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

REPLY BRIEF FOR THE PETITIONERS

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Though one would never know it from the brief in opposition, this case presents the Court with the opportunity to resolve one of the most glaring and lingering anomalies in antitrust law: the application of a per se rule to tying claims, especially in the context of technologically integrated products. In its landmark decision in *United States* v. *Microsoft Corp.*, 253 F.3d 34, cert. denied, 534 U.S. 952 (2001), the D.C. Circuit applied the rule of reason to a tying claim, even though the tied product was sometimes marketed and distributed separately from the tying product. Yet in the decision below, the Ninth Circuit held that the modified per se rule applied to the integration of petitioners' software products simply because one of them is also sold separately.

Resolution of that conflict would justify certiorari in its own right. But this case also tees up the foundational questions of whether courts should apply the rule of reason, and not the modified per se rule, to integrated software products, and whether the Court should reconsider its precedents subjecting tying arrangements to any form of per se rule at all. The Court has made clear that per se condemnation should apply only where courts have sufficient experience with a type of challenged restraint to predict with confidence that the restraint will fail under the rule of reason. But courts necessarily lack such experience with integrated software products. And there is no economic basis for applying a per se approach to tying arrangements more generally.

Respondents seek to paint the petition as raising a one-off factual dispute over whether S/4HANA and HANA are integrated products. But there can be no serious question that, on the undisputed facts here, this case would have come out differently under the D.C. Circuit's reasoning in *Microsoft*. Respondents basically ignore the resulting circuit conflict on whether products can be integrated—such that the rule of reason should govern—if one of the products is also sold separately. And whatever the precise definition of "integration," this is exactly the kind of case in which a per se rule makes no sense. While respondents try to defend the modified per se rule that this Court adopted in *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984), they offer no response to the proposition, advanced by a who's-who of commentators over the years, that there is no economic basis for the assumption underlying the rule: that tying arrangements are inherently anticompetitive.

In an influential decision that has stood the test of time, the D.C. Circuit held that the modified per se rule is a poor fit in the context of integrated software products,

regardless of whether those products are sometimes sold separately. That decision offers a way to harmonize the Court's existing precedents with its obligation to ensure the common law interpreting the Sherman Act reflects economic realities. And if the Court disagrees, it should revisit those anomalous precedents.

The petition for a writ of certiorari should be granted.

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

In the decision below, the Ninth Circuit departed from the D.C. Circuit by concluding that the rule of reason cannot govern when an allegedly tied product is also sold separately. Respondents' attempts to wish away the conflict are unsuccessful.

1. Respondents suggest (Br. in Opp. 17-19) that the fact that HANA is also sold separately played little role in the decision below. That is simply wrong. In the critical paragraph of its opinion, the court attached dispositive weight to the fact that petitioners "can and do[] sell" HANA "independently of S/4HANA" in determining that "the tying and the tied products here are not technologically or physically integrated." Pet. App. 22a-23a. The court pointed to no other aspect of petitioners' products to support its conclusion that "this case is more akin to standard contractual tie cases, which courts regularly evaluate under the per se framework." *Id.* at 23a.

By resting on the fact that HANA is sometimes sold separately from S/4HANA, the decision below broke from the D.C. Circuit's decision in *Microsoft*, which did not treat the question of integration as dependent on whether the allegedly tied product was also sold separately. See Pet. 16-21. Instead, the D.C. Circuit considered whether individual goods were converted into "components of a single physical object," *Microsoft*, 253 F.3d at 88, such as

a disk that later becomes part of a computer's internal hardware, see *id.* at 94. The court also considered whether the arrangement brings "new functionality into platform software," such as by "commingling code" related to both products "in the same files." *Id.* at 64-65, 95. Under that approach, S/4HANA and HANA are plainly integrated. As the district court noted, petitioners specifically designed S/4HANA to "run on HANA rather than on multiple databases." Pet. App. 95a. That streamlined S/4HANA's development and improved its performance. See Pet. 10-12. The Ninth Circuit's approach thus cannot be reconciled with the D.C. Circuit's.

Respondents argue (Br. in Opp. 17-19) that S/4HANA and HANA are not integrated products under *Microsoft* because HANA is not "built into" or "embedded" in S/4-HANA. But the decision below does not rely on that argument, and for good reason. The undisputed evidence demonstrates that the two products are embedded because certain S/4HANA computations happen within HANA. See, *e.g.*, C.A. App. 10223. And to the extent respondents suggest (Br. in Opp. 18) that S/4HANA is not integrated with HANA's "analytical capabilities," that both misstates the record, see C.A. App. 21277-21278, and misframes the inquiry, insofar as the allegedly tied "product" can only be HANA, not HANA's analytical capabilities, see Pet. App. 3a-4a.

2. Respondents' remaining arguments (Br. in Opp. 19-20) invite the Court to wade into issues the court of appeals did not and to scour the record for reasons that the decision might have come out the same way under other parts of the D.C. Circuit's test in *Microsoft*. But the certiorari process is not a truffle-hunting exercise. In any event, respondents' arguments are unavailing because the

undisputed evidence in this case demonstrates that S/4-HANA and HANA involve platform software and benefit both users and third parties.

As to platform software: respondents object (Br. in Opp. 19, 20 n.3) that, in *Microsoft*, the allegedly tying product was the "platform software," whereas here, the proffered platform software is HANA, the allegedly tied product. But there is no indication that the D.C. Circuit attached particular significance to the fact that the platform software was the tying product, rather than the tied product. Instead, the key point is that the two products were technologically integrated. See *Microsoft*, 253 F.3d at 89. Notably, the Ninth Circuit's own test does not seem to require that the platform software be the tying product. See *Epic Games, Inc.* v. *Apple, Inc.*, 67 F.4th 946, 997 (2023).

As to benefits: respondents contend (Br. in Opp. 19-20) that no benefits to users or third parties arise from S/4HANA's integration with HANA. But databases such as HANA make thousands of functions available to third-party application developers, sparing them from duplicating the functions in their own codes. See C.A. App. 10754-10757, 10772-10779. And users benefit from "improved performance and functionality." Pet. App. 95a. Respondents object (Br. in Opp. 20 & n.3) that no benefits arise specifically from HANA's *analytical capabilities*. Even if that were true, but see p. 4, *supra*, the relevant inquiry is simply whether the alleged tie "improved the value of the tying product" (and, separately, whether "the same result could be achieved via quality standards"). See *Microsoft*, 253 F.3d at 90.

B. The Decision Below Is Incorrect

The D.C. Circuit in *Microsoft* correctly declined to apply the modified per se rule of *Jefferson Parish* in light of

the high bar that this Court has set for departing from the rule of reason. And if the Court were to conclude otherwise, it should revisit *Jefferson Parish* altogether. See Pet. 22-28. Respondents' contrary arguments lack merit.

1. Respondents contend (Br. in Opp. 22) that, in *Jefferson Parish*, this Court landed on the modified per se rule as a way of filtering out procompetitive ties. But as the D.C. Circuit correctly observed in *Microsoft*, this Court in *Jefferson Parish* emphasized that only "*certain*" alleged ties pose the sort of "unacceptable risk" warranting a per se approach. 253 F.3d at 89. And if respondents are right that *all* tying claims are subject to the modified per se rule, then it is not clear why the Court felt compelled to hedge by including the word "certain," see 466 U.S. at 9, much less the paragraph acknowledging the existence of procompetitive ties, see *id.* at 11-12.

Respondents also suggest (Br. in Opp. 22) that, by modifying the per se rule to require a substantial effect on commerce in the tied market, the Court in *Jefferson Parish* already justified a departure from the rule of reason for all tying claims. As a preliminary matter, it is telling that respondents do not attempt to reconcile that position with *Microsoft*. If respondents believe that the Ninth Circuit correctly applied *Jefferson Parish* here, while permitting the assumption that the products are technologically integrated, see Br. in Opp. 21-22, then it should follow that they believe *Microsoft* was wrong to apply the rule of reason.

That aside, respondents misunderstand the threshold requirement for application of a per se rule. The rule of reason applies to allegedly anticompetitive practices unless per se treatment is "justified by demonstrable economic effect": namely, that a given business practice "almost always tends to restrict competition and reduce output." *Business Electronics Corp.* v. *Sharp Electronics*

Corp., 485 U.S. 717, 726-727 (1988). Here, that would require that the bundling of integrated software products "almost always tends to restrict competition and reduce output." *Ibid.* But respondents come nowhere near such a showing; it is insufficient simply to point to a triable dispute over whether the alleged tie *in this case* affects a substantial volume of commerce in the tied market. See Br. in Opp. 22.

2. Respondents argue (Br. in Opp. 25-26) that the Court in *Jefferson Parish* heard the economic arguments that petitioners raise here and opted to modify, rather than abandon, per se treatment for ties. As just explained, see p. 6, *Jefferson Parish* should be construed not to apply to integrated software products. To the extent the Court disagrees, however, *Jefferson Parish* should be overruled. See Pet. 25-28.

Respondents emphasize (Br. in Opp. 26) that the Court's decision in *Jefferson Parish* is "longstanding." But the Sherman Act imposes on the courts an obligation to develop the common law, reducing the usual weight given to stare decisis considerations. See *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 899 (2007). For that reason, this Court has abandoned the per se rule in the context of several other vertical restraints, even when doing so required overturning century-old precedent. See, *e.g.*, *id.* at 881-882; *State Oil Co.* v. *Khan*, 522 U.S. 3, 7 (1997); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977). And in so doing, the Court has often relied on "[a]cademic commentary" concerning the economic realities of particular types of restraints. Br. in Opp. 25; see, *e.g.*, *Leegin*, 551 U.S. at 900. In the face of this Court's movement away from the per se rule, respondents' efforts to tout the virtues of that rule (Br. in Opp. 3, 27, 30) are hopelessly outdated.

Seemingly acknowledging that the per se rule has long since fallen out of favor, respondents assert (Br. in Opp. 26) that the economic argument against application of the per se rule to tying arrangements existed even at the time of *Jefferson Parish*. Yet most of the literature that petitioners have cited (Pet. 26-27) was published after *Jefferson Parish* was decided. And it is significant that many of the most respected scholars in antitrust law have taken the position that per se treatment is inappropriate for tying arrangements. See, *e.g.*, Erik Hovenkamp & Herbert Hovenkamp, *Tying Arrangements and Antitrust Harm*, 52 Ariz. L. Rev. 925, 965-966 (2010); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 144-145 (1984); Robert H. Bork, *The Antitrust Paradox: A Policy at War With Itself* 396-397 (Bork Publ'g 2021) (1978).

While the Court did soften aspects of the per se rule for some tying arrangements in *Jefferson Parish*, see Br. in Opp. 25, the resulting modified approach still poses a significant hurdle for innovation. See *Microsoft*, 253 F.3d at 89. The modified per se approach is "backward-looking" and does not capture the benefits of newly integrated products. See *ibid.* That approach is thus ill-suited for the modern economy—which is increasingly driven by technological innovation. See Pet. 29-30; see also Microsoft & Meta Br. 10-11. The time has once again come for the Court's application of the Sherman Act to "evolve to meet the dynamics of present economic conditions." *Leegin*, 551 U.S. at 899; see Pet. 25-28; WLF Br. 5-8.

Finally on this score, respondents posit that the modified per se rule is not "an extreme departure from the rule of reason." Br. in Opp. 25. But that is difficult to square with respondents' suggestion elsewhere that the modified per se rule "mitigates the cost and burdens of

litigation and provides increased guidance for business[es]." *Id.* at 30. And the argument reveals what respondents truly seek: to be relieved of their burden of proving actual, avoidable competitive harm. See *Ohio* v. *American Express Co.*, 585 U.S. 529, 541-542 (2018). The rule of reason is familiar, see, *e.g.*, *Leegin*, 551 U.S. at 885, and it is fair. There is no valid justification for refusing to apply it in this context.

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

The questions presented are profoundly important to antitrust law and American industry, and this case is an optimal vehicle in which to address them. Respondents identify no valid obstacles to the Court's review.

1. Respondents object 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." Br. in Opp. 29. But the fact that the Ninth Circuit has weighed in—and now departed from the D.C. Circuit's decision in *Microsoft*—makes all the difference. The Ninth Circuit is home to Silicon Valley and a quarter of all antitrust appeals nationwide, giving the decision below outsized importance. See Pet. 29-30. Beyond that, with decades of scholarship analyzing per se treatment of tying claims, see Pet. 26-27, no additional percolation is needed to ensure adequate development of the underlying issues.

Respondents suggest that the Court may have an opportunity to address the questions presented if and when "more cases * * * percolate through the courts." Br. in Opp. 30. But it has been four decades since the Court's decision in *Jefferson Parish*, and during that time, calls for the Court to abandon the per se rule, for all or at least some tying claims, have abounded. See Pet. 26-27. And

even a span as short as "six years" can "seem[] like an eternity in the computer industry," given the exceedingly short lifespan of technology products. *Microsoft*, 253 F.3d at 49. Should the Court await further percolation, the intervening years of exposure to per se liability, and accompanying treble damages, could prove stifling for American technology companies.

2. Respondents argue (Br. in Opp. 27-28) that the case is in an interlocutory posture and would go to trial even under the rule of reason. But the Court routinely takes antitrust cases at the summary-judgment stage for precisely this purpose: to decide the correct legal standard. Indeed, the Court did just that in perhaps its most analogous case to this one, *State Oil*, where it abandoned the per se rule for vertical maximum price fixing in favor of the rule of reason. 522 U.S. at 9, 22; see, *e.g.*, *Illinois Tool Works Inc.* v. *Independent Ink, Inc.*, 547 U.S. 28, 32-33, 42-43 (2006); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 576, 578-582 (1986); see generally *National Football League* v. *Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, J., respecting denial of certiorari) (explaining, in a case that was still at the pleading stage, that the petitioners could advance their "substantial arguments on the law" in a new petition for certiorari if they "d[id] not prevail at summary judgment").

As to the possibility that this case may proceed to trial even under the rule of reason, the Court routinely articulates the correct legal standard while entrusting to the lower courts on remand the application of that standard to the facts of the case. See, *e.g.*, *Illinois Tool Works*, 547 U.S. at 46. Petitioners seek nothing more here. Nor is trial under the rule of reason an absolute certainty. The Ninth Circuit determined only that, under the rule of reason, respondents had raised a triable issue of fact as to

"whether the tie has substantial anticompetitive effects in the tied market." Pet. App. 24a. But if the Court were to clarify the legal standard, the parties would be free to request a "fair opportunity" to address the implications of the decision, which could include further factual development and motion practice. See *Illinois Tool Works*, 547 U.S. at 46. None of this is a reason to deny review.

* * * * *

The questions presented have been thoroughly analyzed across nearly a quarter century of lower-court decisions and extensive scholarship. The Ninth and D.C. Circuits have reached differing conclusions on whether the rule of reason governs tying claims involving otherwise integrated software products that are also sold separately. This case presents an ideal opportunity to consider the application of the per se rule to some or all tying claims. The Court's attention to the questions presented is sorely needed. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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