No. 25-667

In the Supreme Court of the United States

COSTAR GROUP, INC., ET AL.,
Petitioners,

v.

COMMERCIAL REAL ESTATE EXCHANGE, INC.,
Respondent.

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

BRIEF OF CHAMBER OF PROGRESS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus Curiae Chamber of Progress is a tech-industry coalition devoted to a progressive society, economy, workforce, and consumer climate. Chamber of Progress seeks to protect Internet freedom and free speech, promote innovation and economic growth, and empower technology customers and users. Particularly relevant here, Chamber of Progress supports legal rules that safeguard the rights of companies to protect their proprietary technology and resist coerced sharing with competitors, especially when forced access would chill innovation and undermine consumer benefits. Chamber of Progress's work is supported by its corporate partners, but its partners do not sit on its board of directors and do not have a vote on, or veto over, its positions. Chamber of Progress does not speak for individual partner companies, and it remains true to its stated principles even when its partners disagree.[1]

[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *Amicus Curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *Amicus Curiae* further states that counsel of record for all parties received timely notice of *Amicus Curiae's* intent to file this brief under Supreme Court Rule 37.2.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns a bedrock limit on antitrust liability long recognized by this Court: A company generally may decide for itself whether and how to deal with third parties, so long as it does not reach out into the marketplace to control conduct off its platform. That rule promotes innovation, preserves market competition, and ensures courts are not enlisted as the central planners of the proprietary technologies and products created by private business—a role for which they are ill-suited. The decision below flouts that basic limit. By accepting Respondent's ("CREXi's") framing of its theory of antitrust liability instead of examining the substance of the alleged conduct, the Ninth Circuit allowed a routine refusal to deal to proceed as an antitrust claim. The consequences of that decision extend far beyond this dispute. If left uncorrected, the Ninth Circuit's ruling weakens longstanding protections for unilateral business conduct and invites courts to police the design, access, and terms of proprietary technologies. It also deepens an entrenched split in the courts of appeals over how refusal-to-deal principles apply. The Court should grant review to reaffirm the antitrust principles it announced long ago and has consistently enforced.

For more than a century, this Court has made clear that antitrust law does not compel companies to share their property or subsidize competitors. A company may choose whether to deal at all. If it chooses to deal, it may set the terms, so long as it is not controlling third-party conduct off its platform in the marketplace. A competitor's disagreement with the company's terms does not alone create an antitrust violation.

The Ninth Circuit failed to apply those bedrock principles. Instead of asking whether the substance of the conduct challenged here amounted to a lawful refusal to deal, the court accepted CREXi's bald representation that it did not. In so doing, the court allowed an antitrust plaintiff's labeling of its asserted claim to vitiate this Court's longstanding protections for unilateral conduct. And it allowed CREXi to easily sidestep this Court's demanding case law for when a refusal to deal can constitute actionable conduct under the Sherman Act.

A proper mode of analysis would have (and should have) ended the case. CREXi's claims challenge only the terms under which Petitioner ("CoStar") made its own proprietary technology available to third parties. As relevant here, CREXi does not allege collusion, coercion, or the termination of a prior voluntary course of dealing. Instead, CREXi's claims seek to impose liability solely because CoStar refused to provide access on the terms CREXi—CoStar's competitor—preferred. That theory alleges a refusal to deal, and it therefore fails as a matter of law.

The contrary decision below worsens an existing circuit split. Some courts faithfully enforce refusal-to-deal principles at the threshold and reject attempts to plead around it. Others, including the Ninth Circuit, allow claims to proceed by accepting claimants' rebranding, which dubs refusals to deal as unlawful exclusionary conduct. The divergence produces different outcomes for identical conduct across jurisdictions. Only this Court can resolve that split.

This issue is important. Ignoring refusal-to-deal principles forces companies to share their innovative and proprietary technologies with competitors. That forced sharing—as this Court has previously warned—chills investment and innovation. And it transforms courts into day-to-day managers of private business. Worse still, compelled coordination over access and terms reduces competition and may even encourage alignment among competitors. The Sherman Act demands the opposite.

The Court should grant the petition.

ARGUMENT

I. The Ninth Circuit's decision is wrong and ignores this Court's well-established precedents.

A. This Court has long held that firms may choose whether and how to deal with third parties.

This Court has long recognized and reiterated that a company is free to decide whether and how to deal with third parties, without running afoul of the Sherman Act.

More than a century ago, in *United States v. Colgate & Co.*, the Court explained that private businesses can lawfully exercise independent discretion over which commercial relationships to abide. 250 U.S. 300, 307 (1919). As the Court made clear, the Sherman Act "does not restrict the long recognized right of . . . [a] private business, freely to exercise [its] own independent discretion as to parties with whom [it] will deal." *Id.* Thus, a "manufacturer . . . can sell to whom he pleases" and "has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself." *Id.* That rule makes good sense, because the "purpose of the Sherman Act is to prohibit monopolies"—not to force companies to share their property or subsidize their competitors. *Id.*

The Court reiterated this doctrine in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, again explaining that "insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents." 540 U.S. 398, 410 (2004). *Trinko* further grounded this rule in two observations. First, "[e]nforced sharing . . . requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited." *Id.* at 408. Therefore, courts should not meddle in a company's decisions about whether and how to deal with its competitors. Second, "compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion." *Id.* In other words, weakening the refusal-to-deal doctrine in the name of antitrust law would actually *hurt* competition, not help it.

Just two years after *Trinko*, the Court reiterated that "[a]s a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 448 (2009). A competitor's dissatisfaction with those terms does not create an antitrust claim. *See id.* n.2.

B. The Ninth Circuit erred by accepting CREXi's framing instead of analyzing whether CoStar lawfully refused to deal.

The Ninth Circuit should have independently examined whether CoStar's conduct amounted to a lawful refusal to deal with third parties on terms those parties preferred. By refusing to ask that threshold question, the court allowed CREXi to plead around the longstanding protections that safeguard a company's ability to decide whether and how to deal with third parties. That departure from binding precedent warrants this Court's review.

Instead of asking whether CREXi's allegations sought to impose liability for protected unilateral conduct, the Ninth Circuit accepted CREXi's theory of liability as given. And it wasn't shy: It expressly declined to apply refusal-to-deal principles because that framework was "not CREXi's theory of liability under § 2." App. 21a. That approach allowed a plaintiff's description of its asserted theory to dictate the governing law, in turn sidestepping the core question whether CoStar lawfully chose the terms on which it would deal at all. *See Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1079 (10th Cir. 2013) (Gorsuch, J.) ("Traditional refusal to deal doctrine is not so easily evaded," and cannot be avoided by "recast[ing]" denials of assistance as "'affirmative' acts of interference . . . that raised the rival's costs of doing business in the process.").

The Ninth Circuit then compounded that error by collapsing its Section 2 analysis into its Section 1 discussion. The panel explained that if CREXi plausibly alleged exclusive agreements under Section 1, it had "also plausibly alleged anticompetitive conduct under § 2." App. 21a. That move once again sidestepped the necessary independent assessment of CoStar's unilateral conduct. The result allowed CREXi's claim of anti-competitive conduct to proceed simply because CREXi described CoStar's lawful refusal to deal using the vocabulary of exclusive dealing.

That mode of analysis conflicts with settled antitrust principles. Courts must evaluate conduct for what it is, not for how a plaintiff styles it, because refusal-to-deal doctrine cannot be avoided through artful pleading that "recast[s]" a lawful refusal to deal as an antitrust violation. *Novell*, 731 F.3d at 1079. The Ninth Circuit's analysis did exactly what that rule forbids: It accepted CREXi's relabeling of CoStar's conduct and failed to test it against this Court's binding precedents governing refusals to deal.

C. Proper application of this Court's refusal-to-deal precedents required dismissal of CREXi's claims.

The decision below is an egregious example of lower courts' failure to dismiss meritless antitrust claims grounded in a company's unilateral refusal to deal. CREXi does not allege collusion, coercion, or the termination of a prior voluntary course of dealing. *See, e.g.*, *Trinko*, 540 U.S. at 409 ("The unilateral termination of a voluntary *(and thus presumably profitable*) course of dealing" is "at or near the outer boundary" of antitrust liability). Instead, CREXi challenges only the terms on which CoStar chose to make its own proprietary technology available. Under settled law, that theory fails as a matter of law.

CREXi's own allegations confirm its claims target *CoStar's* control over *CoStar's* products. As just one example, CREXi's First Amended Counterclaims allege that "*CoStar offers* a product called LoopLink, which *CoStar markets* as a way for brokers to display listings on their own websites, while synching data with LoopNet, *CoStar's internet* CRE listing service." 9th Cir. Dkt. 30 p.6, 4-ER-561 ¶ 4 (emphases added). Similarly: "*CoStar conditions* access to *its* websites" and "brokers' own websites *hosted by LoopLink*," which is CoStar's own proprietary technology. 9th Cir. Dkt. 30 p.20, 4-ER-575 ¶ 55 (emphases added). CREXi then criticizes CoStar for "devis[ing] technological measures to block . . . brokers from sharing their own 'LoopLink powered' listings, on their own websites, with CREXi and *other CoStar competitors*." 9th Cir. Dkt. 30 p.16, 4-ER-571 ¶ 42 (emphasis adjusted).

In other words, CREXi alleges that CoStar offers LoopLink as a tool that allows brokers to display listings on their own websites while synchronizing data with CoStar's LoopNet service. CREXi then faults CoStar for adopting technical measures that prevent brokers from using "LoopLink powered" listings to supply CREXi and other competitors. *Id.* CREXi's claims thus seek to force CoStar to share LoopLink in a way that would allow rivals to extract listing data through CoStar's systems rather than obtaining it independently from brokers.

The remainder of CREXi's allegations reinforce that point. CREXi challenges LoopNet's terms barring use of LoopNet in connection with competing listing services. 9th Cir. Dkt. 30 pp.20-21, 4-ER-575-76 ¶ 56. CREXi also challenges LoopLink's terms conditioning access to listing information on an agreement not to compete with CoStar. 9th Cir. Dkt. 30 p.21, 4-ER-576 ¶ 57. All these allegations attack the same core decision that, by law, belongs to CoStar: how its proprietary technologies may be used, and by whom.

Taken together, those allegations leave no doubt that CREXi seeks to impose antitrust liability on CoStar because CoStar declined to provide a third party with access to LoopNet listings through LoopLink-hosted pages. Put differently, CREXi objects to the terms and conditions under which CoStar makes its own technology available to third parties. But those terms and conditions are a paradigmatic exercise of CoStar's right to refuse to deal on terms third parties prefer, and they do not give rise to antitrust claim liability for what CREXi dubs exclusionary conduct. *E.g.*, *linkLine*, 555 U.S. at 448.

This Court's precedents squarely foreclose CREXi's theory. *Trinko* held that a firm's decisions about the terms on which it chooses to deal with third parties are not exclusionary, absent a narrow exception not applicable here. 540 U.S. at 410. Refusal-to-deal principles protect a company's unilateral decisions to limit access, even when those limits make it harder or more costly for third parties to operate. *linkLine* reinforces the same rule. 555 U.S. at 448. As a general matter, businesses remain free to choose "with whom they will deal," and to dictate the "terms" of those deals as they see fit. *Id.* A company with no duty to deal *at all* therefore has no duty to deal *on terms* competitors find commercially advantageous, and increased costs to a rival do not transform a lawful refusal to deal into an antitrust violation. *See id.*

Applied here, those principles compel dismissal. CoStar had no duty to provide CREXi or other competitors with access to LoopNet listings through LoopLink. Indeed, CoStar could have refused to deal altogether. CREXi's claims thus asked the courts to override CoStar's control of its technology and to mandate access on terms that CREXi prefers. That is precisely what refusal-to-deal doctrine forbids—not only because courts are "ill suited" to decide the "terms" of an agreement, but also because judicial rebalancing of such terms harms competition by inviting "collusion." *Trinko*, 540 U.S. at 408.

Because CREXi's allegations fall squarely within the heartland of protected refusals to deal, the Ninth Circuit should have affirmed dismissal. Its failure to do so conflicts with this Court's settled refusal-to-deal precedents and warrants this Court's intervention.

II. The Ninth Circuit's decision deepens the circuit split over the proper application of longstanding refusal-to-deal doctrine.

The Ninth Circuit's decision entrenches the existing circuit split over how to apply refusal-to-deal principles. Some circuits enforce this Court's teachings and reject artful pleading that attempts to repackage unworkable refusal-to-deal claims as antitrust violations. Others, including the Ninth Circuit below, allow plaintiffs to bypass those limits by calling their claims something else.

The Tenth correctly applies refusal-to-deal doctrine as a threshold rule. It asks whether the challenged conduct amounts to a unilateral decision about access or terms. If it does, liability is absent (except in the narrow circumstances recognized by this Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985)). For example, the Tenth Circuit rejected the claimant's attempt to paint a company's "conduct as an 'affirmative' act of interference rather than an 'omission' of assistance." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1079 (10th Cir. 2013) (Gorsuch, J.). Writing for the panel, then-Judge Gorsuch focused on the "substance" of the claim rather than on how the claimant described it—because "[t]raditional refusal to deal doctrine is not so easily evaded." *Id.* As he explained, refusal-to-deal is a "hard road," but it is the one plaintiffs must travel if they wish to assert claims based on having "to incur costs associated with doing business another firm" refuses to "subsidize." *Id.*

The D.C. Circuit takes the same approach. For instance, in *New York v. Meta Platforms*, the plaintiffs challenged Meta's policies restricting access to its proprietary platform tools. 66 F.4th 288, 305 (D.C. Cir. 2023). The court held that those policies reflected lawful refusals to deal, because to hold otherwise would be to hold that "a dominant firm must lend its facilities to its potential competitors." *Id.* In so holding, the court rightly focused on the substance of the plaintiffs' allegations—including that Meta "cut off . . . access" to its network and "degrade[d] the functionality and distribution" of third parties' content. *Id.* at 305-06 (quotation marks omitted). The D.C. Circuit rightly rejected attempts to reformulate those allegations as exclusionary conduct because the allegations were just "another way of saying that [Meta] refused to deal with its rivals on the rivals' preferred terms." *Id.* at 306; *see also id.* (rejecting *amicus curiae* United States' contention that the plaintiffs' allegations were "fundamentally different from challenges to unilateral refusals to deal").

By contrast, other circuits allow plaintiffs to evade refusal-to-deal limits through artful pleading. The Fourth Circuit's recent decision in *Duke Energy* illustrates the problem. *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337, 366 (4th Cir. 2024), *petition for cert. filed*, No. 24-917 (Feb. 21, 2025). Analyzing a company's "unilateral termination" of service to a rival, the court held that it "need not determine, as a matter of law, whether . . . such conduct in isolation amounted to a § 2 violation under a refusal-to-deal theory of liability" because the plaintiff recast that unilateral conduct as "part of a larger scheme." *Id.* at 356. The result was that the court allowed antitrust claims to proceed without first applying this Court's settled refusal-to-deal framework, thereby allowing liability to turn on how the plaintiff characterized the conduct instead of on whether the "substance" of the conduct was a lawful refusal to deal. *Novell*, 731 F.3d at 1079.

The Seventh Circuit took a similarly erroneous path in *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 466 (7th Cir. 2020). Although Comcast "refus[ed] to continue providing" access to its own infrastructure, the court allowed the case to proceed by accepting the plaintiff's effort to reframe that refusal as unlawful "tying." *Id.* at 462-65. The court reasoned that Comcast's conduct could be challenged because it allegedly presented customers with a "Hobson's choice." *Id.* at 435. That approach allowed the plaintiff to bypass refusal-to-deal doctrine altogether, even though the challenged conduct rested on Comcast's decision not to provide its product to a rival on the terms the rival preferred.

The Ninth Circuit's decision deepens this divide. Like similar decisions in the Fourth and Seventh Circuits, it allowed CREXi to define the governing doctrine through its theory of liability. And it declined to ask whether CoStar's conduct was, in "substance," a refusal to deal on terms rivals preferred. *Novell*, 731 F.3d at 1079. The Tenth and D.C. Circuits would have correctly rejected that approach. This Court should resolve this real and persistent split.

III. The correct application of refusal-to-deal doctrine is significant and requires this Court's intervention.

This Court has repeatedly warned against the "uncertain virtue of forced sharing." *Trinko*, 540 U.S. at 408; *see linkLine*, 555 U.S. at 452 ("Institutional concerns also counsel against recognition of such claims"). Forcing firms to share technology or deal on preferred terms risks serious harm to competition. *Trinko* explained that compelled sharing "may lessen the incentive for the monopolist, the rival, or both to invest in . . . economically beneficial facilities." 540 U.S. at 408. As bad, courts lack a workable standard for supervising access, pricing, and technical integration. As *Novell* put it, if forced sharing became routine, "courts would have to pick and choose the applicable terms and conditions." *Novell*, 731 F.3d at 1073. "That would not only risk judicial complicity in collusion and dampened price competition," but "would also require [courts] to become 'central planners,' a role for which . . . judges lack many comparative advantages." *Id.*

The approach of the Ninth, Fourth, and Seventh Circuits results in forced sharing. By allowing plaintiffs to plead around refusal-to-deal doctrine, those courts effectively require firms to open their technology to third parties. That, in turn, chills innovation. Firms invest in proprietary tools with the expectation they can protect that investment by setting the terms for access and use. Under a regime where antitrust law threatens liability for enforcing those limits (or where liability is uncertain), firms will rationally invest less. Consumers then bear the cost through fewer products, slower improvements, and weaker competition.

This case also shows the litigation costs of doctrinal confusion. CoStar was denied the protections that refusal-to-deal doctrine provides at the motion-to-dismiss stage. Instead of resolving a legal question up front, the Ninth Circuit allowed years of discovery and uncertainty. That burden falls not only on dominant firms, but on any company that relies on technical restrictions to protect its products. Antitrust law should forbid this result, not least by providing "clear rules" that allow early resolution when conduct is lawful. *linkLine*, 555 U.S. at 452.

There is an additional danger. Forcing companies to coordinate access and terms "between competitors may facilitate the supreme evil of antitrust: collusion." *Trinko*, 540 U.S. at 408. When courts require shared platforms or standardized access, rivals may preemptively align their conduct to avoid legal scrutiny. Far from serving a competitive end, that alignment can create the very harms to consumers that antitrust law is designed to reduce.

The Ninth Circuit's reasoning has broad implications. The panel labeled CoStar's conduct "technological barriers." App.3a. That description could apply to access controls, APIs, software licenses, and platform rules across the internet ecosystem and many other industries. If that label suffices to bypass refusal-to-deal doctrine, firms lose the ability to protect their technology through ordinary design choices. The result would be a de facto duty to share, imposed without the safeguards this Court requires.

Indeed, that very result is already playing out in courts across the country, as private plaintiffs and federal antitrust regulators have seized on the confusion in the courts of appeals to pursue sweeping antitrust theories against a broad array of private businesses. *E.g.*, *Celonis SE v. SAP SE*, 2025 WL 3013158, at *1 (N.D. Cal. Oct. 27, 2025) ("As a threshold matter, [the defendant]'s alleged conduct should not be understood as a refusal to deal." (citing the Ninth Circuit decision at issue here)); *Tekion Corp. v. CDK Global, LLC*, No. 24-cv-08879, 2025 WL 1939870, at *4-5 (N.D. Cal. July 15, 2025) (similar).

Those courts are *expressly* relying on the decision below—and others like them—for the idea that "technological barriers [can] constitute anti-competitive conduct." *United States v. Apple, Inc.*, No. 24-cv-4055, 2025 WL 1829127, at *12 (D.N.J. June 30, 2025); *see, e.g.*, *Fed. Trade Comm'n v. Deere & Co.*, No. 25-CV-50017, 2025 WL 1638474, at *7 (N.D. Ill. June 9, 2025) (citing the Seventh Circuit's decision in *Viamedia*, 951 F.3d at 453, and allowing a "refusal to deal" claim to go forward no matter "whether the allegations meet a particular definition"); *United States v. Google LLC*, 778 F. Supp. 3d 797, 867 (E.D. Va. 2025) (holding that "the refusal to deal doctrine articulated in *Trinko* does not protect Google from antitrust liability").

This trend confirms that, absent this Court's intervention, refusal-to-deal doctrine will continue to give way to plaintiffs' label-driven reframing of their claims. The increasing uncertainty threatens innovation, burdens courts and litigants, and distorts competition. This case presents a clean vehicle for restoring the doctrine this Court has long enforced.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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