No. 18-774

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

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QUESTION PRESENTED

Whether a grant of summary judgment is appropriate under *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), when the "evidence" of an alleged unlawful agreement is at least equally consistent with independent business conduct.

CORPORATE DISCLOSURE STATEMENT

1. Time Inc. and Time/Warner Retail Sales & Marketing, Inc. ("TWR"), now known as Time Inc. Retail, state that Time Inc. is the parent corporation of TWR and that Meredith Corporation, a publicly traded company, is the parent corporation of Time Inc.

2. Defendant Kable Distribution Services, Inc. is a wholly-owned subsidiary of DFI Holdings, LLC, which is privately held.

3. Curtis Circulation Company ("Curtis") is wholly owned by Curtis Enterprises LLC. Curtis Enterprises LLC has no parent corporation and no publicly held corporation owns 10% or more of Curtis Enterprises LLC's stock.

4. Rodale, Inc. is not owned by any parent corporation, and there are presently no public companies that own ten percent or more of its stock.

5. Hearst Communications, Inc. ("Hearst") is an indirectly wholly owned subsidiary of The Hearst Corporation, a privately held company.

6. Bauer Media Group (USA) LLC, the successor of Bauer Publishing Co. LP., is a Delaware limited company with no corporate parents, affiliates and/or subsidiaries which are publicly held.

7. American Media, Inc. ("AMI") is a nongovernmental corporate party that is privately held and has no parent corporation and no publicly held corporation owning 10% or more of its stock. Distribution Services, Inc. is wholly-owned indirectly by AMI and is a nongovernmental corporate party.

8. Distribution Services, Inc. (n/k/a In Store Services, Inc.) is a nongovernmental corporate party and is indirectly wholly-owned by AMI Parent Holdings, LLC, a Delaware limited liability company that has no publicly held corporation owning 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioners ask this Court to review a question that neither the District Court nor the Second Circuit addressed. This is an antitrust case arising out of an allegation that Respondents, who are publishers and national distributors in the single-copy magazine industry, entered into an unlawful "group boycott" agreement when they each refused to pay a sudden, sharp price increase levied by Petitioners, a magazine wholesaler, that its major competitor did not seek to impose. The question that the Second Circuit decided below was whether Petitioners had produced sufficient evidence to survive summary judgment on whether there was any agreement in the first place. Applying long-settled precedent from this Court requiring Petitioners to provide more than ambiguous evidence of an antitrust conspiracy, the Second Circuit concluded that the "evidence" of an agreement among Respondents was at least as consistent with competitive, independent action.

Rather than address the Second Circuit's decision and its uncontroversial application of settled precedent, Petitioners mischaracterize the opinion to seek this Court's review of a different question that the Second Circuit did not address: Whether a group boycott agreement, if proved, can be "justified" in some circumstances. The Second Circuit found that there was insufficient evidence that any agreement existed, and therefore had no need to and explicitly did not address the question Petitioners ask this Court to review. Because the Second Circuit's well-reasoned and fact-bound decision did not consider that question, there is no reason for this Court to consider it now.

Respondents respectfully submit that this Court should therefore deny the Petition.

A. The Sherman Act and the *Matsushita* Summary Judgment Framework

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C. § 1. When evaluating a Section 1 claim, courts must address two distinct, sequential questions: (1) whether there was an agreement; and (2) if there was an agreement, whether the agreement should be evaluated under the "*per se*" or "rule of reason" standard. Here, both the District Court and the Second Circuit concluded that Petitioners failed to present sufficient evidence of the existence of an agreement in the first place. As a result, neither decided whether the *per se* or rule of reason standard would have applied had there been an agreement.

An antitrust plaintiff bringing a Section 1 claim must prove the existence of an agreement because "Section 1 applies only to concerted action that restrains trade." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190 (2010). In contrast to other antitrust laws, Section 1 requires a "contract, combination . . . or conspiracy between separate entities, and does not reach conduct that is wholly unilateral." *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 753 (1984) (internal quotations omitted); *see also Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991) (explaining that "the essence of any violation of § 1 is the illegal agreement itself"). In some cases, such as when the alleged restraint is a contract, the existence of an agreement might not be disputed.

Where, as here, the alleged concerted action is a conspiracy among different actors, the question of whether there was an agreement is often dispositive.

The Court has long recognized that allowing antitrust plaintiffs to pursue claims based on ambiguous evidence of concerted action may "deter or penalize perfectly legitimate conduct." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984). To avoid that risk, this Court has provided specific guidance on how to evaluate whether there is sufficient evidence of an agreement, holding that ambiguous evidence—that is, evidence consistent with both independent conduct and concerted action—is insufficient, on its own, for a Section 1 claim to survive summary judgment. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 588 (1986). Under *Matsushita*, "[t]o survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* (quoting *Monsanto*, 465 U.S. at 764). Conversely, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.*

If there is sufficient evidence of an agreement, however, that does not end the analysis. Despite the broad language of Section 1, this Court has interpreted Section 1 to prohibit only "unreasonable" restraints of trade. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018). Whether or not an alleged agreement is an unreasonable restraint of trade is analyzed under one of two approaches. Some agreements are deemed

per se unreasonable because they "always or almost always tend to restrict competition and decrease output." *Id.* (quoting *Business Electronics Corp. v. Sharp Electronics Corp.,* 485 U.S. 717, 723 (1988)). Examples of *per se* unlawful conduct include agreements among horizontal competitors to fix prices or divide markets. *See Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). Other agreements are judged under antitrust's "rule of reason," which permits a more "fact-specific assessment of market power and market structure . . . to assess the [restraint]'s actual effect on competition." *Am. Express Co.*, 138 S. Ct. at 2284 (quoting *Copperweld*, 467 U.S. at 768) (internal quotations omitted).

If, however, there is insufficient evidence of the existence of an agreement in the first place, the analysis ends. A court need not decide whether the alleged agreement should be deemed *per se* unreasonable or analyzed under the rule of reason. "Only after an agreement is established will a court consider whether the agreement constituted an unreasonable restraint of trade." *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 232 (2d Cir. 1999); *see also Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1082 (10th Cir. 2006); *Tunica Web Advert. v. Tunica Casino Operators Ass'n, Inc.*, 496 F.3d 403, 410 (5th Cir. 2007).

B. Factual Background

This case involves an alleged conspiracy in the single-copy magazine industry. "Single-copy" refers to magazines sold by retailers, rather than through subscriptions. App. 4a. The single-copy magazine

industry operates through a chain of distribution involving four types of entities:

- *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")[1], create magazines. *Id.*

- *Second*, national distributors and marketing services firms, including Respondents Time/Warner Retail Sales & Marketing, Inc. ("TWR"), Curtis Circulation Company ("Curtis"), and Kable Distribution Services, Inc. ("Kable"), provide marketing and/or billing services to publishers. App. 4a–5a. Distribution Services, Inc. ("DSI") is a merchandiser retained by publishers that works with national distributors. App. 5a.

- *Third,* wholesalers, including Petitioner Anderson News L.L.C. ("Anderson") are middlemen that buy magazines from publishers and resell them to retailers. *Id.*

- *Fourth*, retailers (*e.g.*, stores such as Wal-Mart and Kroger) sell magazines to customers. App. 6a.

Petitioner Anderson was one of the nation's largest magazine wholesalers. App. 5a. In an effort to shift costs to publishers, Anderson announced in January 2009 that, in a little over two weeks, it would impose a "surcharge" on each publisher for every magazine that it delivered to retailers on a publisher's behalf. App. 7a. In addition, Anderson announced that it would be shifting millions of dollars of inventory costs to

[1] Respondent Hearst is the successor–in-interest to Hachette.

publishers. *Id.* Anderson made clear that it would refuse to ship magazines for any publishers that did not formally agree in writing to its demand prior to February 1, 2009. App. 9a. The surcharge announcement sparked a flurry of communications in the industry about how to respond. *Id.* As Petitioners conceded in the District Court, many of these communications "were not simply permissible, but necessary—it was critical for Publisher[s] . . . to communicate with their distributors regarding their responses to the Anderson proposal, and for the Distributor[s] . . . to discuss the proposal with their publisher clients." App. 10a.

By the time Anderson's February 1 deadline arrived, publishers and distributors, including Respondents, had reacted in different ways. Some publishers agreed to pay the surcharge on a short-term basis, others continued to ship magazines on uncertain terms, others attempted to negotiate an interim compromise with Anderson, and still others rejected the proposed surcharge and made alternative shipping arrangements for their magazines. App. 10a–11a. The overwhelming majority of publishers (including both Respondent publishers and non-party publishers), refused to pay Anderson's surcharge. App. 11a.

Faced with widespread rejection of its proposed terms, including the surcharge, Anderson instituted what it called a "going dark" strategy to try to convince publishers to agree to its demands. App. 12a. Among other things, Anderson (1) enlisted the support of Wal-Mart and Kroger (the two biggest single-copy magazine retailers), which agreed with Anderson to refuse to accept magazine shipments from wholesalers other

than Anderson during negotiations; and (2) used its joint ownership of a logistics company (partially owned by a competing wholesaler) to suspend delivery services to retailers, not only for magazines sold by Anderson, but also by its co-owner, until publishers agreed to pay the surcharge. *Id.* These efforts to pressure publishers into paying the surcharge, however, ultimately failed, and many (but not all) Respondents arranged alternative distribution for their magazines with lower-priced Anderson competitors. Shortly thereafter, Anderson, rather than relent on its surcharge demand, chose to cease doing business and entered bankruptcy. *Id.*

C. Procedural History

In March 2009, Petitioners filed a Complaint in the United States District Court for the Southern District of New York. *Id.* The core allegation was that the Respondents had entered into an unlawful agreement to boycott Petitioners' business in violation of Section 1 of the Sherman Act. App. 12a–13a.

This appeal arises out of the District Court's grant of summary judgment in Respondents' favor. App. 60a–119a.[2] Noting that a claim under Section 1

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[2] The District Court initially granted Respondents' motion to dismiss Anderson's claims, concluding that it was "implausible that magazine publishers would conspire to deny retailers access to their own products" and "completely plausible" that the response to the surcharge was "unchoreographed behavior, a common response to a common stimulus." App. 13a. After the District Court denied Petitioners' motion for reconsideration and for leave to file an amended Complaint, the Second Circuit vacated the District Court's dismissal, allowing the case to proceed to discovery. App. 64a.

requires sufficient evidence of concerted action, the District Court granted summary judgment to Respondents because Petitioners had "failed to demonstrate a genuine issue of material fact regarding whether [Respondents] participated in a 'concerted action' in violation of Section 1 of the Sherman Act." App. 110a. The District Court explained that it had been Petitioner Anderson's "own ill-conceived and badly executed plan [that] led to its downfall." App. 63a.[3]

On appeal, the Second Circuit addressed the narrow question that the District Court decided as an independent ground for granting summary judgment: Whether Petitioners had provided sufficient evidence of the alleged group boycott agreement to survive summary judgment. Petitioners argued that the District Court had ignored or unduly discounted evidence of an agreement. App. 3a. But the Second Circuit rejected that contention. After "[r]eviewing the evidence in light of the totality of the circumstances and under the *Matsushita* 'tends to exclude' standard," the Second Circuit affirmed that the District Court had "correctly ruled that [Petitioner] Anderson has failed to offer sufficient evidence that defendants entered into the alleged unlawful agreement to survive defendants' motions for summary judgment." *Id.* Because the Second Circuit affirmed the District Court's holding that Petitioners had failed to establish the existence of an agreement, it had no need to, and explicitly did not,

[3] The District Court separately found that Respondents were entitled to summary judgment because Petitioners had failed to demonstrate "antitrust injury" and could not show that Respondents' conduct caused their injuries. App. 110a–14a.

address whether the alleged conspiracy would have been justified under the rule of reason had it existed.

REASONS FOR DENYING THE PETITION

The Petition should be denied for three straightforward reasons. *First*, Petitioners seek review of a question that the Second Circuit never addressed. Both the District Court's grant of summary judgment in Respondents' favor and the Second Circuit's subsequent affirmance rested on the same fact-driven application of settled precedent to the same question: Whether Petitioners produced sufficient evidence that there was any agreement among Respondents in the first place. Petitioners seek review on an entirely different question that the court did not consider: Whether a group boycott agreement can be "justified" in some circumstances. Regardless of whether there is any split of authority on the latter question—and, as explained below, there is not—this case is an inappropriate vehicle for addressing it because it was not the basis for any decision by either lower court in this litigation. *Second*, the purported circuit split identified by Petitioners is illusory. This Court ruled more than three decades ago that group boycotts may be *per se* illegal or subject to the rule of reason depending on the facts of the case. The cases cited by Petitioners since then are either inapposite or faithfully apply that uncontroverted precedent. *Third*, although Petitioners do not seek review of the Second Circuit's actual reasoning, the decision below correctly applied settled law to the facts of this case. There is thus no reason for this Court to grant certiorari and every reason to deny it.

I. Petitioners Ask This Court To Consider A Question That Neither The District Court Nor The Second Circuit Addressed Below.

A. The Second Circuit's Fact-bound Decision Applied Long-settled Principles of Antitrust Law to Conclude that Petitioners Failed to Establish an Agreement Between Respondents.

The Second Circuit's decision was a straightforward application of two long-settled and related principles of antitrust law. *First*, to prove a claim under Section 1 of the Sherman Act, a plaintiff must show the existence of an agreement, rather than independent action. App. 16a; *see also* pages 2–3, *supra*. *Second*, to survive summary judgment on the question of whether there is an agreement, plaintiffs must present more than ambiguous evidence that is consistent with both concerted and independent action. App. 18a–19a (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)); *see also* pages 3–4, *supra*. Under *Matsushita*, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." 475 U.S. at 588.

The crux of the Second Circuit's analysis was its assessment under *Matsushita* that Petitioners had failed to submit more than ambiguous evidence of an agreement. App. 27a–51a. In a thorough review of the record, the court concluded again and again that Petitioners' "evidence" of conspiracy was at least as consistent with independent conduct. And it reached that conclusion as to each Respondent. *See, e.g.*, App. 35a ("Evidence in the record as it relates to Time/TWR

can be interpreted as either supporting or refuting the inference of an illegal conspiracy."); App. 37a ("The evidence presented against Curtis is similarly ambiguous."); App. 39a–40a ("We find these communications [between DSI and its publisher clients AMI, Bauer, Rodale, and Hachette], too, ambiguous at best, however."); App. 43a (explaining that allegedly "incriminating communications" from Bauer are "ambiguous at best and do not tend[] to exclude the possibility that the alleged conspirators acted independently") (internal quotation omitted).[4]

As required by *Matsushita*, the Second Circuit concluded that Petitioners' smattering of ambiguous evidence was not enough to survive summary judgment. The Second Circuit could not have been clearer that the basis for its holding was a fact-driven application of the *Matsushita* standard. It expressly held: "Having considered the totality of the circumstances and the evidence offered by [Petitioner] Anderson in support of its allegations, we conclude that a factfinder could not reasonably infer that the conspiratorial explanation is more likely than not." App. 50a. Indeed, in accord with a recent Seventh

[4] The Second Circuit also appropriately examined whether the alleged agreement was economically plausible, App. 20a–27a, because "the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists." *Matsushita*, 475 U.S. at 588 (citing FED. R. CIV. P. 56(e)). After carefully reviewing the record evidence, the Second Circuit concluded that "businesses in defendants' position would have no rational economic motive to join a conspiracy to drive Anderson out of business" and, consequently, that the "broad inferences Anderson urges upon us and that would be permitted if the conspiracy were economically sensible are not appropriate here." App. 26a–27a.

Circuit decision, the decision below reasoned that "We can . . . without suspecting illegal collusion, expect competing firms to keep close track of each other's pricing and other market behavior and often find it in their self-interest to imitate that behavior rather than try to undermine it . . . ." App. 29a (quoting *In re Text Messaging Antitrust Litigation*, 782 F.3d 867, 879 (7th Cir. 2015)). And the Second Circuit further explained that, "when considered in light of the fact that the benefits of alleged conspiracy are at best speculative and the mass of evidence equally compatible with independent action, the evidence does not sufficiently 'tend to exclude' the possibility that defendants acted permissibly." App. 50a–51a. Based on those conclusions, the Second Circuit "affirm[ed] the District Court's grant of summary judgment to defendants on [Petitioner] Anderson's Sherman Act claims." App. 51a.

The Second Circuit conspicuously did not evaluate whether the alleged agreement, if proven, would be *per se* illegal or could be justified under the rule of reason. To the contrary, it explicitly put that question aside by noting that, for the purposes of the appeal, "[a]ll parties on appeal accept that the group boycott alleged (to decline to deal with Anderson and thereby reduce wholesaler competition by putting Anderson out of business) would be illegal . . . At issue here, then, is whether Anderson has presented sufficient evidence for a jury reasonably to conclude that defendants shared a 'conscious commitment' to such an agreement." App. 17a (internal citations omitted). Moreover, because the court concluded that Anderson did not produce sufficient evidence of an agreement, it did not need to address whether *per se* analysis or the rule of reason

applied. As the Second Circuit explained, "[o]nly after an agreement is established will a court consider whether the agreement constituted an unreasonable restraint of trade." App. 17a (quoting *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 232 (2d Cir. 1999)).

Thus Petitioners' entire argument for certiorari is centered on a question that the Second Circuit did not decide and instead treated as irrelevant to the appeal.

B. Petitioners' Assertion That The Second Circuit Found A "Justified" Agreement Mischaracterizes the Decision Below.

The sole question presented for review by Petitioners is whether a horizontal boycott can "escape *per se* condemnation," presumably by being analyzed under the rule of reason. Pet. at 17–28.[5] That issue, however, has nothing at all to do with how the Second Circuit decided this case. In their effort to obscure the straight-forward, fact-bound nature of the decision below, Petitioners torture beyond recognition the lower courts' reasoning in an effort to manufacture a new Second Circuit opinion that decided the case on totally different grounds. Pointing to carefully cherry-picked quotations, and omitting important context, Petitioners claim that the Second Circuit concluded that they *did* provide sufficient evidence of an agreement, but that the agreement "escape[d] *per se* condemnation" because

[5] Although Petitioners' question presented does not mention the rule of reason, there are only two categories under which the "reasonableness" of an alleged restraint are assessed: *per se* unreasonable and the rule of reason. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283–84 (2018).

the court found that the agreement was "justified" or "legitimate" under the circumstances.[6] That sleight of hand is premised on the patently false suggestion that the Second Circuit's finding that the evidence was *ambiguous*—that is, consistent with *both* concerted *and* independent action—was instead a finding that there was an agreement, but that it was justified under the rule of reason. *See* Pet. at 22.

In Petitioners' telling, if "the court had believed that the evidence did not support an inference of concerted action, it had only to say so." *Id.* at 23. The court, however, did say so. In fact, that is precisely what the Second Circuit held. The court affirmed that the District Court had "correctly ruled that [Petitioner] Anderson has failed to offer sufficient evidence that defendants entered into the alleged unlawful agreement to survive defendants' motions for summary judgment." App. 3a.

In sum, Petitioners' claims failed not because (as they suggest) they had set forth sufficient evidence of an agreement and the lower court found the agreement legally justified, but instead because the evidence Petitioners submitted was equally consistent with independent action. Granting summary judgment when all of the alleged evidence of conspiracy is equally

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[6] *See, e.g.*, Pet. at 3 ("According to the Second Circuit, this characteristic of the industry . . . justified respondents' efforts to coordinate a collective refusal to deal with Anderson."); *Id.* at 17 ("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.").

consistent with independent conduct is precisely what *Matsushita* requires. 475 U.S. at 588. And the Second Circuit could not have been clearer that its application of *Matsushita* and finding that Petitioners had offered only ambiguous evidence was the basis for its decision.[7]

Any reasonable reading of the Second Circuit's decision dispels Petitioners' fictitious account. Petitioners argue that the Second Circuit deepened their purported circuit split by finding 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.'" Pet. at 23 (quoting App. 28a). But stripped of misleading ellipses, the paragraph from which Petitioners quote makes clear that the Second Circuit's reference to a "legitimate and compelling explanation" had nothing to do with whether or not the alleged agreement should be treated as *per se* illegal and everything to do with whether, under *Matsushita*, the challenged conduct was consistent with independent behavior, *i.e.*, that there was no agreement in the first place:

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[7] *See* App. 46a ("What [Petitioner] Anderson offers as evidence of the conspiracy could just as easily be characterized as evidence of competition. Without more, such an ambiguous record is insufficient to withstand the scrutiny required by the Supreme Court in *Matsushita*, particularly when, as here, the alleged conspiracy makes little economic sense."); App. 50a–51a ("Although some of the evidence discussed above is suggestive of an agreement, when considered in light of the fact that the benefits of alleged conspiracy are at best speculative and the mass of evidence equally compatible with independent action, the evidence does not sufficiently 'tend to exclude' the possibility that defendants acted permissibly.").

> The conduct complained of here—refusing to accede to the terms of Anderson's Program on a long-term basis by February 1, 2009—*is in our view equally consistent with both a conspiratorial explanation and an independent-action explanation.* As we noted in *Anderson II*, a business entity "has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." Anderson was not willing, as defendants point out, "to do business with [them] on the same terms as the plaintiff's competitors." Anderson's proposed surcharge thus provides a *legitimate and compelling explanation for each defendant to refuse to deal with Anderson*.

App. 28a (internal citations omitted) (emphasis added).

The petition and the Second Circuit's decision are like two ships passing in the night. The Second Circuit did not address the handful of cases that Petitioners incorrectly identify as creating a split, precisely because it resolved the case on the antecedent question of whether Petitioners had sufficiently proven the existence of an agreement. Pet. at 18–22. In fact, the words "per se" and "rule of reason" do not appear even *once* in the Second Circuit's analysis. That is because the court's holding had nothing to do with which type of analysis would have applied had there been an agreement.

Thus, regardless of whether there is some disagreement among the circuits about how to evaluate group boycott agreements when there is sufficient evidence of such an agreement, this case is an improper vehicle for resolving that question because the Second

Circuit did not address it, even in passing. On the question that the Second Circuit *did* address—whether summary judgment is appropriate under *Matsushita* when the "evidence" of an alleged unlawful agreement is at least equally consistent with independent business conduct—there is no division of authority and no cause for this Court's review.

II. Petitioners' Purported Circuit Split is Illusory.

Even on the question presented as articulated (incorrectly) by Petitioners, the alleged circuit split is illusory. More than three decades ago, this Court ruled that group boycotts are not categorically viewed as *per se* unreasonable. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Company*, 472 U.S. 284 (1985). Instead, whether a group boycott qualifies for *per se* or rule of reason treatment depends on a multitude of factors. *See id.* at 294–95. For example, the Court noted that group boycotts may be *per se* unlawful when, *inter alia*, the boycotting firms "possessed a dominant position in the relevant market" or the "practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." *Id.* at 294. Conversely, concerted activity "designed to increase economic efficiency and render markets more, rather than less, competitive" may be subject to rule of reason treatment. *Id.* at 295.

Petitioners rely on a number of inapposite cases in attempting to spin applications of this fact-intensive inquiry into a split of authority. Petitioners argue that the Seventh and Ninth Circuits have held that group boycotts "cannot escape *per se* condemnation." Pet. at

18. The Seventh Circuit case, however, was decided before this Court issued its guidance in *Northwest Wholesale*. *See United States v. Capitol Serv., Inc.*, 756 F.2d 502 (7th Cir. 1985). The Ninth Circuit case involved a conviction for price-fixing (which is unquestionably *per se* unlawful), and the Ninth Circuit only mentioned a group boycott in passing as *dicta*. *See United States v. Alston*, 974 F.2d 1206, 1214 (9th Cir. 1992).

The only case that Petitioners place on the other side of the ledger—other than their re-imagined version of the Second Circuit decision below—is a Sixth Circuit case that correctly noted that "application of the *per se* rule" in the group boycott context depends on the circumstances. *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*, 885 F.2d 313, 316 (6th Cir. 1989) (citing *Northwest Wholesale*, 472 U.S. at 290). The Sixth Circuit ultimately concluded that the agreement at issue was subject to the rule of reason in part because of the "uncertainty about the economic effects" of the agreement. *Id.* at 317.

In short, neither the inapposite cases on one side of the ledger nor the Sixth Circuit's faithful application of *Northwest Wholesale* thirty years ago on the other side creates anything resembling a split of authority on how group boycotts should be evaluated.

III. The Second Circuit's Fact-Bound Decision Is Correct And Does Not Warrant Further Review.

Although Petitioners chose not to seek certiorari on the actual reasoning in the Second Circuit's decision, the Petition should also be rejected because the Second Circuit correctly applied settled law to the facts of this case and vindicated the bedrock antitrust principles underlying the *Matsushita* standard.

Applying this Court's precedents, the District Court and Second Circuit reached the same conclusion: Respondents' conduct was consistent with competitive, independent decision-making. Respondents had their own business reasons to refuse Petitioners' aggressively-implemented price increase and to move their business to lower-priced competitors. And Petitioners admitted below that Respondents had independent reasons to communicate with other industry participants when deciding how to respond to Petitioners' unreasonable demands. Indeed, at every turn, Respondents did precisely what one would expect competitive businesses to do. *See, e.g.*, App. 48a ("[I]t made perfect business sense for the defendants to constantly monitor industry conditions during the short-term period given by [Petitioner] Anderson to consider its ultimatum, before ultimately deciding to independently reject Anderson's higher-cost proposal in favor of lower-cost alternatives."). As the District Court observed, it was not a group boycott that drove Petitioners out of business, but their "ill-conceived and badly executed plan" to raise prices. App. 63a. Indeed, Respondents' response to Petitioners' plan—switching to a lower-cost supplier of wholesaler services—is

exactly the sort of competitive behavior that the antitrust laws are designed to encourage. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998) ("The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage.").

This Court decided *Matsushita* more than three decades ago to ensure that cases like this one—in which the alleged conspiracy is based on "evidence" that is ambiguous at best—are not permitted to go to trial and thereby deter lawful procompetitive conduct. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 593 (1986); *see also Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 309 (2d Cir. 2008) ("Summary judgment is of particular importance in the area of antitrust law, because it helps to avoid wasteful trials and prevent lengthy litigation that may have a chilling effect on pro-competitive market forces." (internal quotations omitted)).

Rigorous evaluation of the record is especially important where, as here, a court concludes that the underlying allegations are implausible. *See Matsushita*, 475 U.S. at 587; *see also* App. 20a–27a. Indeed, *Matsushita* highlighted an earlier group boycott case as an "instructive" example of an implausible conspiracy, explaining that, "[s]ince the defendant lacked any rational motive to join the alleged boycott, and since its refusal to deal was consistent with the defendant's independent interest, the refusal to deal could not by itself support a finding of antitrust liability." *Matsushita*, 475 U.S. at 587 (citing *First Nat.*

Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 280 (1968)). So too here.

The Second Circuit's thorough application of the settled *Matsushita* standard to the record evidence does not warrant this Court's review. The Second Circuit properly rejected Petitioners' contention that they presented enough evidence to survive summary judgment. There is no reason for this Court to revisit the lower courts' fact-bound decisions or to reexamine evidence in the record. Indeed, Petitioners acknowledged as much by declining to petition for certiorari on the actual basis of the Second Circuit's decision. The Petition should therefore be denied.

CONCLUSION

For the reasons stated above, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

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