No. 25-667

IN THE

Supreme Court of the United States

COSTAR GROUP, INC.;
COSTAR REALTY INFORMATION, INC.,
Petitioners,

v.

COMMERCIAL REAL ESTATE EXCHANGE, INC.,
Respondent.

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

BRIEF IN OPPOSITION

ALEX SPIRO
ELLYDE R. THOMPSON
Counsel of Record
GRACE SULLIVAN
QUINN EMANUEL URQUHART & SULLIVAN, LLP
295 5th Avenue, 9th Floor
New York, NY 10016
(212) 849-7000
ellydethompson@quinnemanuel.com

Counsel for Respondent

February 13, 2026

QUESTION PRESENTED

Whether the court of appeals correctly reinstated counterclaims asserting violations of the Sherman Act based on allegations accepted as true at the pleading stage that an undisputed monopolist (a) imposes contract terms that in practice have the effect of preventing customers from using a competitor's services and (b) surreptitiously prevents its customers from sharing their publicly available information with competitors.

RULE 29.6 STATEMENT

Commercial Real Estate Exchange, Inc. has no parent company and no publicly held company owns 10% or more of Commercial Real Estate Exchange, Inc.'s outstanding common stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

INTRODUCTION

Respondent Commercial Real Estate Exchange, Inc. ("CREXi") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by CoStar Group, Inc. and CoStar Realty Information, Inc. (together, "CoStar"). The unanimous decision below allowing CREXi's antitrust counterclaims to proceed past the pleading stage reflects a careful application of settled law to the allegations at issue. Petitioners identify no unsettled legal question or circuit split warranting this Court's review.

This case concerns a dispute between competitor online commercial real estate platforms. CoStar, who has undisputed monopoly power and a history of utilizing aggressive litigation strategies to drive competitors out of the market, sued CREXi for copyright infringement. CREXi responded, asserting counterclaims based on CoStar's improper and illegal anticompetitive practices. At issue here are CREXi's claims under §§ 1 and 2 of the Sherman Act for unlawful monopolization and attempted monopolization and for exclusive dealing. Specifically, CREXi alleges that CoStar intentionally weaponizes a combination of contract provisions and technological barriers to prevent commercial real estate brokers who utilize CoStar's services from also using the services of competitors like CREXi.

After the district court dismissed CREXi's antitrust counterclaims, it granted CREXi's motion for partial final judgment on those claims under Federal Rule of Civil Procedure 54(b) while the parties continued to litigate the remaining claims in the district court. The court of appeals unanimously reversed, holding that "CREXi has plausibly alleged that CoStar engaged in

anticompetitive conduct to protect its monopoly power, and that the conduct is an unreasonable restraint of trade." Pet. App. 28a.[1]

The decision below raises no legal issue warranting this Court's review. Instead, petitioners seek to manufacture legal questions out of their disagreements with the court of appeals' view of CREXi's factual allegations at the motion to dismiss stage.

There is no better proof of that than petitioners' own formulation of the questions presented. Petitioners first ask this Court to intervene to answer the question whether "a 'de facto' exclusive dealing claim is cognizable under the Sherman Act in the absence of exclusive contractual terms, programs, or policies." Pet. i. To begin, there is no dispute among the courts of appeals about whether de facto exclusive dealing claims are cognizable under the Sherman Act. Every circuit to consider the question—including every circuit that petitioners identify—recognizes that such claims are cognizable under the Sherman Act. This universal recognition stems directly from this Court's century-old guidance in *United Shoe Mach. Corp. v. United States*, 258 U.S. 451 (1922), reiterated in *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), that the exclusivity inquiry turns not on a nearsighted interpretation of contract language but rather on practical effect and market realities. That approach is also in line with this Court's instruction that "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust

---

[1] This brief cites to the amended opinion of the court of appeals.

law." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992). In addition, and underscoring the impropriety of review at this stage, CREXi *did* allege that CoStar's contractual provisions are, in practice, exclusive. And the court of appeals first and foremost relied on CoStar's contractual arrangements in reinstating CREXi's counterclaims—an analysis that petitioners never address in their petition, much less call into question. The cases to which petitioners cite in asserting that "confusion" exists among courts of appeals show nothing more than different courts reaching different conclusions based on the specific facts in each case, just as one would expect given the fact-dependent nature of the inquiry. Petitioners' challenges to the sufficiency of the complaint are nothing more than factual disputes better left for the district court—where the parties are still litigating CoStar's copyright claim and other counterclaims—to address in the first instance on a full factual record.

Petitioners likewise mischaracterize the allegations supporting CREXi's counterclaims—and the court of appeals' analysis—in asking this Court to address whether "a refusal-to-deal claim prohibited by *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), is cognizable if the plaintiff calls it something else." Pet. i. That is not an open legal question; the answer is plainly no, and no court of appeals—certainly not the court of appeals in this case—has ever suggested otherwise. But CREXi's claims are simply not refusal-to-deal claims. CREXi alleges that CoStar utilizes technological barriers on *brokers' own websites* to prevent brokers from sharing the *brokers' own information* with CoStar's competitors. That is an exclusive dealing

claim, not a refusal-to-deal claim, and the court of appeals correctly analyzed CREXi's counterclaims under that framework.

Finally, even if the Court were inclined to conclude that confusion exists among the courts of appeals that warrants this Court's consideration of the questions presented, this case is a poor vehicle for doing so. The interlocutory posture of this case, which arrives at this Court following certification under Rule 54(b), weighs against certiorari. Petitioners will have ample opportunity to litigate whether CREXi's counterclaims can succeed on the specific facts of this case, and the courts below will have the opportunity to address that question with the benefit of a full factual record. Indeed, review at this stage is particularly inappropriate given that petitioners' arguments disregard the facts alleged in the complaint, on which the court of appeals relied, and that this Court must accept as true.

For all these reasons, the Court should deny the petition.

COUNTERSTATEMENT

1. CoStar, founded in 1987, has established itself as the behemoth of the commercial real estate technology and data market. 4-ER-566, ¶ 21. According to CoStar itself, "nearly 90% of all [commercial real estate] activity occurs on a CoStar Network." 4-ER-621, ¶ 210. CoStar has obtained this dominance in large part by either acquiring or suing its competition—and in some cases, both. For example, CoStar acquired its former competitor LoopNet after pushing LoopNet to the brink of bankruptcy through litigation. 4-ER-615, ¶ 184. CoStar also sought to acquire its competitor Xceligent,

then owned by LoopNet. 4-ER-615, ¶ 185. The FTC intervened, concluding that the merger would "increas[e] the likelihood that CoStar w[ould] exercise market power unilaterally." 4-ER-615–16, ¶ 185. To resolve the FTC action, CoStar agreed to a consent order requiring CoStar to divest LoopNet's interest in Xceligent. 4-ER-617, ¶ 190. Nevertheless, CoStar sued Xceligent and forced it into bankruptcy and out of the commercial real estate technology and data market. 4-ER-618, ¶¶ 192–195. Just seven months after Xceligent filed for bankruptcy, CoStar raised its average monthly price for new customers by 80 percent. 4-ER-619, ¶ 197. CoStar subsequently acquired an auction platform called Ten-X and its subsidiaries by merger. 4-ER-566, 4-ER-614, ¶¶ 23, 180.

Compounding CoStar's anticompetitive tactics, significant barriers to entry exist in the commercial real estate technology and data market. 4-ER-609, ¶ 168. In the commercial real estate listing business, an increase in seller-side brokers who use a particular service leads to an increase in the value of the service for buyer-side brokers, which in turn leads to more buyer-side brokers using the service, ultimately increasing the value of the service to seller-side brokers. 4-ER-609, ¶ 168. These network effects entrench the industry's one established player: CoStar. They also impede new entrants. A new entrant cannot attract buyer-side brokers to search property listings unless there are enough seller-side brokers using the service to list properties. 4-ER-609-10, ¶ 169. In the same vein, seller-side brokers do not want to use the service to list properties unless it is used by a large number of buyer-side brokers, creating a "catch-22." *Id.*

2. CREXi, founded in 2015, is an innovative new entrant in this market. 4-ER-565, ¶ 18. When CoStar set its sights on CREXi, it turned to a familiar playbook—wielding a copyright infringement lawsuit as a strategic weapon. D. Ct. Dkt. No. 1; SER-124–34, ¶¶ 308–372. In response, CREXi had no choice but to seek to put an end to CoStar's anticompetitive practices that have prevented prospective customers from working with CREXi and damaged CREXi's relationships with its customers. 4-ER-634, ¶ 259. Among other claims, CREXi asserted antitrust counterclaims under §§ 1 and 2 of the Sherman Act for unlawful monopolization and attempted monopolization and for exclusive dealing. D. Ct. Dkt. No. 71; 3-ER-330–423. Specifically, CREXi alleged that CoStar has, as CoStar's own CEO described it, built a "moat" around its customer base. 4-ER-611, ¶ 172. CoStar built this "moat" using two strategies that form the bases of the claims challenged in the petition: (1) exclusive agreements and (2) technological barriers that further promote exclusivity.

First, CREXi alleged that, despite illusory provisions stating that CoStar's rights to brokers' data will be nonexclusive, other specific provisions in CoStar's contracts with brokers render the agreements effectively exclusive. 4-ER-562, ¶ 6. CREXi's allegations relate to four interrelated agreements: "the LoopNet and LoopLink terms that both govern CoStar's listing service; the CoStar terms that govern its information service; and the Ten-X terms that govern its auction service." Pet. App. 23a. For example, the LoopNet terms and conditions posted on the LoopNet website that govern the service forbid brokers from reproducing content available on LoopNet "in connection with any other . . . listing

service" and from "integrat[ing] or incorporat[ing] any portion of the Content into any other database." 4-ER-576, ¶ 56. The LoopNet terms further require brokers and other users of LoopNet to "treat all information obtained from the Service," including the broker's own "listings . . . and any information otherwise made available," as "proprietary to LoopNet." 4-ER-577, ¶ 61. Brokers must also agree that it "shall constitute a prima facie breach" of the LoopNet terms if CoStar determines that "any third party," including a competitor, "has access to property listings" provided by brokers and modified by CoStar. 4-ER-577–78, ¶ 63.

These provisions, CREXi alleges, "impede [brokers] from exploring competitive options." 4-ER-575, ¶ 55. This effect is not accidental. As CREXi alleges, "[t]hese terms, by design, limit brokers' ability to use other listing platforms while they are signed up for CoStar's services." 4-ER-577, ¶ 60. Ultimately, CREXi alleges, these terms mean that "brokers [who] signed up for CoStar's services are foreclosed from working with a competing company like CREXi." 4-ER-579, ¶ 69.

CREXi's concerns about the practical effects of CoStar's contractual provisions are not speculative. Brokers understand these provisions to mean that they cannot work with CoStar's competitors. 4-ER-578, ¶ 65. For example, as CREXi's complaint recounts, on one occasion, CREXi offered to post a broker's listings on CREXi's platform. 4-ER-578, ¶ 66. The broker, however, responded that such an arrangement would be "problematic in regard to our contractual relationship with CoStar" and specifically pointed to LoopNet's contractual requirements that

the broker "shall not integrate or incorporate any portion of the [LoopNet listing] Content into any other database." *Id.* The complaint contains two other accounts of brokers expressing their understanding that they cannot work with CREXi because doing so would conflict with their agreements with CoStar. 4-ER-578–79, ¶¶ 66–68.

Second, technological barriers further prevent brokers from transferring their listings to platforms other than CoStar. 4-ER-561, ¶ 4. CoStar offers a web tool called LoopLink that gives brokers the ability to display their commercial real estate listings, including property information and brokers' own property photos, on brokers' own publicly available websites. 4-ER-570, ¶ 39. The brokers' own websites often serve as the comprehensive and exclusive repository of the brokers' listings. 4-ER-571, ¶ 41. Accordingly, when brokers who use CoStar wish to share their listings on CREXi's platform, they often ask CREXi to pull the brokers' own information from the listings the brokers have created on their own websites. 4-ER-572–73, ¶¶ 45–47. CREXi found that to be impossible, however, because, unknown to the brokers who use LoopLink, CoStar blocks its competitors from viewing brokers' LoopLink-enabled websites. 4-ER-571–72, ¶¶ 42–43. In other words, CoStar restricts its competitors from accessing broker-owned websites, even when brokers request that the competitor visit their sites. Indeed, if a CREXi employee attempts to visit a brokers' LoopLink-enabled website, she will be met with an "Access Denied" screen. 4-ER-572, ¶ 42.

3. The district court erroneously dismissed CREXi's counterclaims concerning exclusive agreements and

technological barriers. Pet. App. 39a–81a. The district court failed to draw all reasonable inferences in CREXi's favor in concluding that "the practical effect" of CoStar's broker contracts "is that the public and brokers are free to access listings through LoopNet, LoopLink, or the brokers' own websites, but cannot copy and reuse the modified images," Pet. App. 46a—a view of the facts divorced from the gravamen of CREXi's counterclaim and directly contradicted by CREXi's allegation that these provisions have the practical effect of "chilling . . . brokers' willingness to work with competitors," 4-ER-577, ¶ 60.

In addition to misapplying the standard of review, the district court misconstrued the nature of CREXi's claims. The district court began its analysis of CREXi's counterclaims with an irrelevant premise: "[A] business generally has the right to refuse to deal with its competitors." Pet. App. 42a. The district court concluded that CREXi failed to allege anticompetitive conduct based on technological barriers because "CoStar is not obligated to provide CREXi with access to its websites and database." Pet. App. 44a. But CREXi has never alleged that CoStar refused to deal with CREXi. Rather, CREXi's counterclaims concern CoStar's efforts to prevent CoStar's *broker customers*—not CoStar itself—from dealing with CREXi, including by preventing those brokers from sharing their listings and information on *their own* websites with CREXi. 4-ER-572, ¶ 43.

Nevertheless, the district court dismissed CREXi's counterclaims, Pet. App. 57a, and entered final judgment as to those counterclaims under Federal Rule of Civil Procedure 54(b), teeing up an appeal, Pet. App. 38a.

4. The court of appeals reversed. Pet. App. 28a. It first concluded that CREXi had plausibly alleged that CoStar wields monopoly power with direct evidence in the form of supra-competitive prices and indirect evidence in the form of CoStar's 90%-plus market share and the noted significant barriers to entry. Pet. App. 12a–19a.

As to CREXi's exclusive agreement allegations, the court of appeals reasoned, "[t]o dismiss an exclusive dealing claim just because a contract does not expressly require exclusivity would be the type of overly formalistic rule that the Supreme Court has cautioned against in antitrust cases." Pet. App. 22a (citing *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992)). Accordingly, at the motion to dismiss stage, it would be improper to dismiss CREXi's exclusive agreement allegations simply because CoStar's agreements with brokers facially disavow exclusivity given that CREXi plausibly alleged that such disavowals were contradicted "in practice" by other "specific provisions in all four of CoStar's contracts." Pet. App. 25a. After discussing how these contractual provisions work in practice, the court recognized that CREXi's examples of brokers refusing to work with CREXi because they believed they were foreclosed from doing so by their contracts confirmed that CREXi's allegations were more than speculation. Pet. App. 24a–25a. In this regard, the court of appeals' decision did not rest on the brokers' impressions. Instead, the court relied on brokers' impressions only as further support for CREXi's allegations about the practical effect of the terms CoStar has elected to include in its contracts. Pet. App. 25a. The panel concluded that "[f]urther proceedings may show that brokers misunderstand

the operation of these contracts. But at the pleading stage, these allegations are sufficient to support an inference that the contracts create an exclusive relationship." *Id.*

As to technological barriers, the court of appeals concluded that the district court erred in presumptively applying a refusal-to-deal framework. The panel recognized that CREXi's allegations concerned not CoStar's refusal to deal with CREXi but CoStar's efforts to prevent brokers from dealing with CREXi: "A monopolist's efforts 'to limit the abilities of third parties to deal with rivals' is a matter of exclusive dealing with the monopolist's customers, not a refusal to deal with the monopolist's competitors." Pet. App. 21a (citing *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013)). The court then concluded that CREXi plausibly alleged that CoStar engaged in anticompetitive conduct by "blocking only rivals' access to otherwise publicly available listings on brokers' own websites without disclosing such blockage" to brokers. Pet. App. 27a. Such a practice "deceives [CoStar's] customers and protects its monopoly in a manner not attributable to competition on the merits." *Id.*

Thus, the court of appeals correctly held that CREXi stated plausible counterclaims under both §§ 1 and 2 of the Sherman Act. Pet. App. 27a–28a.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW CORRECTLY APPLIES THIS COURT'S ESTABLISHED FRAMEWORK FOR DE FACTO EXCLUSIVE DEALING CLAIMS

The unanimous decision below allowed CREXi's de facto exclusive dealing counterclaims to proceed past the motion to dismiss stage by carefully applying this Court's century-old guidance. That decision does not warrant this Court's review. There is no circuit split regarding de facto exclusive dealing claims, and the decision below is correct.

A. No Circuit Split Or Confusion Exists Regarding De Facto Exclusive Dealing Claims

Both the Clayton Act and the Sherman Act regulate exclusive dealing arrangements. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (evaluating exclusive dealing claim under Section 3 of the Clayton Act); *United States v. Columbia Steel Co.*, 334 U.S. 495, 524 (1948) (analyzing exclusive dealing claim under the Sherman Act).

For over a century, this Court has recognized that the exclusivity inquiry turns not on a strict reading of contractual language but on "practical effect." *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 457 (1922). Six decades ago, this Court reaffirmed this point, explaining that "even though a contract does 'not contain specific agreements not to use the goods of a competitor,' if 'the practical effect is to prevent such use,' it comes within the condition of the section as to exclusivity." *Tampa Elec.*, 365 U.S. at 326

(quoting *United Shoe*, 258 U.S. at 457) (alterations adopted).

Petitioners contend (Pet. 9) that the courts of appeals are nonetheless confused about whether and how to apply the de facto exclusive dealing framework in the context of the Sherman Act. But petitioners' proffered circuit split is entirely illusory. Every circuit to consider the question has recognized that de facto exclusive dealing claims are cognizable under the Sherman Act. And every circuit has faithfully applied this Court's framework to varying facts—none of which conflicts with the decision of the court of appeals in this case.

First, petitioners contend (Pet. 9–10) that the Second Circuit has "rejected a de facto exclusive dealing theory on facts similar to those presented here," citing *United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737, 742 (2d Cir. 1989). But *United Air Lines* is not in tension with the decision below.

As to petitioners' threshold contention—that the courts of appeals are confused about *whether* such a theory is cognizable under the Sherman Act—*United Air Lines* reflects no such confusion. Rather, the Second Circuit considered the defendant's de facto exclusive dealing argument and rejected it because "the provisions in the . . . contracts state that the agreements are non-exclusive" and there was "no indication that these terms were defeated by United's Long Island practices." *Id.* at 742. In other words, neither the contract terms themselves *nor their practical effect* supported an exclusive dealing theory.

Nor does *United Air Lines* reflect any confusion about *how* the de facto exclusive dealing theory applies. In *United Air Lines*, the Second Circuit

considered testimony about individuals who were reluctant to contract with competitors. *Id.* The Second Circuit rejected that testimony only because the individuals were outside Long Island, the relevant market, and "evidence of United activities in areas other than Long Island require more than mere inferences to apply to United's Long Island practices." *Id.* *United Airlines* does not suggest that evidence from individuals *within* the relevant market would not be sufficient.

Second, petitioners argue (Pet. 10–11) that the Eighth Circuit has rejected de facto exclusive dealing claims in two discount pricing cases. As to the threshold question, petitioners' cited cases expressly recognize that "Section 1 claims that allege only de facto exclusive dealing may be viable." *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1058 (8th Cir.), *cert denied*, 531 U.S. 979 (2000); *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 612 (8th Cir. 2011) (citing *Concord Boat* for the same proposition).

As to how to conduct the de facto exclusive dealing inquiry, the Eighth Circuit's cases reveal neither confusion nor any contradiction with the decision below. Both cases involved a so-called "golden handcuffs" theory of de facto exclusivity—that "discount programs amounted to de facto exclusive dealing." *Concord Boat*, 207 F.3d at 1054, 1060; *see also Se. Mo. Hosp.*, 642 F.3d at 612. In each case, the defendant did not have any contract terms requiring exclusivity, but offered various discounts to customers based on share and volume of purchases. *See Concord Boat*, 207 F.3d at 1044–45; *Se. Mo. Hosp.*, 642 F.3d at 611. This manner of unfair pricing claims—not present here—requires "great caution and a skeptical

eye" because "low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Concord Boat*, 207 F.3d at 1060 (first quoting *Bathke v. Casey's Gen. Stores, Inc.*, 64 F.3d 340, 343 (8th Cir. 1995); and then quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) (alteration adopted)); *see also Se. Mo. Hosp.*, 642 F.3d at 615 (quoting *Concord Boat*). Accordingly, in both cases, the Eighth Circuit carefully analyzed the facts and concluded they did not support a viable unfair pricing theory.

Third, as petitioners even admit (Pet. 11), the remaining circuits to consider whether de facto exclusive dealing claims are cognizable under the Sherman Act "have each recognized de facto exclusive dealing as a cognizable claim." Thus, petitioners' threshold question can be entirely dismissed. There is no confusion among the circuits as to *whether* such claims are cognizable under the Sherman Act; every circuit to consider the question, including the Ninth Circuit here, recognizes that they are. Because no confusion exists, this Court should not grant certiorari.

Nor do the decisions of the Third, Eleventh, and Tenth Circuits reflect any confusion about how to analyze such claims. In each case that petitioners cite, the court looked to the practical effect of the challenged provisions and policies, in light of the realities of the relevant market. Thus, in *ZF Meritor, LLC v. Eaton Corp.*, "there was sufficient evidence from which a jury could infer that, although the [agreements] did not expressly require the [customers] to meet the market penetration targets,

the targets were as effective as mandatory purchase requirements." 696 F.3d 254, 282 (3d Cir. 2012), *cert. denied*, 569 U.S. 958 (2013). That was so even though the defendant did not actually terminate the agreements when customers failed to meet their targets; it was enough that the customers "believed it might," and "no risk averse business would jeopardize its relationship with the largest manufacturer of transmissions in the market." *Id.* at 282–83.

Similarly, in *LePage's Inc. v. 3M*, the court relied on "powerful evidence that could have led the jury to believe that rebates and discounts" offered to various customers—again, a specialized claim not present here—"were designed to induce them to award business to 3M to the exclusion of LePage's." 324 F.3d 141, 158 (3d Cir. 2003), *cert. denied*, 542 U.S. 953 (2004). That evidence, the Third Circuit explained, included accounts of two former customers who stopped purchasing from LePage's and instead purchased exclusively from 3M. *Id.*

In *United States v. Dentsply International, Inc.*, although the transactions at issue were "technically only a series of independent sales," the Third Circuit again looked to the "economic elements involved," and concluded that they "realistically make the arrangements here as effective as those in written contracts." 399 F.3d 181, 193 (3d Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006).

McWane, Inc. v. F.T.C. followed the reasoning in *Dentsply* closely. There, too, a series of independent sales nonetheless constituted exclusive dealing when viewed "consistent with the Supreme Court's instruction to look at the 'practical effect' of exclusive dealing arrangements." 783 F.3d 814, 834 (11th Cir.

2015), *cert. denied*, 577 U.S. 1216 (2016) (quoting *Tampa Elec.*, 365 U.S. at 326–28).

Finally, in *Chase Manufacturing, Inc. v. Johns Manville Corp.*, the Tenth Circuit considered claims that the defendant threatened customers to prevent them from dealing with its competitors. 84 F.4th 1157, 1165–66 (10th Cir. 2023). The proper approach to such claims, the Tenth Circuit made clear, "look[s] to the reality of the [relevant] market and the practical effect of [the defendant's] conduct." *Id.* at 1173 (citing *Tampa Elec.*, 365 U.S. at 326–28).

Each case petitioners cite for the purpose of demonstrating "confusion" among the circuits in fact reveals the opposite. Every circuit recognizes that de facto exclusive dealing claims are cognizable. And every circuit approaches those claims the same way—by considering the practical effect of the challenged provisions and policies in light of the realities of the relevant market. These decisions all apply the same legal framework to differing facts. There is no circuit split, no unresolved legal question, and no confusion for this Court to address. The question presented does not warrant this Court's review.

B. The Decision Below Is Correct

Petitioners' criticism of the decision below boils down to a simple disagreement with the court of appeals' conclusion that CREXi "plausibly alleges that specific provisions of each contract contradict the express promise of non-exclusivity," and that, "in practice," such provisions "require brokers to exclusively use CoStar's services." Pet. App. 23a–24a. But that conclusion accords with decisions of other circuits and is correct.

The court of appeals correctly applied this Court's "practical effect" approach, finding that CoStar's contractual terms and technological barriers, considered in light of the realities of the real estate marketplace, practically mean that brokers who use CoStar's services are severely constrained from working with competitors such as CREXi. Pet. App. 23a–25a. Petitioners' disagreement with the Ninth Circuit's view of the facts does not warrant this Court's intervention.

Moreover, that disagreement hinges on mischaracterizations of the decision below and CREXi's allegations. Petitioners contend that "a de facto exclusive dealing theory divorced from both contractual terms (Section 1) and any conduct by the defendant (Section 2) is not cognizable." Pet. 15–16. This argument attacks a strawman; contrary to petitioners' retelling (Pet. 14), the court of appeals nowhere held that "a de facto exclusive dealing claim can exist even when the defendant takes no action at all—when the alleged misconduct is squarely tied to the mistakes of others." That mischaracterization ignores the express holding in the decision below that *CoStar's contract provisions*, not mere misunderstandings, support CREXi's exclusive dealing claim. As the court of appeals explained, CREXi plausibly alleged that CoStar included provisions in its various contracts that "forbid brokers from using or reproducing content available" on CoStar's sites in connection with any other listing service; prevent brokers from incorporating any portion of that content into any other database; require brokers to treat "'all information obtained from the Service,' *including broker's own listings*, as 'proprietary'" to CoStar; and require brokers "to agree that it 'shall constitute a

prima facie breach' of the [site] terms if CoStar determines that 'any third party,' including a competitor, 'has access to property listings *provided by brokers* and modified by CoStar." Pet. App. 23a–24a (emphasis added). Further, as the court of appeals emphasized, "CREXi alleges that CoStar leverages its market power to ensure these contract terms are 'non-negotiable' for individual brokers." *Id.* at 24a. The Ninth Circuit concluded that CREXi plausibly alleged that these provisions—not broker misunderstanding —"in practice . . . require brokers to exclusively use CoStar's services" because "if brokers provide data to CoStar, the terms forbid brokers from also providing data to a competitor of CoStar." *Id.* This scheme, CREXi plausibly alleged, "by design[] limit[s] brokers' ability to use other listing platforms." *Id.*

Only after concluding that CREXi had plausibly alleged that the contract terms constituted, in practice, exclusive dealing requirements, did the court of appeals turn to the three specific examples that CREXi alleged. Pet. App. 25a. Taking CREXi's allegations as true, these three examples do not represent "misunderstandings," Pet. 14, at all—rather, they represent precisely what CoStar intended with its contract provisions.

Nor were these examples the sole basis for the Ninth Circuit's holding. Instead, they reinforced that CREXi's plausible "allegations of actual de facto exclusivity are not speculation." Pet. App. 24a. Thus, the court of appeals correctly concluded that CREXi had plausibly alleged a de facto exclusive dealing arrangement based on the practical effect of CoStar's contract terms.

Petitioners' next attack rests on the same mischaracterization of the decision below and CREXi's allegations. Petitioners contend (Pet. 18) that the Ninth Circuit's decision is incompatible with *Tampa Electric* and *United Shoe* because, in those cases, "the contract itself effectively imposed an exclusive relationship, even if it did not say that in so many words." But that is precisely what the Ninth Circuit concluded CoStar's contracts do, taking CREXi's plausible allegations as true. Petitioners' suggestion (Pet. 18) that a court must disregard entirely a contract's practical effects so long as the contract "expressly disavows exclusivity" cannot be squared with this Court's clear guidance that "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." *Eastman Kodak Co.*, 504 U.S. at 466–67.

Finally, petitioners contend (Pet. 18) that the Ninth Circuit's decision runs contrary to this Court's requirement of a "substantial foreclosure" showing in exclusive dealing cases. But, once again, petitioners' only basis for this assertion is that the Ninth Circuit's decision "allow[ed] a de facto exclusive dealing claim to proceed based on nothing more than the misunderstanding of a few customers." Pet. 19. As set forth above, the Ninth Circuit's decision was in fact based on a robust assessment of CoStar's contract provisions and CREXi's allegations about their practical effect. Nor are petitioners correct that the decision below failed to adequately address substantial foreclosure. As the Ninth Circuit explained, "CREXi alleges that any exclusive agreements CoStar entered into apply to all brokers using CoStar's services," and thus if "CoStar has

monopoly power . . . over the markets covered by the alleged agreements, then [CREXi] has also plausibly alleged that those agreements foreclosed competition in a substantial share of the relevant market." Pet. App. 10a. After a thorough analysis, the court of appeals concluded that "CREXi plausibly alleges that CoStar has monopoly power via direct and indirect evidence." Pet. App. 19a. And "because the allegedly exclusive agreements cover the same market over which CoStar allegedly holds monopoly power and the agreements apply equally to all brokers using CoStar's services, CREXi has also plausibly alleged that those agreements substantially foreclosed competition." *Id.* Petitioners do not challenge this reasoning or these holdings in the petition. Instead, petitioners' challenge rests on a misreading of the grounds on which the court of appeals based its decision. The Court should deny review.

II. THE DECISION BELOW CORRECTLY REJECTS THE APPLICATION OF THE REFUSAL-TO-DEAL FRAMEWORK TO THE ALLEGED COUNTERCLAIMS

Next, petitioners ask this Court (Pet. i) to grant certiorari to answer the question whether "a refusal-to-deal claim prohibited by *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), is cognizable if the plaintiff calls it something else." Petitioners' framing itself makes clear that this question does not warrant the Court's review. The answer is, of course, no, and no court of appeals—including the decision below—has suggested otherwise.

A. There Is No Circuit Confusion About *Trinko* And Refusal-To-Deal Claims

Petitioners contend (Pet. 19–20) that the decision below "implicates a circuit conflict," seemingly about whether courts of appeals faithfully apply *Trinko*. But there is no conflict among the circuits; courts on both sides of petitioners' claimed split analyze refusal-to-deal claims consistent with this Court's clear guidance.

First, the case petitioners assert (Pet. 21) "faithfully applied *Trinko*," *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013) (Gorsuch, J.), comports with the decision below. *Novell* involved a challenge to Microsoft's decision to stop sharing its own intellectual property with its competitors directly. Novell, a competitor, therefore had to write its own code as a replacement for Microsoft's code, causing significant delay. The Tenth Circuit carefully articulated the distinction between exclusive dealing claims, which may be cognizable, and refusal-to-deal claims, which typically are not. As the Tenth Circuit explained, "[S]ection 2 misconduct usually involves some assay by the monopolist into the marketplace—to limit the abilities of third parties to deal with rivals (exclusive dealing), to require third parties to purchase a bundle of goods rather than just the ones they really want (tying), or to defraud regulators or customers. By contrast, and 'as a general rule . . . [,] purely unilateral conduct' does not run afoul of section 2—'businesses are free to choose' whether or not to do business with others and free to assign what prices they hope to secure for their own products." *Id.* at 1072 (quoting *Pac. Bell Tel. Co. v. Linkline Commc'ns*, 555 U.S. 438, 448 (2009)). "Put simply if perhaps a

little too simply, today a monopolist is much more likely to be held liable for failing to leave its rivals alone than for failing to come to their aid." *Id.*

The Tenth Circuit thus understood Novell's claim to challenge Microsoft's decision not to share its own intellectual property as a refusal to assist a rival. *Id.* at 1079. The Tenth Circuit then properly distinguished such a claim from one based on conduct by the monopolist designed to "limit the abilities of *third parties* to deal with rivals." *Id.* at 1072 (emphasis added).

Petitioners' own citations confirm that the Tenth Circuit correctly understands that the refusal-to-deal framework does not bar otherwise legitimate exclusive dealing claims. *See Chase Mfg. Inc. v. Johns Manville Corp.*, 84 F.4th 1157, 1173 (10th Cir. 2023) (citing *Novell* and explaining that the district court "applied the wrong standard" to an exclusive dealing claim when it "borrowed . . . from refusal-to-deal-with-rivals caselaw"). As the Tenth Circuit made clear, it has "never extended a refusal-to-deal-with-rivals analysis outside that situation, nor ha[s] [it] mandated analyzing § 2 exclusionary conduct under any solitary framework." *Id.* The Tenth Circuit's approach thus confirms that a flexible, fact-specific framework is appropriate when analyzing alleged § 2 exclusionary conduct.

Second, contrary to petitioners' argument (Pet. 22), the decision below is consistent with *New York v. Meta Platforms, Inc.*, 66 F.4th 288, 305 (D.C. Cir. 2023). In that case, which involved a challenge to a Facebook policy for app developers, the challenged policy "le[ft] app developers entirely free to develop applications for Facebook's competitors." *Id.* at 304. Here, as the

court of appeals concluded, CREXi plausibly alleged that "if brokers provide data to CoStar, the terms forbid brokers from also providing that data to a competitor of CoStar." Pet. App. 24a.

Third, petitioners suggest (Pet. 23–24) that the Fourth and Seventh Circuits have incorrectly allowed plaintiffs to "evad[e] the refusal-to-deal doctrine through creative pleading." Examination of those cases, however, contradicts that suggestion.

In *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, the Fourth Circuit concluded that it did not need to analyze the plaintiff's claims under the narrow refusal-to-deal framework because "we recognize [the plaintiff's] claim that this conduct was but a part of a larger scheme." 111 F.4th 337, 366 (4th Cir. 2024), *cert. denied*, --- S. Ct. ---, No. 24-917 (Jan. 12, 2026). But the Fourth Circuit's approach did not indicate any need for clarification of the applicable standard. Rather, as the Solicitor General explained in recommending denial of the writ, "[t]he circuits broadly agree about whether and how a court adjudicating a Section 2 claim may aggregate the discrete constituent parts of a defendant's overall course of conduct. Across the country, courts analyze the particular challenged acts, apply conduct specific tests where appropriate, and otherwise evaluate the alleged monopolistic conduct holistically." Br. of the United States as Amicus Curiae, No. 24-917, at 17 (Dec. 1, 2025). Like here, the *Duke* "Petitioner's core dispute with the decision below is not over that rule, but rather its application." *Id.* at 13.

Similarly, petitioners attempt to conjure support for their argument based on *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 472 (7th Cir. 2020), *cert denied*

141 S. Ct. 2877 (2021). Yet petitioners' characterization of that opinion as permitting a plaintiff to repackage a refusal-to-deal claim as a tying claim cannot be squared with the opinion itself. Both the panel opinion and the partial dissent analyzed the refusal-to-deal and tying claims separately. *Id.* at 453-80; *see also id.* at 485 (Brennan, J., concurring and in part and dissenting in part) (agreeing plaintiff "plausibly alleged an antitrust violation and is entitled to reversal and remand on its refusal-to-deal claim," but disagreeing with the panel's summary judgment ruling "on [plaintiff's] tying claim because the undisputed facts do not present evidence of an illegal tie").

Petitioners raise no novel legal question requiring this Court's review—indeed, petitioners raise no legal question at all. This Court's approach toward refusal-to-deal claims is well established. So too is this Court's preference to "resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" *Eastman Kodak Co.*, 504 U.S. at 466–67 (quoting *Maple Flooring Mfgs. Assn. v. United States*, 289 U.S. 563, 579 (1925)). Each case petitioners cite looked carefully at the particular facts to assess the viability of each plaintiff's particular antitrust claims. These cases reveal neither a conflict nor any legal issue warranting this Court's review.

B. The Decision Below Correctly Characterized The Counterclaims As Exclusive Dealing Claims

The analysis in the decision below of CREXi's claims under the exclusive dealing framework is in line with *Trinko* and correct. Petitioners' arguments

to the contrary again rest on mischaracterizations of the reasoning of the decision below.

First, petitioners contend (Pet. 25) that the decision below "runs directly contrary to *Trinko* itself," because the court of appeals "should have followed this Court's lead and applied the refusal-to-deal framework." Petitioners misunderstand both *Trinko* and the decision below. In *Trinko*, this Court considered allegations "that Verizon denied interconnection to rivals in order to limit entry." 540 U.S. at 407. Recognizing that "[f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers" and that "[c]ompelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law," this Court rejected Verizon's claim. *Id.* at 407–08.

As the decision below recognizes, CREXi's claims are fundamentally different from Verizon's. As the court of appeals explained, "CREXi contends that CoStar's exclusionary practices kept CoStar's broker customers—*not CoStar itself*—from dealing with CREXi." Pet. App. 21a. Quoting *Novell*, the court of appeals explained that CREXi's counterclaims attack CoStar's efforts "to limit the abilities of third parties to deal with rivals." *Id.* (quoting *Novell*, 731 F.3d at 1072). CREXi's counterclaims do not seek to force CoStar to provide CREXi and CREXi's customers access to CoStar's own platforms, as would be parallel to *Trinko*. Instead, CREXi challenges CoStar's practice of setting up technological barriers that prevent brokers from sharing their own information, on their own websites, with CREXi.

Next, petitioners assert (Pet. 26) that the court of appeals erred by "ignor[ing] the reality of what duty CREXi sought to impose on CoStar: a duty to give rivals like CREXi direct access to CoStar's products and intellectual property." Petitioners again mischaracterize the decision below and CREXi's claim. As the court of appeals clearly explained, CREXi's claim is that CoStar "constructed technological barriers that impede CREXi's ability to access brokers' listing information that is otherwise available to the public *on brokers' own websites*." Pet. App. 25a (emphasis added). CoStar does not demonstrate how blocking CREXi from accessing brokers' information, on brokers' own websites, created and owned by the brokers, and simply hosted by CoStar's LoopLink tool protects CoStar's products or intellectual property in any way.

Finally, petitioners' contention (Pet. 26) that the decision below "creates the same perverse incentives *Trinko* was designed to avoid" rests on the same misconception. Petitioners never identify what "source of their advantage," *Trinko*, 540 U.S. at 407–08, CREXi seeks to force CoStar to share. That is because there is none. Instead, CoStar has designed systems that prevent brokers from sharing their own information with CREXi, even when that information is publicly available. The decision of the court of appeals simply allows discovery to proceed on a claim that CoStar blocks brokers who use LoopLink from sharing their own listing information with CoStar's competitors. The decision below properly analyzed this claim under the exclusive dealing framework and correctly allowed it to proceed.

III. THIS CASE PRESENTS A POOR VEHICLE FOR REVIEW

Even if the questions presented warranted review (they do not), this case presents a poor vehicle to consider them for three reasons.

First, the procedural posture of this case does not lend itself to this Court's review. As CoStar acknowledges, "this case is in an interlocutory posture." Pet. 30. This Court typically requires "special circumstances [to] justify the exercise of [its] discretionary certiorari jurisdiction to review [an] interlocutory order." *Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 515 (2007); *see also Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting denial of certiorari) (declining to grant certiorari where "[a]lthough there is no barrier to our review, the . . . claim is in an interlocutory posture, . . . [and] the District Court has yet to enter a final remedial order"); *Taylor v. Riojas*, 592 U.S. 7, 11 (2020) (Alito, J., concurring in the judgment and writing separately to suggest certiorari was improper) (noting in a case appealed pursuant to Rule 54(b) that "[w]e are generally hesitant to grant review of non-final decisions"); *Va. Military Inst. v. United States*, 508 U.S. 946, 947 (1993) (opinion of Scalia, J., respecting denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

Here, the procedural posture renders this Court's review unnecessary and untimely. The court of appeals has simply reversed the district court's dismissal of CREXi's counterclaims and remanded for further proceedings. Pet. App. 28a. CoStar will still have every opportunity to litigate through summary

judgment and trial whether a de facto exclusive dealing claim is indeed available on these facts and whether CoStar in fact imposes technological barriers to competition, as alleged. *See Taylor*, 592 U.S. at 12 (Alito, J., concurring in the judgment and writing separately to suggest certiorari was improper) (noting the fact that the petitioner could still prevail below should have been considered a reason not to grant certiorari).

Second, the applicable standard of review is ill-suited to the questions petitioners have raised. The court of appeals was quite clear that it was merely evaluating CREXi's counterclaims "at the pleading stage"—assuming all facts alleged as true and drawing reasonable inferences in CREXi's favor. Pet. App. 25a. Indeed, the discrepancy here between the district court's ruling in favor of CoStar and the court of appeals' ruling in favor of CREXi is rooted in the fact that the court of appeals accepted as true CREXi's allegation "that, in practice, [CoStar's broker agreements] require brokers to exclusively use CoStar's services," Pet. App. 24a, while, to the contrary, the district court improperly drew inferences favorable to CoStar, Pet. App. 46a. Petitioners ask the Court to address "[w]hether a 'de facto' exclusive dealing claim is cognizable under the Sherman Act in the absence of exclusive contractual terms, programs, or policies," Pet. i, ignoring CREXi's many allegations that there *are* exclusive contractual terms, programs, and policies at issue here. Such a question cannot be answered at the pleading stage where reasonable inferences must be made in the plaintiff's favor.

Finally, this case is a poor vehicle because factual disputes overshadow the purportedly legal questions that petitioners construct. For example, petitioners contend that the court of appeals failed to give adequate weight to the allegation that "over 500 CREXi customers worked with both CoStar and CREXi," which, in petitioners' view, should weigh against CREXi's examples of brokers believing they were contractually prohibited from working with CREXi. Pet. 6. And petitioners contend that CREXi's inability to access brokers' own listings on brokers' own websites due to CoStar's technological barriers amounts to nothing more than a bid for "direct access to CoStar's products and intellectual property," challenging CREXi's factual contention that it has no meaningful way to access brokers' listings other than through the brokers' own websites. Pet. 26. The Court need not weigh in on such factual disputes. *See* Sup. Ct. R. 10; *Kyles v. Whitley*, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting and suggesting certiorari was improper) ("What we have here is an intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err—precisely the type of case in which we are *most* inclined to deny certiorari."); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) ("Since this is primarily a factual issue which does not, by itself, justify the exercise of our certiorari jurisdiction, the writ of certiorari is dismissed as improvidently granted.").

Petitioners' disputes with the decision below are factual, not legal, making this case a poor vehicle to consider any legal questions about the scope of de facto exclusive dealing claims or refusal-to-deal claims.

CONCLUSION

The petition should be denied.

Respectfully submitted,

ALEX SPIRO
ELLYDE R. THOMPSON
Counsel of Record
GRACE SULLIVAN
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
295 5th Avenue, 9th Floor
New York, NY 10016
(212) 849-7000
ellydethompson@
quinnemanuel.com

Counsel for Respondent

February 13, 2026