No. 25-1385

IN THE

Supreme Court of the United States

ENDURE INDUSTRIES, INCORPORATED,

Petitioner,

v.

VIZIENT INCORPORATED,
A DELAWARE CORPORATION, *et al.*,

Respondents.

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

BRIEF OF ELIZABETH HANNAH RADER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Elizabeth Hannah Rader is a member of the Bar of this Court since 2007. Her professional focus has been on intellectual property and its relationship with the public domain and the First Amendment. Amicus has participated in landmark intellectual property matters before this Court, such as *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) and most recently *Georgia v. Public. Resource.Org, Inc.*, 590 U.S. 255 (2020).

The Fifth Circuit's decision falls into the same pattern as *KSR* did. The Court decides a seminal case and announces a flexible standard that gives lower courts discretion as they confront different unique facts, but appellate courts flatten that standard into rigid rules that are easy to apply but leave the lower courts without that discretion. Here, the Fifth Circuit has transformed this Court's flexible, multi-factor framework for defining a relevant market into a threshold test considering only evidence of cross-elasticity of demand. That shortcut ignores evidence of commercial realities important to apply the rule of reason.

Healthcare affordability is a national crisis. Petitioner's antitrust claims alleged anticompetitive arrangements by

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus and counsel made a monetary contribution to this brief's preparation or submission. Counsel notified both parties' counsel of amicus's intent to file this brief on July 2, 2026.

hospital GPOs that raise hospital costs. This brief explains that granting certiorari to restate the importance of considering all available relevant evidence could result in better enforcement of our antitrust laws to protect consumers.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Petition is not solely about Petitioner Endure's specific antitrust claims against Group Purchasing Organization Vizient or how courts decide if a plaintiff has proved a relevant market. It concerns an issue of national importance. Healthcare affordability now ranks as the public's single greatest concern in Gallup's issue tracking polls. While many factors contribute to the skyrocketing cost of healthcare, the rising cost of disposable medical supplies is an important one. When healthcare GPOs' policies reduce competition among sellers, they drive up hospitals' costs. Hospitals pass those increased costs to patients or their insurance companies, which in turn pass them on to employers or individual policyholders. Employers pass the costs on to their own customers. Or they pay the higher premiums, but they cannot simultaneously raise their employees' salaries or wages. Few Americans are unaffected.

The Petition demonstrates and explains a split among the circuit courts in how they analyze whether an antitrust plaintiff has shown a relevant market. Most antitrust cases are resolved at the market definition stage. This brief argues that the Fifth Circuit decision below exemplifies a troubling pattern. This Court crafts a broad, flexible standard in a widely-cited opinion, but leaves it to lower

courts to work out how to apply it as cases present new fact patterns. But in doing so, the lower courts create rigid tests that are easier to apply consistently, but eliminate flexibility, preventing district courts, closest to the evidence, from exercising their discretion when markets evolve and new fact patterns emerge. Here, the Fifth Circuit purported to follow this Court's teachings in *Brown Shoe v. United States*, 370 U.S. 294 (1962) but made one factor—cross-elasticity—dispositive, essentially throwing away other evidence relevant under this Court's flexible, fact-intensive standard. Meanwhile, some economists argue persuasively that identifying a relevant market is not only unnecessary—courts should focus directly on market power—but also ignores available material evidence and causes errors. If the Court grants the Petition, antitrust and economics experts will likely weigh in and the Court may wish to revisit whether market identification should be a step at all, much less a dispositive threshold test. Circuit courts need to be reminded that while they have some flexibility in following this Court's precedents, they are not empowered to turn a multi-factor test into a one-factor test because it seems efficient to do so. They are bound by stare decisis. Only this Court, after notice and opportunity to be heard, can overrule its holdings.

ARGUMENT

I. The Petition presents an issue of national importance because Americans struggle to afford healthcare, and anticompetitive conduct by GPOs increases those costs.

In a May 2026 survey by the Century Foundation of 2,002 registered voters, 53% reported cutting back on care or taking on debt to cope with healthcare costs. *As Healthcare Costs Spiral, A Supermajority of Americans Want Major Reform* (June 23, 2026). Even three-quarters of voters having employer-based insurance reported increases in their premiums, co-pays, deductibles, or out-of-pocket minimums. *Id.* The Century Foundation concluded that "healthcare costs are imposing a heavy and broadly shared burden, forcing millions of families—including Americans with 'good' job-based insurance—to ration care, take on debt, and switch to worse coverage." *Id.* When asked about what the federal government should do to lower health costs, eighty-seven percent of those polled said stopping hospitals from charging excessive prices was either the top priority or an important priority. *Id.* And eighty-six percent identified surprise hospital billing as a top or important priority. *Id.*

In 2025, total hospital expenses grew 7.5%, and hospital supplies at 9.9%. Am. Hosp. Ass'n, *Costs of Caring: Challenges Facing America's Hospitals as They Care for Patients in 2026* 2 (2026) (available at aha.org/system/files/media/file/2026/03/costs-of-caring-2026.pdf). As for insurance costs, according to PwC's forecast for 2027, health plan actuaries it surveyed anticipate medical cost trends for the Group and Individual markets to

remain elevated. PwC, *Medical Cost Trend 2027: Behind the Numbers* (June 11, 2026), pwc.com. PwC projected the group medical cost trend to be 9% in 2027 and the individual market trend to be 8.5%. *Id.* "With medical cost trend nearing double digits, payers face the big squeeze." *Id.* Rising hospital costs lead to rising insurance costs. The costs of employer-sponsored health insurance, a substantial component of total worker compensation, have climbed by close to twenty percent over the past five years. *Are Rising Employee Health Insurance Costs Dampening Wage Growth?*, Fed. Reserve Bank of N.Y.: Liberty St. Econ. (March 4, 2026), newyorkfed.org.

Businesses that provide insurance to their workers indicated in response to surveys that, but for those cost increases, they would have raised wages by roughly one percentage point. *Id.* at 1. Some firms reported passing part of the cost increases to their customers by raising prices of goods or services. *Id.* at 2. Others absorbed them, reducing their own profit margins. And some reported reducing workers' health insurance coverage or increasing employee contributions. *Id.* In short, healthcare affordability is a national crisis.

II. When GPOs behave anticompetitively, that increases hospital care costs, and the effects ripple throughout the healthcare system and harm consumers.

Hospitals originally established GPOs to pool their purchasing power to obtain more favorable contracts with suppliers of medical supplies. Christian DeRoo, Note, *Pay-To-Play: The Impact of Group Purchasing Organizations on Drug Shortages*, 3.1 Am. U. Bus. L.

Rev. 219, 232 (2013) (citing S. Prakash Sethi, Int'l Ctr. for Corp. Accountability, *Group Purchasing Organizations: An Evaluation of Their Effectiveness in Providing Services to Hospitals and Their Patients* 6, 17 (2006)). As of 2010, 98% of U.S. hospitals used GPOs to purchase products and about 72% of purchases by hospitals are through GPOs. Diana L. Moss, Am. Antitrust Inst., White Paper, *Healthcare Intermediaries: Competition and Healthcare Policy at Loggerheads?* 3 (May 7, 2012) [hereinafter Moss, *Healthcare Intermediaries*] (citing U.S. Gov't Accountability Off., GAO-10-738, *Group Purchasing Organizations: Services Provided to Members and Concerns Regarding Unfair Trading Practices* (2010)). "[W]hen multilateral monopoly or oligopoly characterizes relationships between an intermediary and an upstream or downstream market, bargaining largely replaces competitive market forces." *Id.* "Under those circumstances, smaller rivals in markets along the supply chain are particularly exposed to potentially exclusionary conduct." *Id.* Many contracts that GPOs enter into with medical device manufacturers amount to exclusionary agreements. Einer Elhauge, *The Exclusion of Competition for Hospital Sales Through Group Purchasing Organizations* 2 (2002).

Smaller manufacturers offering lower-cost or superior products are potentially foreclosed from the market if they cannot afford to pay high administrative fees associated with high-volume contracts to GPOs. Moss, *Healthcare Intermediaries*, *supra*, at 17 (citing Robert E. Litan & Hal J. Singer, *Do Group Purchasing Organizations Achieve The Best Prices for Member Hospitals? An Empirical Analysis of Aftermarket Transactions* (2010)). When GPOs' policies exclude some suppliers, patients' costs rise.

Additionally, when intermediaries' exclusionary practices result in overly limited choices in medical devices, "consumers fail to receive the benefits of innovation and a diversity of products and services, ultimately suffering the consequences of poorer health and well-being." *Id.* at 6. The lack of transparency in GPO contracts with hospitals disincentivizes hospitals to police pricing, and instead "higher prices are absorbed by insurers and passed on [to employers and consumers] through higher premiums." *Id.* at 16.

Moss concludes, among other things, that ensuring that intermediaries like GPOs deliver their promised benefits—cost savings for hospitals and those who pay hospital bills—will require more vigorous antitrust enforcement. *Id.* at 22. One of her policy recommendations is that antitrust analysis should consider both direct and indirect effects when balancing intermediaries' procompetitive benefits against the potential anticompetitive effects of their exclusionary conduct. *Id.* at 22–23. These include "structural changes in markets and firm conduct that impair supply chain stability, diversity of suppliers, and negative spillovers relating to public health." *Id.* at 23. "While these factors may not fit squarely within the traditional antitrust metrics for assessing competitive harm," Moss argues, "considering them recognizes the idiosyncratic features of competition in healthcare and aligns antitrust and broader healthcare policy objectives." *Id.* This recommendation is consistent with this Court's teachings in *Brown Shoe* that when evaluating proposed submarkets, courts should consider evidence of any number of practical indicia bearing on commercial reality. *See Brown Shoe*, 370 U.S. at 325.

For these reasons, granting the Petition and resolving the circuit split identified in it could lead to empowering lower courts to permit more antitrust cases to proceed to a stage where all the relevant evidence of commercial realities can be considered. That would increase scrutiny of anticompetitive vertical arrangements and potentially lower costs for consumers, as the antitrust laws were intended to do.

III. The Petition presents the Court with an opportunity to correct a systemic doctrinal shift in some circuit courts and provide additional guidance for the lower courts.

A. The rule of reason is Court-made law.

"The Sherman Act reflects a legislative judgment that, ultimately, competition will produce not only lower prices but also better goods and services... The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and price—are favorably affected by the free play of competitive forces." *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 695 (1978). Indeed, the original antitrust laws, read literally, prohibited all anticompetitive conduct. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. It is a felony to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." *Id.* § 2. But courts quickly concluded that Congress only meant to prohibit

"unreasonable" restraints of trade. *See Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 66 (1911) (noting that if the direct or indirect effects of the challenged actions are the criteria on which courts decide whether antitrust law prohibits them, "of course the rule of reason becomes the guide"); *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 687 (noting that the Sherman Act's language in § 1 presents the problem "that it cannot mean what it says"). Some restraints of trade, like price-fixing, were and are deemed illegal per se when proven. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396–401 (1927); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). But for the more difficult cases, where the challenged restraints might have both anticompetitive and procompetitive effects, courts developed the "rule of reason" to balance a restraint's harms and benefits to competition. *Standard Oil*, 221 U.S. at 65–67. The rule of reason's whole point is to assess each case on its merits based on a wide range of evidence. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (noting that courts must ordinarily consider facts peculiar to the industry, how business has changed since the restraint was imposed, its nature and effects, and the reasons for imposing the restraint).

B. The Fifth Circuit's use of cross-elasticity alone as a threshold screen improperly deprives courts of discretion to consider all evidence of practical indicia, contrary to this Court's precedents.

Over the past fifty years, as more courts have written decisions applying the antitrust laws to live controversies, the Court has applied the per se anticompetitive rule less—and the rule of reason more. As a result, vertical

agreements between buyers and sellers—like those at issue in the Petition—are treated more leniently now than they were historically. Michael A. Carrier & Mark A. Lemley, *Rule or Reason? The Role of Balancing in Antitrust Law*, 100 Notre Dame L. Rev. 139, 143 (2025) (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007); *State Oil Co.*, 522 U.S. at 22; *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 339–40 (1990); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57–59 (1977)). "Nominally, agreements between buyers and sellers are subject to the rule of reason, but in practice courts virtually always hold them legal." Mark Lemley & Mark McKenna, *Is Pepsi a Substitute for Coke? Market Definition in Antitrust and IP*, 100 Geo. L.J. 2055, 2092 n.163 (2012). The rule of reason "has become a burden-shifting approach that weeds out cases at successive steps." Carrier & Lemley, *supra*, at 148 & n.55.

Market definition is the most litigated issue in the antitrust field. *Louis Kaplow, Why (Ever) Define Markets?*, 124 Harv. L. Rev. 437, 438 (2010) (citing *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 469 n.15 (1992)) ("Because market power is often inferred from market share, market definition generally determines the result of the case."). Kaplow recognizes that adjudicators define markets as a useful and quick screen to dismiss cases that are almost surely baseless. *Id.* at 505. But he concludes that market power is a far better screen and market definition should be abandoned. *Id.* at 441 (citing Franklin M. Fisher, *Economic Analysis and "Bright-Line" Tests*, 4 J. Competition L. & Econ. 129, 132 (2008)) ("The question of what is the relevant market never arises in economics outside of antitrust" and "is not a question that has a precise, well-defined answer."). Not

only is defining the relevant market useless, in Kaplow's opinion, but it actually causes errors by throwing away information that might be useful. Kaplow, *supra*, at 472. The current fixation on market definition directs adjudicators' attention away from evidence that bears directly on the more important issue of market power. *Id.* at 480.

The Court has treated the relevant market inquiry as fact-intensive, instructing courts to consider at least seven "practical indicia" to decide whether a plaintiff has shown that a relevant submarket exists. *Brown Shoe Co.*, 370 U.S. at 325. Commercial realities should inform courts' analysis of market definition. *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966). The Court rejected assumptions about interchangeability of competitors' products or services that ignored evidence of actual market behavior. *Eastman Kodak Co.*, 504 U.S. at 466–67. But some lower courts have quietly replaced the Court's "practical indicia" methodology with a different one which treats cross-elasticity and interchangeability as a determinative test for determining whether a relevant market has been shown, rather than only one indicium, of varying importance, in a non-exclusive list of practical indicia. The Fifth Circuit's decision below is an example of that doctrinal shift. The court acknowledged *Brown Shoe*'s qualitative factors but described them as "really practical indicia or observable proxies that are probative of demand where low cross-elasticity of demand may otherwise be challenging to observe." *Endure Indus., Inc. v. Vizient Inc.*, 164 F.4th 405, 412 (5th Cir. 2026). It acknowledged that practical factors are "helpful" in identifying goods that obviously have different demands, in overcoming misleading elasticities where goods have

overlapping demand curves but are nevertheless distinct products, and to avoid underestimating market power where it spills over into separate goods. *Id.* at 412–13. But it concluded that the *Brown Shoe* factors "invite courts to apply their judgment" to decide if cross-elasticity identifies goods as the same or distinguishes them from one another. *Id.* at 413.

Granting review would allow the Court to resolve the current circuit split and confirm that *Brown Shoe* requires consideration of all available practical indicia. Or, if the Court concludes that evidence of cross-elasticity of demand, alone, renders a proposed market legally insufficient and a case susceptible to summary judgment—eliminating the need to consider other commercial realities—it can so hold and still create order out of the current chaos in the lower courts.

In cases involving intellectual property, antitrust's neighbor under the broad umbrella of unfair competition, the Court has repeatedly reined in lower courts when they purport to apply its flexible standards by creating and applying inflexible rules. *See, e.g., KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 415 (2007) (rejecting the teaching-suggestion-motivation test for analyzing obviousness under 35 U.S.C. § 103); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014) (rejecting an unduly restrictive framework for deciding whether to award attorneys' fees under 35 U.S.C. § 285); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 104–07 (2016) (rejecting a test for willful infringement as too restrictive to allow district courts discretion to consider the particular circumstances of each case, and as requiring a high standard of proof with no basis in 35 U.S.C. § 284). In other words, the Court often reminds

lower courts not to let a useful heuristic become a rigid, inflexible test. Here, the Petition does not present just the legal question of whether evidence of cross-elasticity of demand dooms a proposed relevant submarket. It presents the doctrinal question of whether evidence of cross-elasticity has become a bright-line test that has substantially replaced the Court's more flexible and fact-intensive *Brown Shoe* standard. If so, the decision below should be reversed because vertical stare decisis is absolute for lower courts. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 20); *Ramos v. Louisiana*, 590 U.S. 83, 115 n.4 (Kavanaugh, J., concurring). Because the framework for defining a relevant market is Court-made law, only this Court can change it.

CONCLUSION

All but the wealthiest Americans struggle to afford healthcare, especially hospital care for acute injuries or diseases. While many factors contribute to the crisis, as the final word interpreting the antitrust laws, the Court is uniquely empowered to address hospital GPOs' anticompetitive policies. Resolving the circuit split and providing guidance on how courts should determine whether an antitrust plaintiff has shown a relevant market will improve antitrust law's ability to protect consumers of all goods and services. Amicus respectfully urges the Court to grant the Petition.

Respectfully submitted,

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