No. _____

IN THE

Supreme Court of the United States

CALIFORNIA CRANE SCHOOL, INC., ET AL.,
Petitioners,

v.

GOOGLE LLC, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit has ignored this Court's well-established standards regarding per se antitrust violations, including division of markets (*United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990)), profit pooling (*Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969), foreclosure of competitors from a substantial market (*Int'l Salt Co. v. United States*, 332 U.S. 392 (1947)), and price fixing (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)), where the Second Amended Complaint plausibly alleged horizontal agreements between Google and Apple to divide markets, share profits, and foreclose competition, as corroborated by the findings in *United States v. Google LLC*, 20-cv-3010-APM (D.D.C. Aug. 5, 2024).
2. Whether a district court may stay all discovery in an antitrust case based solely on a "preliminary peek" at a pending motion to dismiss, without any showing of good cause as required by Rule 26(c) of the Federal Rules of Civil Procedure, and in derogation of the due process and equal protection rights of plaintiffs, contrary to the Ninth Circuit's own precedent in *Mach-Tronics, Inc. v. Zirpoli,* 316 F.2d 820 (9th Cir. 1963).
3. Whether this Court should resolve the conflict between the Ninth Circuit's decision below and the District of Columbia's decision in *United States v. Google LLC*, 747 F. Supp. 3d 1 (D.D.C. 2024), which found that Google's

exclusive agreements with Apple and others were anticompetitive and resulted in supra competitive prices for search advertising.

4. Whether the Ninth Circuit erred in enforcing Google's arbitration clause based on an "opt-out" that was illusory in practical effect, where undisputed monopoly power left Petitioners with no viable alternative for search advertising and no evidence established Google would have continued to deal with Petitioners had they opted out—contrary to the Federal Arbitration Act's saving clause and the "effective vindication" doctrine recognized by this Court (9 U.S.C. § 2; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Am. Express Co. v. Italian Colors Rest.,* 570 U.S. 228 (2013)).
5. Whether compelling arbitration of private antitrust claims seeking legal remedies violates the Seventh Amendment right to a jury trial where such claims are "suits at common law" and do not fall within the public-rights exception—especially in light of this Court's recent holding restoring the Seventh Amendment's scope in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024) (*Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33 (1989); *Tull v. United States*, 481 U.S. 412 (1987)).
6. Whether the district court erred in denying relief from judgment under Rule 60(b) based on newly discovered, trial-proven evidence of Google's unlawful monopoly maintenance agreements with Apple—evidence later made

public in the federal government's successful antitrust suit—where Petitioners could not, with reasonable diligence, have obtained that evidence earlier and where it likely would have altered the outcome (Fed. R. Civ. P. 60(b)(2), (6); *Gonzalez v. Crosby*, 545 U.S. 524 (2005); *United States v. Beggerly,* 524 U.S. 38 (1998)).

7. Whether the courts below erred by denying Petitioners any opportunity for targeted discovery in a complex antitrust case where critical evidence resided exclusively with Defendants—contrary to this Court's instruction that antitrust plaintiffs must have a fair opportunity to develop facts (*Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464 (1962); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992)).
8. Whether the Ninth Circuit misapplied the pleading standard under *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) by crediting its own view of the facts and failing to draw reasonable inferences for Petitioners, and further erred by denying leave to amend despite significant new evidence—contrary to *Foman v. Davis*, 371 U.S. 178 (1962) and circuit authority.
9. Whether the Ninth Circuit failed to give due effect to Section 5(a) of the Clayton Act—which makes final government antitrust judgments prima facie evidence in subsequent private actions—by disregarding the trial

findings in the United States' successful monopolization case against Google that corroborate Petitioners' injuries from supra competitive advertising prices (15 U.S.C. § 16(a); *Emich Motors Corp. v. Gen. Motors Corp.*, 340 U.S. 558 (1951); *United States v. Google LLC*, No. 1:20-cv-3010 (D.D.C. Aug. 5, 2024)).

PARTIES TO THE PROCEEDING

Petitioners: California Crane School, Inc.
Respondents: Google LLC; Alphabet Inc.; XXVI Holdings Inc.; Apple Inc.; Sundar Pichai; Tim Cook; Eric Schmidt.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner California Crane School, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

The following proceedings are directly related within the meaning of Rule 14(b)(iii)

California Crane School, Inc. v. Google LLC, et al., No. 5:21cv10001-PCP, U.S. District Court for the Northern District of California. Judgment entered March 24, 2024.

California Crane School, Inc. v. Google LLC, et al., No. 24-460, U.S. Court of Appeals for the Ninth Circuit. Memorandum disposition entered September 4, 2025.

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The Ninth Circuit's memorandum disposition (Sept. 4, 2025) is unpublished and reproduced in the Appendix. The district court orders granting dismissal/compelling arbitration and denying Rule 60(b) relief are reproduced in the Appendix.

JURISDICTION

The Ninth Circuit entered judgment on September 4, 2025. This petition is timely under Rule 13.1. Jurisdiction rests on 28 U.S.C. § 1254(1) .

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- U.S. Const. amend. VII.
- Sherman Act §§ 1–2, 15 U.S.C. §§ 1–2.
- Clayton Act §§ 4, 5(a), 15 U.S.C. §§ 15, 16(a).
- Federal Arbitration Act, 9 U.S.C. § 2.

STATEMENT OF THE CASE

Petitioners are small advertisers who relied on Google's search advertising to reach customers. They alleged that Google, in concert with Apple and others, unlawfully maintained a monopoly in general search and search advertising through default/exclusive distribution agreements and revenue-sharing deals that foreclosed rivals and led to supra competitive ad prices—injuring advertisers like Petitioners.

The Second Amended Complaint specifically alleged that Google and Apple, as potential

horizontal competitors, entered into agreements to divide the market and share profits, with Google paying Apple billions of dollars annually to stay out of the search market. Judge Mehta, in the United States' antitrust case against Google, found it not only plausible but reasonable to conclude that these agreements kept Apple from competing with Google, allowing Google to maintain its monopoly and charge supra competitive prices for search advertising.

The district court granted Respondents' motions to dismiss, compelled arbitration of claims against Google based on a form "opt-out" clause, denied all discovery, and later denied Rule 60(b) relief despite newly available trial exhibits and findings from the federal government's monopolization case against Google. The Ninth Circuit affirmed in an unpublished disposition.

After a full trial, the United States secured findings that Google unlawfully maintained monopolies in general search and search advertising through exclusionary agreements—including with Apple—that raised advertiser prices and suppressed competition. Those findings directly corroborate Petitioner's allegations that Google's conduct left them with no realistic alternative channel to reach users at competitive prices and that any supposed "opt-out" of arbitration risked forfeiting essential access to Google's platform.

REASONS FOR GRANTING THE WRIT

I. *The Ninth Circuit's Decision Ignores Supreme Court Precedent on Per Se Antitrust Violations*

Petitioners' Second Amended Complaint plausibly alleged *per se* violations of the antitrust

laws, including profit sharing and division of markets between Google and Apple, as recognized in *Citizen Publ'g Co. v. United States* and in *Palmer v. BRG of Georgia, Inc*. The complaint detailed a horizontal relationship in which Google paid Apple, a potential competitor, billions of dollars annually to stay out of the search market. Judge Mehta's findings in the government's case confirmed that these agreements disincentivized Apple from launching its own search engine, thereby allowing Google to maintain its monopoly and charge supra competitive prices for advertising.

Petitioners moved based on trial exhibits and findings later unsealed/posted from the federal case, including written Google–Apple agreements confirming the exclusionary conduct and market foreclosure they alleged. The denial below rested on the notion that the evidence was "public" earlier or would not change the outcome—contrary to the record and the government court's findings validating Petitioners' theory of harm. That is precisely the kind of new, material proof that justifies reopening judgment.

The trial evidence in the Mehta case established that Google's monopoly power, maintained by exclusive distribution agreements, enabled it to increase text ad prices without meaningful competitive constraint. The district court's and Ninth Circuit's failure to recognize these per se violations, and to credit the plausible allegations and corroborating government findings, is in direct conflict with this Court's precedents on market division, profit pooling, and foreclosure of competition.

Plaintiff made allegations demonstrating the plausibility of the Defendants *per se* violations of the antitrust laws of profit sharing (*Citizen Publ'g v. United States,* 394 U.S. 131 (1969)) and division of markets (*Palmer v. BR of Georgia,* 498 U.S. 46 (1990).

In addition, the Second Amended Complaint alleged a horizontal relationship between Google and Apple, its potential competitor in the search and search advertising business. Google paid Apple, a potential competitor, billions of dollars per year in publicly reported revenue sharing to stay out of the search market. This point was recognized by Judge Mehta when he said that Google had monopolized the search advertising market.

In fact, Judge Mehta concluded that it was not only "plausible" but reasonable to conclude that the Google-Apple agreements kept Apple from competing with Google.

Still, the ultimate question is whether the ISA reasonably appears capable of significantly contributing to keeping Apple *on the sidelines* of search, thus allowing Google to maintain its monopoly. *See United States v. Microsoft,* 253 F.3d 34,79 (D.C. Cir. 2001). The revenue share payments unquestionably have that effect. The prospect of losing tens of billions in guaranteed revenue from Google—which presently comes at little to no cost to Apple—*disincentivizes* Apple from launching its own search engine when it otherwise has built the capacity to do so. *United States v. Google, LLP*, 20-cv-3010-APM (D.D.C. Aug. 5, 2024) (Dkt. No. 1033), at p. 242.

These agreements with Apple allowed Google to charge supra-competitive prices for its

advertising, thereby injuring Plaintiff and the putative class of companies and entities who advertised with Google.

> Judge Mehta specifically found:
>
> Importantly, the court also finds that Google has exercised its monopoly power by charging Supracompetitive prices for general search text ads. That conduct has allowed Google to earn monopoly profits. (Mehta Opinion at 4).

Google's exclusive agreements with Apple (as was alleged by Plaintiff) and others permit Google to profitably charge supra competitive prices for text ads:

> The trial evidence firmly established that Google's monopoly power, maintained by the exclusive distribution agreements, has enabled Google to increase text ads prices without any meaningful competitive constraint. (Mehta Opinion at 259).
>
> * * *
>
> The trial evidence firmly established that Google's monopoly power, maintained by the exclusive distribution agreements, has enabled Google to increase text ads prices without any meaningful competitive constraint. There is no dispute that the cost-per-click for a text ad has grown over time. UPFOF ¶¶ 629–637, 652–676; FOF ¶ 186. (Mehta Opinion at 60).

II. *The District Court's "Preliminary Peek" Stay of Discovery Rule Violates Rule 26 and Due Process; Petitioner Was Denied Discovery.*

May the District Court stay discovery pending the resolution of Defendants' motions to dismiss based upon a "preliminary peek" at those motions and without any showing of good cause for a stay as required by Rule 26(c) of the Federal Rules of Civil Procedure, even though the Court admitted that the Federal Rules "do not provide for an automatic stay of discovery just because a potentially dispositive motion is pending"?

The answer should be "No," but in this case the District Court stayed all discovery based solely on a "preliminary peek" at the motions to dismiss, without any showing of good cause as required by Rule 26(c). This approach is contrary to the Ninth Circuit's own precedent in *Mach-Tronics, Inc. v. Zirpoli,* which held that judicial action should not be based on "feelings" or "hunches" before trial, but only after evidence, hearing, and findings. The stay delayed prosecution of the case, denied Petitioners the opportunity to develop facts, and effectively prejudged the merits before any evidence was presented. Such stays are disfavored and undermine the just, speedy, and inexpensive determination of actions as required by Rule 1.

The motion to dismiss procedural standard of *Iqbal* and *Twombly* in antitrust cases is broken and should be revisited. A motion to dismiss after a stay of discovery is tantamount to a motion for summary judgment under *Iqbal* and *Twombly*. The District Courts are requiring evidentiary facts to be pled in the complaints and are not satisfied with mere allegations. The plausibility standard is broken

because it is arbitrary. The District Courts are requiring proof of the violation before they allow discovery, and they measure the allegations of the complaint against their own arbitrary "plausibility" standard. This Court should impose a procedural rule that requires that adequate discovery take place before any antitrust action may be dismissed.

This Court has repeatedly cautioned that antitrust cases often require discovery because "proof is largely in the hands of the alleged conspirators." *Hospital Bldg.*, 425 U.S. at 746; *see Poller*, 368 U.S. at 473 (antitrust cases "notoriously" depend on inferences from records held by defendants). The blanket refusal to permit even targeted discovery (e.g., limited depositions or focused document requests regarding Google–Apple agreements) before dismissal was an abuse of discretion, especially given the later government trial record validating Petitioners' allegations. *See also Eastman Kodak*, 504 U.S. at 467–79 (reversing summary judgment; record required development of factual issues about market power and foreclosure).

In *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820 (9th Cir. 1963), the Ninth Circuit acknowledged and affirmed the importance of the enforcement of the civil antitrust laws by reversing and vacating a stay entered in an antitrust case pending before the District Court, Judge Zirpoli. The Court noted that a stay of proceedings in an antitrust matter may never be based upon the District Court's "feelings" or "hunches" about the lack of merits of the antitrust allegations in any cases before it. In response to the lower court and the dissent, the Ninth Court stated:

> The dissent makes clear where our difference lies. Judge Duniway thinks

> that the trial judge "had a feeling" as to the lack of merits of the antitrust charges; that the trial court "may feel" that it is being used for purely tactical purposes, and that it may grant a stay based upon such "feel" or "hunch". It is our position that **judicial action** should not be based on "feelings" before trial, but rather that judicial action may properly be taken only after evidence, hearing, and findings.

Id. at 834-35.

Notwithstanding that ruling in *Mach-Tronics,* District Courts in the Ninth Circuit have been taking "preliminary peeks" at the pleadings in antitrust filings and have used their pre-judged conclusions based upon these "preliminary peeks" to stay discovery in antitrust actions for months on end, contributing NOT to the efficient prosecution of the cases before the courts, or to "the just, speedy, and inexpensive determination of every action and proceeding" as required by Fed. R. Civ. Proc. 1, but rather contributing only to the exacerbation of the substantial delay of litigation that now haunts these cases and typically results in extended and unnecessarily time consuming antitrust litigation.

This case presents the need and opportunity to examine and to put an end, once and for all and circuits-wide, to these "preliminary peeks" and "hunches" that mask a prejudice in complicated cases against plaintiffs' discovery without even attempting to require good cause and in derogation of the initial disclosures of Rule 26 of the Federal Rules of Civil Procedure and that amount to nothing more than a pre-judgment of the merits of a case

before the parties have had the opportunity to present their evidence and that is, in effect, a denial of due process and equal protection of the laws to the parties, as the Court in *Mach-Tronics* said:

> When a District Court decides to … dismiss the suit … or grant a stay… To the litigant, entitled to be heard, the effect is the same, and just as disastrous to his rights. *Mach-Tronics, supra*, 316 F.2d at 834.

In this case, the District Court erroneously found that "good cause exists to stay discovery until the pending motions are resolved for three reasons: (1) Defendants' motions may dispose of some Defendants and/or Plaintiff's entire case; (2) no discovery would help the court to resolve those motions; and (3) forcing Defendants to engage in discovery before the court's ruling on the pending motions may subject Defendants to undue burden and expense." *See* Order, p. 2. The ruling is contrary to both law and fact. It has the chilling effect of stalling and delaying prosecution of this case and, in effect, imposes a unilateral stay on all discovery without any legal or factual support. The "preliminary peek" approach has a chilling effect upon the civil enforcement of the antitrust laws, besides being an obvious denial of due process and equal protection of the law. The "preliminary peek" test is no substitute for proper "judicial action." The Order is erroneous and amounts to abuse of discretion. *See Mach-Tronics*, *supra*, 316 F.2d at 835-36.

First, the District Court *admits* that "[t]he Federal Rules of Civil Procedure do not provide for an automatic stay of discovery just because a

potentially dispositive motion is pending." Order, pp. 1-2. The Order notes the judge's "wide discretion in controlling discovery." *Id*. p. 2. Yet, there is no discovery to be controlled in this case as it hasn't started. The District Court's reliance on the two decisions both issued by a fellow judge in the Northern District, is misguided. Indeed, before the Plaintiff had even filed its opposition to the motion to dismiss, the District Court had already issued his Order staying the discovery, plainly a violation of due process that requires notice and opportunity to be heard. The District Court took a "preliminary peek" at the as yet unopposed motion and determined that the motion may dispose of the entire case. The basis for the District Court's conclusion, as referenced in the Order, was the Defendants' bald statement within the motion that it was dispositive of the entire case, which is what every Defendant routinely claims on a motion to dismiss. The District Court's "preliminary peek" cannot, may not and must not be allowed to justify prohibiting Plaintiff from proceeding with the prosecution of its case. A District Court's "feel" or "hunch" with regard to any of the Defendants' pending motions does *not* warrant a stay of discovery in this case. The Plaintiff is entitled to "judicial action" and not "hunches" or "feelings" or "peeks."

The Order also makes no mention of any issues with the Court's calendar requiring a stay, which in this case goes far beyond any attempt of the District Court to "fix or adjust its own calendar, or to postpone consideration of the case because of prior commitment of the court to cases having an earlier place upon its calendar." *Mach-Tronics*, *supra*, 316 F.2d at 823. By the Order in question the District

Court simply chose to "withhold the further exercise of its authority… and abandoned its control over and conduct of the case, including any placing of the case upon its calendar for trial." *Id*.

The Court owes a duty to "secure the just, speedy, and inexpensive determination of every action and proceeding." *See* Fed. R. Civ. Proc. 1. "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with the economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Texaco, Inc. v. Borda*, 383 F.2d 607, 608 (3d Cir.1967) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936)). Moreover, as this Court said in *Mach-Tronics*, "It is our position that judicial action should not be based on 'feelings' before trial, but rather that judicial action may properly be taken only after evidence, hearing, and findings." *Mach-Tronics, supra*, 316 F.2d at 834-35.

The District Court's April 28 Order staying discovery is a clear violation of the express requirements of the Federal Rules and, in particular, Rule 26(a)(1) which requires initial disclosures and Rule 26(f)(2)and(3) which require a proposed plan for discovery. The Judge's Order causes a significant delay to the Plaintiff and its ability to prosecute this action. The Order improperly imposes a stay on this litigation and precludes Plaintiff from moving forward with discovery.

Commencing discovery in federal cases has become increasingly difficult. The most common delay tactic now practiced by the defense is to

challenge the initial pleadings and argue that the Rule 26 discovery should be stayed until motions to dismiss are resolved. This delays the start of discovery for many months, and many District Court judges do not issue the scheduling conference order until after the pleadings are resolved. The defense arguments often result in discovery stays that cause unnecessary delays, prevent discovery that may aid in amending the complaint or allow plaintiffs to get a start on case preparation. The discovery delays may also be harmful to plaintiffs if documents are lost or destroyed, witnesses become unavailable or their memories fade. *See e.g., Jackson v. Denver Water Bd.*, No. 08-cv-01984-MSK-MEH, 2008 WL 5233787, at *1 (D. Colo. Dec. 15, 2008) (staying case could result in delay and attendant "adverse consequences such as a decrease in evidentiary quality and witness availability").

In the present case, the Court's reasons for delaying the prosecution of the case are neither warranted under any Rule nor supported by any showing of "good cause." No provision in the Federal Rules of Civil Procedure prevents discovery from moving forward. Motions for stays of discovery are disfavored, and it has been held that even a filed motion to dismiss does not establish grounds for staying discovery. *See Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D.Cal.1990), *see also Tambura v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at *1–2 (N.D. Ill. Nov. 17, 2010).

In addition, even if it were appropriate under the Rules to entertain a motion to stay, the Court erroneously granted Defendants' motion pursuant to Rule 26(c). That Rule is explicit in its requirements. None of the requirements of the Rule were met or

even addressed, however, and no Defendant presented either a Declaration or Affidavit to support its contentions, much less made any cognizable showing of good cause to assert that the discovery, including the depositions of the executives, who formed and regularly met to confirm the conspiracy. Nor were there any declarations that show, in any way, an annoyance, embarrassment, or cause oppression or undue burden or expense, other than the normal discovery experiences of litigation.

The Discovery Plan submitted by the Plaintiff called for five depositions of the Defendants including, Mr. Cook, Mr. Pichai, Mr. Schmidt, as well as Mr. Sewell who has knowledge regarding the person(s) who made statements that Apple and Google would act in effect as "one company" that was "merged without merging," and that the two companies "envisioned themselves as being one company." These depositions would support the allegations of their complaint.

The FAC alleged the time and place of secret and clandestine meetings between Google's and Apple's chief executives. At each of these meetings these top executives solidified and confirmed their agreements to cooperate rather than compete against each other. (FAC, Para. 104).

By way of example of the clandestine meetings, one of the secret meetings between the CEOs of Google and Apple took place at a late dinner on March 10, 2017, between Sundar Pichai, CEO of Google and its parent Alphabet, Inc., and Tim Cook, CEO of Apple, during which they discussed their agreements and the search business. Tim Cook had actively promoted the profit-sharing arrangement

from the very beginning in exchange for Apple's commitment not to compete in the search business. Cook knew, as Google observed in a 2018 strategy document, that "People are much less likely to change [the] default search engine on mobile." After the meeting, Apple announced that Google would be the search vehicle for Siri, and Google announced that it had increased its payments to Apple in its sharing agreements for search traffic. (FAC, Paras. 121-123).

As alleged in the FAC, the Defendants' executives boasted that the companies act as though "they actually merged without merging" and that "Our vision is that we work as if we are one company. . ." and that "If we just sort of merged the two companies, we could just call them AppleGoo." Their general counsel described the reality of their combination as "coopetition." (FAC, Paras. 80, 99-100). Steve Jobs told Google: "I said we would, if we had good relations, guarantee Google access to the

iPhone and guarantee it one or two icons on the home screen." (FAC, Para. 102)

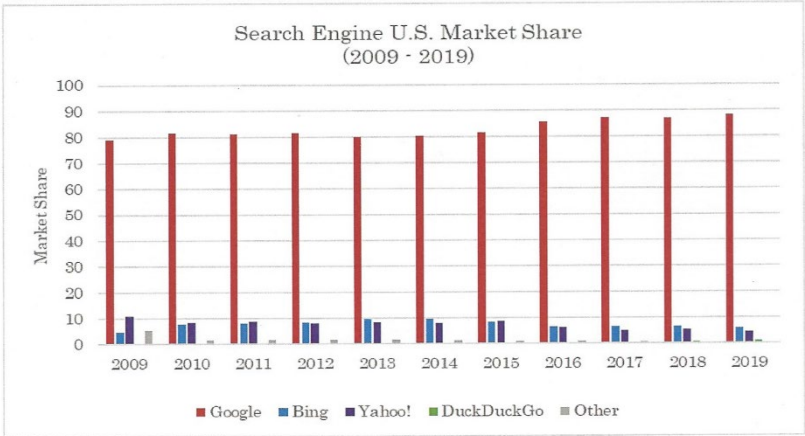
In the past, Apple had actively worked on developing its own general search engine as a potential competitor to Google. As a result, Apple is a potential direct competitor of Google in the search business and potentially threatens Google's dominance in the search business but for its agreement not to compete with Google and to share profits with Google. (FAC, Para. 108).

It was reported that as late as 2014 Apple had been working on its own search engine. However, Apple opted to receive the payment of billions of dollars from Google instead of competing with Google. (FAC, Para. 127). Google's own documents admit that Apple's "Safari default is a significant revenue channel" and that losing that exclusivity with Apple would substantially harm Google's bottom line. Google viewed the prospect of Apple's competition in the search business as a "Code Red" emergency. (FAC, Paras. 119-120).

It has been estimated that if Apple were to launch its own search engine in competition with Google, at least $15 billion a year of Google revenue would go to Apple. (FAC, Para. 109). Google makes approximately $25 billion a year in advertising revenue from its searches on Apple's devices, iPhones, iPads, and Macs. (FAC, Para. 106). Google estimates that, in 2019, almost fifty percent (50%) of its search traffic originated on Apple devices. (FAC, Para. 107). Google's annual payments to Apple – estimated to be $8 billion to $15 billion a year – up from $1 billion a year in 2014, account for 14 to 21 percent of Apple's annual profits. (FAC, Para. 128).

Apple is the major threat to Google as a potential competitor in the search business. (FAC, Para. 110). More than half (50%) of Google's search business was conducted through the use of Apple devices. (FAC, Para. 19). Because of that, Apple was a major potential threat to Google, and this threat was designated by Google as "Code Red." (FAC, Paras. 20, 22). If Apple became a competitor in the search business, Google would have lost half of its business. (FAC, Para. 23).

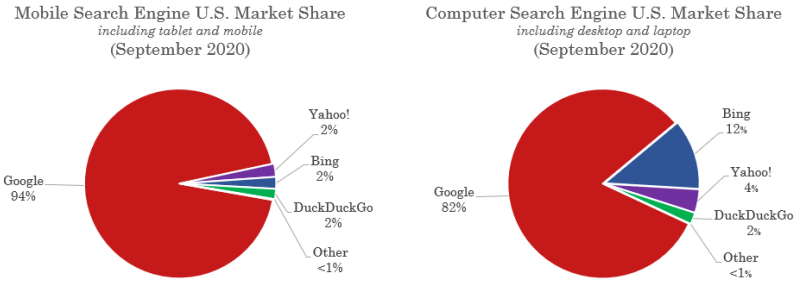
Google's next closest competitor in 2020 commanded less than 2% of the mobile search market. All the competitors, Yahoo!, Bing, DuckDuckGo, and others have less than 7% of the market compared to Google's almost 94%.



This chart is taken from Figure 6 found at paragraph 92 in the United States Government's first amended complaint against Google, dated January 15, 2021, filed in the District of Columbia, 1:20-cv-03010-APM.

As of September 2020, Google controlled 94% of the mobile search engine U.S. market share and 82% of the computer search engine U.S. market

share. For the last 10 years, from 2009 to 2019, Google increased its control of the search engine U.S. market share from 80% to 88%. (FAC, Paras. 24-26).



These charts are taken from Figures 7 and 8 found at paragraph 93 in the United States Government's first amended complaint against Google, dated January 15, 2021, filed in the District of Columbia, 1:20-cv-03010-APM.

Google's next closest competitor in 2020 commanded less than 2% of the mobile search market. All the competitors, Yahoo!, Bing, DuckDuckGo, and others have less than 7% of the market compared to Google's almost 94%. (FAC, Para. 84).

Apple has agreed with Google that it will neither develop nor offer a general search engine in competition with Google. (FAC, Para. 112).

From 2005 up to and including the time of the filing of this complaint, Google paid Apple more than $50 billion not to compete in the search business. (FAC, Para. 39). By paying billions of dollars to Apple each year, Google has locked in Apple's commitment not to compete in search. (FAC, Para. 115.)

The FAC therefore alleges that, in exchange for Apple's commitment not to compete in the search

business against Google, and to keep Apple out of the search advertising business, Google has shared its advertising profits with Apple and has paid Apple billions of dollars over the last 15 years, all in violation of Section 1 of the Sherman Act. *See Citizen Publ'g Co. vs. United States,* 394 U.S. 131 (1969). Google has made payments to Apple totaling 20% of Apple's own profits.

Plaintiff alleges a horizontal market allocation agreement between Apple and Google that Apple will not compete against Google in the search advertising market, (*See Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990)), and that Google will pay them not to compete, and that Google will pay them billions of dollars, as well as an agreement between Apple and Google to share revenue and profits (*see Citizens, supra*), which reduces the incentive to compete with one another. The quid pro quo for the agreement is that Google must pay Apple billions of dollars to stay out of the market and to discriminate in favor of Google foreclosing all other potential competitors. The more money Google made in search, the more money Apple made. (FAC, Paras. 3-4).

The evidence alleged is consistent with the salient observation made by the father of economics and the author of the benefits of competition and the principles of supply and demand, Adam Smith, who said in his monumental classic, *The Wealth of Nations*: "People of the same trade seldom meet together even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." The Wealth of Nations, Adam Smith, Book One, Chap. X, Part II.

As a result, the District Court's ruling contains several clear, significant and irreparable errors that warrant this Court's certiorari review.

III. *The Ninth Circuit's Decision Conflicts with the D.C. District Court's Findings in United States v. Google*

Judge Mehta's decision in *United States v. Google LLC* found that Google was a monopolist that maintained its monopoly through anticompetitive, exclusionary agreements with Apple and others, and that these agreements enabled Google to charge supra competitive prices for search advertising. The Ninth Circuit's decision below, which held that allegations of agreement with Apple to divide markets and share revenue were insufficient to state a claim, is in direct conflict with the D.C. District Court's findings. This Court's review is necessary to resolve this circuit conflict and ensure uniform application of the antitrust laws.

Judge Mehta in *United States v. Google, LLC*, 747 F.Supp.3d 1 (D.D.C. 2024), found that google was a monopolist that had attained its monopoly by reason of the anticompetitive, exclusionary agreements Google had entered into with Apple and others:

> After having carefully considered and weighed the witness testimony and evidence, the court reaches the following conclusion: Google is a monopolist, and it has acted as one to maintain its monopoly. It has violated Section 2 of the Sherman Act.
>
> Specifically, the court holds that (1) there are relevant product markets for general search services and general

> search text ads; (2) Google has monopoly power in those markets; (3) Google's distribution agreements are exclusive and have anticompetitive effects; and (4) Google has not offered valid procompetitive justifications for those agreements. Importantly, the court also finds that Google has exercised its monopoly power by charging supracompetitive prices for general search text ads. That conduct has allowed Google to earn monopoly profits. (*Id*. at 32-33.)

Judge Mehta's decision in the District of Columbia now directly conflicts with the Ninth Circuit's opinion in this case in which it has ruled that allegations of agreement with Apple to divide markets and share revenue are not sufficient to state a cause of action against Google and Apple.

IV. *The Decision Below Blesses The Enforcement Of An Illusory "Opt-Out" Arbitration Clause Where Monopoly Power Leaves Customers No Real Alternative, Undermining The FAA's Saving Clause And The Effective-Vindication Doctrine.*

The FAA enforces arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 ; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) . This Court has recognized an "effective vindication" principle that preserves federal statutory claims from prospective waiver in arbitration. *Mitsubishi Motors*, 473 U.S. at 637 n.19; *Green Tree,* 531 U.S. at 90; *Italian Colors*, 570 U.S. at 236. While narrow, it prohibits enforcement of

arbitration terms that, as a practical matter, foreclose the pursuit of statutory rights.

Here, the panel treated Google's "opt-out" as curing procedural and substantive unconscionability. But there was no record evidence that Google would continue to deal with advertisers who opted out; the market structure found after trial in the government's case confirms advertisers lacked meaningful alternatives and faced prohibitive switching costs and reach deficits. *See United States v. Google* LLC (D.D.C. Aug. 5, 2024). In such circumstances, enforcing arbitration because a customer could theoretically "opt out" disregards the economic realities of monopoly power. The result is a *de facto* prospective waiver: advertisers are coerced to accept arbitration to avoid losing indispensable access to the dominant platform.

This Court should clarify that courts must evaluate whether an "opt-out" is genuinely available in light of market power and network effects, and that the effective-vindication doctrine applies when arbitration is imposed under conditions of monopoly coercion that would otherwise extinguish the practical ability to pursue antitrust rights. Cf. *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 831–35 (9th Cir. 2019) (upholding anti-waiver rule preserving ability to seek public injunctive relief).

V. *The Decision Conflicts With The Seventh Amendment's Guarantee Of A Jury Trial For "Suits At Common Law," Particularly After Jarkesy.*

Antitrust treble-damages suits are paradigmatic "suits at common law." *See Granfinanciera,* 492 U.S. at 42 ; *Tull*, 481 U.S. at 417–18 . In *SEC v. Jarkesy,* 144 S. Ct. 2117 (2024) , this Court held that the Seventh Amendment

requires a jury when the government seeks civil penalties for fraud claims analogous to common-law actions and the public-rights exception does not apply. The Court emphasized substance over form in assessing whether claims are legal and historically triable to a jury.

Compelling arbitration here displaced the Seventh Amendment jury right for Petitioners' private antitrust claims seeking legal damages—claims that do not fall within the public-rights exception. *See Granfinanciera*, 492 U.S. at 53–54. Although this Court has held that statutory antitrust claims may be arbitrated, *Mitsubishi Motors,* 473 U.S. at 628, *Jarkesy* reaffirms that courts must safeguard the jury-trial guarantee where Congress created legal claims analogous to common-law causes of action. The question presented—whether adhesion arbitration that extinguishes a civil jury in a private antitrust damages case is consistent with the Seventh Amendment—warrants review given the explosion of mandatory arbitration in concentrated digital markets.

VI. *The Courts Below Misapplied Rule 60(B) In Rejecting Newly Discovered, Outcome- Altering Evidence From The Government's Successful Monopolization Case.*

Rule 60(b)(2) authorizes relief for "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial," and Rule 60(b)(6) provides a residual safety valve for "extraordinary circumstances." Fed. R. Civ. P. 60(b); *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) ; *United States v. Beggerly*, 524 U.S. 38, 46–47 (1998) . Petitioners moved based on trial

exhibits and findings later unsealed/posted from the federal case, including written Google–Apple agreements confirming the exclusionary conduct and market foreclosure they alleged. The denial below rested on the notion that the evidence was "public" earlier or would not change the outcome—contrary to the record and the government court's findings validating Petitioners' theory of harm. That is precisely the kind of new, material proof that justifies reopening judgment.

VII. *The Categorical Denial Of Discovery Contravenes This Court's Antitrust Jurisprudence.*

This Court has repeatedly cautioned that antitrust cases often require discovery because "proof is largely in the hands of the alleged conspirators." *Hospital Bldg.*, 425 U.S. at 746; *See Poller*, 368 U.S. at 473 (antitrust cases "notoriously" depend on inferences from records held by defendants). The blanket refusal to permit even targeted discovery (e.g., limited depositions or focused document requests regarding Google–Apple agreements) before dismissal was an abuse of discretion, especially given the later government trial record validating Petitioners' allegations. *See also Eastman Kodak*, 504 U.S. at 467–79 (reversing summary judgment; record required development of factual issues about market power and foreclosure).

VIII. *The Panel Misapplied Twombly/Iqbal And Compounded Error By Denying Leave To Amend Despite New Evidence.*

Twombly requires courts to accept well-pleaded factual allegations as true and draw reasonable inferences in plaintiff's favor, 550 U.S. at 555–56, and *Iqbal* directs courts to consider the complaint's non-conclusory factual content as a

whole in determining plausibility, 556 U.S. at 678–79. The panel discounted plausible allegations aligning with the government's later- proven case and drew inferences against Petitioners. That is error. *See, e.g., Viamedia v. Comcast Corp*, 951 F.3d at 468–72 (reversing dismissal of antitrust claims; plausibility viewed with inferences for plaintiff).

Further, leave to amend should be "freely given when justice so requires." *Foman*, 371 U.S. at 182 . The Ninth Circuit applies a "strong policy" favoring amendments absent prejudice, bad faith, undue delay, or futility. Eminence Capital, 316 F.3d at 1051–52 . Where Petitioners proffered concrete new evidence from a subsequent federal antitrust trial directly corroborating their claims, denial of leave was reversible error.

IX. *The Decision Below Fails To Give Appropriate Effect To Section 5(A) And The Government's Trial Findings In United States v. Google.*

Section 5(a) provides that a final judgment in a civil antitrust action brought by the United States "shall be prima facie evidence" in any subsequent private action as to "all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." 15 U.S.C. § 16(a) . This Court has long held that private plaintiffs may rely on such judgments to establish key elements. *Emich Motors*, 340 U.S. at 568–71 . Judge Mehta's extensive findings that Google unlawfully maintained monopolies in general search and search advertising, and that its exclusive agreements raised advertiser costs, are quintessentially within § 16(a)'s scope for prima facie use. See United States v. Google LLC (D.D.C. Aug. 5, 2024) . At minimum, the Ninth Circuit should have allowed amendment to

incorporate those findings and exhibits. Its refusal deepens confusion over § 16(a)'s operation in the digital-platform era and warrants this Court's guidance.

THIS CASE IS AN EXCELLENT VEHICLE TO CORRECT THE IMBALANCE IN THE LAW

The issues are cleanly presented and outcome-determinative. The government's later trial victory against Google provides a unique, concrete record that underscores the stakes: if dominant platforms can leverage illusory arbitration "opt-outs" to remove private antitrust claims from juries and Article III courts—while courts deny discovery and disregard new, corroborative evidence—private enforcement of the antitrust laws will be severely curtailed. This Court's review is warranted to restore the balance struck by the FAA, the Seventh Amendment, Rule 60(b), *Twombly/Iqbal*, and § 16(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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