No. 15-565

IN THE
Supreme Court of the United States

APPLE, INC.,
Petitioner,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.

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

BRIEF OF ACT | THE APP ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CASES Page

Broad. Music, Inc. v. *CBS*, 441 U.S. 1 (1979) 3, 4, 8, 9
Continental T.V., Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) 9
Dastar Corp. v. *Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) 1
Leegin Creative Leather Prods., Inc. v. *PSKS, Inc.*, 551 U.S. 877 (2007) 3, 4, 16
NCAA v. *Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) 3, 5, 6, 17
Petrella v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) 1
Polk Bros., Inc. v. *Forest City Enters., Inc.*, 776 F.2d 185 (7th Cir. 1985) 8
State Oil Co. v. *Khan*, 522 U.S. 3 (1997) 4
In re Sulfuric Acid Antitrust Litig., 703 F.3d 1004 (7th Cir. 2012) 8
United States v. *Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) 1

SCHOLARLY AUTHORITIES

Vibhanshu Abhishek et al., *Agency Selling or Reselling? Channel Structures in Electronic Retailing*, Mgmt. Sci. (forthcoming), *available at* http://repository.cmu.edu/cgi/viewcontent.cgi?article=1398&context=heinzworks (Jan. 2015) 7, 8
Daniel J. Gifford & Robert T. Kudrle, *Antitrust Approaches to Dynamically Competitive Industries in the United States and the European Union*, 7 J. Competition L. & Econ. 695 (2011) 4

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES Page

Alice in Wonderland iPad App Reinvents Reading, Huffington Post (June 14, 2010, updated May 25, 2011), http://www.huffingtonpost.com/2010/04/14/alice-in-wonderland-ipad_n_537122.html 14

Richard Adhikari, *Amazon Unlikely to Fire Up Devs With Kindle App Store*, Tech NewsWorld, Jan. 21, 2010, http://www.technewsworld.com/story/69164.html 11, 12

Apple Developer Program, *Program Membership Details*, https://developer.apple.com/programs/whats-included/ (last accessed Dec. 2, 2015) 9

Apple, Inc., *Frequently Asked Questions About iBooks*, https://support.apple.com/en-us/HT204619 (last accessed Nov. 25, 2015) 15

Apple, Inc., *Prepare your apps for the App Store*, https://developer.apple.com/app-store/submit/ (last accessed Dec. 2, 2015) 10

Apple.com, *iBooks Author*, http://www.apple.com/ibooks-author/ (last accessed Nov. 25, 2015) 12

Claudine Beaumont, *Apple's iPhone is a developer's goldmine*, The Daily Telegraph, Apr. 16, 2009, http://www.telegraph.co.uk/technology/apple/5163678/Apples-iPhone-is-a-developers-goldmine.html 10

TABLE OF AUTHORITIES—continued

Page

Rebecca Borison, *Ranked: The 15 Most Successful App Companies*, Bus. Insider, June 17, 2014, http://www.businessinsider.com/15-most-successful-app-companies-2014-6?op=1 16

Tim Bradshaw & Shannon Bond, *Apple Rewrites App Economics for Media*, Fin. Times, June 5, 2015, http://www.ft.com/cms/s/0/01a151fc-0b8b-11e5-8937-00144feabdc0.html#slide0 9

BrandIndex, *Amidst Stable of Prize-winners, Apple's Own Brand Still Perceived as Best*, Forbes, Dec. 2, 2011, http://www.forbes.com/sites/brandindex/2011/12/02/admidst-stable-of-prize winners-apples-own-brand-still-perceived-the-best/ 12

Rick Broida, *5 Amazing iPad e-books for kids*, CNET (Apr. 14, 2010), http://www.cnet.com/news/5-amazing-ipad-e-books-for-kids/ 14

Brian X. Chen, *Apple's iPad Will Read Books Out Loud, Support Free e-Books*, Wired, Mar. 12, 2010, http://www.wired.com/2010/03/ipad-ebook-features/ 15

eBook Architects, *Learn About eBooks: Enhanced eBooks*, http://ebookarchitects.com/learn-about-ebooks/enhanced-ebooks/ (last accessed Nov. 25, 2015) 12

eBook Architects, *Learn About eBooks: Non-Fiction Fixed Layout eBooks*, http://ebookarchitects.com/learn-about-ebooks/non-fiction-fixed-layout/ (last accessed Nov. 25, 2015) 14

TABLE OF AUTHORITIES—continued

Page

Lex Friedman, *The App Store turns five: A look back and forward*, Macworld, July 8, 2013, http://www.macworld.com/article/2043841/the-app-store-turns-five-a-look-back-and-forward.html 5

FTC & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000) 5

Jonathan Godfrey & Morgan Reed, III, ACT, *App Store after Five Years: What the Most Successful Apps Reveal about the Mobile Economy* (2013), http://actonline.org/wp-content/uploads/2014/04/The-App-Store-After-Five-Years.pdf 5, 10

Mary Ellen Gordon, *The History of App Pricing, And Why Most Apps Are Free,* Flurry, July 18, 2013, http://flurrymobile.tumblr.com/post/115189750715/the-history-of-app-pricing-and-why-most-apps-are 6

Brandon Griggs, *Developer Strikes It Rich with iPhone Game*, CNN, Nov. 18, 2008), http://www.cnn.com/2008/TECH/11/18/iphone.game.developer/index.html?eref=rss_tech 10

Rhian Hunt, *Battle of the super titans: Apple iOS vs. Google Android – who will reign superior*, Feb. 12, 2014, http://www.pfhub.com/apple-ios-vs-google-android-who-will-reign-superior-377/ 10, 13

John Letzing, *Amazon to Challenge iPad*, Wall Street J., Sept. 28, 2011, http://www.wsj.com/articles/SB10001424052970204422404576597141076634146 17

TABLE OF AUTHORITIES—continued

Page

Farhad Manjoo, *Why Apple's SDK [Software Development Kit] Finally Justifies iPhone Hype*, Salon.com (Mar. 6, 2008), http://www.salon.com/2008/03/06/iphone_sdk/ 10

Harry McCracken, *iBooks Author Is the Most Interesting Apple Software You Aren't Using*, Time, May 30, 2014, http://time.com/107725/ibooks-author/..... 11

Harry McCracken, *The Smartphone App Wars Are Over, and Apple Won*, Time, Feb. 21, 2014, http://time.com/9205/ios-vs-android-2/..... 11

Prince McLean, *Apple Pre-Loading iBook Store with 30,000 Free eBooks*, apple insider, Mar. 25, 2010, http://appleinsider.com/articles/10/03/25/apple_loads_up_new_ibooks_store_with_free_public_domain_ipad_titles..... 16

Walter S. Mossberg, *Finding the Best Way to Read Books on an iPad*, Sept. 15, 2010, Wall Street J., http://www.wsj.com/articles/SB10001424052748703743504575493883578854158..... 15

INTEREST OF THE *AMICUS CURIAE*[1]

ACT | The App Association (formerly known as the Association for Competitive Technology) is an international grassroots advocacy and education organization representing more than 5,000 small and mid-size app developers and information technology firms. It is the only organization focused on the needs of small business innovators from around the world. ACT advocates for an environment that inspires and rewards innovation while providing resources to help its members leverage their intellectual assets to raise capital, create jobs, and continue innovating.

ACT has participated as an *amicus curiae* in this and other courts in antitrust and other cases involving technological innovation. See, *e.g.*, *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014); *Dastar Corp.* v. *Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *United States* v. *Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam). In light of the critical role that technological innovation plays in enhancing competition and improving the welfare of consumers, ACT has a keen interest in ensuring that federal antitrust law is properly applied to dynamic industries and innovative technologies.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.2(a), Petitioner Apple, Inc., the United States, and the State respondents received timely notice of, and consented to, amicus curiae's filing of this brief. Their consent letters have been filed with this brief.

In particular, ACT wishes to underscore the sea change marked by Apple's introduction of the iBookstore, iBooks software and iPad. Apple's innovations in this space illustrate why rule of reason—rather than *per se*—analysis should have been employed to evaluate the conduct at issue, *viz.*, Apple's entry into "agency agreements" with publishers of electronic books ("e-books"). Moreover, the innovations possible through iBooks, the iBookstore and the iPad are remarkable because they have made, or stood to make, dramatic improvements in welfare for consumers and content developers alike. Those welfare enhancements have been facilitated by the agency agreements at issue here, which parallel those used, to the great benefit of producers and consumers, in Apple's App Store.

In the e-book setting at issue, consumers now have access to categories of e-books—cookbooks, children's books, books with embedded animation and videos, and books that can read themselves to a user—that were virtually unheard of previously. At the same time, Apple has released democratizing software that enables content creators—authors, publishers, and software developers alike—to earn higher revenue and generate products with a suite of software programs that are less restrictive and more creator-friendly than competing programs. Those incentives in turn spur the creation of more—and more diverse—product choices for consumers. Based on ACT's familiarity with technological development, including development facilitated by an Apple business model that tracks the one the government attacked here, ACT emphasizes that this case is an exceedingly poor candidate for *per se* analysis. The Second Circuit's holding that the practices challenged by respondents, notwithstanding their significant

procompetitive effects and potential effects, were unlawful *per se* warrants this Court's review.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT CONTRAVENED THIS COURT'S PRECEDENTS—AND BASIC PRECEPTS OF ANTITRUST LAW—BY APPLYING *PER SE* ANALYSIS TO THE CONDUCT AT ISSUE IN THIS CASE.

The default rule for analyzing the legality of an alleged restraint of trade is the rule of reason. *E.g.*, *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885 (2007) ("The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1.").

That test seeks to determine whether, on balance, the sum of the restraint's anticompetitive harms outweigh its procompetitive benefits. As is especially significant to *amicus curiae*, those effects, in turn, include not only direct financial impacts on end consumers, but also effects on other market actors that alter consumer welfare more indirectly. Such effects are material under this Court's antitrust precedents. In *NCAA* v. *Board of Regents of the University of Oklahoma*, for instance, this Court's rule of reason analysis of a Section 1 claim against the NCAA emphasized that the NCAA's "actions widen consumer choice—*not only the choices available to sports fans but also those available to athletes*—and hence can be viewed as pro-competitive." 468 U.S. 85, 102 (1984) (emphasis added); see *Broad. Music, Inc.* v. *CBS*, 441 U.S. 1, 20-23 (1979) (discussing the phenomenon of blanket music licenses and how their use effects a "substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers").

In contrast to the flexibility and inclusiveness of the rule of reason stands the narrow rigidity of the *per se* approach, which is appropriate only where the nature of the restraint in question is such that it would be held unlawful under the rule of reason in "all or almost all instances." *Leegin*, 551 U.S. at 886-87; *accord State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997) ("[W]e have expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." (internal quotation marks omitted)); *Broad. Music*, 441 U.S. at 9-10 ("[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations" (alteration in original) (quoting *United States* v. *Topco Assocs.*, 405 U.S. 596, 607-08 (1972)) (citing *White Mot. Co.* v. *United States*, 372 U.S. 253, 263 (1963)).

Consequently, absent a sufficient body of judicial experience with a particular commercial arrangement, an antitrust challenge to that arrangement is properly addressed through the rule of reason. See, *e.g.*, *Broad. Music*, 441 U.S. at 10 (observing that this Court "ha[s] never examined a practice like this one before," and declining to adopt a *per se* approach). This judicial reluctance to brand unfamiliar arrangements as *per se* anticompetitive is particularly appropriate where, as here, the challenged agreement spurs technological evolution and innovation. See generally Daniel J. Gifford & Robert T. Kudrle, *Antitrust Approaches to Dynamically Competitive Industries in the United States and the European Union*, 7 J. Competition L. & Econ. 695 (2011) (discussing application of antitrust principles to dynamically innovative industries). Similarly, *per se* treatment is inappropriate where the challenged

arrangement may increase output. *NCAA*, 468 U.S. at 103 (discussing *Broad. Music*, 441 U.S. at 18-23); see also FTC & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* 8 § 3.2 (2000). In sum, *per se* rules suit only well-trodden ground and familiar fact patterns, rather than cases where the factual, technical, and commercial landscapes are both unfamiliar and rapidly changing.

As petitioner aptly explains—and, indeed, as the Government conceded during the proceedings in the Court of Appeals—such a body of experience is lacking here. See Pet. 18-20; Pet. App. 108a (Jacobs, J., dissenting) (noting that "the government conceded at oral argument [that] no court has previously considered a restraint of this kind"). Consequently, rule-of-reason treatment should have been afforded to the alleged restraint here.

Moreover, Apple's introduction of the iBookstore—with its associated agency business model (like that of Apple's App Store, which preceded the iBookstore[2])—and the iPad, through which users

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[2] *See generally* Jonathan Godfrey & Morgan Reed, III, ACT, *App Store after Five Years: What the Most Successful Apps Reveal about the Mobile Economy* 3 (2013), http://actonline.org/wp-content/uploads/2014/04/The-App-Store-After-Five-Years.pdf (discussing growth in the app market, including "sharp increase in App Store revenues," job growth in the app development sector, and $10 billion paid to developers through the App Store over five years, with approximately half of that in the prior year alone); Lex Friedman, *The App Store turns five: A look back and forward*, Macworld, July 8, 2013, http://www.macworld.com/article/2043841/the-app-store-turns-five-a-look-back-and-forward.html (discussing, *inter alia*, the App Store's pricing model, which led to App developers earning more than $10 billion by 2013, and the proliferation of apps on the store from 552 when it launched in 2008 to more than 65,000

typically access such content, have unleashed significant procompetitive forces in the eBooks market, to the great benefit of authors, software developers, and, ultimately, the consuming public. These procompetitive effects, coupled with the novelty of the alleged restraint and the dynamic nature of the relevant market, render untenable the Court of Appeals' decision to hold Apple's agency agreements illegal *per se*.

II. THE AGENCY MODEL AND iBOOKSTORE HAVE SIGNIFICANTLY ENHANCED COMPETITION FOR THE DEVELOPMENT OF EBOOKS, MOBILE APPS, AND APP-DEVELOPMENT PLATFORMS.

In debuting the iPad and iBookstore, Apple opened a new frontier of competition for producers of written and digital content. See *NCAA*, 468 U.S. at 102-03 (citing as a procompetitive justification for a restriction on television broadcast arrangements the fact that the actions at issue expanded the choices not only for end-consumers but also the athletes who helped produce the sporting events being "consumed").

These procompetitive effects can be observed at several levels. First, the agency agreements themselves have significant procompetitive effects—the panel majority's contrary conclusion notwithstanding. Second, that business model is ample ground for competition among developers, who utilize tools

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apps just three years later); *see also* Mary Ellen Gordon, *The History of App Pricing, And Why Most Apps Are Free,* Flurry (July 18, 2013), http://flurrymobile.tumblr.com/post/115189750715/the-history-of-app-pricing-and-why-most-apps-are (illustrating and discussing a history of falling prices on the App Store); *cf.* Pet. App. 13a (stating that Apple had "to create a business model for the iBookstore").

Apple makes available, to supply new and innovative e-books content. Third, Apple's iPad provides a platform on which e-books developers can aim for the stars, which, in turn, dramatically increases the type, quality, and quantity of e-book choices available to consumers.

The Second Circuit majority failed to recognize the procompetitive effects of the agency agreements, iBooks software, and iBookstore, instead acknowledging only that the *iPad* is "a revolutionary ereader boasting many more features than the Kindle." Pet. App. 77a; *id.* at 80a (noting "the various technological innovations embedded in the iPad"). As explained below, however, the iPad is only part of the story; also critical are Apple's iBooks software and the iBookstore. Together, these innovations have effectively re-written the very definition of an e-book—to consumers' great and lasting benefit.

First, the agency agreements themselves were important drivers of competition in the e-books industry, by realigning the incentives of distributors and publishers. The distributors and publishers include traditional major book houses, which were subject to litigation below, small traditional publishers, and independent developers focused solely or largely on electronic work. As the academic literature reveals, agency agreements tend to *increase* consumer welfare by lowering price and increasing output. See Vibhanshu Abhishek et al., *Agency Selling or Reselling? Channel Structures in Electronic Retailing*, Mgmt. Sci. (forthcoming), *available at* http://repository.cmu.edu/cgi/viewcontent.cgi?article=1398&context=heinzworks, at 13 (Jan. 2015). The explanation for this inheres in the nature of agency selling: "The prices in agency selling are lower (as compared to reselling) because . . . a higher

price would mean more payout to the retailer"—*i.e.*, the agent—which effectively means a "higher marginal cost" for the manufacturer. *Id.* That higher price, in turn, would result in lower sales. *Id.* "To counteract this loss, the manufacturer lowers the price to avoid the high payout to the retailer and [thereby also] achieves higher sales." *Id.*; *id.* at 20-23 (discussing the e-books industry in early 2010 as a case study in how externalities (*e.g.*, sales of a complementary product such as the Kindle) can affect price-setting and mode-of-distribution (*i.e.*, wholesale vs. agency) decisions). See also *infra* at 9-10, 12.

Consequently, the Court of Appeals erred by applying the *per se* rule to Apple's agreements with the publishers, because those agreements are precisely the sort of "cooperative venture that promises greater productivity and output" that courts have long subjected to rule-of-reason analysis. See *Polk Bros., Inc.* v. *Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (Easterbrook, J.) (citing *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271, 280-83 (6th Cir. 1898) (Taft, J.), *aff'd*, 172 U.S. 211 (1899)); see also *Broad. Music*, 441 U.S. at 19-20; *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1010-12 (7th Cir. 2012) (Posner, J.).

Nor did the panel majority adequately explain its conclusion that these cases authorize rule-of-reason treatment "only when the restraint at issue was imposed in connection with some kind of potentially efficient joint venture," rather than in connection with detailed, formalized vertical distribution agreements. Pet. App. 63a. Elevating such technicalities is inconsistent with this Court's command that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."

Continental T.V., Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36, 58-59 (1977). Instead, the relevant criterion for present purposes—as in *all* cases where the question is whether to apply *per se* or rule-of-reason treatment—is whether the agreement in question "facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead [is] one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broad. Music*, 441 U.S. at 19-20. However, given the novelty of the issue and the price-lowering, output-increasing, and welfare-improving effects of agency distribution generally, see Abhishek, *supra,* at 13, it takes little scrutiny to determine that the *per se* rule had no place in the Court of Appeals' analysis.

Second, Apple's experience has already demonstrated how agency agreements do increase innovation and competition. Similar to its agency agreements with publishers (both institutional and self-publishing authors), in connection with its App Store, Apple enters into a standard agreement with app developers that allows them to keep 70% of the sales revenue, does not charge fees for hosting the apps, requires Apple to handle payment processing, and gives developers tools to create and test their applications. See, *e.g.*, Apple Developer Program, *Program Membership Details*, https://developer.apple.com/programs/whats-included/ (last accessed Dec. 2, 2015).

Apple's relationship with independent app developers (again, much like its relationship with e-book publishers) is built on several key mechanisms. The first, and most obvious, is a strong financial incentive. See, *e.g.*, Tim Bradshaw & Shannon Bond,

Apple Rewrites App Economics for Media, Fin. Times, June 5, 2015, http://www.ft.com/cms/s/0/01a151fc-0b8b-11e5-8937-00144feabdc0.html#slide0; Claudine Beaumont, *Apple's iPhone is a developer's goldmine*, The Daily Telegraph, Apr. 16, 2009, http://www.telegraph.co.uk/technology/apple/5163678/Apples-iPhone-is-a-developers-goldmine.html ("It's an easy platform to develop for, and the distribution channel is key. Apple cut a very fair deal—70 per cent to the developers, 30 per cent to Apple, end of story."); Brandon Griggs, *Developer Strikes It Rich with iPhone Game*, CNN, Nov. 18, 2008), http://www.cnn.com/2008/TECH/11/18/iphone.game.developer/index.html?eref=rss_tech. Indeed, as of July 2013, Apple was the top-earning platform for app developers, having paid more than $10 billion to developers through the App Store as of that point in time—its closest competitor had paid out only 40% as much. Godfrey & Reed, *supra*, at 3 & n.3.

Another prong of Apple's innovation-encouraging structure is the extensive suite of highly sophisticated development software it makes available to content developers. See Apple, Inc., *Prepare your apps for the App Store*, https://developer.apple.com/app-store/submit/ (last accessed Dec. 2, 2015); Farhad Manjoo, *Why Apple's SDK [Software Development Kit] Finally Justifies iPhone Hype*, Salon.com (Mar. 6, 2008), http://www.salon.com/2008/03/06/iphone_sdk/.

This package of development tools is widely popular in the industry, for several reasons. Rhian Hunt, *Battle of the super titans: Apple iOS vs. Google Android – who will reign superior*, Pfhub, Feb. 12, 2014, http://www.pfhub.com/apple-ios-vs-google-android-who-will-reign-superior-377/ ("App developers greatly prefer iOS . . . ."). One reason is

that some hardware manufacturers impose far more stringent conditions, or offer more limited options, than Apple does, in terms of the features they will permit apps to have. Cf., *e.g.*, Harry McCracken, *The Smartphone App Wars Are Over, and Apple Won*, Time, Feb. 21, 2014, http://time.com/9205/ios-vs-android-2/ (describing a view among developers that it may be "twice as hard" to develop a "slick app" for Android's operating system as for Apple). When Amazon released app-development software in 2010, for example, it precluded apps from incorporating Voice over IP functionality and prohibited advertisements in all apps—limiting developers' options for pricing their products (*e.g.*, free, with revenue generated by ads vs. charging an up-front fee for the app vs. imposing two purchase prices—one for an app with ads, and one without them). Richard Adhikari, *Amazon Unlikely to Fire Up Devs With Kindle App Store*, TechNewsWorld, Jan. 21, 2010, http://www.technewsworld.com/story/69164.html.

These tools—and the benefits they offer—are mirrored in the e-books segment of the Apple ecosystem. To enhance publishers' ability to create high-quality e-books that could take advantage of some of the technical innovations of the iPad (*e.g.*, a full-color screen supporting embedded audio, video, and animation), Apple released its (free) iBooks Author software in January 2012. See Harry McCracken, *iBooks Author Is the Most Interesting Apple Software You Aren't Using*, Time, May 30, 2014, http://time.com/107725/ibooks-author/ ("But Apple being Apple, iBooks is visually sumptuous . . . . iBooks Author . . . lets you design stylish books that incorporate images, video, embedded web widgets and other trimmings."). The resulting e-book can then be kept for personal use, distributed privately,

or listed for sale on the iBookstore. Apple.com, *iBooks Author*, http://www.apple.com/ibooks-author/ (last accessed Nov. 25, 2015); eBook Architects, *Learn About eBooks: Enhanced eBooks*, http://ebook architects.com/learn-about-ebooks/enhanced-ebooks/ (last accessed Nov. 25, 2015) ("[T]he iBookstore does not require that you sign up for a special program or have special access to upload an enhanced eBook file. You can just submit your eBook to the store directly or through a distributor.").

The developer agreements also allow content producers to benefit from the cachet and assumption of quality associated with the Apple brand. See BrandIndex, *Amidst Stable of Prizewinners, Apple's Own Brand Still Perceived as Best*, Forbes, Dec. 2, 2011, http://www.forbes.com/sites/brandindex/2011/12/02/admidst-stable-of-prizewinners-apples-own-brand-still-perceived-the-best/ (noting the high consumer regard for the Apple brand, independent of consumer perceptions of any individual Apple product). An independent e-book developer or app developer ordinarily would have to invest considerable time and money to attract virtual foot traffic, and even more resources to convince any consumer who found the products that the offerings are legitimate, that the payment schemes are secure, that customer service exists for problems downloading the content, and so forth. The agency model and its markets for content remove such friction and overhead.

Additionally, Apple's iOS app-development platform offers developers instant access to virtually every iPhone user at once, and similarly guarantees that the app will have the same look, features, and functionality for *all* of those users. See Adhikari, *supra* ("Developers care about one thing and one

thing only—the [existing, established user] base[:] . . . . Will the device they're developing for have the ability to reach a large mass of consumers so they can make their business work? The Kindle doesn't, and this is the same problem that the Palm device and Android phones have." (internal quotation marks omitted)). Other platforms cannot offer that combination of a broad audience and guaranteed end-user experience, due to a phenomenon known as fragmentation. Google's Android operating system, for example, is the operating system not for a small handful of device product lines, as is the case for Apple's iOS software (*e.g.*, iPhone, iPad, and iPod), but rather is deployed across dozens of device types produced by several different manufacturers. This "fragmentation" means that any developer looking to create a mobile-device application has a strong structural incentive to create it for Apple and iOS, instead of Android. See Hunt, *supra* ("Due to lack of fragmentation, apps are easily discoverable by the entire available market, and development costs are held down also.").

The upshot of this structure is clear: Whether for books or apps, Apple's business model and offerings provide unmatched support, incentives, and opportunities to independent content developers. The result is a richer, wider range of consumer products than otherwise would exist.

Third, the iPad is a uniquely attractive device for which to develop digital content, including e-books. Before the iPad, eBooks users were largely relegated to single-purpose, black-and-white e-readers. The iPad and the iBooks software it ran changed all that. As alluded to above, the iPad was the first e-reader to offer groundbreaking features such as color, a touch-sensitive screen, audio playback, and countless other

features that transformed eBooks into a truly immersive experience. See Pet. App. 81a. These features, coupled with developers familiarity with Apple's tools and sales models, facilitated the creation of entirely new categories of products and services that producers of digital content have competed vigorously to supply.

Even the earliest content that developers wrote specifically for the iPad was described as "reinvent[ing] reading." *Alice in Wonderland iPad App Reinvents Reading*, Huffington Post (June 14, 2010, updated May 25, 2011), http://www.huffingtonpost.com/2010/04/14/alice-in-wonderland-ipad_n_537122.html. Far from the typical e-books experience before (and the experience with many e-books on other platforms since), developers produced work through which "users don't just flip the 'pages' of the eBook—they're meant to shake it, turn it, twist it, jiggle it, and watch the characters and settings in the book react." *Id.*; see also, *e.g.*, Rick Broida, *5 Amazing iPad e-books for kids*, CNET (Apr. 14, 2010), http://www.cnet.com/news/5-amazing-ipad-e-books-for-kids/ ("Welcome to the real reason the iPad will kill the Kindle: children's books. They're colorful, interactive, and amazing.").

The iPad gave developers another attractive target for their imaginations insofar as the device introduced a new format for displaying e-books, which is currently referred to as "Fixed Format" or "Fixed Layout." As the name suggests, a "Fixed Format" e-book has text and images "fixed" in specific locations on a page. This innovation greatly enhances the ability of e-book publishers to create works that depend on the relative position of particular images and blocks of text, such as children's books and cookbooks. See generally eBook

Architects, *Learn About eBooks: Non-Fiction Fixed Layout eBooks*, http://ebookarchitects.com/learn-about-ebooks/non-fiction-fixed-layout/ (last accessed Nov. 25, 2015).

As a result, iBooks users also have the ability to interact with, and learn from, their e-books. Indeed, at least some of iBooks' innovations have created new markets of e-book consumers that did not previously exist, and, thus, opportunities for publishers to develop new types of e-books to serve those new markets. For example, the iPad's VoiceOver software will read e-books aloud, a move that "[t]he National Federation for the Blind has . . . applauded." Brian X. Chen, *Apple's iPad Will Read Books Out Loud, Support Free e-Books*, Wired, Mar. 12, 2010, http://www.wired.com/2010/03/ipad-ebook-features/.

iBooks offers expanded capabilities within existing markets, as well. For instance, readers can look up definitions to words they encounter in the book, and, what is more, they can find those definitions not only in English but also Spanish, French, and Simplified Chinese (among others). Readers can also search Wikipedia without leaving the book, and can use the iBooks software to share passages from the book on social media sites such as Facebook and Twitter. See Apple, Inc., *Frequently Asked Questions About iBooks*, https://support.apple.com/en-us/HT204619 (last accessed Nov. 25, 2015); Walter S. Mossberg, *Finding the Best Way to Read Books on an iPad*, Sept. 15, 2010, Wall Street J., http://www.wsj.com/articles/SB10001424052748703743504575493883578854158.

Moreover, the iBookstore has substantially broadened the range of e-book titles available to consumers by enabling them to purchase not just prominent titles from the major publishing houses but also countless self-published works, just as the

App Store enables consumers to purchase apps from solo developers and corporate conglomerates alike.[3] In such a market, self-published works, such as Andy Weir's *The Martian* and E.L. James's *Fifty Shades of Grey* do gain widespread acclaim (not to mention major motion picture deals). Likewise, many independent developers who have released apps in the App Store have experienced smashing financial success. See Rebecca Borison, *Ranked: The 15 Most Successful App Companies*, Bus. Insider, June 17, 2014, http://www.businessinsider.com/15-most-successful-app-companies-2014-6?op=1 (noting, *inter alia*, that a single app for Japanese app developer GREE brought in more than $5 million in just 30 days, and that another developer raked in more than $1.4 billion in 2013—from a single game ("Puzzle & Dragons")). There is every reason to believe that, under the same business model, content developers would increase the number, breadth and innovativeness of their offerings as they sought similar break-out success in the iBookstore.

All of these components greatly added and continue to add to consumer welfare and, more broadly, to authors' and publishers' ability to compete. See *Leegin*, 551 U.S. at 886 (distinguishing "between restraints with anti-competitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest"). Once there was an e-reader that could support such

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[3] The iBookstore also drastically expanded consumer choice by enabling consumers to download more than 30,000 books that were freely available in the public domain. *See* Prince McLean, *Apple Pre-Loading iBook Store with 30,000 Free eBooks*, appleinsider, Mar. 25, 2010, http://appleinsider.com/articles/10/03/25/apple_loads_up_new_ibooks_store_with_free_public_domain_ipad_titles.

features, e-book publishers could—and did—enhance their e-books with these features, and could thereby seek to differentiate themselves from their competitors. See *NCAA*, 468 U.S. at 102-03.

Finally, it merits mention that since the release of the iPad, other e-book retailers have been forced to compete, not just based on their e-*books* but on their e-*readers*. For example, in response to the iPad, Amazon stepped up its own efforts to innovate, including by releasing full-color multimedia e-reader of its own (namely, the Kindle Fire and its successors). See, *e.g.*, John Letzing, *Amazon to Challenge iPad*, Wall Street J., Sept. 28, 2011, http://www.wsj.com/articles/SB10001424052970204422404576597141076634146.

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At bottom, the Court of Appeals' decision cannot be squared with this Court's consistent command that *per se* treatment is appropriate *only* when evaluating the lawfulness of well-understood restraints in familiar circumstances. It is *not* appropriate in cases, such as the one at bar, which involve a novel alleged restraint in a quickly evolving industry. It is even less appropriate where that restraint has the potential to increase and diversify market output, streamline the production process for content creators, and reduce prices paid by end consumers. Whether taken individually or collectively, these are significant procompetitive effects that argue strongly for rule-of-reason treatment. Because the panel majority held to the contrary, the petition should be granted and the Second Circuit's judgment vacated.

CONCLUSION

For these reasons and those stated by the petitioner, the writ should be granted.

Respectfully submitted,

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