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

REPLY BRIEF FOR PETITIONERS

THOMAS P. LYNCH
LYNCH ROWIN LLP
30 Vesey Street
New York, New York 10007
(212) 682-4001
Counsel for Lloyd T. Whitaker, as the Assignee Under an Assignment for the Benefit of Creditors for Anderson Services, L.L.C.

MICHAEL K. KELLOGG
Counsel of Record
AARON M. PANNER
JOSHUA D. BRANSON
JEREMY S. B. NEWMAN
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(mkellogg@kellogghansen.com)
Counsel for Anderson News, L.L.C. and Charles Anderson, Jr.

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(Additional Counsel Listed On Inside Cover)

MARC E. KASOWITZ
HECTOR TORRES
SETH DAVIS
KASOWITZ BENSON TORRES LLP
1633 Broadway
New York, New York 10019
(212) 506-1700
Counsel for Anderson News, L.L.C.

CORPORATE DISCLOSURE STATEMENTS

Petitioners' Rule 29.6 Statements were set forth at page iii of their petition for a writ of certiorari, and there are no amendments to those Statements.

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The Second Circuit deepened an existing circuit split by holding that a group boycott engineered to resist a wholesaler's attempt to exercise market power did not trigger *per se* liability under Section 1 of the Sherman Act. Respondents' argument that review is unwarranted because the Second Circuit did not reach that issue misreads the court's opinion. The Second Circuit was careful to avoid stating that there was no agreement at all among the respondents – which would have been untenable on this record – and held instead that there was insufficient evidence of an *unlawful* agreement. The court made clear that, although respondents engaged in "lobbying efforts to persuade each other . . . to consider dealing with an alternative wholesaler," App. 29a, that concerted action was (supposedly) motivated by an effort to combat Anderson's effort to raise prices, not by a desire to drive a competitor from the market. For the Second Circuit, that difference took the agreement outside the contours of the antitrust rule banning group boycotts.

Once the lower court's decision is recognized for what it is, the case for review is strong. Respondents mischaracterize prior precedent in a perfunctory attempt to dispute that courts are divided on the legality of the type of agreement at issue here; in fact, there is a clear split that commentators have recognized. Moreover, respondents do not dispute the importance of articulating a clear rule regarding the scope of *per se* liability for horizontal group boycotts, in light of the lower courts' confusion on this issue.

The Court should grant the petition.

ARGUMENT

I. THE SECOND CIRCUIT REJECTED *PER SE* LIABILITY FOR A HORIZONTAL GROUP BOYCOTT TO RESIST THE EXERCISE OF MARKET POWER

Respondents' argument against review turns on their assertion that the decision below reflected the uncontroversial principle that unilateral action is not subject to scrutiny under Section 1 of the Sherman Act, which (of course) reaches only concerted action. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). But that argument cannot be squared with the court's opinion, much less the record below. Suppose that, in a case alleging price-fixing, a court acknowledged evidence that, before a successful coordinated price increase, the defendants engaged in "lobbying efforts to persuade each other . . . to consider," App. 29a, a price increase. An argument that such evidence would not support a jury finding that the price increase was the product of agreement – "'a conscious commitment to a common scheme,'" *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)) – would hardly be taken seriously. *See*, *e.g.*, *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002) (denying summary judgment to defendants on price-fixing agreement, relying on evidence that a defendant stated it had "an understanding within the industry not to undercut each other's prices" and would "support efforts" by competitors "to limit . . . pricing"); *In re Publication Paper Antitrust Litig.*, 690 F.3d 51, 64 (2d Cir. 2012) (denying summary judgment to defendants on price-fixing agreement, relying on testimony of a defendant's

executive that he and competitor's executive had a "common understanding" that "both companies are matching" a price increase). Yet that is what respondents argue here as virtually the sole ground for bringing this case to an end.

Notwithstanding respondents' effort to obscure the basis for the decision below, the opinion depends on the line that the court drew between legal and illegal boycotts. To make out a claim, the court held, Anderson had to present evidence that "tends to prove that [respondents] entered into an agreement *to reduce competition in the wholesaler market by driving Anderson out of business*." App. 29a (emphasis added). Having concluded that only a group boycott with the purpose of "reduc[ing] competition" by "driving Anderson out of business" would be illegal, the Second Circuit limited its summary-judgment analysis to determining whether Anderson had presented sufficient evidence of *that* agreement. Respondents fail to come to terms with that limitation. For example, respondents (at 8) quote the Second Circuit as concluding that "Anderson has failed to offer sufficient evidence that defendants entered into the alleged unlawful agreement," but they ignore that, in the same paragraph, the Second Circuit defined the "unlawful agreement" as an agreement "to refuse to deal with Anderson *and to drive it out of business*." App. 3a (emphasis added).

The Second Circuit's suggestion that a group boycott was economically implausible, far from supporting respondents, reveals that respondents' reading of the opinion below cannot be correct. The Second Circuit, like the district court, observed that wholesalers like Anderson are, in effect, suppliers to the publishers; all else equal, publishers want more wholesalers in the

market, not fewer. Accordingly, the Second Circuit concluded that it makes little sense to suggest that publishers would conspire with the goal of eliminating a wholesaler.

That all is sensible enough – except that, in this case, Anderson, by virtue of its strong relationships with key retailers, was attempting to effect changes in the business relationship between wholesalers (or at least Anderson) and publishers that would advantage wholesalers. A single publisher, acting unilaterally, if it chose to reject Anderson's terms, would harm only itself: experience showed that no publisher offered publications so important to retailers that the retailers would drop Anderson in response to losing that publisher's magazines. *See* Pet. 8-9, 25 n.11. By banding together, the publishers gained sufficient economic leverage to defeat Anderson's effort to bring needed reforms to the industry.

Respondents offer more of the same blinkered reading of the Second Circuit opinion in asserting (at 10-11) that the Second Circuit found ambiguity in the evidence of conspiracy. In fact, as Anderson showed in its petition (at 24 & n.10), the Second Circuit made clear that it evaluated the evidence with respect to whether it demonstrated an agreement *to drive Anderson out of business*. *See*, *e.g.*, App. 40a-41a (an email "could suggest that [respondents] were acting to further a conspiracy," but "is hardly convincing evidence that these parties also entered into a separate agreement with the goal of putting Anderson out of business").

Respondents' reading of the opinion is further refuted by the arguments they themselves made in the court below. The Second Circuit's sole legal support for the holding that lobbying efforts to persuade each

other to boycott Anderson were lawful was a decades-old Second Circuit decision, *Interborough News Co. v. Curtis Publishing Co.*, 225 F.2d 289, 293 (2d Cir. 1955). Respondents relied on that same case in their Second Circuit briefing to argue that they had a "'legal right to break away' from Anderson," even if they did so through "collusion." Time/TWR/Hachette C.A. Br. 55 (quoting *Interborough*, 225 F.2d at 293). Having persuaded the Second Circuit to accept their argument that their boycott was justified, respondents should not shy away from defending the same argument on further review.

To be sure, as respondents point out (at 16), the Second Circuit did not explain its decision in terms of "per se" rules or "rule of reason" analysis. But it is common ground that Anderson's only claim was that respondents' agreement was *per se* unlawful; Anderson did not attempt to prove a violation under the rule of reason. The Second Circuit's analysis reflects the framing of the case before it. As Judge Chin commented at oral argument, Anderson had "strong evidence of an agreement, an agreement to say no to Anderson."* The issue the court decided was that this agreement did not run afoul of the *per se* rule against group boycotts. That holding, as explained in the petition and further below, is worthy of review.

II. THE CIRCUITS ARE DIVIDED ON THE QUESTION PRESENTED

As Anderson showed in its petition (at 18-25), the circuits are divided over whether efforts to resist the exercise of market power take concerted action

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* 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).

outside the scope of *per se* rules. Leading antitrust commentators have recognized the split. Respondents' attempt to deny the existence of this split rests on mischaracterization of the cases.

First, *United States v. Capitol Service, Inc.*, 756 F.2d 502 (7th Cir. 1985), is relevant to the need for review, notwithstanding that it was decided before this Court clarified the scope of the *per se* rule against group boycotts in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). At the outset, nothing in *Northwest Wholesale* calls into question the holding in *Capitol Service* that a horizontal agreement to forgo competitive bidding is *per se* illegal, notwithstanding the contention that the scheme was "formed in response" to "excessive terms" resulting from competitive bidding. *Capitol Serv.*, 756 F.2d at 503, 506. Indeed, the Seventh Circuit has repeatedly reaffirmed *Capitol Service* since *Northwest Wholesale*. *See Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188 (7th Cir. 1985); *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 369 (7th Cir. 1987). Respondents do not claim that *Capitol Service* has been implicitly overruled: it is binding precedent in the Seventh Circuit, which is what matters.

Respondents dismiss (at 18) the relevance of *United States v. Alston*, 974 F.2d 1206 (9th Cir. 1992), by contending that this was a price-fixing case and that any discussion of group boycotts was dicta. That reinforces the analogy to the decision below and hence the need for review: as in *Alston*, respondents' concerted refusal to deal with Anderson was designed to give effect to an agreement to demand a change in pricing terms. *See Alston*, 974 F.2d at 1211. In *FTC v. Superior Court Trial Lawyers Association*, 493 U.S.

411 (1990), which *Alston* acknowledged as governing precedent, *see* 974 F.2d at 1208, this Court described such an agreement (in which trial lawyers agreed to reject indigent representation appointments by the District of Columbia unless the District revised its fee schedules) as a "group boycott[]" with a "price-fixing component." 493 U.S. at 436 n.19. Thus, *Alston*'s conclusion that the defendants could not lawfully engage in "price fixing or a group boycott" was not dicta but was part of the court's holding, which the district court would be required to follow in its conduct of a new trial on remand. 974 F.2d at 1214.

Respondents likewise dispute that *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*, 885 F.2d 313 (6th Cir. 1989), conflicts with the above cases by describing it (at 18) as merely noting that, for group boycotts, application of the *per se* rule "depends on the circumstances." But *Balmoral* concluded that a horizontal group boycott escaped *per se* liability because the conspirator film exhibitors "may be justified in combating the market power of film suppliers by group action." 885 F.2d at 316-17. Respondents do not acknowledge or respond to petitioners' showing (at 22) that antitrust scholars have correctly recognized that *Balmoral*'s acceptance of a countervailing power justification for horizontal conspiracies to escape *per se* condemnation conflicts with the law in other circuits.

The Second Circuit's decision deepens this split. Anderson's established relationships with large retailers gave it leverage in dealing with publishers and distributors, which would risk losing access to those large retailers if they did not deal with Anderson. As a result of Anderson's business success, no single publisher was in a position to sever its relationship

with Anderson without losing sales and profits. Furthermore, the Second Circuit held, "retailers' past preference for maintaining an exclusive relationship with a single wholesaler" – the source of Anderson's leverage – gave respondents "a legitimate reason for [their] lobbying efforts to persuade each other . . . to consider dealing with an alternative wholesaler." App. 29a. The Second Circuit's reasoning is of a piece with *Balmoral*'s reasoning that competitors "may be justified in combating . . . market power . . . by group action," 885 F.2d at 316-17, and in conflict with *Alston*'s holding that, while the antitrust laws may permit some joint action in response to market power (such as sharing cost information), they do not permit "price fixing or a group boycott," 974 F.2d at 1214.

Not only is there a clear split on the question presented, the circuits have articulated and applied conflicting standards and multi-factor tests in applying the *per se* rule against group boycotts, and that confusion regarding the proper test has been widely acknowledged by courts and scholars. *See* Pet. 25-28. Whether competitors may respond to a firm with market power by engaging in a group boycott aimed at influencing the target's pricing is a recurring issue of substantial importance to the enforcement of the antitrust laws. *See* Pet. 32-34. Respondents offer no response to these points. Certiorari is warranted because this case implicates a deepening circuit split on an important issue, giving the Court an opportunity to clarify the antitrust rules governing group boycotts.

III. THE SECOND CIRCUIT'S DETERMINATION THAT A PRICE INCREASE JUSTIFIES A CONCERTED REFUSAL TO DEAL IS INCORRECT

Although respondents purport to defend the Second Circuit's ruling (at 19-21), their argument is based on their characterization of the decision below as simply holding that there was insufficient evidence of any agreement to withstand summary judgment. As shown above, that characterization is incorrect. *See supra* Part I.

Respondents – after making the argument below and persuading the Second Circuit to accept it – do not even attempt to defend the Second Circuit's holding that the bargaining leverage Anderson obtained by virtue of its preferential relationships with large retailers gave respondents a "legitimate reason" to "persuade each other" to boycott Anderson. App. 29a. Nor could they persuasively do so. On the contrary, that holding runs afoul of this Court's precedents. As this Court held in *Trial Lawyers*, 493 U.S. at 436 n.19, a horizontal agreement to boycott unless the target changes its pricing terms is tantamount to a price-fixing conspiracy that is *per se* illegal. *See* Pet. 28-30. As this Court further held in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959), and reaffirmed in *Northwest Wholesale*, 472 U.S. at 290, a group boycott that deprives a merchant of access to the product it needs to compete is inherently anti-competitive and a *per se* violation of Section 1. *See* Pet. 30. Although *Northwest Wholesale* held that not all concerted refusals to deal warrant *per se* condemnation, respondents' boycott satisfies the standards articulated in *Northwest Wholesale* for a *per se* violation. *See* Pet. 30-32. Respondents fail to respond to these points.

Respondents' effort instead to defend the Second Circuit's decision as holding that respondents simply did not agree is particularly untenable because the evidence that defendants reached agreement is clear-cut. Anderson presented a plethora of candid emails and oral admissions by respondents' top executives of their agreement to reject Anderson's surcharge. *See* Pet. 7-12 (summarizing evidence).

The most damning evidence includes: (i) the email of respondent publisher AMI's CEO David Pecker, stating "I agree" with the proposal "to get [competing respondent publisher] Bauer and as many other big players as possible on board to moving business away from Anderson," C.A.Conf.App.1778; (ii) respondents developed a "Script for Wal-Mart" of talking points that AMI and Bauer would use on a joint phone call to persuade Wal-Mart to abandon Anderson, C.A.Conf.App.2722-24, but AMI and Bauer decided to deliver the identical talking points on separate phone calls because "there will be lawsuits involved and having teamed up on the calls will be challenged," C.A.Conf.App.1776; (iii) CEO Bob Castardi of respondent distributor Curtis stating of Rich Jacobsen, President of respondent distributor TWR: "If [Jacobsen] says right, I go right. If he says left, I go left. We're in lockstep. We're doing this together," C.A.App.1359; (iv) Castardi's admission on a telephone call with Anderson's CEO that "he and [Jacobsen] were working together and . . . whatever [Jacobsen] decided, he was going to decide," C.A.App.251; and (v) a top executive of publisher Rodale, after calling non-respondent distributor Comag "dangerous" for agreeing to deal with Anderson, asking a top executive of respondent DSI in an email, "[o]ur man in bauerland [referring to respondent publisher Bauer] still solid?", and being reassured, "He's solid alright," C.A.Conf.App.1793-95.

In light of this evidence and the other evidence presented by Anderson, it would have been a gross misapplication of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), for the Second Circuit to conclude that Anderson presented insufficient evidence at the summary-judgment stage of an agreement to reject Anderson's surcharge. The Second Circuit held that respondents' agreement was not unlawful; it did not and could not hold that there was no agreement at all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS P. LYNCH
LYNCH ROWIN LLP
30 Vesey Street
New York, New York 10007
(212) 682-4001
Counsel for Lloyd T. Whitaker, as the Assignee Under an Assignment for the Benefit of Creditors for Anderson Services, L.L.C.

MARC E. KASOWITZ
HECTOR TORRES
SETH DAVIS
KASOWITZ BENSON TORRES LLP
1633 Broadway
New York, New York 10019
(212) 506-1700
Counsel for Anderson News, L.L.C.

MICHAEL K. KELLOGG
Counsel of Record
AARON M. PANNER
JOSHUA D. BRANSON
JEREMY S. B. NEWMAN
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(mkellogg@kellogghansen.com)
Counsel for Anderson News, L.L.C. and Charles Anderson, Jr.

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