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Supreme Court, U.S.
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No. 15-

IN THE
Supreme Court of the United States

JSW STEEL (USA), INCORPORATED,
Petitioner,

v.

MM STEEL, L.P., *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the Sherman Act, a vertical restraint that would otherwise be subject to the rule of reason can be condemned as *per se* unlawful just because it was entered upon to facilitate a horizontal conspiracy.

2. Whether it is permissible to infer that a manufacturer knowingly joined an antitrust conspiracy based solely on evidence that the manufacturer terminated a distributor in response to or following complaints and threats by other distributors.

PARTIES TO THE PROCEEDING

JSW Steel (USA), Incorporated, petitioner here, was a defendant-appellant in the Court of Appeals. Nucor Corporation, respondent here, was also a defendant-appellant in the Court of Appeals.

MM Steel, L.P., respondent here, was the plaintiff-appellee in the Court of Appeals.

RULE 29.6 DISCLOSURE STATEMENT

JSW Steel (USA), Incorporated's parent company is JSW Steel Holding (USA) Inc., which is not a publicly held company. No publicly held company owns 10% or more of JSW Steel (USA), Incorporated's stock.

JSW Steel Holding (USA) Inc.'s parent company is JSW Steel (Netherlands) BV, which is also not a publicly held company. No publicly held company owns 10% or more of JSW Steel Holding (USA) Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

JSW Steel (USA), Incorporated, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 806 F.3d 835. Pet. App. 1a-28a. The District Court's order denying JSW's post-trial motion for judgment as a matter of law is unreported. *Id.* at 29a-30a. The District Court's memorandum opinion and order denying JSW's motion for judgment as a matter of law at the close of all evidence are also unreported but available at 2014 WL 1167489. Pet. App. 51a-56a.

JURISDICTION

The Fifth Circuit entered judgment on November 25, 2015, Pet. App. 1a, and denied a timely petition for rehearing on March 11, 2016, *id.* at 57a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act provides in pertinent 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.

15 U.S.C. § 1.

INTRODUCTION

This case presents two fundamental questions regarding the scope of the Sherman Act worthy of this Court's review. The first is whether a vertical restraint that would otherwise be subject to the rule of reason can be condemned as *per se* unlawful simply because it was entered upon to facilitate a horizontal conspiracy. In this case, JSW, a steel manufacturer, allegedly imposed a vertical restraint on trade by refusing to deal with MM Steel, L.P., a steel distributor. This Court has long held that such vertical restraints should be judged case-by-case under the rule of reason—not condemned as unlawful *per se*. *See NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 135-136 (1998). The Fifth Circuit nevertheless applied a *per se* rule here, on the view that JSW's vertical conduct facilitated a horizontal conspiracy by two of MM's competitors. That decision cannot be squared with *Leegin Creative Leather Products, Inc.* v. *PSKS,*

Inc., 551 U.S. 877, 893 (2007), which rejected just such a broad-brush approach to application of the *per se* rule. Nor can it be squared with a decision of the Third Circuit, which (unlike the decision below) was faithful to *Leegin*. And the question is not academic here: If the *per se* rule applies, MM wins a $150-million verdict; if the rule of reason governs, the verdict cannot stand. This case is an ideal vehicle for resolving this circuit split and deciding this vital question.

The second question presented concerns the sort of proof necessary to support an inference of antitrust conspiracy. When the evidence is "as consistent with permissible competition as with illegal conspiracy," the law forbids such an inference. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). In this case, JSW decided to stop selling steel to MM after two of JSW's longtime distributors complained about unethical conduct by MM's founders and threatened to withdraw their business if JSW kept dealing with MM. According to the Fifth Circuit, the evidence was enough to establish that "JSW's refusal to deal was a response to the two threats from the distributors." Pet. App. 12a. And the Fifth Circuit held that "evidence that a manufacturer responded to a distributor['s] actual *threat* can show concerted action." *Id.* at 11a. Five other circuits have reached the opposite conclusion, holding that such evidence does not demonstrate an antitrust conspiracy because it is equally consistent with a manufacturer's independent decision to avoid losing the business of the complaining distributors.

This Court has long warned of the "irrational dislocation in the market" that would occur if manufacturers were not free to act on their distributors'

complaints. *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). The decision below reads like a worst-case hypothetical. Under the Fifth Circuit's decision, a manufacturer that learns about one distributor's sharp practices from others' complaints is free to cut ties with that distributor. But if the distributor is so unscrupulous that those complaints rise to the level of *threats*, the manufacturer must continue dealing with that distributor at the risk of losing the others' business—or else face a treble-damages verdict for antitrust conspiracy.

The Fifth Circuit's *per se* ruling only compounded the absurdity of this dilemma. The combined effect of the court's holdings was to sustain a $150-million judgment without a shred of evidence that JSW's conduct was not justified by legitimate business concerns. Because that remarkable outcome cannot be reconciled with the decisions of other circuits or this Court, the petition for certiorari should be granted.

STATEMENT

A. Factual Background

In the Gulf Coast domestic steel industry, steel manufacturers supply steel plate to distributors, who in turn sell the plate to end users. Pet. App. 2a. Matt Schultz and Mike Hume sold steel for distributors in the region. *Id.* They first worked as salesmen for American Alloy Steel, Inc. (also known as AmAlloy). *Id.* Then, in 1999, they both defected to a competing distributor, Chapel Steel Corp. *Id.*

In 2011, they deserted their employer once again—this time, to form their own distribution company, MM. *Id.* Schultz and Hume began to lay the groundwork for this venture even while still working

for Chapel. *Id.* at 2a-3a. As part of their preparations, they approached JSW, one of Chapel's suppliers. *Id.* at 2a. They told JSW that they were forming MM and wanted to have a supplier in place. C.A. R.O.A. 16897-98, 18593.[1] They also assured JSW that they would be leaving Chapel on "good terms," so "[t]here would be no issue" with their departure. C.A. R.O.A. 18593; *see also id.* at 16897-98. With that assurance, JSW agreed to supply MM with steel plate for one year. Pet. App. 2a-3a. Soon after, Schultz and Hume resigned from Chapel "without providing notice," and "officially opened MM." *Id.* at 3a.

On September 16, 2011—just six weeks into the deal—MM asked JSW to hold off on any additional shipments until further notice. *Id.* Despite their earlier assurances that they were leaving Chapel on good terms, Schultz and Hume now told JSW that Chapel was suing them for violating a non-compete agreement. *Id.* Given that lawsuit, MM acknowledged that it might have to return some of the steel it had already bought from JSW. *Id.* at 3a-4a.

On September 19—three days after MM's stop-shipment request—JSW met with AmAlloy, one of JSW's longtime customers, at AmAlloy's invitation. *Id.* at 4a. During that meeting, AmAlloy's president, Arthur Moore, shared some information about MM's founders, Schultz and Hume. C.A. R.O.A. 18602. Moore explained that Schultz and Hume had once been "trusted employees" of AmAlloy, but that when they left to join Chapel, they did so on "bad terms,"

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[1] "C.A. R.O.A." refers to the Record on Appeal filed in the Court of Appeals.

taking with them "sensitive and confidential sales documents." *Id.* According to Moore, Schultz and Hume had been "unethical in their dealings with him at the end." *Id.* And as a consequence, Moore said, AmAlloy was "not going to do business with people that chose to do business with Mr. Hume and Mr. Schultz." *Id.* at 18603; *see also* Pet. App. 4a.

Two weeks later, on October 4, JSW met with another longtime customer, Reliance Steel & Aluminum Co.—Chapel's parent corporation. Pet. App. 4a. JSW had intended to "get together" with Reliance as early as spring 2011, and it viewed the meeting as an opportunity to expand the two companies' business relationship. C.A. R.O.A. 18608-10. Near the end of that meeting, Reliance's president, Greg Mollins, brought up MM. *Id.* at 18609-10. Mollins said he understood that JSW was "doing business with two people" who had left Chapel. *Id.* at 18610. And he explained that when they left, Schultz and Hume had violated their employment agreements and stolen Chapel's customer book and other customer-related documents. *Id.* Mollins expressed "some real serious problems with that," and added, "we'll find it very difficult to do business with people that work with companies that have [MM's] type of an ethical code." *Id.* at 18610-11; *see also* Pet. App. 4a.

Soon after, MM told JSW that it had settled its lawsuit with Chapel. Pet. App. 4a. On October 19, JSW held an internal meeting of its top executives and discussed Chapel's lawsuit against MM, "what was revealed to [them] from American Alloy," and "what was revealed to [them] from Reliance." C.A. R.O.A. 18614. Because JSW's relationship with MM was no longer one of "100 percent trust," JSW decided that it would not sell to MM. *Id.* Later that

day, JSW emailed Chapel, reiterating JSW's desire to "step up" their mutual business. Pet. App. 4a. The email made no mention of JSW's decision regarding MM. C.A. R.O.A. 21209. Recognizing "the gravity of the situation," JSW informed MM of its decision the next day. Pet. App. 4a.

B. Procedural History

1. In 2012, MM sued AmAlloy, Moore, Reliance, and Chapel in federal district court, alleging that they had conspired to drive MM out of business, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Compl. ¶ 5, No. 4:12-cv-1227 (S.D. Tex. Apr. 19, 2012), ECF No. 1. MM also sued JSW and two other steel manufacturers, Nucor Corporation and SSAB Enterprises, LLC, alleging that they had joined the conspiracy by refusing to sell steel to MM. *Id.* MM further claimed that JSW breached their one-year supply contract. Pet. App. 6a. SSAB reached a settlement with MM, and the other defendants proceeded to trial. *Id.*

At trial, MM argued that the manufacturers (JSW and Nucor) should be held *per se* liable under the Sherman Act for joining a conspiracy between the distributors (AmAlloy and Chapel) to exclude MM from the market. *Id.* At the close of evidence, the manufacturers moved for judgment as a matter of law on the Sherman Act claim. They argued that antitrust law prohibited any inference that they had agreed to join a conspiracy, and that in any event, vertical agreements between manufacturers and distributors should be analyzed under the so-called rule of reason rather than condemned as *per se* unlawful under the Sherman Act. Defts' Joint Mot. for J. as a Matter of Law 18-28, No. 4:12-cv-1227

(S.D. Tex. Mar. 20, 2014), ECF No. 496. The District Court denied their motion, holding that the evidence was "legally sufficient" and that the *per se* rule applied. Pet. App. 54a-55a. Consistent with that ruling, the court then submitted the case to the jury without any instructions that would have allowed the jury to consider justifications for the manufacturers' actions under the rule of reason. *See id.* at 42a-47a.

The jury found that the distributors conspired to exclude MM from the market, and that the manufacturers "knowingly join[ed] th[at] conspiracy," making all of them liable *per se*. *Id.* at 42a. The jury also found that JSW breached its supply contract with MM. *Id.* at 47a. The manufacturers filed renewed motions for judgment as a matter of law, which the District Court denied. *Id.* at 29a-30a. MM elected recovery on its antitrust claims, and after trebling the damages, the District Court entered judgment against all defendants, jointly and severally, for more than $150 million. *Id.* at 2a, 7a. The distributor defendants—AmAlloy, Moore, Reliance, and Chapel—eventually reached a settlement with MM, leaving JSW and Nucor as the only remaining defendants on appeal. *Id.*

2. A three-judge panel of the Fifth Circuit affirmed the judgment as to JSW. *Id.* at 28a. The Fifth Circuit first held that there was substantial evidence that JSW knowingly agreed to join a conspiracy between the distributors to exclude MM from the market. *Id.* at 11a. As to JSW's supposed *knowledge* of the conspiracy, the Fifth Circuit pointed to the fact that both AmAlloy and Chapel "threat[ened]" to withdraw their business from JSW "within several weeks of each other." *Id.* at 12a. As for JSW's al-

leged *agreement to join* the conspiracy, the Fifth Circuit pointed to "JSW's abrupt decision to no longer deal with MM following these threats and JSW's statements regarding that decision." *Id.* The court explained that such evidence was enough to demonstrate that "JSW's refusal to deal was a response to the two threats from the distributors." *Id.* And the court held that "evidence that a manufacturer responded to a distributor['s] actual *threat* can show concerted action." *Id.* at 11a. On the basis of that evidence alone, the court upheld the jury's verdict against JSW. *Id.* at 13a. The court reversed the judgment as to Nucor, however, holding that MM failed to exclude the possibility that Nucor had acted independently of the distributors' conspiracy. *Id.* at 17a.

The Fifth Circuit next considered whether JSW's conduct should be condemned as *per se* unlawful or instead analyzed under the rule of reason. *Id.* at 18a. Because MM had waived any reliance on the rule of reason in the District Court, the judgment could be sustained only if JSW's conduct was a *per se* violation. *See id.* at 6a (noting that in the District Court, "MM's sole theory of liability" was a *per se* theory).

The Fifth Circuit acknowledged that under "settled Supreme Court case law," "purely *vertical* agreements to refuse to deal are not per se unlawful." *Id.* at 20a (emphasis added). The court further acknowledged that the circumstances of this case involved "members of a horizontal conspiracy us[ing] *vertical* agreements anticompetitively to foreclose a competitor from the market." *Id.* (emphasis added). Nevertheless, despite the vertical nature of JSW's refusal to deal with MM, the court held that JSW

had committed a *per se* violation of the Sherman Act. *Id.* at 22a.

The Fifth Circuit denied JSW's petition for rehearing en banc and its motion to stay the mandate pending the filing of a petition for certiorari. *Id.* at 57a-58a; Order, No. 14-20267 (5th Cir. Mar. 18, 2016). JSW then filed an application to recall and stay the mandate, which Justice Thomas denied. *See* 15A976.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD DECIDE WHAT RULE APPLIES TO VERTICAL RESTRAINTS THAT FACILITATE HORIZONTAL AGREEMENTS

The Fifth Circuit held that JSW's vertical refusal to deal with MM was *per se* unlawful because "per se liability has always applied [when] members of a horizontal conspiracy use vertical agreements anti-competitively to foreclose a competitor from the market." Pet. App. 20a. That holding creates a circuit split and departs from this Court's decision in *Leegin*. This case is an ideal vehicle to address this vital question regarding the scope of the Sherman Act.

A. The Decision Below Creates A Circuit Split

Despite acknowledging that "purely vertical agreements to refuse to deal are not per se unlawful," the Fifth Circuit condemned the vertical refusal to deal in this case as *per se* unlawful because it facilitated a horizontal conspiracy. Pet. App. 20a. That holding conflicts with the Third Circuit's deci-

sion in *Toledo Mack Sales & Service, Inc.* v. *Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008). There, the Third Circuit held that a vertical restraint is subject to the rule of reason even when it is entered upon to facilitate a horizontal conspiracy. *Id.* at 225.

Like this case, *Toledo Mack* involved allegations of a horizontal conspiracy among dealers, which used a vertical agreement with a manufacturer to achieve anticompetitive ends. The plaintiff, a truck dealer, alleged that other dealers had entered into a horizontal conspiracy to control prices—a *per se* violation of the Sherman Act. *See id.* at 221. The plaintiff further alleged that the manufacturer, Mack Trucks, had entered into a vertical agreement to support the dealers' "illegal conspiracy" by, among other things, refusing to extend certain benefits to dealers that sold outside their assigned geographic areas. *Id.*

The Third Circuit explained that "the legality of a vertical agreement that imposes a restriction on the dealer's ability to sell the manufacturer's product is governed by the rule of reason." *Id.* at 225. The court went on to hold that the rule of reason "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." *Id.* (citing *Leegin*, 551 U.S. at 893). Accordingly, the Third Circuit evaluated the vertical agreement between Mack Trucks and its dealers under the rule of reason, while condemning the horizontal agreement between the dealers as *per se* unlawful. *Id.* at 221, 224-225.

The Third Circuit's decision in *Toledo Mack* cannot be reconciled with the decision below. Unlike the Fifth Circuit, the Third Circuit assesses a defend-

ant's liability based on the type of restraint the defendant imposed—"even when" its purpose is "to support" another type of restraint. *Id.* at 225. Had this case arisen in the Third Circuit, the outcome would have been different: The Third Circuit would have rejected application of a *per se* rule to JSW's vertical refusal to deal even though that refusal allegedly supported an illegal horizontal conspiracy. Certiorari should be granted to resolve this circuit split.

B. The Decision Below Is Contrary To This Court's Precedent

The Fifth Circuit recognized the potential conflict with *Toledo Mack*, Pet. App. 22a, but attempted to justify its decision on the ground that some of this Court's earlier cases applied a *per se* rule to certain kinds of vertical conduct in "group boycotts." *Id.* at 21a-22a. That reasoning cannot be squared with this Court's more recent decision in *Leegin* or with the group boycott cases themselves. The decision below is wrong on the merits, and certiorari should be granted to reverse.

1. "The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1." *Leegin*, 551 U.S. at 885. And under settled precedent, vertical refusals to deal are judged by that flexible rule—not condemned as unlawful *per se*. *See NYNEX*, 525 U.S. at 135-136. It does not matter whether the vertical restraint facilitated an illegal horizontal conspiracy. As this Court's decision in *Leegin* makes clear, even vertical agreements "entered upon to facilitate" a horizontal conspiracy should be judged under "the rule of reason." 551 U.S. at 893.

In *Leegin*, the Court abandoned the longstanding *per se* rule against vertical minimum price restraints. *See id.* at 907 (overruling *Dr. Miles Med. Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911)). In doing so, the Court made clear that an interest in deterring horizontal restraints cannot justify applying *per se* rules to adjunct vertical agreements. *Id.* at 892-893 (citing *Bus. Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 725-726 (1988)). The Court recognized that "[a] horizontal cartel among competing manufacturers or competing retailers * * * to increase price is, and ought to be, *per se* unlawful." *Id.* at 893. But it went on to say that, "[t]o the extent a *vertical* [price restraint] is entered upon to facilitate either type of cartel, it * * * would need to be held unlawful *under the rule of reason*." *Id.* (emphases added). It is therefore inappropriate to apply a *per se* rule to a vertical restraint solely because it is used to facilitate a horizontal conspiracy.

Dismissing the Court's reasoning in *Leegin* as dicta, the Fifth Circuit "decline[d] to hold" that *Leegin* "silently overruled" decisions applying *per se* rules to vertical conduct in group boycotts. Pet. App. 20a-21a. But the Fifth Circuit misread this Court's group boycott cases. Those cases do not hold that any vertical agreement that facilitates a horizontal boycott should be subject to *per se* liability. Rather, they stand only for the proposition that *per se* treatment should apply to the vertical *organizer* of a horizontal boycott.

Thus, in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), this Court held that a retail store could be found *per se* liable for using its "'monopolistic' buying power to bring about" a horizontal boycott of one of its competitors by a group of manu-

facturers and distributors. *Id.* at 209. Similarly, in *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), the Court held that the *per se* rule applied to General Motors' vertical conduct in service of a horizontal boycott by its distributors, where General Motors had itself orchestrated the conspiracy. *See id.* at 144 ("General Motors sought to elicit from all the dealers agreements, substantially interrelated and interdependent, that none of them would do business with the discounters.").

These holdings make sense: The party that *creates* or *organizes* a horizontal boycott should not be permitted to escape *per se* liability merely because it does not have a horizontal relationship with the other conspirators. But that does not mean that a vertical refusal to deal may be subject to *per se* treatment solely because it *facilitates* a horizontal conspiracy.

2. To the extent these early boycott cases do suggest such a broad holding, they should be overruled as inconsistent with *Leegin* and this Court's other more recent antitrust precedent. *See Leegin*, 551 U.S. at 899 ("*Stare decisis* is not as significant * * * [when] the issue before us is the scope of the Sherman Act.").

Leegin rejected the sort of *per-se*-by-association approach the Fifth Circuit found implicit in the group boycott cases, and *Leegin* was just the latest in a string of cases in which this Court has "continued to temper, limit, or overrule once strict prohibitions on vertical restraints." *Id.* at 901. For example, in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), this Court overturned the *per se* rule for vertical nonprice restraints that it had embraced just

ten years earlier. *See id.* at 57-59 (overruling *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)). In the 1980s, the Court placed further limitations on the application of the *per se* rule to vertical restraints in *Monsanto* and *Business Electronics*. And in 1997, the Court overruled a 29-year-old precedent in order to hold that vertical maximum price-fixing agreements should be evaluated under the rule of reason rather than under the *per se* rule. *See State Oil Co.* v. *Khan*, 522 U.S. 3, 22 (1997) (overruling *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968)).

In keeping with this consistent approach to vertical restraints, this Court should grant certiorari to clarify that—whatever its past cases might be read to suggest—the rule of reason applies to vertical agreements even when they facilitate horizontal conspiracies.

C. This Case Is An Ideal Vehicle For This Court's Review

This case is an ideal vehicle for deciding what rule should apply to vertical restraints that facilitate horizontal agreements. The question was squarely pressed and passed upon below. *See* Pet. App. 18a-22a, 29a-30a, 54a-55a. And it is outcome-determinative. At trial, MM's "sole theory" under the Sherman Act was that JSW should be held liable under the *per se* rule; MM did not offer any theory of liability based on the rule of reason. *Id.* at 6a.[2]

[2]It is no coincidence that MM decided not to pursue a rule-of-reason theory. JSW had legitimate business reasons for refusing to deal with MM; those reasons included cutting ties with MM's untrustworthy founders and avoiding the loss of

Thus, if the *per se* rule does not apply, the judgment against JSW must be overturned. *See Texaco Inc.* v. *Dagher*, 547 U.S. 1, 7-8 & n.2 (2006). This case therefore presents the question of which rule should apply in the starkest of terms.

Moreover, this case is a far better vehicle for resolving the question than *United States* v. *Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376 (2016) (No. 15-565), a recent antitrust case that purportedly raised a similar issue. In that case, the defendant ebook distributor, Apple, "agree[d] to orchestrate a horizontal price-fixing conspiracy" among ebook publishers. *Id.* at 322. Apple asserted that its dealings with the publishers were vertical agreements excepted from a *per se* rule by *Leegin*, even though they furthered the publishers' horizontal conspiracy.

A divided panel of the Second Circuit rejected this assertion. As part of the analysis, both the majority and the dissent considered *Leegin*'s statement 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.'" *Id.* at 324 (quoting *Leegin*, 551 U.S. at 893). Viewing that statement as "cryptic," the majority concluded that it did not need to decide whether a vertical agreement that merely facilitates a horizontal conspiracy is subject to the *per se* rule. *See id.* at 324-325. The majority explained that, at a minimum, the *per se* rule applies to a party like

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AmAlloy's and Chapel's business. *See infra* pp. 24-26. The *per se* rule foreclosed consideration of those reasons in evaluating the reasonableness of JSW's conduct.

Apple that is the "vertical *organizer*" of a horizontal price-fixing scheme. *Id.* at 325 (emphasis added).[3]

Because the defendant "orchestrate[d]" the horizontal conspiracy in *Apple*, *id.* at 322, the case did not cleanly present the question posed here: whether a vertical restraint may be subject to the *per se* rule simply because it facilitates a horizontal conspiracy. Unlike *Apple*, this case squarely presents that question; there is no suggestion that JSW "orchestrate[d]" or "organize[d]" the distributors' horizontal conspiracy. The denial of certiorari in *Apple* should therefore have no bearing on whether review should be granted here. The question warrants this Court's consideration, and this case is an ideal vehicle for resolving it.

II. THIS COURT SHOULD ALSO DECIDE WHEN ANTITRUST LAW PERMITS AN INFERENCE OF CONSPIRACY

Certiorari should also be granted to decide a second question: whether it is permissible to infer that a manufacturer knowingly joined an antitrust conspiracy based on evidence that the manufacturer terminated a distributor in response to or following complaints and threats by other distributors. The Fifth Circuit held that such an inference is permissible. Every other circuit to confront the issue has reached the opposite conclusion. The split is square; the Fifth

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[3]Judge Jacobs disagreed. Writing in dissent, he read *Leegin* to mean that *no* vertical conduct may be subject to the *per se* rule, regardless of the role that conduct plays in a horizontal conspiracy. *Apple*, 791 F.3d at 345-348 (Jacobs, J., dissenting). This confusion over the meaning of *Leegin* only highlights the need for further guidance from this Court.

Circuit's decision cannot be reconciled with this Court's decisions; and this case is an ideal vehicle for deciding this important legal question.

A. The Decision Below Conflicts With The Decisions Of Other Circuits

In *Monsanto*, this Court held that a manufacturer's decision to terminate a distributor "in response to" complaints from other competing distributors was insufficient, by itself, to permit an inference of an antitrust conspiracy between the manufacturer and the complaining distributors. 465 U.S. at 763. The Court reasoned that the distributors' complaints and the manufacturer's decision to act on them did not "tend[] to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 764 (internal quotation marks omitted). "[S]omething more" was necessary to demonstrate that the manufacturer was not acting for its own legitimate purpose on the information contained in the complaints. *Id.*

In the years since *Monsanto*, the courts of appeals have confronted the next logical question: whether concerted action may be inferred when a distributors' complaints rise to the level of threats to withdraw business from the manufacturer. In the decision below, the Fifth Circuit answered that question in the affirmative. It acknowledged that "evidence of mere *complaints* from a distributor to a manufacturer would not be sufficient evidence to establish a conspiracy or that a manufacturer joined a conspiracy." Pet. App. 11a (emphasis added). But it held that "evidence that a manufacturer responded to a distributor['s] actual *threat* can show concerted

action that is not independent conduct." *Id.* at 11a-12a (emphasis in original).

The First, Fourth, Sixth, Seventh, and Eleventh Circuits all disagree. *See Euromodas, Inc.* v. *Zanella, Ltd.*, 368 F.3d 11, 20 (1st Cir. 2004); *Garment Dist., Inc.* v. *Belk Stores Servs., Inc.*, 799 F.2d 905, 909-911 (4th Cir. 1986); *Bailey's, Inc.* v. *Windsor Am., Inc.*, 948 F.2d 1018, 1030 (6th Cir. 1991); *Miles Distribs., Inc.* v. *Specialty Constr. Brands, Inc.*, 476 F.3d 442, 450-451 (7th Cir. 2007); *Winn* v. *Edna Hibel Corp.*, 858 F.2d 1517, 1519-1520 (11th Cir. 1988). Those circuits hold that "complaints that rise to the level of threats do not alter the standard of proof prescribed by *Monsanto*." *Garment Dist.*, 799 F.2d at 911. Thus, they reject the assertion that a plaintiff may prove that a manufacturer agreed to join an antitrust conspiracy merely by demonstrating that the manufacturer terminated one distributor in response to threats from competing distributors. In their view, avoiding the loss of a distributor's business is a legitimate, independent objective. A manufacturer's decision to terminate one distributor to avoid losing the business of another is therefore entirely consistent with independent conduct and thus incapable of supporting an inference of conspiracy under *Monsanto*.

Consider the Sixth Circuit's decision in *Bailey's*. In that case, Bailey's—a mail-order business selling logging supplies—alleged that it was unable to purchase various chain-saw parts because of an unlawful conspiracy between the manufacturer of those parts and several of its distributors. The evidence showed that the manufacturer had stopped selling to Bailey's after the president of one of the other distributors had informed the manufacturer

that the distributors "had 'discussed or rather cussed Bailey's,'" and that "'they [we]re going to drop any supplier that sells to Bailey's.'" *Bailey's*, 948 F.2d at 1024. The evidence also showed that the president "promised to write orders to cover Bailey's orders if [the manufacturer] would quit supplying [Bailey's]." *Id.* Other evidence similarly demonstrated that the manufacturer had terminated sales because of threats and promises to increase business from its other distributors. *Id.* at 1025-1026.

The Sixth Circuit concluded that this evidence was insufficient to demonstrate the existence of an antitrust conspiracy. It explained that "it would be reasonable to infer that the defendant manufacturer terminated direct sales to one customer in order to retain or increase the volume of business it did with other customers." *Id.* at 1030. But the Sixth Circuit concluded that "it is not illegal to terminate a sales relationship to avoid losing the business of disgruntled dealers." *Id.* (internal quotation marks omitted). And given that evidence of a termination in response to threats suggested that the manufacturer was acting in pursuit of this legitimate, independent goal, that evidence could not establish that the manufacturer had joined a conspiracy with its distributors to achieve an improper purpose. *Id.*

The Fourth Circuit reached the same conclusion in *Garment District*. There, the dealer plaintiff alleged that one of its competing dealers, Belk, "coerced [the manufacturer] into agreeing to terminate sales [to the plaintiff]." *Garment Dist.*, 799 F.2d at 906. The evidence showed that Belk had acted with the purpose of "eliminat[ing]" the plaintiff. *Id.* at 908. And the evidence demonstrated that Belk had succeeded in pressuring the manufacturer "to stop supplying

[the plaintiff] by threatening [the manufacturer] with the loss of all of Belk's business." *Id.* at 907.

The Fourth Circuit held that this was not enough to establish an antitrust conspiracy. It pointed to *Monsanto*'s holding that "a manufacturer may have legitimate, independent reasons for terminating a discounter in response to dealer complaints," and observed that one such reason "is to avoid losing the business of disgruntled dealers." *Id.* at 909. Moreover, the court rejected any distinction between "complaints," on the one hand, and "economic duress, coercion and threats," on the other. *Id.* (internal quotation marks omitted). Thus, the court held that, "regardless of whether the complaints are mere expressions of dismay or constitute economic duress, coercion, and threats, the terminated distributor must still present *additional* evidence that the manufacturer and another dealer acted in concert" to achieve some improper objective. *Id.* (emphasis added).

The other circuits that have addressed this question have rendered the same holding. In *Miles*, the Seventh Circuit granted summary judgment for a defendant manufacturer despite evidence that the manufacturer had terminated the plaintiff distributor in response to threats from other distributors to "carry a competing brand" or to "stop promoting the [manufacturer's] brand." 476 F.3d at 449-450. The evidence also showed that the threatening distributors had offered to increase business with the defendant after the termination, and had made good on that offer. *Id.* at 446, 450. Nonetheless, the Seventh Circuit concluded that this evidence could not support a finding of a conspiracy either among the distributors or between the distributors and the

manufacturer, observing that under *Monsanto* "suppliers may legitimately decide to retain their larger customers by terminating a price-cutting competitor." *Id.* at 451.

Similarly, in *Winn*, the Eleventh Circuit held that a manufacturer's acquiescence to pressure from one dealer to terminate another did not justify an inference of antitrust conspiracy, because "a manufacturer may legitimately respond to pressure from a dealer in order to avoid losing that particular dealer's business." 858 F.2d at 1520. And in *Euromodas*, the First Circuit held that a defendant manufacturer was entitled to summary judgment on an antitrust claim even if the evidence suggested that the manufacturer's "termination of its distribution relationship with the plaintiff was in direct response to" another distributor's threats and subsequent withdrawal of business. 368 F.3d at 20 (citing *Winn*, 858 F.2d at 1520).

In contrast to these five circuits, the Fifth Circuit in this case held that evidence that a manufacturer terminated a distributor "in response to" threats from other distributors was sufficient to "show concerted action." Pet. App. 10a-11a. It is immaterial that the other circuits' decisions involved alleged price-fixing agreements, whereas JSW was accused of joining a group boycott. The Fifth Circuit itself recognized that *Monsanto*—a price-fixing case—was the key precedent. *Id.* at 10a. And indeed, "the critical element in the *Monsanto* analysis is not what motivates the *distributors* to complain, but rather what motivates the *manufacturer* to terminate discounters in response to these complaints." *Garment Dist.*, 799 F.2d at 910 (emphases added). It thus makes no difference whether the distributors

were motivated by fixing prices or by driving a competing distributor out of business, either one of which would be an improper purpose. What matters is whether the manufacturer terminated the competitor for a legitimate, independent purpose. According to the Fifth Circuit, avoiding the loss of the other distributors' business does not qualify as such a purpose; according to five other circuits, it does.

It is similarly irrelevant that the Fifth Circuit in this case held that the evidence established that JSW *knew* that the threatening distributors were involved in a conspiracy to drive MM out of business. Pet. App. 12a. Knowledge of the conspiracy is of course necessary for Sherman Act liability, but it is not sufficient. Even if JSW *knew* about the conspiracy, MM still had to prove that JSW *agreed to join* it, with evidence that "tends to exclude the possibility" that JSW was "acting independently." *Monsanto*, 465 U.S. at 764. Five other circuits would have held that MM failed to meet its burden, because evidence that a manufacturer terminated a distributor in response to other distributors' threats is too ambiguous to rule out independent conduct.

In any event, the sole evidence that the Fifth Circuit pointed to in support of JSW's knowledge of the conspiracy was the fact that both AmAlloy and Chapel made "threats within several weeks of each other." Pet. App. 12a. But both *Bailey's* and *Miles* also involved threats from multiple distributors, and the Sixth and Seventh Circuits held that that evidence did *not* permit an inference that the manufacturer joined an antitrust conspiracy. *See Bailey's*, 948 F.2d at 1018, 1030-1032; *Miles*, 476 F.3d at 449-450. In fact, the Seventh Circuit in *Miles* specifically rejected the contention that multiple contemporane-

ous threats from distributors could demonstrate that those distributors were engaged in a horizontal boycott, 476 F.3d at 449-450—contrary to the Fifth Circuit's holding that such threats made JSW "aware of" the distributors' conspiracy here. Pet. App. 12a.

In short, if this case had arisen in the First, Fourth, Sixth, Seventh, or Eleventh Circuits, JSW would have been entitled to judgment as a matter of law because evidence that it had terminated a distributor in response to threats from other distributors would not have been adequate to demonstrate that JSW knowingly joined an antitrust conspiracy. But because JSW was sued in the Fifth Circuit, it now faces $150 million in antitrust damages. Review should be granted to resolve this circuit split.

B. The Decision Below Is Contrary To This Court's Precedent

This Court should grant review for an additional reason: The Fifth Circuit's decision is contrary to this Court's precedent. This Court has admonished time and again that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita*, 475 U.S. at 588. When the evidence is "as consistent with permissible competition as with illegal conspiracy," the law forbids any "inference of antitrust conspiracy." *Id.* "To survive a motion * * * for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* (quoting *Monsanto*, 465 U.S. at 764).

1. As every other circuit to confront the question has held, evidence that a manufacturer terminated one distributor in response to threats from other

distributors is "as consistent with permissible competition as with illegal conspiracy." *Id.* That is because when distributors threaten to withdraw their business if a manufacturer keeps dealing with a competitor, the manufacturer may "legitimately" refuse to deal with that competitor in order to retain the other distributors' business. *Miles*, 476 F.3d at 451; *see also Euromodas*, 368 F.3d at 20; *Garment Dist.*, 799 F.2d at 909; *Bailey's*, 948 F.2d at 1030; *Winn*, 858 F.2d at 1520. The manufacturer's decision does not demonstrate agreement with the others' allegedly unlawful objective of boycotting the competitor and driving it out of the market. Rather, the manufacturer's decision is just as consistent with the possibility that the manufacturer is acting for its own legitimate purpose of keeping the other distributors as customers. Thus, when complaints about a competitor rise to the level of threats, evidence of a termination in response to or following those complaints and threats does not "'tend to exclude the possibility'" that the manufacturer "acted independently." *Miles*, 476 F.3d at 449 (quoting *Monsanto*, 465 U.S. at 764).

That is all the more true when the complaints themselves convey important, adverse information about the competitor. In this case, AmAlloy and Chapel did not simply threaten to withdraw their business if JSW continued dealing with MM. They also conveyed significant information to JSW about the character of MM's founders—namely, that Schultz and Hume had behaved unethically in leaving both of their companies. *See supra* p. 5-6. That information was corroborated by JSW's own experience in dealing with MM's founders. Schultz and Hume had induced JSW to supply them by representing that there would be "no issue" with their

leaving Chapel—only to reveal later that there was in fact a non-compete agreement, which Chapel had sued to enforce, causing them to halt shipments from JSW a mere six weeks into their deal. *Supra* p. 5. Given all that JSW had learned about MM's founders, it was entirely reasonable for JSW to decide to stop doing business with MM rather than be associated with such unsavory characters. *See Monsanto*, 465 U.S. at 764 ("To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market.").

JSW's decision to terminate MM in response to or following the threats and complaints from AmAlloy and Chapel was therefore consistent with at least two legitimate, independent purposes: preserving its relationships with two longstanding distributors, and avoiding a risky relationship with a new distributor with a tarnished record. The Fifth Circuit's decision to affirm the jury's finding that JSW had agreed to join an antitrust conspiracy was contrary to this Court's precedent.

2. The Fifth Circuit's decision is contrary to this Court's precedent for another reason. In order to find that JSW had agreed to join the conspiracy between AmAlloy and Chapel, the Fifth Circuit had to find that JSW *knew* about that conspiracy. A party's knowledge of a conspiracy does not demonstrate that it has joined it, *see supra* p. 23, but a party certainly cannot join a conspiracy it does not know about. Here, the circuit court held that JSW's knowledge could be inferred from a single fact—"that both [AmAlloy and Chapel] made * * * threats [to JSW] within several weeks of each other." Pet. App. 12a.

That holding is contrary to this Court's decision in *Monsanto*. There, multiple distributors complained to a manufacturer about a rival distributor's practice of cutting prices. *Monsanto*, 465 U.S. at 758-759. The Court held that "[p]ermitting an agreement to be inferred merely from the existence of complaints * * * could deter or penalize perfectly legitimate conduct." *Id.* at 763. As the Court explained, "complaints about price cutters are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals." *Id.* (internal quotation marks omitted). "Such complaints * * * arise in the normal course of business and do not indicate illegal concerted action." *Id.* (internal quotation marks omitted).

Monsanto forbids any inference that JSW knew of its distributors' illegal conspiracy. Both AmAlloy and Chapel had employed Schultz and Hume. And both had been burned by Schultz's and Hume's decisions to leave, taking sales information with them. So it was hardly surprising that both AmAlloy and Chapel complained when Schultz and Hume formed a rival distributorship; as *Monsanto* explained, "distributors are an important source of information for manufacturers." 465 U.S. at 763. That AmAlloy and Chapel also threatened to take their business elsewhere makes no difference. That kind of purely parallel behavior, spurred by parallel motives, is perfectly consistent with independent action. *See Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). From JSW's perspective, the complaints and threats were "unavoidable * * * reactions by distributors to the activities of their rivals," "aris[ing] in the normal course of business." *Monsanto*, 465 U.S. at 763 (internal quotation marks omitted). There was no

reason for JSW to think AmAlloy and Chapel were acting in concert.

3. This case illustrates perfectly why there are limits on the inferences that may be drawn from ambiguous evidence. Under the decision below, a manufacturer may refuse to deal with a distributor whose problematic behavior prompts mere complaints from other customers. But when a distributor's behavior is so intolerable that other customers not only complain but also threaten to take their business elsewhere, a manufacturer that decides not to deal with that distributor risks a treble-damages verdict under the Sherman Act. The distinction that the Fifth Circuit sought to draw between complaints and threats is untenable—particularly given that the point at which a complaint becomes a threat is often indiscernible. Because the inference of conspiracy the Fifth Circuit permitted is contrary to the decisions of this Court and other circuits, certiorari should be granted.

C. This Case Is An Ideal Vehicle For This Court's Review

The question presented here is an iteration of the "crucial question" in all cases arising under § 1 of the Sherman Act: "whether the challenged anticompetitive conduct stems from independent decision or from an agreement." *Twombly*, 550 U.S. at 553 (internal quotation marks omitted). The "range of permissible inferences" from the evidence is a question of "law." *Matsushita*, 475 U.S. at 588. And this Court has seen fit to police the boundaries of that range in numerous cases in the past. *See Twombly*, 550 U.S. at 556-557; *Matsushita*, 475 U.S. at 587-588; *Monsanto*, 465 U.S. at 763-764. In *Monsanto*, for exam-

ple, this Court granted certiorari to decide whether it is permissible to infer that a manufacturer knowingly joined an antitrust conspiracy when the manufacturer terminated a distributor "in response to or following complaints by other distributors." 465 U.S. at 759. The Court held it is not, and the question here is simply a logical follow-on: whether the answer is any different when the complaints rise to the level threats. *See supra* p. 18.

This case is an ideal vehicle for deciding that question. There is no dispute that AmAlloy and Chapel complained to JSW about MM, and threatened to withdraw their business if JSW continued to deal with MM. The issue is therefore cleanly presented: When a manufacturer terminates a distributor in response to or following complaints and threats from other distributors, is it permissible to infer that the manufacturer knowingly joined an antitrust conspiracy? This Court should grant review to decide that straightforward legal question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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