No. 128767

IN THE

SUPREME COURT OF ILLINOIS

THE STATE OF ILLINOIS, by its Attorney General, KWAME RAOUL, Plaintiff-Appellee, v. COLONY DISPLAY LLC, Defendant-Appellant.	On Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-21-0840 There Heard on Appeal from the Circuit Court of Cook County, Illinois Chancery Division, No. 2020 CH 05156 The Honorable Raymond Mitchell, Judge Presiding

BRIEF OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The United States enforces the federal antitrust laws and has a strong interest in their correct application. In particular, the United States enforces Section 1 of the Sherman Act, 15 U.S.C. § 1, against firms that agree with one another to fix wages or allocate workers, including agreements not to hire, solicit, and/or otherwise compete for employees (hereafter "no-poach" agreements).[1] The United States has filed amicus briefs and statements of interest addressing such agreements.[2]

This appeal involves the application of the Illinois Antitrust Act ("IAA") to alleged wage-fixing and no-poach agreements. The IAA provides that "[w]hen the wording of this Act is identical or similar to that of a federal antitrust law, the courts of this State *shall* use the construction of the federal law by the federal courts as a guide in construing this Act." 740 ILCS 10/11 (emphasis added). This appeal presents a question as to which "the construction of the federal [antitrust] law[s] by the federal courts" could serve

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[1] *See, e.g.*, *United States v. Manahe*, No. 2:22-cr-00013-JAW (D. Me. Jan. 27, 2022); *United States v. Patel*, No. 3:21-cr-00220 (D. Conn. Dec. 15, 2021); *United States v. Hee*, No. 2:21-cr-00098-RFB-BNW (D. Nev. Mar. 30, 2021); *United States v. Surgical Care Affiliates, LLC*, No. 3:21- cr-00011-L (N.D. Tex. July 8, 2021).

[2] *See, e.g.*, *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, No. 20-55679 (9th Cir. Nov. 19, 2020), ECF No. 14; *Markson v. CRST Int'l, Inc.*, No. 5:17-cv-01261-SB (SPx) (C.D. Cal. July 15, 2022), ECF No. 637; *In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, No. 1:21-cv-00305 (N.D. Ill. Dec. 9, 2021) (Doc. 91); *Seaman v. Duke Univ.*, No. 1:15-cv-00462-CCE-JLW (M.D.N.C. Mar. 7, 2019), ECF No. 325; *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2:18-mc-00798-JFC (W.D. Pa. Feb. 8, 2019), ECF No. 158.

as a useful "guide in construing" the IAA: The certified question concerns Section 3(1) of the IAA, which the Illinois Supreme Court has held is "patterned after section 1 of the Sherman Act" and therefore "in [its] construction of the Illinois Antitrust Act" this Court is "guided by Federal case law construing analogous provisions of Federal legislation." *People ex rel. Scott v. College Hills Corp.,* 91 Ill. 2d 138, 150 (1982).

The United States files this brief under Ill. Sup. Ct. R. 345 and 28 U.S.C. § 517 to address how federal antitrust law would apply to the question before this Court.[3]

ISSUE PRESENTED

Whether the *per se* rule under Section 3(1) of the Illinois Antitrust Act, 740 ILCS 10/3(1), applies to alleged horizontal agreements facilitated by a vertical noncompetitor.

STATEMENT OF FACTS

This appeal and a companion appeal (No. 128763) arise out of a State enforcement action under the IAA against Defendants Elite Staffing, Inc., Metro Staff, Inc., Midway Staffing, Inc. (the "Staffing Agencies") and Colony Display LLC. The Staffing Agencies "compete with one another to recruit, select, and hire employees that will be staffed at third-party client locations

[3] Defendant Colony Display argues that this Court should not look to federal law in construing the IAA. *See, e.g.*, Colony Br. 2. The United States does not take a position on this issue.

on a temporary basis." A23 (Compl. ¶ 18).[4] Colony manufactures and installs displays for retail and hospitality businesses. It employs "75-100 full-time employees and between 200 and 1,000 temporary workers at any given time." *Id.* (Compl. ¶ 17). Colony separately contracted with each of the three Staffing Agencies to provide it with temporary workers at its facilities. A23–24 (Compl. ¶¶ 18–20). The Staffing Agencies employed and paid each of the temporary workers assigned to Colony locations. A23–24 (Compl. ¶¶ 18, 22).

The State alleges that, beginning in March 2018, the Staffing Agencies "agreed, combined, and conspired not to recruit, hire, solicit, or poach temporary workers from each other at Colony locations." A25 (Compl. ¶ 25). Pursuant to this agreement, the Staffing Agencies "would not approach temporary workers employed by another [Staffing] Agency Defendant at Colony locations and offer them better wages or other benefits." *Id.* (Compl. ¶ 26). The Staffing Agencies also agreed not to allow temporary workers to switch agencies. If a temporary worker did manage to switch, the agencies would require that worker to return to the original agency employer. A25–26 (Compl. ¶ 26).

The State alleges that, at roughly the same time, and at the request of Colony, the Staffing Agencies also conspired to fix the wages paid to the temporary workers at Colony locations. Specifically, the Staffing Agencies

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[4] The facts recited come from the State's Complaint, the allegations of which are accepted as true at the motion-to-dismiss stage. *See, e.g.*, *Long v. City of New Bos.*, 91 Ill. 2d 456, 463 (1982).

agreed to pay the workers a below-market, fixed wage set by Colony "with the understanding that all other Agency Defendants also agreed to pay the same wage." A33 (Compl. ¶¶ 4, 56, 63). Although the Staffing Agencies would ordinarily compete to attract workers by offering better wages, A34 (Compl. ¶ 60), they agreed "not to compete over wages for temporary workers assigned to Colony," thereby suppressing those workers' wages below the competitive level, *id.* (Compl. ¶ 61).

The State alleges that Colony participated in the Staffing Agencies' no-poach and wage-fixing conspiracies by facilitating communications between the Staffing Agencies and helping them enforce their agreements. The Staffing Agencies "communicat[ed] with each other through Colony" to enforce the no-poach conspiracy. If one agency violated the agreement "by hiring the temporary employees of another Agency," "a complaint would be made to Colony," and "Colony would then communicate the issue to all of the Agency Defendants and ensure that the conspiracy was enforced." A26 (Compl. ¶ 27). Similarly, Colony facilitated the wage-fixing conspiracy by setting the pay rate that each Staffing Agency followed, A33 (Compl. ¶ 59), communicating the agreement on that wage to each Staffing Agency, A34 (Compl. ¶ 63), and responding to Staffing Agencies' complaints that another Staffing Agency was not abiding by the agreement, A35 (Compl. ¶¶ 64–65).

The State charged the Staffing Agencies and Colony with a per se unlawful no-poach conspiracy, in violation of 740 ILCS 10/3(1) (Count 1); and

a per se unlawful wage-fixing conspiracy, in violation of 740 ILCS 10/3(1) (Count 2). A36–38 (Compl. ¶¶ 69–78). Defendants moved to dismiss the complaint, arguing (as relevant here) that the IAA does not apply to agreements regarding labor services and that, even if it did, the alleged agreements were not per se illegal because they involved a vertically-related participant.

The Circuit Court denied the motions to dismiss. A232–235. The court rejected the argument that the IAA "does not apply to labor services," holding that Section 4 of the IAA "was passed in 1965 after the U.S. Supreme Court rendered the key decisions determining the scope of the labor organizations exemptions in section 6 of the federal Clayton Act"—which does not create a "blanket immunization for labor services." A233. Adverting to federal case law construing Section 1 of the Sherman Act, the court also held that "the restraint agreed to by all participants was plainly horizontal," involving "competitors agreeing not to solicit or hire each other's workers and to fix wages, which would be *per se* illegal," and that "the fact that Colony, a common client to the Agency Defendants, participated in the agreements does not recharacterize an agreement that is horizontal in nature as a vertical one." A234.

At Defendants' request, the Circuit Court certified two questions for immediate appeal: (1) "Whether the definition of 'Service' under Section 4 of the [IAA], 740 ILCS 10/4, which states that Service 'shall not be deemed to

include labor which is performed by natural persons as employees of others,' applies to the IAA as a whole and thus excludes all labor services from the IAA's coverage," and (2) "Whether the *per se* rule under Section 3(1) of the IAA, 740 ILCS 10/3(1), which states that it applies to conspiracies among 'competitor[s],' extends to alleged horizontal agreements facilitated by a vertical noncompetitor." A236.

On the first question, the Appellate Court held that "the exclusion of labor from the definition of 'service' in section 4 [of the IAA] is primarily concerned with restraints on the individual labor of natural persons for the purpose of allowing employees and management to engage in collective bargaining and related activities." A10 (¶ 22). The court explained that the labor exemption in the IAA operates "like that of Section 6 of the Clayton Act." A7 (¶ 16) (quoting Bar Comm. Comts-1967 (West 2018)). The court held that the IAA's exemption does not extend to "the hiring and managing services provided by temporary staffing agencies." A10 (¶ 22).

On the second question, the Appellate Court held that "a vertical party's coordination of a horizontal restraint among competitors does not necessarily transform the otherwise horizontal restraint into a vertical one." A13 (¶ 30). In reaching this conclusion, the court was "guided by Federal case law" because the relevant portion of state law "is patterned after Section 1 of the Sherman Act" and "Illinois courts have not yet weighed in on the question presented." A12 (¶ 28) (citation omitted). "[T]ak[ing] instruction from federal

court decisions," *id.*, the Appellate Court concluded that "the classification of a conspiracy as horizontal or vertical is not determined by the presence of a vertically situated party, but rather by the existence or absence of concerted horizontal action," A16 (¶ 34).

Colony and the Staffing Agencies separately petitioned for leave to appeal to this Court, and the Court allowed both petitions. Colony Br. 4 & n.4. Colony's appeal concerns only the second certified question (whether per se treatment applies); the Staffing Agencies' appeal concerns only the first question (the scope of Illinois's labor exemption).

ARGUMENT

The certified question in this appeal is whether the IAA's per se rule "extends to alleged horizontal agreements facilitated by a vertical noncompetitor." Colony Br. 3. Under federal law, the answer to that question is clear: Per se illegal horizontal agreements remain per se illegal when a vertically-related firm participates in them. If the Court chooses to address Colony's argument that a vertically-related firm cannot itself be subject to per se liability under the IAA, federal law likewise makes clear that a vertically-related firm is itself subject to per se liability if it participates in a per se illegal horizontal restraint.

A. Per se illegal horizontal conspiracies, such as price-fixing and market-allocation, remain per se illegal even if a vertically-related firm participates.

1. Section 1 of the Sherman Act prohibits agreements that unreasonably restrain trade. 15 U.S.C. § 1; *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018). Restraints of trade "can be unreasonable in one of two ways." *Am. Express*, 138 S. Ct. at 2283. Some restraints are unreasonable per se based on their inherently anticompetitive "nature and character." *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 64–65 (1911); *see, e.g., Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2156 (2021). These per se unlawful restraints include horizontal agreements to fix prices or allocate markets. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *see, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (price fixing); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49–50 (1990) (per curiam) (market allocation). "Restraints that are not unreasonable per se are judged under the 'rule of reason,'" which generally requires "a fact-specific assessment of 'market power and market structure . . . to assess the [restraint]'s actual effect' on competition." *Am. Express*, 138 S. Ct. at 2284 (alterations and omission in original) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)).

2. "[H]orizontal restraints . . . eliminate some degree of rivalry between persons or firms who are actual or potential competitors." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir.

1986). But the parties agreeing to a horizontal restraint need not all be situated horizontally to each other in their *business relationships* for the per se rule to apply. Thus, the Supreme Court has held on several occasions that a vertically-related firm—i.e., one at a different level of the market from the other parties—can participate in an agreement to restrain trade between actual or potential competitors without altering the agreement's horizontal character.

In *Klor's, Inc. v. Broadway–Hale Stores, Inc.,* the Supreme Court held that the per se rule applied to an alleged agreement between an appliance retailer and various appliance manufacturers and distributors to not sell to the retailer's competitor. The defendant retailer had "used its 'monopolistic' buying power to bring about" the conspiracy. 359 U.S. 207, 209 (1959). The Court held that this "wide combination consisting of manufacturers, distributors and a retailer," if proved at trial, would constitute a group boycott for which each participant—including the vertically-related retailer—could be subject to per se liability. *Id.* at 213. As the Supreme Court later explained, "[a]lthough *Klor's* involved a threat made by a single powerful firm, it also involved a horizontal agreement among those threatened, namely, the appliance suppliers, to hurt a competitor of the retailer who made the threat." *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998).

The Court reached a similar result in *United States v. General Motors Corp.*, 384 U.S. 127 (1966). In *General Motors*, the Court considered

allegations that General Motors had conspired with Los Angeles-area Chevrolet dealers to prevent sales of cars through discounters. After certain dealers complained to General Motors that other dealers were selling through discounters, General Motors elicited an agreement from each dealer not to deal with discounters and helped police the arrangement to ensure that dealers abided by it. *Id.* at 136–37. The Court had "no doubt" that this "[e]limination, by joint collaborative action, of discounters from access to the market [was] a per se violation of the [Sherman] Act," even though a vertically-related party (General Motors) was involved. *Id.* at 145; *cf. Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 734 (1988) (holding that the rule of reason applied to a vertical agreement between a manufacturer and a dealer, and distinguishing *General Motors* and *Klor's* on the ground that "both cases involved horizontal combinations").

3. Federal courts of appeals, too, repeatedly have applied the per se rule to horizontal conspiracies involving vertically-related participants. In *United States v. Apple, Inc.*, for example, the Second Circuit affirmed a judgment against Apple for a per se violation of Section 1. 791 F.3d 290, 296–98 (2d Cir. 2015). Through distribution agreements with electronic-book ("ebook") publishers participating in its iBookstore, Apple had organized a price-fixing conspiracy among the publishers. *Id.* at 304–08. Apple argued that the per se rule should not apply because the distribution agreements were vertical. *Id.* at 321. But the court cautioned that "the Sherman Act

outlaws *agreements* that unreasonably restrain trade and therefore requires evaluating the nature of the restraint, rather than the identity of each party who joins in to impose it, in determining whether the *per se* rule is properly invoked." *Id.* at 297. There, the challenged restraint was "the *horizontal* agreement that Apple organized among the Publisher Defendants to raise ebook prices." *Id.* at 323 (emphasis added). And under *General Motors* and *Klor's*, that agreement was per se illegal even though Apple was vertically related to the publishers. *Id.* at 322–23. As the court explained, horizontal price-fixing agreements are per se illegal because they pose a "'threat to the central nervous system of the economy,'" and that threat "is just as significant when a vertical market participant organizes the conspiracy." *Id.* at 323 (quoting *Socony-Vacuum*, 310 U.S. at 224 n.59).

Similarly, in *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 337 (2010), the Third Circuit held that plaintiffs had stated a per se claim under Section 1 by alleging a hub-and-spoke conspiracy—namely, an agreement among insurers, orchestrated by a vertically-related broker, not to compete for each other's incumbent business. And in *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 936 (7th Cir. 2000), the Seventh Circuit upheld the FTC's determination that a toy retailer committed a per se Section 1 violation (and hence violated § 5 of the FTC Act) by coordinating a horizontal agreement among a number of toy manufacturers not to sell their products to warehouse club stores. Several other decisions from federal courts of appeals are in

accord. *See, e.g.*, *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993) (conspiracy among marine dealers to fix prices by excluding a rival dealer from boat shows was horizontal; "[t]hat the conspiracy was joined by the operators of the . . . boat shows does not transform it into a vertical agreement"); *United States v. All Star Indus.*, 962 F.2d 465, 473 (5th Cir. 1992) ("[W]e find that defendants cannot escape the per se rule simply because their conspiracy depended upon the participation of a 'middle-man', even if that middleman conceptualized the conspiracy, orchestrated it by bringing the distributors together around contracts it held with its buyers, and collected most of the booty."), *disapproved of on other grounds by United States v. Calverley*, 37 F.3d 160 (5th Cir. 1994); *United States v. MMR Corp. (LA)*, 907 F.2d 489, 498 (5th Cir. 1990) ("[A] noncompetitor can join a Sherman Act bid-rigging conspiracy among competitors. If there is a horizontal agreement between A and B, there is no reason why others joining that conspiracy must be competitors.").

4. Despite this substantial body of precedent, Colony suggests that federal law is equivocal "as to whether *per se* scrutiny is appropriate for horizontal agreements facilitated by a vertical noncompetitor." Colony Br. 18–19. Not so.

Contrary to Colony's suggestion, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877 (2007), did not alter the well-established principle that per se illegal horizontal conspiracies facilitated by a vertically-related

firm remain subject to per se condemnation. *Leegin* had no occasion to address that principle, since the Court expressly declined to consider any claim that the vertically-related defendant "participated in an unlawful horizontal cartel." *Id.* at 907.

Colony cites *Leegin*'s dicta that if a "vertical agreement setting minimum resale prices is entered upon to facilitate" a horizontal cartel, it "would need to be held unlawful under the rule of reason." *Leegin*, 551 U.S. at 893. But as the Second Circuit explained in *Apple*, it is unlikely that "the Supreme Court meant to overturn *General Motors* and *Klor's*—precedents that it has consistently reaffirmed"—with a single sentence in an opinion that did not mention either case. *See Apple*, 791 F.3d at 324. And in any event, that sentence "is entirely consistent with holding the [vertical] 'hub' in such a conspiracy liable for the horizontal agreement that it joins." *Id.* *Leegin*'s point was that because vertical resale-price agreements may be procompetitive, such vertical agreements, if *themselves* challenged, would have to be judged under the rule of reason. But in the hub-and-spoke context, "the court need not consider whether the vertical agreements restrained trade because all participants agreed to the horizontal restraint, which is 'and ought to be, *per se* unlawful.'" *Id.* at 325 (quoting *Leegin*, 551 U.S. at 893); *see also Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435 & n.3 (6th Cir. 2008) (acknowledging, post-*Leegin*, that the per se rule applies to a hub-and-spoke conspiracy in which a

vertically-related firm participates in "a horizontal agreement among direct competitors"). Indeed, the Court in *Leegin* expressly acknowledged the possibility, and competitive danger, of hub-and-spoke conspiracies involving vertical players. The Court noted that vertical agreements "might be used to organize cartels at the retailer level" and accordingly may "be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel." 551 U.S. at 893. Such a horizontal cartel, the Court affirmed, is subject to the per se rule. *Id.*

Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc., 530 F.3d 204 (3d Cir. 2008), likewise does not support Colony's claim of "disagree[ment]" among federal courts. Colony Br. 18–19. In *Toledo Mack*, the Third Circuit considered two separate agreements: an alleged horizontal agreement among Mack truck dealers not to compete with each other on price; and an alleged "vertical agreement between Mack and [the] dealers" that Mack would deny sales assistance to dealers that sought to make sales outside their assigned areas of responsibility. *Id.* at 221. There was no suggestion in *Toledo Mack* that the vertically-related manufacturer (Mack) was itself a party to the dealers' horizontal conspiracy. *See MM Steel, L.P. v. JSW Steel (USA) Inc.*, 806 F.3d 835, 850 (5th Cir. 2015) (holding that manufacturers could be subject to per se liability under § 1 for joining a group boycott with distributors; distinguishing *Toledo Mack* on the ground that it did not "find[] that the manufacturer[] joined a horizontal group boycott"). The Third

Circuit's holding that the rule of reason applied to the alleged "vertical agreement" between Mack and the dealers thus has no bearing on a case like this one, where the vertically-related party is alleged to have participated in a horizontal conspiracy.

5. The Staffing Agencies have filed a Statement in this appeal arguing that, to the extent this Court looks to federal law to answer the certified question, this Court should hold that "the rule of reason can apply to blended vertical-and-horizontal conduct through the ancillary restraints doctrine." Staffing Agencies Stmt. 5. The United States takes no position on whether that issue is properly before the Court. Regardless, the Staffing Agencies' argument is incorrect.

Under the ancillary-restraints doctrine, a horizontal restraint that would otherwise be per se illegal may instead be judged under the rule of reason if the defense shows that the restraint is (i) "subordinate and collateral," *Rothery Storage*, 792 F.2d at 224, to a separate, "legitimate business collaboration" among the conspirators, *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006), and (ii) reasonably necessary to achieve a procompetitive objective of the collaboration, *Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995); *see also Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021). The doctrine has nothing to do with determining whether a restraint is horizontal or vertical. Nor does the participation of a vertically-related firm alone mean that a restraint is

ancillary. *See, e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 347 (rejecting argument that "'horizontal agreements that exist to facilitate . . . vertical ones' must be tested by the rule of reason" because they are ancillary; if that were so, "then per se condemnation of hub-and-spoke conspiracies would appear to be impossible").

B. A vertically-related firm that participates in a per se illegal restraint is itself subject to per se liability.

Colony addresses most of its brief, not to the question certified for appeal, but to a different question: It argues that even if the IAA's per se rule applies to an agreement facilitated by a vertically-related firm, the vertical participant cannot itself be subject to per se liability for its role in the agreement. Colony Br. 21–22. The United States takes no position on whether this question is properly before the Court. But if this Court accepts Colony's argument, it would create a disparity between the IAA and federal law. Indeed, under federal law, Colony's argument would be foreclosed by black-letter conspiracy law, *see Smith v. United States*, 568 U.S. 106, 111 (2013) ("a defendant who has joined a conspiracy . . . becomes responsible for the acts of his co-conspirators in pursuit of their common plot"), and by the same authorities described *supra*, *see, e.g., Gen. Motors Corp.*, 384 U.S. at 132–38, 140–41, 144–46 (manufacturer subject to per se liability for enforcing horizontal restraint agreed upon by distributors); *Apple*, 791 F.3d at 298,

321–25 (Apple subject to per se liability for organizing horizontal price-fixing conspiracy among publishers).[5]

Colony's proposed rule conflicts not just with the holdings of these cases but also with their rationales. As the Second Circuit explained in *Apple*, "the vertical organizer of a horizontal conspiracy designed to raise prices"—or lower wages—has not "agreed to a restraint that is any less anticompetitive than its co-conspirators." 791 F.3d at 325. Moreover, the vertical participant is often the linchpin necessary for a hub-and-spoke conspiracy to work; without the vertically-related firm as monitor and enforcer, the horizontal conspirators may not be able to hold their agreement together. In *Toys "R" Us*, for example, the evidence showed that "each manufacturer was afraid to curb its sales to the [boycotted] warehouse clubs alone"; "as is classically true in such cartels," the competing manufacturers were only willing to forgo sales to warehouse clubs if Toys "R" Us, the vertically-related player, ensured that *all* the manufacturers did the same thing. *Toys "R" Us*, 221 F.3d at 936. Similarly, in *Apple*, Apple "consciously played a key role in organizing [the publishers'] express collusion," by telling them "that Apple would launch its iBookstore only if a sufficient number of them agreed to participate and that each publisher would receive identical terms, assuring them that a critical mass of major publishers" would participate in the price-fixing agreement.

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[5] Colony's argument also would be foreclosed by the plain text of Section 1, which makes liable "[e]very person" who "engage[s]" in an unlawful conspiracy, 15 U.S.C. § 1.

791 F.3d at 318. Colony's proposed rule thus would give preferential treatment to the very party that may be "a *sine qua non* of [an] alleged horizontal agreement." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 337.

CONCLUSION

For the foregoing reasons, if this Court looks to federal law for guidance in interpreting the IAA, the Court should conclude that, under federal law, per se illegal horizontal conspiracies facilitated by a vertically-related firm remain subject to per se condemnation.

Respectfully submitted,

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May 31, 2023

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 4,334 words.

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