No. 15-565

In The
Supreme Court of the United States

APPLE INC., PETITIONER

v.

UNITED STATES, ET AL.

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

BRIEF OF INTERNATIONAL CENTER FOR LAW & ECONOMICS AND SCHOLARS OF LAW AND ECONOMICS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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The International Center for Law & Economics ("ICLE") and scholars of law and economics respectfully submit this brief as amici curiae in support of certiorari.[1]

INTEREST OF AMICI CURIAE

The International Center for Law & Economics is a nonprofit, non-partisan global research and policy center. ICLE works with more than fifty affiliated scholars and research centers around the world to promote the use of evidence-based methodologies in developing sensible, economically grounded policies that will enable businesses and innovation to flourish.

ICLE is joined as amici curiae by scholars of law and economics who are professors at leading U.S. universities:

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[1] All parties have received ten day's notice of amici's intention to file this brief, and have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals' decision poses a grave risk to the innovation economy. The court condemned as per se violations of the antitrust laws practices that made competition possible in a nascent market through introduction of a new business model. And it did so in the absence of any precedent holding that the novel combination of practices at issue could be deemed per se illegal. The court of appeals' decision thus sends a chill wind through industry sectors where entrepreneurs are contemplating the launch of innovative business models to fuel the modern economy.

This Court's precedent on application of the per se rule is clear: "[I]t is only after considerable experience with certain business relationships that courts classify them as per se violations" of the antitrust laws. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979) ("*BMI*"). Per se condemnation is appropriate only when a practice lacks any plausible procompetitive rationale. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999). If there is no long track record of judicial experience establishing that a practice always or almost always lessens competition, then the practice should be subject to analysis under the rule of reason. *BMI*, 441 U.S. at 23-24. In that way, a finding that a novel practice (or an old practice in a new context) is anticompetitive may be made only after a rigorous analysis of all the facts and circumstances. Such a rule sensibly avoids unintentional condemnation of economically valuable activity where the full effects of that activity are simply unknown to the courts.

In disregard of these principles, the court of appeals applied the per se rule to a novel combination of competition-enabling practices in an emerging market. The negative consequences of the court's ruling will be particularly acute for modern high-technology sectors of the economy, where entrepreneurs planning to create entirely new markets or inject competition into existing ones through adoption of new business models will now face exactly the sort of artificial deterrents that this Court has strived to prevent. "Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("*Trinko*") (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

The growth of the internet and ubiquity of mobile communications have enabled companies to develop a variety of new business models for selling goods and services. These models include "multi-sided" distribution platforms that bring together large numbers of suppliers and customers participating in a vertical chain of commerce—e.g., Expedia for travel services and Uber for on-demand ridesharing.

Firms offering such multi-sided platforms must compete aggressively to attract the critical mass of participants required to succeed. This form of business model competition cannot occur unless firms reach common agreements with large groups of both suppliers and customers. Success therefore requires greater cooperation among participants at different levels of the market than would be found in hypothetical models of perfect competition. That was the path followed by Apple to introduce competition to the multi-sided marketplace for e-books.

By subjecting such practices to the per se rule, the court of appeals has raised the specter of the rule's application in precisely the circumstances where uncertainty is costliest. The fact that it was the United States that invoked per se liability when it brought this case greatly compounds the problem. Entrepreneurs must now reckon not only with a class action bar emboldened by the court of appeals' decision but also with the chilling prospect of being accused of a per se violation by a Department of Justice unrestrained by settled understandings of the limits on that theory of liability.

Absent a ruling from this Court that the lawfulness of the kind of practices at issue here must be judged under the rule of reason, entrepreneurs will be deterred from using the most efficient business models to advance the development of our economy. The result will be adoption of "suboptimal distribution strateg[ies]" that weaken competition and reduce consumer welfare, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 903 (2007), or, even worse, the absence of competition altogether. This Court's review is warranted.

ARGUMENT

THE COURT OF APPEALS' DECISION CREATES LEGAL UNCERTAINTY THAT THREATENS TO STIFLE COMPETITION AND ECONOMIC GROWTH

A. Competition Among Different Business Models Is Critical To Our Nation's Economic Success

1. Entry with new business models spurs competition and economic growth

Entrepreneurship is "the driving force of the market." Israel M. Kirzner, *The Driving Force of the Market: Essays in Austrian Economics* 12 (2000) (quoting Ludwig von Mises, *Human Action* 325-26 (1949)). In the twenty-first century American economy, entrepreneurs compete not only to provide new goods and services but also to create entirely new models to facilitate their exchange. Entrepreneurs that enter markets using new business models disrupt the competitive status quo and stimulate rivalry. To be sure, an innovative new entrant may not spur immediate price reductions—indeed, the opposite can occur in the short term. But that entrant's innovation may improve quality and ultimately create welfare-enhancing competition between firms where before there was none. *See generally* Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. Comp. L. & Econ. 153 (2010).

Economists refer to certain of these new models as "multi-sided platforms." A multi-sided platform is a business model that creates value by reducing the transaction costs of direct interactions between buyers and sellers in innovative ways that mere resellers cannot replicate. *See generally* David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses*, in *Oxford Handbook On International Antitrust Economics* 409 (Roger Blair & Daniel Sokol, eds., 2013).

Our new economy is filled with industries that depend on a multi-sided platform model, including online commerce, computer software, entertainment, and travel. *See* David S. Evans, *Economics of Vertical Restraints for Multi-Sided Platforms* 2 (Coase-Sandor Institute for Law & Economics Working Paper No. 626, Jan. 2, 2013) ("*Vertical Restraints*"). These industries account for hundreds of billions of dollars in commerce each year.

Amazon's Marketplace, for example, connects thousands of small merchants to tens of millions of customers each month. For these merchants, access to the platform increases sales by an average of 50%, and customers enjoy a much broader array of product offerings. Estimates place the total revenue generated by third-party merchants on the Marketplace platform at a minimum of $72 billion. *See* Greg Bensinger, *Competing With Amazon on Amazon*, Wall Street J. (June 27, 2012). And in even newer ventures, the growth of multi-sided markets is equally impressive.

It has been reported that Uber—a ridesharing service that connects willing drivers and riders—processed more than $10 billion in fares in just the last year, and projects that figure to climb to more than $26 billion next year. Carmel DeAmicis, *Leaked Doc: Uber Nears $2 Billion in Revenue, Expects IPO in 18-24 Months*, RE/CODE (Aug. 21, 2015).

2. Entry by new platform businesses often requires collaboration among participants at different levels of the market and use of vertical restraints

To ensure the successful entry of new business models into the marketplace, entrepreneurs may need to share certain information and use restrictive contract terms with their prospective business partners. In this context, these communications and agreements are procompetitive in the most basic sense: they make competition possible. The court of appeals' condemnation of these tools of entry as per se violations of the antitrust laws could have broad consequences well beyond the present case. The kinds of conduct the court condemned—sharing market information with prospective business partners, using most-favored-nation clauses ("MFNs") and price caps—are often employed by new market entrants.

Information sharing can be a particularly important tool of entry for entrepreneurs entering multi-sided markets. A critical feature of multi-sided platforms is that the demand of platform participants is interdependent: customers on one side of a platform depend on the participation of customers on the other side of the platform. *See Vertical Restraints*, *supra*, at 2. Thus, for these markets (including the e-book market) critical mass on all sides is necessary to ensure the viability of the platform. A new platform generally cannot be launched unless it has commitments to use it from multiple market participants on each side of the platform. Entrepreneurs entering a market with a multi-sided platform business model therefore often must share market information with their prospective business partners in order to ensure this "critical mass" of participation will occur.

For example, retailers will not incur the expense of accepting credit cards unless many consumers will use them, while banks will not incur the expense of issuing credit cards to consumers unless many merchants will accept them. Thus, no single market participant (retailer or bank) may be willing to commit to the platform and make the requisite investment unless it knows its rivals will do so as well. This shared knowledge among competitors ensures each potential participant that its up-front investment will not be in vain.

Additionally, businesses often employ one or more forms of vertical restraint to make entry viable. Vertical restraints are agreements between participants at different levels of the market—e.g., the platform owner and its suppliers—that constrain one or both parties' commercial conduct. This Court has recognized that vertical restraints often have procompetitive effects, including "facilitating market entry for new firms and brands." *Leegin*, 551 U.S. at 891; *see also id.* at 889-92; *State Oil Co. v. Khan*, 522 U.S. 3, 11-15 (1997). It has therefore held categorically that "[v]ertical price restraints are to be judged according to the rule of reason." *Leegin*, 551 U.S. at 907.

In platform businesses, vertical restraints are generally used to achieve a number of procompetitive objectives, including: addressing coordination problems that would otherwise inhibit platform growth; attaining scale that will provide significant benefits to consumers; and providing benefits to one side of the platform that will encourage platform use and increase overall consumer welfare. *See, e.g.*, *Vertical Restraints*, *supra*, at 8-9. To achieve these objectives, new platform entrants may use a variety of vertical restraints, including (i) entering into long-term, fixed-price supply contracts; (ii) negotiating for exclusivity; (iii) agreeing to price ceilings to ensure sufficient demand; and (iv) using devices like MFNs to attract sellers and mitigate the ability of competitors to undermine their entry.

Each of these restraints typically enhances consumer welfare when employed by new entrants in platform industries. It is widely-recognized that MFNs in particular "are likely to have procompetitive justifications for multi-sided platforms beyond those that have been offered for single-sided firms." *Id.* at 12. For example, a supplier will be reluctant to commit to a new platform if it believes that its competitors could join later and obtain better terms. An MFN overcomes this "free-riding" problem by providing any supplier that commits to the platform a contractual assurance that it will not later find itself at a competitive disadvantage. *See Leegin*, 551 U.S. at 890-91 (vertical restraints can enhance competition by preventing "free rider[s]" from "captur[ing] some of the increased demand" generated by others). MFNs can also help maintain critical mass by guaranteeing that the platform's pricing remains competitive.

Businesses that implement vertical restraints often do so with the knowledge that the restraints may result in higher prices. Contrary to the court of appeals' suggestion (Pet. App. 66a), it has long been settled that such price increases do not make the restraints per se unlawful. For example, the implementation of minimum resale price maintenance in *Leegin* was specifically designed to prevent certain retailers from selling products at a discount, yet the Court held that it must be evaluated under the rule of reason. 551 U.S. at 883, 894. Indeed, even where genuine vertical conduct also serves to facilitate anticompetitive collusion (as the court of appeals erroneously concluded was the case here), this Court has made clear that such conduct "would [still] need to be held unlawful under the rule of reason." *Id.* at 893.[2]

Antitrust law should not permit courts, which are "ill suited" to "act as central planners," to condemn a new business model without detailed review of its actual competitive effects. *Trinko*, 540 U.S. at 408. To that end, this Court has instructed that the per se rule should not be applied to "cooperative activity involving a restraint or exclusion" where there are "*plausible arguments* that [the activities] were intended to enhance overall efficiency and make markets more competitive." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294-96 (1985) (emphasis added); *accord Cal. Dental*, 526 U.S. at 771. Because the kinds of business models and vertical restraints the court of appeals found unlawful in this case "can have either

[2] *See also Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 225 & n.15 (3d Cir. 2008) (although horizontal agreement among truck dealers was per se unlawful, vertical agreement between manufacturer and dealers must be judged under the rule of reason). To be sure, there may be cases in which a vertical actor is engaged in a sham—i.e., conduct that has no plausible procompetitive effects. In these circumstances, courts may apply the per se rule because the conduct lacks "any redeeming virtue." *MM Steel, L.P. v. JSW Steel (USA) Inc.*, No. 14-20267, 2015 WL 7694519, at *8-10 (5th Cir. Nov. 25, 2015); *see also Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959). But that is not the case here, where Apple's entry offered publishers and readers a new e-book platform that the district court concluded benefited consumers. Pet. App. 248a n.69.

procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed," they are "ill suited for per se condemnation." *Leegin*, 551 U.S. at 894.

B. The Court Of Appeals' Erroneous Per Se Condemnation Of Apple's New Entry Creates Enormous Uncertainty For Future Entrepreneurs

The court of appeals' departure from this Court's established precedent (and its conflict with the Third Circuit, *see* Pet. 17-18) makes it impossible for businesses to judge with any confidence when genuine vertical conduct may subject them to per se liability and treble damages. This uncertainty is particularly acute for entrepreneurs contemplating entry into the platform markets that are so critical to our new economy.

1. Apple and Amazon offered the market competing business models

This case involves novel facts and the novel use of vertical restraints that enabled entry by a new competitor into a multi-sided platform market. E-books and e-readers form an archetypal platform market that connects publishers to readers in an innovative fashion. At its core, this case is about competition between two different platform business models for the distribution of e-books. As such, it is a quintessential candidate for application of the rule of reason.

From 2009 through 2010—the time of the events underlying this case—the e-book market was still "nascent," Pet. App. 3a, and extremely small compared to the broader book market with which it competes, *see* Rüdiger Wischenbart, *The Global eBook Market: Current Conditions & Future Projections* 4 (2011). Amazon had entered the e-book market in 2007 and grown rapidly. Other competitors had entered or were planning to enter and compete against Amazon. Barnes & Noble and Sony entered before Apple, and Google was also contemplating entry. Pet. App. 9a, 204a. All of these firms were engaged in a race to develop their own business models to promote the development of the e-book industry.

Amazon was the leading e-book platform, in part because of its "loss-leader" strategy to sell e-books below cost in order to stimulate the growth of its e-commerce platform. *See, e.g.*, Geoffrey Manne, *Amazon vs. Macmillan: It's all about control*, Truth on the Market (Feb. 7, 2010), http://truthonthemarket.com/2010/02/07/amazon-vs-macmillan-its-all-about-control/. But Amazon's particular business model was by no means the inevitable victor in the race among e-book platforms. Individual publishers, whose interests diverged from Amazon's, were unhappy with Amazon's loss-leader strategy. Even before Apple's entry the publishers had attempted to alter Amazon's pricing model by raising wholesale prices and delaying the release of new and best-selling books. Pet. App. 11a-12a, 16a. Those efforts were unsuccessful.

Absent a strong challenger to Amazon, any publisher wishing to sell e-books had to deal with Amazon on Amazon's terms.

Apple seized the opportunity to compete with Amazon by offering publishers a new product and a different distribution model. Apple's development of the iPad (e-book reader) and the iBookstore (e-book store) was an innovative and competitive alternative to Amazon. But to succeed with this multi-sided platform, Apple had to obtain critical mass among both users (iPad owners) and suppliers (publishers). Unlike Amazon, Apple had no pre-existing relationships with publishers; it entered the e-book market as a by-product of its entry into (indeed, creation of) a new platform business with the iPad. In an effort to attract a critical mass of publishers to its new platform and earn a profit selling e-books, Apple offered the publishers an attractive deal, using the agency model that Apple had successfully employed to sell other digital products, such as music in its iTunes store. Pet. App. 145a.

The agency model encouraged the publishers to join Apple's platform by giving them more control over the price at which their e-books were sold, and the MFN clauses and price caps guaranteed that prices would be attractive to consumers as well. Without those vertical restraints, Apple risked marketing a platform filled with unattractively-priced content. Apple's business model thus reduced the risk to Apple of developing and investing in its platform, and offered publishers and consumers a viable competitive alternative to Amazon.

2. The Second Circuit's application of the per se rule was inappropriate

This Court has emphasized that the per se rule should be applied (1) "only after courts have had considerable experience with the type of restraint at issue" and (2) "only if courts can predict with confidence that [the restraint] would be invalidated in all or almost all instances under the rule of reason" because it "'lack[s] * * * any redeeming virtue.'" *Leegin*, 551 U.S. at 886-87 (omission in original; citation omitted). Neither prerequisite is satisfied here.

As the lower courts acknowledged, each element of Apple's business model—the agency relationship, MFNs, and price caps—is commonly found in "entirely lawful contracts" that enhance competition. Pet. App. 228a; *see* Pet. App. 98a (Jacobs, J., dissenting). In the lower courts' view, it was only "under the particular circumstances of this case" that the *combination* of these elements unlawfully restrained trade. Pet. App. 51a. In other words, the court of appeals based its application of the per se rule on a novel combination of elements in a nascent industry. Those are precisely the kind of untested circumstances that should have foreclosed per se analysis and invited application of the rule of reason. *See BMI*, 441 U.S. at 10 (holding rule of reason must apply because "we have never examined a practice like this one before");

In re Sulfuric Acid Antitrust Litig., 703 F.3d 1004, 1011-12 (7th Cir. 2012) ("[i]t is a bad idea to subject a novel way of doing business (or an old way in a new and previously unexamined context * * *) to per se treatment"); *United States v. Microsoft Corp.*, 253 F.3d 34, 84, 89 (D.C. Cir. 2001) (refusing to apply the per se rule to "tying arrangements involving platform software products" because they were an entirely "novel categor[y] of dealings").[3]

Nor can it be predicted with any confidence that the vertical restraints at issue here would be invalidated under the rule of reason in all or nearly all circumstances. *See Leegin*, 551 U.S. at 887 ("It should come as no surprise, then, that 'we have expressed reluctance to adopt per se rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.'" (quoting *Khan*, 522 U.S. at 10)). There is no support in the case law or economic literature for the proposition that agency models, MFNs, or price caps lack any redeeming virtue. To the contrary, courts have concluded that these tools—and vertical restraints more broadly—generally *enhance* competition. *See*, *e.g.*, *United States v. Gen. Elec. Co.*, 272 U.S. 476, 488 (1926) ("genuine contracts of agency" do not violate the antitrust laws); *Khan*, 522 U.S. at 15-16 (vertical

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[3] *See also Cal. Dental*, 526 U.S. at 781 (courts' mode of analysis "may vary over time, if rule-of-reason analyses in case after case reach identical conclusions").

price caps must be judged under the rule of reason); *Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (use of MFNs can enhance competition; "[i]t is not price-fixing"). Moreover, far from establishing their uniformly anticompetitive impact, the existing literature on the use of multi-sided or platform MFNs is sparse, at best, and the literature on the use of such MFNs by new entrants is essentially non-existent.[4]

Indeed, judicial and academic experience counsels in favor of recognition of the procompetitive potential of MFNs in the context of new entry. *See, e.g.*, *Marshfield Clinic*, 65 F.3d at 1415 (use of MFNs is "the sort of conduct that the antitrust laws seek to encourage").[5] The use of MFNs by new entrants to mitigate the riskiness of investment is economically analogous to the use of other vertical restraints to achieve similar procompetitive ends. *See, e.g.*, Robin S. Lee, *Vertical Integration and Exclusivity in Platform and Two-Sided Markets*, 103 Am. Econ. Rev.

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[4] For a review of the existing literature, see Pinar Akman, *A Competition Law Assessment of Platform Most-Favored-Customer Clauses* 5 (Centre for Competition Policy, Working Paper 15-12, Sept. 2015).

[5] Economists have recognized that MFNs in single-sided markets are often procompetitive, and potentially anticompetitive only in certain market circumstances, making per se condemnation of these restraints inappropriate. *See, e.g.*, Jonathan B. Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, 27 Antitrust, Spring 2013 at 20, 20-22 (2013).

2960 (2013) (demonstrating that exclusive contracts between hardware manufacturers and software developers in the videogame industry facilitated new platform entry). And this Court has recognized the *benefits* to new entrants of such vertical restraints. *See, e.g.*, *Leegin*, 551 U.S. at 891 ("Resale price maintenance, in addition, can increase interbrand competition by facilitating market entry for new firms and brands." (citing *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 55 (1977))); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 41 (1984) (O'Connor, J., concurring) ("'[Tie-ins] may facilitate new entry into fields where established sellers have wedded their customers to them * * * .'" (first alteration in original; citation omitted)), *abrogated on other grounds by Ill. Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

3. The court of appeals' focus on short-term increases in Amazon's prices was misplaced

The court of appeals emphasized that in some cases e-book prices increased after Apple's entry, and it viewed that fact as strong support for application of the per se rule. Pet. App. 66a. This Court, however, has emphasized that the per se rule is inappropriate where, as here, "prices can be increased in the course of promoting procompetitive effects." *Leegin*, 551 U.S. at 895-96.

Competition occurs on many planes other than price. Higher prices, therefore, do not necessarily suggest decreased competition or anticompetitive effects. *See* Joshua D. Wright, *Antitrust, Multi-Dimensional Competition, and Innovation: Do We Have An Antitrust-Relevant Theory of Competition Now?*, in *Regulating Innovation: Competition Policy and Patent Law Under Uncertainty* 239 (Geoffrey A. Manne & Joshua D. Wright, eds., 2011) ("[T]he multi-dimensional nature of competition implies that antitrust analysis seeking to maximize consumer or total welfare must inevitably calculate welfare tradeoffs when innovation and price effects run in opposite directions."); *see also* Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* 84 (1943) (discussing circumstances in which price competition is "a matter of comparative indifference" when compared to "the competition from the new commodity, the new technology, the new source of supply, [or] *the new type of organization*") (emphasis added). Higher prices may accompany welfare-enhancing "competition on the merits," resulting in greater investment in product quality, reputation, innovation, or distribution mechanisms.

In this case, the court found damning that Apple's entry resulted in Amazon charging higher prices for certain e-books. While the court acknowledged that "[n]o court can presume to know the proper price of an ebook," Pet. App. 68a, its analysis rested on the presumption that Amazon's prices before Apple's entry were competitive, Pet. App. 45a-47a. The record, however, offers no support for that presumption, and thus no support for the inference that post-entry price increases were anticompetitive. In fact, a restraint might increase prices precisely because it overcomes a market failure. *See* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. Ill. L. Rev. 77, 146-51 (2003). Here, the change in Amazon's prices may simply reflect the fact that Amazon's business model resulted in artificially low prices, akin to market failure—not that Apple sought or obtained *supracompetitive* prices.

The court of appeals also focused erroneously on the effect of Apple's entry on the e-book prices of a single competitor, Amazon, instead of on the e-book marketplace as a whole. The court found problematic that Apple's entry "'stiffened the spines'" of the publishers, Pet. App. 45a, and enabled them to "demand new terms from Amazon," including the use of the agency model, Pet. App. 163a. But that is exactly what competition from new entrants does: it empowers parties to obtain better products and more favorable terms from their suppliers. The fact that an incumbent firm—particularly a market leader such as Amazon—had to respond to the rigors of competition is hardly ground for condemning a new entry. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 (1986) (the antitrust laws are for "the protection of *competition, not competitors*").

Moreover, while Amazon's loss-leader pricing strategy might have benefited consumers in the early days of the nascent and growing e-book market, it might have had exactly the opposite effect over time. Amazon's below-cost pricing would have deterred new entry (absent an innovative entry strategy like Apple's), restraining long-term competition and growth in the market. Amazon's loss-leader model could also have diminished the incentives of authors and publishers to invest in creating new content, of brick and mortar stores to promote and sell that content, and of distributors (including Amazon) to invest in efficient marketing of e-books. *See* Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free Riding*, 76 Antitrust L.J. 431, 436-37 (2009). In this sense, the move to an agency model may yield the same procompetitive benefits as resale price maintenance, and therefore should be judged under the rule of reason. *See, e.g.*, *Leegin*, 551 U.S. at 890-91 (resale price maintenance can increase investment in product development and promotion).

4. The court of appeals' application of the per se rule disregarded the potential procompetitive benefits of Apple's conduct

Apple's conduct in obtaining the publishers' participation in the iBookstore facilitated its competitive entry. As explained above, the problem of ensuring that a new entrant has the critical mass of suppliers or customers it needs to compete is common, particularly when distributors offer platforms that facilitate trade among many sellers and buyers. *See supra* pp. 9-14. The district court correctly concluded that Apple acted in its own "independent, economic interests" in obtaining the publishers' commitments to participate in the iBookstore. Pet. App. 227a.

Apple could not have launched its new distribution platform without a critical mass of publishers and titles. Pet. App. 14a-15a, 21a. No individual publisher, however, would commit to the iBookstore without assurances that others would join because they all feared retribution from Amazon. Pet. App. 23a. Apple's conduct in solving this problem by organizing the publishers' participation in the iBookstore facilitated its competitive entry. That conduct enhanced, not lessened, competition. *See Leegin*, 551 U.S. at 891.

And it was the fact of Apple's entry, not the use of vertical restraints in its contracts, that enabled the publishers to wield the bargaining power sufficient to move Amazon to the agency model. *See* Pet. App. 79a (noting that introduction of the iPad and iBookstore "gave publishers more leverage to negotiate for alternative sales models or different pricing"); Dist. Ct. Transcript of Bench Trial at 2095-98 (June 18, 2013) (B. Klein) ("Apple's entry probably gave the publishers an increased ability to threaten [Amazon sufficiently that it accepted the agency model]. * * * The MFN [made] a trivial change in the publishers' incentives. * * * The big change that occurs is the change on the other side of the bargaining situation after Apple comes in where Amazon now cannot just tell them no.").

For all these reasons, the relevant competition between Apple and Amazon is at the *platform* level. As explained above, it is misleading to look solely at prices—and even more so prices on only one side of a multi-sided market—in evaluating the market's competitiveness. Provided that switching costs are low enough and information about the platforms is available to consumers, consumer welfare may have been enhanced by competition between the platforms on a range of non-price dimensions. Among those non-price factors were: the Apple iBookstore's distinctive design, Apple's proprietary file format, features on Apple's iPad that were unavailable on Kindle Readers, Apple's use of a range of marketing incentives unavailable to Amazon, and Apple's algorithmic matching between its data and consumers' e-book purchases. Those features all could have served to strengthen competition and to make the e-book market more attractive to publishers and readers alike, even at higher prices.

The court of appeals' failure to consider these dimensions of competition was error. In fact, as the district court concluded, Apple's entry and the launch of the iBookstore was "extremely beneficial to consumers and competition." Pet. App. 248a n.69. The court's candid acknowledgement of "the plausibility of competing claims about the effects of [Apple's entry] rules out the indulgently abbreviated review" it conducted under the per se rule. *Cal. Dental*, 526 U.S. at 778.

C. The Uncertainty Created By The Court Of Appeals' Decision Will Deter New Entry And Lessen Competition

This case involves conduct indistinguishable from conduct that this Court has held to be subject to the rule of reason. *See supra* pp. 17-20. But under the court of appeals' approach, a company's communications with its suppliers or customers regarding market information or the adoption of commonplace vertical restraints could be challenged as a per se unlawful effort to "facilitate" horizontal price fixing.

Absent a reaffirmation by this Court that the lawfulness of potentially procompetitive vertical conduct must be judged under the rule of reason, entrepreneurs will be deterred from using the most efficient business models to advance the development of our new economy. In *Leegin*, this Court admonished lower courts not to apply the antitrust laws in a way that makes use of a particular business model "more attractive based on the per se rule" rather than "real market conditions." 551 U.S. at 903. The consequence, the Court warned, would be market "distortion[s]" that would force businesses to "engage in second-best alternatives" and cause consumers "to shoulder the increased expense of the inferior practices." *Id.* at 902-03.

The court of appeals' decision would create precisely this kind of market distortion and thus deter "procompetitive conduct the antitrust laws should encourage." *Id.* at 895. Indeed, the court of appeals concluded that “if Apple could not turn a profit [using the wholesale model], then there was no place for its platform in the ebook retail market.” Pet. App. 74a. That is, according to the court, Apple’s choices were to use the incumbent, wholesale model and compete unprofitably; not compete at all; or enter with a new business model and risk legal liability. But this is an artificial choice manufactured by the court’s application of the per se rule and one that “real market conditions” do not dictate. Faced with this Hobson’s choice, it is likely that many future entrepreneurs will refrain from investing in the new and innovative business models that drive economic growth, lest they subject themselves to potential per se antitrust liability and treble damages claims.

The fact that it was the United States that brought this case compounds entrepreneurs’ problems. It means that innovators must now face the chilling prospect of being accused of a per se violation by a Department of Justice unrestrained by settled understandings of the limits on that theory of liability. And the potential for per se liability will encourage the private class action bar to bring additional actions against entrepreneurs that develop successful new business models, recognizing that the mere threat of discovery expense and treble damages “will push cost-conscious defendants to settle even anemic cases.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). Entrepreneurs’ vulnerability to such claims will be particularly great in platform and “sharing economy” markets that depend on interdependent commitments among market participants. Rather than incur these risks, entrepreneurs will choose "suboptimal distribution strateg[ies]" that weaken competition and reduce consumer welfare, *Leegin*, 551 U.S. at 903, or, worse still, not compete at all. This Court's review is needed to resolve the enormous and costly uncertainty created by the court of appeals' decision.

CONCLUSION

For the foregoing reasons and those provided in the petition for a writ of certiorari, the petition should be granted.

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