No. 15-565

In the Supreme Court of the United States

APPLE, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner had violated Section 1 of the Sherman Act, 15 U.S.C. 1, by orchestrating and participating in a per se unlawful horizontal price-fixing conspiracy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-119a) is reported at 791 F.3d 290. The opinion of the district court (Pet. App. 121a-250a) is reported at 952 F. Supp. 2d 638.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2015. On September 17, 2015, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 28, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.

STATEMENT

1. In 2010, in conjunction with the launch of its iPad tablet computer, petitioner became a retailer of electronic books (ebooks). In order to enter that market on its preferred terms, petitioner orchestrated a conspiracy with five major publishers to eliminate retail price competition and raise ebook prices.

a. In 2009, the "Big Six" publishers—Hachette, HarperCollins, Macmillan, Penguin, Random House, and Simon & Schuster—dominated the American book publishing industry, accounting for more than 90% of *New York Times* bestsellers. The industry operated on a "wholesale" model. The Big Six and other publishers sold print books to retailers at wholesale prices and established "list" prices for the retailers' sales to consumers. For example, a newly released hardcover book might have a wholesale price of $12.50 and a list price of $25. But retailers like Barnes & Noble were free to set their own prices, and thus to compete with each other by offering discounts below the publishers' list prices. Pet. App. 7a, 20a.

As of 2009, the market for print books dwarfed the nascent market for ebooks, but demand for ebooks was growing rapidly. Amazon had introduced the first

commercially successful ebook reader, the Kindle, in 2007. Like print books, ebooks were sold on a wholesale model, allowing Amazon and other retailers to set their own prices. Amazon used a "classic loss-leading strategy," pricing new releases and bestsellers at $9.99—roughly equal to or slightly below the wholesale prices it paid to publishers. Pet. App. 9a (citation omitted).

In an effort to induce Amazon to raise its retail ebook prices, the publishers raised their wholesale prices to amounts "several dollars above Amazon's $9.99 price point." Pet. App. 132a. "This tactic, however, failed to convince Amazon to change its pricing policies and it continued to sell many [*New York Times*] Bestsellers as loss leaders at $9.99." *Ibid.* As of late 2009, Amazon was responsible for approximately 90% of ebook sales, but Barnes & Noble had just launched its own ebook reader and Google was planning to enter the market as well. *Id.* at 9a. Other ebook sellers generally matched Amazon's prices. *Id.* at 129a-130a; see *id.* at 169a.

The Big Six saw Amazon's ebook prices as a serious threat to their way of doing business. They worried that consumers buying new releases would choose discounted ebooks over substantially more expensive hardcovers. More fundamentally, they feared that consumers would grow accustomed to what one CEO called the "wretched $9.99 price point," permanently depressing the prices that consumers would pay for ebooks and print books alike. Pet. App. 9a-10a.

The Big Six believed that their problem with Amazon's prices "was a collective one." Pet. App. 10a. Penguin concluded that "the industry need[ed] to develop a common strategy" because it would "not be

possible for any individual publisher to mount an effective response." *Ibid.* (citation omitted). Simon & Schuster's CEO likewise observed that unless the Big Six acted with a "critical mass," they had "no chance of success in getting Amazon to change its pricing." *Id.* at 10a-11a (citation omitted).

The Big Six had long enjoyed a cooperative relationship, and their executives "felt no hesitation in freely discussing * * * joint strategies for raising [Amazon's] prices." Pet. App. 11a (citation omitted). As of late 2009, however, they had no plausible plan to achieve that goal. *Id.* at 11a-12a.

b. As the Big Six were searching for a way to force Amazon to raise prices, petitioner was preparing for the scheduled January 27, 2010, launch of the iPad, a new multifunction tablet computer. Petitioner's Senior Vice President Eddy Cue wanted the iPad to be accompanied by an ebook marketplace, the "iBookstore," that would compete with Amazon. Petitioner's CEO Steve Jobs approved Cue's proposal in November 2009, leaving Cue just two months to develop a business model and recruit enough publishers for a viable marketplace. Pet. App. 12a-13a.

Cue focused his efforts on the Big Six. Cue quickly came to appreciate that the Big Six "wanted to pressure Amazon to raise the $9.99 price point" and "were willing to coordinate their efforts." Pet. App. 14a (citation omitted). Petitioner was unwilling to match Amazon's loss-leader strategy, but it also did not want to be undersold. *Ibid.* Petitioner therefore decided that it would be willing to sell ebooks for more than $9.99, but only if Amazon's prices rose to comparable levels. *Id.* at 14a-15a, 148a.

On December 15 and 16, Cue held initial meetings with executives of the Big Six. Pet. App. 14a. Cue assured the publishers that petitioner was not interested in "a low-price strategy," and he told them that petitioner would sell ebooks for as much as $14.99 so long as Amazon raised its prices. *Id.* at 147a; see *id.* at 145a, 151a. Cue also made clear that petitioner was negotiating with all of the Big Six and that it would not launch the iBookstore unless they all went along. *Id.* at 14a-15a, 145a-146a.

Cue's overtures prompted a "flurry of communications" among the Big Six about what one CEO called the "[t]errific news" that petitioner "was not interested in a low price point" and "d[id]n't want Amazon's $9.9[9] to continue." Pet. App. 15a, 148a. In a series of calls and emails, the Big Six CEOs "hashed over their meetings" and made plans to "coordinate a response." *Id.* at 148a-149a; see *id.* at 15a.

c. Based on his initial meetings, Cue recognized that petitioner's "most valuable bargaining chip" was the publishers' "desperat[ion] 'for an alternative to Amazon's pricing'" and their belief that petitioner's entry into the market "'would give them leverage in their negotiations with Amazon.'" Pet. App. 16a (citation omitted). Relying on that insight, Cue decided to shift the iBookstore from a wholesale model—his original plan—to an "agency" model, an alternative suggested by two of the Big Six as a way "to fix Amazon's pricing." *Id.* at 17a & n.3 (citation omitted).

Under an agency model, "the *publisher* sets the price that consumers will pay for each ebook" and pays the retailer a commission equal to "a fixed percentage of each sale." Pet. App. 17a. In the version of the model Cue developed, publishers would set retail

prices in the iBookstore, subject to caps they negotiated with petitioner, and would pay petitioner a 30% commission. *Ibid.* To induce publishers to participate, petitioner planned to propose price caps significantly higher than $9.99. *Ibid.* But petitioner believed that higher prices would be unsustainable if Amazon were selling the same ebooks for less. Petitioner therefore concluded that it needed to "eliminate all retail price competition" by requiring the Big Six to "switch all of their other ebook retailers—including Amazon—to an agency pricing model." *Id.* at 18a.

Although the publishers' past attempts to change Amazon's prices had failed, petitioner's requirement to switch Amazon to the agency model was feasible because of the structure of petitioner's proposal. Petitioner had made clear that it would proceed with the iBookstore only if a "critical mass" of the Big Six went along. Pet. App. 14a-15a. Any publisher that agreed to join the iBookstore could thus be confident that its competitors would also demand a shift to agency, presenting Amazon with a united front. Accordingly, as Cue explained to three Big Six executives, petitioner's proposal "solve[d] [the] Amazon issue" by providing a way for the publishers to act together to take control of retail pricing across the industry. *Id.* at 18a.

On January 4 and 5, Cue conveyed the basic terms of petitioner's proposal to each of the Big Six in separate but materially identical emails. Pet. App. 18a. The emails proposed price caps pegged to print prices—for example, the ebook version of a title with a hardcover list price above $35 could be sold for up to $14.99. *Id.* at 18a-19a. The emails also emphasized that the publishers would need to shift "all other re-

sellers" to the agency model. *Id.* at 19a (brackets and citation omitted).

A few days later, on January 11, Cue sent the Big Six draft contracts. Pet. App. 19a. By that point, petitioner had become concerned that an explicit requirement that the publishers move other retailers to agency pricing would be legally unenforceable, but it had developed an "elegant" alternative that would achieve the same result. *Id.* at 157a-158a. That alternative was a "most-favored nation" (MFN) clause that would require each publisher to set the iBookstore price of any book at an amount equal to or less than the lowest price offered through any other retailer, including Amazon. *Id.* at 19a, 157a-158a.

The MFN clause made it "imperative" for publishers to shift Amazon to agency pricing. Pet. App. 20a. Under petitioner's proposal, publishers would already be making less money on each ebook, since instead of receiving a wholesale price of $12.50 on a book with a list price of $25, they would be paid only 70% of petitioner's price caps—about $8.75 for an ebook selling for $12.99. *Ibid.* The publishers were willing to accept that lost revenue in order to gain control over pricing. *Ibid.* But the MFN clause meant that, if Amazon remained on the wholesale model, the publishers would face "the worst of both worlds": They would make less money *without* displacing Amazon's $9.99 prices, which they would have to match in the iBookstore. *Ibid.* All parties to the negotiations thus understood that the MFN clause would force any publisher that signed an agreement with petitioner "to

move Amazon to an agency relationship." *Id.* at 20a-21a; see *id.* at 22a, 163a-165a.[1]

d. On January 13 and 14, the majority of the Big Six indicated their willingness to accept petitioner's proposal, but pushed for higher price caps. Pet. App. 22a. Those caps were critical because, as petitioner and the publishers understood, they would become the de facto schedule of retail prices for the entire industry once the publishers moved all retailers to agency pricing. *Id.* at 22a & n.5, 30a-31a, 166a. On January 16, Cue told the Big Six that petitioner would accept a revised schedule with caps as high as $19.99. *Id.* at 22a. He also continued to promote petitioner's proposal as the "best chance for publishers to challenge the 9.99 price point," and he reiterated that petitioner would not proceed "unless 5 of the 6 major publishers signed the agreement." *Id.* at 23a (brackets and citation omitted).

By January 22, Hachette and Simon & Schuster had verbally committed to petitioner's proposal, and Penguin had accepted it in principle. Pet. App. 23a. As negotiations with the other publishers continued, Cue kept them informed about which of their competitors were already on board, assuring those on the fence that if they went along, "they weren't going to be alone" in confronting Amazon. *Ibid.* He also used the publishers who were already on board to persuade those who were wavering. For example, after learn-

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[1] Macmillan's CEO initially believed that it could consummate an agency agreement with petitioner while keeping Amazon on the wholesale model. Pet. App. 24a. Cue corrected his error, explaining that "Macmillan had no choice but to move Amazon to an agency model" if it signed an agreement with petitioner that contained the MFN. *Ibid.*

ing that Macmillan's CEO had reservations about moving other retailers to an agency model, Cue arranged for him to speak with the CEOs of Simon & Schuster and HarperCollins, who resolved his doubts. *Id.* at 24a-25a. Cue used a similar strategy to secure a final agreement with Penguin. *Id.* at 25a.

e. Cue ultimately persuaded five of the Big Six (all except Random House) to participate in the iBookstore. Pet. App. 27a. During the iPad launch a few days later, Jobs touted the iBookstore and demonstrated the purchase of an ebook for $14.99. *Ibid.* After the event, a reporter asked "why someone should purchase an ebook from [petitioner] for $14.99 as opposed to $9.99 with Amazon or Barnes & Noble." *Ibid.* Jobs "paused, and with a knowing nod responded: 'The price will be the same.'" *Id.* at 190a. He explained that "[p]ublishers are actually withholding their books from Amazon because they are not happy" with Amazon's prices. *Ibid.*[2] The next day, Jobs told his biographer that the publishers would tell Amazon, "You're going to sign an agency contract or we're not going to give you the books." *Id.* at 27a.

Consistent with Jobs's expectation, the five participating publishers acted quickly to shift Amazon to agency pricing. Pet. App. 27a-28a. Macmillan went first, conveying its demand the day after the iPad launch. *Ibid.* The other publishers soon followed. *Id.* at 28a-29a. Amazon opposed the agency model and "did not want to cede pricing authority" to the publishers. *Id.* at 29a. Amazon recognized, however, that it "could not prevail in this position against five of the

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[2] Simon & Schuster's general counsel was appalled by Jobs's statements, calling them "incredibly stupid." Pet. App. 27a n.8 (brackets and citation omitted).

Big Six," and it ultimately agreed to negotiate agency terms. *Ibid.* During those negotiations, the publishers communicated with each other and with petitioner about their respective negotiating positions. *Id.* at 29a-30a, 194a-195a.

f. The iBookstore began to operate in April 2010. Ebook prices increased immediately, and "the iBookstore price caps quickly became the new benchmark" for prices across the market. Pet. App. 30a. Both on the iBookstore and on Amazon, the five conspiring publishers increased the prices of nearly all of their new releases and bestsellers to the contractual ceilings. *Id.* at 30a-31a. By contrast, Random House—which remained on the wholesale model—"saw virtually no change" in its prices. *Id.* at 31a.

Over the iBookstore's first year, the participating publishers' average ebook prices increased by 24.2% for new releases and 40.4% for bestsellers, and their sales decreased by an estimated 13%-15%. Pet. App. 31a-32a; see *id.* at 198a-200a (charts showing price increases). Those prices "remained elevated a full two years after [the publishers] took control over pricing." *Id.* at 67a.

2. In April 2012, the United States filed this suit, alleging that petitioner and the five participating publishers had conspired to fix retail ebook prices in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.[3] The publishers settled, agreeing to consent decrees that required them to return pricing authority to ebook retailers for specified periods. Petitioner proceeded to trial. Pet. App. 33a-36a.

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[3] Thirty-three States and territories also filed a civil action alleging violations of Section 1 and of parallel state laws, and the two cases were consolidated. Pet. App. 3a, 121a-122a.

After a three-week bench trial that included extensive economic testimony, the district court found petitioner liable for violating the Sherman Act. Pet. App. 121a-250a. Based on detailed factual findings, the court concluded that "overwhelming evidence" showed that the publishers had "joined with each other in a horizontal price-fixing conspiracy," and that petitioner "was a knowing and active member of that conspiracy." *Id.* at 213a. Applying the rule that has long governed horizontal agreements fixing prices among competitors, the court held that the conspiracy was "a *per se* violation of the Sherman Act." *Id.* at 219a.

The district court also held, in the alternative, that petitioner's conduct would violate the Sherman Act if it were analyzed under the rule of reason. Pet. App. 219a-220a. The court explained that the conspiracy had "destroyed" retail price competition in the ebook market and had allowed the publishers to impose an "across-the-board price increase." *Ibid.* The court further found that petitioner had not established "any pro-competitive effects" attributable to the challenged conduct, let alone benefits sufficient to outweigh those anticompetitive harms. *Id.* at 219a. The court explained that the benefits petitioner had invoked, including "its launch of the iBookstore" and the "technical novelties of the iPad," were "independent of the Agreements [between petitioner and the publishers] and therefore do not demonstrate any pro-competitive effects flowing from the Agreements." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-119a.

a. The court of appeals held that petitioner had organized and participated in a horizontal price-fixing conspiracy that was a per se violation of the Sherman

Act. Pet. App. 38a-69a. As relevant here, its analysis proceeded in three steps.

i. The court of appeals held that petitioner had participated in the publishers' price-fixing conspiracy. Pet. App. 40a-52a. The court rejected petitioner's contention that it had "unwittingly facilitated [the publishers'] joint conduct." *Id.* at 48a (quoting Pet. C.A. Br. 23). That argument, the court explained, "founders—and dramatically so—on the factual findings of the district court," which showed that petitioner had "consciously played a key role in organizing [the publishers'] express collusion." *Ibid.* The court therefore upheld the district court's conclusion that petitioner had "*agreed* with the [publishers], within the meaning of the Sherman Act, to raise consumer-facing ebook prices by eliminating retail price competition." *Id.* at 50a.

ii. The court of appeals rejected petitioner's contention that its conduct should be analyzed under the rule of reason because its contracts with the publishers were "vertical agreements" between firms at different levels of the ebook supply chain. Pet. App. 54a-62a. The court acknowledged that "vertical restraints—including those that restrict prices—should generally be subject to the rule of reason." *Id.* at 53a. The court explained, however, that "the relevant 'agreement in restraint of trade' in this case is not [petitioner's] vertical [c]ontracts with the [publishers]," but rather "the horizontal agreement that [petitioner] organized among the [publishers] to raise ebook prices." *Id.* at 57a. Such a horizontal price-fixing conspiracy is the "archetypical example" of a per se unlawful restraint on trade. *Id.* at 53a (citation omitted). The court further explained that, under this

Court's decisions, *all* participants in such a conspiracy are liable for the per se violation. *Id.* at 54a-62a.

iii. The court of appeals rejected petitioner's contention that an exception to per se liability was warranted because its conduct purportedly promoted "enterprise and productivity." Pet. App. 62a-63a. The court explained that courts have sometimes applied the rule of reason to restraints that would otherwise be subject to per se condemnation where "restraints on competition [we]re essential if the product [wa]s to be available at all." *Id.* at 63a (citation omitted). But the court found those decisions inapplicable here, observing that, "even if read broadly," they support the application of the rule of reason "only when the restraint at issue was imposed in connection with some kind of potentially efficient joint venture." *Ibid.* The court explained that "there was no joint venture or other similar productive relationship between any of the participants in the conspiracy that [petitioner] joined." *Ibid.*

b. Writing for herself, Judge Livingston concluded, in the alternative, that petitioner's conduct would violate the Sherman Act if it were analyzed under the rule of reason. Pet. App. 69a-82a.

c. Judge Lohier concurred. Pet. App. 90a-91a. He acknowledged the "surface appeal" of petitioner's argument that the retail ebook market "needed more competition" to challenge Amazon. *Id.* at 91a. He concluded, however, that "[i]t cannot have been lawful for [petitioner] to respond to a competitor's dominant market power by helping rival corporations (the publishers) fix prices." *Ibid.*

d. Judge Jacobs dissented. Pet. App. 91a-119a. He expressed the view that a "vertical relationship

that facilitates a horizontal price conspiracy does not amount to a *per se* violation" of the Sherman Act, and must instead be analyzed under the rule of reason. *Id.* at 102a. He would have held that petitioner's conduct survives rule-of-reason scrutiny because it allowed petitioner to challenge Amazon's dominant position in the retail ebook market. *Id.* at 110a-117a.

ARGUMENT

Petitioner contends (Pet. 13-35) that the court of appeals erred and created a circuit conflict by treating its vertical conduct as a per se violation of the Sherman Act. That contention rests on a fundamental misreading of the decision below. The court of appeals specifically disclaimed any holding that petitioner's *vertical* agreements with publishers were unlawful. Instead, the court held that petitioner had orchestrated and participated in the publishers' *horizontal* conspiracy to fix prices, and that all participants in such a conspiracy are liable for the per se violation. The court's conclusion that petitioner was a member of a horizontal price-fixing conspiracy was supported by overwhelming evidence. Its holding that all members of such a conspiracy are liable follows directly from the text of the Sherman Act, and it does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly held that petitioner had violated the Sherman Act by orchestrating a per se unlawful horizontal price-fixing conspiracy.

a. After a three-week trial, the district court found that the publishers had "joined with each other in a horizontal price-fixing conspiracy," and that petitioner "was a knowing and active member of that conspiracy." Pet. App. 213a. The court described the evidence

supporting those findings as "compelling" and "overwhelming." *Id.* at 213a, 219a, 232a. And although Cue and other key participants in the conspiracy sought to obscure the full extent of their collusion, the court repeatedly found those denials not credible because they contradicted a "contemporaneous documentary record" that was "replete with admissions about [the] scheme." *Id.* at 204a; see, *e.g.*, *id.* at 18a n.4, 24a n.6, 28a n.10, 29a, 49a n.18, 154a & n.19, 189a n.47, 218a n.59, 237a n.66.

On appeal, petitioner did not challenge the district court's finding that the publishers had engaged in a horizontal conspiracy to raise ebook prices. Pet. App. 58a; see *id.* at 213a n.58. Instead, petitioner challenged only the court's finding that petitioner itself had participated in that conspiracy. Petitioner contended that it had, at most, "unwittingly facilitated [the publishers'] joint conduct." *Id.* at 48a (quoting Pet. C.A. Br. 23). The court of appeals rejected that argument, explaining that "ample" evidence established that petitioner had "consciously played a key role in organizing [the publishers'] collusion," and that "[t]he district court did not err in concluding that [petitioner] was more than an innocent bystander." *Id.* at 44a.

b. Under the text of the Sherman Act and this Court's precedents, petitioner's liability follows directly from the lower courts' determinations that it participated in the publishers' conspiracy to raise ebook prices.

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C. 1. This Court has long held that only unreasonable re-

straints violate Section 1, and it has clarified that most restraints are properly analyzed under the "rule of reason," which requires the factfinder to balance the pro- and anti-competitive effects of the restraint at issue. *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885-886 (2007) (*Leegin*).

"The rule of reason does not govern all restraints." *Leegin*, 551 U.S. at 886. Some categories of agreement are so plainly anticompetitive that they "are deemed unlawful *per se*." *Ibid.* (quoting *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997)). "A horizontal agreement to fix prices" has long been the "archetypical example" of a restraint subject to per se condemnation. *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (per curiam). Price-fixing agreements among competitors threaten "the central nervous system of the economy," and the Sherman Act "places all such schemes beyond the pale." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 224 n.59 (1940); see *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 342-348 (1982) (*Maricopa County*).

By its terms, the Sherman Act requires an analysis of the challenged "contract, combination * * * or conspiracy." 15 U.S.C. 1. The per se rule and the rule of reason "are means of evaluating 'whether a *restraint* is unreasonable,' not the reasonableness of a particular defendant's role in the scheme." Pet. App. 55a (quoting *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 342 (1990)). Accordingly, to determine "whether the *per se* rule is properly invoked," a court must examine "the nature of the restraint, rather than the identity of each party who joins in to impose it." *Id.* at 5a; see *id.* at 55a.

Once a conspiracy is found to be an unreasonable restraint on trade (under either the per se rule or the rule of reason), *all* participants in the conspiracy are liable for the violation, even if a particular conspirator's conduct would not otherwise violate any legal norm. The Sherman Act states that "[e]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty." 15 U.S.C. 1. Consistent with ordinary principles of conspiracy law, that provision makes clear that "[p]arties who knowingly join an antitrust conspiracy, like any conspiracy, are liable to the same extent as other conspirators." *MM Steel, L.P.* v. *JSW Steel (USA) Inc.*, 806 F.3d 835, 844 (5th Cir. 2015).

c. Petitioner does not appear to dispute that the publishers engaged in a horizontal price-fixing conspiracy that was properly subject to per se condemnation. The publishers were horizontal competitors, and they colluded to "raise the prices of their e-books overnight and substantially" to agreed-upon levels. Pet. App. 213a-214a. That is a classic example of a horizontal price-fixing scheme categorically prohibited by the antitrust laws. See, *e.g.*, *Socony-Vacuum Oil*, 310 U.S. at 221-222.

Because petitioner knowingly participated in a "conspiracy * * * declared to be illegal" under the Sherman Act, it is "deemed guilty" of the violation. 15 U.S.C. 1. The fact that petitioner stood in a vertical relationship to its co-conspirators does not alter that conclusion. Consistent with the text of the Sherman Act and with general conspiracy principles, this Court's decisions have long made clear that, when a horizontal conspiracy is subject to per se condemna-

tion, a vertically-related firm that joins the conspiracy is liable to the same extent as its co-conspirators. See *United States* v. *General Motors Corp.*, 384 U.S. 127, 145 (1966) (conspiracy among General Motors and its dealers); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-213 (1959) (conspiracy "consisting of manufacturers, distributors, and a retailer"); *Interstate Circuit* v. *United States*, 306 U.S. 208, 225-227 (1939) (conspiracy among film distributors and exhibitors). The Court has explained that the per se rule was properly applied in cases like *Klor's* because those cases "involv[ed] not simply a 'vertical' agreement, but * * * also a 'horizontal' agreement among competitors." *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 136 (1998); see, *e.g.*, *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 735 (1988) (explaining that an "agreement among retailers" was properly regarded as a "*horizontal* conspiracy among competitors" for purposes of the per se rule even though it was organized by a vertically-related manufacturer).

Other courts of appeals have likewise held that a participant in a horizontal conspiracy does not escape per se liability merely because it has a vertical relationship to its co-conspirators. For example, the Seventh Circuit held in an analogous case that a toy retailer was liable for "orchestrat[ing] a horizontal agreement among its key suppliers" to boycott competing retailers. *Toys "R" Us, Inc.* v. *FTC*, 221 F.3d 928, 932 (2000). The court explained that "[h]orizontal agreements among competitors, including group boycotts, remain illegal *per se*," and that the vertically-related retailer was liable for its role in the conspiracy. *Id.* at 936. Other courts similarly have recognized that the per se rule applies where, as in this case,

"vertical participants * * * actually join the horizontal conspiracy." *MM Steel*, 806 F.3d at 849.[4]

2. Petitioner and its amici raise several challenges to the court of appeals' analysis. All lack merit.

a. The premise of the certiorari petition is that the court of appeals applied the per se rule to "vertical activity" that merely "had the alleged effect of facilitating horizontal collusion." Pet. i. Based on that characterization—which pervades the petition and supporting amicus briefs[5]—petitioner asserts (Pet. 14-17) that the decision below departed from *Leegin*'s holding that "[v]ertical price restraints are to be judged according to the rule of reason." 551 U.S. at 907.

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[4] See, *e.g.*, *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 327, 337-338 (3d Cir. 2010) (observing that per se unlawful horizontal conspiracies involving participants at different levels of a distribution chain have "a long history in antitrust jurisprudence"); Total *Benefits Planning Agency, Inc.* v. *Anthem Blue Cross*, 552 F.3d 430, 435 & n.3 (6th Cir. 2008) (explaining that "the *per se* standard" applies where a vertically-related firm participates in a conspiracy that includes "a horizontal agreement among direct competitors"); *United States* v. *MMR Corp. (LA)*, 907 F.2d 489, 498 (5th Cir. 1990) ("If there is a horizontal agreement between [competitors], there is no reason why others joining that conspiracy must be competitors."), cert. denied, 499 U.S. 936 (1991).

[5] See, *e.g.*, Pet. 4 (asserting that petitioner was "subjected to *per se* antitrust liability because the courts below found that its vertical dealings with suppliers (book publishers) made it easier for publishers to engage in alleged horizontal collusion"); Pet. 11 (asserting that the district court applied the per se rule because petitioner's "vertical conduct facilitated an agreement among the publishers"); Pet. 16 ("The panel majority deemed [petitioner's] dealings with publishers *per se* unlawful because those dealings supposedly 'facilitated' *horizontal* 'price-fixing' by the publishers.").

Petitioner's central argument rests on a persistent refusal to acknowledge the stated rationale for the decision below. The court of appeals did not hold that petitioner's vertical contracts with the publishers were unlawful—much less conclude that vertical restraints are subject to per se condemnation whenever they have the "effect of facilitating horizontal collusion." Pet. i. Instead, the court held that petitioner had "orchestrat[ed] a horizontal conspiracy" to fix prices and that it was liable for *participating in* that conspiracy. Pet. App. 4a. The court emphasized that petitioner's vertical agreements with the publishers were not challenged here, and it explained that "[h]ow the law might treat [those] vertical agreements in the absence of a finding that [petitioner] agreed to create the horizontal restraint is irrelevant." *Id.* at 61a-62a; see *id.* at 57a (observing that petitioner's "vertical [c]ontracts with the [publishers] might well, if challenged, have to be evaluated under the rule of reason"). Petitioner is thus entirely mistaken when it asserts (Pet. 16) that the court "appl[ied] the *per se* rule to [its] vertical dealings with e-book publishers."[6]

For much the same reason, petitioner is wrong in relying (Pet. 15-16) on the *Leegin* Court's statement

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[6] The court of appeals did find petitioner's contracts with the publishers to be "strong evidence" of its participation in the horizontal conspiracy, particularly because those contracts "were only attractive to the [publishers] to the extent they acted collectively." Pet. App. 44a, 51a. But the courts below expressly disclaimed any conclusion that the vertical agreements themselves were unlawful. *Id.* at 50a-51a, 248a-249a. The courts' evidentiary use of those agreements was entirely consistent with *Leegin*, in which the Court recognized that vertical agreements can be "useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel." 551 U.S. at 893.

that a vertical restraint "entered upon to facilitate" a horizontal cartel "would need to be held unlawful under the rule of reason." 551 U.S. at 893. As the court below explained, that statement appears to contemplate circumstances in which the parties to a horizontal conspiracy "use[] vertical agreements to facilitate coordination without the other parties to those agreements knowing about, or agreeing to, the horizontal conspiracy's goal." Pet. App. 60a; see *Leegin*, 551 U.S. at 892-893 (hypothesizing manufacturer and retailer cartels that use resale price maintenance agreements with non-conspirators to "facilitate" their price-fixing). *Leegin* indicates that, if such vertical arrangements are challenged, their legality should be determined under the rule of reason. But the Court did not address a situation like this one, where "the vertical organizer has not only committed to vertical arrangements, but has also agreed to participate in the horizontal conspiracy." Pet. App. 61a.[7] In that circumstance, a court need not consider the legality of the vertical agreements because all participants are liable for participating in the per se unlawful horizontal conspiracy.[8]

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[7] Indeed, the Court in *Leegin* expressly declined to consider a separate claim that the manufacturer in that case had "participated in an unlawful horizontal cartel" among retailers. 551 U.S. at 907-908; see *PSKS, Inc.* v. *Leegin Creative Leather Prods.*, 615 F.3d 412, 420 (5th Cir. 2010) (addressing that claim on remand), cert. denied, 562 U.S. 1217 (2011).

[8] Petitioner also misunderstands the import of *Leegin*'s statement about vertical agreements that are "entered upon to facilitate" horizontal cartels. Petitioner views that statement as establishing only that such agreements must be analyzed under the rule of reason. Read in full and in its context, however, that statement indicates that, although such vertical restraints are reviewed

b. In a variation on the same theme, petitioner asserts (Pet. 21-26) that the court of appeals improperly "relabeled" its "vertical conduct" a "horizontal price-fixing conspiracy." Pet. 21. Petitioner suggests that it simply engaged in parallel vertical dealings with the publishers, and that the court of appeals deemed it to have joined the publishers' conspiracy solely because those vertical agreements "allegedly impeded competition among horizontal rivals." Pet. 22.

As the court of appeals explained in rejecting the same "benign portrayal" of petitioner's dealings with the publishers, that alternative narrative "founders—and dramatically so—on the factual findings of the district court." Pet. App. 44a, 48a. Petitioner's insistence that this case involves per se condemnation of vertical conduct merely because of its horizontal effects is thus a thinly veiled challenge to the factual findings made by the district court and upheld by the court of appeals. Petitioner identifies no sound basis for rejecting those findings, let alone the sort of "obvious and exceptional showing of error" that this Court requires before overturning "concurrent find-

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under the rule of reason, a showing that a particular restraint is used to facilitate a horizontal price-fixing conspiracy is sufficient to establish that it is unreasonable:

> A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase prices is, and ought to be, *per se* unlawful. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, *it, too, would need to be held unlawful* under the rule of reason.

551 U.S. 893 (emphasis added; citations omitted).

ings of fact by two courts below." *Glossip* v. *Gross*, 135 S. Ct. 2726, 2740 (2015) (citation omitted).[9]

Proof that a party was a member of an antitrust conspiracy requires a showing of a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co.* v. *Spray-Rite Serv. Co.*, 465 U.S. 752, 764 (1984) (citation omitted). The trial record in this case demonstrates that petitioner "consciously played a key role in organizing [the publishers'] collusion" to raise prices. Pet. App. 44a. From the outset, petitioner used "the promise of higher prices as a bargaining chip to induce the [publishers] to participate in the iBookstore." *Id.* at 46a. All parties to the negotiations understood that the attractiveness of petitioner's proposal "hinged on whether [petitioner] could successfully help organize [the publishers] to force Amazon to an agency model and then to use their newfound collective control to raise ebook prices." *Ibid.*

Petitioner then went further, explicitly promoting its offer as a means for the publishers to act collectively to raise prices. For example:

- Cue told publishers that petitioner's proposal "solves [the] Amazon issue." Pet. App. 18a (citation omitted).
- Cue explained that "all publishers" would need to move "all retailers" to agency pricing. Pet. App. 19a (citation omitted)

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[9] Even the dissenting judge in the court of appeals did not question the district court's factual findings. To the contrary, he "*agree*[*d*] that [petitioner] intentionally organized a conspiracy among the [publishers] to raise ebook prices." Pet. App. 4a-5a; see *id.* at 91a-92a (Jacobs, J., dissenting).

- Cue promoted petitioner's plan as "the best chance for publishers to challenge the 9.99 price point." Pet. App. 23a (citation omitted).
- Cue touted petitioner's proposal as "the only way" for the publishers to "move the whole market off 9.99." Pet. App. 157a.
- Jobs urged a reluctant publishing executive to "[t]hrow in with [petitioner] and see if we can all make a go of this to create a real mainstream ebooks market at $12.99 and $14.99." Pet. App. 26a.

During negotiations, petitioner kept the publishers informed of what their competitors were doing and even "coordinated phone calls between the publishers who had agreed and those who remained on the fence." Pet. App. 49a. The record was thus replete with evidence that petitioner had urged the publishers to work together to achieve a result that none of them could have achieved alone, and that petitioner had then actively helped to coordinate their efforts. Those activities "went well beyond legitimately 'exchang[ing] information' within 'the normal course of business.'" *Id.* at 49a-50a (quoting *Monsanto*, 465 U.S. at 762-764).

Petitioner is thus wrong to suggest (Pet. 21-22) that this case resembles *Business Electronics*. There, this Court held that the per se rule did not apply to a manufacturer's agreement with a retailer to terminate its relationship with another retailer, even though the *effect* of the agreement was to eliminate horizontal competition between the retailers. 485 U.S. at 721. The Court explained that "whether a restraint is horizontal" for purposes of antitrust analysis de-

pends on "whether it is the product of a horizontal agreement," not on "whether its anticompetitive *effects* are horizontal." *Id.* at 730 n.4. As the Court observed, "*all* anticompetitive effects are by definition horizontal." *Ibid.* (emphasis added). In this case, by contrast, the publishers' agreement was indisputably a horizontal price-fixing scheme, not simply a vertical agreement with horizontal effects. The Court in *Business Electronics* made clear that the per se rule applies where, as here, vertical participants join in a "horizontal combination[]." *Id.* at 734 (citing *General Motors*, 384 U.S. at 140, and *Klor's*, 359 U.S. at 213).

c. Petitioner asserts (Pet. 18-20) that, even if it participated in a price-fixing conspiracy that would otherwise warrant per se condemnation, an exception to the per se rule is warranted here because of the "highly novel circumstances of this case" and the purported procompetitive benefits of its conduct. In a related vein, petitioner maintains (Pet. 26-28) that its ostensible procompetitive motive distinguishes this case from "'hub-and-spoke' cases" such as *General Motors* and *Klor's*. Those arguments are misconceived.

This Court has held that the per se rule does not apply in certain narrow circumstances where "restraints on competition are essential if the product is to be available at all." *American Needle, Inc.* v. *National Football League*, 560 U.S. 183, 203 (2010) (citation omitted). That standard is satisfied where the product at issue is "league sports," *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984) (citation omitted), or a blanket license covering thousands of copyrighted works, *Broadcast Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23-24 (1979).

Here, by contrast, petitioner "does not claim, nor could it, that creating an ebook retail market is possible only if the participating publishers coordinate with one another on price." Pet. App. 63a; see *Maricopa County*, 457 U.S. at 355-357 (declining to analogize price-fixing agreement among independent physicians to the blanket license at issue in *Broadcast Music*).[10]

Petitioner observes (Pet. 18-19) that, under this Court's decisions, "the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue." *Leegin*, 551 U.S. at 886; cf. *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1011 (7th Cir. 2012). Here, however, "the type of restraint at issue" is horizontal price fixing. The facts that the conspiracy occurred in a nascent market and that the conspirators relied in part on a novel combination of contract terms to effectuate their agreement do not alter the fundamental nature of their conduct. And this Court has squarely rejected "the argument that the *per se* rule must be rejustified for every in-

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[10] Petitioner asserts (Pet. 20) that the Court in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), referred to the possibility of "additional exceptions to the *per se* rule for new entrants in an industry." *Id.* at 53-54 n.22. But this Court was referring to a "*per se* rule" against certain "nonprice vertical restrictions," a rule that *Sylvania* itself overturned. *Id.* at 51 n.18; see *id.* at 58-59. This Court has never suggested that new entrants could be exempt from the per se rule against horizontal price-fixing. In any event, the five publishers who agreed to raise ebook prices were scarcely new entrants into the relevant market. If their agreement was per se unlawful (as it clearly was), and if petitioner knowingly helped to orchestrate their illegal scheme (as the courts below found), petitioner cannot invoke its own "new entrant" status as a basis for escaping liability.

dustry" or for every new mechanism for fixing prices. *Maricopa County*, 457 U.S. at 351.

Petitioner is also wrong in asserting (Pet. 26-28) that its purported procompetitive motives distinguish the "hub and spoke" cases. Under those decisions, a vertically-related firm (the hub) may be held liable if it joins a per se unlawful agreement among horizontal competitors (the spokes). Petitioner maintains (Pet. 26) that the rule reflected in those decisions is limited to "naked group-boycott cases where the hub's actions lacked *any* potential redeeming virtue," and that it does not apply where, as purportedly was the case here, the hub acted "in pursuit of a procompetitive objective." But the "procompetitive objective" to which petitioner apparently refers was simply the goal of operating a profitable iBookstore that, if successful, would reduce Amazon's share of the retail ebook market. The Court in *General Motors* rejected a similar argument, finding it to be of "no consequence" that each party to the conspiracy had "acted in its own lawful interest." 384 U.S. at 142. The Court added that conspiracies among manufacturers and retailers are "not to be saved [from application of the per se rule] by reference to the need for preserving the collaborators' profit margins" or by the need to combat "allegedly tortious conduct" by others in the market. *Id.* at 146.[11]

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[11] Contrary to petitioner's assertion (Pet. 26-27), the Seventh Circuit in *Toys "R" Us* assessed the defendant's motives not as part of the court's per se analysis, but as part of its rule-of-reason analysis of certain vertical restraints. 221 F.3d at 937-938. The court found the later horizontal conspiracy to be per se unlawful as to all participants, including the vertically-related retailer who had organized it, without regard to their motives. *Id.* at 934-935.

Similarly here, petitioner's objective in fixing retail ebook prices was to enter the market on its preferred terms by eliminating price competition from Amazon, which was pursuing a "loss leader" ebook pricing strategy that petitioner did not wish to emulate. But the fact that higher prices would "remove a barrier to other sellers who may wish to enter the market" cannot justify horizontal price-fixing. *Catalano*, 446 U.S. at 649; see *ibid.* ("Nothing could be more inconsistent with our cases."). The Court has squarely rejected the suggestion that price-fixing is a proper antidote to "[r]uinous competition" or the ostensible "evils of price cutting." *Socony-Vacuum*, 310 U.S. at 221.

d. Petitioner's price-fixing conspiracy thus was properly condemned as per se unlawful without an examination of its purported competitive benefits. The very premise of the per se rule is that "[t]he anticompetitive potential inherent in all price-fixing arrangements justifies their facial invalidation" without regard to any purported "pro-competitive justifications." *Maricopa County*, 457 U.S. at 351. In any event, the ostensible competitive benefits that petitioner identifies are either illusory or not fairly attributable to the horizontal price-fixing conspiracy.

Petitioner places great weight (Pet. i, 6, 9) on the "revolutionary" nature of the iPad, which unquestionably brought great benefits for consumers. Those benefits, however, were in no way attributable to the price-fixing conspiracy challenged here. The iBookstore was a last-minute addition to the iPad, and it was clear from the outset that the iPad would "go to market with or without the iBookstore." Pet. App. 12a-13a.

Petitioner also suggests that its conduct benefitted competition by "disrupt[ing] Amazon's dominant position." Pet. i. But petitioner entered the ebook market only after "ensuring that market-wide ebook prices would rise to a level that it, and the [publishers], had jointly agreed upon." Pet. App. 6a. Petitioner and the publishers thus sought to reduce Amazon's dominance in the ebook market, not by introducing new goods or pricing policies that consumers would find more attractive than those that Amazon had previously offered, but by increasing the price (and thus reducing the attractiveness) of Amazon's own wares. As the court of appeals observed, "competition is not served by permitting a market entrant to *eliminate price competition* as a condition of entry, and it is cold comfort to consumers that they gained a new ebook retailer at the expense of passing control over all ebook prices to a cartel of book publishers." *Ibid.*

Petitioner also asserts (Pet. 1) that, "[f]ollowing [its] entry" into the ebook market, "output increased" and "overall prices decreased." The district court found, however, based in part on analysis by petitioner's own experts, that prices of the new and bestselling ebooks subject to the conspiracy increased—indeed, they rose immediately and dramatically, and they "remained elevated a full two years" later. Pet. App. 67a; see *id.* at 30a-34a, 198a-200a. It is true that *total* ebook sales increased and *overall* average prices decreased in the years after petitioner's entry. But "the ebook market had been expanding rapidly even before [petitioner's] entry and average prices had been falling as lower-end publishers entered the market and larger numbers of old books became available in digital form." *Id.* at 32a. In determining the effect

of the price-fixing conspiracy, the relevant comparison is between actual post-conspiracy ebook prices and those that would have prevailed in the absence of the collusive conduct. On that question, the record established, and the district court found, that "the actions taken by [petitioner] and the [publishers] led to an increase in the price of e-books." *Id.* at 33a. That fact is scarcely surprising, since from the publishers' perspective the entire purpose of the agreement was to dislodge Amazon from a price point that the publishers viewed as too low.

3. The decision below does not conflict with any decision of another court of appeals. Petitioner asserts (Pet. 17-18) a conflict between the Second Circuit's decision in this case and the decision of the Third Circuit in *Toledo Mack Sales & Service, Inc.* v. *Mack Trucks, Inc.*, 530 F.3d 204 (2008) (*Toledo Mack*). In that case, an authorized dealer of Mack trucks asserted that two agreements violated the Sherman Act: (1) a "horizontal agreement among [Mack] dealers" barring price competition, and (2) a "vertical agreement" between Mack and its dealers under which Mack would deny discounts to any dealer that tried to compete on price. *Id.* at 218-219. The Third Circuit concluded that the dealers' horizontal agreement would, if proved, be "*per se* unlawful." *Id.* at 221. The court held, however, that under *Leegin*, the separate vertical agreement between the dealers and Mack should be analyzed under the rule of reason. *Id.* at 224-225.

The Third Circuit's application of the rule of reason does not conflict with the decision below because the *Toldeo Mack* court analyzed the conduct at issue as two *separate* unlawful agreements, not as a single

conspiracy. The plaintiff alleged that the purpose of the dealers' vertical agreement with Mack was "to support [the] illegal horizontal agreement[] between [the] dealers." *Toledo Mack* 530 F.3d at 225. But the premise of the court's analysis was that Mack had not actually joined—much less "orchestrated," Pet. App. 3a-4a—the dealers' horizontal conspiracy. See 530 F.3d at 221 (explaining that proof of the per se unlawful conspiracy among the dealers would "not establish that Mack itself was a party to an agreement that violated [Section] 1 of the Sherman Act").

Here, in contrast, the decisions below rest on the district court's finding that petitioner organized and participated in the publishers' per se unlawful horizontal price-fixing conspiracy. Nothing in *Toledo Mack* suggests that a party to such a conspiracy can escape liability merely because it has a vertical relationship with the other conspirators. And a subsequent Third Circuit decision confirms (albeit in dicta) that a "horizontal agreement" does not escape per se condemnation even if it is organized by "an entity vertically oriented" to the other conspirators. *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 337 (2010); cf. *MM Steel*, 806 F.3d at 849 (noting that the manufacturer in *Toledo Mack* had not joined the horizontal conspiracy).[12]

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[12] Petitioner is wrong to suggest (Pet. 18) that *In re Musical Instruments & Equipment Antitrust Litigation*, 798 F.3d 1186 (9th Cir. 2015), supports its view that the liability of a vertical participant in a horizontal price-fixing conspiracy should be analyzed under the rule of reason. The Ninth Circuit in that case stated that vertical agreements should be analyzed under the rule of reason even if they are part of a broader "hub-and-spoke conspiracy" that includes horizontal elements. *Id.* at 1192-1193. But the court also indicated that *all* participants in the hub-and-spoke

4. Finally, petitioner asserts (Pet. 28-29) that the decision below "will sow uncertainty," chill pro-competitive conduct, and raise questions about the legality of common contract terms such as agency agreements and MFN clauses. But that argument rests on the premise that petitioner was held liable for the sanitized version of its conduct that it presents in the petition, not for its orchestration of the price-fixing conspiracy actually found by the courts below. Both of the courts below unambiguously based their legal analyses on the district court's finding that petitioner had consciously joined a horizontal price-fixing conspiracy, and both courts emphasized that their decisions cast no doubt on the "broader legality" of the contract terms at issue, such as the "agency model and MFNs." Pet. App. 50a-51a, 248a-249a.

The decision below rests on the unexceptionable proposition that petitioner was not entitled to accomplish its entry into a market by organizing a horizontal price-fixing conspiracy among that market's suppliers. Petitioner was not a hapless actor that unwittingly "bec[ame] enmeshed with some form of alleged collusion * * * only because of the business necessities of assembling suppliers." Pet. 29. Instead, petitioner orchestrated the publishers' conspiracy and actively relied on their collusion to achieve its business ends. Far from making "it perilously difficult for market

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conspiracy—including the vertically-related firms—may be held liable for the per se unlawful horizontal restraint. *Id.* at 1193 n.4 (observing that in that case, as in this one, the plaintiff had not claimed that the vertical agreements were unlawful, and that the claims against the vertical participants were instead premised on the allegation that they "conspired to facilitate and keep in place the [horizontal] agreements among the manufacturers").

participants to tell when vertical conduct might cross a line into *per se* condemnation," *ibid.*, the court of appeals' ruling provides clear guidance firmly rooted in this Court's precedents and in the statutory text. The Sherman Act condemns horizontal price-fixing conspiracies as per se unlawful, and "[e]very person" who participates in such an unlawful conspiracy is liable for the violation. 15 U.S.C. 1. The Second Circuit's reaffirmation of that settled rule poses no threat to innovation or legitimate competition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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