No. 22-4544

IN THE
United States Court of Appeals for the Fourth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
BRENT BREWBAKER,
Defendant-Appellant.

On Appeal from the
United States District Court for the Eastern District of North Carolina
No. 5:20-cr-00481-FL-1 (Hon. Louise Wood Flanagan)

PETITION OF THE UNITED STATES FOR PANEL REHEARING AND REHEARING EN BANC

JONATHAN S. KANTER
Assistant Attorney General
DOHA MEKKI
Principal Deputy Assistant Attorney General
MAGGIE GOODLANDER
Deputy Assistant Attorney General
MANISH KUMAR
Deputy Assistant Attorney General
MARKUS A. BRAZILL
Counsel to the Assistant Attorney General
RACHEL KROLL
ALISON FRIBERG
Attorneys
U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
DANIEL E. HAAR
STRATTON C. STRAND
PETER M. BOZZO
Attorneys
U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
950 Pennsylvania Ave., N.W.
Room 3224
Washington, D.C. 20530-0001
(202) 803-1196
peter.bozzo@usdoj.gov
Counsel for the United States

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RULE 35(b)(1) STATEMENT

Section 1 of the Sherman Act bars agreements that unreasonably restrain trade. *See* 15 U.S.C. § 1. The Supreme Court has held that some agreements are categorically unreasonable—or per se unlawful—under Section 1 based upon their inherently anticompetitive "nature and character." *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 64-65 (1911). And since at least 1898, federal courts have recognized that agreements between competitors to rig bids are per se unlawful under Section 1. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898) (Taft, J.), *aff'd in relevant part*, 175 U.S. 211 (1899); *United States v. W.F. Brinkley & Son Constr. Co.*, 783 F.2d 1157, 1160-61 (4th Cir. 1986).

This case is a federal criminal prosecution alleging a bid-rigging conspiracy between two competitors in violation of Section 1. Rather than applying settled precedent, the panel held that the district court should have dismissed the grand jury's indictment of defendant Brent Brewbaker for rigging public construction bids by agreeing with a competitor to submit intentionally losing bids. The panel so held because, in addition to agreeing to rig their competing bids—conduct the panel acknowledged would otherwise be horizontal—the conspirators also had a vertical supply relationship. That holding flouts multiple decisions of the Supreme Court, this Court, and other

courts of appeals and raises a question of exceptional importance for antitrust enforcement.

In over a century of experience examining restraints of trade, courts have often encountered agreements among entities that have both horizontal and vertical relationships with each other, and have developed legal standards for categorizing these agreements. Courts treat as horizontal "agreement[s] among competitors on the way in which they will compete with one another." *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 99 (1984). They do so even if the competitors also have a vertical relationship. *See, e.g.*, *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 47, 50 (1990) (per curiam). And they have recognized that certain horizontal agreements, such as agreements to rig bids, fix prices, or allocate markets, are per se unlawful. *Id.* at 50 (market allocation); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (price fixing); *Brinkley*, 783 F.2d at 1160-61 (bid rigging).

Meanwhile, courts treat agreements governing a supply or distribution relationship, such as a supply contract, as vertical and thus subject to the rule of reason, a "fact-specific assessment" of the restraint's "'actual effect' on competition," *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (citation omitted). *See Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15, 16 (4th Cir. 1981) (per curiam). They do so even if the supplier and distributor

also have a horizontal relationship. *See Hampton Audio Elecs., Inc. v. Contel Cellular, Inc.*, 966 F.2d 1442, at *3 (4th Cir. 1992) (per curiam) (unpublished). Finally, where a horizontal agreement is needed to support vertical aspects of the relationship, it can be exempted from per se condemnation if the requirements of the ancillary-restraints doctrine are met. *See, e.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2007).

Instead of applying these longstanding doctrines, the panel devised a problematic new standard that contradicts them. The panel mistakenly concluded that "[t]he only restraints that the Supreme Court has held to be *per se* unreasonable are purely horizontal, or in other words, are agreements between entities who are *only* related as competitors." Op. 16 n.9 (emphasis in original). Applying this novel rule, the panel exempted a textbook horizontal bid-rigging conspiracy from per se scrutiny because the conspirators also had a vertical relationship—without considering the nature of the restraint or whether rigging bids was ancillary to any procompetitive collaboration.

Foreclosing application of the per se rule against horizontal price fixing, bid rigging, and market allocation in the presence of any vertical relationship would provide antitrust's "supreme evil," *FTC v. Actavis, Inc.*, 570 U.S. 136, 152 (2013) (citation omitted), an easy get-out-of-jail-free card. Rivals may escape

per se treatment for market allocations simply by distributing a co-conspirator's products. *But see Palmer*, 498 U.S. at 46, 50. Or they may avoid per se treatment by agreeing to provide services to each other at the same time they divide markets. *But see Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 589 (7th Cir. 1984) (Posner, J.). Bid-riggers may escape per se condemnation by pointing to the subcontracts regularly provided as kickbacks for their harmful schemes. *But see United States v. MMR Corp. (LA)*, 907 F.2d 489, 492-96, 498 (5th Cir. 1990). And Toyota and Honda may claim that they can fix car prices without running afoul of the per se rule so long as one sells spark plugs to the other. *But see Socony-Vacuum*, 310 U.S. at 178. These outcomes would upend Section 1 doctrine in this circuit in any cases pursued under a per se theory, including criminal prosecutions.[1]

Given the ubiquity (and the growing number) of firms with both horizontal and vertical relationships in today's economy, this is no idle concern. Indeed, alleged conspirators already are citing the panel's decision to argue that, whenever conspirators have anything other than a "*purely horizontal*" relationship, the rule of reason applies. *See* Rule 28(j) Letter,

[1] The Department of Justice generally "reserves criminal prosecution under Section 1 for per se" offenses, including horizontal bid rigging. Just. Manual § 7-2.200 (2022). The Department generally proceeds civilly against conduct that violates Section 1 under the rule of reason.

Giordano v. Saks & Co., No. 23-600 (2d Cir. Dec. 14, 2023, *appeal docketed* Apr. 17, 2023), ECF No. 196. Practitioners, too, have recognized that the panel's opinion suggests "companies with vertical business relationships can 'apparently go ahead and collude on bidding to the government.'" Anna Langlois, *Bid-Rigging Reversal Risks "Serious Blow" To DOJ, Practitioners Say*, GLOBAL COMPETITION REVIEW (Dec. 5, 2023), https://globalcompetitionreview.com/gcr-usa/article/bid-rigging-reversal-risks-serious-blow-doj-practitioners-say.

The United States therefore respectfully requests panel rehearing and rehearing en banc.

ISSUE PRESENTED

Whether the per se rule against horizontal bid rigging is limited to conspiring bidders who are related to one another only as competitors, or can apply to conspiring bidders who compete but also have a vertical relationship to one another.

STATEMENT OF THE CASE

The grand jury charged that Brewbaker, while working for Contech Engineered Solutions LLC, entered into a conspiracy with Pomona Pipe Products that constituted a per se violation of Section 1 of the Sherman Act. JA45-46, JA50-51.

The indictment alleged that, from at least 2009 to 2018, Contech and Pomona competed with one another for certain contracts let by the North Carolina Department of Transportation (NCDOT).[2] JA46. Those contracts were for the construction of aluminum structures, which control the flow of water around roads, bridges, overpasses, and other civil-engineering projects. JA44, JA46-47. The process of building an aluminum structure includes manufacturing aluminum pieces, shipping the pieces, designing the structure, fabricating the structure out of the pieces, and installing the structure. JA45-46, JA52. When competing for contracts to build these structures, Contech and Pomona each submitted separate bid packages to NCDOT. JA47, JA49.

The indictment also alleged that Contech and Pomona had a longstanding supply relationship with one another. Contech supplied aluminum pieces to Pomona, and Pomona used the aluminum pieces to complete work for NCDOT, including for aluminum-structure projects. JA46. Also, beginning before 2009, Pomona began serving as a dealer for Contech. *Id.*

The grand jury charged that, beginning at least in 2009 and continuing until at least 2018, Brewbaker (on Contech's behalf) and Pomona participated

[2] The indictment refers to Pomona as "COMPANY A." Pomona's identity was revealed at trial.

in a conspiracy to rig bids for NCDOT aluminum-structure projects. JA50. Before Contech's bids for the projects were submitted, Brewbaker or a subordinate would contact Pomona employees and ask them to provide Pomona's total bid price for the upcoming projects—which the Pomona employees did. JA48-49. Brewbaker and the Pomona employees understood that he would use his knowledge of Pomona's total bid price to ensure that Contech submitted a higher—and thus intentionally losing—bid. JA48-49. And that is exactly what Brewbaker did: He manipulated Contech's bid price to ensure that it exceeded Pomona's and then submitted the bid "to make it appear to NCDOT" that Contech had competed for the contract "when, in fact, [he] knew that [Contech's] bid was intended to lose." JA51.

Before trial, the district court denied a motion to dismiss filed by Contech (joined by Brewbaker), which asked the court to "apply the 'rule of reason,'" rather than the per se rule, "to the antitrust charge." JA63-64, JA985.

The evidence at trial established what the indictment alleged: Brewbaker had joined a horizontal conspiracy to rig bids. An NCDOT official testified to her understanding that Contech and Pomona were "[c]ompetitors." JA1778. Pomona's president agreed that Pomona "compete[d] against Contech for . . . NCDOT contracts." JA1846. The Contech employee who oversaw aluminum-structure bids before Brewbaker similarly described

Contech and Pomona as "competitors" when they bid for aluminum-structure contracts. JA2116. Moreover, Brewbaker appreciated that his conduct was illegal. As part of its rigged bids, Contech falsely certified under penalty of perjury that the bids were submitted "competitively and without collusion." JA1775; *see also* JA1767, JA1777-78, JA1782. And Brewbaker "tried to cover his tracks" by "delet[ing] conversations between Pomona and Contech employees," keeping communications oral, and varying "the percent he added to Pomona's bid . . . to avoid raising 'red flag[s]' to NCDOT." Op. 4.

In closing, Brewbaker argued that the alleged bid rigging was simply "a one-way sharing of information," which was done for "legitimate reasons." JA2536, JA2538-39. He asserted that neither Contech nor Pomona viewed the other "as a competitor." JA2548.

The jury rejected Brewbaker's arguments. The court instructed the jury, "Bid rigging is defined as follows: Any agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party." JA2597. The court also instructed the jury that, to convict on the Section 1 charge, the jury needed to find that "a conspiracy to suppress and eliminate competition by rigging bids to the North Carolina Department of Transportation[] existed." JA2592. Based on those instructions, the jury found Brewbaker guilty of the Section 1 charge, as well as of wire fraud, three

counts of mail fraud, and conspiracy to commit mail and wire fraud. JA50-60, JA2654-55.

Although affirming Brewbaker's fraud convictions, the panel reversed Brewbaker's Section 1 conviction, holding that the district court should have granted the motion to dismiss. Op. 33. According to the panel, the Section 1 count did not state an offense under the per se rule against horizontal bid rigging because the charged restraint was purportedly a "hybrid," not a "horizontal," restraint. *Id.* at 16. To reach this conclusion, the panel began from the premise that "[t]he only restraints that the Supreme Court has held to be *per se* unreasonable are purely horizontal, or in other words, are agreements between entities who are *only* related as competitors." *Id.* at 16 n.9 (emphasis in original). Rather than looking to "the nature of the limitation imposed" by the restraint, the panel looked to "the relationship of the parties to the agreement *en total*." *Id.* at 17.

ARGUMENT

The Panel's "Purely Horizontal" Test Conflicts with Supreme Court, Fourth Circuit, and Other Circuit Precedent on Horizontal Restraints

The panel's "purely horizontal" test for identifying horizontal agreements that are subject to Section 1's per se rule departs from Supreme Court and circuit precedent defining agreements as horizontal when they

govern the way in which the parties will compete, even if the parties also have a vertical relationship.

A. The Panel Opinion Conflicts with Supreme Court and Circuit Precedent Defining Horizontal Restraints

The Supreme Court has held that horizontal restraints are "agreement[s] among competitors on the way in which they will compete with one another." *NCAA*, 468 U.S. at 99; *see Am. Express*, 138 S. Ct. at 2285 n.7 ("horizontal restraints involve agreements between competitors not to compete in some way"); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986) ("horizontal restraints . . . eliminate some degree of rivalry between persons or firms who are actual or potential competitors"). Horizontal agreements to rig bids are per se unlawful. *Brinkley*, 783 F.2d at 1160-61; *see Addyston Pipe*, 85 F. at 293 (Section 1 categorically forbids "an agreement between intending bidders at a public auction . . . not to bid against each other, and thus to prevent competition").

The grand jury charged a horizontal bid-rigging agreement. As the panel acknowledged, the indictment alleged that "Pomona and Contech both submitted bids for NCDOT aluminum [structure] projects." Op. 15. The indictment also alleged, as the panel again acknowledged, that Brewbaker submitted "intentionally losing bid[s]" on Contech's behalf "[u]nder an

agreement between Contech and Pomona." *Id.* at 5. Contech and Pomona therefore were actual "competitors" for aluminum-structure projects, *NCAA*, 468 U.S. at 99, and they agreed on how "they w[ould] compete with one another," *id.*, for those projects (Contech would lose). That horizontal bid-rigging agreement is per se unlawful. *See Brinkley*, 783 F.2d at 1160-61; *Addyston Pipe*, 85 F. at 293.

The panel, however, ignored the Supreme Court's well-settled definition of horizontal restraints. Instead, the panel fashioned a new category of restraints ("hybrid") and an excessively limiting definition of horizontal (a restraint between entities that are "only related as competitors"). Op. 16 & n.9. Contrary to the panel's claim that the Supreme Court has treated only such "purely horizontal" restraints as per se unlawful (Op. 16 n.9), an uninterrupted line of authority, comprising numerous Supreme Court and circuit-court cases, has treated agreements as horizontal where they governed the way the parties would compete—even where the parties also had a vertical relationship.

1. In *Palmer*, which the panel addressed only in a footnoted string-cite and misdescribed as involving a "purely horizontal" restraint (Op. 16 n.9), two bar-review course providers, BRG and HBJ, entered into an agreement with vertical and horizontal components. 498 U.S. at 47. First, the agreement had a

vertical component because it "gave BRG an exclusive license to market HBJ's material in Georgia and to use its trade name [Bar/Bri]." *Id.* Second, the agreement had a horizontal component (market allocation) because "[t]he parties agreed that HBJ would not compete with BRG in Georgia and that BRG would not compete with HBJ outside of Georgia." *Id.*

Even though the parties had been in "direct, and often intense, competition," 498 U.S. at 47, the Eleventh Circuit held the market allocation was not per se unlawful. 874 F.2d 1417, 1424 (1989). A dissent warned that the providers' arguments "would essentially nullify the *per se* rule because horizontal competitors could avoid antitrust liability by simply entering into anticompetitive agreements that have vertical aspects." *Id.* at 1433 (Clark, J., dissenting). Reversing in a per curiam decision, the Supreme Court held the market allocation "unlawful on its face" under its per se cases. 498 U.S. at 50; *see Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (citing *Palmer* as holding "horizontal agreement[]" "*per se* unlawful"); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998) (same). Because only *horizontal* market-allocation agreements were per se unlawful at the time *Palmer* was decided, *see Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57-59 & n.28 (1977), the decision stands for the proposition that agreements between

firms on the way in which they will compete are horizontal even if the firms also have a vertical relationship.

This case is on all fours with *Palmer*. Here, as there, two parties entered into an agreement on the way in which they would compete. The panel here should have held that agreement on how competitors would compete with each other to be horizontal and per se unlawful even though the parties also had a supplier-distributor relationship, just as the Supreme Court did with the agreement in *Palmer*. *Palmer* alone justifies rehearing.

Palmer is only the latest in a long line of Supreme Court decisions contradicting the panel's holding that firms with vertical relationships can never form horizontal conspiracies. Take the foundational case on horizontal price fixing, *United States v. Socony-Vacuum Oil Co.*, where the indicted oil companies conspired with independent refineries (from which the oil companies purchased gasoline) to fix downstream gasoline prices. 310 U.S. at 166-69 & n.4. The Supreme Court declared that multi-leveled conspiracy unlawful "per se," *id.* at 218, and the Court continues to cite *Socony-Vacuum* as a paradigmatic case of "horizontal" price fixing, *NYNEX*, 525 U.S. at 133.

Consider as well the many other per se illegal conspiracies involving entities operating at multiple levels of the distribution chain. In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 208-09, 211-13 (1959), for example,

manufacturers and distributors, which competed to sell appliances, participated in a conspiracy that included one of their appliance-store customers. The panel misdescribed *Klor's* as a case in which the vertically related entities were merely "encourager[s]" of the conspiracy, not participants in it (Op. 19). But *Klor's* held that the complaint alleged a "combination *consisting of* manufacturers, distributors and a retailer"—in other words, a horizontal combination that included vertically related participants, not just facilitators. 359 U.S. at 213 (emphasis added); *see MM Steel, L.P. v. JSW Steel (USA) Inc.*, 806 F.3d 835, 849 (5th Cir. 2015) ("In [*Klor's*], the vertical participants . . . actually join[ed] the horizontal conspiracy.").

Similarly, in *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 461 (1941), competing garment retailers conspired with their suppliers (competing garment manufacturers) and with the manufacturers' suppliers (competing textile producers).[3] *See also United States v. Gen. Motors Corp.*, 384

[3] *Klor's* and *Fashion Originators* addressed group boycotts, which are per se unlawful only when the boycott "involv[es] horizontal agreements." *See NYNEX*, 525 U.S. at 135. The Supreme Court's application of the per se rule to these boycotts thus indicates that the Court understood them to be horizontal—a point that the Court emphasized in *NYNEX*. *See id.* (*Klor's* and *Fashion Originators* "involv[ed] horizontal agreements among direct competitors").

U.S. 127, 129, 145 (1966) (car manufacturer conspired with dealers that competed to sell the cars). And in *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 306-08 (1956), a vertically integrated drug company—which both manufactured and wholesaled drugs—conspired with the drug wholesalers against which it competed.[4] All these cases illustrate that horizontal conspiracies can involve vertically related actors and still be subject to the per se rule. *See, e.g.*, *NYNEX*, 525 U.S. at 133 (identifying *Palmer*, *Socony-Vacuum*, *Fashion Originators Guild*, and *Klor's* as concerning per se "horizontal" agreements); *GTE Sylvania*, 433 U.S. at 58 n.28 (*General Motors* involved "horizontal restriction").

2. The panel seemed to believe that *Leegin sub silentio* superseded the holdings of all these cases. *See* Op. 12-15 & n.8, 20-21 & n.11. But *Leegin* merely overruled a per se prohibition on *vertical* resale price maintenance. 551 U.S. at 881-82. And in doing so, *Leegin* reaffirmed the per se prohibitions

[4] The panel misapprehended *McKesson*'s holding (Op. 21 n.11). *McKesson* applied a statutory provision that "continue[d] the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level." 351 U.S. at 313 (citation omitted). By determining that the agreement at issue was subject to the provision, *McKesson* held that the agreement was "'horizontal' price fixing," *id.*—a holding that survives the provision's 1976 repeal. *See United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 508 (4th Cir. 2005) (relying on *McKesson*).

against horizontal price fixing and market allocation, citing *Palmer* approvingly. *Id.* at 886.

Leegin cannot plausibly be read to have overturned *Palmer* while favorably citing it. Nor can *Leegin* plausibly be read to have modified the Supreme Court's longstanding definition of horizontality, *see NCAA*, 468 U.S. at 99, when *Leegin* never addressed the proper method for assessing horizontality. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."). Indeed, in *TFWS, Inc. v. Franchot*, this Court held that *Leegin* did not affect a pre-*Leegin* decision holding that a restraint was "*horizontal* price fixing" because *Leegin* "concerned *vertical* resale price maintenance." 572 F.3d 186, 192 (4th Cir. 2009).

3. The panel's decision contravenes not only holdings of the Supreme Court, but also those of at least six other circuits that have treated agreements as horizontal when they governed the way in which the parties would compete even where the conspirators also had vertical relationships.

For example, in the Seventh Circuit's decision in *General Leaseways*, members of the association competed horizontally to "lease trucks to businesses" and collaborated vertically to supply each other truck-repair services. 744 F.2d at 589. Judge Posner applied the per se rule to a horizontal

market division among the members. *Id.* at 595. He explained that "firms often have both a competitive and a supply relationship with one another," but "[i]t does not follow" that these firms are permitted "to cooperate in ways that yield no economies but simply limit competition." *Id.* at 594. In several other cases, the Seventh Circuit has similarly contradicted the panel decision's "purely horizontal" test by applying per se condemnation to horizontal restraints between firms that also had vertical relationships. *See Deslandes v. McDonald's USA, LLC*, 81 F.4th 699, 703 (7th Cir. 2023) (Easterbrook, J.) (per se rule applicable to a "horizontal restraint" through which McDonald's and its vertically-related franchisees agreed not to compete horizontally for labor); *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 777, 782 (7th Cir. 1994) (horizontal agreement among vertically related franchisor and franchisees); *see also Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 187, 189 (7th Cir. 1985) (describing agreement between lessor and lessee as "horizontal").

The panel's opinion also conflicts with the Ninth Circuit's decision in *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102 (9th Cir. 2021). That case involved two "healthcare staffing agencies" that placed nurses at healthcare facilities to fill temporary vacancies. *Id.* at 1106. One of the firms subcontracted assignments to the other, and the two firms agreed

that the subcontractor would not solicit any of the other firm's employees. *Id.* Despite the parties' vertical "subcontractor-subcontractee relationship," the Ninth Circuit stated that the agreement was "horizontal" because it restricted the parties' competition for employees. *Id.* at 1109.

The panel's "purely horizontal" test also conflicts with the Fifth Circuit's approach to horizontality. In *MMR*, several firms agreed to rig bids for an electrical contract, and the winning bidder agreed to award a subcontract to one of the co-conspirators. 907 F.2d at 492-95. Despite the vertical subcontracting relationship, the court applied the per se rule against horizontal bid-rigging. *Id.* at 496, 498; *see also MM Steel*, 806 F.3d at 844-45, 850 (agreement among manufacturer and distributors was horizontal and per se unlawful).

The First, Second, and D.C. Circuits also have treated agreements as horizontal where the agreement governed the way in which the parties would compete but the parties also had a vertical relationship. *See Rothery Storage*, 792 F.2d at 211, 214-15 (van line and its agents); *United States v. Koppers*, 652 F.2d 290, 292, 296-97 (2d Cir. 1981) (road-tar producer and its customer); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 8-11 (1st Cir. 1979) (manufacturer and its dealer), *abrogated on other grounds by Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983);

see also United States v. Aiyer, 33 F.4th 97, 122 n.23 (2d Cir. 2022) (applying per se rule to bid-rigging agreement over objection that defendant's role was "akin to" "supplier in a vertical relationship").

The panel failed to recognize these conflicts—and, in at least one case, misdescribed another circuit's case law. The Second Circuit in *United States v. Apple, Inc.*, held that an agreement was horizontal and per se unlawful even though the participants were (1) Apple and (2) book publishers that competed with each other but were vertically related to Apple. 791 F.3d 290, 316-21 (2015). In contrast to the panel's approach here, the Second Circuit held that Section 1 "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. Consistent with that approach—and contrary to the panel's description—the Second Circuit treated Apple not as a mere "encourager" of the conspiracy (Op. 19), but as a "conspir[er] with the Publisher Defendants"—or, said otherwise, as an entity that "not only committed to vertical agreements [with the publishers], but . . . also agreed to participate in the horizontal conspiracy." 791 F.3d at 320, 325 (citation omitted).

4. Until the panel's decision, this Court had adhered to the same approach. In a series of bid-rigging decisions, the Fourth Circuit treated

agreements among rival bidders on how they would submit bids as horizontal and per se unlawful—including in one case where the conspirators had vertical relationships. By fashioning its "purely horizontal" test, the panel created multiple intra-circuit splits.

In *United States v. Portsmouth Paving Corp.*, this Court held that "[a]ny agreement between competitors"—i.e., any horizontal agreement—"pursuant to which contract offers are to be submitted to or withheld from a third party constitutes bid rigging per se violative of 15 U.S.C. section 1." 694 F.2d 312, 325 (1982). In *Brinkley*, this Court reaffirmed that language and upheld a jury instruction stating that an agreement among bidders "that one will submit a bid for a project higher or lower than the others" is per se unlawful bid rigging. 783 F.2d at 1160-61. And in *United States v. Gosselin World Wide Moving, N.V.*, the Court relied on these precedents to describe an agreement as "naked bid rigging" that "clearly violated" Section 1—demonstrating that the Court understood the agreement to be horizontal even though some of the conspirators subcontracted with others and thus had vertical relationships. 411 F.3d 502, 505-08 (4th Cir. 2005); *see also United States v. Gosselin World*

Wide Moving N.V., 333 F. Supp. 2d 497, 500-01 (E.D. Va. 2004) (describing parties' relationships).[5]

Under these decisions, the indictment here plainly alleged horizontal, per se bid rigging. And, as *Gosselin* confirms, 411 F.3d at 508, the fact that Contech and Pomona had a partly vertical relationship does nothing to undermine this agreement's horizontality.

B. The Panel Opinion Deviates from the Approach that Courts Have Taken to Evaluate Dual-Distribution Restraints

The panel pitched its "purely horizontal" test as an attempt to account for "parties who simultaneously compete and collaborate" (Op. 18), but the panel failed to recognize that existing doctrines already account for such situations. And as the cases cited above demonstrate, these doctrines do so without categorically holding that restraints are not horizontal whenever the

[5] *Gosselin*'s reaffirmation of *Brinkley* and *Portsmouth* came after the Supreme Court's decision in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988). That decision established that the per se rule against vertical price fixing covered only "agreement[s] on price or price levels"—a limitation that was (and remains) inapplicable to the per se rule against horizontal price fixing. *Id.* at 733-34, 736. While the panel discounted *Portsmouth* because it was "decided when both horizontal and vertical price fixing were *per se* unlawful" (Op. 20), *Portsmouth* was reaffirmed (along with *Brinkley*) at a time when only a limited subset of vertical price fixing was per se unlawful—and thus the reaffirmation rested on the horizontal orientation of those cases. *Portsmouth* and *Brinkley* therefore survive subsequent decisions that cut back on (and eventually eliminated) the per se rule against vertical price fixing.

parties have any vertical relationship. Cases addressing so-called "dual-distribution" restraints illustrate the same point: They examine the nature of the restraint to determine whether it is a horizontal restraint covering the competitive relationship between the parties, or a vertical restraint covering their distribution relationship.

Dual distributors are suppliers that are both horizontally and vertically related to the firms that distribute their products. *See Hampton*, 966 F.2d 1442, at *3. For example, a manufacturer might sell its products to distributors, creating a vertical relationship with those distributors, while also competing with them by making sales directly to consumers. *See id.*

As an article cited by the panel explains (Op. 18 n.10), courts "routinely" analyze whether restraints among a dual-distributing manufacturer and its distributors are "horizontal or vertical" and do so using an approach that departs from the panel's. Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1238 (2008). As a court in the Fourth Circuit explained, this approach looks to whether the manufacturer "was acting as a supplier (in a vertical capacity) or as a competitor distributor (in a horizontal capacity)" when imposing the restraint. *L.C. Williams Oil Co. v. Exxon Corp.*, 625 F. Supp. 477, 487 (M.D.N.C. 1985). If the manufacturer and the distributor enter into an agreement that

governs their supply relationship (such as an agreement on the price at which the distributor will resell the manufacturer's product), the agreement is vertical. *See Donald B. Rice*, 638 F.2d at 16 (recognizing that some dual-distribution restraints are "vertical" and "analyzed under the rule of reason").[6] But if the manufacturer and the distributor agree on the way in which they will compete with one another, their agreement is horizontal. *See id.* (recognizing that some dual-distribution restraints are "horizontal" and "per se illegal").[7] This is a direct application of the Supreme Court's definition of horizontal restraints. *See NCAA*, 468 U.S. at 99.

Rather than engage with the distinction drawn between horizontal and vertical restraints, the panel adopted an approach that would treat as non-

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[6] *See also AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 531 (3d Cir. 2006) (distributor's agreement with dual-distributing supplier not to sell to certain customers was "[v]ertical restraint[]"); *Int'l Logistics Grp., Ltd. v. Chrysler Corp.*, 884 F.2d 904, 906 (6th Cir. 1989) ("policies . . . imposed by [dual-distributing manufacturer] upon its distributors[]" were "vertical" restraints because they were "directed to competitors at different levels of competition" from the manufacturer, rather than "directed toward . . . parties at the same competitive level").

[7] *See also Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1341 (11th Cir. 2010) (if dual-distributing defendant agreed with distributors that it would sell at certain prices "when it acted as a distributor," "a horizontal arrangement would exist between [defendant], qua distributor, and its distributors"); *Hobart Bros. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 899 (5th Cir. 1973) (agreement between manufacturer and distributor was horizontal because it "resulted in a horizontal territorial allocation between [the supplier] and its own distributors").

horizontal *any* restraints between parties that also have a dual-distribution relationship.

Had the panel applied these cases, it would have been apparent that the facts alleged in the indictment bear no resemblance to even the broadest conception of a vertical dual-distribution restraint. The charged agreement did not set the prices at which Pomona could resell Contech's products, *see, e.g.*, *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 420-21 (5th Cir. 2010), or the territories within which Pomona could do so, *see, e.g.*, *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1354 (9th Cir. 1982), nor did it otherwise set the terms on which Pomona could buy or sell Contech products. These were determined, as the indictment indicated, by an entirely separate agreement reached before the bid-rigging agreement was formed, JA46, and there is no allegation of any relationship between the terms of the supply and bid-rigging agreements. Instead, the conspiracy charged here separately set the terms on which the two firms competed for aluminum-structure contracts. JA51. On any plausible reading of prevailing law, a manufacturer's agreement with a rival bidder to submit intentionally losing bids—reached independently from their distribution agreement—is not a dual-distribution restraint but a classic horizontal bid-rigging scheme.

C. The Panel Opinion Renders the Ancillary-Restraints Doctrine Superfluous

While the dual-distribution cases ensure that "parties who simultaneously compete and collaborate" (Op. 18) can enter into vertical agreements without per se condemnation, the ancillary-restraints doctrine accommodates horizontal restraints needed to achieve vertical supply relationships and other collaborations.

The ancillary-restraints doctrine can exempt otherwise per se horizontal restraints from per se treatment when those restraints support the procompetitive features of other relationships, including vertical relationships, between parties. "Under the [ancillary-restraints] doctrine, courts must determine whether the nonventure restriction is a naked restraint on trade," and thus potentially per se "invalid," or "one that is ancillary to the legitimate and competitive purpose of the business association," and thus subject to the rule of reason. *Dagher*, 547 U.S. at 7. For a restraint to qualify as ancillary, the defendant must establish that the restraint was "(1) 'subordinate and collateral to a separate, legitimate transaction,' and (2) 'reasonably necessary' to achieving that transaction's procompetitive purpose." *Aya*, 9 F.4th at 1109 (quoting *Rothery Storage*, 792 F.2d at 224; *Addyston Pipe*, 85 F. at 281) (citations omitted). If the defendant

does so, the restraint is evaluated under the rule of reason "in the context of" the parties' collaboration "as a whole." *MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 340 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment); *see Polk Bros.*, 776 F.2d at 189 (restraint is ancillary where it is part of an "enterprise" that, "viewed as a whole," "expands output and competition").

Not surprisingly, many of the cases addressing ancillarity involve firms with both horizontal and vertical relationships, with the question arising whether to exempt the per se horizontal agreement from per se treatment because of its connection to the vertical relationship. *See, e.g.*, *Deslandes*, 81 F.4th at 703-05 (alleged "agreements among competitors" not ancillary, and per se rule applicable, even though restraint "appeared in franchise agreements"); *Aya*, 9 F.4th at 1109-11 (restraint "horizontal" notwithstanding "subcontractor-subcontractee relationship," but not per se unlawful because subordinate and collateral to legitimate business collaboration and reasonably necessary to achieve collaboration's procompetitive purpose); *Gen. Leaseways*, 744 F.2d at 595 (concluding the "organic connection between the restraint and the cooperative needs of the enterprise that would allow us to call the restraint a merely ancillary one is missing"). But the panel failed even to mention the ancillary-restraints doctrine; to the contrary, by holding that a restraint can never be horizontal when it is between horizontal competitors

that also have a vertical relationship, the panel rendered the doctrine superfluous.

Had the panel considered the ancillary-restraints doctrine, it would have found it neither presented nor satisfied below. Tellingly, Brewbaker never argued below that the indictment's allegations established the elements of the ancillary-restraints doctrine such that the charged restraint was exempt from the per se rule, nor did he request a jury instruction on ancillary restraints. Moreover, the indictment's allegations nowhere allege facts establishing that the charged restraint was ancillary. On the contrary, the indictment alleged that the bid rigging was designed to "eliminate," not promote, competition by "mak[ing] it appear" that Contech had competed "when, in fact, . . . [Contech's] bid was intended to lose." JA50-51. Indeed, the gap between the initiation of the distribution relationship and the beginning of the bid-rigging conspiracy, JA46, renders it implausible that the bid rigging was subordinate and collateral to the distribution relationship or reasonably necessary to achieve a procompetitive objective of the relationship. Accordingly, even if Brewbaker had sought dismissal of the indictment on ancillarity grounds, he would have failed.

CONCLUSION

The panel's decision upsets well-established precedent of the Supreme Court, this Court, and several other circuits. It jeopardizes civil and criminal enforcement actions for hardcore cartel violations that are the supreme evil of antitrust. And it is entirely unnecessary to protect legitimate business relationships. The Court should grant the petition for panel rehearing and rehearing en banc.

Respectfully submitted.

/s/ Peter M. Bozzo

JONATHAN S. KANTER
Assistant Attorney General

DOHA MEKKI
Principal Deputy Assistant Attorney General

MAGGIE GOODLANDER
Deputy Assistant Attorney General

MANISH KUMAR
Deputy Assistant Attorney General

MARKUS A. BRAZILL
Counsel to the Assistant Attorney General

RACHEL KROLL
ALISON FRIBERG
Attorneys
U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

DANIEL E. HAAR
STRATTON C. STRAND
PETER M. BOZZO
Attorneys
U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
950 Pennsylvania Ave., N.W.
Room 3224
Washington, D.C. 20530-0001
(202) 803-1196
peter.bozzo@usdoj.gov

Counsel for the United States

January 16, 2024

CERTIFICATE OF COMPLIANCE

1. Excluding the parts exempted by Fed. R. App. P. 32(f), the petition contains 5,982 words. Contemporaneously with the filing of the petition, the United States has moved for leave to exceed the length limitations contained in Fed. R. App. P. 35(b)(2)(A) and Fed. R. App. P. 40(b)(1).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the petition has been prepared in Microsoft Word 2019, using 14-point New Century Schoolbook font, a proportionally spaced typeface.

/s/ Peter M. Bozzo
Peter M. Bozzo
Counsel for the United States

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2024, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users, including counsel for Brent Brewbaker.

/s/ Peter M. Bozzo
Peter M. Bozzo
Counsel for the United States