15-565

No. 15-

IN THE

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

THEODORE J. BOUTROUS, JR.
GIBSON, DUNN
& CRUTCHER LLP
333 South Grand Ave.
Los Angeles, CA 91030

A. DOUGLAS MELAMED
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305

SETH P. WAXMAN
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

DANIEL G. SWANSON
BLAINE H. EVANSON
GIBSON, DUNN
& CRUTCHER LLP
333 South Grand Ave.
Los Angeles, CA 91030

CYNTHIA E. RICHMAN
GIBSON, DUNN
& CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, DC 20036

PAUL R.Q. WOLFSON
LEON B. GREENFIELD
PERRY A. LANGE
ARI J. SAVITZKY*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

MARK C. FLEMING
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

QUESTION PRESENTED

In 2010 Apple launched the revolutionary iPad, and with it, the iBookstore, an innovative retail platform; together, they disrupted Amazon's dominant position in the e-books market. Apple entered with a new agency business model, concluding vertical arrangements with e-book publishers that included commonplace provisions that are often procompetitive and unquestionably served Apple's legitimate business objectives in offering consumers a new e-books platform. Yet a divided court of appeals panel condemned Apple's conduct as *per se* unlawful under Section 1 of the Sherman Act because its vertical activities supposedly facilitated horizontal collusion among the publishers, who wished to be free from Amazon's dominance. The panel majority declined to follow this Court's decision in *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U.S. 877 (2007), which instructed that such vertical conduct must be analyzed under the rule of reason, and also rejected another circuit's decision that properly followed *Leegin*.

The question presented is:

> Whether vertical conduct by a disruptive market entrant, aimed at securing suppliers for a new retail platform, should be condemned as *per se* illegal under Section 1 of the Sherman Act, rather than analyzed under the rule of reason, because such vertical activity also had the alleged effect of facilitating horizontal collusion among the suppliers.

PARTIES TO THE PROCEEDING

Petitioner is Apple Inc., a defendant-appellant in the court of appeals.

Respondents, and plaintiffs-appellees in the court of appeals, are the United States of America; the State of Texas; the State of Connecticut; the Commonwealth of Puerto Rico; the State of Utah; the State of Alabama; the State of Alaska; the State of South Dakota; the State of North Dakota; the District of Columbia; the State of Indiana; the State of Arizona; the State of Tennessee; the State of Nebraska; the State of Michigan; the State of Colorado; the State of Vermont; the Commonwealth of Massachusetts; the State of Illinois; the State of West Virginia; the State of New Mexico; the State of Iowa; the Commonwealth of Virginia; the State of Kansas; the State of Maryland; the State of New York; the State of Idaho; the State of Missouri; the State of Arkansas; the State of Ohio; the State of Louisiana; the Commonwealth of Pennsylvania; the State of Wisconsin; and the State of Delaware.

Defendants-appellants in the court of appeals, who are not petitioners here, are Simon & Schuster, Inc.; Simon & Schuster Digital Sales, Inc.; Verlagsgruppe Georg Von Holtzbrinck GmbH; and Holtzbrinck Publishers, LLC, DBA Macmillan. Defendants in the district court, who are not petitioners here, are Hachette Book Group, Inc.; HarperCollins Publishers L.L.C.; and The Penguin Group, a Division of Pearson PLC, Penguin Group (USA), Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner Apple Inc. has no parent corporation. To the best of Apple's knowledge and belief, and based on public filings with the Securities and Exchange Commission, as of October 26, 2015, no publicly held corporation owns 10% or more of Apple's stock.

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PETITION FOR A WRIT OF CERTIORARI

Apple Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

Apple's launch of the iBookstore as a platform for tens of millions of consumers to buy and read digital books ("e-books") on the iPad dramatically enhanced competition in the e-books market, benefitting authors, e-book publishers, and retail consumers. Following Apple's entry, output increased, overall prices decreased, and a major new retailer began to compete in a market formerly dominated by a single firm. As the district court acknowledged: "[H]aving the creativity and com-

mitment of Apple invested in the enhancement of a product like the iBookstore [was] extremely beneficial to consumers and competition." App. 248a n.69. Yet a divided panel of the Second Circuit deemed the procompetitive nature of Apple's entry irrelevant and held Apple's conduct *per se* unlawful because, in entering the e-books market through its vertical dealings with five e-book publishers, Apple was found also to have facilitated horizontal collusion among the publishers.

The panel majority's decision contradicts this Court's precedent and, as Judge Jacobs explained in dissent, "creates a circuit split, and puts [the Second Circuit] on the wrong side of it." App. 106a. Under Section 1 of the Sherman Act, 15 U.S.C. § 1, the presumptive standard for evaluating whether a defendant's conduct unreasonably restrains trade is the rule of reason. *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885 (2007). Unlike the *per se* rule, the rule of reason requires assessment of the real-world competitive effects of the challenged conduct. *Id.* Condemnation under the *per se* rule is "appropriate only" for conduct that "'would always or almost always tend to restrict competition'" and "only after courts have had considerable experience with the type of restraint at issue." *Id.* at 886. Moreover, *per se* condemnation is not appropriate for genuine "vertical" arrangements between firms at different levels of the industry structure, such as Apple (an e-book retailer) and the publishers (e-book suppliers), as opposed to "horizontal" arrangements between competitors. That is because vertical conduct often brings procompetitive effects. *Id.* at 889-894.

The panel majority sought to justify its result by characterizing Apple's vertical conduct in assembling a new content platform as "orchestrat[ing]" *per se* illegal

horizontal collusion among e-book publishers. App. 55a. The panel's ruling is contrary to this Court's precedent and creates a conflict with the Third Circuit. *Toledo Mack Sales & Serv., Inc.* v. *Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008) (reviewing a vertical agreement that allegedly facilitated a horizontal conspiracy under the rule of reason). And the panel majority's error is even more clear because, as the government conceded, "no court ha[d] previously considered a restraint" like Apple's agreements with publishers, App. 108a (Jacobs, J. dissenting), and, as the panel majority acknowledged, the "nascent" e-books market had "new and unusual features," App. 69a.

The Second Circuit's decision will harm competition and the national economy. It threatens to subject procompetitive vertical conduct to categorical antitrust condemnation, contrary to this Court's repeated recognition that vertical conduct often enhances competition and its repeated decisions "to temper, limit, or overrule once strict prohibitions on vertical restraints," *Leegin*, 551 U.S. at 901. And the Second Circuit's approach creates intolerable uncertainty over how courts will assess vertical conduct accused of having horizontal effects—uncertainty that will chill innovation and risk-taking.

This Court should grant the petition, confirm that vertical activity, undertaken for bona fide, potentially procompetitive purposes, is not transformed into *per se* illegal conduct merely because it also has been found to facilitate horizontal collusion, and overturn the court of appeals' erroneous application of the *per se* rule.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-119a) is reported at 791 F.3d 290. The decision of the district court (App. 121a-250a) is reported at 952 F. Supp. 2d 638.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2015. App. 1a. On September 17, 2015, Justice Ginsburg extended the time for filing a petition for certiorari to October 28, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

STATEMENT

Apple, a newcomer to the world of digital books, succeeded in delivering an innovative retail platform to consumers that disrupted the incumbent's dominant position. The question in this case is whether Apple may nevertheless be subjected to *per se* antitrust liability because the courts below found that its vertical dealings with suppliers (book publishers) made it easier for the publishers to engage in alleged horizontal collusion among themselves.

A. The E-Books Market Before Apple's Entry

Before Apple entered the e-books market, that market was dominated by a single firm: Amazon. App. 95a. Amazon used a "loss leader" strategy, under which it sold new releases and best-seller e-books at $9.99—less than the wholesale prices Amazon paid e-book publishers—to attract sales for Amazon's other products. App. 2a, 8a-9a.

Because any new entrant "'would run the risk of losing money if it tried'" to match Amazon's below-cost pricing, Amazon's strategy deterred new competitors from innovating and offering readers new e-book platforms. App. 95a (quoting 149a). By 2009, Amazon claimed almost 90% of the e-books retail market and faced virtually no competition. App. 96a & n.2, 130a.

With no real alternative retail platform for e-books—and thus no other outlet to reach readers—publishers were forced to accept Amazon's terms for selling e-books to consumers, including the loss-leading retail model, which publishers believed undermined their interests. App. 95a-96a. Among other things, publishers believed that Amazon's strategy cannibalized hardcover book sales, threatened the viability of brick-and-mortar bookstores that generate demand for titles, and devalued books in the eyes of consumers. App. 95a, 131a. Given Amazon's dominance, however, the publishers had little recourse. One of the publishers' few potential options was to withhold e-books from Amazon for a period of time, a practice known as "windowing." App. 135a-137a & n.10. But windowing came with serious costs; it made books unavailable to consumers in digital form, alienated e-book readers, encouraged piracy, and harmed long-term book sales. App. 139a.

B. Apple Develops The iBookstore And Enters The Market

In late 2009, Apple was preparing to launch the iPad, a "revolutionary" tablet with "remarkable features" that made an e-book reader "an obvious addition to the device." App. 247a-248a & n.69. Apple sought to develop the iBookstore, a competing platform for purchasing e-books that could be read on the iPad. App. 142a-145a.

The iBookstore is an example of a content platform, which has emerged as a common element of digital commerce. Content platforms benefit consumers by aggregating content from diverse suppliers into convenient, feature-rich forums that are easy for consumers to use. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. Pa. L. Rev. 1663, 1666-1666 (2013). For the iBookstore, publishers were the relevant content suppliers and Apple was the assembler.

In that role, with the iPad launch scheduled for January 2010, Apple opened negotiations with each of the six largest publishers in December 2009.[1] App. 13a-14a. The press had already reported that the publishers were eager for a new e-book platform to provide an alternative to Amazon. App. 14a, 135a-138a, 144a. In separate meetings, Apple told the publishers that it was negotiating with each of them and that it wanted to begin selling e-books within 90 days. App. 14a-15a.[2]

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[1] In 2009, there were six major e-book publishers. Five—Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster—were defendants in this action; the largest publisher (Random House) was not.

[2] According to the courts below, the publishers had long been coordinating to move Amazon from its loss-leader model before

Apple also discussed with its potential suppliers their own requirements and preferences. *Id.*

To create a viable content platform and enter the market as an e-book retailer, Apple needed to attract a critical mass of publishers so that it could provide a broad, compelling e-book selection to consumers. App. 14a-15a, 231a. It also needed a business model that would allow it to offer competitive prices while also making a profit. App. 16a-17a, 97a-98a. Apple was not prepared to adopt a loss-leader strategy, to offer e-books at prices that were not competitive with Amazon's, or to offer consumers less than a rich and current selection. App. 15a, 215a, 231a.

Over the course of extensive negotiations, Apple developed a vertical business model that would enable it to meet those goals and thus to enter the e-books market. App. 149a-155a. Its vertical contracting structure had three core components. First, it used an "agency," rather than wholesale, model: Instead of buying e-books from publishers and reselling them, Apple would act as each publisher's agent, selling the publisher's e-books at the iBookstore at a retail price set by that publisher, with Apple taking a commission on each sale. App. 97a-98a. Second, the vertical agreements had "most-favored-nation" ("MFN") clauses requiring each publisher to price its iBookstore offerings no higher than the price offered by any other e-book retailer. App. 98a. Third, the vertical agreements capped the maximum price each publisher could set for various categories of e-books sold at the iBookstore. *Id.*

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their respective negotiations with Apple began. *E.g.*, App. 9a-12a. This petition does not depend on any challenge to that finding.

Those interrelated provisions advanced Apple's independent business interests and facilitated its entry into the e-books market. The agency model allowed Apple to offer competitive retail prices to consumers while also turning a profit; by contrast, under a wholesale model, Apple would have risked being unable to negotiate e-book wholesale prices low enough to profitably offer e-books at competitive prices. App. 16a-17a, 114a-115a. The MFN clause ensured that iBookstore titles would be sold at prices that were competitive with other e-book retailers, allowing Apple to be price competitive with Amazon for best-sellers and other popular titles, which Amazon was selling below its own costs. App. 157a. Finally, the price caps ensured that a publisher would not set its iBookstore prices so high as to damage the iBookstore's or Apple's credibility with consumers. As the district court found, these contracting terms and Apple's negotiation tactics are commonplace and certainly not inherently illegal. App. 228a.

In attempting to assemble a critical mass for its iBookstore, Apple faced another reality as well: It had to convince enough publishers that its business model was sufficiently attractive for them to join. Apple offered the above terms to each publisher in separate emails sent on January 11, 2010. App. 19a-20a. After additional negotiations—including "intense" negotiations over the price caps, App. 166a-173a—Apple proposed revised terms to each publisher several days later and renewed its efforts to persuade each publisher to sell through the iBookstore. App. 22a-23a.[3] Consistent

[3] The negotiations were hard-fought because the parties' interests on this point were at odds; Apple wanted lower price caps to avoid "alienat[ing]" consumers, whereas the publishers would have preferred no caps at all. App. 172a.

with its goal of maximizing publisher participation in its new platform, Apple reminded the publishers that its entry, using the agency model, represented their best hope of challenging Amazon's dominance and gaining an effective alternative to Amazon's below-cost pricing, which undermined the publishers' business strategy. *E.g.*, App. 23a-24a, 44a-45a, 49a. And Apple again told each publisher that it could not launch the iBookstore without a sufficient number of e-book suppliers. App. 23a, 48a-49a. In that regard, during its final push, Apple kept the publishers "'apprised about who was in and how many were on board,'" assuring each publisher that the iBookstore would be successful and that they would not be alone if Amazon retaliated against them for joining, as the publishers feared it would. App. 23a-26a, 49a, 132a, 216a-217a.

Apple ultimately succeeded in negotiating terms that would allow it to enter the e-books market. When the iPad launched on January 27, 2010, five of the six largest publishers had signed on to the iBookstore. App. 27a.

Apple's entry and the emergence of its new e-books platform introduced substantial innovation and competition into the e-books sector and disrupted Amazon's dominance, both as a buyer from publishers and as a retailer to consumers. Amazon's share of e-book retailing was reduced from almost 90% to 60%, and output of e-books sharply increased. App. 66a-67a, 99a, 112a-113a. Expert testimony established that overall e-book prices declined following Apple's entry. App. 67a, 201a-202a, 220a n.61. The iPad was a "revolutionary" product in e-reading hardware and software as well as in digital publishing. App. 112a-113a, 231a, 247a-248a. Tens of millions of consumers now purchase and read e-books on the iPad, using the iBookstore platform. And

Apple's entry, and the agency structure, replaced Amazon's dominance with a multitude of price setters. App. 111a-112a.[4]

Development of Apple's new e-books platform also meant that publishers were no longer at the mercy of Amazon as an e-book distributor and had new leverage to negotiate with it. App. 188a-189a. Immediately after Apple announced the iBookstore, the publishers that had signed vertical agreements with Apple began negotiating new terms with Amazon. By June 2010, Amazon had agreed to an agency model with each of them. App. 30a.[5]

C. Proceedings Below

In April 2012, the United States and 33 States (together "the government") sued Apple and the five publishers that joined the iBookstore at its launch, alleging that Apple and the publishers had violated Section 1 of the Sherman Act, 15 U.S.C. § 1. The government principally asserted that the publishers had engaged in a horizontal price-fixing conspiracy to raise e-book retail prices by moving Amazon away from a wholesale model, and that Apple had committed a *per se* violation by entering *vertical* agency agreements with the publishers that supposedly "facilitated" the publishers' alleged *horizontal* conspiracy. Compl. ¶¶ 6-7, 97. The government

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[4] There was no allegation, and no evidence, that the publishers agreed not to compete with each other once they had obtained the ability to set prices.

[5] The courts below found that, during negotiations between Amazon and the publishers, the publishers communicated with one another in an effort to present a united front and force concessions. App. 99a, 196a. Again, this petition does not depend on challenging that finding.

also asserted that the defendants' conduct violated Section 1 under a rule-of-reason analysis. Compl. ¶ 98.

The publishers ultimately entered into consent decrees with the government but did not admit liability. Apple—believing it had done nothing wrong and that its entrance into the e-books market was procompetitive—proceeded to trial. App. 34a-36a. At trial, the government conceded that neither the terms of Apple's contracts with the publishers nor its negotiating tactics were themselves unlawful. App. 228a. And the district court expressly declined to find that Apple desired to increase e-book prices, the object of the publishers' supposed horizontal conspiracy. App. 244a n.68. But the district court nonetheless agreed with the government that Apple should be condemned under the categorical *per se* rule because its vertical conduct facilitated an agreement among the publishers to join forces against Amazon. In a one-paragraph analysis, the district court also found Apple liable under the rule of reason, App. 219a-220a, even though it also acknowledged that Apple was acting in its "independent, economic interests" and seeking "to create a profitable iBookstore on a superior e-reader," and that Apple's goal of launching the iBookstore was "admirable" and "extremely beneficial to consumers and competition," App. 227a, 231a, 232a, 248a n.69.

A fractured panel of the Second Circuit affirmed based solely on application of the *per se* rule, App. 6a, 90a, in a decision that produced three separate opinions. In an opinion by Judge Livingston, a panel majority concluded that Apple committed a *per se* violation by "orchestrat[ing]" a horizontal conspiracy among the publishers to raise e-book prices. App. 55a. The majority reasoned that the *per se* rule's application depended on "the type of restraint" imposed, irrespective of

whether Apple's own conduct was vertical or horizontal in nature. App. 55a-58a. The majority conceded that Apple's vertical conduct "might well, if challenged, have to be evaluated under the rule of reason," App. 57a, but nonetheless ruled that the relevant "'agreement in restraint of trade'" was the publishers' horizontal conspiracy, App. 57a, 61a.

The panel majority acknowledged this Court's statement in *Leegin* that "if a 'vertical agreement setting minimum resale prices is entered upon to facilitate' a horizontal cartel, it 'would need to be held unlawful under the rule of reason.'" App. 59a-60a (quoting *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 893 (2007)). It declined to follow that statement, however, dismissing it as a "cryptic sentence" that did not foreclose *per se* condemnation in this case. App. 60a. The panel majority considered *Leegin* inapposite because it did not address a scenario where the defendant "'participated in an unlawful horizontal cartel with [its] *competing retailers*,'" App. 59a (quoting *Leegin*, 551 U.S. at 907-908) (emphasis and bracketed text added)—even though there was no allegation in this case that Apple conspired with its own e-book retailer rivals. The panel majority also believed *Leegin* did not extend to so-called "hub-and-spoke" cases, where "the vertical organizer ... has also agreed to participate in the horizontal conspiracy." App. 60a-61a.

Judge Livingston, writing for herself only, alternatively would have affirmed based on a "quick look" rule-of-reason analysis. App. 69a-82a. Judge Lohier, however, joined only the portion of Judge Livingston's opinion discussing the *per se* rule and declined to join the portion relating to the rule of reason, concluding that "Apple's appeal rises or falls based on the application of the per se rule." App. 90a.

Judge Jacobs dissented. He read this Court's decision in *Leegin* and other authority as directing that Apple's vertical conduct be evaluated under the rule of reason. App. 101a-104a. Judge Jacobs observed that the majority's application of the *per se* rule "creates a circuit split" with *Toledo Mack Sales & Service, Inc.* v. *Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008), "and puts us on the wrong side of it." App. 104a-106a. Judge Jacobs would have reversed the district court based on a full rule-of-reason analysis because "Apple's conduct ... was unambiguously and overwhelmingly procompetitive." App. 94a; *see also* App. 109a-116a. "Apple took steps to compete with a monopolist and open the market to more entrants, generating only minor competitive restraints in the process. Its conduct was eminently reasonable; no one has suggested a viable alternative." App. 116a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT AND CREATES A CIRCUIT SPLIT

The Second Circuit's application of the *per se* rule to Apple's novel, vertical conduct conflicts with *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U.S. 877 (2007), and other decisions of this Court, and creates an acknowledged division in the circuits. Only by erroneously dismissing a key point in *Leegin* as a nonbinding "cryptic sentence," App. 60a, was the panel majority able to apply the *per se* rule here. The panel's flawed ruling threatens to forestall procompetitive conduct—the exact result this Court's modern antitrust decisions have sought to avoid.

A. Application Of The *Per Se* Rule To Apple's Vertical Conduct Conflicts With This Court's Decision In *Leegin* And Creates A Circuit Split

Section 1 of the Sherman Act "'outlaw[s] only unreasonable restraints'" of trade. *Leegin*, 551 U.S. at 885 (quoting *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997)). Accordingly, "the accepted standard for testing whether a practice restrains trade in violation of § 1" is the "rule of reason," which requires a court to consider "'all of the circumstances of a case'" in order to "distinguish[] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Id.* at 885, 886. Only a narrow set of horizontal agreements (*i.e.*, agreements among competitors) may be "'deemed unlawful *per se*,'" without any inquiry into their reasonableness "in light of real world market forces." *Id.* at 886.[6]

This Court has repeatedly made clear, most recently in *Leegin*, that genuine vertical activities—like a retailer's business arrangements with suppliers—are assessed under the rule of reason, not the *per se* rule. The Court's modern cases have consistently "rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones." *Leegin*, 551 U.S. at 888. Accordingly, over the last four decades, this Court has "continued to temper,

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[6] *Per* se unlawful conduct "include[s] horizontal agreements among competitors to fix prices, or to divide markets," *Leegin*, 551 U.S. at 886 (citation omitted), and certain forms of group boycott agreements, *e.g.*, *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). Apple was not accused of entering into any agreement with a competitor or participating in any group boycott.

limit, or overrule once strict prohibitions on vertical restraints." *Id.* at 901 (overruling precedent and holding that vertical resale price maintenance is subject to the rule of reason); *Khan*, 522 U.S. at 21-22 (overruling precedent and holding that vertical maximum price maintenance agreements are subject to the rule of reason); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 57-59 (1977) (overruling precedent and holding that vertical non-price restraints are subject to the rule of reason).

This Court has rejected *per se* treatment for vertical conduct because vertical conduct often has "procompetitive effects." *Leegin*, 551 U.S. at 901. The "differences in economic effect between vertical and horizontal agreements" mean that a real-world analysis of market effects from vertical conduct—*i.e.*, analysis under the rule of reason—is always required to avoid subjecting potentially procompetitive activity to categorical liability. *Id.* at 888; *see also Khan*, 522 U.S. at 11, 14-17 (discussing how "vertical maximum price fixing ... is not necessarily harmful to competition and consumers" and can have procompetitive benefits); *Sylvania*, 433 U.S. at 50-51, 54 (discussing the "redeeming virtues" of vertical restrictions).

"[A]ll vertical restraints ... have the potential" to facilitate unlawful collusion among horizontal competitors. *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 728 (1988). Where, as here, vertical conduct is accused of having had that effect, the conduct is no less subject to assessment under rule of reason. In *Leegin*, this Court recognized that resale price maintenance has the potential to "facilitate" a *per se* illegal horizontal cartel at the manufacturer or retailer level. 551 U.S. at 892-893. Nonetheless, the Court stated that "[t]o the extent a vertical agreement setting minimum resale

prices is entered upon to facilitate either type of cartel, it ... would need to be held unlawful *under the rule of reason*." *Id.* at 893 (emphasis added); *see also Khan*, 522 U.S. at 17 (even if vertical maximum price-fixing agreement were "used to disguise" unlawful conduct, such conduct still "can be appropriately recognized and punished under the rule of reason").

Here, the Second Circuit departed from *Leegin* by incorrectly applying the *per se* rule to Apple's vertical dealings with e-book publishers, bypassing any assessment of the real-world competitive effects of Apple's entry into the e-books market. The panel majority deemed Apple's vertical dealings with publishers *per se* unlawful because those dealings supposedly "facilitated" *horizontal* "price-fixing" by the publishers. App. 36a, 61a. Not only did that reasoning ignore this Court's repeated mandate that *per se* treatment is inappropriate for legitimate vertical activity because it so often brings procompetitive benefits, *e.g.*, *Leegin*, 551 U.S. at 888, it also disregarded the broader context of Apple's entry and enhancement of competition in the e-books market.

Apple's conduct was vertical in nature—as a prospective e-books retailer, it was negotiating with its prospective suppliers regarding the terms of supply. *See Business Elecs.*, 485 U.S. at 730. Both the panel majority and the district court recognized that agency agreements, MFN clauses, and price caps—all of which indisputably flowed from these supplier negotiations—are not in themselves unlawful and can be entirely appropriate business strategies. App. 57a, 228a. No aspect of Apple's vertical activity—either the terms of the agreements themselves or Apple's efforts to persuade suppliers to participate in the iBookstore platform—was found to be a sham designed solely to pro-

mote a publisher horizontal conspiracy or otherwise not genuinely related to Apple's efforts to enter the market in a sustainable way.

Under *Leegin*, Apple's bona fide vertical conduct cannot be condemned as illegal *per se*, and the procompetitive benefits of that conduct cannot be ignored, even if it supposedly "facilitate[d] [a publisher] cartel." 551 U.S. at 893. In ruling otherwise, the panel majority elided *Leegin*'s express, on-point direction as a "cryptic sentence," App. 60a, and wrongly labeled Apple's vertical conduct as an "agree[ment] to participate in the horizontal conspiracy," App. 61a. This Court should correct the panel majority's error.

Moreover, as Judge Jacobs recognized, "[t]he majority's holding ... creates a circuit split, and puts [the Second Circuit] on the wrong side of it." App. 106a. In *Toledo Mack Sales & Service, Inc.* v. *Mack Trucks, Inc.*, 530 F.3d 204, 225 (3d Cir. 2008), the Third Circuit properly followed *Leegin* to hold that "[t]he rule of reason analysis applies even when ... the plaintiff alleges that the purpose of the vertical agreement between a manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers." Toledo, a former truck dealer, asserted a two-part conspiracy, involving both horizontal collusion among dealers not to compete on price and a vertical agreement between the dealers and manufacturer Mack, under which Mack agreed to punish dealers that cheated on the arrangement. *Id.* at 209-210. Although the horizontal agreement in *Toledo Mack* was deemed *per se* unlawful, the Third Circuit, relying on *Leegin*, correctly held that the rule of reason applied to the vertical agreement between Mack and its dealers. *Id.* at 225 & n.15 (citing *Leegin*, 551 U.S. at 893, and abrogating pre-*Leegin* cir-

cuit authority);[7] *see also, e.g.*, *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1192-1193 (9th Cir. 2015) (distinguishing vertical and horizontal components of an alleged conspiracy).

The Second Circuit's decision cannot be reconciled with *Toledo Mack*. Had this case arisen in the Third Circuit, Apple's conduct would have been assessed under the rule of reason, consistent with *Leegin*. Indeed, Apple's accused vertical arrangements present an even stronger case for the rule of reason than *Toledo Mack*. In that case, the only purpose of the challenged vertical conduct was to facilitate horizontal collusion, 530 F.3d at 225, whereas here the courts below acknowledged Apple's "independent business reasons for creating an e-bookstore," and its "entirely appropriate or even admirable motives." *E.g.*, App. 230a-231a. Yet the panel majority still condemned Apple's conduct as illegal *per se*. The conflict is clear and ripe, and requires resolution.

B. Application Of The *Per Se* Rule To The Novel Circumstances Of This Case Also Conflicts With This Court's Precedents

The court of appeals' decision also conflicts with this Court's admonition that *per se* treatment is appropriate only for restraints that history and judicial experience have shown lack any redeeming value and are unquestionably anticompetitive, such that they would

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[7] The Third Circuit has since confirmed its holding. *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 318-319 (3d Cir. 2010). The panel majority's statement that "[t]he panel in *Insurance Brokerage* ... had no occasion to revisit *Toledo Mack*," App. 61a n.20, is both incomplete and irrelevant. *Insurance Brokerage* expressly distinguished vertical agreements from related horizontal ones and applied the rule of reason to the former, 618 F.3d at 318-319—exactly what the panel majority failed to do here.

fail the rule of reason "in ... almost all instances." *Leegin*, 551 U.S. at 886-887; *see also Khan*, 522 U.S. at 10. As the Seventh Circuit has explained, "[i]t is a bad idea to subject a novel way of doing business (or an old way in a new and previously unexamined context) ... to per se treatment .... The per se rule is designed for cases in which experience has convinced the judiciary that a particular type of business practice has no ... redeeming benefits ever." *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1011-1012 (7th Cir. 2012). Repeated experience is required before courts can be sure that their "departure from the rule-of-reason standard [is] based upon demonstrable economic effect rather than ... formalistic line drawing." *Sylvania*, 433 U.S. at 58-59.

The circumstances here plainly raise issues new to the federal courts. Using a combination of vertical arrangements that the government conceded "no court ha[d] previously considered," App. 108a, Apple pursued entry into a "nascent" digital market that had been dominated from inception by a single firm, App. 3a, 69a. Its conduct brought many market effects that the district court acknowledged were "extremely beneficial to consumers and competition," App. 248a n.69, including an innovative retail platform for consumers, new content and increased e-book output, and the disruption of Amazon's dominance as both a wholesale purchaser and retailer of e-books. No court had *ever* considered the constellation of contract terms at issue here, let alone conclusively determined their effects on competition in *this* market, which the panel majority acknowledged was "new and at least arguably involves some new ways of doing business." App. 54a; *see also* Shelanski, 161 U. Pa. L. Rev. at 1685 ("The characteristics of digital platforms make competition enforcement more challenging than usual.").

Given that the courts have never addressed the unique combination of business arrangements present here or the resulting complex economic analysis that is required, this is decidedly not an appropriate case in which to forgo inquiry into real-world competitive effects. *E.g.*, *Broadcast Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1, 10 (1979) (rejecting *per se* rule for conduct that had been labeled as "price fixing" by court below and observing that "[w]e have never examined a practice like this one before"); *Sulfuric Acid*, 703 F.3d at 1012 (rejecting *per se* rule in novel circumstances involving market entry); *see also, e.g.*, *Sylvania*, 433 U.S. at 53-54 n.22 (noting the potential for "additional exceptions to the *per se* rule for new entrants in an industry"). As Judge Jacobs explained, "the analysis [of Apple's conduct] is sufficiently complex and yields such substantial pro-competitive results that *per se* liability is an abdication of the duty to distinguish reasonable restraints from those that are unreasonable." App. 108a. This Court should correct the panel majority's erroneous application of the *per se* rule to the highly novel circumstances of this case.[8]

C. The Second Circuit's Reasons For Applying The *Per Se* Rule Are Flawed And Inconsistent With This Court's Antitrust Jurisprudence

The panel majority's reasons for treating Apple's vertical conduct as *per se* illegal were conceptually

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[8] Applying "quick look" rule-of-reason analysis, as suggested by Judge Livingston writing only for herself, App. 70a, would have been error as well. Quick-look analysis is appropriate only where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 770 (1999); *see also id.* at 777-778.

flawed in at least two ways: The majority conflated vertical and horizontal conduct, and it misinterpreted the "hub-and-spoke" cases.

1. The panel majority disregarded the crucial distinction between Apple's vertical conduct and the publishers' alleged horizontal conspiracy, because Apple supposedly understood that the agency agreements it was offering would create incentives for the publishers collectively to move Amazon to an agency model and used negotiating strategies directed at convincing the publishers to join its new iBookstore. App. 44a-50a. In the panel majority's view, even though none of Apple's conduct was inherently unlawful, Apple could be tagged with having "agreed to the horizontal restraint," App. 61a, and held liable *per se* because it supposedly knew that its vertical actions would allow the publishers to accomplish their goal of raising retail prices for certain e-books above Amazon's below-cost $9.99 price point. App. 44a-50a. But vertical conduct—especially concededly lawful vertical conduct with obviously legitimate aims and the potential for procompetitive benefits—may not be relabeled as a "horizontal price fixing-conspiracy" merely because it is claimed to have facilitated a horizontal conspiracy.

In *Business Electronics*, this Court rejected the proposition that a restraint between parties at different levels of the industry structure should be treated as "a horizontal rather than a vertical restraint" (and thus as *per se* illegal) merely because it would restrain horizontal "dealer-level competition." 485 U.S. at 729, 730. As that case makes clear, it is error to determine "whether a restraint is horizontal" based on "whether its anticompetitive *effects* are horizontal." *Id.* at 730 n.4. Rather, "a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizon-

tal agreement." *Id.* at 731 n.4. Thus, "[r]estraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical." *Id.* at 730.

Indeed, if courts could relabel vertical activities as *per se* illegal horizontal conduct merely because they allegedly impeded competition among horizontal rivals, this Court's directives that resale price maintenance (*Leegin*) and territorial restrictions (*Sylvania*) be assessed under the rule of reason would be nullified. Resale price maintenance would become "facilitation" of dealer price fixing, and territorial restraints would be transformed into "orchestration" of dealer market division. *Business Elecs.*, 485 U.S. at 730 n.4 (observing that if agreements were classified as horizontal based on their horizontal effects, there would be no such thing as an illegal vertical agreement). For example, the panel majority and the district court repeatedly characterized Apple's vertical conduct as having "eliminated retail price competition" through introduction of the agency-plus-MFNs business model, citing supposed price effects as a basis for *per se* condemnation of Apple's vertical conduct. *E.g.*, App. 36a, 127a-128a. But *Leegin* involved a challenge to vertical agreements *expressly intended* to eliminate competitive discounting by retailers; that is precisely what resale price maintenance agreements are designed to do. 551 U.S. at 882-883; *see also Sylvania*, 433 U.S. at 57-59.

This Court's insistence on carefully distinguishing between vertical and horizontal conduct stems from the same imperative that drove *Leegin*, *Khan*, and *Sylvania*: ensuring that courts do not chill procompetitive vertical conduct through *per se* condemnation. *E.g.*, *Business Elecs.*, 485 U.S. at 726. If vertical activity is

alleged to have facilitated horizontal collusion, any resulting anticompetitive effects factor into the rule-of-reason assessment, along with the vertical conduct's procompetitive benefits. *See, e.g., Toledo Mack*, 530 F.3d at 225 & n.15; *see also, e.g., In re Southeastern Milk Antitrust Litig.*, 739 F.3d 262, 273 (6th Cir. 2014) (where "the restraint at issue appears to involve a vertical relationship," the court is required "to apply the rule of reason").

Here, though, the panel majority ignored the vertical character of Apple's conduct. Much of that conduct involved proposing and negotiating the terms of vertical contracts, and was therefore vertical by definition. *E.g.*, App. 57a, 228a. Apple's vertical agency agreements were themselves unquestionably procompetitive; they brought Apple into the e-books market to disrupt single-firm dominance. *See United States* v. *General Elec. Co.*, 272 U.S. 476, 488 (1926) ("genuine contracts of agency" are not "violations of the Anti-Trust Act"). Holding Apple liable *per se* for having facilitated a horizontal price-fixing conspiracy because its vertical agreements allowed the publishers to increase prices, *e.g.*, App. 66a, was error; "all vertical restraints ... have the potential to allow [the price-setters] to increase 'prices' and can be characterized as intended to achieve just that," *Business Elecs.*, 485 U.S. at 728.

The few other purported incidents that the panel majority believed demonstrated Apple's "orchestrat[ion of] a horizontal conspiracy among" the publishers, App. 4a, similarly provide no basis to relabel Apple's vertical conduct as horizontal. For example, the majority pointed to Apple's purportedly encouraging two publishers to convince a third that it should agree to Apple's agency terms and join the iBookstore, App. 23a-25a, and to Apple's "'ke[eping] the [publishers] ap-

prised about who was in and how many were on board,'" App. 26a; *see also* App. 28a-29a, 48a-49a. But Apple indisputably undertook those actions to assemble the critical mass of suppliers necessary to launch the iBookstore and bring competition to a market that desperately needed it. And more broadly, Apple's courting of the publishers and discussions about their needs—including pointing out that new competition from the iBookstore could give the publishers sufficient leverage to move Amazon from the below-cost pricing model that harmed them—were entirely proper aspects of Apple's efforts to launch a new content platform. As this Court has found, back-and-forth between manufacturers and distributors is "legitimate," "natural," and "'arise[s] in the normal course of business and do[es] not indicate illegal concerted action.'" *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984). Indeed, "expos[ing] [a] defendant to treble damage liability"—much less *per se* condemnation—because it responds to input from vertical counterparties and crafts its business proposition accordingly "would create an irrational dislocation in the market," "'inhibit management's exercise of independent business judgment[,] and emasculate the terms of the [Sherman Act].'" *Id.* at 763, 764.[9]

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[9] In recasting Apple's vertical conduct as orchestration of horizontal collusion among publishers, the courts below also relied on Apple's observations about the likely effects of its market entry, such as telling publishers that joining the iBookstore was their best chance to move Amazon off its loss-leader pricing, or responding to the publishers' justifiable fear that Amazon would retaliate against any single publisher who signed on to Apple's agency model. *E.g.*, App. 23a, 216a-217a, 240a; *see also, e.g.* App. 190a-191a (relying on purported prediction that Amazon's $9.99 price would not persist). Such statements of the obvious or efforts to persuade potential suppliers regarding the benefits of a new platform cannot

The courts below also continually and mistakenly invoked alleged short-term price increases for certain e-books in condemning Apple's conduct as *per se* illegal, *E.g.*, App. 66a-69a, 127a-129a, 219a-220a, failing to recognize that "prices can be increased in the course of promoting procompetitive effects," *Leegin*, 551 U.S. at 895-896. They confused the pricing decisions of a single dominant firm with the operation of the competitive *process*. That a monopolist has "cut[] prices to unsustainably low levels—prices below 'incremental' costs"—does not signify healthy competition. *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 231 (1st Cir. 1983) (Breyer, J.); *see also Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993). If a new firm's entry disrupts a monopoly and creates long-term competition, that is to be lauded, whether the previous prices were artificially high or artificially low. *See Sommers* v. *Apple, Inc.*, 729 F.3d 953, 964 (9th Cir. 2013). Purported price increases are no justification for ignoring the difference between vertical and horizontal conduct and subjecting vertical conduct to *per se* condemnation.

The panel majority's conflation of Apple's vertical conduct with its purported horizontal effects ignores this Court's teaching that "easy labels do not always supply ready answers." *Broadcast Music*, 441 U.S. at 8-9 (declining to condemn potentially procompetitive conduct that was "'price fixing' in the literal sense" as *per se* illegal); *see also Northwest Wholesale Stationers,*

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justify *per se* treatment. Applying the *per se* rule based on inferences from such regular business remarks would "deter or penalize perfectly legitimate conduct" and "seriously erode[]" rules crafted to support procompetitive vertical conduct. *Monsanto*, 465 U.S. at 763.

Inc. v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 293-297 (1985) (refusing to condemn as *per se* illegal conduct that could be labeled a "group boycott" but lacked obvious anticompetitive effects). And the majority's resulting use of the *per se* rule disregards this Court's insistence that "'departure from the rule-of-reason standard ... be based on demonstrable economic effect rather than upon formalistic line drawing.'" *Leegin*, 551 U.S. at 887.

2. The panel majority invoked "hub-and-spoke" cases, App. 55a-58a, but those cases do not support application of the *per se* rule here. Those cases, all of which predate *Leegin*, involved a "hub" firm that actively shepherded an agreement among horizontal competitors (the "spokes") for the *exclusive* purpose of illegally boycotting or otherwise undermining rivals to achieve a patently illegal objective. They are naked group-boycott cases where the hub's actions lacked *any* potential redeeming virtue and (unlike Apple's conduct here) were not in pursuit of a procompetitive objective, like assembling suppliers for a content platform. *See California Dental Ass'n* v. *FTC*, 526 U.S. 756, 771 (1999) (summary condemnation improper where challenged conduct might "plausibly be thought to have a net procompetitive effect").

For example, in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, the hub, a dominant retailer, organized a group boycott by its suppliers to deprive a small competing retailer of "its freedom to buy appliances in an open competitive market and drive[] it out of business as a dealer in the [suppliers'] products." 359 U.S. 207, 213 (1959). Similarly, in *Toys "R" Us, Inc.* v. *FTC*, a dominant toy retailer bullied its suppliers into refusing to deal or dealing only on unfavorable terms with competing retailers. 221 F.3d 928, 935-936 (7th Cir. 2000).

And notably, before upholding liability under the *per se* rule, the Seventh Circuit in *Toys "R" Us* considered whether the retailer's conduct was in pursuit of a non-pretextual procompetitive objective—avoiding free-riding—and found that it was not. *Id.* at 937-938. That is precisely the question the Second Circuit should have asked here, but never did.

In other cases on which the panel majority relied, horizontal competitors enlisted a hub supplier to act for the sole purpose of organizing and enforcing the horizontal competitors' collusive boycotting of rivals. *See United States* v. *General Motors Corp.*, 384 U.S. 127, 139-141 (1966) (Chevrolet dealers and dealer associations enlisted hub GM in effort to "eliminate" discount sellers "by terminating business dealings" with them, using GM to monitor and enforce dealers' horizontal agreement); *Denny's Marina, Inc.* v. *Renfro Prods., Inc.*, 8 F.3d 1217, 1219-1220 (7th Cir. 1993) (rival boat dealers and boat dealer association forced boat show producer to exclude competing dealer). None of those cases involved bona fide vertical activity with genuine procompetitive aims. Instead, they involved predatory conduct that was merely "facially vertical" and aimed solely at an unlawful objective like eliminating an incipient rival. *Business Elecs.*, 485 U.S. at 731 n.4; *see also Sylvania*, 433 U.S. at 58 n.28 (*General Motors* involved "horizontal restrictions originating in agreements among the [competing] retailers" rather than true vertical restrictions).

Here, by contrast, Apple was undisputedly engaged in vertical dealings with the publishers to advance its own "independent, economic interests," App. 227a; *see also* App. 47a, in bringing competition to the e-books market. *See, e.g., U.S. Healthcare, Inc.* v. *Healthsource, Inc.*, 986 F.2d 589, 593-594 (1st Cir. 1993)

(rejecting *per se* liability premised on exclusive-dealing clauses alleged to have facilitated horizontal conspiracy and observing that clauses served vertically-situated firm's "own interests"). Of course, Apple acted as an organizer in the sense that it was developing a content platform, which required it to sign up multiple suppliers for that new venture. But that sort of procompetitive organizing is categorically different from the naked exclusionary conduct at issue in *Klor's*, *General Motors*, and *Toys "R" Us*.

Finally, because the panel majority's hub-and-spoke cases all predate *Leegin* (many predate *Khan* and *Sylvania* too), the courts in those cases did not have the benefit of *Leegin*'s guidance regarding the critical importance of distinguishing vertical from horizontal conduct and evaluating vertical conduct under the rule of reason. *Cf. Musical Instruments*, 798 F.3d at 1192-1193 (evaluating ostensible "hub-and-spoke" conspiracy post-*Leegin*).

II. THE QUESTION PRESENTED IS EXCEEDINGLY IMPORTANT TO THE NATIONAL ECONOMY

Whether the *per se* rule applies to novel, vertical business arrangements is a question of exceptional importance to businesses, innovators, and the national economy. The Second Circuit's rule threatens market entrants and risk-takers with unpredictable summary condemnation of vertical conduct in pursuit of procompetitive objectives. Unless reversed, the panel majority's conception of the *per se* rule will sow uncertainty, discourage procompetitive business ventures, and chill

innovation and risk taking to the benefit of entrenched incumbents and the detriment of consumers.[10]

A. The decision below creates great uncertainty about the demarcation between lawful vertical conduct and *per se* illegal facilitation of a horizontal conspiracy. That vagueness makes it perilously difficult for market participants to tell when vertical conduct might cross a line into *per se* condemnation—and will result in substantial chilling of procompetitive endeavors.

The panel majority's expansive notion of *per se* liability could reach all manner of legitimate vertical conduct whenever a company becomes enmeshed with some form of alleged collusion, if only because of the business necessities of assembling suppliers at a different industry level. Apple's situation illustrates the point. Its goal was to enter the e-books market and compete against Amazon, and it developed a new vertical business model to do so. Because Apple needed a critical mass of suppliers to launch the iBookstore, it told publishers that it would enter the market only if a minimum number of them signed agency agreements and kept them apprised of how many had done so.

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[10] The question presented is also outcome-determinative in this case. *See* App. 90a (Lohier, J., concurring) ("Apple's appeal rises or falls based on the application of the per se rule."). Although neither the district court nor the panel majority applied a proper rule-of-reason analysis, there is every reason to believe that Apple's conduct in bringing competition to a monopolized market would survive such an assessment, as Judge Jacobs explained. *E.g.*, App. 110a-116a. Even the district court, although ruling against Apple in a cursory, one-paragraph rule-of-reason analysis (that was not affirmed), App. 219a-220a, acknowledged that "having the creativity and commitment of Apple invested in the enhancement of a product like the iBookstore [was] extremely beneficial to consumers and competition," App. 248a n.69.

The decision below rests on the assumption that, at some point, Apple's knowledge of the publishers' goals related to the deal—their desire to move Amazon off its loss-leader $9.99 price—should have caused Apple to abandon its otherwise lawful attempts at entry, lest it risk *per se* condemnation under the antitrust laws (and treble damages). *Contra Monsanto*, 465 U.S. at 763-764. That assumption gives future entrants no guidance as to when legitimate vertical business dealings might cross the *per se* line. Was Apple supposed to abandon the iBookstore because the terms that allowed it to enter the market might also have helped the publishers accomplish their separate goal of moving Amazon to a different business model? Was Apple supposed to abandon the iBookstore—and leave Amazon's dominance undisturbed—if it developed some quantum of suspicion that the publishers were colluding among themselves?

Absent this Court's review, the line dividing legal and *per se* illegal conduct will be blurred, in contravention of this Court's "repeated[] emphasi[s] [on] the importance of clear rules in antitrust law." *Pacific Bell Tel. Co.* v. *Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009); *see also FCC* v. *Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (it is a "fundamental principle in our legal system ... that laws which regulate persons or entities must give fair notice of conduct that is forbidden"); *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.) ("antitrust rules ... must be clear enough for lawyers to explain them to clients"). Instead, firms—including incipient platform suppliers and digital innovators—will constantly fear that their otherwise lawful vertical conduct will result in treble damages and will be forced to curb their entrepreneurship accordingly.

B. The uncertainty engendered by the decisions below will also discourage vertical contracting provisions that frequently serve important procompetitive purposes. Vertical terms tailored to the demands of the particular circumstances—*e.g.*, terms addressing parties' incongruent incentives (like those here)—are often necessary to permit disruptive entry into new or stagnant markets. *Leegin*, 551 U.S. at 891 (resale price maintenance can "facilitat[e] market entry for new firms and brands"). Such terms can "encourage[] retailers to invest in tangible or intangible services or promotional efforts" and have "the potential to give consumers more options." *Id.* at 890. And parallel vertical arrangements are absolutely crucial to new entry in the digital economy.[11]

Yet under the Second Circuit's approach, new entrants justifiably will fear that their particular form of vertical dealing could be declared *per se* unlawful without inquiry into overall context and market effects, even if it would withstand scrutiny under the rule of reason.

For example, the panel majority's decision creates great uncertainty as to whether and when a vertical player may use MFN clauses. The Second Circuit condemned the MFN clauses for allegedly "'stiffen[ing] the spines'" of the publishers to demand agency terms from Amazon. App. 45a. But as the courts below recognized, MFN clauses are not inherently anticompetitive. *E.g.*, App. 228a. That is not changed by the fact an

[11] E-commerce platforms that aggregate inputs from disparate suppliers have become ubiquitous and are a driver of American prosperity—from product retailers like Amazon and eBay, to content platforms like Netflix, iTunes, and YouTube, to sharing economy platforms like Uber and Airbnb.

MFN in an agency agreement may have the effect of eliminating price competition among retailers and vesting it instead with product suppliers. *See, e.g., In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, 997 F. Supp. 2d 526, 538 (N.D. Tex. 2014) (rejecting characterization of MFN clauses in agency agreements as *per se* illegal price-fixing and observing that MFN clauses serve the legitimate purpose of ensuring that retailers "will not be undercut").

Here, Apple needed the MFN clauses to "protect[] [its] interests" against the publishers' potentially adverse interests. App. 157a; *see, e.g., Sulfuric Acid*, 703 F.3d at 1012 (*per se* rule did not apply to new entrant's agreements with existing suppliers because "the aim was to facilitate entry into the U.S. market"). Indeed, MFN provisions in agency agreements are particularly common in the world of e-commerce. Weiner & Falls, *Counseling on MFNs After* e-books, 28 Antitrust 68, 69 (Summer 2014) ("[P]rice parity MFNs arising in an agency model of distribution ... are increasingly being used in e-commerce by online selling platforms.").

By applying the *per se* rule to Apple's vertical activity, the panel majority committed an "especially costly" mistake, "chill[ing] the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986); *see also United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 441-442 n.17 (1978) ("The possibility that those subjected to strict liability will take extraordinary care in their dealings is frequently regarded as one advantage of a rule of strict liability. However, where the conduct proscribed is difficult to distinguish from conduct permitted and indeed encouraged, as in the antitrust context, the excessive caution spawned by a regime of strict liability will not necessarily redound

to the public's benefit." (citations omitted)). Particularly for market entry—the very essence of competition—new entrants like Apple must have flexibility to use vertical tools to address contracting challenges without risking *per se* antitrust liability. *See Sulfuric Acid*, 703 F.3d at 1012 ("The plaintiffs' claim that the price would have been even lower without the [challenged price-raising] agreements is doubtful ... because without the agreements the [defendants] might not have entered the U.S. market."); *see also Leegin*, 551 U.S. at 917-918 (Breyer, J., dissenting) (discussing potential "exception" to *per se* rule for resale price maintenance to facilitate new entry). At bottom, Apple offered suppliers an appealing new vertical business model in order to facilitate its entry into the market; the Second Circuit's decision cuts deep into territory that this Court's modern antitrust decisions have sought to protect from *per se* condemnation precisely because of vertical conduct's procompetitive potential.

The panel majority was unconcerned about "stifl[ing] productive enterprise" by inferring a *per se* unlawful price-fixing agreement on the basis of otherwise lawful vertical conduct; in its view, "vertical agreements, lawful in the abstract, can in context 'be useful evidence for ... attempting to prove the existence of a horizontal cartel,' particularly where multiple competitors sign vertical agreements that would be against their own interests were they acting independently." App. 50a, 51a (citing *Toys "R" Us*, 221 F.3d at 935-936, and *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 222 (1939)). This reasoning illustrates the risk of deterring procompetitive vertical contracting. Apple's object was to launch a *multi*-publisher content platform that required a critical mass to be viable; the nature of such platforms meant that

each publisher's determination whether joining served its own interests *necessarily* depended on the decisions of other publishers. That Apple recognized this interdependence and used it in successfully launching the iBookstore does not make its efforts to enter the market *per se* illegal.

C. Entry into new markets and disruption of established business models through innovation are critical to the American economy, especially in new and rapidly growing markets for digital products and services. If the Second Circuit's decision stands and the *per se* rule is applied to vertical conduct whenever it can be said to have spilled over into "orchestration" of others' alleged horizontal collusion, the antitrust laws will be transformed from a tool for promoting new entry and competition into a means for retarding them. Entrants and disruptors will err on the side of staying out of new markets and will forgo the types of vertical contracting that are so often necessary for entry, thus leaving dominant players protected from the disruptive challenges that drive innovation. Those outcomes are antithetical to the dynamic and robust competitive environment that our antitrust laws are meant to foster. *See, e.g.*, *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945) (L. Hand, J.) ("[I]mmunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE J. BOUTROUS, JR.
DANIEL G. SWANSON
BLAINE H. EVANSON
GIBSON, DUNN
& CRUTCHER LLP
333 South Grand Ave.
Los Angeles, CA 91030

CYNTHIA E. RICHMAN
GIBSON, DUNN
& CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, DC 20036

A. DOUGLAS MELAMED
STANFORD LAW SCHOOL
559 Nathan Abbott Way
Stanford, CA 94305

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
LEON B. GREENFIELD
PERRY A. LANGE
ARI J. SAVITZKY*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

MARK C. FLEMING
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

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