, challenged this software design as an unlawful tying arrangement. It claimed that SAP had unlawfully required buyers of S/4HANA (the claimed tying product) also to purchase certain analytical capabilities in HANA (the claimed tied product).

The Ninth Circuit agreed. It held that, if Teradata successfully proves that SAP has "market power" in a tying product market and that "the tying arrangement affects a not insubstantial volume of commerce in the tied product market," the challenged product design can be condemned as unlawful without any further showing. Pet. App. 21a (cleaned up). In so holding, it acknowledged the "concern that the per se rule for

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[2] All facts are drawn from the Ninth Circuit's opinion.

ties, especially as applied to software markets, sits uneasily with the rationale courts have articulated for the per se rule in other contexts." *Id.* at 23a. But it considered itself bound by *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), to "deem[]" such arrangements "unreasonable as a matter of law." Pet. App. 21a-22a. It declined to follow the approach in *Microsoft*, where the D.C. Circuit considered the nature of the software products at issue before declining to apply *Jefferson Parish*'s per se rule. *See* 253 F.3d at 89-90.

Broad application of a rule that allows for condemnation of product designs that require products to operate in tandem – where they once operated separately – without proof of anticompetitive harm threatens to chill innovation that benefits consumers. *Jefferson Parish*'s modified per se rule seeks to protect against false condemnation through the dual requirement of tying-product market power and the separate-products test, which requires that the plaintiff establish distinct demand for the tying and tied products. For multiple reasons, however, these requirements do a poor job of limiting condemnation to those cases where tying is likely to harm consumers (and unlikely to benefit them), particularly in industries where rapid innovation may include reorganization of functions in new and more efficient ways.

Application of the rule of reason, rather than the modified per se rule, to tying claims based on innovations in software design will help to forestall condemnation of innovations that are competitively benign or even beneficial, while affording defendants the opportunity to establish that any competitive impacts are justified by efficiency gains. At the same time, the rule of reason ensures appropriate condemnation of arrangements that cause unjustified competitive harm. If proof of actual harm is not required, companies will think twice before introducing efficient, pro-consumer design changes that – under the Ninth Circuit's decision – may not only invite burdensome litigation but threaten unjustified liability.

This Court's review is further justified by the importance of harmonizing tying rules with standards governing claims of exclusionary product design more generally. A change to product design may render rivals' products incompatible with the defendant's product, which can lead to claims of monopolization under Section 2. This Court has never addressed such a claim; lower courts have established somewhat divergent standards that generally set a high bar for liability, given the importance of innovation to consumer welfare and the limited ability of courts to evaluate product design. *Compare*, *e.g.*, *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991 (9th Cir. 2010), *with C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340 (Fed. Cir. 1998). Reframing a claim of exclusionary product design as one for tying should not afford rivals an easier path to establishing a claim under the Sherman Act.

ARGUMENT

I. Unilateral Software Design Decisions Should Be Evaluated Under the Rule of Reason

Tying claims based on software design decisions should not be subject to condemnation in the absence of evidence of actual harm to competition in the tied product market that is not justified by countervailing efficiencies. For reasons articulated by this Court and the en banc D.C. Circuit in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam) – and for additional reasons supported by economic scholarship – application of the per se rule of *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), to such claims risks discouraging the very innovation that antitrust rules are meant to encourage.

First, the "separate products" inquiry articulated by the Supreme Court in *Jefferson Parish* – which is intended to limit application of the per se rule to circumstances where tying is unlikely to offer significant efficiencies – carries a significant risk of false positives in innovative technology industries. *See Microsoft*, 253 F.3d at 88-89. As the D.C. Circuit explained, the "separate products" inquiry – which depends on the existence of sufficient demand for purchase of the tied product separately from the tying product – is backward-looking; it therefore risks "preventing firms from integrating into their products new functionality previously provided by standalone products." *Id.* at 89. "If integration has efficiency benefits, these may be ignored by the *Jefferson Parish* proxies." *Id.* For example, if "integrating [a disk] drive into [a] computer enhances the performance of both the computer and the drive and lowers the manufacturer's production cost and hence the consumer's price," then "consumers would likely prefer the bundled product, and the backward-looking inquiring into their past preferences would produce a legal answer contrary to the consumer's present interests." Daniel A. Crane, *Tying Law for the Digital Age*, 99 Notre Dame L. Rev. 821, 861 (2024). "Such an approach could stultify innovation by deterring producers from redesigning products in ways that benefited consumers but could give rise to tying liability." *Id.*

Second, such efficiencies are far more likely to be jeopardized by overbroad application of the per se rule in high-technology industries than in traditional industries that were at issue when the per se rule was first formulated. The early Supreme Court cases on tying dealt with contractual restrictions.[3] They did not address technological integration; they did not involve enhancements to the tying or tied products that increased the value of complementary goods; and any claimed benefits for users could be achieved by establishing standards for the tied product. *See Microsoft,* 253 F.3d at 90. As the D.C. Circuit recognized, those characteristics of technological integration "affirmatively suggest[] that per se rules might stunt valuable innovation." *Id.* at 92; *see also Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 998 (9th Cir. 2023) ("Software markets are highly innovative and feature short product lifetimes—with a constant process of bundling, unbundling, and rebundling of various functions. . . . If *per se* condemnation were to follow, we could remove would-be popular products from the market—dampening innovation and undermining the very competitive process that antitrust law is meant to protect."), *cert. denied*, 144 S. Ct. 681 & 682 (2024).

Third, and more broadly, the per se rule against tying is difficult to reconcile with broader antitrust legal principles and economic scholarship. Bluntly, "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). Economists recognize that tying offers many potential efficiencies, including lower production, distribution, and trans-

[3] *See* Crane, 99 Notre Dame L. Rev. at 824 ("Tying law . . . was built to address a set of industrial-era problems about the exploitation of intellectual property rights to leverage power to adjacent markets through contractual requirements clauses. Such problems have not vanished in the digital age, but they are no longer characteristic of most tying claims.").

action costs and higher product quality. *See* David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 Yale J. on Reg. 37, 83-84 (2005); Qian Wu & Niels J. Philipsen, *The Law and Economics of Tying in Digital Platforms: Comparing* Tencent *and* Android, 19 J. Competition L. & Econ. 103, 106-07 (2023). "[T]ying is not a naked restraint. It is a ubiquitous part of business practice, serving to protect product or service quality, to reduce production or distribution costs, to meter usage, or to support presumptively output increasing price discrimination." Herbert Hovenkamp, *The Rule of Reason*, 70 Fla. L. Rev. 81, 97-98 (2018).

Part of the analytical mismatch stems from the fact that tying claims are often pursued under Section 1 of the Sherman Act, with the tying sale treated as satisfying the Section 1 requirement of concerted action. *See, e.g.*, *Systemcare, Inc. v. Wang Lab'ys Corp.*, 117 F.3d 1137, 1144-45 (10th Cir. 1997) (en banc). That triggers per se treatment, even when the conduct is substantively unilateral and there is no collusion, i.e., "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). As this case illustrates, conduct challenged as tying may involve nothing but the defendant's unilateral choices regarding product design, marketing, and sales. As courts have recognized, rules that restrict firms from adopting efficient practices and competing vigorously, which by definition threatens rivals, harms consumers, who miss out on the benefits of lower prices and better products – not only from the defendant firm, but also from competitors driven to up their game. *See Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir.

1986) (Posner, J.). It also forces a court into the role of product manager, deciding when (and at what price, and for how long) a stripped-down version of a product must be sold. Application of the rule of reason helps to avoid these problems. *See* Dennis W. Carlton & Michael Waldman, *Tying*, *in* 3 *Issues in Competition Law and Policy* 1859, 1860 (ABA Section of Antitrust Law 2008) (noting that "intervention makes more sense in cases in which tying is accomplished by contract rather than by product design because in cases out of product design intervention would require the government interfering in the internal workings of the firm").

In addition, as SAP has argued, to the extent there is any agreement at issue, it is a vertical agreement; all such agreements – even where they are far more restrictive of competition than the sort of bundled sale at issue here – are subject to scrutiny under the rule of reason. *See Ohio v. American Express Co.*, 585 U.S. 529, 541 (2018). By contrast, per se condemnation is properly reserved for horizontal restraints that enhance each colluding firm's preexisting market power – like price-fixing, output restrictions, bid-rigging, and the like – and that "deprive[] the marketplace of the independent centers of decisionmaking that competition assumes and demands," *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984), and which lack redeeming virtues.

Fourth, economic scholarship calls into question the basic assumption underlying the per se rule against tying – namely, that such arrangements "serve hardly any purpose beyond the suppression of competition," *Jefferson Parish*, 466 U.S. at 34 (O'Connor, J., concurring in the judgment) (cleaned up). *Jefferson Parish* itself recognized that the assumption was mistaken. *See id.* at 11-12 (majority); *Illinois Tool Works Inc. v.*

Independent Ink, Inc., 547 U.S. 28, 36 (2006) (further confirming the error of that assumption). In fact, tying is prevalent in competitive markets, reflecting the many benefits that offering two products together can provide to consumers. *See Microsoft*, 253 F.3d at 93 ("The ubiquity of bundling in competitive platform software markets should give courts reason to pause before condemning such behavior in less competitive markets.").

Moreover, given the expansiveness of the *Jefferson Parish* "separate products" inquiry, a competitor that has lost sales as the result of a change in product design that has rendered its own product obsolete or unattractive may have little difficulty in characterizing the new design as a suspect tying arrangement. Nearly any liability rule may entail a risk of false positives by condemning conduct that is benign or beneficial. But the per se rule against tying, particularly if applied in contexts for which it was not originally formulated, is especially poorly tailored to reach conduct that, in most though not all cases, has a high likelihood of harm. *See* Carlton & Waldman, *supra*, at 1876 ("[P]er se illegality is incorrect and likely results in intervention in many cases in which intervention harms welfare."); Hovenkamp, 70 Fla. L. Rev. at 159 ("When ties or exclusive deals are legitimately exclusionary they are so on more-or-less the same conditions as the general run of unilaterally-imposed exclusionary practices. As a result, Sherman Act Section 2 monopoly-power standards should apply to them.") (footnote omitted).

Applying rule-of-reason scrutiny to tying arrangements involving high-tech products strikes the right balance: it invites antitrust scrutiny when tying conduct harms competition but not otherwise, and it permits consideration of redeeming efficiencies. Such an approach appropriately treats unilateral tying like any other practice by an allegedly dominant single firm. To be sure, such an inquiry may raise litigation expenses in some circumstances, but those costs are likely to pale in comparison to the costs – to consumers, the proper focus of antitrust concern – of discouraging procompetitive innovations. "Rule of reason analysis," at least, "affords the first mover an opportunity to demonstrate that an efficiency gain from its 'tie' adequately offsets any distortion of consumer choice." *Microsoft*, 253 F.3d at 92; *see also* Crane, 99 Notre Dame L. Rev. at 877-78 ("The ultimate issue in a tying case is the very one that the per se rule purported to excise from tying analysis: whether the tying arrangement harms competition."); Hovenkamp, 70 Fla. L. Rev. at 98 ("[Tying] should be accorded rule of reason treatment."); Jean Tirole, *The Analysis of Tying Cases: A Primer*, 1 Competition Pol'y Int'l 1, 25 (2005) ("Tying should be submitted to a rule of reason standard.").

For all these reasons, the Ninth Circuit's wooden application of a per se rule was inconsistent with this Court's precedents and bad as a matter of policy. Already, most courts recognize that the per se label is a misnomer. *See*, *e.g.*, *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 468 (7th Cir. 2020) (noting that the per se rule for tying is "nominal[]" and "peculiar" and requires proof of "much of what must be demonstrated in a rule of reason case," in part because, "even when treated as per se illegal, 'the Supreme Court has almost always been willing to consider a defendant's offered justifications'") (quoting X Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1760(b) (4th ed. 2015) ("Areeda & Hovenkamp, *Antitrust Law*")).

And, even now, knowledgeable observers agree "it is more accurate to read Supreme Court precedent on tying as embracing a rule of reason, where anticompetitive effects must be shown or inferred and procompetitive justifications are admissible." Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397, 425-26 (2009). The Court should take this opportunity to clarify what should be clear: that lower courts are not bound to blind application of a per se rule, at least in the context of unilateral software design decisions.

II. The Standard of Liability for Independent Product Design Decisions Should Not Depend on Doctrinal Labels

This case also implicates more generally the question of how the Sherman Act should address a competitor's challenge to a firm's design decisions that may render that competitor's products either incompatible or less attractive to buyers. This Court, by addressing the tying claim presented here, can ensure that the standards governing product design do not depend on doctrinal labels but instead on substantive antitrust considerations.

As a general matter, courts of appeals have adopted standards to govern claims of exclusionary product design that set a high bar for liability, reflecting the importance of preserving incentives for innovation and concerns about the institutional competence of courts to evaluate technical merit. For example, in *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991 (9th Cir. 2010), the defendant ("Tyco") sold pulse oximetry systems, which comprise both sensors (attached to the patient) and monitors (separate devices that receive signals from the sensors). Tyco's "R-Cal" system was originally patent-protected

– which prevented other manufacturers from making compatible sensors – but, when the relevant patent expired, competitors began to sell such sensors, undercutting Tyco's price. In response, Tyco developed a new (also patent-protected) monitoring system, in which the sensors contained a digital memory chip; the monitors in the new system would not work with generic sensors (although the new sensors worked with the old monitors, Tyco allegedly discontinued those). Among other things, the plaintiffs claimed that Tyco had forced customers to purchase new monitors, which rendered generic sensors – that lacked digital memory chips – unusable. The district court granted summary judgment; the plaintiffs appealed, arguing that the district court had erroneously failed to "balance the benefits of Tyco's alleged product improvement against its anticompetitive effects." *Id.* at 998.

The Ninth Circuit affirmed, noting that, while "changes in product design are not immune from antitrust scrutiny," if a "design change is an improvement, it is necessarily tolerated by the antitrust laws, unless the monopolist abuses or leverages its monopoly power in some other way when introducing the product." *Id.* at 998, 1000 (citation omitted). It noted "the undesirability of having courts oversee product design" and the concern that "any dampening of technological innovation would be at cross-purposes with antitrust law." *Id.* at 1000. The inclusion of a digital memory chip in the sensor "allow[ed] new functions, such as sensor event reporting and sensor messaging, to be included in the sensors themselves." *Id.* at 1001. Moreover, "even if Tyco has not yet been able to successfully utilize the new flexibility provided by the [new] platform, that in no way contradicts that the platform facilitates the introduction of new types of sensors and sensor functions and will reduce costs for consumers in the long run." *Id.* Other appellate decisions reflect similarly demanding liability standards. *See Microsoft*, 253 F.3d at 65 ("As a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes."); *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 544 (9th Cir. 1983) ("[T]he introduction of technologically related products, even if incompatible with the products offered by competitors, is alone neither a predatory nor anticompetitive act."); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281, 286 n.30 (2d Cir. 1979) ("[b]ecause . . . a monopolist is permitted, and indeed encouraged, by § 2 to compete aggressively on the merits, any success that it may achieve through the process of invention and innovation is clearly tolerated by the antitrust laws"; "it is not the product introduction itself, but some associated conduct, that supplies the violation"); *cf. New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 652 (2d Cir. 2015) ("Well-established case law makes clear that product redesign is anticompetitive when it coerces consumers and impedes competition.").

As the standards articulated by these courts reflect, however, product design decisions have not been immunized from liability. In *C.R. Bard,* for example, the defendant ("Bard") redesigned its Biopty "biopsy gun" so that it could use only Bard needles instead of cheaper, generic needles. *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1382 (Fed. Cir. 1998) (Bryson, J., concurring in part and dissenting in part). The Federal Circuit affirmed the jury's liability finding, given evidence that "Bard made a change in its Biopty gun for predatory reasons, *i.e.*, for the purpose of injuring competitors in the replacement needle market, rather than for improving the operation of the gun." *Id.*[4] The panel cited internal Bard documents showing "that the gun modifications had no effect on gun or needle performance" and "that the use of non-Bard needles in the gun 'could not possibly result in injury to either the patient or the physician.'" *Id. C.R. Bard* thus confirms that "[j]udicial deference to product innovation . . . does not mean that a monopolist's product design decisions are per se lawful." *Microsoft*, 253 F.3d at 65; *see also Allied Orthopedic*, 592 F.3d at 998 ("[C]hanges in product design are not immune from antitrust scrutiny and in certain cases may constitute an unlawful means of maintaining a monopoly under Section 2.").

Viewing the decision below through the lens of these Section 2 cases underscores the need for clarification of the tying standard. Left in place, the opinion below offers a tempting playbook. If a company introduces a new product with additional or combined functionality, a competitor could potentially allege a tie, as the plaintiffs did in this case. But characterization of the conduct as tying does not change its likely effects or potential benefits. Accordingly, the standard to be applied should likewise lead to the same liability outcome. *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 1757a (updated May 2025) (because "antitrust tribunals cannot generally supervise product design"

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[4] Judge Bryson's analysis of Bard's antitrust liability commanded a panel majority. *See* 157 F.3d at 1382 (Bryson, J., concurring in part and dissenting in part) ("Chief Judge Mayer and I agree . . . that there is sufficient evidence to affirm the jury's antitrust liability verdict based on Bard's gun modification program, for the reasons set forth below."); *id.* at 1374 (Mayer, C.J., concurring in part and dissenting in part) ("I join Judge Bryson's opinion sustaining the jury verdict on M3's antitrust counterclaim and remanding.").

and "the range of justifications is broader," "no tying agreement or conditioned sale should be found for purposes of the per se rule").

Prior to this case, following this Court's implicit lead, the circuits had reached a consensus that "[t]ying law's per se rule has no place in such inquiries." *Id.* ¶ 1757c; *see also id.* (noting that "none of the Supreme Court decisions fashioning or supporting the per se rule involved purely unilateral design changes"). The decision below represents a troubling departure. This Court should intervene.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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