No. 24-1324

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Ninth Circuit remanded this case for trial, finding that respondents (collectively, Teradata) had raised a material factual dispute on their antitrust tying claim under both this Court's longstanding modified per se approach *and* under the rule of reason. Petitioners (collectively, SAP) challenge only the Ninth Circuit's application of the modified per se approach; they do not challenge (and barely acknowledge) the court of appeals' decision that respondents' tying claim may proceed to trial under the rule of reason. In addition, prior Ninth Circuit precedent has already adopted the D.C. Circuit's exception to the modified per se approach that petitioners rely on for a purported circuit conflict; the decision below simply determined that exception did not apply on the specific facts here. The questions presented are:

1. Whether the Court should grant interlocutory review to consider the factbound correctness of the court of appeals' decision that this case does not fit within the exception to the modified per se rule that petitioners ask this Court to adopt.

2. Whether this Court should grant interlocutory review to consider whether to overrule its longstanding modified per se approach to tying arrangements when resolution of that question would not be outcome determinative.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, counsel for respondents Teradata Corporation, Teradata US, Inc., and Teradata Operations, Inc. state that: Teradata Corporation has no parent corporation. BlackRock, Inc., a publicly traded company, owns more than 10% of Teradata Corporation's stock. Teradata US, Inc. and Teradata Operations, Inc. are wholly owned subsidiaries of Teradata Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

SAP's petition presents two questions that may never matter to this case's ultimate outcome. Teradata's tying claim is proceeding to trial regardless of the applicability of this Court's modified per se rule, because the Ninth Circuit found a triable factual dispute existed under the rule of reason as well—a disposition that SAP's petition never challenges and hardly even acknowledges. If Teradata prevails under the rule of reason, there will be no need for this Court to consider either question SAP presents. That alone is reason to deny review.

Nor is there any circuit conflict. As SAP acknowledges, prior Ninth Circuit precedent has adopted the legal rule from the D.C. Circuit's decision in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc per curiam). Pet. 14, 19-20. Both circuits apply the rule of reason to ties that satisfy three requirements: the tying product is software that serves as a platform for third-party applications; the tying good and the tied good are technologically integrated; and the tie has procompetitive benefits to both users and other parties that cannot be achieved absent the tie. *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 997 (9th Cir. 2023) (adopting *Microsoft*).

What SAP is really arguing is that the unanimous decision below misapplied the Ninth Circuit's own precedent to the specific facts of this case. That question does not warrant this Court's review. Recognizing as much, SAP tries to dress up its argument as presenting a "conflict" with *Microsoft*; but the decision below applied *Microsoft*'s rationale and simply reached a different conclusion on different facts. In arguing otherwise, SAP premises its petition on an erroneous factual assumption: that its products are technologically integrated. The court below determined they are not, and SAP internal documents admit as much. Yet SAP's petition develops no challenge on that issue, and in any event, the correctness of that factbound question would not warrant this Court's review. This predicate factual issue is further reason to deny review, especially in this interlocutory posture.

SAP is similarly wrong that the decision below conflicts with this Court's precedent. Indeed, it could not: SAP acknowledges the Court has never passed on the factual questions raised here. Nor has this Court ever endorsed the *Microsoft/Epic Games* exception (or any exception) to its modified per se rule for tying claims. SAP's argument thus quickly devolves into a bare invitation for this Court to overrule its longstanding precedent. But SAP's policy-driven arguments would present no reason to overturn precedent under any circumstances—and especially not here, as this Court considered those same arguments when crafting its modified per se rule.

In the 24 years since the D.C. Circuit issued *Microsoft*, the Ninth Circuit is the only circuit to have had occasion to adopt its rationale—and then only in 2023. If these issues are as important as SAP asserts, this Court will have future opportunities to address them. The Court should await a posture where its decision will matter to the outcome.

The petition should be denied.

STATEMENT

A. Legal Background

Restraints of trade are generally evaluated under one of two different analytical frameworks: per se or the rule of reason. Restraints of trade that have "predictable and pernicious anticompetitive effect[s]" and "limited potential for procompetitive benefit" are per se unreasonable. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). The per se rule has several advantages. It allows courts to deem restraints unreasonable "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)). This contrasts with the rule-of-reason inquiry, which "requires courts to conduct a fact-specific assessment of market power and market structure *** to assess the [restraint]'s actual effect on competition." *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018) (quotation marks omitted; alterations in original). Per se rules thus "minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials." *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977). They also "tend to provide guidance to the business community" by offering clearer rules. *Ibid.*

Tying arrangements are a type of restraint that have long been subject to per se analysis because they "pose an unacceptable risk of stifling competition." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984); *see Int'l Salt Co. v. United States*, 332 U.S. 392, 396 (1947) (first articulating per se rule for tying claims). "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 34-35 (2006). Over the past 75 years, this Court has endorsed the per se rule for tying arrangements "many times." *Jefferson Parish*, 466 U.S. at 9-10.[1]

The Court has also recognized that "every refusal to sell two products separately cannot be said to restrain competition." *Id.* at 11. Accordingly, it has adopted a modified per se rule for tying arrangements, under which a tie is deemed per se unreasonable only "if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 462 (1992) (quoting *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969)); *see Jefferson Parish*, 466 U.S. at 16-18, 26-27. In addition, even if a tie is not per se

[1] *See, e.g.*, *U.S. Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 619-21 (1977); *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 498-99 (1969); *White Motor Co. v. United States*, 372 U.S. 253, 262 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 330 (1962); *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962); *N. Pac. Ry. Co.*, 356 U.S. at 5; *Black v. Magnolia Liquor Co.*, 355 U.S. 24, 25 (1957); *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 608-09 (1953); *Standard Oil Co. v. United States*, 337 U.S. 293, 304-06 (1949); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 462 (1992).

unlawful, it may still be invalidated under the rule of reason. *Jefferson Parish*, 466 U.S. at 17-18.

B. Factual Background

Teradata is a leading provider of enterprise analytical database systems, which are "designed to integrate and store data from various sources—including from transactional databases—and restructure it for analysis." Pet. App. 2a. Teradata's flagship product is the Teradata Database, which uses massively parallel processing to provide data analytics on vast amounts of data. Pet. App. 2a; C.A. App. 15208, 15395-96.[2]

SAP is a dominant provider of enterprise resource planning (ERP) software, which allows companies to manage data required to conduct day-to-day business activities. Pet. App. 2a. ERP applications operate on transactional databases. Pet. App. 2a. SAP lacked the expertise to develop an enterprise analytical database system like Teradata's; SAP's customers thus relied on third-party solutions to handle the data that SAP's ERP applications generated. C.A. App. 15729-30, 16228.

Teradata, seeing opportunities for combining and marketing its technology to SAP's ERP customer base, entered a collaboration with SAP called the Bridge Project to "bridge" SAP's front-end application to Teradata's back-end database. Pet. App. 2a; C.A. App. 15229-31. This collaboration was needed

[2] Citations to "C.A. App." are to the joint appendix filed in the Ninth Circuit, citations to "C.A. Dkt." are to the docket in the Ninth Circuit, and citations to "D.C. Dkt." are to the docket in the district court.

because SAP's application could not natively communicate with the Teradata Database. C.A. App. 15204, 15231-32. SAP needed Teradata's tools and expertise to develop the communication software, which would be called Teradata Foundation. Pet. App. 3a; C.A. App. 468-69, 15204-05, 15231-32. The parties signed agreements to protect their intellectual property, including trade secrets, and to prevent use of the other's intellectual property outside the Bridge Project. C.A. App. 457-66, 474-77.

Nevertheless, and without Teradata's knowledge, SAP used Teradata's confidential information to develop SAP's own competing enterprise analytical database system, HANA. Pet. App. 3a. SAP engineers worked on both HANA and the Bridge Project, discussed details of the two in close proximity, and forwarded Teradata emails to HANA engineers. C.A. App. 15280-87, 15430, 15437, 15444, 15467, 15475-76, 16352. SAP planned to exploit Teradata's information and then terminate the Bridge Project. SAP executives instructed colleagues "to get as much as we can out of the relationship" with Teradata "over the next 9 months." C.A. App. 15488. In 2011, two months after SAP released HANA, SAP unilaterally terminated the Bridge Project and stopped supporting, selling, and marketing Teradata Foundation. Pet. App. 3a; C.A. App. 15520, 15638-39.

The market perceived HANA as overpriced and underperforming compared to competing enterprise analytical database systems, and for years, HANA's sales were "very, very poor." C.A. App. 15652-53, 15826-28, 16243-46. SAP responded by contractually tying HANA to its ERP product. In 2015, SAP released an updated version of its ERP application called S/4HANA and required anyone purchasing S/4HANA to also purchase HANA, via either a full-use license or a runtime license. Pet. App. 3a.

Contrary to the petition's repeated suggestion, the "tie" was solely contractual. C.A. App. 17641. As SAP admitted in an internal document, HANA was "not bundled with" S/4HANA—"neither technically nor commercially." C.A. App. 17786. Although SAP asserts that "S/4HANA was designed to run only on the HANA database" (Pet. 11), the evidence shows HANA is not needed to run S/4HANA. CA App. 15293-95. Regardless, SAP's assertion about how S/4HANA is designed refers to S/4HANA's purported use of HANA's *transactional* capabilities. C.A. App. 15650-51. Yet SAP forced customers to license HANA's *analytical* capabilities as well, something that no competing provider requires—and it is those capabilities that compete with products like Teradata Database. C.A. App. 13929-30, 13993-97, 14103-05, 20748-49, 21109-10; *supra* p.5. And, as it did before the tie, SAP continues to sell HANA separately from S/4HANA. Pet. App. 23a; C.A. App. 13975, 16174.

SAP's contractual tie was successful: as SAP's internal documents recognized, SAP "most often" sold "to customers that have no choice but to use our products (e.g. HANA Runtime)." C.A. App. 19676; *see* Pet. App. 25a (noting evidence "that the 'overwhelming majority' of HANA sales were to S/4HANA customers"); C.A. App. 13971-74. The demand for S/4HANA drastically increased HANA sales—and forced SAP's "locked in" customer base to abandon competitor enterprise analytical database systems that they would have purchased had they not been coerced into buying HANA instead. C.A. App. 14097 & n.107, 16079-82, 18470, 18476, 20459. Thus, although customers objected to SAP's tie—and its largest customer group repeatedly asked SAP to "promptly" allow S/4HANA to be "operated on alternative databases"—SAP persisted. C.A. App. 13894-95, 15822, 16172-73, 16189, 18193.

SAP's strategy was to use the tie to take sales and market share from competitors in the tied market. C.A. App. 13968-75. And it sought to take customers from Teradata specifically. It instructed employees to "[p]ush HANA to every Teradata customer that has SAP," and directed HANA sales campaigns at Teradata customers. C.A. App. 15491, 18557. SAP's tie is causing significant competitive harm to Teradata and other providers of enterprise analytical database systems: Teradata, for instance, has lost a multitude of customers and sales. C.A. App. 13993-97, 16079-82. And if SAP's tie continues, it will result in foreclosure of competition in a staggering 48-73% of the tied-product market. C.A. App. 14097; Pet. App. 24a-26a. The tie also harms users: despite being an inferior product, HANA costs significantly more than comparable databases. C.A. App. 13975-76, 13982, 19140; Pet. App. 24a-26a.

C. Procedural Background

1. In 2018, Teradata sued SAP, bringing antitrust and trade secret claims (among others). Pet. App. 3a-4a. Teradata alleged SAP violated federal antitrust laws by tying HANA to S/4HANA, thus coercing SAP's locked-in customers to purchase an inferior product rather than superior databases with enterprise analytical functionalities, like Teradata's. C.A. App. 808-18, 822-24; *see* 15 U.S.C. §§ 1, 14. Teradata

contended that this tie was unreasonable under both the modified per se rule and the rule of reason. In support of its antitrust claims, Teradata presented the expert opinions of Dr. John Asker, a respected economist at the University of California, Los Angeles, who opined on the relevant product markets and the anticompetitive harms caused by SAP's tie. Pet. App. 4a.

The district court granted SAP summary judgment on Teradata's claims, in large part due to its exclusion of portions of Dr. Asker's opinions. Pet. App. 4a. The district court also concluded that the modified per se rule did not apply to Teradata's tying claim, based solely on the district court's view that there were "procompetitive justifications from SAP's design of S/4HANA to run on HANA rather than on multiple databases." Pet. App. 94a-96a.

2. A unanimous panel of the Ninth Circuit reversed and remanded, holding that "material factual disputes preclude summary judgment." Pet. App. 2a. After holding that the district court wrongly excluded Dr. Asker's opinions on market definition, market power, and harm to competition, the court of appeals concluded that Teradata had shown triable disputes of fact on its tying claim under both the modified per se rule and the rule of reason. Pet. App. 9a-26a.

The court of appeals explained that "tying arrangements—or at least some of them—have long been subject to per se condemnation," albeit under a "modified" per se approach. Pet. App. 21a (citing *Int'l Salt Co.*, 332 U.S. at 396, and *Jefferson Parish*, 466 U.S. at 9). Dr. Asker's testimony created a triable issue as to market power in the tying market—the "only element" of the modified per se standard that SAP had disputed. Pet. App. 24a.

The court of appeals disagreed with SAP that this case fit within the "narrow exception to the per se rule" that had been articulated by the D.C. Circuit in *Microsoft* and adopted by the Ninth Circuit in *Epic Games*. Pet. App. 22a-23a. Those decisions, the court of appeals explained, hold "that the per se approach is inappropriate when (1) a tie 'involv[es] 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.'" Pet. App. 22a (quoting *Epic Games*, 67 F.4th at 997). The court of appeals held that standard unmet because "the tying and the tied products here are not technologically or physically integrated." Pet. App. 22a-23a (contrasting the facts here with the integration present in both *Microsoft* and *Epic Games*). Instead, this case was "more akin to standard contractual tie cases, which courts regularly evaluate under the per se framework." Pet. App. 23a.

The court of appeals took note of "SAP's 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—that a class of practices can be declared unreasonable because judicial experience has shown that they are almost always anticompetitive and lack redeeming value." Pet. App. 23a. But long-settled precedent instructed that "certain tying arrangements"—including those where, as here, "a seller uses its tying-market power to capture a non-de minimis volume of commerce—are unreasonable per se." Pet. App. 23a (quoting *Jefferson Parish*, 466 U.S. at 9). The Ninth Circuit concluded that it "ha[d] no basis for expanding *Epic Games*'s narrow exception to that rule to cover software markets generally." Pet. App. 23a (citing the D.C. Circuit's similar conclusion in *Microsoft*, 253 F.3d at 95).

The court of appeals then held that, regardless, Teradata had raised a "triable dispute" on its tying claim "[u]nder the rule of reason." Pet. App. 24a; *contra*, *e.g.*, Pet. 5 (incorrectly stating court of appeals "declined to apply the rule of reason"). Teradata's evidence created a triable dispute about SAP's market power in the tying market as well as "substantial anticompetitive effects in the tied market," including evidence that SAP's "tie would eventually foreclose at least 65 percent of" the tied-product "market, well over the level at which the parties agree we should presume foreclosure unreasonable." Pet. App. 24a. Specific evidence supporting that foreclosure conclusion included data indicating that a significant percentage of the world's largest companies rely on the tying product, S/4HANA; "SAP documents describing its ERP customers as 'locked in'"; the tied product "HANA's high prices," notwithstanding its "lower quality than rival" products; and a regression analysis establishing "Teradata's lost revenue from the tie." Pet. App. 24a-26a.

Finally, the court of appeals reversed the grant of summary judgment to SAP on Teradata's state-law trade secret claim, remanding it for trial as well. Pet. App. 26a-30a. The Ninth Circuit found material disputes of fact about whether Teradata's documents, marked "Teradata Confidential" on each page, had adequately designated the shared information as confidential. Pet. App. 26a-27a. The court of appeals also found a triable dispute about whether SAP had improperly used that information in violation of the parties' agreements and the covenant of good faith and fair dealing. Pet. App. 27a-30a.

SAP sought rehearing en banc, challenging what it deemed "[t]he panel's erroneous application of *Epic Games*." C.A. Dkt. 74 at 16. The court of appeals denied the petition without calling for a response and without recorded dissent. Pet. App. 126a. It also denied SAP's motion to stay issuance of the mandate pending its certiorari petition. C.A. Dkt. 82.

3. On remand, the district court denied SAP's stay motion, and an April 2026 trial is scheduled on Teradata's antitrust and trade secret claims as well as on SAP's patent counterclaim. D.C. Dkt. 657. As Teradata explained in opposing SAP's stay motion, the trial evidence on the tying claim will be essentially the same regardless of the standard: under both the modified per se and rule-of-reason approaches, the jury will need to evaluate the relevant tying market, whether SAP has tied two products, and the injury to Teradata from that conduct. D.C. Dkt. 642 at 3-4; *see* D.C. Dkt. 649 (SAP not disputing this point).

REASONS FOR DENYING THE PETITION

Certiorari is unwarranted here. SAP's petition seeks advisory answers to theoretical questions that are either not implicated by this case or that may not matter to its ultimate outcome once this case proceeds beyond its current interlocutory posture.

First, SAP has failed to identify any circuit conflict. Only two circuits—the D.C. Circuit in *Microsoft* and the Ninth Circuit in *Epic Games*—have created an exception to this Court's modified per se rule for tying claims in specific technological circumstances, and no circuit has rejected such a rule. Both the D.C. and Ninth Circuits have applied the same legal rule and have reached consistent conclusions. SAP asks this Court to review the Ninth Circuit's application of that rule here; but whether a circuit correctly applied its own law is not a certworthy question. That is especially true here, where the Ninth Circuit determined SAP's products were not technologically integrated, yet SAP's petition never develops any argument for how they supposedly are—much less shows why that factbound issue warrants this Court's review. Moreover, the decision below reaches the correct outcome under the *Microsoft/Epic Games* exception for two additional reasons SAP ignores: the tying product is not platform software, and the tie does not create new benefits for both users and other third parties.

Second, SAP identifies no conflict between the decision below and this Court's precedent. Nor could it. As SAP acknowledges, this Court has never considered a case with similar facts and has never adopted the *Microsoft/Epic Games* (or any other) exception to its modified per se rule for tying claims. Here too, SAP's question presented assumes its products are technologically integrated, which the Ninth Circuit rightly rejected and which SAP fails to meaningfully challenge. No doubt recognizing these problems, SAP falls back on asking this Court to overrule decades of its antitrust jurisprudence. SAP's meager support for this drastic request—academic sources noting that ties are sometimes procompetitive—would not justify review under the best of circumstances. And certainly not here, where the Court has considered and rejected the same arguments when reaffirming the modified per se rule.

Third, this case is an exceptionally poor vehicle for review. Further proceedings may render moot any potential reason for this Court to consider either question SAP presents. SAP does not challenge the Ninth Circuit's decision that Teradata's tying claim should go to trial under the rule of reason. And again, multiple independent grounds support application of the modified per se rule here, including that SAP's products are not technologically integrated. In addition, SAP's arguments about the supposed risks posed by the Ninth Circuit's ruling are speculative, particularly given that only two circuits have ruled on this issue. If SAP is right about its assertions of importance, more cases will come up for this Court's review—including ones that present the questions in a posture that would actually matter.

The petition should be denied.

I. THE DECISION BELOW ACCORDS WITH THE ONLY OTHER CIRCUIT TO HAVE RULED ON THE NARROW ISSUE SAP RAISES

A. The D.C. And Ninth Circuits Apply The Same Legal Rule

In *Microsoft*, the D.C. Circuit considered Microsoft's "contractual and technological bundling of the IE [Internet Explorer] web browser" to "its Windows operating system." 253 F.3d at 84. Departing from this Court's modified per se approach for tying claims, the D.C. Circuit held "that the rule of reason *** should govern the legality of tying arrangements involving platform software products." *Ibid.* The D.C. Circuit identified three pertinent differences between the tie at issue and the ties this Court has historically assessed under a modified per se analysis: (1) no other case had "involve[d] software that serve[d] as a platform for third-party applications"; (2) in no prior case was "the tied good physically and technologically integrated with the tying good"; and (3) in no prior case did the defendant "argue that their tie improved the value of the tying product to users *and* to makers of complementary goods." *Id.* at 89-90 (D.C. Circuit's emphasis).

The D.C. Circuit emphasized the narrowness of its ruling. It stressed that its "judgment regarding the comparative merits of the per se rule and the rule of reason is confined to the tying arrangement before" it, "where the tying product is software whose major purpose is to serve as a platform for third-party applications and the tied product is complementary software functionality." *Id.* at 95. Specifically, the

D.C. Circuit "ha[d] no present basis for finding the per se rule inapplicable to software markets generally," as opposed to the narrower context "when the tying product is *platform* software" and the tie "increase[s] the value of third-party software … to consumers." *Ibid.* (D.C. Circuit's emphasis). And it cautioned that its opinion should 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." *Ibid.*

It was 22 years before another court of appeals addressed whether to adopt *Microsoft*'s narrow exception—and no circuit has rejected it. In *Epic Games*, the Ninth Circuit considered Apple's tie of its in-application payment processing system to Apple's application distribution platform. 67 F.4th at 994. The Ninth Circuit "join[ed] the D.C. Circuit in holding that per se condemnation is inappropriate for ties 'involv[ing] software that serves as a platform for third-party applications.'" *Id.* at 997 (quoting *Microsoft*, 253 F.3d at 89). The Ninth Circuit concluded that the same facts were present in *Epic Games* as in *Microsoft*: Apple's "app-transaction platform"—the tying product—was "platform software"; the tied good was "technologically integrated with the tying good"; and the tie presented "purported procompetitive benefits that could not be achieved by adopting quality standards for third-party suppliers of the tied good." *Ibid.* (quoting *Microsoft*, 253 F.3d at 90, 93-94). Accordingly, the Ninth Circuit applied the rule of reason rather than the modified per se rule. *Id.* at 998.

B. The Decision Below Adhered To That Legal Rule, And SAP Simply Complains About Its Fact-Specific Application

1. SAP concedes that *Epic Games* is consistent with *Microsoft*, and SAP does not purport to challenge the holding (or reasoning) of either decision. Pet. 16-21. Nor does SAP challenge the three-part "framework" that the decision below applied, which the court of appeals drew directly from *Epic Games* and, by extension, *Microsoft*. Pet. 20; *see* Pet. App. 22a. Instead, SAP challenges how the decision below applied just one of the three elements of that framework—whether "the tied good is technologically integrated with the tying good"—to the specific facts of this case. Pet. 20. But whether the Ninth Circuit correctly applied its own legal rule is not a question warranting this Court's review, especially in this interlocutory posture. Sup. Ct. R. 10.

Trying to conjure up a "conflict," SAP seizes on a statement in the decision below that SAP "can and do[es] sell" HANA "independently of S/4HANA." Pet. 20 (quoting Pet. App. 23a). SAP argues that statement conflicts with the "reasoning" of *Microsoft*, which deemed two products integrated even though the tied product was (according to SAP) "marketed and distributed" separately from the tying product. Pet. 20-21.

Contrary to SAP's suggestion, the Ninth Circuit's decision did not turn solely on SAP's products being sold separately. Pet. 20-21. Rather, in explaining what it means for two products to be technologically integrated in this context, the court of appeals invoked the facts of *Microsoft* and *Epic Games*, where the tied products were "built into" or "embedded into" the tying products' software. Pet. App. 22a. Specifically, in *Epic Games*, "Apple's in-app payment processor was integrated with its app distribution platform because both were built into the iPhone operating system." Pet. App. 22a (citing 67 F.4th at 967-68, 997); *see Epic Games*, 67 F.4th at 968 (explaining how app "developers must use Apple's IAP [in-app payment processor] to process in-app payments" and "cannot communicate out-of-app payment methods through certain mechanisms such as in-app links"). And in *Microsoft*, "Internet Explorer's application programming interfaces were embedded into the Windows operating system," creating "an integrated physical product." Pet. App. 22a-23a (citing 253 F.3d at 90); *see Microsoft*, 253 F.3d at 88-89 (defining "integrating" as "converting individual goods into components of a single physical object").

By contrast, HANA is not "software functionality that is technologically or physically integrated with SAP's ERP application." Pet. App. 23a. As an SAP manager admitted in an internal document, HANA is "not bundled with" S/4HANA—"neither technically nor commercially." C.A. App. 17786; *see* C.A. App. 15650-51 (SAP's expert admitting that S/4HANA does not run on HANA's analytical capabilities at all). Absent that integration, the court of appeals correctly concluded that SAP's tie is "more akin to standard contractual tie[s]" to which this Court has long applied a form of the per se rule. Pet. App. 23a (citing *N. Pac. Ry. Co.*, 356 U.S. at 5-8); *accord Microsoft*, 253 F.4th at 90 (collecting cases involving "contractual ties" and the per se analysis accompanying them); *see* C.A. App. 13895, 17640-41 (showing that SAP contractually requires all purchasers of S/4HANA to license all aspects of HANA, including its transactional and analytical functionalities).

The different dispositions of *Microsoft* and *Epic Games* on the one hand, and the decision below on the other, thus has an unremarkable (and uncertworthy) explanation: different facts lead to different outcomes under the same legal rule. SAP has no meaningful response. In fact, its petition never develops any argument about why the Ninth Circuit should have deemed its products technologically integrated on this record; SAP simply assumes that integration. And that narrow factual question would be unsuitable for review in any event.

2. SAP is similarly silent on the two additional reasons why this case is unlike *Microsoft* and *Epic Games*. First, the tying product, S/4HANA, is not software that serves as a platform for third-party applications (and SAP has never argued otherwise). Second, SAP's tie does not "improve[] the value of the tying product to users *and* to makers of complementary goods." *Microsoft*, 253 F.3d at 89-90 (D.C. Circuit's emphasis).

To the contrary, the tie harms users, who are coerced into buying a more expensive and inferior enterprise analytical database system rather than using a competitor's product, despite SAP's customers asking SAP to "promptly" allow them to use S/4HANA with databases other than HANA. *Supra* pp.7-8. And although SAP has purported to identify benefits to S/4HANA customers from using HANA's *transactional* capabilities, SAP has never attempted to identify any benefit, to customers or anyone else, from forcing S/4HANA users to license HANA's *analytical* capabilities—the heart of the illegal tie. C.A. App. 12186-207, 13929-30, 13993-97, 14103-05, 15650-51, 21109-10. And the tie does nothing to enable third parties to create new products on S/4HANA—which is not even platform software—to increase competition. Instead, the tie eliminates the value of S/4HANA to makers of enterprise analytical database systems, because they are foreclosed from the market when customers who would have bought their products are forced to buy HANA instead. *Supra* pp.7-8.[3]

These reasons provide two additional, independent grounds foreclosing application of the narrow *Microsoft/Epic Games* exception in this case. The alternative grounds are further reason to deny interlocutory review, as even were this Court to adopt the *Microsoft/Epic Games* exception, that would not change the outcome of the decision below.

[3] Although SAP argued for the first time on appeal that HANA "is 'platform software,' because it 'make[s] available to ERP applications thousands of functions,'" the court of appeals did not accept that argument. Pet. App. 22a-23a. Even were HANA to be deemed a software platform, the *Microsoft/Epic Games* exception still would not apply because HANA is the *tied* product, not the *tying* product. If HANA offers benefits, consumers will purchase it on its own merits, without being coerced by SAP's S4/HANA market power. *But see supra* pp.6-7 (describing evidence disproving any such benefits, including by showing that HANA's sales were "very, very poor" before the tie and that the "overwhelming majority" of HANA sales are to entities forced to buy it).

II. THE DECISION BELOW IS CORRECT, AND THIS COURT SHOULD REJECT SAP'S INVITATION TO RECONSIDER ITS LONGSTANDING PRECEDENT

A. SAP Identifies No Conflict Between The Decision Below And This Court's Precedent—And Indeed No Conflict Would Be Possible On These Facts

1. SAP also argues the decision below conflicts with this Court's precedent because "*Jefferson Parish* is best understood not to apply to technologically integrated software products." Pet. 24. But as explained, the factual predicate for that argument is absent here because SAP's products are not technologically integrated. *Supra* p.18. SAP tries to brush that problem aside, arguing the Court can nevertheless decide the supposedly "underlying question whether integrated software products should ever be subject to per se treatment." Pet. 21. SAP turns on its head which question is antecedent: as the case comes to this Court, answering that question would be purely advisory.

Even if SAP's products were technologically integrated, there still would be no conflict with this Court's caselaw. SAP essentially acknowledges as much, stating that this "Court has never decided *** whether the modified per se approach or the rule of reason should apply to integrated software products." Pet. 21. Absent such a decision, the court of appeals cannot have deviated from controlling precedent.

SAP cannot avoid this conclusion by invoking general statements from this Court's antitrust jurisprudence, including statements from the very decision applied by the court below. SAP cites *Jefferson Parish*'s acknowledgement that some ties are procompetitive. Pet. 22 (citing 466 U.S. at 12). That is precisely why *Jefferson Parish* modified the per se rule for tying arrangements, and it is that modified rule the court of appeals applied. Pet. App. 21a-24a (citing *Jefferson Parish*). SAP then insists that the traditional per se rule is "appropriate only for restraints that are 'manifestly anticompetitive'" and that a "'demonstrable economic effect' is required to depart from" the rule of reason. Pet. 23 (quoting first *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-87 (2007), then *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988)). Again, what is relevant here is the modified per se rule, which *Leegin* did not address; that modified per se rule requires a case-by-case showing that the tie affects a substantial volume of commerce in the tied market. *Eastman Kodak Co.*, 504 U.S. at 462. SAP's petition never challenges the court of appeals' holding that Teradata "raise[d] a triable dispute as to whether the tie has substantial anticompetitive effects" (Pet. App. 24a); nor did SAP even move for summary judgment on whether its tie affected a not insubstantial volume of commerce (C.A. App. 10160-62, 21965-66)—making its economic-impact argument ring hollow here.

SAP also quotes the D.C. Circuit's observations in *Microsoft* about the potentially dynamic character of technology markets, where tying "may produce efficiencies." Pet. 23. That, of course, does not speak to any conflict with any decision of this Court, which has never endorsed the *Microsoft/Epic Games* exception. Nor are there any efficiencies here, where the only purported benefits relate to HANA's *transactional* functionality—not its *analytical* functionality, which is the subject of the challenged tie. *Supra* pp.19-20. Regardless, SAP's attempt to extract a sweeping rule from *Microsoft* ignores the D.C. Circuit's repeated warnings that its holding was not intended to apply to "software markets generally." 253 F.3d at 95. No circuit has adopted the broad "technologically integrated software products" exception SAP apparently seeks—further counseling against this Court's entertaining the question now.

2. SAP resorts to nitpicking supposed "analytical errors" in the court of appeals' decision. Pet. 24. But SAP identifies no error, much less one that might suggest a conflict with this Court's precedent.

SAP argues the court of appeals mistakenly concluded ties are not vertical restraints, but that is not what the decision said. Pet. App. 21a (explaining a tie is distinct from the "classic type" of vertical restraint, "agreement[s] between firms at different levels of distribution"). SAP next argues 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." Pet. 24. Not so: the court of appeals expressly acknowledged SAP's arguments against applying the modified per se rule to "software markets," yet correctly concluded that this Court's longstanding precedent offered "no basis" for creating an "exception to that rule to cover software markets generally." Pet. App. 23a. SAP's critique of this analysis as "formalistic line drawing" (Pet. 24-25) cherry-picks language from an unrelated context, where this Court noted that "departure from the rule-of-reason standard must be based upon demonstrable economic effect." *GTE Sylvania*, 433 U.S. at 58-59. As noted, the modified per se rule already requires demonstrable economic effect (*Eastman Kodak Co.*, 504 U.S. at 462; *Jefferson Parish*, 466 U.S. at 16), and SAP never challenges that such an effect has been shown here. *Supra* pp.8, 11, 22.

Regardless, this Court "review[s] judgments of the lower courts, not statements in their opinions." *Amgen Inc. v. Sanofi*, 598 U.S. 594, 615 (2023). Here, the Ninth Circuit rightly concluded that Teradata's evidence creates a triable factual dispute that SAP is engaging in exactly the sort of tie that warrants application of the modified per se rule. There is evidence that SAP is leveraging its "economically significant market power" over its locked-in ERP customers to force them to buy a product that they do not want and charging them a premium price for that inferior product. Pet. App. 24a-26a; *supra* pp.7-8. There is also evidence that SAP's tie is causing the classic harm such tying arrangements create: foreclosing competition on the merits from others, like Teradata, that offer competing products. Pet. App. 24a-26a; *supra* pp.8, 11. The modified per se rule is designed to address precisely that type of coercive conduct and anticompetitive harm.

B. In Seeking To Overrule Precedent, SAP Relies On Arguments This Court Has Already Considered And Rejected

No doubt recognizing the weakness of its first question presented, SAP swings for the fences, inviting the Court to overrule its longstanding modified per se rule for all ties, not just those related to technologically integrated software. Pet. 25-28. But SAP cites no case that comes close to showing that the "doctrinal underpinnings" of the modified per se rule have been undermined. *Leegin*, 551 U.S. at 900. To the contrary, SAP relies on generic economic arguments that have been present for decades—arguments this Court considered when adopting the modified per se rule in its current form.

1. The main justification SAP offers for overruling the Court's precedent is that academics have observed some "tying arrangements simply do not threaten competition." Pet. 26-27. Academic commentary is no reason to overrule precedent. In any event, the Court already recognized decades ago in *Jefferson Parish* that "every refusal to sell two products separately cannot be said to restrain competition." 466 U.S. at 11. And it acknowledged existing criticism of a strict per se rule for tying. *E.g.*, *id.* at 21 n.33.

Yet the Court nonetheless reiterated the longstanding principle that certain ties "pose an unacceptable risk of stifling competition." *Id.* at 9 (collecting cases). It observed that per se scrutiny for ties "reflects congressional policies underlying the antitrust laws," noting that Congress "expressed great concern about the anticompetitive character of tying arrangements." *Id.* at 10. The Court balanced these competing concerns by further modifying its per se rule for tying claims. Thus, contrary to SAP's characterization of the modified per rule as an extreme departure from the rule of reason, it is commonly recognized that "[t]he factual elements that must be proven for a tying claim capture much of what must be demonstrated in a rule of reason case." *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 468 (7th Cir.

2020) (collecting sources). And both before and after *Jefferson Parish*, the Court has endorsed and applied the modified per se rule for ties without abandoning it. *See supra* p.4 n.1 (collecting cases).

2. None of SAP's other arguments suggests that reconsideration of that longstanding precedent is warranted. As for caselaw, SAP cites *Microsoft* (Pet. 25-26), but *Microsoft* expressly cautioned against extending its exception to the modified per se rule to other contexts. 253 F.3d at 95.

SAP also cites three examples where "the Court has departed from precedent applying a per se rule *** where the economic rationale for applying it had been undermined over time." Pet. 28. But again, the Court in *Jefferson Parish* was already aware of the longstanding economic argument that some ties are procompetitive (*supra* p.25), and SAP identifies no *new* economic arguments that have developed since. Moreover, the decisions SAP cites discussed classic types of vertical restraints like resale price fixing and territorial sales restrictions; they thus do nothing to cast doubt on the modified per se rule for tying arrangements, which present unique concerns. *State Oil Co.*, 522 U.S. at 7; *Leegin*, 551 U.S. at 882; *GTE Sylvania*, 433 U.S. at 57-58; *cf.* Pet. App. 21a (distinguishing ties from "classic" vertical restraints).

SAP contends that the government has deemed the application of the per se rule to tying claims "misguided" (Pet. 26), but SAP largely obscures that the government withdrew that guidance as inconsistent with this Court's law. *See* Department of Justice, Press Release, *Justice Department Withdraws Report on Antitrust Monopoly Law*, D.O.J. 09-459, 2009 WL

1285899, at *1 (May 11, 2009) (stating that "courts and antitrust practitioners should not rely on" prior report and that withdrawal signaled "return to tried and true case law and Supreme Court precedent"). That different administrations may have taken different positions on application of the modified per se rule hardly supports overturning this Court's precedent.

In sum, application of per se scrutiny to tying arrangements has a long, unbroken history—and that standard has been carefully modified to address longstanding economic concerns about unfairly condemning ties. There is no basis for this Court to intervene now.

III. THE ALTERNATIVE BASES FOR THE INTERLOCUTORY DECISION AND THE NARROW, FACTBOUND NATURE OF THIS CASE ARE FURTHER REASONS TO DENY REVIEW

Even had SAP identified a conflict in authority or a compelling reason to consider overruling precedent, the interlocutory decision here would present an exceptionally poor vehicle for review of either question presented.

A. Answering Either Question Presented In SAP's Favor Would Not Change The Outcome Of The Decision Below

The "interlocutory posture" of a case generally counsels against certiorari review. *E.g.*, *Nat'l Football League v. Ninth Inning, Inc.*, 141 S. Ct. 56, 56-57 (2020) (Kavanaugh, J., statement respecting denial of certiorari). That is particularly true here, where the

Court's ruling on the questions SAP presents may never matter for multiple independent reasons.

First and foremost, Teradata's tying claim is proceeding to trial under the rule of reason regardless. Pet. App. 24a. There are thus no judicial efficiencies warranting this Court's intervention before the facts are fully developed, and good reasons for it not to intervene. Under either standard, the jury will need to evaluate the relevant tying market, whether SAP has tied two products, and the injury to Teradata. D.C. Dkt. 642 at 3-4; D.C. Dkt. 649 (SAP not disputing). If Teradata prevails under the rule of reason, this Court will have no need to decide whether the modified per se rule should apply here—much less whether to take the drastic step of overruling decades of precedent.

SAP's only response is that summary judgment plays a "critical role" in antitrust litigation. Pet. 31. But that is no answer to the specific vehicle problem here, where (in contrast to the cases SAP cites) this Court's review would not be outcome dispositive.

Second, as explained, even were this Court to adopt the *Microsoft/Epic Games* exception to the modified per se rule, that exception would not apply here for two alternative reasons in addition to the reason given by the court of appeals: (1) the tying product is not platform software, and (2) the tie does not present benefits to users and makers of complementary products. *Supra* pp.19-20. SAP has no response to this problem. *Supra* pp.19-20.

Third, and again as explained, as this case comes to the Court, SAP's products have been determined not to be technologically integrated. *Supra* pp.17-18. Thus, to the extent SAP seeks a "technologically integrated" exception to this Court's precedent (whether the same as or broader than that in *Microsoft/Epic Games*), this case does not present that question. And SAP makes no argument that the fact-bound question of whether its products are technologically integrated is worthy of this Court's review.

B. SAP Has Identified No Question Worthy Of Interlocutory Review

SAP's "importance" arguments are overblown. SAP argues that failing to review the Ninth Circuit's decision will "expose broad swaths of beneficial conduct to liability—and to treble damages." Pet. 28. But that notion is belied by the fact that only two courts of appeals have ruled on whether and when to apply this Court's modified per se rule to technologically integrated products. Nor does SAP have any support for how the ruling on the specific factual context here will create issues for other situations: this case involves technology quite different from the type of third-party platform software at issue in *Microsoft* and *Epic Games*.

SAP invokes the risk of treble damages (Pet. 28), but that is a congressional judgment applying to all antitrust violations, whether under the per se rule or the rule of reason, and whether involving the software context or otherwise. 15 U.S.C. § 15(a). It thus says nothing about the nature of the particular questions raised here—nor explains the need for interlocutory review, especially when Teradata's tying claim is going to trial regardless.

SAP and its amici also issue an unsupported warning that the decision below will "threaten[] American innovation without benefiting consumers." Pet. 29. Time will tell whether the decision has any such consequence; were that theory to prove true, more cases will percolate through the courts, providing this Court future opportunities to address the issue once its importance is established and its contours further developed.

SAP's other purported harms prove too much. It raises the expense and time of antitrust litigation, and it suggests that the looming "risk of antitrust liability" will chill innovation. Pet. 30. But the per se rule both mitigates the cost and burdens of litigation and provides increased guidance for business, as compared to the rule of reason. *GTE Sylvania*, 433 U.S. at 50 n.16. Regardless, SAP's abstract concerns have no application here, where SAP will be defending against Teradata's tying claim at trial no matter what.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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