No. 15-565

In the Supreme Court of the United States

APPLE INC., PETITIONER,
v.
STATE OF TEXAS, ET AL.

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

BRIEF IN OPPOSITION FOR THE PLAINTIFF STATES, DISTRICT OF COLUMBIA, AND COMMONWEALTH OF PUERTO RICO

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QUESTION PRESENTED

Whether petitioner was correctly held liable under § 1 of the Sherman Act for orchestrating and participating in a per se illegal price-fixing conspiracy among horizontal competitors.

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INTRODUCTION

Beginning in late 2009, Apple engineered and implemented a conspiracy with five of the six largest book publishers in the country to take control of and raise industry-wide retail prices for electronic books (ebooks). The conspiracy was a success, and consumers who purchased ebooks subject to conspiracy pricing paid more than they would have without the price-fixing agreement. Apple's role in the conspiracy was pivotal, and its conduct a necessary ingredient to the conspiracy's realization and the resulting harm to consumers. The district court's and court of appeals' decisions are intensely fact-bound. Because the narrative advanced by Apple here and the dissent below are "not spun from any factual findings of the district court," Pet. App. 5a, this brief sets forth in some detail the facts as found based on the evidence presented at trial.

STATEMENT

1. Before Apple orchestrated the conspiracy at issue here, ebooks were sold under a "wholesale" model. Publishers sold ebooks to retailers for a certain discount below a list price, and retailers were free to sell these ebooks to consumers at whatever price they saw fit. Pet. App. 7a-8a. Amazon, the leading ebook retailer, sold many new releases and New York Times bestsellers at $9.99. Pet. App. 8a-9a. For some of those ebooks, that $9.99 price was equal to or slightly below the wholesale cost paid by Amazon. Pet. App. 9a, 130a. Amazon used certain popular ebooks as loss leaders to encourage consumers to adopt its Kindle e-reader and purchase those and other ebooks from its online store. Pet. App. 9a. Amazon therefore took a "small loss on a small percentage of its sales designed to encourage consumers to adopt [its] new technology." Pet. App. 65a. Other retailers, such as Barnes & Noble, often matched Amazon's ebook prices, Pet. App. 129a-130a, and at least one other technology business, Google, was poised to enter the market on the wholesale model prior to Apple's price-fixing conspiracy with the publishers. Pet. App. 9a.

The "big six" book publishers in the country were Hachette, HarperCollins, Macmillan, Penguin, Simon & Schuster, and Random House. Pet. App. 7a. They were adamantly opposed to Amazon's pricing strategy. Pet. App. 9a. Their CEOs and other top executives believed that sustained pricing of ebooks at $9.99 would result in readers' perception of that price as "standard," and lead to a decline in the perceived value of not just ebooks but also more expensive hardcover books. Pet. App. 9a-10a.

The publishers also feared that Amazon might eventually demand to pay lower wholesale prices or provide a viable platform for authors to publish directly with Amazon, thus cutting the traditional publishers out of the production chain entirely. Pet. App. 10a. The competing publishers often discussed their concerns with each other, including at regular "CEO dinners." Pet. App. 11a. They knew that the "Amazon problem" was not one that could be tackled without collective action; in internal documents, the publishers made observations such as that "[i]t will not be possible for any individual publisher to mount an effective response, because of both the resources necessary and the risk of retribution, so the industry needs to develop a common strategy." Pet. App. 10a.

The publishers' most serious attempt at pressuring Amazon to abandon its $9.99 pricing before their agreement with Apple involved "windowing"—that is, withholding certain new releases in ebook form until the hardcover had been available for a specified period of time. Pet. App. 11a-12a. While the publishers coordinated their windowing efforts, ultimately only a handful of titles were windowed, and there was no evidence that the practice would have become a widespread phenomenon. Pet. App. 11a, 235a-236a.

2. Apple devised a plan to eliminate price competition and begin selling ebooks for a significantly greater price. While the publishers struggled to find a way to force Amazon to raise consumer prices, Apple was considering establishing its own retail ebook portal, called the iBookstore. Apple's late CEO, Steve Jobs, entrusted the project to Eddy Cue, a senior executive responsible

for many of Apple's negotiations with content providers. Pet. App. 13a. Apple was planning to release its new tablet device, the iPad, and the launch event was scheduled for late January 2010. Pet. App. 12a. Apple thought that announcing the iBookstore then would promote consumer awareness of it, but the iPad undisputedly would have been released regardless of whether the iBookstore came to fruition. Pet. App. 13a.

Apple knew the publishers were frustrated with the low prices at which Amazon sold ebooks. Pet. App. 14a. So Apple set out to develop an iBookstore plan that would appeal to the publishers' desire to eliminate Amazon's retail ebook pricing. Pet. App. 14a.

Cue's team, which included iTunes Director Keith Moerer and in-house attorney Kevin Saul, flew to New York and met with each of the six major publishers on December 15 and 16, 2009. Pet. App. 13a-14a. Cue made sure that each of the publishers knew that Apple was meeting with competing publishers as well, that the timeline for working out a deal was short, and that unless all or most of the major publishers signed on, the iBookstore would not launch. Pet. App. 14a-15a. At those initial meetings, the publishers' executives were vocal in expressing their disdain for, and desire to eliminate, Amazon's $9.99 pricing. Pet. App. 14a-15a, 145a-147a. Cue reported to Jobs that Amazon's $9.99 pricing was "the biggest issue" for the publishers. Pet. App. 14a.

Apple, for its part, made abundantly clear that it had no interest in competing with Amazon on price. Apple's team, in those initial meetings, suggested that ebooks should be priced at $12.99 or $14.99. Pet. App.

15a. Apple was not even willing to sell ebooks if Amazon retained its $9.99 price point; Apple "could not tolerate a market where the product is sold significantly more cheaply elsewhere." Pet. App. 15a. While the details remained to be worked out, the publishers expressed their satisfaction with the meetings internally and there was a concurrent spike in the frequency of communications among the competing CEOs. Pet. App. 15a-16a.

Apple's willingness to sell ebooks for more than the prevailing market price could not, under the existing wholesale model, address what the publishers perceived as a problem. Nor was Apple willing to position itself as a higher-priced alternative to the market leader and rely on the merits of its technology to justify the difference. Rather, Apple knew that it must "eliminate all retail price competition" to guarantee that the higher prices it had floated to the publishers would be "competitive" with what other retailers would offer. Pet. App. 18a (quoting Pet. App. 151a); *see* Pet. App. 165a n.26 (district court's explanation that use of the word "competitive" to describe Apple's vision was particularly inapt, as it meant "the eradication of retail price competition").

Apple seized on a suggestion presented by two of the publishers in the initial meetings. HarperCollins and Hachette had suggested the "agency model" as an alternative to wholesale. Under that model, a business selling ebooks to consumers is an agent of the ebook publisher. Thus, the publisher, rather than a retailer, would set the sales prices for ebooks sold under this model. The "agents" in this model (the retailers) are compensated with a percentage of sales revenue, as a

commission, while the publishers retain the remaining proceeds from sales. Pet. App. 16a-17a.

The publishers would not be able to eliminate Amazon's ebook pricing simply by contracting with Apple under an agency model. The publishers had to unite to force all retailers, including Amazon, to switch to an agency model. Apple and the publishers knew that, if they could force that switch, the publishers would raise and maintain uniform retail prices and Apple would be able to avoid having to compete with Amazon's existing ebook price. Pet. App. 17a-18a, 127a.

3. Apple embarked on a mission to impose the agency model for ebook sales on an industry-wide basis. Cue began by approaching three of the four publishers with whom he had not discussed the agency model at the initial round of meetings. (Cue did not initially approach Penguin, based on his perception that Penguin was a "follower" and unlikely to play a significant role early in the scheme. Pet. App. 151a-152a.) Cue expressly pitched the agency model as a way to "solve [the] Amazon issue," by eliminating Amazon's ability to set retail prices and lodging that decision with the publishers. Pet. App. 18a-19a. Cue sent term sheets to each of the six publishers on January 4 and 5, 2010. Pet. App. 18a. These term sheets included what were labeled as price "caps" applicable to certain categories of ebooks (categorized according to their status as new release or bestseller and their hardcover list prices). Pet. App. 18a-19a, 155a-156a. Apple and the publishers knew, however, that these caps would in fact become the standard prices across all retailers. "Apple's pitch to the Publishers was—from beginning to end—a vision

for a new industry-wide price schedule." Pet. App. 18a n.4 (quoting Pet. App. 154a n.19).

Acknowledging that the switch to the agency model could only accomplish Apple's and the publishers' common goals if it were implemented throughout the entire industry, Cue included in the term sheets the requirement that "to sell ebooks at realistic prices . . . all [other] resellers of new titles need to be in [the] agency model." Pet. App. 19a. Apple informed the publishers that it would move ahead only if "a critical mass" signed on. Pet. App. 15a. Apple became concerned that it could not enforce an explicit contractual requirement that the publishers convert all of their retailers to agency. So Apple developed an "elegant" (Pet. App. 158a) means to ensure each publisher abided by that plan: a "most favored nation" (MFN) clause requiring each publisher to set an ebook's iBookstore price at no more than the lowest price at which the same ebook was offered to consumers by any other retailer, including retailers like Amazon on the wholesale model. Pet. App. 19a.

The MFN clause served to "stiffen[] the spines" of publishers, by ensuring that all publishers joining Apple's plan would be presenting Amazon with a united front. Pet. App. 21a. All parties understood that the clause would force publishers to move all of their retailers, including Amazon, to the agency model. Pet. App. 20a-21a. To do otherwise would be to sacrifice short-term revenue under Apple's pricing caps without a mechanism for seeking long-term stability by fixing all retail ebook prices. Pet. App. 20a. As Cue explained it, "any decent MFN forces the model." Pet. App. 21a. Cue even intervened when a publisher CEO believed he

could proceed with Apple without switching Amazon to an agency model. Pet. App. 24a, 177a-178a.

Apple and the publishers then focused on the contractual price "caps" that were to become the new industry-wide price schedule for ebooks. Pet. App. 167a. To illustrate how this new proposal would raise ebook prices across the board, Apple's Moerer sent the publishers substantially identical emails with a table listing bestselling books from all six major publishers. The table showed then-current hardcover list prices, hardcover and ebook prices at Amazon, and ebook prices at Barnes & Noble. For the publisher to whom each email was sent, Moerer also included the proposed Apple ebook price, which was, in all cases, $12.99 or $14.99—higher than the price at Amazon or Barnes & Noble. Pet. App. 167a-169a.

Apple refused to budge from its insistence on a 30% agency commission for any ebook sales through its iBookstore, and the publishers recognized that under the switch to agency this refusal would mean that they would obtain less profit on every ebook sale as compared to the existing wholesale model. Pet. App. 166a. The publishers were not satisfied with the price schedule proposed by Apple. Several of them requested that Apple raise the prices. On January 16, Cue emailed the publishers with a revised proposal. While not quite as high as the prices the publishers would have preferred, these higher prices provided, according to Cue, the "best chance for publishers to challenge the 9.99 price point." Pet. App. 23a, 49a, 161a. The publishers ultimately agreed. Before suggesting these prices to the publishers, Cue received the blessing of Jobs, who ex-

pressly conditioned the offer of the higher tiers on the publishers all moving Amazon to the agency model. Pet. App. 22a.

Even after settling on a price schedule, the publishers still faced the prospect of delivering an ultimatum to Amazon: switch to agency, or face a withholding of new ebooks. Pet. App. 27a-28a, 173a, 176a-177a. The publishers knew that none of them, alone, could successfully enforce such a threat because they would lose ebook sales that other publishers would not. Apple also knew this. Cue acknowledged that it was his role to shepherd the publishers across the finish line by assuring them that they were acting jointly and that the likelihood of being challenged by Amazon was therefore less. In his words, he needed to convince them "that they weren't going to be alone, so that [he] would take the fear awa[y] of the Amazon retribution that they were all afraid of." Pet. App. 23a. The publishers monitored Cue to make sure he was doing that job. For example, Carolyn Reidy of Simon & Schuster requested (on January 21, 2010, Apple's initial deadline for publishers to sign agency contracts) "an update on your progress in herding us cats." Pet. App. 26a n.7.

With the iPad launch event fast approaching, certain publishers were still hesitant to commit to such a drastic change in the widely accepted wholesale model used by the industry. Cue continually reassured them that they acted in concert and encouraged them to speak with each other. Pet. App. 24a-26a. In the case of Harper Collins, the last of the big six publishers to sign with Apple, Cue requested help from above. He asked Jobs to contact James Murdoch of News Corp, which

owned HarperCollins, to convince him that, because other publishers were on board, switching to agency would be "no leap of faith." Pet. App. 25a, 183a.

Jobs agreed, calling and emailing Murdoch multiple times, informing him that four of HarperCollins's competitors were on board and entreating him to "[t]hrow in with [A]pple and see if we can all make a go of this to create a real mainstream ebooks market at $12.99 and $14.99"—rather than the alternative to "[k]eep going with Amazon at $9.99." Pet. App. 186a. After HarperCollins's CEO made one last round of phone calls to other publishers to confirm that they had signed on as Cue and Jobs had said, HarperCollins signed its agreement. Pet. App. 26a, 187a. Ultimately, five of the big six publishers joined the endeavor, with only Random House abstaining. Pet. App. 27a.

4. The iBookstore was introduced at the iPad launch event on January 27, 2010. Pet. App. 27a. Jobs demonstrated the feature by purchasing an ebook onstage. The book he purchased, *True Compass* by Senator Edward Kennedy, was listed at $14.99.

After the demo, a reporter asked Jobs why anyone would buy that ebook for $14.99 when it was currently selling for $9.99 on Amazon. Pet. App. 27a, 190a. Jobs' response (captured on video) was telling. He replied, "that won't be the case." Pet. App. 190a. The reporter asked him to explain: "You mean you won't be 14.99 or they won't be 9.99?" Pet. App. 190a. "Jobs paused, and with a knowing nod responded, 'The price will be the same.'" Pet. App. 190a.

5. The publishers then confronted Amazon with their concerted position. Macmillan CEO John Sargent

first approached Amazon with the demand to move to agency, explaining in an email that he "had no doubt" that the other conspiring publishers would follow. Pet. App. 193a. They did so, recognizing "that any one of them acting alone would not be able to compel Amazon to move to agency." Pet. App. 191a. The publishers communicated with each other and with Apple about their negotiations, Pet. App. 29a-30a, 194a-195a, and both Cue and Jobs knew that the publishers would all make the same demand to Amazon. Pet. App. 189a n.47. Amazon realized that it "could not prevail in [its] position [opposing agency] against five of the Big Six." Pet. App. 29a; *see* Pet. App. 192a-194a. It agreed to the publishers' demands to move to the agency model, Pet. App. 29a-30a; Pet. App. 195a, and other retailers too were quickly moved to the agency model, some more willingly than others. Pet. App. 30a n.12, 230a.

6. With all retailers moved to agency, prices for the conspiring publishers' ebooks increased. As intended, the "price caps" in the Apple agency contracts became the industry standard prices for bestsellers and new releases. Pet. App. 197a-198a. Prices of other ebooks went up too. Pet. App. 198a-199a. Across the entirety of the publisher defendants' catalogs, the average price increase was 18.6%, while prices for ebooks published by non-conspiring publishers held steady. Pet. App. 66a.[1] Beyond the increase in prices, ebook sellers were also denied the ability to engage in previously common

[1] Over the first year after the iBookstore became available, the conspiring publishers' weighted average prices rose 40.4% for bestsellers and 24.2% for new releases. Pet. App. 31a-32a.

promotions that had benefited consumers, such as "buy one get one free" offers or one-day discounts on a particular genre. Pet. App. 201a. The conspiracy harmed consumers who were forced to purchase books at supracompetitive prices, as well as consumers who could not afford to purchase ebooks they otherwise would have purchased. Pet. App. 201a.

7. Thirty-one States, the District of Columbia, and the Commonwealth of Puerto Rico (plaintiff States, for brevity) and the United States alleged in parallel actions that Apple and the publisher defendants violated § 1 of the Sherman Act. The United States sought injunctive relief. The plaintiff States sought injunctive relief and damages for harm to their residents.

All five publisher defendants settled the claims before trial. The district court then held a three-week bench trial to determine Apple's liability on plaintiffs' claims and any appropriate injunctive relief. The district court issued an opinion and order, which included over 100 pages of fact findings, some of which are described above. Among other things, the court found that Apple "played a central role in facilitating and executing" the conspiracy among the competing publishers. Pet. App. 126a.

Based on those findings, the court held Apple liable as a knowing participant in a per se unlawful horizontal price-fixing conspiracy. Pet. App. 219a. Because Apple contended that the rule of reason applied, the district court applied that rule in the alternative and held that the conspiracy violated the antitrust laws because of the competitive harm it caused and the complete lack of any countervailing procompetitive benefits. Pet. App. 219a.

Examining the alleged benefits that Apple proffered, such as the technical advances embodied in the iPad, the court found them to have been either entirely independent of the conspiracy, outside the relevant market, or both. Pet. App. 219a-220a, 247a.

8. The court of appeals affirmed. It held "that the district court's decision that Apple orchestrated a horizontal conspiracy among the Publisher Defendants to raise ebook prices is amply supported and well-reasoned, and that the agreement unreasonably restrained trade in violation of § 1 of the Sherman Act." Pet. App. 4a. The court of appeals noted that this Court has repeatedly held that "horizontal agreements with the purpose and effect of raising prices are *per se* unreasonable because they pose a 'threat to the central nervous system of the economy.'" Pet. App. 57a (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940)).

The court of appeals applied this Court's rulings that a conspirator is liable for orchestrating a per se illegal horizontal conspiracy, even if the orchestrator was a supplier to or buyer from the conspiring horizontal competitors. Pet. App. 58a-62a. Apple claimed that this Court held otherwise in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). But the Second Circuit noted that *Leegin* made clear that it addressed only the lawfulness of a vertical agreement and not the separate claim that the manufacturer there "participated in an unlawful horizontal cartel with competing retailers." Pet. App. 59a (citing *Leegin*, 551 U.S. at 907-08).

Judge Livingston, writing only for herself, also agreed with the district court's alternative, rule-of-reason holding. She explained that, "given the clear applicability of the *per se* rule in this context, the analysis here is largely offered in response to the dissent." Pet. App. 82a. Applying the rule of reason to analyze the effects of the agreement between Apple and the publishers, Judge Livingston concluded that the agreement was still properly held unlawful. Pet. App. 69a-82a.

Judge Lohier wrote separately, noting that the rule of per se illegality "clearly applies to the central agreement in this case." Pet. App. 90a. Judge Lohier then addressed the possible "surface appeal" of Apple's rationalization that its scheme helped challenge Amazon's market dominance. Pet. App. 91a. He explained: "It cannot have been lawful for Apple to respond to a competitor's dominant market power by helping rival corporations (the publishers) fix prices, as the District Court found happened here." Pet. App. 91a.

Judge Jacobs dissented. He argued that, because Apple was not a competing publisher itself and instead sold the publishers' ebooks to consumers (albeit under an "agency" relationship with the publishers), Apple could not be held liable for what he acknowledged as its "participation in and facilitation of a horizontal price-fixing conspiracy." Pet. App. 101a. He concluded that the rule of reason applies to Apple's "relationship" to the conspiracy, and that Apple's conduct was, on balance, procompetitive because it "deconcentrated" the retail market for ebooks, Pet. App. 112a, and "encourage[ed] innovation," Pet. App. 113a.

ARGUMENT

The Second Circuit's decision is consistent with this Court's decisions and does not conflict with the decision of any other circuit. Apple repeatedly argues that the basis of its liability is "vertical" conduct. But the evidence and fact findings confirm that Apple engaged in a price-fixing conspiracy among horizontal competitors. Apple successfully avoided price competition in the ebooks market by organizing and implementing a conspiracy with five major publishers to fix and raise ebook prices. Consumers who purchased the conspiring publishers' ebooks paid, on average, 18.6% more than they would have paid absent the conspiracy.

The district court and court of appeals correctly recognized the horizontal price-fixing conspiracy that Apple engineered and joined as a per se violation of § 1 of the Sherman Act. The per se rule is an approach to judging the reasonableness of a *conspiracy*, which is the relevant activity declared unlawful by the Sherman Act. 15 U.S.C. § 1. Every conspirator is liable for its role in an illegal conspiracy. *Id.* And the district court made voluminous findings of fact demonstrating Apple's orchestration of and joinder in the conspiracy here.

To answer the question Apple contends is presented by this case would require this Court to ignore or overturn many of the most significant findings. Apple's argument is premised on the incorrect assertion that its culpable conduct consisted of the execution of "vertical arrangements" that, as an unintended consequence, "supposedly facilitated horizontal collusion among the publishers." Pet. i. But Apple's role was not so limited. Apple knowingly participated in and orchestrated a hor-

izontal price-fixing conspiracy. Apple's motive is obvious: It stood to profit from the elimination of retail price competition in the ebook market. The district court found that Apple ensured that result by knowingly and intentionally engaging with the publishers in concerted action to strip ebook retailers of their ability to set retail prices and to collectively impose prices drastically higher than those that would have prevailed absent the conspiracy.

The conspiracy, and Apple's actions in leading it, can certainly be said to have "disrupted" the market for ebooks—but not in any way legitimate under the antitrust laws. Price-fixing among horizontal competitors has never been shielded from the rule of per se illegality simply because the resulting increase in prices also encourages entry for an additional seller of the price-fixed goods. Price-fixing and other forms of collusion might often be the surest way to advance a firm's agenda and enhance its bottom line—what Apple calls its "independent business interests." Pet. 8. But the law does not permit such concerted action at the expense of competition and consumers.

Apple alleges procompetitive effects of its conduct, but that allegation ignores the detailed findings of the district court, affirmed by the majority below, Pet. App. 30a-33a, demonstrating that there were no procompetitive effects flowing *from the conspiracy*. The district court examined each of Apple's arguments and—contrary to Apple's reference to a "one-paragraph" rule of reason analysis, Pet. 29, n.10—made extensive findings related to the effects of the conspiracy, *e.g.*, Pet.

App. 197a-202a, determining that Apple failed to prove cognizable procompetitive effects. Pet. App. 219a-220a.

But this analysis is unnecessary here; no party contests that horizontal price-fixing conspiracies are per se unlawful. Pet. 14 n.6. There is no occasion for relitigation of the effects of such conspiracies; that is the point of the per se rule. *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 351 (1982). As Judge Livingston recognized, Apple's "sloganeering references to 'innovation' [are] a distraction from the straightforward nature of the conspiracy proven at trial." Pet. App. 69a. After a three-week bench trial, the district court found that Apple knowingly participated in the conspiracy among horizontal competitors—which Apple engineered—and this Court has never intimated that such a knowing participant is not liable for a per se illegal conspiracy.

The district court soundly applied this Court's precedents upon finding Apple the orchestrator of a horizontal price-fixing conspiracy that harmed consumers. The court of appeals correctly affirmed the district court's fact-bound ruling. That decision poses no threat to the national economy or to legitimate innovation in technology markets. The only conduct that may be deterred is conduct that has long been held categorically impermissible under § 1 of the Sherman Act: horizontal price-fixing, the "supreme evil of antitrust." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

I. The Decision Below Neither Conflicts With This Court's Precedents Nor Creates A Circuit Split.

The Second Circuit's decision is consistent with this Court's decisions and does not conflict with the decision of any other circuit. Apple repeatedly argues that the basis of its liability is "vertical" conduct. But the evidence and fact findings confirm that Apple knowingly engaged in a price-fixing conspiracy among horizontal competitors. That its co-conspirators were publishers who shared Apple's goal of eliminating price competition in the retail market does not alter the standard to be applied to the restraint.

"Every contract, combination in the form of trust or otherwise, or conspiracy" that qualifies as a condemned restraint of trade is "declared to be illegal." 15 U.S.C. § 1. Horizontal price-fixing conspiracies have long been recognized as the "archetypal example" of per se unlawful restraints under § 1. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (per curiam). Once a conspiracy is deemed illegal, every conspirator is liable for its role in the conspiracy. 15 U.S.C. § 1 ("Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty . . . ."). The district court found that Apple engineered and knowingly participated in the illegal conspiracy here. The court of appeals thus correctly affirmed Apple's liability. That application of settled law does not warrant further review.

A. The court of appeals' decision does not conflict with this Court's *Leegin* decision.

The Second Circuit correctly explained that its decision does not conflict with this Court's *Leegin* decision. *Leegin* did not silently overrule decades of antitrust jurisprudence. To the contrary, *Leegin* expressly noted that it was not addressing liability for knowing participation in a horizontal price-fixing conspiracy.

Leegin dealt with a challenge only to a resale price maintenance (RPM) agreement between a manufacturer and a retailer. The Court held that a vertical agreement by which a manufacturer sets minimum prices at which a retailer may sell its goods is judged under the rule of reason. 551 U.S. at 882. The Court specifically noted that a horizontal price-fixing conspiracy among retailers was not alleged below and therefore would not be addressed. *Id.* at 907-08. The Court confirmed that "[a] horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful." *Id.* at 893 (citations omitted).

Leegin was premised on parity in the rule used to judge various types of vertical agreements. Extending the rule of reason to a vertical RPM agreement was supported by the potential procompetitive justifications for resale price maintenance—primarily the promotion of interbrand competition at the expense of intrabrand competition, the former being a central goal of antitrust law because it generally results in lower prices for consumers. *Id.* at 889-92, 895. Here, of course, the conspiracy proved was among producers of competing goods

(ebooks). The conspiracy that Apple orchestrated eliminated interbrand competition at the retail level by imposing an industry-wide business model and price schedule, which was rigidly followed and led to higher prices and fewer sales. Pet. App. 30a-32a. This is the very kind of horizontal conspiracy that *Leegin* confirmed is per se unlawful.

Apple ignores the district court's findings, supported by "overwhelming" evidence, that Apple spearheaded and participated in a horizontal price-fixing agreement among competing publishers. Pet. App. 50a, 232a. Apple tries to sidestep application of the per se rule by noting that it was "not accused of entering into any agreement with a competitor . . . ." Pet. 14 n.6. But Apple was found to have joined in a conspiracy among *five* competitors—the publisher defendants. That Apple was not a publisher does not negate Apple's incentive to fix prices or the district court's correct finding of a conspiracy orchestrated by Apple.

This single conspiracy is the one condemned as unlawful per se. And familiar principles of conspiracy law make all knowing participants liable for a conspiracy. *See, e.g.*, *MM Steel, L.P. v. JSW Steel (USA) Inc.*, 806 F.3d 835, 844, 847-50 (5th Cir. 2015) (rejecting argument that *Leegin* changes the per se illegality of horizontal conspiracies, and explaining that "parties who knowingly join an antitrust conspiracy, like any conspiracy, are liable to the same extent as other conspirators"). Apple's status as a dealer of its co-conspirators' goods neither exempts Apple from liability for its participation nor changes the standard to be applied. *See, e.g.*, *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d

1217, 1220 (7th Cir. 1993) ("The conspiracy in this case was horizontal because it was the product of a horizontal agreement. It consisted of Denny's competitors and their association. That the conspiracy was joined by the operators of the Fairgrounds boat shows does not transform it into a vertical agreement.") (internal quotation marks omitted). *Leegin* does not speak to this issue at all.

As the court of appeals explained, "the Sherman Act outlaws *agreements* that unreasonably restrain trade and therefore requires evaluating the nature of the restraint, rather than the identity of each party who joins in to impose it, in determining whether the *per se* rule is properly invoked." Pet. App. 5a (emphasis in original); *accord, e.g.*, *Denny's*, 8 F.3d at 1220 ("The nature of the restraint determines which rule will be applied."); *United States v. MMR Corp. (LA)*, 907 F.2d 489, 498 (5th Cir. 1990) ("If there is a horizontal agreement between A and B, there is no reason why others joining that conspiracy must be competitors."). *Leegin* confirms this principle. *Leegin* examined the nature of the restraint challenged there (a vertical restraint) to determine what type of antitrust scrutiny applies. That restraint was qualitatively different from the horizontal restraint alleged and proved here—an agreement among competitors to collectively fix and raise prices, an outcome they could not have achieved individually. *Cf. Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 936 (7th Cir. 2000) (explaining that, where a toy retailer induced its suppliers to collude in fixing prices, because "the only condition on which each toy manufacturer would agree . . . was if it

could be sure its competitors were doing the same thing," the conspiracy "is a horizontal agreement").

B. The court of appeals' decision does not conflict with the Third Circuit's *Toledo Mack* decision.

Apple's claim that the court of appeals' decision conflicts with the Third Circuit's decision in *Toledo Mack* is likewise unfounded. There, the Third Circuit addressed antitrust challenges to two different types of agreements: a horizontal agreement among dealers of Mack trucks that they would not compete on price, and vertical agreements between Mack and its dealers to deny certain rebates known as "sales assistance" to dealers who sought to sell trucks outside their assigned geographic area. *Toledo Mack*, 530 F.3d at 210-11.[2]

The court, after concluding that the plaintiff had presented sufficient evidence of both a horizontal agreement among dealers and vertical agreements between Mack and its dealers, determined that the rule of reason should be applied to determine whether the *vertical* agreements were unlawful. Citing *Leegin*, it held that "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." *Toledo Mack*, 530 F.3d at 225 (citing *Leegin*, 551 U.S. at 907). But while "support" might have been the dealers' goal, there was no allegation that Mack knowingly participated in the horizontal

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[2] *Toledo Mack*, like *Leegin*, dealt with restrictions on intrabrand competition (Mack brand trucks). *Toledo Mack*, 530 F.3d at 220.

conspiracy, let alone that it orchestrated the agreement among dealers. *Cf.* Pet. App. 4a. In fact, the horizontal conspiracy among the dealers in *Toledo Mack* was found to have begun years before the manufacturer's entry into its challenged vertical agreements with dealers. 530 F.3d at 211, 220. That explains why the Third Circuit expressly analyzed the conduct at issue as two separate agreements alleged to be unlawful. *Id.* at 218-19.

Any doubt that the Third Circuit recognized the continued applicability of the per se rule to horizontal conspiracies led by vertically related parties was dispelled by its subsequent opinion in *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300 (3d Cir. 2010). That decision noted that the conspiracy at issue was "instigated, coordinated, and policed" by a non-competitor of its co-conspirators, but that defendants "failed . . . to show why this feature would preclude per se condemnation of the horizontal agreement." *Id.* at 334-35. This forecloses any claim of a circuit conflict.

At bottom, Apple's assertion of a circuit split rests on a mischaracterization of the conspiracy alleged and proved here—a horizontal price-fixing agreement among the publishers that Apple conceived, joined, and saw through. The district court did not find Apple liable for merely undertaking "vertical dealings that facilitate *per se* unlawful horizontal agreements," as the dissent portrayed. Pet. App. 104a. Rather, "the relevant 'agreement in restraint of trade' in this case is the price-fixing conspiracy identified by the district court, not Apple's vertical contracts with the Publisher Defendants." Pet. App. 61a. That agreement is *per se* un-

lawful, and Apple cannot be exempted from accountability for its leading role in implementing that horizontal agreement to the detriment of consumers. *See United States v. All Star Indus.*, 962 F.2d 465, 473 (5th Cir. 1992) (holding that parties to a horizontal conspiracy "cannot escape the per se rule simply because their conspiracy depended upon the participation of a 'middleman', even if that middle man conceptualized the conspiracy, orchestrated it . . . , and collected most of the booty").

Neither the law nor common sense supports a conclusion that "one who organizes a horizontal price-fixing conspiracy . . . among those competing at a different level of the market has somehow done less damage to competition than its coconspirators." Pet. App. 5a. The Second Circuit has not broken any new ground in refusing to create a rule to that effect.

II. The Resolution Of Apple's Liability Is Heavily Fact-Bound, And Apple Cannot Sidestep Key Fact Findings.

The petition's arguments turn on factual assertions that often contradict the district court's findings of fact. The fact-bound nature of the dispute makes this case a poor vehicle for review of the legal question Apple contends is presented.

The district court received testimony from eighteen fact witnesses and five expert economists. Pet. App. 123a-125a. The trial took three weeks and the district court's findings of fact were voluminous. Pet. App. 126a-206a. Even the dissent below acknowledged that the district court's findings were "conscientious." Pet. App.

91a. Although the dissent claimed to "have no quarrel" with those findings, Pet. App. 91a, both it and Apple sidestep many of the findings. Their position is "premised on various mischaracterizations of the record." Pet. App. 76a (opinion of Livingston, J.). This Court could not confront the legal question Apple contends is presented by this case unless it were to overturn factual findings and accept Apple's version of the facts, which was rejected by the district court in its role as fact-finder. As the district court noted, adopting Apple's narrative would require "explaining away reams of documents and blinking at the obvious." Pet. App. 238a. This Court should decline Apple's invitation to review the court of appeals' fact-bound decision.

A. Apple designed and knowingly participated in a conspiracy among horizontal competitors.

Apple was a knowing and intentional participant in the horizontal price-fixing conspiracy that it engineered. Apple presents a picture of itself as a sort of "innocent bystander" whose unilateral actions unwittingly resulted in several of its contractual counterparties successfully developing a price-fixing conspiracy as to which Apple was indifferent. Pet. App. 44a. It claims to have been held liable for merely "negotiating with its prospective suppliers regarding the terms of supply," Pet. 16, and argues that no single aspect of its conduct was, in isolation, "found to be a sham designed solely to promote a publisher horizontal conspiracy" and therefore that it cannot be held to have participated in a per se illegal price-fixing conspiracy. Pet. 16-17; *see* Pet. App. 93a, 99a (dissent characterizing Apple as a "verti-

cal enabler" that, at worst, "encourag[ed] the publishers to coordinate horizontally . . . .").

But the district court properly examined all the evidence, *see Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), and found that Apple "*agreed* with the Publisher Defendants, within the meaning of the Sherman Act, to raise consumer-facing ebook prices by eliminating retail price competition," and that the evidence of Apple's "orchestration" of the conspiracy was unambiguous and "overwhelming." Pet. App. 50a; *see also, e.g.*, Pet. App. 213a (finding that Apple was a "knowing and active member" that "not only willingly joined the conspiracy, but also forcefully facilitated it"). Neither court below held that any given contract between Apple and a publisher had terms that were on their face "independently unlawful." Pet. App. 44a; *see* Pet. App. 228a. But the district court found that "Apple consciously played a key role in organizing [the publishers'] express collusion," and the Second Circuit held that Apple's argument to the contrary "founders—and dramatically so—on the factual findings of the district court." Pet. App. 48a.

In Apple's initial meetings with the publishers in December 2009, it made clear that it was similarly meeting with all six major publishers, that time was of the essence since the goal was to announce the iBookstore at the iPad event on January 27, 2010, and that Apple would only move forward if it attracted a "critical mass" of major publishers to participate. Pet. App. 14a-15a. Apple assured the publishers that all of their major competitors were being offered the same terms. Pet. App. 20a. With the knowledge that the pub-

lishers were desperate to raise retail prices but unable individually to leverage Amazon to do so, Apple "offered each Big Six publisher a proposed [c]ontract that would be attractive only if the publishers acted collectively." Pet. App. 44a. It was Apple that made it a prerequisite to force Amazon and all other retailers to an agency model, first explicitly and then "elegant[ly]" through the MFN clause. Pet. App. 18a-19a, 45a, 158a. Apple ensured the publishers understood that joint acceptance of Apple's proposal would "solve[] [the] Amazon issue." Pet. App. 18a, 154a.

Apple repeatedly told the publishers that agreeing on a collective switch to agency and on increased prices was the "best chance" to eliminate Amazon's discounted pricing. Pet. App. 49a. Apple also continuously assured the publishers that they were, in fact, acting together. Pet. App. 23a-26a; 179a-187a. Apple's insistence that "all [other] resellers of new titles need to be in [the] agency model," and that "'all publishers' would need to move 'all retailers' to an agency model," was the key to the conspirators' joint goal of higher prices. Pet. App. 19a. That requirement imposed by Apple, reflected in the MFN clause, allowed Apple to sell ebooks without competing on price and allowed the publishers to confidently confront Amazon knowing that they acted in concert. Pet. App. 21a. The MFN clause, in fact, made it "imperative, not merely desirable, that the publishers wrest control over pricing from ebook retailers generally." Pet. App. 20a. The MFN clause served the common goals of the conspiracy to the advantage of Apple and the publishers; it "protected Apple from retail price competition as it punished a Publisher if it failed to im-

pose agency terms on other e-tailers." Pet. App. 21a (quoting Pet. App. 163a).

When Macmillan CEO Sargent mistakenly perceived that his company could proceed with Apple on the agency model but continue on the wholesale model with Amazon, Apple's Cue was quick to correct Sargent. Cue explained that moving Amazon to agency was required if Macmillan wanted to sign an agency agreement with Apple. Pet. App. 24a. The next day, Sargent told Amazon that the Apple contract required Macmillan to offer only the agency model to all retailers. Pet. App. 25a. Cue and Sargent each denied that Cue informed Sargent that Macmillan was required to shift Amazon to agency, but the district court found such denials not credible. Pet. App. 177a n.38. The credibility—or lack thereof—of Apple's and the publishers' executives was a substantial factor in the district court's resolution of fact issues. Pet. App. 237a. And the court of appeals held that the district court's findings regarding these witnesses' credibility were not clearly erroneous. Pet. App. 18a n.4, 24a n.6, 28a n.10, 49a n.18.

Apple did not merely negotiate and sign supply contracts with five competitors in a vacuum, nor did it simply "encourage[] publishers to implement agency pricing in their contracts with other retailers." Pet. App. 92a-93a (Jacobs, J., dissenting). Apple "forc[ed] collective action" among the publishers to accomplish their shared goals. Pet. App. 45a.

That Apple did so knowingly and intentionally was made clear to the district court by, among other evidence, Steve Jobs' response, captured on video, to a reporter's question about why anyone would pay $14.99

for an ebook that was listed at $9.99 on Amazon. In that response, he noted that the publishers were withholding books from Amazon because of their dissatisfaction with its pricing policies, but confidently predicted that, with the release of the iPad and the iBookstore, "the price [would] be the same." Pet. App. 27a. At least one publisher recognized the revealing nature of Jobs' avowal. Simon & Schuster's general counsel wrote in an email to CEO Carolyn Reidy that she "[could not] believe that Jobs made [this] statement," calling it "[i]ncredibly stupid." Pet. App. 27a n.8, 191a. Jobs also told his biographer the day after the iPad launch—while Sargent was in Seattle meeting with Amazon—that the publishers "went to Amazon and said, 'You're going to sign an agency contract or we're not going to give you the books.'" Pet. App. 28a n.10, 242a. Jobs knew this to be the case because Sargent had informed Cue in advance of his planned meeting with Amazon. Pet. App. 28a. Cue's denial of this at trial was one of the many instances in which the district court found Cue's testimony not credible. Pet. App. 189a n.47.

Even after the publishers agreed with Apple on their own contract terms, Apple (and Cue in particular) continued to monitor and to counsel the publishers about the publishers' negotiations with Amazon. When Amazon first indicated it would discuss an agency contract with Macmillan, Sargent, in an email marked "URGENT," sought Cue's assistance in determining the terms of that deal, and the two had a phone conversation about that topic the very same night. Pet. App. 29a, 194a-195a. This was yet another instance in which

the district court found Cue's denials not credible. Pet. App. 195a n.52.

Apple did not indifferently "enable" collusion among the publishers. Those publishers "agreed with each other and Apple to solve the 'Amazon issue' and eliminate retail price competition for e-books." Pet. App. 188a. With respect to eliminating retail price competition and raising ebook prices, Apple and the publishers did not have "incongruent incentives," Pet. 31, but were completely aligned. That these results of the conspiracy were in Apple's "independent business interests," Pet. 8—i.e., that Apple was pleased to be able to charge higher prices and not have to compete with Amazon regardless of the publishers' plans—does not somehow disprove that it orchestrated and knowingly participated in the conspiracy. "[T]he fact that Apple's conduct was in its own economic interest in no way undermines the inference that it entered an agreement to raise ebook prices." Pet. App. 47a. Indeed, it was Apple's planning and coordination that made the conspiracy work.

The court of appeals' decision was based on the detailed factual findings as to Apple's conduct. Whether Apple's actions in this case constitute participation in the horizontal price-fixing conspiracy is a factual question that does not warrant this Court's review.

B. The conspiracy resulted in increased prices and reduced sales.

Apple dismisses the district court's alternative rule-of-reason analysis as comprising only "one paragraph," but Apple ignores that the conclusion in that paragraph

is premised on many pages of factual findings relating to the effects of the conspiracy. There was no dearth of expert economic evidence at trial; five economists testified, three of them for Apple. Apple had an opportunity to present its proof regarding alleged procompetitive effects, but was unable to do so convincingly. Pet. App. 219a.

The conspiracy's effect on the publishers' ebook prices is plain. The price "caps" in the Apple agency contracts, which were higher than the pre-conspiracy prevailing prices, immediately became the prices for bestsellers and new releases as envisioned—the "standard across the industry." Pet. App. 22a. In the iBookstore, 99.4% of bestsellers and 92.1% of new releases were priced within one percent of the applicable price caps. At Amazon, 96.8% of bestsellers and 85.7% of new releases were priced within one percent of the caps. Pet. App. 30a-31a. The publishers also raised prices on ebooks not subject to the Apple price tiers. Pet. App. 31a. Taking into account the entirety of the publisher defendants' catalogs, the average price increase for the two-week period following agency as compared to the two weeks prior was 18.6%, while prices for ebooks published by non-conspiring publishers held steady. Pet. App. 66a. As prices went up, output went down. According to an expert's study, the conspiring publishers sold 12.9% fewer ebooks in the two weeks after the agency switch than the two weeks before, while other publishers sold 5.4% more. Pet. App. 32a, 200a n.55. The district court cited another expert study showing that over a six month period, the conspiring publishers' sales decreased by 14.5% relative to those of

Random House—the one large publisher that declined to join the conspiracy. Pet. App. 32a, 200a.

Even Apple's experts agreed that, after the market was forced to the agency model as a result of the conspiracy, the publisher defendants' books increased substantially in price, and that the increase was durable over a two year period. Pet. App. 32a, 67a. Apple argues that "overall prices" decreased in the years following the implementation of the conspiracy, Pet. 1, but despite ample opportunity, Apple did not present any evidence attempting to control for the other factors that affected price in the ebook market. Pet. App. 32a-33a, 201a-202a. There was no evidence at trial that causally linked to the price-fixing scheme any eventual decline in average price of ebooks or the evolution of the market via the introduction of new titles and the expansion of self-publishing. Pet. App. 80a-81a (opinion of Livingston, J.); Pet. App. 220a n.61 ("The Apple experts did not offer any scientifically sound analysis of the cause for this purported price decline or seek to control for the factors that may have led to it.").

C. The conspiracy did not result in technological innovations.

With regard to the alleged technological innovations occasioned by the introduction of the iPad and the iBookstore, the district court found these to have been unrelated to the ebook-pricing conspiracy. The "cutting-edge functions and applications" cited by the dissent were features of the iPad, Pet. App. 113a, which, there is no dispute, would have been released even absent the inclusion of the iBookstore. Consumers could

have read the very same books on an iPad through applications offered by other retailers. Pet. App. 81a (opinion of Livingston, J.).

And at trial, Rob McDonald, the Apple executive whose testimony was centered on the purportedly unique benefits of the iBookstore, conceded on cross examination that virtually every one of them was either first developed by a company other than Apple or was introduced long after the iBookstore's debut. *See, e.g.*, C.A. App. A2120[3] (Tr. at 2333:11-2334:18) (audio and video enhancement); C.A. App. A2120-21 (Tr. at 2334:19-2338:7) (color in ebooks); C.A. App. A2121-23 (Tr. at 2340:16-2341:4, 2347:7-17) (type face and size variety); C.A. App. A2122 (Tr. at 2341:5-2344:6) (sepia page-background color); C.A. App. A2122-23 (Tr. at 2344:7-2347:6) ("page curl" graphical feature); C.A. App. A2123 (Tr. at 2348:6-13) (dimming backlighting); C.A. App. A2123-24 (Tr. at 2348:14-2349:10) (marketing campaigns).

D. Apple did not prove that the conspiracy was the only means for it to enter the market.

Apple and the dissent also argued that the conspiracy enabled Apple to enter the market as an ebook retailer. Pet. 19; Pet. App. 112a. This contention is factually unsupported. Pet. App. 76a-77a. Before concluding that imposition of the agency model on the industry was the best means for Apple to eliminate price competition, Apple had developed a plan to enter the market using

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[3] Citations to "C.A. App." are to the 12-volume Court of Appeals Deferred Appendix.

the same traditional wholesale model that Amazon and others had been using. Pet. App. 16a-17a; 145a-146a. That Apple decided it was "not prepared" either to compete with Amazon on price or to rely on the purported attractiveness of its platform to justify higher prices, Pet. 7, does not equate to a finding that Apple had no choice but to conspire with the publishers if it wanted to sell ebooks. "[I]t is far from clear that either Apple itself or other ebook retailers could not have entered the ebook retail market without Apple's efforts with the Publisher Defendants to eliminate price competition," and Apple did not even attempt to make such a showing at trial. Pet. App. 76a-77a. In all events, even if it were true that Apple could not have entered the market absent the conspiracy, it would not justify Apple's conduct. "[I]f Apple could not turn a profit by selling new releases and bestsellers at $9.99, or if it could not make the iBookstore and iPad so attractive that consumers would pay *more* than $9.99 to buy and read those ebooks on its platform, then there was no place for its platform in the ebook retail market." Pet. App. 74a (emphasis in original). The mere addition of another outlet from which consumers could purchase ebooks does not justify the "marketplace vigilantism" in which Apple engaged. Pet. App. 6a.

This would be true regardless of Amazon's status as a "dominant" ebook retailer prior to the conspiracy. Though the dissent repeatedly refers to Amazon as a "monopolist," *e.g.*, Pet. App. 94a, 110a, there was neither any showing nor argument at trial that Amazon's pricing of ebooks was unlawful. And, even were there such a showing, it would not have made the conspiracy

in which Apple participated any less an antitrust violation. Pet. App. 74a-75a; 248a. When horizontal price-fixing agreements are at issue, "no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *Socony-Vacuum Oil Co.*, 310 U.S. at 218.

It may be that "[a]ll Apple's energy . . . was directed to weakening its competitive rival, and pushing it aside to make room for Apple's entry," Pet. App. 107a (Jacobs, J., dissenting). But "[t]he purpose of the antitrust laws . . . is 'the protection of *competition*, not competitors.'" *Leegin*, 551 U.S. at 906 (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990)) (emphasis in original). "Plainly, competition is not served by permitting a market entrant to *eliminate price competition* as a condition of entry . . . ." Pet. App. 6a (emphasis in original). The law does not require "ebook consumers [to] subsidize Apple's entry into the market by paying more for ebooks so that Apple would not have to compete on price." Pet. App. 75a n.22 (opinion of Livingston, J.).

The court of appeals faithfully applied this Court's antitrust precedents in a case that turns on a voluminous factual record establishing that Apple engaged with five competing publishers in a conspiracy to fix prices. That fact-bound decision does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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