No. 15A-15A301

IN THE SUPREME COURT OF THE UNITED STATES

APPLE INC.,

Applicant,

v.

UNITED STATES OF AMERICA, STATE OF TEXAS, STATE OF CONNECTICUT, COMMONWEALTH OF PUERTO RICO, STATE OF UTAH, STATE OF ALABAMA, STATE OF ALASKA, STATE OF SOUTH DAKOTA, STATE OF NORTH DAKOTA, DISTRICT OF COLUMBIA, STATE OF ARIZONA, STATE OF TENNESSEE, STATE OF NEBRASKA, STATE OF MICHIGAN, STATE OF COLORADO, STATE OF VERMONT, COMMONWEALTH OF MASSACHUSETTS, STATE OF ILLINOIS, STATE OF WEST VIRGINIA, STATE OF NEW MEXICO, STATE OF IOWA, COMMONWEALTH OF VIRGINIA, STATE OF KANSAS, STATE OF MARYLAND, STATE OF NEW YORK, STATE OF IDAHO, STATE OF MISSOURI, STATE OF ARKANSAS, STATE OF OHIO, STATE OF LOUISIANA, COMMONWEALTH OF PENNSYLVANIA, STATE OF WISCONSIN, STATE OF DELAWARE,

Respondents.

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit:

Pursuant to Rule 13.5, Apple Inc. requests a 30-day extension of time, to and including October 28, 2015, within which to file a petition for a writ of certiorari in this case. The United States Court of Appeals for the Second Circuit entered judgment in this matter on June 30, 2015. App. 1a. Therefore, absent an extension of time, Apple's petition would be due on or before September 28, 2015. This Court's jurisdiction will be invoked under 28 U.S.C. § 1254(1).

The Second Circuit's decision in this case conflicts with this Court's precedent and with the decisions of other lower courts on a significant question of law—namely, whether and when *per se* liability under the Sherman Act may apply to a firm's vertical conduct. This question is exceedingly important to the United States economy, as it concerns the rules that will govern disruptive entry by dynamic companies into new or stagnant markets. This sort of market innovation and entry often requires the very type of vertical contracting and conduct that the Second Circuit's decision would condemn as a *per se* Sherman Act violation. This Court's review of this question is therefore essential, and a short extension of time within which Apple may file its petition is warranted.

1. This case concerns the imposition of *per se* antitrust liability on the basis of vertical conduct that was geared toward a new market entry and the disruption of a competitor's monopoly. Under Section 1 of the Sherman Act, 15 U.S.C. § 1, the presumptive standard for evaluating whether a defendant's conduct restrains trade is the "rule of reason," which involves weighing all of the circumstances of the case, including both the procompetitive and anticompetitive effects of the alleged conduct. *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885-886 (2007). In a narrow range of circumstances, certain conduct can amount to a "*per se*" violation of Section 1—eliminating the need to consider the conduct's economic effects—but the categorical *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; *see also State Oil Co.* v. *Khan*, 522 U.S. 3, 12 (1997) (the "proper inquiry" under a *per se* rule is "'not whether

[the conduct at issue] is *ever* illegal, but whether it is *always* illegal'" (quoting *Albrecht* v. *Herald Co.*, 390 U.S. 145, 165-166 (1968) (Harlan, J., dissenting))). Categorical *per se* treatment is particularly inappropriate for "vertical" conduct—that is, arrangements between firms at different levels of the market structure that are not direct competitors. *See Leegin*, 551 U.S. at 889-894; *see also Khan*, 522 U.S. at 13-17; *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 54-55 (1977).

2. In January 2010, Apple launched the iPad, its innovative, market-transforming tablet, and the iBookstore, which allows users to purchase and read digital books ("e-books") on the iPad. Before Apple entered the e-books market, Amazon held almost 90% of the market for e-books, which Amazon sold for use on its closed Kindle system. Amazon used its dominance in the e-books retail market to price certain e-books below cost; this pricing strategy suppressed competition and innovation in the market and caused e-book publishers to withhold or threaten to withhold their products, reducing output and disserving consumers. In order to enter the market and compete with Amazon, Apple needed suppliers for its iBookstore on terms that would allow it to sell e-books profitably, notwithstanding Amazon's below-market pricing strategy. Apple crafted a series of vertical agreements with e-book publishers designed to ensure the iBookstore's success as a new market entrant. The contracts included agency arrangements that allowed the publishers to set (and compete with each other on) e-book prices on the iBookstore, as well as "most favored nation clauses" and price caps that ensured that the iBookstore's prices would not be higher than the prices available from other e-book retailers, including Amazon. Apple apprised publishers of its efforts to sign on a critical mass to the iBookstore. Those efforts at market entry

succeeded: Millions now read e-books purchased on the iBookstore; Amazon's share of the e-books retail market has decreased to 60%; total e-book output and consumption has increased dramatically; and, in the medium term, e-book retail prices have fallen.

3. The Department of Justice and certain States sued Apple and the publishers, asserting that the publishers had engaged in a horizontal price-fixing conspiracy that was *per se* illegal and (relevant here) that Apple's *vertical* dealings with the publishers also constituted a *per se* violation of the Sherman Act. After a bench trial, the district court found Apple liable under the *per se* rule and also under a flawed, one-paragraph rule of reason analysis. *United States* v. *Apple Inc.*, 952 F. Supp. 2d 638, 694 (S.D.N.Y. 2013).

4. A divided panel of the United States Court of Appeals for the Second Circuit affirmed based on *per se* liability only, concluding that the rule of reason did not apply because, the panel majority ruled, Apple "orchestrate[d]" a horizontal price-fixing conspiracy among the publishers. App. 72a. Judge Livingston, writing for herself only, alternatively would have affirmed based on a "quick look" rule of reason analysis. App. 90a-106a. Judge Lohier declined to join that portion of Judge Livingston's opinion, concluding that "Apple's appeal rises or falls based on the application of the per se rule." App. 118a. Judge Jacobs dissented, pointing out that, consistent with this Court's decision in *Leegin* as well as other authority, the rule of reason, and not the *per se* rule, was the proper standard for evaluating Apple's conduct under the Sherman Act. App. 137a. Judge Jacobs noted that the majority's application of the *per se* rule "creates a circuit split" with the Third Circuit's decision in *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. 137a-139a. Judge Jacobs would have reversed the district court based on a full rule of reason analysis, explaining that Apple's conduct was fundamentally procompetitive. App. 144a-153a.

5. This case presents a significant question of law on which the lower courts are divided—namely, whether and when categorical *per se* liability under the Sherman Act may apply to a firm's vertical conduct. In *Toledo Mack*, the Third Circuit properly followed this Court's decision in *Leegin* to hold that the presumptive rule of reason standard applied to allegations that a manufacturer entered into vertical agreements with its dealers to keep them from competing with each other on price. *Toledo Mack*, 530 F.3d at 224-225. Had this case arisen in the Third Circuit, Apple's conduct would have been assessed under the rule of reason. In the Second Circuit, however, it was condemned as illegal *per se*, a result that is inconsistent not only with *Toledo Mack*, but with *Leegin* itself.

6. This case also presents issues of surpassing importance to the United States economy. Dynamic, disruptive entry into new or stagnant markets—the lifeblood of American economic growth—often requires the very type of vertical contracting and conduct that the Second Circuit's rule would condemn as a *per se* Sherman Act violation.

7. Apple requests a 30-day extension of time in which to file a petition for a writ of certiorari. This extension is requested because undersigned counsel of record has several other pressing matters pending in the courts, including this Court, in the weeks leading up to and immediately following the current filing deadline. For example, undersigned counsel will be: filing a mediation brief in *Liberty Media* v.

Vivendi, No. 13-596 (2d Cir.), on September 17; filing a supplemental brief in the Federal Circuit in *Akamai Technologies* v. *Limelight Networks*, No. 09-1372, on September 18; filing appellees' brief in the First Circuit in *Fair Admissions, Inc.* v. *President & Fellows of Harvard College*, No. 15-1823, on September 23; presenting oral argument in the Eleventh Circuit in *United States* v. *Farha*, No. 14-12373, on October 2; and presenting oral argument in this Court in *Hurst* v. *Florida*, No. 14-7505, on October 13.

For the foregoing reasons, Apple respectfully requests that the time for filing a petition for a writ of certiorari in this case be extended by 30 days, to and including October 28, 2015.

Respectfully submitted.

THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 91030
(213) 229-7000
tboutrous@gibsondunn.com

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

CERTIFICATE OF SERVICE

I, Seth P. Waxman, a member of the bar of this Court, certify that on September 16, 2015, all parties required to be served were served copies of the foregoing via first-class mail at the address listed below:

Counsel for Respondent United States

DONALD B. VERRILLI, JR.
SOLICITOR GENERAL
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-2217
supremectbriefs@usdoj.gov

Counsel for Respondents Texas et al.

ERIC LIPMAN
ASSISTANT ATTORNEY GENERAL
CAM BARKER
DEPUTY SOLICITOR GENERAL
P.O. Box 12548
Austin, TX 78711
(512) 463-2100
eric.lipman@texasattorneygeneral.gov
cam.barker@texasattorneygeneral.gov

Seth P. Waxman/dc

SETH P. WAXMAN