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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The Ninth Circuit twice departed from its sister circuits to dramatically expand antitrust liability. First, the Ninth Circuit held that an antitrust plaintiff can state a de facto exclusive-dealing claim based on allegations that a handful of customers misunderstood an expressly non-exclusive contract to be exclusive in practice. Second, the Ninth Circuit held that an antitrust plaintiff can evade *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), by calling a refusal-to-deal claim something else. As a result, technological innovators now may face sweeping discovery based on allegations that cannot possibly sustain an antitrust claim.

CREXi does not dispute that either holding would conflict with decisions of numerous other circuits. It does not dispute that both would be legally indefensible. And it does not dispute that, if the Ninth Circuit had adopted either holding, this Court's review would be warranted.

CREXi argues instead that the Ninth Circuit held no such thing. CREXi's view is that the exclusive-dealing holding rests on contractual terms (not customer confusion) and that this case is all about access to brokers' own websites (not CoStar's proprietary LoopLink tool). That's not what the decision says. Future plaintiffs will not read the decision in that countertextual and counterfactual way. Nor will district courts in the Ninth Circuit. And amici ask this Court to grant review because they, too, understand what the Ninth Circuit held. It substantially and erroneously expanded antitrust liability and watered down the pleading standard. That is, the questions presented *are* presented.

CREXi's abject failure to defend the decision on its own terms could make this the rare case in which summary reversal would be warranted. Either way, the Court should grant review.

ARGUMENT

I. The Court Should Grant Certiorari On The De Facto Exclusive-Dealing Question

The Ninth Circuit held that an exclusive-dealing claim can survive a motion to dismiss based solely on the allegation that a handful of customers interpreted a concededly non-exclusive contract as exclusive. CREXi does not dispute that, if the Ninth Circuit in fact so held, its decision would conflict with those of other circuits and create a new category of de facto exclusive-dealing claims far beyond what the Sherman Act could support. Unable to defend the Ninth Circuit's new legal rule, CREXi argues about what the Ninth Circuit actually held. Once CREXi's strained interpretation is stripped away, it has offered this Court no reason to deny certiorari.

A. There is no dispute that, if the Ninth Circuit held as CoStar says it did, the decision below would represent a dramatic expansion of de facto exclusive dealing. But even before the Ninth Circuit came on the scene, the circuits disagreed over the circumstances under which such claims are cognizable. Pet. 9-14. And this Court has never addressed the viability or scope of such claims under the Sherman Act. The Court's guidance is needed.

1. The decision below recognized a novel type of exclusive-dealing claim, dramatically expanding defendants' potential liability. In the typical exclusive-dealing case, the court considers whether the contract language is expressly exclusive. But

some circuits have concluded that, even when the contract is not expressly exclusive, a plaintiff can still state an exclusive-dealing claim if the contract's economic incentives create exclusivity in practice. This "de facto" exclusive-dealing theory can arise either from economic incentives that foreclose competition or contract terms that, while not explicitly exclusive, evince a policy equivalent to an exclusive contract. *See* Pet. 11.

The Ninth Circuit went further: it carved out a third path for liability that depends only on a customer's subjective beliefs—not the contract's text or economic incentives. As the Ninth Circuit recognized, and as "CREXi [had] concede[d]," CoStar's agreements "'expressly disavow[] any ownership in or claim to [brokers'] data, agreeing that CoStar's right to use the data will be 'non-exclusive.'" Pet. App. 21a-22a. And as the Ninth Circuit admitted, "CREXi's allegations are different" than other de facto exclusive-dealing cases, because "the contracts at issue do not contain rebate or discount terms that create de facto exclusivity." *Id.* at 23a. No matter: it was enough that CREXi alleged, and some customers allegedly believed (rightly or wrongly), that the contracts were exclusive.

That decision directly conflicts with the Second Circuit's holding that customers' testimony regarding their reluctance to contract with a defendant's competitors is not enough. *See United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737, 742 (2d Cir. 1989). CREXi says (at 13-14) the Second Circuit decision is different because it rests on the geographic location of the customers. But a key point was that the customers used competitors' products "alongside" the defendant's products. *United Air Lines*, 867 F.2d

at 742. So too here: over 500 brokers used both CREXi's and CoStar's products. 4-ER-633 (¶ 257). Yet the Ninth Circuit still held CREXi stated an exclusive-dealing claim.

2. More broadly, the circuits are confused about when a de facto exclusive-dealing claim is cognizable. Although CREXi claims uniformity and suggests any differences are the mere application of "the same legal framework to differing facts," Opp. 17, the circuits have taken divergent approaches to similar facts.

Take bundled discounts. The Eighth Circuit held that "bundled" and "share-based discounts" *cannot* support a theory of de facto exclusive dealing, notwithstanding "'economic realities'" that "deter[red] [customers] from switching to other manufacturers." *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 613, 617 (8th Cir. 2011). By contrast, the Third Circuit held that "bundled rebates and discounts" and "market-share targets" *can* "operate as exclusive dealing arrangements" precisely because of "'actual market realities.'" *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 282 (3d Cir. 2012) (quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466 (1992)), *cert. denied*, 569 U.S. 958 (2013). That is not the application of the same legal rule to different facts—it is the application of different legal rules to highly analogous facts.

CREXi's response—that all courts of appeals simply evaluate "the practical effect of the challenged provisions and policies in light of the realities of the relevant market"—says it all. Opp. 17. At such a high level of generality, it is hard to see how any conflict could arise. But the reality is there is no consistent understanding of when de facto exclusive-dealing claims are cognizable.

3. The confusion is understandable, since this Court has not opined on the issue of "de facto" exclusive dealing since *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). And that case arose in the entirely different context of the Clayton Act. This Court has never addressed whether or when such a theory could be cognizable under the Sherman Act. *See* Pet. 16-18; Former Antitrust Officials and Antitrust Scholars *Amici* Br. 4-11. Especially given the divergent results, this Court's guidance is needed.

B. CREXi's primary response is not to defend the decision below, but to recharacterize it. According to CREXi, the Ninth Circuit's "express holding" was that "*CoStar's contract provisions*, not mere misunderstandings, support CREXi's exclusive dealing claim." Opp. 18. That's not what the court held—expressly or otherwise. Properly understood, the Ninth Circuit decision creates a legally indefensible and dangerous precedent.

1. CREXi argues the Ninth Circuit found CoStar's contracts exclusive because the decision cited allegations that "specific provisions of each contract contradict the [contract's] express promise of non-exclusivity." Pet. App. 23a. Not at all.

That discussion is focused on what CREXi *alleged*. Both sentences of the opinion setting out the relevant contractual provisions begin by making clear the Ninth Circuit was merely repeating CREXi's allegations. *See id.* at 24a ("CREXi alleges that, in practice, the[] [terms] require brokers to exclusively use CoStar's services."); *id.* ("CREXi alleges that the terms . . . ."). Later too, the Ninth Circuit cited *CREXi's* allegation that, "in practice, [CoStar]

require[d] brokers to exclusively use CoStar's services." *Id.*

The Ninth Circuit could not have done more because it did not engage in any contractual interpretation of its own. The court did not analyze the text of particular contract terms, consider how the different provisions operate together, or otherwise determine whether those terms created exclusivity. But these are all legal questions a court is well-equipped to answer at the motion-to-dismiss stage. *See Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1118 (9th Cir. 2018) (courts independently construe unambiguous contracts on a motion to dismiss). Nor did the court consider whether the allegedly contradictory contractual terms made the contract ambiguous as to whether it was (or was not) exclusive.* Indeed, the *only* actual holding about the contractual language was that "[t]hese contractual provisions are not expressly exclusive." Pet. App. 24a.

The Ninth Circuit found CREXi's allegations plausible only because it had provided "specific examples of brokers who underst[oo]d CoStar's contract terms to actually foreclose their ability to work with CREXi." *Id.* (emphasis omitted). Rather than interpret the contract language, the Ninth Circuit allowed CREXi to proceed to discovery based

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* There is no ambiguity. The terms prohibit brokers from "us[ing] or reproduc[ing] any Content that is obtained *from the Service*." 2-ER-201–02 (emphasis added); *see* 2-ER-221–22. And as the Ninth Circuit recognized, "Content" is defined as material "contained on or provided through" CoStar's platform. Pet. App. 24a. But of course brokers retain rights to their own data and listings, a point which the contract makes explicit. 2-ER-199; 2-ER-221; 2-ER-238.

entirely on three customers' understandings as parroted in *CREXi's* pleading.

CREXi's mantra that the Ninth Circuit just relied on the "practical effect" of "contractual terms" misreads the decision—and misunderstands what the "practical effects" cases do. Contract interpretation is not about practical effects; it is about what the contract says. The Ninth Circuit is the first court to ever allow a de facto exclusive-dealing claim to proceed on this third rail.

2. Properly understood, the Ninth Circuit's decision creates two legally indefensible and dangerous precedents.

First, by relying principally on how third-party customers "understand" the contract terms, Pet. App. 24a—and not on contractual language or action by the defendant itself—the Ninth Circuit failed to require a showing the defendant actually "*used*" its alleged monopoly power "'to foreclose competition,'" *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005) (emphasis added) (citation omitted). As amici highlight, "prior to the opinion below, no court had entertained such a broad conception of de facto exclusive dealing divorced from express contractual terms and the defendant's conduct." Antitrust Scholars *Amici* Br. 10. Absent plausible allegations about either the contracts themselves or other conduct by CoStar, the court of appeals should not have simply accepted as sufficient some third-party brokers' alleged (mis)understandings of the terms.

Second, the Ninth Circuit appeared to accept that a plaintiff need not show that the alleged (mis)understanding was either reasonable or widespread. On the pleaded facts, "many more" than

500 brokers thought CoStar's terms were non-exclusive; three brokers believed otherwise. 4-ER-633 (¶ 257); *see* 2-ER-179–83 (examples). But the court of appeals apparently believed that a view held by an exceedingly small percentage of customers was enough for the claim to survive a motion to dismiss.

The upshot: a defendant can be subject to far-reaching antitrust discovery based on the alleged misimpressions of a *single* customer—no matter how unreasonable the misunderstanding might be and absent any allegations the defendant itself did anything wrong. If taken seriously, that holding would eviscerate the requirement that plaintiffs plead substantial foreclosure in exclusive-dealing cases—as the original panel opinion in this case forthrightly admitted. Pet. 18-19.

This Court should grant certiorari and make clear that de facto exclusive-dealing claims unmoored from any exclusive contractual terms or anticompetitive conduct by the defendant are not cognizable.

II. The Court Should Grant Certiorari On The Refusal-To-Deal Question

CREXi does not dispute that, if its claim is about access to CoStar's products (i.e., a refusal to deal), it cannot plead around *Trinko*. Opp. 21. Nor does it dispute that, if the Ninth Circuit permitted it to do so, that holding would conflict with decisions of the Tenth and D.C. Circuits. *Id.* at 23, 26. CREXi instead pretends this case is about something else. It is not.

A. CREXi repeatedly mischaracterizes its claim as being about access to brokers' "own websites," not CoStar's products. Opp. 3-4, 26. But CREXi's own allegations show that is demonstrably false. CoStar does not prevent CREXi from accessing brokers' own

websites—websites over which it has no control. What CREXi cannot access, and what it really wants, is CoStar's proprietary LoopLink tool. LoopLink is a web tool brokers can use to embed CoStar's LoopNet database and proprietary data on their websites. As CREXi itself alleges, LoopLink is a "widget" that "display[s]" the "database functionality offered by LoopNet" on a broker's website. 4-ER-570–71 (¶¶ 39, 41); *see* 4-ER-572 (¶ 45) ("listings are on the [broker] website *via* Looplink" (emphasis added)). Even on CREXi's telling, CoStar merely prevents CREXi from accessing *CoStar's* proprietary database, which some brokers have embedded on their websites.

That distinction was front and center in the Ninth Circuit. *See* CA9 Answering Br. 46-47; CA9 Oral Argument at 12:25-13:12, 15:47-17:22, 25:30-31:15. But rather than grapple with *Trinko*, the court allowed CREXi to recharacterize what is plainly a refusal-to-deal claim as something else merely because "*CREXi contend[ed]*" that it was not alleging a refusal-to-deal "theory of liability." Pet. App. 21a (emphasis added). The Ninth Circuit never explained how CREXi's characterization of its theory could possibly be squared with its allegations seeking access to CoStar's LoopLink product.

B. CREXi does not seriously dispute that, if the Ninth Circuit allowed it to plead around *Trinko*, that decision would conflict with decisions of other circuits. And so CREXi's assertion (at 22-23) that all the circuits are "consistent" in applying *Trinko* ignores the Ninth. And the Ninth Circuit has a history of skirting *Trinko*. More than 15 years ago, this Court granted certiorari to correct the Ninth Circuit's failure to apply *Trinko* in *Pacific Bell Telephone Co. v.*

linkLine Communications, Inc., 555 U.S. 438 (2009). *See* Pet. 25-26. It has done so again.

Other circuits have also allowed creative plaintiffs to plead around *Trinko*. *See* Pet. 23-24. And district courts have seized upon the Ninth Circuit's disregard of *Trinko* in this very case to deny motions to dismiss for other refusal-to-deal claims. *See* Pet. 29-30 (collecting cases); Chamber of Progress *Amicus* Br. 16 (same).

The Tenth and D.C. Circuits, on the other hand, have faithfully followed this Court's case law. In the Tenth Circuit, *Trinko* applies regardless of what "one chooses to call" the challenged course of conduct. *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1079 (10th Cir. 2013) (Gorsuch, J.), *cert. denied*, 572 U.S. 1096 (2014). *Trinko*'s refusal-to-deal doctrine, the Tenth Circuit has explained, "is not so easily evaded" just because a plaintiff "recast[s]" its allegations. *Id.* Likewise, the D.C. Circuit has consistently applied *Trinko*'s refusal-to-deal doctrine even when plaintiffs attempt to circumvent it. For example, in *New York v. Meta Platforms, Inc.*, 66 F.4th 288 (D.C. Cir. 2023), the plaintiffs argued that Facebook had forbidden app developers from developing competing applications. But as the plaintiffs' actual allegations showed, Facebook merely prohibited developers from "*us[ing] [the] Facebook Platform*" to do so—a classic refusal-to-deal claim that the D.C. Circuit treated as such. *Id.* at 305 (citation omitted).

This Court should grant certiorari to resolve this confusion and reinforce *Trinko*.

III. The Questions Presented Are Important, And This Case Is A Good Vehicle

Without this Court's intervention, the Ninth Circuit's holdings will water down the pleading standard, encourage antitrust plaintiffs to seek creative ways around this Court's decisions, and discourage innovation and ingenuity. Absent clear legal rules enforced at the motion-to-dismiss stage, businesses will be left wondering whether they must share their latest technological developments with competitors or face the risk of steep antitrust discovery costs.

Diverting resources from research and development to litigation and settlement costs for unmeritorious antitrust cases will produce "fewer products, slower improvements, and weaker competition." Chamber of Progress *Amicus* Br. 14. And as amici point out, those risks are amplified by an increasingly high-tech economy that relies on a broad swath of commonplace internet technologies to protect intellectual property from competitors—including "access controls, APIs, software licenses, and platform rules"—that may suddenly be unlawful under the Ninth Circuit's crabbed view of the refusal-to-deal doctrine. *Id.*

CREXi's primary response is to emphasize the "pleading stage" posture of this case. Opp. 29-30. But that is exactly why this Court's intervention is needed. As the Court has repeatedly explained, antitrust discovery typically has an "extensive scope" and is "unusually … cost[ly]." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007). After the parties have "litigate[d] through summary judgment and trial," as CREXi suggests (at 28-29), the Court

will not have an opportunity to clarify the motion-to-dismiss standard. And given the settlement pressure for even unmeritorious cases, there is no guarantee this Court will have another chance to review the decision below. *See Twombly*, 550 U.S. at 558-59; *Cunningham v. Cornell Univ.*, 604 U.S. 693, 710 (2025) (Alito, J., concurring) ("[I]n modern civil litigation, getting by a motion to dismiss is often the whole ball game because of the cost of discovery."). This Court's review is warranted and needed now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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