No. _____

In the
Supreme Court of the United States

THE MEDICAL CENTER AT ELIZABETH PLACE, LLC,
Petitioner,

v.

ATRIUM HEALTH SYSTEM, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When assessing the legality of competitive restraints imposed by joint ventures, this Court's antitrust jurisprudence recognizes that overly lax enforcement standards promote anticompetitive conduct and overly restrictive enforcement standards can chill potentially procompetitive conduct. This Court also recognizes that, even in the context of joint ventures, certain competitive restraints are so inherently destructive of healthy competition that they are illegal per se.

In this case, the Sixth Circuit held that a joint venture formed by several hospitals could avoid per se condemnation for their efforts — including bribery and threats of economic retaliation — to keep a lower-priced rival from access to over 90% of the market. Acknowledging that the circuits are split on the governing standard, the Sixth Circuit held that joint venture members (Respondents) are entitled to summary judgment, dismissing all claims of Sherman Act §1 per se violations, merely by asserting a "plausible procompetitive rationale" for a restraint that "may contribute to the success of [their] cooperative venture." In so ruling, the Sixth Circuit expressly disagreed with circuits holding that the per se standard applies unless defendants can show that "a restraint is reasonably necessary to achieve a joint venture's efficiency-enhancing purposes." *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring).

The questions presented are:

1. For a restraint to be deemed "ancillary" to a joint venture, and thus exempt from per se condemnation,

must the restraint be reasonably necessary to achieve an efficiency-enhancing purpose of the venture?

2. For a joint venture to satisfy this test at summary judgment must it substantiate through verifiable means the claimed efficiencies and efficiencies' relationship to the restraint, or is it sufficient for the defendants merely to proffer a "plausible procompetitive rationale"?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner The Medical Center at Elizabeth Place, LLC ("MCEP") has no parent corporation and no publicly held corporation owns 10% or more of Petitioner's stock.

Respondents are Atrium Health System ("AHS"), Samaritan Health Partners ("SHP"), MedAmerica Health System Corporation ("MedAmerica"), Upper Valley Medical Center ("UVMC"), and Premier Health ("Premier"). During the relevant time period AHS, SHP, MedAmerica, and UVMC were separate corporate entities, contractually related ostensibly and purportedly in the form of a joint venture; Premier was the name of the joint venture. Each of the joint venture's members owned and operated separate hospitals that competed with Petitioner: AHS: Atrium Medical Center; SHP: Good Samaritan Hospital; MedAmerica: Miami Valley Hospital; and UVMC: Upper Valley Medical Center.

STATEMENT OF RELATED PROCEEDINGS

- *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, No. 17-3863 (6th Cir.) (opinion issued and judgment entered Apr. 25, 2019; rehearing, en banc, denied Jun. 7, 2019; mandate issued Jun. 7, 2019).
- *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, No. 14-4166 (6th Cir.) (opinion issued and judgment entered Mar. 22, 2016; rehearing, en banc, denied May 4, 2016; mandate issued May 13, 2016).
- *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, No. 3:12-cv-00026-WHR (S.D. Ohio) (opinion issued and judgment entered Aug. 9, 2017; addendum to judgment entered Aug. 14, 2017).

There are no additional proceedings in any court that are directly related to this case.

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The Medical Center at Elizabeth Place ("MCEP") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 922 F.3d 713. The district court decisions on summary judgment (Pet. App. 48a-112a, 115a-182a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2019 (Pet. App. 1a). A timely petition for rehearing was denied on June 7, 2019. (Pet. App. 268a-269a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

INTRODUCTION

A foundational principle of American antitrust law is that certain forms of conduct are so inherently anticompetitive and damaging that they warrant condemnation without further inquiry, in each individual case, into their effects on the particular market or on the existence of potentially procompetitive justifications. *Fed. Trade Comm'n v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 421-23 (1990) (refusal by a group of lawyers to represent indigent criminal defendants unless fee paid for representation was increased); *Ariz. v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 352-55 (1982) (medical association setting maximum prices that member physicians could charge for services); *Catalano, Inc. v. Target Sales*, 446 U.S. 643, 648 (1980) (agreement among competitors to standardize credit terms offered to purchaser); *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959) (defendant appliance retailer orchestrated agreement among appliance manufacturers and distributors not to deal with rival retailer); *see* DOJ/FTC ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, April 2000, § 3.2 ("GUIDELINES"). This case exemplifies the extent to which that core principle is under siege.

As the Sixth Circuit acknowledged (Pet. App. 22a), the circuit courts are in conflict on the dispositive issue: when should a form of conduct that falls within the category of per se condemnation – here, competitors jointly persuaded customers to deny a rival business relationships needed to compete – be exempt from that category because it is a restraint ancillary to

defendants' joint venture? The leading test, adopted by federal antitrust regulators (GUIDELINES § 3.2), was concisely articulated by then-Judge Sotomayor in her concurrence in *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008): "[W]here a restraint is reasonably necessary to achieve a joint venture's efficiency-enhancing purposes (*i.e.*, ancillary), it will be analyzed under the rule of reason as part of the joint venture." *Id.* at 339. *Accord In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 345, 346 (3d Cir. 2010) (restraint must be reasonably necessary to achieve a joint venture's efficiency-enhancing purposes; "a restraint is not automatically deemed ancillary simply because it 'facilitates' a procompetitive arrangement"); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1395 (9th Cir. 1984) (an ancillary restraint is "subordinate and collateral to another legitimate transaction and necessary to make that transaction effective") (citations omitted). Other circuits have imposed different tests, ranging from the more rigorous, *e.g.*, *Sullivan v. Nat'l Football League,* 34 F.3d 1091, 1102 (1st Cir. 1994), to the more lenient, *e.g.*, *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985).

In affirming summary judgment in favor of Respondents in this case, the Sixth Circuit has now established yet another, even more lenient, standard: a naked horizontal restraint imposed by joint venturers is exempt from per se scrutiny if defendants offer "plausible" procompetitive goals as to which the restraint "may contribute." (Pet. App. 22a). For reasons that are both doctrinal and practical, that flawed standard warrants this Court's review.

First, the acknowledged, entrenched conflict among the circuits requires resolution.

Second, the Sixth Circuit standard takes a virtual sledgehammer to the longstanding understanding of per se illegality. By cloaking themselves in a joint venture, market miscreants can self-exempt from per se condemnation simply by proffering a "plausible" justification. Still worse, the victim cannot get its Section 1 per se claim to trial without establishing the *im*plausibility of the excuse as a matter of law. Since the Sixth Circuit views the entire issue as a question of law, even factual disputes on the justification's "plausibility" pose no hurdle to summary judgment. And if the "plausibility" of an alleged procompetitive justification is to be assessed in the context of each individual case, there is no per se label left to apply.

The record in this case demonstrates precisely why it is an ideal vehicle for review. As the district court observed, the challenged conduct was that Respondents' were "bribing payers in exchange for a commitment" not to do business with a lower-priced rival. (Pet. App. 127a). Traditional antitrust analysis, including decades of this Court's precedent, teaches that wrongdoers engaging in that behavior do not escape per se condemnation; and especially not by conjuring up "procompetitive" justifications in the hope they will be deemed "plausible."

Third, the proliferation of healthcare facility joint ventures over the past two decades underscores the practical importance of the issues presented in this case. And the real-world consequences extend far beyond the healthcare industry. The range of markets

involved in this Court's joint venture antitrust jurisprudence proves the broad impact a decision in this case will have. *E.g.*, *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010) (professional football league); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (refining and selling gasoline); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985) (office supply purchasing cooperative); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85 (1984) (television broadcasts of intercollegiate football games); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974) (commercial banking); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964) (manufacture and sale of chemicals).

Certiorari is necessary to provide uniform guidance on this important antitrust issue, and to reiterate the priority of market realities over theoretical justifications in assessing the legality of anticompetitive restraints.

STATEMENT OF THE CASE

A. Factual Background

Petitioner MCEP is a physician-owned, adult acute care hospital in Dayton, Ohio that opened in September 2006. (Pet. App. 2a). Respondent Premier Health, a joint venture of four Dayton-area hospitals, had more than a 55% share of Dayton's inpatient surgical services during the relevant time period. Before MCEP saw its first patient, the joint venture vowed that defendants "would do whatever they needed to do in order to stop [MCEP] from opening." (Pet. App. 270a).

Defendants backed up that threat with action, securing commitments that excluded MCEP from networks covering more than 90% of hospital services in the greater Dayton area. At Respondents' behest, the market's key Payers agreed not to add MCEP to their respective managed-care networks: Anthem, United Healthcare, Humana, Aetna, CIGNA, Emerald Health, and Private Healthcare Systems. (Pet. App. 43a-44a, 130a-131a, 141a-142a, 286a (¶14), 287a-288a (¶¶20-26)). These payers represent more than 90% of the privately insured consumer of hospital services in the greater Dayton area. (Pet. App. 277a, 279a-280a). Without managed-care contracts, MCEP could not compete for patients insured by those payers. (Pet. App. 286a (¶13)). This harmed competition in the market because consumers were blocked from obtaining MCEP's significantly lower rates. (Pet. App. 195a-196a, 286a (¶15)).

MCEP challenged Respondents' conduct as a per se illegal restraint in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The theory of recovery at issue here is a classic per se violation: that Respondents' agreement among themselves to secure commitments from payers to exclude MCEP constituted a concerted refusal to deal, *i.e.*, a "joint effort[] by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'" *Nw. Wholesale Stationers*, 472 U.S. at 294 (citations omitted).

B. District Court Proceedings

Respondents initially challenged this theory on the ground that their status as a joint venture made them a single entity incapable of conspiring under the antitrust laws. (Pet. App. 227a, 246a). In an earlier appeal in this case, the Sixth Circuit – relying on this Court's decision in *American Needle* – rejected Respondents' argument. *Medical Ctr. at Elizabeth Place LLC v. Atrium Health Sys.*, 817 F.3d 934 (6th Cir. 2016) ("*MCEP I*") (Pet. App. 192a, 197a-200a). The Sixth Circuit held that MCEP had presented evidence that the Respondents, notwithstanding their joint venture, had remained "independent centers of decisionmaking" capable of conspiring. (Pet. App. 192a) ("The defendant hospitals continue to function more or less as independent and competing hospitals that entered into the joint operating agreement largely to derive the benefit of conforming certain business practices to a uniform standard.").

On remand from the Sixth Circuit decision in *MCEP I*, Respondents pursued, *inter alia*, a second argument to bar MCEP's Section 1 claim: they asserted that their actions should be assessed under the Rule of Reason. (Pet. App. 122a). In denying summary judgment, District Judge Black observed that Respondents' argument "ignored the ancillary restraint doctrine," which "'recognizes that a restraint that is unnecessary to achieve a joint venture's efficiency-enhancing benefits may not be justified based on those benefits. Accordingly, a challenged restraint must have a reasonable procompetitive justification, related to the efficient-enhancing purposes of the joint venture.'" (Pet.

App. 125a) (quoting *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring). Reinforcing his holding that "[o]rganizing a group boycott of MCEP does not promote any legitimate objective of the JOA or achieve any procompetitive benefits," (Pet. App. 261a), Judge Black found that the evidence reasonably supported a conclusion that Respondents jointly extracted commitments from payers that "restricted output by excluding MCEP, which payers considered a viable price competitor to Defendants." (Pet. App. 125a). Further, the district court found that Respondents' proffered justification for the exclusionary restraint – that it enabled the joint venture to provide price reductions – was "simply Defendants bribing payers in exchange for a commitment to not bring in a rival that the Defendants would have to deal with for the payer's business." (Pet. App. 127a). As a result, the district court held that Respondents failed to present evidence that "their joint contracting has any efficiency-enhancing purpose to which such [restraint] is necessary," and the restraint must be evaluated outside the context of the joint venture, *i.e.*, a horizontal agreement among defendants "as separate actors and competitors of MCEP to prevent MCEP from competing" (Pet. App. 127a, 128a n.10) that is subject to per se condemnation. (Pet. App. 127a-136a).

Having determined that the per se rule governed the Section 1 claim, Judge Black reassigned the case to Judge Rice for trial. (Pet. App. 113a-114a). Rather than permit the case to go to trial, Judge Rice reversed Judge Black's ruling on MCEP's per se claim and granted summary judgment in favor of Respondents. In

Judge Rice's view, the ancillary restraint doctrine was not applicable because the agreements Respondents obtained from payers not to do business with MCEP was part of a "core activity" of the joint venture. (Pet. App. 87a).

C. The Sixth Circuit Decision

The Sixth Circuit affirmed on different grounds.

The court rejected Judge Rice's finding that the restraint is a "core activity," but held that the concerted refusals to deal Respondents orchestrated constituted an ancillary restraint that should be assessed in the joint venture context under the Rule of Reason. (Pet. App. 18a, 22a-23a). Acknowledging the existing circuit conflict on this issue, the court expressly rejected the ancillary restraint test articulated in the GUIDELINES and used by Judge Black – calling it "of dubious relevance." (Pet. App. 20a). Instead, the court established the following test for determining whether a restraint is ancillary to a joint venture:

> [A] joint venture's restraint is ancillary and therefore inappropriate for per se categorization when, viewed at the time it was adopted, the restraint may contribute to the success of a cooperative venture.

(Pet. App. 22a) (internal quotations omitted). Further, the court held that defendants could satisfy this test at summary judgment by presenting a "plausible procompetitive rationale for the restraint" notwithstanding the existence of evidence calling the bona fides of the rationale into question. (Pet. App. 20a, 25a-28a). Accepting as plausible Respondents' argument

that excluding competition from MCEP could lower the costs of defendants' services and thereby "contribute to the efficiency-enhancing purposes of the joint venture, specifically improving 'cost effectiveness and efficiencies in the delivery of health care services.'" (Pet. App. 28a). As a result, the Sixth Circuit deemed Respondents' orchestration of a concerted refusal to deal to be an ancillary restraint governed by the Rule of Reason and not subject to per se condemnation. (Pet. App. 37a). Since MCEP asserted only a per se Section 1 claim, the Sixth Circuit affirmed Judge Rice's entry of summary judgment dismissing the claim. (Pet. App. 4a, 7a).

REASONS FOR GRANTING THE PETITION

In a case with drastic fiscal consequences for the nation's healthcare industry, the Sixth Circuit's judgment allows hospitals to band together to block a lower-priced potential competitor from entering a market, and yet avoid the per se condemnation that the Sherman Act requires. In reaching that result, the Sixth Circuit imposed on antitrust plaintiffs a burden that is substantively incorrect and singularly inappropriate at the summary judgment stage. This case, which exacerbates an entrenched circuit conflict, is an ideal vehicle for this Court to provide sound, uniform guidance on an issue of compelling national significance.

Consider the pernicious consequences of the Sixth Circuit standard on the competitive struggle that the antitrust laws work to preserve. Suppose competitors whose prices hover around 4x conclude that by combining certain functions (but not assets) in a joint venture, their prices might be lowered to 3x. That

sounds like a potential procompetitive effect. Now, suppose the resulting joint venture bribes and threatens customers to keep out of the market a rival who offers the same products or services for 2x. That conduct is illegal per se. But not in the Sixth Circuit. And that is the core problem with the judgment below.

I. THE SIXTH CIRCUIT'S "MAY CONTRIBUTE TO PLAUSIBLE GOALS" TEST CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

The Sixth Circuit acknowledged a Circuit split on the test for determining whether a restraint is ancillary to a joint venture. (Pet. App. 22a). Although it claims to adopt the "majority" rule, the Sixth Circuit articulated a test that is markedly different from, and more permissive than, any test used in other Circuits. This split merits review.

In determining whether a restraint is ancillary to a joint venture, the leading articulation of the governing standard is found in then-Judge Sotomayor's concurring opinion in *Salvino*. In that case, the majority held that the rule of reason controlled Major League Baseball teams' agreement to use an exclusive licensor of team merchandise. Defendants in *Salvino* had submitted evidence of both the justification for their restraint and how the procompetitive benefit would diminish without the restraint. *Salvino*, 542 F.3d at 340.

In her concurring opinion, then-Judge Sotomayor observed that the ancillary restraint framework "effectively isolates" the circumstances when exclusionary conduct should be considered a

"reasonably necessary part of a joint venture" and thus governed by the rule of reason. *Id.* at 341. She explained that those circumstances exist where the challenged restraint (a) has "a reasonable procompetitive justification, related to the efficiency-enhancing purposes of the joint venture," and (b) is "reasonably necessary to achieve a joint venture's efficiency-enhancing purposes." *Id.* at 339. Federal antitrust agencies have long used this test in their enforcement efforts. GUIDELINES § 3.2 ("An agreement may be 'reasonably necessary' without being essential. However, if the participants could achieve an equivalent or comparable efficiency-enhancing integration through practical, significantly less restrictive means, then the Agencies conclude that the agreement is not reasonably necessary."). The Third and Ninth Circuits likewise employ the "reasonably necessary" test. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 345, 346 (3d Cir. 2010) (restraint must be reasonably necessary to achieve a joint venture's efficiency-enhancing purposes; "a restraint is not automatically deemed ancillary simply because it 'facilitates' a procompetitive arrangement"); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1395 (9th Cir. 1984) (an ancillary restraint is "subordinate and collateral to another legitimate transaction and necessary to make that transaction effective") (citations omitted). The First and Eleventh Circuits go even further, instructing that a restraint is ancillary where it is "required" in order for the joint venture to be effective. *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1102 (1st Cir. 1994) (ancillary restraint is "one that is required to make the joint activity more efficient"); *Nat'l Bancard Corp.*

(NaBanco) v. VISA U.S.A., Inc., 779 F.2d 592, 602 (11th Cir. 1986) (restraint must be a "necessary consequence" of the joint venture in order to be considered ancillary). And the District of Columbia Circuit's standard is similar but more specific, requiring proof from the defendants that the restraint "serves to make the [joint venture] more effective in accomplishing its purpose. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (citing *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)).

In the decision below, the Sixth Circuit expressly rejected any form of the "reasonably necessary" standard. Instead, the Sixth Circuit nominally joined the Seventh and Federal Circuits, both of which articulate a more permissive view of what constitutes an ancillary restraint to a joint venture. That permissive test requires merely that the challenged restraint "may contribute to the success of a cooperative venture that promises greater productivity and output." Pet. App. 14a (quoting *Polk Bros.*, 776 F.2d at 189); *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1336 (Fed. Cir. 2010) (en banc).

Contrary to the Sixth Circuit's misapprehension that the standard it applied is the "majority" view, many more circuits have in fact adopted the rigorous standard that the decision below rejected as "of dubious relevance." (Pet. App. 22a, 20a). And the Sixth Circuit standard also deviates significantly from even the most permissive test articulated by *any* other court of appeals. Specifically, the decision below authorizes rule

of reason analysis for any type of horizontal concerted action merely because members of a joint venture posit "a plausible procompetitive rationale for the restraint." (Pet. App. 20a). This standard is substantively flawed, particularly so as a basis for giving antitrust wrongdoers a free pass on summary judgment.

Beyond the conflict with other courts of appeals on applying per se analysis, the Sixth Circuit's "plausible rationale" test is directly at odds with the standard the federal government has long utilized. For decades, the enforcement guidelines have required competitors to meet a higher burden before a broader collaborative context (*e.g.*, joint venture) justifies analyzing anticompetitive agreements under the Rule of Reason:

> The participants must substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency; how and when each would be achieved; any costs of doing so; how each would enhance the collaboration's or its participants' ability and incentive to compete.... Efficiency claims are not considered if they are vague or speculative or otherwise cannot be verified by reasonable means.

GUIDELINES, §3.36(a). The "plausibility" standard the Sixth Circuit imposes on joint ventures to posit—at the summary judgment stage—a procompetitive rationale for a naked restraint is more forgiving than even the *evidentiary* burden antitrust defendants bear to show procompetitive effects of a market restraint in a full Rule of Reason analysis at trial. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) ("If the plaintiff

carries its burden [of proving a substantial anticompetitive effect], then the burden shifts to the defendant to show a procompetitive rationale for the restraint"); *Food Lion, LLC v. Dean Foods Co.* (*In re Se. Milk Antitrust Litig.*), 739 F.3d 262, 272 (6th Cir. 2014) ("If a plaintiff passes over these hurdles, the burden then shifts to the defendant to produce evidence that the restraint in question has 'procompetitive effects' that are sufficient 'to justif[y] the otherwise anticompetitive injuries'") (quoting *Expert Masonry, Inc. v. Boone Cty.*, 440 F.3d 336, 343 (6th Cir. 2006)); *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 42 (2d Cir. 2018) (same); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (same); *Flegel v. Christian Hosp. Ne.-Northwest*, 4 F.3d 682, 688 (8th Cir. 1993) (same); *Cal. ex rel. Harris*, 651 F.3d 1118, 1160 (9th Cir. 2011) (same).

The Sixth Circuit's deviation is the result of its misperception of decisions of the Second, Eighth, and Ninth Circuits. With respect to then-Judge Sotomayor's *Salvino* concurrence, the Sixth Circuit misconstrued her use of "reasonable" procompetitive justification as synonymous with "plausible." (Pet. App. 21a-22a, 28a n.10). The remaining cases on which the Sixth Circuit relies involved the test for determining whether to apply the per se rule to concerted action among competitors *outside* a synergistic joint venture. *Craftsmen Limo, Inc. v. Ford Motor Co.*, 363 F.3d 761, 776 (8th Cir. 2004) (advertising restrictions imposed by trade association); *Paladin Assocs. v. Mont. Power Co.*, 328 F.3d 1145, 1153 (9th Cir. 2003) (vertical agreement between a rival of plaintiff and a common supplier that operated as a boycott). The Eighth Circuit has not

announced its test for determining whether a restraint is ancillary to a joint venture, and the Ninth Circuit requires proof that the restraint "is necessary to make that [joint venture] effective." *L.A. Mem'l Coliseum Comm'n*, 726 F.2d at 1395 (evaluating whether the NFL rule requiring exclusive territories for NFL teams was an ancillary restraint).

The decision below perpetuates and significantly expands an existing split on this issue by crafting a test that renders the ancillary restraint doctrine *fait accompli* whenever the colluding competitors happen to be part of a plausibly legitimate joint venture. These dramatically different tests mean that whether a particular horizontal action is deemed a naked restraint or a restraint ancillary to a joint venture depends on the forum. That is the defining characteristic of a circuit split that warrants review.

This lack of uniformity should be resolved by the Court.

II. THE SIXTH CIRCUIT'S DECISION PERMITS RULE OF REASON TREATMENT FOR NAKED RESTRAINTS IMPOSED BY COLLABORATING COMPETITORS, IN SQUARE CONFLICT WITH THIS COURT'S DECISIONS AND THE SHERMAN ACT'S CENTRAL PURPOSE – PROTECTING THE COMPETITIVE PROCESS

Federal antitrust law is an essential safeguard for the Nation's free market structures, "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the

protection of our fundamental personal freedoms." *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101, 1109 (2015) (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)). And this Court has specifically identified price and output restrictions as "the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 107-08.

This Court has also recognized the potential for certain competitor collaborations to expand output and create efficiencies that benefit the market by enhancing the competitive process. At the same time, the Court remains alert to the risk of competitors insulating naked horizontal anticompetitive conduct by cloaking the restraint with the mantel of a joint venture. *See American Needle*, 560 U.S. at 197 (citing *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951)); *Nw. Wholesale Stationers*, 472 U.S. at 295 n.6; *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 113; *U.S. v. Sealy, Inc.*, 388 U.S. 350, 353 (1967). This case presents the Court with an opportunity to provide the competitive process with a clear, uniform framework that balances the rewards and risks of competitor collaborations.

Historically, this Court has required a careful look before allowing the rule of reason to apply to otherwise per se illegal horizontal restraints. Invariably, the standard is whether the challenged restraint is essential to achieving the larger collaboration's procompetitive potential. For example, in *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 101 (1984), the Court reviewed an NCAA limit on the number of television appearances a particular college

football team could make during a season. The Court acknowledged that the restraint operated to (i) reduce output, *i.e.*, "the quantity of television rights available for sale"; and (ii) fix the prices that teams charged broadcasters – practices that are per se illegal. *Id.* at 99-100. But the Court applied the Rule of Reason to the NCAA limit because college football is an "industry in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101. The fulcrum for decision was not – as the Sixth Circuit would have it – that the NCAA's justification was merely "plausible."

Similarly, as the Court noted in *American Needle*, "*necessity* of cooperation is a factor relevant to whether the agreement is subject to the Rule of Reason." 560 U.S. at 199 n.6 (emphasis supplied). *Accord Brunswick Corp.*, 94 F.T.C. 1174, 1979 FTC LEXIS 107 *231 (Nov. 9, 1979) ("[T]o be legitimately ancillary to a joint venture, [the restraint] must be limited to those inevitably arising out of dealings between partners, and necessary (and no broader than necessary) to make the joint venture work"), *aff'd as modified sub nom. Yamaha Motor Co. v. Fed. Trade Comm'n*, 657 F.2d 971 (8th Cir. 1981). By removing "necessity" from its formulation of the ancillary restraint doctrine for joint ventures, the Sixth Circuit's approach is a wholesale rejection of this Court's precedent on the subject.

If that were not enough to warrant review, the Sixth Circuit's "plausibility" standard flies in the face of the evidentiary burden this Court has imposed on antitrust defendants seeking to justify a market restraint under the Rule of Reason. *Am. Express Co.*, 138 S. Ct. at

2284. The disconnect – that joint venture defendants can elude per se condemnation of their otherwise naked restraints without even presenting the *evidence* of procompetitive effects that would be required to satisfy the Rule of Reason – is untenable.

This disconnect is all the more apparent because this case involves a restraint that has long been categorized as per se unlawful. *See Nw. Wholesale Stationers*, 472 U.S. at 293-94 (listing examples of per se illegal concerted refusals to deal). Petitioner is not seeking to expand per se condemnation to cover some new type of behavior with which courts have no prior experience. Collective acts of bribery and threats of economic retaliation designed to block a lower-priced competitor are per se violations of Sherman Act § 1. *E.g.*, *Fashion Originators' Guild, Inc. v. Fed. Trade Comm'n*, 312 U.S. 457, 461 (1941) (threat of withholding products from retailers doing business with lower-priced rivals). Under established principles, defendants do not get to revisit that classification — much less avoid its condemnation altogether — by "plausibly" contending that their misdeeds "may contribute" to the success of their collaborative venture. Especially when, as here, the challenged restraint flows directly from the joint venture's threat to "do whatever they needed to do in order to stop [the lower-priced competitor] from opening." (Pet. App. 270a).

And this disconnect will have a real-world impact. The popularity of joint ventures has increased in recent years. (Deloitte Consulting LLP, *Joint venture and alternative structure transactions: Getting them right from the start* (2016), available at

https://tinyurl.com/y6dyp6ms). As of 2017, the value of joint ventures was growing at twice the rate of merger and acquisitions.[1] This growth is evident in the healthcare industry; in 2010 the Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 *et seq*., codified the concept of Accountable Care Organizations (ACOs), many of which are structured as joint ventures. (Kelly T.; Jackson, E, Key *Issues in Joint Ventures*, ABA Health eSource (Sept. 27, 2018) available at https://tinyurl.com/y52uluqj). These healthcare facility joint ventures have emerged throughout the United States. For example, in 2018 34 Ambulatory Surgery Center[2] ("ASC") joint ventures announced or opened in 18 different states implicating every regional Circuit Court of Appeals except the District of Columbia. (Stewart, A., *34 joint venture ASCs opened & announced in 2018*, Becker's ASC REVIEW (December 5, 2018), available at https://tinyurl.com/yy5l9pmz).

All of these factors combine to make this case an ideal vehicle for this Court to resolve an acknowledged circuit conflict on an important issue of antitrust law that has, and will continue to have, major practical ramifications nationwide.

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[1] A. Leroi, P. Leung, *Tapping the Unexpected Potential of Joint Ventures*, BAIN INSIGHTS (Feb. 8, 2017) (available at https://tinyurl.com/yysy5c2k).

[2] The Centers for Medicare and Medicaid Services defines an Ambulatory Surgery Center as a non-hospital health care facility where surgeries are performed on an outpatient basis, *i.e.*, the surgical patient enters and leaves the facility on the same day. Centers for Medicare and Medicaid Services, *Ambulatory Surgery Centers* (Jul. 25, 2019) (available at https://tinyurl.com/cms-asc).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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