No. 18-_____

IN THE
Supreme Court of the United States

ANDERSON NEWS, L.L.C., CHARLES ANDERSON, JR., AND LLOYD T. WHITAKER, AS THE ASSIGNEE UNDER AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS FOR ANDERSON SERVICES, L.L.C.,
Petitioners,

v.

AMERICAN MEDIA, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a horizontal agreement to boycott a supplier can escape *per se* condemnation under Section 1 of the Sherman Act based on the assertion that the conspirators organized the boycott in response to the supplier's proposed price increase and not for the purpose of reducing competition in the supplier's market.

PARTIES TO THE PROCEEDINGS

Petitioner Anderson News, L.L.C. was a plaintiff/counter-defendant in the district court proceedings and an appellant/cross-appellee in the court of appeals proceedings.

Petitioner Charles Anderson, Jr. was a counter-defendant in the district court proceedings and a cross-appellee in the court of appeals proceedings.

Petitioner Lloyd T. Whitaker, as the Assignee under an Assignment for the Benefit of Creditors for Anderson Services, L.L.C., was a plaintiff in the district court proceedings and an appellant in the court of appeals proceedings.

Respondents American Media, Inc., Hearst Communications, Inc., and Time Inc. were defendants/counter-claimants in the district court proceedings and appellees/cross-appellants in the court of appeals proceedings.

Respondents Bauer Publishing Co., LP, Curtis Circulation Company, Distribution Services, Inc., Hachette Filipacchi Media, U.S., Inc., Kable Distribution Services, Inc., Rodale, Inc., and Time/Warner Retail Sales & Marketing, Inc. were defendants in the district court proceedings and appellees in the court of appeals proceedings.

Hudson News Distributors LLC and The News Group, LP were defendants in the district court proceedings; The News Group was dismissed from the case on March 12, 2009, and Hudson News was dismissed from the case on December 19, 2013.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Anderson News, L.L.C. and Lloyd T. Whitaker, as the Assignee under an Assignment for the Benefit of Creditors for Anderson Services, L.L.C., state the following:

Anderson News, L.L.C. ("Anderson News") is wholly owned by Brookvale Holdings, L.L.C. ("Brookvale"). Brookvale owns 100% of Anderson News's stock.

Lloyd T. Whitaker is the Assignee under an Assignment for the Benefit of Creditors for Anderson Services, L.L.C. ("Anderson Services"). Anderson Services is wholly owned by Brookvale. Brookvale owns 100% of Anderson Services' stock.

Brookvale is wholly owned by Anderson Media Corporation. Anderson Media Corporation owns 100% of Brookvale's stock. Anderson Media Corporation has no parent corporation, and no publicly held corporation owns 10% or more of Anderson Media Corporation's stock.

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Petitioners Anderson News, L.L.C., Charles Anderson, Jr., and Lloyd T. Whitaker, as the Assignee under an Assignment for the Benefit of Creditors for Anderson Services, L.L.C., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.1a-57a) is reported at 899 F.3d 87. The opinion of the district court granting summary-judgment motions (App.60a-119a) is reported at 123 F. Supp. 3d 478. The opinion of the district court granting in part and denying in part motions to exclude certain testimony (App.120a-129a) is not reported (but is available at 2015 WL 5003528).

JURISDICTION

The court of appeals entered its judgment on July 19, 2018. On October 5, 2018, Justice Ginsburg extended the time for filing a petition for certiorari to and including December 14, 2018. App.130a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS 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.

INTRODUCTION

This case presents an important and recurring question regarding the scope of the rule of *per se* illegality for horizontal group boycotts under Section 1 of the Sherman Act. Petitioner Anderson[1] had been one of the country's leading magazine wholesalers, delivering magazines for sale in retail stores, for nearly a century. In early 2009, Anderson proposed a new pricing structure, including a $0.07 surcharge on each magazine shipped, whether or not it was sold, designed to place a more equitable share of the increasing costs associated with unsold magazines on publishers. In response, respondents – several of the country's largest magazine publishers and distributors – cut off Anderson's supply of magazines. Deprived of the lifeblood of its business, Anderson was driven into bankruptcy. Anderson sued, claiming that respondents' horizontal agreement to deprive Anderson of magazines constituted a *per se* unlawful group boycott in violation of Section 1.

The summary-judgment record showed that respondents jointly organized the boycott. But the Second Circuit nonetheless affirmed summary judgment in respondents' favor. It found that Anderson's proposed price increase "provides a legitimate and compelling explanation for each defendant to refuse to deal with Anderson." App.28a. But there was a catch: in this industry, each retailer – Wal-Mart, Kroger, CVS – traditionally has done business with just one regional wholesaler. If a single publisher cut off Anderson – while the others continued to deal with it – the

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[1] Anderson News, L.L.C. was a magazine wholesaler. Anderson Services, L.L.C. provided logistical services for Anderson News. This petition uses "Anderson" to refer collectively to petitioners.

publisher would lose all sales at retailers served by Anderson. Respondents had learned this from experience. According to the Second Circuit, this characteristic of the industry – "retailers' past preference for maintaining an exclusive relationship with a single wholesaler," App.29a – justified respondents' efforts to coordinate a collective refusal to deal with Anderson. The court held that respondents had "a legitimate reason for . . . lobbying efforts to persuade each other . . . to consider dealing with an alternative wholesaler." *Id.* The court indicated that, if the purpose of the agreement had been "to reduce competition in the wholesaler market," respondents "could still be liable for a Sherman Act violation." App.29a-30a. But because the boycott had a "legitimate explanation[]," App.29a – respondents' common desire to avoid Anderson's proposed pricing terms – Anderson's *per se* claim failed.

This case thus presents the question whether competitors that agree to cut off a supplier can escape *per se* treatment by arguing that concerted action was justified to resist the pricing demands of a firm with market power. While this Court has condemned as *per se* unlawful a group boycott despite an assertion of countervailing power, *see FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), and the Seventh and Ninth Circuits have rejected such a justification, *see United States v. Capitol Serv., Inc.*, 756 F.2d 502 (7th Cir. 1985); *United States v. Alston*, 974 F.2d 1206 (9th Cir. 1992), the Second Circuit joined the Sixth Circuit in *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*, 885 F.2d 313 (6th Cir. 1989), in allowing such a justification.

More generally, the circuit courts are divided on the scope of the *per se* rule for concerted refusals to deal.

While this Court's earlier decisions suggested that any horizontal concerted refusal to deal was unlawful, the Court has since clarified that only "certain concerted refusals to deal or group boycotts" are "condemned as *per se* violations of § 1." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 290 (1985). Since then, lower courts have articulated inconsistent standards to describe the scope of the *per se* rule, and courts and commentators have widely recognized the confusion. This Court should grant review to resolve this division of authority.

Review is further warranted because the Second Circuit's decision is incorrect. This Court has held that horizontal group boycotts are *per se* illegal when they are used to insist on pricing terms because such boycotts have a forbidden price-fixing component. *See Trial Lawyers*, 493 U.S. at 436 & n.19. Furthermore, this Court has never questioned the *per se* illegality of horizontal group boycotts that deprive a merchant of the product it needs to compete. *See Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). To permit competitors to band together to discipline a supplier (or customer) based on the self-interested judgment that the supplier (or customer) seeks to impose unfair economic terms that each competitor cannot resist on its own contradicts the Sherman Act's reliance on competition – not cartels – to promote efficiency and consumer welfare. Because the circumstance presented by this case is replicated every day in industries across the economy, clarity on this point is essential. The petition should be granted and the decision reversed.

STATEMENT

A. Factual Background

1. The market for "single-copy" (*i.e.*, non-subscription) magazines involves four levels of participants. First, ***publishers*** – including respondents Time Inc. ("Time"); American Media, Inc. ("AMI"); Bauer Publishing Co., LP ("Bauer"); Rodale, Inc. ("Rodale"); and Hachette Filipacchi Media, U.S., Inc. ("Hachette") (collectively, "respondent publishers") – create and produce magazines. App.4a. Respondent publishers are among the largest single-copy publishers, accounting in 2008 for 41% of the market by revenue and 48% by units sold. C.A.Conf.App.1865-66.

Second, ***distributors*** serve as publishers' billing and marketing agents, manage relationships with magazine wholesalers, and provide consulting services to publishers. App.4a-5a. Respondent distributors are Time/Warner Retail Sales & Marketing, Inc. ("TWR"), Curtis Circulation Co. ("Curtis"), and Kable Distribution Services, Inc. ("Kable"). App.4a. TWR represented Time; Kable represented Bauer; and Curtis represented Rodale, AMI, and Hachette. App.4a-5a. Together, TWR, Kable, and Curtis served as distributors for 75% of the single-copy magazine market in 2008. App.5a. Respondent Distribution Services, Inc. ("DSI") is a subsidiary of AMI that provided consulting and marketing services to each respondent publisher except Time. *Id.*

Third, ***wholesalers*** purchase magazines from publishers at discounted prices and sell to retailers at higher wholesale prices. *Id.*; C.A.Conf.App.1842-43. Wholesalers are responsible for delivering magazines to retailers and retrieving and disposing of unsold magazines. App.5a. In 2008, Anderson was wholesaler for 30% of single-copy magazines sold nationwide.

Id. The four largest wholesalers – Anderson, Source Interlink Distribution, L.L.C. ("Source"), The News Group, LP ("TNG"), and Hudson News Distributors LLC ("Hudson") – together comprised 93% of the market. *Id.*

Fourth, ***retailers*** such as Wal-Mart and Kroger sell magazines to customers, typically at cover prices higher than the wholesale price. App.6a; C.A.Conf.App.2023-25. To reduce logistical costs, retailers generally demand that a single wholesaler deliver magazines to each of their retail outlets. App.6a. Large retailers Wal-Mart and Kroger preferred to deal with Anderson; in the past, when distributors asked Wal-Mart and Kroger to use a different wholesaler, Wal-Mart and Kroger each informed the distributors that they would need to use Anderson if they wanted their magazines to be available in Wal-Mart or Kroger stores. C.A.Conf.App.1870-73.

The single-copy-magazine distribution chain has many economic and environmental inefficiencies, stemming from publishers' typical practice of distributing three times as many magazines to retailers as they can sell. App.6a; C.A.Conf.App.2016-17. Wholesalers bear the primary costs of this inefficiency: collecting, tabulating, and disposing of unsold magazines. C.A.Conf.App.2015-18. Retailers instituted "scan-based trading," in which retailers paid wholesalers for magazines only after each magazine was scanned and sold, which imposed on wholesalers the inventory cost of magazines sitting on shelves and the cost of unexplained losses of magazines. App.6a-7a; C.A.Conf.App.1845. Anderson and other wholesalers repeatedly attempted to persuade publishers and distributors to adopt scan-based trading, so that a wholesaler would pay a publisher only when a magazine

was scanned, but publishers and distributors steadfastly resisted such efforts. C.A.Conf.App.2006-07.

2. In January 2009, Anderson proposed two measures designed to remedy distribution inefficiencies: a $0.07 per-copy surcharge to publishers on each delivered magazine (not just sold magazines) and that publishers pay Anderson for inventory costs from scan-based trading. App.7a. Those measures would give publishers incentives to increase efficiency by reducing distribution of excess magazines; Charles Anderson, the CEO of Anderson News, believed that publishers could fully offset the cost of the surcharge through increased efficiency. C.A.App.157.

Mr. Anderson informed some publishers of the proposed surcharge on January 12 and 13, 2009, and announced the surcharge in an interview with an industry publication on January 14. App.7a-8a. Mr. Anderson knew that the surcharge proposal would be subject to negotiation, and, to increase leverage in negotiations, Mr. Anderson announced that he would not ship magazines for publishers that had not agreed to Anderson's proposals by February 1. App.8a-9a; C.A.App.229.[2]

Anderson's proposal prompted a flurry of coordinated activity among respondents. On January 12, David Pecker (CEO of AMI) instructed Mike Porche (president of DSI) to contact Rick Parker (VP of Bauer). The next day, Porche relayed that Bauer "believes we should start simultaneously using our collective resources and influence to direct business towards [TNG]," Anderson's largest competitor.

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[2] Rival wholesaler Source announced a similar $0.07 surcharge proposal on January 19, 2009. C.A.Conf.App.2286; *see also infra* note 4.

C.A.Conf.App.1778. An AMI and DSI consultant replied that "our best strategy now is to get Bauer and as many other big players as possible on board to moving business away from Anderson." *Id.* Pecker responded: "I agree." *Id.* The next day, Pecker met with Parker, and Parker reported to Bauer's president that "Pecker [is] with us." C.A.Conf.App.2737.

The emerging plan to reject Anderson's surcharge depended on persuading retailers to cease doing business with Anderson. The nation's two largest single-copy magazine retailers, Wal-Mart and Kroger, supported Anderson's surcharge and "commit[ted] . . . to refuse to accept shipments from wholesalers other than Anderson during Anderson's . . . negotiations with the publishers." App.7a.[3] Thus, respondents needed to convince those retailers to move to a different wholesaler. C.A.App.157; C.A.Conf.App.1870-73. No individual respondent, however, controlled enough magazine titles to be able to pressure retailers that preferred Anderson to switch. C.A.Conf.App.1935-36. If a single publisher or distributor, acting alone, refused to deal with Anderson, retailers would continue dealing with Anderson and simply cease selling that publisher's magazine titles.

Indeed, that had happened twice before. In 1999, two distributors attempted to persuade Kroger to drop Anderson and switch to another wholesaler. C.A.Conf.App.1870-71. Kroger stuck with Anderson and stopped carrying the distributors' titles. Within weeks, the distributors backed down and agreed to deal with Anderson. C.A.Conf.App.1871. Similarly,

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[3] In 2008, Anderson serviced more than 2,300 Wal-Mart stores accounting for 14% of all single-copy magazines sold nationwide. Dkt. 392, Anderson Rule 56.1 Counter Statement at 26 (¶ 32).

in 2008, Curtis threatened to refuse to supply Anderson in certain Texas markets, but Curtis withdrew its threat after Wal-Mart and other retailers insisted on using Anderson. C.A.Conf.App.1871-72. These incidents illustrate that only by acting together could respondents deprive retailers of a sufficiently broad range of magazines to force retailers to switch wholesalers. C.A.Conf.App.1928-29.

Respondents therefore delivered coordinated messages to retailers telling them to move away from Anderson. Rich Jacobsen (president of distributor TWR) told a senior buyer of retailer Kroger that Anderson's proposed surcharge would "put [Anderson] out of business," that "they were going to teach [Anderson] a lesson," and that it was "very clear that no publishers were going to support the charge." C.A.App.2087-89. Robert Castardi (CEO of Curtis) told that same Kroger buyer that "he had spoken with several executives" from other distributors, including Jacobsen, and that "none of their publishers were going to support the 7-cent surcharge either; that Anderson News was going out of business." C.A.App.2089, 2091. Kroger's senior buyer testified he was "troubl[ed]" that he was having "the same exact conversation [with] multiple people that were competitors. It was like they were almost reading a script." C.A.App.2095.

Respondents also delivered a coordinated message to Wal-Mart. On January 15, 2009, Porche of DSI emailed AMI's CEO a "Script for Wal-Mart" describing the business that "AMI and Bauer" provided to Wal-Mart and concluding that "AMI and Bauer cannot and will not pay the additional 7¢ per copy" sought by Anderson. C.A.Conf.App.2722-24. Although Porche initially proposed that representatives of AMI and

Bauer "should cover together" these issues "on the phone with Wal-Mart," he later decided that AMI and Bauer should deliver the same messages to Wal-Mart "independently" because "there will be lawsuits involved and having teamed up on the calls will be challenged." C.A.Conf.App.1776. The next day, Porche wrote to AMI's CEO that he spoke with Bauer's VP, who confirmed that Bauer's conversation with Wal-Mart was "exactly like mine" and that Bauer's VP "made clear Bauer would not agree to the 7¢ per copy distributed." C.A.Conf.App.1787.

Jacobsen of distributor TWR also told Jim Gillis of Source that competing distributors were working together to refuse to deal with wholesalers imposing a surcharge. Jacobsen told Gillis that "he was going to make it a two-magazine wholesaler system, and [Source] was not going to be one of them." C.A.App.1359.[4] Gillis responded that "[y]ou can't do it unless you have everybody else." *Id.* Jacobsen responded that "[a]ll I need is Bob Castardi [of TWR's competitor Curtis], and I got Bob Castardi. . . . I've already met with him." *Id.* Gillis then called Castardi, who said: "If Rick [Jacobsen] says right, I go right. If he says left, I go left. We're in lockstep. We're doing this together." *Id.*

Shortly after announcing the new pricing proposals, Mr. Anderson attempted to negotiate agreements individually with each respondent but found that they were presenting a united front. On January 17, 2009, Castardi called Mr. Anderson and said "he wanted me to know that he and Rich [Jacobsen] were working together and . . . whatever Rich decided, he was going

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[4] Two national wholesalers, TNG and Hudson, had not demanded a surcharge, in contrast to Anderson and Source.

along with." C.A.App.251. In a meeting on January 31, Jacobsen later confirmed Mr. Anderson's understanding that "Curtis was working with Time." C.A.App.221. Anderson therefore focused its efforts on negotiating with TWR, Time's distributor. C.A.App.253.

Meanwhile, on January 29, 2009, Anderson reached a deal with Comag, the only major distributor outside the alleged conspiracy, to distribute magazines under a new pricing structure in which Comag increased Anderson's discounts. C.A.App.2324-25. The Comag deal led respondents to worry that the plan to reject Anderson could fall apart. Rich Alleger (VP of publisher Rodale) lamented to Porche (of DSI) that Comag's president was "dangerous" for agreeing to ship to Anderson. C.A.Conf.App.1793. A DSI executive reassured Alleger that "this 'storm' . . . will clear; everyone just needs to stick to their guns." C.A.Conf.App.1795. Alleger asked, "[o]ur man in bauerland still solid?", to which the DSI executive responded, "He's solid alright." C.A.Conf.App.1794-95.

On January 31, 2009, Mr. Anderson met with Jacobsen. The two reached a handshake deal that Anderson would rescind the surcharge and inventory cost shift in exchange for a discount of 2-2.75% on magazines. C.A.App.221-22, 2325. However, the next day, Jacobsen told distributor Kable that they were "not shipping . . . [to Anderson]," leading Kable's CEO to write that they "will announce shut off . . . [of Anderson] tomorrow." C.A.Conf.App.1807. Both Jacobsen and Time's CEO told Mr. Anderson on February 2 that they were reneging on the handshake deal and "terminating" Anderson. C.A.App.233.

Respondents announced in rapid succession that they were cutting off Anderson's magazine supply. C.A.Conf.App.1734 (January 29 email: "effective immediately, Curtis is suspending all further shipments of magazines to all [Anderson] wholesaler operations"); C.A.Conf.App.2812 (February 1 email: "We have cut off and will no longer supply any Bauer titles to . . . [Anderson]"). As a Rodale executive wrote on February 2, Anderson "is no longer receiving product from Time/Warner, Bauer, AMI, Curtis Circulation, Kable Distribution. This represents well over 65% of all product billing . . . and 85% of the retailers profit. Does not appear they can continue." C.A.Conf.App.2806.[5] On the evening of February 1, Parker, adapting a famous Monday Night Football phrase, wrote "Dandy D[o]n, turn out the lights! The[y're] done." C.A.Conf.App.2781.

Facing respondents' united decision to cut off Anderson, retailers reluctantly began to switch from Anderson to other wholesalers. Stripped of magazine supply and retailer support, Anderson had "no way economically to run the trucks and . . . pay [its] personnel." C.A.App.1124. Anderson suspended business operations, which included suspending distribution operations of a joint venture logistics firm in which TNG held a minority stake. C.A.App.203, 212-13. TNG sued and obtained a temporary restraining order forcing Anderson to reopen the joint venture. C.A.App.225. Mr. Anderson

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[5] Respondents frequently conferred by telephone during this period. In the month after Anderson announced its proposal, inter-respondent telephone calls increased ten-fold by duration over the previous month. C.A.Conf.App.2258. A surge in calls occurred from January 29 through February 2, when respondents made their final announcements to cut off Anderson. *Id.*

then focused on "salvaging jobs for thousands of Anderson employees" and "conducting a painful fire-sale" of Anderson's assets, which resulted in securing alternative employment for 77% of Anderson's employees. C.A.App.2327-28. Anderson went bankrupt in March 2009. App.12a.

B. Procedural Background

1. On March 10, 2009, Anderson sued, claiming that respondents conspired to boycott Anderson in violation of Section 1 of the Sherman Act. Dkt. 1, Compl. ¶¶ 77-81. The district court granted respondents' motion to dismiss Anderson's claims, reasoning that "[c]ollusion to destroy Anderson and non-party Source – the ultimate goal of the alleged conspiracy – is facially implausible." *Anderson News, L.L.C. v. American Media, Inc.*, 732 F. Supp. 2d 389, 397 (S.D.N.Y. 2010). The court interpreted respondents' boycott as an "unchoreographed . . . common response to [the] common stimulus" of Anderson's proposed pricing changes. *Id.* at 398-99. The Second Circuit reversed, holding that Anderson's allegations stated a Section 1 claim because they were "sufficient to suggest that the cessation of shipments to Anderson resulted . . . from a lattice-work of horizontal and vertical agreements to boycott Anderson." *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 189 (2d Cir. 2012).

2. After discovery, the district court granted respondents' motion for summary judgment, concluding that Anderson lacked evidence supporting "a common motive to force Anderson . . . out of business." App.92a. The court rejected the notion that the antitrust laws could be "successfully invoked by an entity attempting to raise prices and shift inventory costs to its trading partners." App.97a. The court

acknowledged that respondents' emails showed efforts "to gather information regarding how their competitors were reacting to the Anderson proposal," but dismissed them as "not indicat[ing] that a coordinated agreement existed." App.107a.[6]

3. Anderson appealed. Anderson argued that it had presented evidence of a conspiracy with two goals: "to induce Anderson and Source to rescind their proposed $0.07-per-copy surcharges," and to "[e]liminat[e] Anderson and Source" so that respondents could "restructure the magazine-distribution system for their long-term benefit." Anderson C.A. Br. 20. Respondents argued that a "group boycott" was not actionable if the "injury stems from [plaintiff's] demand for an above-market price." Time/TWR/Hachette C.A. Br. 45. Respondents argued that their conduct was "protected" under the antitrust laws because Anderson's supposed "supracompetitive demands" gave respondents "a legal right to break away" from Anderson, even if they did so through "collusion." *Id.* at 55.

The Second Circuit affirmed. The court stated that "[a]ll parties on appeal accept that the group boycott alleged (to decline to deal with Anderson and thereby reduce wholesale competition by putting Anderson out of business) would be illegal." App.17a. But the court noted that respondents "each ceased doing business with Anderson because they each did not want to pay the proposed 'above-market' surcharge." *Id.* Accordingly, the court concluded, it was not enough for Anderson to show respondents' agreement to move

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[6] Certain respondents filed counterclaims against Anderson, claiming that Anderson engaged in an antitrust conspiracy to coerce publishers to accept a price increase. The district court granted summary judgment to Anderson on the counterclaims. App.115a-119a.

business away from Anderson; rather, Anderson was required to proffer evidence that their agreement was "intended to reduce competition in the wholesaler market." *Id.* Accordingly, unless respondents' objective was "to reduce competition in the wholesaler market by driving Anderson out of business," conduct arising from "independent[]" decisions not "to pay the surcharge" would not constitute an unlawful agreement. App.27a-28a.

In particular, "each defendant . . . had a legitimate business reason to constantly monitor competitors' behavior to determine Anderson's ongoing viability," App.28a, and, in light of "retailers' past preference for maintaining an exclusive relationship with a single wholesaler," they could "lobby[] . . . to persuade each other and also retailers . . . to consider dealing with an alternative wholesaler," App.29a. Although "Anderson's failure to offer competitive terms does not . . . immunize defendants from antitrust liability," it did put the burden on Anderson "to exclude the legitimate explanations" and to show that the goal of the conspiracy was "to reduce competition in the wholesaler market by driving Anderson out of business." *Id.*

Because the court believed that publishers would generally prefer more competition at the wholesale level, it deemed the possibility that respondents had a common goal of eliminating Anderson "sufficiently speculative" as to make it "economically implausible." App.24a. Viewing every piece of evidence through that lens, the court concluded that "the picture that emerges is too murky for us to conclude that [the] evidence is anything other than ambiguous." App.31a-32a. Rather than an agreement "to drive Anderson out of business," the court found the evidence "at least equally consistent with legitimate, independent, and

procompetitive action to reject Anderson's Program by seeking alternative wholesalers that could offer better terms." App.33a-34a. Given Anderson's short deadline, "it was reasonable (and probably prudent) for industry players to gather information about how the market would react and to plan for the possibility that negotiations with Anderson would be unsuccessful." App.34a.

Having concluded that it was insufficient for Anderson to show that respondents conspired to resist Anderson's surcharge, the Second Circuit considered the evidence solely with respect to whether it demonstrated "a conspiracy to drive Anderson out of business." App.26a. The email exchanges regarding a "Script for Wal-Mart" involving AMI and Bauer "could suggest that [respondents] were acting to further a conspiracy" and showed that DSI "aided AMI and Bauer in their communications with Wal-Mart," but this was "hardly convincing evidence that these parties also entered into a separate agreement with the goal of putting Anderson out of business." App.40a-41a. The court likewise concluded that other emails did not demonstrate an agreement with the "objective . . . to reduce competition in the wholesaler market by driving Anderson out of business." App.27a-28a, 35a-46a.[7]

[7] Certain respondents cross-appealed the district court's grant of summary judgment for Anderson on the counterclaims. The Second Circuit affirmed. App.52a-56a.

REASONS FOR GRANTING THE PETITION

I. CIRCUIT COURTS ARE SPLIT REGARDING THE SCOPE OF THE RULE OF *PER SE* ILLEGALITY FOR HORIZONTAL GROUP BOYCOTTS

The Second Circuit's decision reflects the belief that, faced with a demand for a price increase and business circumstances that made unilateral action risky or worse, competitors may legitimately cooperate to defeat what they perceive to be unwarranted exploitation of market clout. The court accordingly required Anderson to prove not merely that respondents agreed to shift their business away from Anderson, but that their purpose in doing so was "to reduce competition in the wholesaler market" rather than to avoid a price increase. App.17a-18a, 27a-28a. The Sixth Circuit adopted just such a rationale in *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*, 885 F.2d 313, 316-17 (6th Cir. 1989). But the Seventh and Ninth Circuits have recognized that the desire to join forces against a supplier or customer with perceived market power provides no basis to avoid liability under a *per se* rule. The decision thus deepened an existing and recognized split of authority on this important question.

The particular claim at issue here – an alleged concerted refusal to deal – makes review especially warranted. Since this Court last addressed this issue, the circuit courts have articulated a variety of standards to govern the scope of *per se* illegality. Some of those standards would reach respondents' conduct; others, like the Second Circuit's standard, would not. This Court's prior decisions in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), and *FTC v. Superior Court Trial*

Lawyers Association, 493 U.S. 411 (1990), make clear that the conduct at issue in this case was subject to condemnation as unlawful *per se*. The Court should accordingly grant certiorari and reverse the judgment below.

A. The Circuits Are Divided Over Whether Efforts To Resist the Exercise of Market Power Take Concerted Action Outside the Scope of *Per Se* Rules

The Second Circuit's determination that respondents' joint response to Anderson's proposed price increase fell outside the scope of the *per se* prohibition on horizontal concerted refusals to deal deepens an existing split on this question.

1. The Seventh and Ninth Circuits have held that a horizontal group boycott or price-fixing conspiracy cannot escape *per se* condemnation based on a defense that the conspiracy created countervailing power to counteract the market power of other industry participants, thereby producing more "competitive" prices.

a. In *United States v. Capitol Service, Inc.*, 756 F.2d 502 (7th Cir. 1985), defendants were movie exhibitors in the Milwaukee area that formed a "split agreement" in which "particular films are allocated to specific theatres," and defendants agreed "not to bid on pictures" and "not to negotiate for a picture split to another exhibitor." *Id.* at 503-04. The district court condemned the split as unlawful and entered an injunction against all "split agreements in other markets throughout the United States." *Id.* at 504.

Defendants argued that the injunction was too broad because split agreements were potentially beneficial to competition and therefore should be judged under the rule of reason. In the district court, defendants had argued that a split was "formed in

response" to what they "viewed as the 'excessive terms' which resulted" when large film distributors put films out for competitive bidding. *Id.* at 503. The Seventh Circuit agreed with the district court's holding that "all splits are *per se* illegal" because they restricted competitive bidding. *Id.* at 505-06. The court rejected defendants' arguments that there were "so-called 'good' split[s]" that permitted introduction of evidence of competitive benefits. *Id.* at 506. The Seventh Circuit's affirmance of a broad prohibition against restrictions on competition – notwithstanding the possibility that such cooperation could reduce prices – contrasts with the Second Circuit's conclusion that respondents could "lobby[] . . . to persuade each other" not to deal with Anderson so long as they had reached independent decisions to resist Anderson's proposed price increase. App.29a.

b. In *United States v. Alston*, 974 F.2d 1206 (9th Cir. 1992), defendants were dentists convicted of criminal price-fixing in violation of Section 1. The evidence at trial showed that dentists in Tucson were frustrated that prepaid dental plans set fees for dentists at rates so low that some dentists "were failing to break even." *Id.* at 1207. Defendants met with many local dentists to discuss the fees and subsequently circulated a letter urging the dentists to send identical letters to the plans demanding higher fees. *Id.* at 1207, 1211.

The district court granted judgments of acquittal notwithstanding the verdict as to two defendants. *Id.* at 1208. On appeal, the Ninth Circuit first held that a "per se theory" applied to the alleged conspiracy. *Id.* at 1209. The court then reversed the judgment of acquittal for those two defendants, finding the evidence sufficient to convict. *Id.* at 1211-13.

The Ninth Circuit upheld, however, the district court's decision to grant a third defendant a new trial and suggested that the other defendants could likewise obtain a new trial. The court accordingly clarified "what the jury has to find in order to trigger the per se rule." *Id.* at 1214. The court noted that "health care providers who must deal with consumers indirectly through plans such as the one in this case face an unusual situation that may legitimate certain collective actions. Medical plans serve, effectively, as the bargaining agents for large groups of consumers; they use the clout of their consumer base to drive down health care service fees." *Id.* The court held that, "[i]n light of these departures from a normal competitive market, individual health care providers are entitled to take some joint action (*short of price fixing or a group boycott*) to level the bargaining imbalance created by the plans and provide meaningful input into the setting of the fee schedules." *Id.* (emphasis added). Although providers might "band together to negotiate various . . . aspects of their relationship with the plans," the court held that "[s]uch concerted actions, which would not implicate the per se rule, must be carefully distinguished from efforts to dictate terms by explicit or implicit threats of mass withdrawals from the plans." *Id.*

The Second Circuit's ruling, which found that, confronted with a price increase, respondents could "lobby[] . . . to persuade each other . . . to consider dealing with an alternative wholesaler," conflicts with *Alston*.[8]

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[8] Although it did not involve a claim that sellers had market power, *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000), likewise rejects an argument that the allegation that a conspiracy was designed to reduce prices could modify

2. In conflict with the Seventh and Ninth Circuits, the Sixth Circuit has held that a horizontal movie "split" agreement should be judged under the rule of reason because defendants could be "justified in combating the market power of film suppliers by group action." *Balmoral*, 885 F.2d at 316-17. In *Balmoral*, film exhibitors in the Memphis area "met periodically to allocate among themselves the right to bid on specific films offered by the distributors." *Id.* at 315. Distributors joined the conspiracy by agreeing to license each film only to the exhibitor assigned that film by the split. *Id.* Plaintiff was an exhibitor that was not part of the split; plaintiff alleged that the exhibitors and distributors conspired to allocate the market and deprive plaintiff of films. *Id.* At trial, the judge instructed the jury that plaintiff's claims should be judged under the rule of reason, and the jury found no "unreasonable restraint of trade." *Id.* Plaintiff appealed, arguing that the conspiracy was a *per se* violation. *Id.*

The Sixth Circuit affirmed. The court acknowledged that the conspiracy was "more akin to practices labeled a 'group boycott' . . . than to a vertical non-price restraint," but held that "[t]he District Court was correct" to "put the case to the jury under a rule of reason instruction." *Id.* at 316. The court concluded that the conspiracy could be justified because "it may simply lower prices paid by exhibitors to distributors and hence indirectly to producers in a market where the distributors and the producers have

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application of the *per se* rule against price-fixing. The court rejected defendants' argument that plaintiffs could not plead antitrust injury because a buyers' cartel reduced prices, concluding that "[i]t is competition – not the collusive fixing of prices at levels either low or high – that [the antitrust laws] recognize as vital to the public interest." *Id.* at 988.

historically wielded great market power over film products at the expense of exhibitors. Exhibitors, as purchasers of films, may be justified in combating the market power of film suppliers by group action." *Id.* at 316-17. The Sixth Circuit thus held, contrary to the Seventh and Ninth Circuits, that an effort to resist the high prices charged by suppliers with "market power" was a potentially pro-competitive justification that removed a horizontal group boycott from the scope of the *per se* prohibition. Commentators have recognized this circuit split. *See* John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. Miami L. Rev. 1, 19 (2014) (recognizing split); *see also* XII Herbert Hovenkamp, *Antitrust Law* ¶ 2015b, at 161-62 & n.5 (3d ed. 2012) ("*Antitrust Law*").

3. The Second Circuit deepened the split by holding that Anderson's proposed surcharge and market power obtained from its relationship with large retailers justified coordinated action by respondents to defeat the surcharge. The record, and the court's opinion, leave little doubt that respondents reached an agreement to boycott Anderson and to present a united front against Anderson's proposed pricing changes – as the court put it, they "persuade[d] each other . . . to consider dealing with an alternative wholesaler." App.29a. Among the litany of evidence of agreement, the CEO of one respondent distributor said of the President of a competing respondent distributor: "'If Rick [Jacobsen, of TWR] says right, I go right. If he says left, I go left. We're in lockstep. We're doing this together.'" App.37a (quoting C.A.App.1359) (alteration in opinion below). Indeed, in the panel's first remarks during oral argument, Judge Chin stated, "I think I agree that the emails

provide some strong evidence of an agreement, an agreement to say no to Anderson."[9]

The Second Circuit nevertheless concluded that any agreement was insufficient to establish a *per se* violation because "Anderson's proposed surcharge . . . provides a legitimate and compelling explanation for each defendant to refuse to deal with Anderson." App.28a. Moreover, Anderson's surcharge not only explained respondents' *unilateral* decisions not to deal with Anderson, but also justified their *coordinated* efforts to move their collective business to other wholesalers. App.28a-29a. The court's belief that collective action was justified if it was intended to combat a proposed price increase informed the court's analysis throughout. Although the court purported to acknowledge that "the group boycott alleged . . . would be illegal," and to analyze whether Anderson had provided sufficient evidence of such an agreement, App.17a, the court made clear that a concerted refusal to deal would fall within the *per se* rule only if its "objective" was "to reduce competition in the wholesaler market," App.27a-28a, rather than to ensure that each conspirator would be able to resist "acced[ing] to [Anderson's proposed] terms," App.28a.

4. Respondents will likely argue that the Second Circuit simply found that respondents had not agreed to boycott Anderson and that the scope of any prohibition of a concerted refusal to deal is accordingly not at issue. But that is an untenable reading of the Second Circuit's opinion. If the court had believed that the evidence did not support an inference of concerted action, it had only to say so. But no such statement

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[9] Oral Argument, No. 15-2714 (Dec. 2, 2016), http://www.ca2.uscourts.gov/decisions/isysquery/c39aa5e2-93b4-479c-9805-0adba4d5dd47/41-50/list/ (3:09).

was possible in light of the evidence described above that respondents engaged in close coordination leading up to the fatal events of late January and early February 2009.

Furthermore, the Second Circuit consistently made clear that Anderson's evidence was deficient *not* because it failed to show an agreement to boycott Anderson but instead in establishing the purpose or objective behind it. That is why, over and over, the court explained that what was lacking was evidence that the agreement was intended "to reduce competition."[10] And that is why the court, applying *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), found that the conspiracy was not "economically sensible." App.27a. The court believed that Anderson was required to prove that respondents intended to reduce competition – which the court believed that the publishers had little motive to do. No wonder it therefore found the evidence of such an intent unconvincing. But the court never disputed, and even frankly acknowledged, that respondents had a powerful motive to avoid what they saw as a supra-competitive price increase by presenting retailers with

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[10] *See* App.17a (agreement to "reduce wholesaler competition by putting Anderson out of business" "would be illegal," so the "issue . . . is whether Anderson has presented sufficient evidence for a jury reasonably to conclude that defendants shared a 'conscious commitment' to such an agreement"); App.29a-30a ("If Anderson presents evidence that sufficiently tends to exclude the legitimate explanations and tends to prove that defendants entered into an agreement to reduce competition in the wholesaler market by driving Anderson out of business, defendants could still be liable for a Sherman Act violation."); App.38a (evidence does not show "an unlawful agreement . . . with the goal of putting Anderson out of business"); App.40a (evidence fails to show that respondents "agree[d] to a boycott with the goal of driving Anderson out of business") (citing C.A.Conf.App.1778).

a unified position that a switch away from Anderson was already an accomplished fact.[11] That in itself is an ample basis for *per se* liability. The unmistakable implication of the Second Circuit's decision is that, if driving Anderson out of business and reducing competition in the wholesale market was the foreseeable but, in some sense, "unintended" consequence of respondents' concerted actions, respondents could escape liability. It is precisely that conclusion that warrants review.

B. The Scope of the *Per Se* Rule Against Horizontal Concerted Refusals To Deal Has Divided the Circuits

Review is further warranted because this case provides an appropriate vehicle to clarify the scope of the *per se* prohibition on horizontal concerted refusals to deal. This Court traditionally treated horizontal concerted refusals to deal as *per se* unlawful. *See*, *e.g.*, *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 611-14 (1914); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 465 (1941); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). More recently, the Court has stated that only "certain concerted refusals to deal or group boycotts . . . should be condemned as *per se* violations of § 1." *Northwest Wholesale Stationers*, 472 U.S. at 290; *see also NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (noting that "precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors" and rejecting application of *per se* rule to vertical agreement).

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[11] The fact that distributor Comag (which did not participate in the conspiracy) agreed to grant Anderson additional discounts shows that, absent collusion, the operation of market forces would have resulted in respondents granting similar pricing concessions. C.A.App.2324-25.

Since *Northwest Wholesale Stationers*, lower courts have articulated a variety of conflicting multi-factor standards and tests for the *per se* rule against horizontal group boycotts. The Eighth Circuit has held that "[a] boycott is a narrow category of per se violation 'limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor.'" *Steele v. City of Bemidji*, 257 F.3d 902, 906 (8th Cir. 2001). The First Circuit has similarly stated that the *per se* rule "is principally reserved for cases in which competitors agree with each other not to deal with a supplier or distributor if it continues to serve a competitor whom they seek to injure." *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 593 (1st Cir. 1993); *see also Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of Rhode Island*, 373 F.3d 57, 64 (1st Cir. 2004) (*per se* rule for group boycotts applies "principally" to "anticompetitive secondary boycotts – *e.g.*, manufacturers who agree not to supply a store that buys from a discounting manufacturer").

Other courts have articulated more expansive tests. The Eleventh Circuit has held that, in the group boycott context, "the *per se* rule requires a historically focused inquiry directed at ascertaining whether the behavior complained of is of the type that regularly poses anticompetitive consequences." *Retina Assocs., P.A. v. Southern Baptist Hosp. of Florida, Inc.*, 105 F.3d 1376, 1381 (11th Cir. 1997) (per curiam).

In *Tunica Web Advertising v. Tunica Casino Operators Association, Inc.*, 496 F.3d 403 (5th Cir. 2007), the Fifth Circuit issued a different multi-factor test for the *per se* rule: "(1) whether [defendants] hold a dominant position in the relevant market; (2) whether [defendants] control access to an element necessary to enable [plaintiff] to compete; and (3) whether there

exist plausible arguments concerning pro-competitive effects." *Id.* at 414-15. Later, in *MM Steel, L.P. v. JSW Steel (USA) Inc.*, 806 F.3d 835 (5th Cir. 2015), the Fifth Circuit held that the district court correctly condemned a horizontal agreement to cut off a supplier (much like respondents' agreement) as a *per se* violation without "applying these factors" from *Tunica*. *Id.* at 850.

This confusion regarding the scope of the *per se* rule for group boycotts has been widely recognized. This Court acknowledged in *Northwest Wholesale Stationers* that "'[t]here is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine.'" 472 U.S. at 294 (quoting Lawrence A. Sullivan, *Law of Antitrust* 229-30 (1977)). Many courts and commentators since *Northwest Wholesale Stationers* have recognized this confusion. *See Tunica*, 496 F.3d at 412 ("Precisely which group boycotts are subject to the *per se* rule is . . . not always clear."); *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999) ("The scope of the *per se* rule against group boycotts is a recognized source of confusion in antitrust law."); *Cha-Car, Inc. v. Calder Race Course, Inc.*, 752 F.2d 609, 613 (11th Cir. 1985) (application of *per se* rule "unsettled" and subject to "confusing array of exceptions and qualifications"); Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 Iowa L. Rev. 1207, 1230 (2008) (lower federal courts have exhibited "great confusion" on scope of *per se* rule).

This case provides an appropriate vehicle to clear up the confusion. As the Second Circuit indicated, the agreement among respondents, at a minimum, involved a concerted effort to resist a price increase by taking business away from Anderson and "dealing

with an alternative wholesaler" instead. App.29a. We submit (as explained further below) that such an effort displays those characteristics that place it within the scope of the *per se* rule. But the Second Circuit – by requiring evidence that the "objective" of respondents' collective action "would be to reduce competition in the wholesaler market by driving Anderson out of business," App.27a-28a – indicated that it was not enough for Anderson to show that respondents collectively withheld a necessary input. Rather, the court, in line with the tests articulated by the First and Eighth Circuits, effectively restricted *per se* condemnation to circumstances where the boycott was directed at a competitor of the conspirators. *See* App.22a ("Notably absent is evidence supporting Anderson's allegation that wholesalers . . . were involved in defendants' alleged conspiracy."). This case will thus allow the Court to unify the varying standards that the circuits have applied since *Northwest Wholesale Stationers*.

II. THE SECOND CIRCUIT'S DETERMINATION THAT RESPONDENTS' ACTIONS ARE NOT SUBJECT TO *PER SE* CONDEMNATION WAS INCORRECT

The decision below – which applies in arguably the most important business circuit in the country – is incorrect, providing an additional reason to grant the petition. A horizontal group boycott that cuts off a business's supply of the product it needs to compete in order to resist that business's proposed price increase is plainly anticompetitive and thus appropriately subject to *per se* condemnation for two basic reasons.

First, concerted efforts to resist a price increase interfere with market mechanisms for setting prices and are therefore tantamount to a price-fixing conspiracy. *See Knevelbaard Dairies*, 232 F.3d at 988 ("[T]he interaction of competitive forces, not price-

rigging, is what will benefit consumers."). This Court established that principle in *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990). There, lawyers boycotted appointments by the District of Columbia for representation of indigent criminal defendants, resolving to refuse such appointments "unless [they] [we]re granted a substantial increase in [their] hourly rate." *Id.* at 416. The Court held that this group boycott was a *per se* violation, "emphasiz[ing] that this case involves not only a boycott but also a horizontal price-fixing arrangement." *Id.* at 436 & n.19. While the Court recognized that some concerted refusals to deal did not warrant *per se* condemnation, none of those arrangements involved a "price-fixing component." *Id.* at 436 n.19.

As in *Trial Lawyers*, respondents' group boycott had a "price-fixing component." *Id.* Respondents' agreement to move to alternative wholesalers was – as the Second Circuit indicated – a reaction to Anderson's supposed "failure to offer competitive terms." App.29a. Such concerted efforts to manipulate market pricing are *per se* violations. And it does not matter that the conspirators believed that Anderson had an unfair advantage (by virtue of its relationship with retailers) or was charging too much. In *Trial Lawyers*, this Court found a *per se* violation even though the lawyers' boycott was a response to the District's monopsony power over court appointments, which led to hourly fees that the lawyers viewed as well below market rate. 493 U.S. at 415-16. Even if the boycott "served a cause that was worthwhile" and helped to change "unreasonably low" "preboycott rates," the boycott was still a *per se* antitrust violation. *Id.* at 421-22; *see* Einer Elhauge, *United States Antitrust Law and Economics* 148 (3d ed. 2018) ("Elhauge") ("As *Trial Lawyers* indicates, U.S. antitrust

law recognizes no exception to its per se rule for cases where a cartel is organized to counteract market power.").

Second, group boycotts by a dominant group of firms to deprive a business of a needed input can eliminate competitors from the market entirely – as the boycott, in fact, did here. The tendency to concentrate markets, perhaps among firms whose willingness to forgo consumer-benefiting efficiency recommends them to parties benefiting from inefficiency, is itself predictably harmful to competition. *See*, *e.g.*, *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 (7th Cir. 1985) ("Antitrust law is based on the premise that when markets are competitive, the process of sellers' rivalry and buyers' choice produces the best results.").

This Court has long recognized that a horizontal group boycott that deprives a merchant of access to the product it needs to compete is a *per se* violation of Section 1. *See Klor's*, 359 U.S. at 212 (such agreements are "banned" "[e]ven when they operated to lower prices or temporarily to stimulate competition" because they "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment"). In *Northwest Wholesale Stationers*, even as the Court held that not all concerted refusals to deal are *per se* violations, the Court favorably cited *Klor's* as presenting an example of a "group boycott" that is "so likely to restrict competition without any offsetting efficiency gains that [it] should be condemned as [a] *per se* violation[]" of Section 1. 472 U.S. at 290; *see also NYNEX*, 525 U.S. at 135 (approvingly citing *Klor's* finding of a *per se* violation).

Furthermore, respondents' boycott satisfies the standard for *per se* condemnation set forth in *Northwest Wholesale Stationers*. As this Court explained:

> Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle. In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, and frequently the boycotting firms possessed a dominant position in the relevant market. In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive.

472 U.S. at 294 (citations omitted). The Court clarified that "a concerted refusal to deal need not necessarily possess all of these traits to merit *per se* treatment." *Id.* at 295.

Respondents' group boycott fits this mold. For one thing, the boycott "cut off" Anderson's "access to a supply . . . necessary to enable [Anderson] to compete." *Id.* at 294. As one of respondents' executives wrote, the firms cutting off Anderson "represent[ed] well over 65% of all product billing . . . and 85% of the retailers profit. Does not appear they can continue." C.A.Conf.App.2806. And "the boycotting firms possessed a dominant position in the relevant market." *Northwest Wholesale Stationers*, 472 U.S. at 294. Respondent publishers published nearly half the magazines in the single-copy magazine market, and respondent distributors held 75% of the market. *See supra* p. 5.

Moreover, "the practices were . . . not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." *Northwest Wholesale Stationers*, 472

U.S. at 294. To be sure, respondents offered the supposed justification that Anderson's pricing demands were "supracompetitive." Time/TWR/Hachette C.A. Br. 55. But interference with market mechanisms for setting prices cannot be deemed pro-competitive. *See infra* pp. 32-34. If Anderson was in a position to demand favorable pricing terms, it is only because it had succeeded in a competitive struggle against rival wholesalers to serve some of the nation's leading retailers. Collective efforts to deprive Anderson of the ability to recoup its investment punish efficiency; they do not promote it.

The Second Circuit perhaps thought it sufficient that Anderson could not demonstrate that any direct competitor of Anderson was party to the conspiracy. *See* App.22a. But this Court's precedents establish no "bright-line" requirement for *per se* illegality requiring that "the victim is a competitor of at least one of the conspirators." *Tunica*, 496 F.3d at 413. Where competitors possessing a dominant position conspire to "'cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete,'" *per se* treatment is warranted even if the victim is not a competitor of the conspirators. *Id.* at 413-14 (quoting *Northwest Wholesale Stationers*, 472 U.S. at 294).

III. THIS CASE PRESENTS A RECURRING ISSUE OF NATIONAL IMPORTANCE

The issue presented in this case is of undeniable importance. The situation that arose here – a proposed price increase by a large supplier (or price cut by a large buyer) that competing buyers (or sellers) have collective reason to oppose – is ubiquitous. Taken at its word, the Second Circuit's decision indicates that, so long as competitors share a determination to resist a price increase they deem supracompetitive, joint action – including concerted efforts

to boycott the supplier whose pricing they oppose – is not subject to *per se* condemnation.

Prominent commentators and regulators have explained why such an approach would be unwise and economically unsound. If such a justification were recognized, it "would certainly be raised in almost any case where the selling market is not perfectly competitive," leading to difficult questions, "such as how much seller power is required to justify an offsetting cartel of buyers?" XII *Antitrust Law* ¶ 2015b, at 162. Further, "even when applied against real exercises of monopoly power, the exertion of countervailing power typically does not improve the situation." *Id.* Instead, "it creates a bilateral monopoly" in which two levels "cooperate and share the monopoly power that exists rather than strive to eliminate it." *Id.* As Hovenkamp recognizes, it is not necessary to allow competitors to enter into horizontal agreements ordinarily subject to *per se* rule condemnation; they can respond in ways that are consistent with competition. *Id.* at 162-63; *see also* Elhauge at 151 ("the antitrust doctrine of not allowing the countervailing power defense appears preferable" because such a defense "would certainly lessen the certainty of the per se rule and thus reduce the rule's ability to deter undesirable cartels").

Likewise, then-FTC Chairman Robert Pitofsky has warned that "antitrust law will not be receptive" to arguments "about creating a countervailing force in order to neutralize a perceived imbalance in bargaining power." Robert Pitofsky, *Thoughts on "Leveling the Playing Field" in Health Care Markets*, 1997 WL 80767, at *4 (F.T.C. Feb. 13, 1997). Pitofsky agreed with the Ninth Circuit that "'price fixing or a group boycott[]' are not proper means of leveling [an] imbalance" in marketing power and that more limited cooperation, such as information sharing, is

an "appropriate response." *Id.* (quoting *Alston*, 974 F.2d at 1214).[12]

That view, however, is not unanimous. Scholars have debated whether (or when) "countervailing power" should be entertained as a cognizable justification for horizontal price-fixing conspiracies and group boycotts that would ordinarily be subject to *per se* condemnation.[13] And respondents asserted that very position below, when they argued that a "group boycott" was not subject to *per se* condemnation if the "injury stems from [plaintiff's] demand for an above-market price." *See supra* p. 14.

More broadly, this case provides an appropriate vehicle to address persistent disagreement among the circuits regarding the scope of the rule of *per se* illegality for concerted refusals to deal. It has been two decades since the Court last decided a concerted refusal to deal case, *see NYNEX*, and even longer since the Court addressed a horizontal group boycott, *see Trial Lawyers*. In the interim, as described above, courts have diverged in their understanding and application of the standards set out in *Northwest Wholesale Stationers*. The Court should grant the petition to address the issue.

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[12] *See also* U.S. Dep't of Justice & Federal Trade Commission, *Improving Health Care: A Dose of Competition*, Ch. 2, at 21 (July 2004) ("The Agencies believe that antitrust enforcement to prevent the unlawful acquisition or exercise of monopsony power by insurers is a better solution than allowing providers to exercise countervailing power."), *available at* https://www.justice.gov/atr/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice.

[13] *See* Kirkwood, 69 U. Miami L. Rev. at 51-63; Brandon Gould, *How the Countervailing Power of Insurers Can Resolve the Tradeoff Between Market Power and Health Care Integration in Accountable Care Organizations*, 22 Geo. Mason L. Rev. 159, 163-64 (2014).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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