No. 15-565

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

BRIEF OF *AMICI CURIAE* THE AUTHORS GUILD, INC., AUTHORS UNITED, AMERICAN BOOKSELLERS ASSOCIATION, AND BARNES & NOBLE

Michael S. Becker
John C. O'Quinn
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington D.C. 20005

Dale M. Cendali
Counsel of Record
Claudia Ray
Mary Mazzello
Kirkland & Ellis LLP
601 Lexington Ave.
New York, NY 10022
(212) 446-4846
dale.cendali@kirkland.com

Counsel for The Authors Guild, Inc., Authors United, American Booksellers Association, and Barnes & Noble

Additional counsel listed on inside cover

Deanne M. Ottaviano
Arent Fox LLP
1717 K Street, NW
Washington, DC 20006-5344

Counsel for American Booksellers Association

Jan F. Constantine
Mary Rasenberger
The Authors Guild
31 East 32nd Street, 7th Floor
New York, NY 10016

Counsel for The Authors Guild, Inc.

Bradley A. Feuer
Vice President & General Counsel
Barnes & Noble, Inc.
122 Fifth Ave, New York, NY 10011

Counsel for Barnes & Noble

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INTERESTS OF *AMICI CURIAE*

Pursuant to this Court's Rule 37.2, amici curiae respectfully file this brief in support of the petition for a writ of certiorari.[1]

The Authors Guild, Inc. (the "Guild"), founded in 1912, is a national non-profit association of over 9,000 professional, published historians, novelists, biographers, and other writers of fiction and nonfiction. Guild members have won Pulitzer and Nobel Prizes, National Book Awards, and other accolades. It is the nation's oldest and largest professional organization for writers. The Guild works to promote the professional interests of authors in various areas, including copyright, freedom of expression and taxation. The Guild is concerned with ensuring a diverse and competitive publishing marketplace for decades to come, and protecting the free flow of ideas, which is vital to our Republic.

Authors United was founded in 2014 to serve as a voice for authors in the e-book market. Specifically, it is concerned about the harm to authors when e-book distribution is dominated by one company and is working to promote a competitive retail environment for e-books.

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[1] Pursuant to this Court's Rule 37, *amici* state (1) that the Guild notified the parties of its intent to file this brief and the parties consented, as evidenced by letters filed with the Clerk of this Court, and (2) that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and that no person other than *amici curiae* or their counsel made such a monetary contribution.

American Booksellers Association ("ABA") is a 115-year-old national, not-for-profit trade organization that works to help independently owned bookstores grow and succeed. ABA's core members are key participants in their communities' local economy and culture, and to assist them ABA creates relevant programs; provides education, information, business products, and services; and engages in public policy and industry advocacy. ABA actively supports and defends free speech and the First Amendment rights of all Americans. ABA represents more than 1,700 locally owned and operated independent bookstores operating in more than 2,200 locations nationwide. Approximately 400 ABA member bookstores participate in an association-sponsored ecommerce program, IndieCommerce, through which they sell physical books, e-books, tickets to author events and other items, www.indiecommerce.com.

Barnes & Noble is the nation's largest retail bookseller and a leading retailer of content, digital media and educational products. The company operates 647 Barnes & Noble bookstores in 50 states (as of August 1, 2015), and one of the Web's premier e-commerce sites, BN.com (www.bn.com). Barnes & Noble's Nook Digital business offers a lineup of popular NOOK® tablets and eReaders and an expansive collection of digital reading and entertainment content through the NOOK Store® (www.nook.com).

Most of the authors represented by the Guild and Authors United have written books that are sold in digital format. These authors rely on a competitive, diverse retail market with multiple platforms for selling and displaying their books to earn their livelihoods. ABA's members and Barnes & Noble sell print and digital books and provide vital distribution channels for authors and content creators, disseminating First Amendment protected expression to the American public. The booksellers depend on a competitive book industry with a wide variety of books and authors in order to stay in business, serve their customers, and provide for the further distribution of authors' content. Accordingly, the Guild, Authors United, ABA, and Barnes & Noble have a strong interest in ensuring that adoption of the agency model of e-book pricing, a business model that improved competition and diversity in the e-book market, is not treated as an antitrust violation, to the detriment of authors, retailers, consumers, and the bedrock principle of freedom of expression in the United States.

SUMMARY OF ARGUMENT

Competition is vital to the book industry, which in turn fuels the marketplace of ideas on which this country is founded. In a competitive market, authors create a variety of works, from science fiction to historical biographies, each making an important contribution to American discourse and First Amendment-protected expression. Retailers then compete to sell these books, serving as a link between authors and consumers and providing distribution channels for authors' content, as well as fora where consumers can learn about authors and exchange ideas. A healthy, competitive book industry fosters more book titles, diversity, and output.

In late 2009, the market for retail distribution of electronic books ("e-books") was essentially a monopoly, with Amazon.com, Inc. ("Amazon") controlling 90% of e-book sales. Amazon sold many of the most popular e-books at a loss, making it difficult for other retailers to enter the e-book market as they "would run the risk of losing money if [they] tried." Pet. App. 95a (quoting Pet. App. 149a). Authors feared that Amazon would use its dominance as a distributor to negotiate lower e-book wholesale prices, decreasing the revenue stream to authors and publishers to the point of causing a drop in e-book output and the number and variety of e-book *titles* created, to the detriment of consumers. They also worried that below-cost pricing threatened brick-and-mortar distributors, who distributed the majority of physical books in the United States.

Around this time, Apple sought to enter the e-book market with its iBookstore app, which would allow consumers to download e-books and read them on Apple's revolutionary iPad tablet device. To compete with Amazon and facilitate the launch of the iBookstore, Apple entered agreements with five publishers (the "Publisher Defendants") to distribute e-books. These agreements included (1) an agency model which allowed each publisher to set the retail prices at which its e-books were sold through the iBookstore, (2) caps on e-book retail prices, and (3) a most-favored-nation clause which ensured that while competition would be among publishers, Apple, as a retailer, would not be left unable to respond to its competitors' pricing. With these agreements in place, in April 2010 Apple entered the e-book market.

Following Apple's entry into the market and the adoption of the agency model, competition within the e-book retail industry increased dramatically. Average retail prices for trade e-books, meaning e-books sold to the general public as opposed to textbooks or technical manuals, fell and output increased because there were more price setters competing on retail prices and more opportunities and better incentives for authors and independent publishers to write books and distribute them through the e-book market.

The number of e-book titles available to consumers increased. Self-publishing terms improved, which spurred authors to create and self-publish new works. At the same time, publishers each were able to independently set e-book retail prices for the e-books that they produced and ensure that revenue remained at the level necessary to support the continued creation of research-intensive and/or time-consuming book titles that often can be written only with publisher support.

In addition, the number of retailers selling e-books increased. Following Apple's entry into the e-book market and the adoption of the agency model, Amazon's market share decreased from 90% to about 60%. Hundreds of independent bookstores began selling e-books, and Barnes & Noble's e-book business grew as well. This retail competition spurred Barnes & Noble, Apple and others to create many technological innovations for e-books and ereaders, including a fixed format for e-books that made it easier for consumers to read visually-focused e-books, such as cookbooks, which require text and graphics to appear at specific locations on the "page."

After Apple's entry into the e-book market, a single distributor no longer controlled the electronic marketplace of ideas, consumers had access to more content and a greater variety of retailers from whom to purchase and learn about e-books, and authors, including those represented by *amici*, had a choice among electronic distribution platforms. Under the rule of reason, which is the general standard for determining whether conduct is an antitrust violation, these procompetitive effects of Apple's conduct in providing for the adoption of agency pricing should have been considered when determining whether Apple committed an antitrust violation. Because the Second Circuit applied a *per se* rule, however, it failed to consider them.

The Second Circuit's decision is inconsistent with this Court's precedent and is a prime example of why the rule of reason is the preferred standard, with the *per se* rule reserved for the rarest of circumstances. Absent correction, the lower court's wooden approach threatens to undermine the very objective of antitrust law—to ensure robust competition. Such concerns are particularly heightened here, where the conduct held to be *per se* unlawful, especially the adoption of the agency model of e-book pricing, in fact invigorated competition in the marketplace of ideas and intellectual discourse. This Court's intervention is needed to make clear that, consistent with long-settled precedent, the rule of reason should apply here.

REASONS FOR GRANTING THE WRIT

I. UNDER THIS COURT'S PRECEDENT, THE CONDUCT AT ISSUE SHOULD BE GOVERNED BY THE RULE OF REASON

"The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1 [of the Sherman Act.]" *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). This is because for most conduct the economic effect cannot be determined without "weigh[ing] all of the circumstances of a case." *Id.* (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 49 (1977)). The rule of reason "distinguishes 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 886.

The *per se* rule, on the other hand, "is confined to restraints . . . 'that would always or almost always tend to restrict competition and decrease output.'" *Id.* (quoting *Business Elecs. Corp. v. Sharp Elecs. Corp.,* 485 U.S. 717, 723 (1988)). Thus, this Court has "expressed reluctance to adopt *per se* rules with regard to 'restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.'" *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (quoting *FTC v. Indiana Fed'n of Dentists,* 476 U.S. 447, 458–459 (1986)). It also has advised that courts should adopt *per se* rules only after they have had "considerable experience" with a restraint and "can predict with confidence" that it would be invalid under the rule of reason in almost all instances. *Leegin*, 551 U.S. at 886–87.

Despite this Court's express directive that *per se* prohibitions are justified only if the restraint has "manifestly anticompetitive effects and lack[s] . . . any redeeming virtue," *Id.* at 886 (internal citations and quotation marks omitted), and its warning against applying *per se* rules to novel practices, *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 10 (1979), the panel majority for the Second Circuit held that Apple's conduct in providing for adoption of the agency model of e-book pricing—which allowed it to enter the nascent e-book market and had a procompetitive effect—was a *per se* antitrust violation. In doing so, the Second Circuit ignored this Court's unwavering instruction that *per se* rules should not apply to conduct with potentially procompetitive effects. *See, e.g.*, *Leegin*, 551 U.S. at 886; *Continental T.V.,* 433 U.S. at 57–58. The Supreme Court should grant Apple's petition, and issue a writ of certiorari. As explained below, doing so here is not just an academic exercise, but critical to maintaining a healthy marketplace for the ideas and First Amendment-protected expression that authors and bookstores facilitate.

II. THE FEATURES OF THE E-BOOK INDUSTRY ILLUSTRATE WHY THE RULE OF REASON SHOULD APPLY TO THIS CASE

The rule of reason allows a factfinder to distinguish, based on real-world, case-specific market effects, "restraints stimulating competition" from "restraints with anticompetitive effect." *Leegin*, 551 U.S. at 886. Apple's agreements with the Publisher Defendants to adopt agency e-book pricing and its entry into the e-book market were procompetitive and expanded output. Compared to the world before Apple entered the e-book industry, the world after had more e-books, e-book titles, retailers, reading platforms, publishing platforms (including self-publishing platforms), price-setters, and price competition in an industry that is essential to consumers and freedom of expression. But because the Second Circuit applied a *per se* rule, it did not consider these demonstrated procompetitive effects. It condemned Apple's procompetitive conduct as a *per se* antitrust violation, making this case, in the process, a quintessential example of erroneous application of the *per se* rule.

A. THE BOOK INDUSTRY

In order to appreciate the procompetitive effect of Apple's entry into the e-book market, and the tremendous benefit to competition among authors and retailers generally, it is necessary to understand the various players in the book industry. Authors write and research a variety of books—biographies, history books, travel books, mysteries, comics, science fiction, cookbooks, scholarly books, and many others. While some books can be written quickly without outside input, most books require input from development editors, copy editors, and designers before they are ready for publication. In addition, once books are finished, many of them need to be marketed to consumers in order for them to find an audience.

For many authors, publishers provide these editing and marketing services.[2] Publishers also provide authors with advances to help them cover their costs and provide for their families while they are researching and writing, which, for many books, can take years. By pooling resources, publishers function like venture capitalists for the book industry, funding a variety of books and taking risks on authors and their ideas.[3] Self-published authors, on the other hand, have to either forgo such support or pay for editing and marketing services on their own, without any publisher marketing efforts or the benefit of an advance to buoy them during the writing process.

Once a book is complete, it generally is sold through a retailer, such as a brick-and-mortar bookstore or an e-retailer. Bookstores, however, provide many services beyond selling books. Fundamentally, they provide channels for authors and content creators to distribute their works. By displaying books and providing spaces for author events, book readings, and book groups, bookstores

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[2] *See* Jeremy Greenfield, *Leaked: Hachette Document Explains Why Publishers Are Relevant*, Digital Book World (Dec. 6, 2011), http://www.digitalbookworld.com/2011/leaked-hachette-explains-why-publishers-are-relevant/ (publisher Hachette's services include "nurtur[ing] talent," "fund[ing] author's writing process," "sales and distribution," and "brand build[ing]"); *Inside Random House: Bringing Our Authors' Books to Life*, YouTube (May 31, 2012), https://www.youtube.com/watch?v=4FlnAFH4HV4.

[3] Greenfield, *supra* note 2.

additionally provide marketing and promotional support to authors, allowing them to share their vital contributions with the American public.[4] They also serve as "cultural centers" for consumers, where consumers can browse books and exchange ideas.[5] And, by developing relationships with their customers, booksellers can provide tailored recommendations to serve their customers' needs.[6]

B. BEFORE APPLE ENTERED THE E-BOOK MARKET, ONE RETAILER DOMINATED THAT MARKET

Through 2009, Amazon accounted for almost 90% of all e-book sales. Pet. App. 8a, 13a, 95a, 130a. It sold both self-published e-books and traditionally

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[4] *See* Keither Gessen, *The War of the Words*, Vanity Fair, Nov. 30, 2014 (one value of bookstores is that they "display[] the merchandise"); Scott Turow (former President, The Author's Guild), *Letter from Scott Turow: Grim News*, The Author's Guild (Mar. 9, 2012), https://www.authorsguild.org/industry-advocacy/letter-from-scott-turow-grim-news/ ("A robust book marketplace demands both bookstore showrooms to properly display new titles and online distribution for the convenience of customers.").

[5] George Packer, *Cheap Words: Amazon Is Good For Customers. But Is It Good For Books?*, The New Yorker, Feb. 17, 2014.

[6] Tom Roberge, *Why We Need Independent Bookstores More Than Ever,* Pub. Persp. (Aug. 18, 2014), http://publishingperspectives.com/2014/08/why-we-need-independent-bookstores-more-than-ever/ ("[B]ookstore employees talk to their regular customers, get to know their tastes, and recommend titles that Amazon might never deem appropriate. [Bookstores] are the most valuable participants in the crucial search for word-of-mouth buzz, championing our titles on the frontline of literary engagement.").

published e-books, which consumers could read on Amazon's e-reader, the Kindle. For self-published e-books sold on Amazon, authors received only a 35% royalty on each sale even though Amazon did not provide an advance or otherwise develop or edit these e-books.[7] In light of Amazon's dominant market position, self-published authors had little choice but to accept Amazon's terms.

For traditionally published book titles, Amazon purchased e-books from publishers at wholesale and then set retail prices. Pet. App. 8a. For certain new releases and *New York Times* bestsellers, Amazon set retail prices at *less than* the wholesale prices it paid for these e-books.[8] Pet. App. 8a–9a, 95a. Publishers were concerned that this below-cost pricing would diminish the value of all books to consumers and threaten the viability of the brick-and-mortar bookstores on which publishers depend to sell and display print books. Pet. App. 131a. They also feared that Amazon would leverage its market share to demand lower wholesale prices from publishers for e-books, which would affect the supply of book titles and overall output. *Id.*

Many authors shared these concerns. It takes a significant investment of time and resources to write books, particularly nonfiction books that

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7 David Carnoy, *Amazon ups author royalty for Kindle, matching Apple*, CNET (Jan. 20, 2010), http://www.cnet.com/news/amazon-ups-author-royalty-for-kindle-matching-apple/.

8 Amazon priced over 80% of e-book versions of hardcover new releases below their wholesale cost in 2009. Apple CA App. A1887 ¶ 10.

require substantial research and travel, as well as literary fiction, which can take years to write. If Amazon, which had a history of squeezing publishers for more favorable terms,[9] used its power to squeeze down wholesale prices, then authors would no longer be able to write as many books. While lower wholesale prices may increase sales for certain books, as Dr. Gilbert, the government's own expert, explained in a recent article, they also have the effect of reducing book sales by *decreasing the number of overall book titles*.[10] When wholesale prices fall, publishers earn less, leaving less money for them to offer authors and spend on book promotion, which leads to a decrease in the number of book titles available to consumers.[11] When determining the effects on output and consumer welfare from lower wholesale prices, any positive effect due to increased sales for books that still get authored has to be weighed against the negative effect from a decrease in the number of titles.[12] In other words, pricing books at $9.99 is not a panacea for consumers or authors, as it can lead to fewer books titled and sold, and any proper analysis of the effects on consumer welfare and output must account for this effect.

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9 Packer, *supra* note 6.

10 Richard J. Gilbert, *E-Books: A Tale of Digital Disruption*, 29(3) J.of Econ. Persp. 173–74 (2015).

11 *Id.* at 173; *see also* William Petrocelli, *The Justice Department Jumps Into Amazon's Pocket,* Huffington Post (Apr. 24, 2012), http://www.huffingtonpost.com/william-petrocelli/doj-apple-publishing-lawsuit_b_1444319.html ("A low e-book price won't do the reading public any good if that pricing structure causes authors to get discouraged from writing the books that people want to read.").

12 Gilbert, *supra* note 11, at 173–174.

From the authors' perspective, consumer welfare also should take into account the *types* of titles being cut. Some works cost more to create than others. Authors feared that if wholesale prices declined to a uniform figure across the board, publishers would invest only in low-risk books with broad appeal, and not in literary fiction or research intensive non-fiction titles, which tend to have a small, but committed, audience and are especially important to intellectual discourse and free expression.[13] Nor could authors typically afford to self-publish these books without publisher support in the form of advances during the lengthy writing process and marketing and promotional expertise.[14]

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13 *See* Scott Turow, *Apple Antitrust Suit Would Aid Amazon: Scott Turow,* Bloomberg (Mar. 21, 2012), http://www.bloombergview.com/articles/2012-03-21/apple-antitrust-suit-would-aid-amazon-book-monopoly (if the book industry were to return to the "status quo before Apple's agency-model breakthrough" readers would suffer because they would "see the diversity of titles and authors diminish while leading titles get more expensive"); Turow, *supra* note 5.

14 Self-published books tend to be "a particular kind of book . . . known as 'genre' books: thrillers, mysteries, horror stories, romances." Gessen, *supra* note 5. For books that "t[ake] a decade to write," self-publishing is not an option. *Id.* This is partly because the revenue for self-published books tends to be low. *See* Packer, *supra* note 6 (more than 50% of all self-published authors make less than $500); Dana B. Weinberg, *Investigating Author-Publisher Dynamics: 2015 Author Survey Results*, Digital Book World (Jan. 22 2015), http://www.digitalbookworld.com/2015/investigating-author-publisher-dynamics-results-from-the-2015-author-survey/ (authors published by advance-paying publishers "earn[ed] substantially more" on their most recent book than authors published by other means). In addition, self-published authors must shoulder the entire financial risk of writing a book and do

Furthermore, a market that favors low-risk books disproportionately harms midlist and emerging authors. While blockbuster authors can survive on brand recognition alone, midlist and emerging authors' discovery often hinges on the investments of publishers and the support of brick-and-mortar bookstores. Thus, Amazon's dominant market position also was a threat to the variety of e-book titles.

The sale of e-books by a dominant retailer at below the cost paid to publishers also threatened brick-and-mortar retailers, and the publishers who depended on them to distribute the majority of books, because it "cannibalized" hardcover sales. Pet. App. 95a, 131a.[15] Further, for the most part, these retailers were delayed in entering the e-book market because the below-cost pricing deterred them from investing in the technology necessary to compete in this market and they could not afford to lose money on each e-book sold. Pet. App. 95a. Thus, the "loss-leader" strategy also deterred potential competitors from gaining traction in developing a distribution model that could provide a wider range and supply of e-books. Further, the reduction in the breadth and variety of content that authors anticipated would adversely impact bookstores as well, as bookstores depend on a rich supply of diverse content in order to satisfy their consumers' varying tastes.

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all marketing and book design themselves even though they often have no expertise in these areas.

[15] *See also* Packer, *supra* note 6 (bookstores "glimpsed their possible doom").

C. AFTER APPLE ENTERED THE E-BOOK MARKET, COMPETITION INCREASED, WHICH BENEFITTED AUTHORS, RETAILERS, AND CONSUMERS

Apple entered the e-book market in April 2010 with the launch of the iPad, a tablet device on which consumers could read e-books purchased from Apple's iBookstore app. Pet. App. 130a, 142a. Whatever else may be said about how Apple entered the market, one thing is clear: Following its entry the industry became more competitive, with upstream and downstream benefits to consumers.

1. E-Book Retail Prices Decreased And Output Increased.

After Apple's entry into the e-book market, although average retail prices for e-books published by the Publisher Defendants increased, Pet. App. 66a–67a, average retail prices across the entire trade e-book market, meaning the market for books sold to the general public, which is the relevant market in this case, decreased, Pet. App. 67a. Once Apple opened the iBookstore, it offered agency pricing to all publishers and authors. Control over retail prices for e-books thus shifted from one company to thousands of companies and individuals, including self-publishers, independent publishers, and traditional publishers, who competed on retail price and drove average retail prices down. Apple's expert found, and the government's experts did not dispute, that the average retail price in the trade e-book market fell, from $7.97 in the two years before the agency model was adopted to $7.34 in the two years after Apple entered the e-book market.[16] Similarly, Barnes & Noble found in an independent analysis that average e-book retail price weighted by units sold decreased.[17]

As would be expected, trade e-book sales increased during this period. Pet. App. 67a. According to Nielsen Book and data from PubTrack Digital, which collects e-book sales data,[18] e-book sales in the United States grew from just over 10 million sales in the first quarter of 2010 to over 40 million sales in the first quarter of 2012.[19] This growth was due in part to the increase in self-publishing, the increase in e-book titles, and the improvements in e-book technology that, as discussed below, resulted from the increase in competition in the e-book distribution market.

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16 Apple CA App. A1890 ¶18, A1891 ¶ 20; *see also id.* A1885–86 ¶¶ 4–5, A2763.

17 Comments of Barnes & Noble, Inc. On The Proposed Final J. at 11–12, *U.S. v. Apple, Inc.*, 889 F. Supp. 2d 623 (S.D.N.Y. 2012) (ATC-0097). http://www.justice.gov/sites/default/files/atr/legacy/2012/11/30/atc-0097.pdf.

18 Nielsen PubTrack, http://www.nielsenbookscan.co.uk/controller.php?page=1152. Apple's expert found an even greater increase in sales from about 18 million in the second quarter of 2010 to 100 million in the first quarter of 2012. Apple CA App. A1893–94 ¶ 30.

19 Jonathan Nowel, *The Changing Mix of What Sells in Print: How Eboooks have Changed the Print Book Marketplace*, Nielsen, Slide 6 (Jan. 2015), http://www.slideshare.net/PublishersLaunch/the-changing-mix-of-what-sells-in-print-jonathan-nowell-nielsen-book.

2. The Number Of E-Book Titles Increased.

It cannot be overemphasized that the number of e-book *titles* increased exponentially following Apple's entry into the e-book market and the introduction of the agency model.[20] This increase is due in part to the fact that Apple itself converted more than 500,000 titles to EPUB format on behalf of publishers.[21] At the same time, Barnes & Noble continued to convert numerous titles to EPUB format. The improvement in self-publishing terms, which resulted from Apple's entry into the e-book market and the increased competition among booksellers, also contributed to the increase in e-book titles, as incentives for authors to create e-books and other copyrighted works improved.

Prior to Apple entering the e-book market, Amazon offered self-published authors a 35% royalty on sales of their e-books.[22] On January 20, 2010, Amazon announced that it would offer a 70% royalty to self-published authors who agreed to sell their books on Amazon at a retail prices between $2.99 and $9.99, effective June 2010. Pet. App. 175a.[23] This decision appeared to be a direct response to

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[20] Apple CA App. A1894 ¶ 32, A1185.

[21] *Id.* A1533 ¶ 24.

[22] Carnoy, *supra* note 8.

[23] *See also* Press Release, Amazon Announces New 70 Percent Royalty Option for Kindle Digital Text Platform, Enabling Authors and Publishers to Earn More Royalties from Every Kindle Books Sold (Jan. 30, 2010), http://phx.corporate-ir.net/phoenix.zhtml?ID=1376977&c=176060&p=irol-newsArticle.

Apple's likely entry into the e-book market and Amazon's belief that Apple would offer publishers a 70% royalty when it entered.[24]

Moreover, once Apple entered the e-book market, self-published authors had choices about where to distribute their books, and Apple, Amazon, and others had to compete for their e-book titles. For example, Apple offers many favorable terms to self-publishers that Amazon does not, including a 70% royalty on e-books regardless of exclusivity or the retail price for the e-book and no distribution fees.[25] These terms benefit authors and motivate them to write more e-book titles, which benefits consumers who desire a broad variety of e-book content. Barnes & Noble also began offering a self-publishing platform, thus expanding the options for self-published authors.

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[24] *See, e.g.*, Carnoy, *supra* note 8 (Amazon's new pricing is "not coincidentally" the same as that which Apple offers developers selling apps); Katherine Noyes, *Amazon Fattens E-Book Royalty Checks in Preemptive Strike*, E-Commerce Times (Jan. 20, 2010), http://www.ecommercetimes.com/story/69151.html (new royalty rate a "preemptive strike" against Apple); Matthew Shaer, *New Amazon royalty terms could be tied to release of Apple Tablet*, The Christian Sci. Monitor (Jan. 20, 2010), http://www.csmonitor.com/Technology/Horizons/2010/0120/New-Amazon-royalty-terms-could-be-tied-to-release-of-Apple-Tablet (royalty increase "appears timed to coincide with the unveiling of the Apple Tablet").

[25] Giacomo Giammatteo, *ALLi Watchdog: Amazon vs. Apple*, ALLI (Feb. 5, 2015), http://www.selfpublishingadvice.org/alli-watchdog-amazon-vs-apple/ (comparing Amazon and Apple self-publishing terms and concluding Apple's are more favorable).

3. Competition Among E-Book Retailers Increased.

Apple's entry into the e-book market and the adoption of the agency model had procompetitive effects on e-book distribution. Following Apple's entry into the e-book market, Amazon's market share dropped from about 90% to about 60%. Pet. App. 93a, 99a. Barnes & Noble and Apple cut into Amazon's market share considerably, Apple with the introduction of its iBooks app and Barnes & Noble through the increased viability of its Nook. Barnes & Noble, which also shifted to the agency model, Pet. App. 30a, continued to develop and promote the Nook e-reader and e-bookstore, something that would not have been possible had Barnes & Noble continued selling e-books under the wholesale model. Moreover, independent e-retailers entered the e-book market. As of November 2015, approximately 500 ABA members are capable of selling e-books through ABA's partnership with the e-reading service Kobo, including approximately 400 bookstores using ABA's IndieCommerce subsidiary to sell e-books.

This expansion in the number of retailers selling e-books benefitted consumers, who had more points of access for learning about books and authors. It also led retailers to compete for customers by improving customer experience. For example, Barnes & Noble began offering a Read-In-Store program, which allowed Nook owners free access to e-books if they read them in Barnes & Noble's stores.

Retail competition also spurred innovation as e-book retailers competed for consumers and content.

For example, in late 2010, Barnes & Noble and Apple utilized technology that made it possible to create fixed format e-books, meaning e-books in which the text and graphics appear at specific locations on the "page."[26] This is essential for visually focused books, such as cookbooks and travel books, which, previously, could not be sold in e-book format without sacrificing quality. In addition, in 2012, Apple released iBooks Author, a free software program that made it easier for all authors to write and publish e-books. Barnes & Noble introduced a lending program to cultivate new customers and allow e-book owners to use their e-books in much the same way as they would use their physical books. These technological innovations, which would not have occurred without the agency model and with Amazon dominating distribution, facilitated the expansion in e-book titles, diversity in e-book genres, and increase in e-book output that are the touchstones of a competitive literary market. These developments should have been considered as procompetitive effects of Apple's conduct in entering the e-book retail market; the Second Circuit's disregard of such considerations was error.

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[26] *See* E-Books Architect, http://ebookarchitects.com/learn-about-ebooks/non-fiction-fixed-layout/ (ePub2 format did not have a fixed layout option, but Apple "developed a solution"); *Evolution of Fixed-Layout Epub Format* (Interactive Timeline), Tiki-Toki, http://www.tiki-toki.com/timeline/entry/49169/Evolution-of-fixed-layout-ePub-format/#vars!panel=438747! (Barnes & Noble offered the first e-reader that supported a fixed layout e-book; Apple was the first to allow publishers to make e-books with a fixed layout); Apple CA App. A1539–40 ¶¶ 32–33.

III. THE CONDUCT CONDEMNED AS *PER SE* UNLAWFUL PROMOTED BROAD ACCESS TO CULTURE AND COMPETITION IN THE MARKETPLACE OF IDEAS

The United States has a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Indeed, the First Amendment exists to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail" and to protect the "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences"—the very ideas and experiences that consumers can find in books. *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969). "[R]ight conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *N.Y. Times*, 376 U.S. at 270 (citation omitted).

"When it comes to books, [competition] is about ensuring access to ideas."[27] Amazon's dominant market position, however, threatened the free exchange of ideas which this country values so highly. With a 90% market share, nearly every customer who wanted to purchase an e-book had to do so through Amazon. Amazon could exercise this power to suppress specific publishers, authors, or messages with which it disagreed, with impunity. It also could steer the culture toward the ideas it

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[27] Jordan Weissman, *The Justice Department Just Made Jeff Bezos Dictator-for-Life,* The Atlantic, Apr. 12, 2012.

valued.[28] Amazon controlled what e-books were promoted on its home page, what e-books were recommended to consumers, and what books appeared at the top of a consumer's search results when she searched for e-books on the Amazon.com website. Moreover, Amazon could, and in fact did, cut off access to certain e-books, leaving many consumers with no practical way to purchase them. *See, e.g.*, Pet. App. 192a (when Macmillan approached Amazon about switching to the agency model, Amazon removed the "buy" button for Macmillan e-books and print books from the Amazon.com website).

Fortunately, when Apple and others entered the e-book market, Amazon's control over culture decreased. E-books not sold on Amazon were available elsewhere. E-books not marketed by Amazon were marketed elsewhere. While the reduction in Amazon's market share from 90% to about 60% did not resolve all of the book industry's concerns about Amazon's market dominance, the fact

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[28] Indeed, even after Apple entered the e-book market and reduced Amazon's market share, many cultural commentators and economists expressed concern over Amazon's cultural influence. *E.g.*, Jeremy Greenfield, *How the Amazon-Hachette Fight Could Shape the Future of Ideas*, The Atlantic (May 28, 2014), http://www.theatlantic.com/business/archive/2014/05/how-the-amazon-hachette-fight-could-shape-the-future-of-ideas/371756/; Paul Krugman, *Amazon's Monopsony is not O.K.*, The New York Times (Oct. 19, 2014), http://www.nytimes.com/2014/10/20/opinion/paul-krugman-amazons-monopsony-is-not-ok.html ("By putting the squeeze on publishers, Amazon is ultimately hurting authors and readers. But there's also the question of undue influence.").

remains that the cultural conversation surrounding e-books is no longer in the hands of a single company. The increase in competition among retailers that was facilitated by the agency model and Apple's entry into the e-book market is a significant consideration, and should not be overlooked.

A 2014 contract dispute between Amazon and publisher Hachette regarding e-book pricing is particularly instructive. When contract negotiations reached a standstill, Amazon removed the pre-order button from the point of purchase page for Hachette's book titles.[29] This was disastrous for authors, as pre-orders are included in a book's first week of sales and thus play a significant role in books becoming bestsellers. Amazon, which controlled about two-thirds of all on-line sales for print books, also delayed shipments for many Hachette print books, and when consumers searched Amazon.com for Hachette titles, Amazon "directed users to 'Similar items at a lower price.'"[30]

This is part and parcel of Amazon's prior conduct in negotiations with publishers. For example, it was well-publicized that, in 2004, Amazon removed the "buy" button from the point of purchase page for print books published by the small publishing company Melville House when it refused to pay Amazon co-op fees in order to have its books

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29 Elizabeth Weise, *Amazon-Hachette: The war of the button*, USA Today (Nov. 14, 2014), http://www.usatoday.com/story/tech/2014/11/13/amazon-hachette-preorder-publishing/18995643/.

30 Gessen, *supra* note 5.

promoted on Amazon.com and publicly complained about Amazon's demand.[31] Similarly, in 2008, Amazon disabled the "buy" button for books sold by several small publishers who refused to use Amazon's print-on-demand service to print their books rather than a printing service of their choice.[32] Many others have folded in the face of threats by Amazon.

Amazon's decision to direct consumers away from Hachette's books in 2014 was harmful. It led some authors to lose about 50 to 90% of their sales.[33] Consumers interested in Hachette's books had a more difficult time purchasing them. Imagine, however, if Amazon had adopted these tactics in 2009, when it controlled 90% of the e-book market. The damage would have been far greater. Nonetheless, the Second Circuit's panel majority ignored the positive impact Apple's entry into the e-book market and promotion of agency pricing had on ensuring the robust discourse that is vital to democracy.

CONCLUSION

Increased competition among authors to write e-books, publishers to price them, and retailers to

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[31] Packer, *supra* note 6.

[32] Doreen Carvajal, *Small Publishers Feel Power of Amazon's "Buy" Button*, N.Y. Times (June 16, 2008), http://www.nytimes.com/2008/06/16/business/media/16amazon.html.

[33] Letter from Authors United to Amazon.com, Inc. board of directors (Sept. 19, 2014), http://www.authorsunited.net/amazonboardletterprivate/.

sell them has been good for readers and good for American democracy, which is rooted in broad access to culture and a vibrant marketplace of ideas. Because the Second Circuit majority panel's decision diminishes, rather than enhances, competition in the market for e-books, this Court should grant Apple's petition for a writ of certiorari.

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Dale M. Cendali
Counsel of Record
Claudia Ray
Mary Mazzello
Kirkland & Ellis LLP
601 Lexington Ave.
New York, NY 10022
(212) 446-4846
dale.cendali@kirkland.com

Michael S. Becker
John C. O'Quinn
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington D.C. 20005

Counsel for The Authors Guild, Inc., Authors United, American Booksellers Association, and Barnes & Noble

Deanne M. Ottaviano
Arent Fox LLP
1717 K Street, NW
Washington, DC 20006-5344

Counsel for American Booksellers Association

Jan F. Constantine
Mary Rasenberger
The Authors Guild
31 East 32nd Street, 7th Floor
New York, NY 10016

Counsel for The Authors Guild, Inc.

Bradley A. Feuer
Vice President & General Counsel
Barnes & Noble, Inc.
122 Fifth Ave
New York, NY 10011

Counsel for Barnes & Noble