No. 15-565

IN THE

Supreme Court of the United States

APPLE, INC.,

Petitioner,

v.

UNITED STATES, *et al.*,

Respondents.

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

WILLIAM A. ISAACSON
Counsel of Record
KAREN L. DUNN
ABBY L. DENNIS
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue NW
Washington, DC 20015
(202) 237-2727
wisaacson@bsfllp.com

Counsel for Amici Curiae

262711

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are professors of antitrust law and experts in Sherman Act jurisprudence. The purpose of the antitrust laws is to promote and protect competition. To ensure that legitimate, procompetitive conduct is not deterred or penalized under these laws, firms must be able to distinguish between conduct condemned under the *per se* rule and conduct analyzed under the rule of reason. This case blurs that line so that it can no longer be easily identified. *Amici* support certiorari because the decision of the Court of Appeals injects untenable uncertainty into the antitrust laws, undermines this Court's precedent, and exposes legitimate, procompetitive vertical business arrangements to *per se* liability.

SUMMARY OF THE ARGUMENT

Per se condemnation of vertical restraints is a relic of the early- and mid-twentieth century. For nearly forty years, this Court has repeatedly required more thorough review of restraints between manufacturers and distributors that had once been categorically outlawed: non-price restraints, such as territorial restrictions, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); maximum resale price maintenance, *State*

1. The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least ten days prior to the due date of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Oil Co. v. Khan, 522 U.S. 3 (1997); and, most recently, minimum resale price maintenance, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). The reasoning behind this Court's recent jurisprudence is important to competition: vertical restraints quite often have procompetitive effects and are thus ill-suited for the *per se* rule. The Court has likewise articulated the clear, well-established principle that the *per se* rule is applicable only to restraints (whether horizontal or vertical) that are "manifestly anticompetitive," *GTE Sylvania*, 433 U.S. at 51, and devoid of "'any redeeming virtue,'" *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 289 (1985) (quoting *N. Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958)).

Notwithstanding the retreat of the *per se* rule in the context of vertical relationships, the Court of Appeals held Apple *per se* liable because its agency agreements for the distribution of electronic books ("e-books") purportedly furthered a horizontal price-fixing conspiracy between book publishers. As the court acknowledged, these agreements were vertical in nature (*i.e.*, between a manufacturer and a retailer), contained terms that are otherwise evaluated under the rule of reason, and enabled a new firm to enter a market that had previously been dominated by a single retailer. Yet, according to the Court of Appeals, the agreements—and Apple's negotiation of them—evidenced that Apple had organized and facilitated a horizontal price-fixing cartel among the publishers and were *per se* unlawful.

The decision of the Court of Appeals resurrects an inhospitality to vertical restraints that has long been abandoned by this Court. It also introduces great

uncertainty into the antitrust laws, calling into question the use of legitimate, procompetitive business practices, such as agency agreements and resale price maintenance. The Court of Appeals is silent as to when and under what circumstances the otherwise lawful vertical restraints in Apple's e-books agreements crossed into an area of *per se* illegality: they leave firms and their lawyers to grapple with that issue. The result does anything but protect competition, as firms will be reluctant to engage in economically desirable conduct that the antitrust laws seek to promote.

ARGUMENT

I. The *Per Se* Rule Is Not Appropriate for Vertical Conduct With Potential Procompetitive Effects.

The *per se* rule is a categorical prohibition, outlawing types of restraints without any regard to the reasonableness of the restraint or its effect on the market. This Court has long stated that its application should be limited to restraints with a "'pernicious effect on competition'" and that "'lack of any redeeming virtue.'" *Nw. Wholesale Stationers, Inc.*, 472 U.S. at 289 (quoting *N. Pac. R. Co.* 356 U.S. at 5)). This approach makes perfect sense for *horizontal* restraints among competitors that set prices, divide markets, or fix bids. *See* XI Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1902a, at 233–35 (3d ed. 2011). For most of last century, the Court also subjected certain *vertical* restraints between manufacturers and retailers to *per se* liability, its deep suspicion reflecting a lack of appreciation regarding the procompetitive effects of vertical restraints. *E.g.*, *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S.

373, 408 (1911) ("the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other").

In the latter part of last century, a wave of academic literature began to undermine the theoretical underpinnings of the Court's hostility toward vertical restraints, demonstrating that these restraints can be, and often are, procompetitive and differ significantly from horizontal restraints. *E.g.*, Richard A. Posner, Antitrust Law: An Economic Perspective 147-67 (1976); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Divsiion, part II*, 75 Yale L.J. 373 (1966); *see also* Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself (1978); . Relying, in part, on this literature, the Court in *GTE Sylvania* began a four-decade retreat from a *per se* analysis in the context of vertical arrangements. There, the Court acknowledged that territorial and customer restrictions in distribution agreements could have "redeeming virtues" and were not appropriate for *per se* condemnation. 433 U.S. at 54–55, 59. In particular, the Court noted that manufacturers could use these restraints to promote interbrand competition and "to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products." *Id.* at 55.

The Court's subsequent decisions have echoed a similar refrain and warned of the risks and costs associated with erroneously punishing legitimate, procompetitive conduct. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998) (declining to apply *per se* rule

to decision to switch suppliers: "The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage"); *Khan*, 522 U.S. at 7 (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), and concluding vertical maximum price fixing was not a *per se* violation of the antitrust laws); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988) ("we have recognized that the scope of *per se* illegality should be narrow in the context of vertical restraints"); *Matsushita Elec. Indus. Co. v. Zenith Ratio Corp.*, 475 U.S. 574, 594 (1986) ("cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect"); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984) (rejecting an evidentiary standard that "could deter or penalize perfectly legitimate conduct").

In 2007, *Leegin* drove the final nail into the *per se* coffin in the context of vertical price restraints, overruling *Dr. Miles* and concluding that the rule of reason governed minimum resale price maintenance. As in *GTE Sylvania*, the Court observed that "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance." 551 U.S. at 889. One such justification was preventing discounting retailers from free riding off the services provided by other retailers, which could discourage those retailers from offering those services. *Id.* at 890–91. Another was new entry: "New products and new brands are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance there is a procompetitive effect." *Id.* at 891; *see also id.* at 917–18 (Breyer, J., dissenting).

The *Leegin* Court further reiterated that *per se* condemnation was reserved only for conduct "'that would always or almost always tend to restrict competition and decrease output.'" *Id.* at 886 (quoting *Business Elecs. Corp.*, 485 U.S. at 723) Courts are to judge all other conduct under the rule of reason, carefully considering the relevant business and "'the restraint's history, nature, and effect.'" *Id.* at 885 (quoting *Khan*, 522 U.S. at 10). This is true even for conduct that carries the threat of anticompetitive effects. *E.g.*, *id.* at 897 ("Resale price maintenance, it is true, does have economic dangers").

Rule-of-reason scrutiny is particularly appropriate for "business relationships where the economic impact of certain practices is not immediately obvious." *State Oil Co.*, 552 U.S. at 10 (quoting *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458–59 (1986)). To guard against an expansive application that could deter procompetitive conduct, *per se* treatment is applied only when courts "have had considerable experience with the type of restraint at issue" and can "predict with confidence that [the restraint] would be invalidated in all or almost all instances under the rule of reason." *Leegin*, 551 U.S. at 886–87; *accord White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) ("We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business and within the 'rule of reason'" (internal citations omitted)).

If a business relationship has or *could* have procompetitive effects, or if it is one with which courts

have little experience, categorical *per se* condemnation is ill-advised and indeed disfavored under this Court's jurisprudence.

II. Application of the *Per Se* Rule to Apple's Conduct Was Erroneous.

A. The Restraints at Issue Are Not "Manifestly Anticompetitive" and Lacking in "Any Redeeming Virtue."

The Apple e-books agreements contained restraints that this Court and others have acknowledged have the potential for procompetitive effects and are to be judged under a rule of reason. Even so, the Court of Appeals held Apple *per se* liable because its agreements purportedly facilitated a horizontal price-fixing conspiracy between book publishers. Its decision is inconsistent with this Court's plain—and repeated—admonition that the *per se* rule is applicable only to restraints that are "manifestly anticompetitive," *GTE Sylvania*, 433 U.S. at 51, and without "'any redeeming virtue,'" *Nw. Wholesale Stationers, Inc.*, 472 U.S. at 289 (quoting *N. Pac. R. Co.*, 356 U.S. at 5).

The Court of Appeals' *per se* analysis condemned as conspiratorial conduct specific provisions of Apple's agreements—such as a most-favored-nations clause, price caps and floors, and an agency arrangement. *United States v. Apple, Inc.*, 791 F.3d 290, 315–17 (2d Cir. 2015). It also pointed to Apple's negotiation tactics—in particular, communications between Apple and the publishers and Apple's decision not to enter the market except under certain terms—as evidence of a conspiracy. *Id.* at 318–19.

But each of these contract provisions and negotiation tactics can and ordinarily do have procompetitive effects, as multiple courts, including this one, have recognized.

With respect to price floors and caps, minimum resale price maintenance can facilitate new entrants and prevent free-riding, thus promoting interbrand competition and leading to better retail services for consumers, *Leegin*, 551 U.S. at 890–91, and maximum resale price maintenance can protect against price increases by a monopolistic retailer, *see Khan*, 522 U.S. at 16 (quoting from the opinion of the Court of Appeals, 93 F.3d 1358, 1362 (7th Cir. 1996) (Posner, J.)); *see also Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 343 n.13 (1990).

As to agency relationships, these structures can promote efficiencies in distributing products and have long been accepted under antitrust law. *E.g.*, *United States v. Gen. Elec. Co.*, 272 U.S. 476, 488 (1926) ("there is nothing as a matter of principle or in the authorities which requires us to hold that genuine contracts of agency like those before us, however comprehensive as a mass or whole in their effect, are violations of the Anti-Trust Act"); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967), *overruled on other grounds by GTE Sylvania, Inc.*, 433 U.S. at 58; *Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282, 290 (4th Cir. 2009) ("It cannot 'seriously be argued that the ancient and ubiquitous practice of principals' telling their agents what price to charge the consumer is just some massive evasion of the rule against price fixing'" (quoting *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1437 (7th Cir. 1986))).

Most-favored-nations clauses can lead to lower consumer prices as well as guard against a firm being priced out of the market. *See Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic,* 65 F.3d 1406, 1415 (7th Cir. 1995) ("'Most favored nations' clauses are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers. The Clinic did this to minimize the cost of these physicians to it, and that is the sort of conduct that the antitrust laws seek to encourage. It is not price-fixing."); *Ocean State Physicians Health Plan v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1110 (1st Cir. 1989) ("such a policy of insisting on a supplier's lowest price . . . tends to further competition on the merits"). Courts have condemned or considered condemning most-favored-nations clauses only when used by a dominant monopolist—not by a new entrant such as Apple. *E.g.*, *Marshfield Clinic*, 65 F.3d at 1415.

Finally, it cannot be said that a retailer discussing prices with manufacturers is manifestly anticompetitive. *Monsanto Co.*, 465 U.S. at 762 ("A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market"). The same is true for a firm communicating the conditions under which it will sell. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (The Sherman Act "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell").

Each aspect of Apple's conduct to which the Court of Appeals pointed as furthering a conspiracy has proven to further competition. There is nothing in the antitrust jurisprudence—and the decision of the Court of Appeals does not state otherwise—that suggests that some combination, or even the sum total, of the restraints at issue makes application of the *per se* rule any more appropriate than when considering each of them separately.

B. The Decision of the Court of Appeals Is Inconsistent With the Procompetitive Purposes of the Antitrust Laws.

The Court of Appeals relied on each of the aforementioned contract provisions and examples of negotiating conduct as evidence that Apple had organized a horizontal price-fixing cartel among publishers and that its conduct should be condemned *per se*. But it is precisely when conduct, like here, has potentially ambiguous and highly fact-specific competitive effects that courts must apply the rule of reason to determine the actual market effects in the particular case—rather than preempt that analysis by applying the *per se* rule. Indeed, both the Court of Appeals and the District Court conceded these aspects of Apple's agreements and its negotiation tactics were not inherently unlawful. *Apple*, 791 F.3d at 319; *United States v. Apple, Inc.*, 952 F. Supp. 2d 638, 698 (S.D.N.Y. 2013) ("The Plaintiffs do not argue, and this Court has not found, that the agency model for distribution of content, or any one of the clauses included in the Agreements, or any of the identified negotiation tactics is inherently illegal").

To escape this apparent contradiction, the Court of Appeals asserted that the "relevant" agreement in this

case was not the vertical one between Apple and the book publishers, but rather the horizontal agreement amongst the publishers. *Apple*, 791 F.3d at 325. This conclusion—which subjects Apple's conduct to *per se* condemnation because it may have purportedly furthered a price-fixing conspiracy between players on a different level of the distribution chain—has no support in this Court's modern precedent and reflects a return to the reasoning of *Dr. Miles*. *Leegin*, 551 U.S. at 893 ("To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate [a horizontal cartel], it, too, would need to be held unlawful under the rule of reason."); *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 225 (3d Cir. 2008) ("The rule of reason analysis applies even when, as in this case, 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."). The agreements at issue were *not* a sham or purely a mechanism for accomplishing the objectives of a *per se* illegal horizontal agreement—the lower courts observed that Apple had its own legitimate business reasons for negotiating the agency agreements. *See Apple, Inc.*, 952 F. Supp. 2d at 700 (noting "Apple's entirely appropriate or even admirable motives"). To categorically condemn such conduct would compromise the holding of *Leegin* and disincentivize a wide swath of legitimate and economically desirable conduct.

Not only is it inconsistent with the Sherman Act's procompetitive goals to judge Apple's vertical conduct under the *per se* rule, but the use of ambiguous circumstantial evidence in this case to transform a vertical agreement into a horizontal price-fixing agreement effectively limits the scope of *Leegin* to a narrow set of

circumstances. A manufacturer will often seek similar contractual terms with its retailers, or a large retailer may seek similar terms with manufacturers of a product it sells. Allowing the Second Circuit's decision to stand would deny parties in these cases the ability to rely on the holding of *Leegin*, which would harmfully impact procompetitive incentives. *See Business Elecs. Corp.*, 485 U.S. at 727–28.

The decision of the Court of Appeals is troubling not simply because it condemns conduct proven to further competition in other circumstances—it penalizes conduct that improved competition *in this specific case*. As the dissent in the Court of Appeals recognized, Apple's e-books agreements exemplified one of the procompetitive rationales for minimum resale price maintenance expressly referenced in *Leegin*—a new entrant in a market dominated by one retailer. *Apple, Inc.*, 791 F.3d at 350–51 (Jacobs, J., dissenting).

By rendering the Apple agreements illegal under a *per se* analysis, the majority opinion in the Court of Appeals did not consider the potential procompetitive effects of Apple's conduct. *Apple,* 791 F.3d at 321 (majority opinion). Instead, it took a myopic view of competition, focusing solely on consumer prices. *Id.* at 326–28. But lower, short-term prices are not the singular aim of the antitrust laws—even when there are allegations of concerted action—and other procompetitive effects can, should, and often do outweigh price considerations. *See Leegin*, 551 U.S. at 896–97 ("Many decisions a manufacturer makes and carries out through concerted action can lead to higher prices. A manufacturer might, for example, contract with different suppliers to obtain

better inputs that improve product quality. Or it might hire an advertising agency to promote awareness of its goods. Yet no one would think these actions violate the Sherman Act because they lead to higher prices. The antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want. The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices. The same can hold true for resale price maintenance").

The e-books market was in its infancy when the agency agreements were executed, and it is unclear what effects the agreements would ultimately have had on the market. This uncertainty called for a rule-of-reason analysis. Courts are ill-equipped to judge conduct in areas, such as nascent industries, where they lack considerable experience; when they make wholesale condemnations absent such experience, they potentially overlook, and risk chilling, legitimate, procompetitive conduct. *See, e.g.*, *White Motor Co.*, 372 U.S. at 263 (declining *per se* analysis when it was unclear if restraints were "allowable protections against aggressive competitors" or a means for new entry).

That the conduct at issue has furthered competition in many other cases and *could* (and, in fact, did in the short-term) have had procompetitive effects in this one demonstrates the error of the Court of Appeals' *per se* condemnation.

III. The Decision of the Court of Appeals Introduces Uncertainty into Antitrust Law And Risks Deterring Legitimate, Procompetitive Conduct.

By condemning under the *per se* rule conduct that this Court and others have repeatedly condoned under a rule-of-reason analysis, the decision of the Court of Appeals creates an unworkable, and potentially dangerous, precedent. It is now unclear when vertical conduct will merit a rule-of-reason analysis or *per se* condemnation; conduct that is perfectly acceptable in one case may be *per se* liable in another. Use of the *per se* rule in this case potentially casts a shadow over many situations in which a retailer negotiates simultaneously with multiple suppliers or vice versa and risks punishing a large amount of economically desirable conduct. *See Business Elecs. Corp.*, 485 U.S. at 728 (rejecting a *per se* analysis under which a manufacturer engaging in legitimate, procompetitive conduct "exposes itself to the highly plausible claim that its real motivation was to terminate a price cutter"); *see also Leegin*, 551 U.S. at 903 (recognizing that *per se* rule was unworkable in the context of resale price maintenance because the "economic effects of unilateral and concerted price setting are in general the same. The problem for the manufacturer is that a jury might conclude its unilateral policy was really a vertical agreement, subjecting it to treble damages and potential criminal liability" (internal citations omitted)).

The natural consequence is that market participants will be left to guess when otherwise legitimate, procompetitive conduct will merit *per se* condemnation. This approach to antitrust law, if left uncorrected by this Court, will breed market inefficiencies, the cost of

which will ultimately be passed to consumers. Firms will hesitate to enter new markets. Firms advised by antitrust counsel considering the decision of the Court of Appeals will refrain from employing perfectly legitimate, procompetitive mechanisms, such as resale price maintenance, agency relationships, or most-favored-nation clauses, that could be construed as facilitating collusion at another level of distribution. Firms will inevitably "choose second-best options to achieve sound business objectives." *Leegin*, 551 U.S. at 904. And they may refuse to engage or negotiate with other members of their retail chains without taking costly and inefficient precautions. *Id.* at 903. ("this danger [of antitrust liability] can lead, and has led, rational manufacturers to take wasteful measures. . . . The increased costs these burdensome measures generate flow to consumer in the form of higher prices").

An analysis that encourages these outcomes, as this Court has recognized, "is a flawed antitrust doctrine that serves the interests of lawyers—by creating legal distinctions that operate as traps for the unwary—more than the interests of consumers." *Id.* at 904. The antitrust laws should not have the perverse effect of disincentivizing market participants from engaging in procompetitive activity, or "deter or penalize legitimate conduct' or '[] create an irrational dislocation in the market.'" *Business Elecs. Corp.*, 485 U.S. at 726 (quoting *Monsanto Co.*, 465 U.S. at 763, 764).

This Court should grant certiorari to correct the error of the Court of Appeals, provide firms clarity regarding the application of the rule of reason, and thwart an expansive use of the *per se* rule that threatens to penalize legitimate, procompetitive conduct, to the detriment of consumers and competition.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

William A. Isaacson
Counsel of Record
Karen L. Dunn
Abby L. Dennis
Boies, Schiller & Flexner LLP
5301 Wisconsin Avenue NW
Washington, DC 20015
(202) 237-2727
wisaacson@bsfllp.com

Counsel for Amici Curiae

APPENDIX — LIST OF *AMICI CURIAE*

Amitai Aviram
Professor of Law
University of Illinois College of Law

Keith N. Hylton
William Fairfield Warren
Distinguished Professor
Professor of Law
Boston University School of Law

Thomas A. Lambert
Wall Family Chair of Corporate
Law and Governance
University of Missouri Law School

Fred S. McChesney
de la Cruz-Mentschikoff Endowed
Chair in Law and Economics
University of Miami School of Law

Justin McCrary
Professor of Law
University of California, Berkeley
School of Law