No. 23-285

IN THE
SUPREME COURT OF THE UNITED STATES

AMORY INVESTMENTS LLC, ET AL.,
Petitioners,

v.

TYSON FOODS INCORPORATED, ET AL.,
Respondents.

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

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Amory Investments LLC is not the subsidiary of any parent corporation, and no publicly held corporation owns more than 10% of its stock. Amory Investments LLC is indirectly owned by Burford Capital Ltd., a publicly held corporation.

Campbell Soup Company, a publicly held company, is not the subsidiary of any parent corporation, and no publicly held corporation owns more than 10% of its stock.

The sole shareholder of Campbell Soup Supply Company L.L.C. is Campbell MFG 1 Company, which is a wholly owned subsidiary of Campbell Soup Company.

McLane Company, Inc., d/b/a McLane/Southwest, McLane/Southeast, McLane Southeast, McLane/Northwest, McLane/Southeast–Dothan, McLane/High Plains, and McLane/North Texas, is a wholly owned subsidiary of Berkshire Hathaway, Inc., which is a publicly held company.

McLane/Mid-Atlantic, Inc., d/b/a McLane/Carolina; McLane/Midwest, Inc., d/b/a McLane/Cumberland, McLane/Midwest, McLane Midwest, and McLane/Ozark; McLane Minnesota, Inc.; McLane New Jersey, Inc.; McLane/Eastern, Inc., d/b/a McLane/Northeast, McLane/Northeast-Concord, and McLane PA; McLane/Suneast, Inc., d/b/a McLane/Pacific, McLane/Southern California, McLane/Sunwest, McLane Sunwest, McLane/Suneast, and McLane Ocala; McLane Ohio, Inc.; McLane/Southern, Inc.; McLane/Western, Inc.; McLane Express, Inc., d/b/a C.D. Hartnett Company,

Inc.; Kinexo, Inc.; McLane Foodservice Distribution, Inc.; and McLane Foodservice, Inc. are wholly owned subsidiaries of McLane Company, Inc.

Target Corporation, a publicly held company, is not the subsidiary of any parent corporation, and no publicly held corporation owns more than 10% of its stock.

Carina Ventures LLC is not the subsidiary of any parent corporation, and no publicly held corporation owns more than 10% of its stock. Carina Ventures LLC is indirectly owned by Burford Capital Ltd., a publicly held corporation. Carina's assignor, Sysco Corporation, is not the subsidiary of any parent corporation, and no publicly held corporation owns more than 10% of its stock.

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Respondents cannot dispute the purpose and effect of their Judgment Sharing Agreement ("JSA") is to weaken or displace joint and several liability, a critical feature of the federal antitrust regime which should govern this case. The text of the JSA makes explicit that joint and several liability is a primary target (Petition at 16-17), and Respondents told the District Court their JSA sought to "ameliorate the impact of joint and several liability on the settlement dynamic."[1] The District Court acknowledged the efficacy of the challenged JSA provisions, observing they may "lessen[] the negotiating power of a plaintiff" and "make it more difficult for a plaintiff to settle on more advantageous terms." Pet. App. at 12a.

Despite this, the Seventh Circuit held, in a precedential order, that the District Court's JSA Order does not implicate an interest sufficiently important to warrant appellate review under the collateral order doctrine. That holding conflicts with this Court's long-standing antitrust jurisprudence, which has repeatedly emphasized the importance of federal antitrust laws and the *public* interest in their private enforcement.

The collateral order doctrine is applied when "delaying review until the entry of final judgment 'would imperil a substantial public interest.'" *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 107 (2009)

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[1] No. 1:16-cv-08637 (N.D. Ill. Feb. 22, 2022), ECF No. 5448 (transcript of Feb. 17, 2022 oral argument) at 33:20-21.

(quoting *Will v. Hallock*, 546 U.S. 345, 353 (2006)). The JSA Order, and the Seventh Circuit's Order disregarding its importance, pose a significant threat to private enforcement of federal antitrust laws and the public interest—in this case and others.

Seeking to avert this Court's review, Respondents mischaracterize the collateral order doctrine, and conjure up arguments not adopted by the Seventh Circuit that the JSA Order is "enmeshed with the merits," and can be effectively reviewed after final judgment. Those arguments are makeweight, and lack merit.

I. The JSA Order is Separate from the Merits

Although the Seventh Circuit made no such claim, Respondents mistakenly contend the JSA Order is "enmeshed with the merits," and therefore outside the scope of the collateral order doctrine. BIO at 19. That argument does not withstand scrutiny.

Respondents' theory is that the collateral order doctrine's separate-from-the-merits requirement is not met because, they claim, "the enforceability of the JSA is *only* relevant if, at some point in the future, Petitioners obtain a judgment in their favor that could conceivably be shared among the JSA Defendants under the terms of the JSA." BIO at 18 (emphasis added). That, however, is not what separateness means for purposes of the collateral order doctrine. It means the merits of the underlying claims are not intertwined with the order in question—as they often are, for example, in orders regarding class certification. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978). Respondents concede, as they must, "the question of whether the JSA is enforceable

is different from the question of whether Defendants in this case engaged in the alleged antitrust conspiracy." BIO at 18.

Furthermore, Respondents' assertion that the enforceability of the JSA is relevant *only* if and when there is a *judgment* for Petitioners should not be taken seriously. Respondents told the District Court their JSA sought to "ameliorate the impact of joint and several liability on the *settlement* dynamic,"[2] and the District Court recognized the JSA may "lessen[] the negotiating power of a plaintiff" and "make it more difficult for a plaintiff to settle on more advantageous terms." Respondents' exclusive focus on a *judgment* ignores the vital role settlements play in enforcing the federal antirust regime. As the Petition explained, the antitrust laws themselves establish the playing field for settlement negotiation—leaving the parties to weigh the risks imposed by application of the law governing liability and damages to the facts. The JSA Order permitted distortion of that playing field, by *allowing Defendants to coordinate and agree* about imposition of the J&S Negation Provision in settlement negotiations with plaintiffs. Petition at 19-20.[3]

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[2] *See supra* note 1 (emphasis added).

[3] Respondents point out (BIO at 4), as did the District Court, that the JSA allows a settling Defendant to exempt a given settlement from the JSA's terms—a so-called "unqualified settlement." *See* Pet. App. at 10a. The Petition noted the District Court declined to ask the JSA Defendants whether, or how often, that has occurred—ignoring how the JSA is operating in the real world. Petitioners are unaware of it ever having occurred, and

Respondents' focus on final judgment also ignores the JSA's impact on claims and damages requests presented to a jury. This impact was evident in the first trial in this case (which concluded in late October 2023, after the Petition was filed), where most plaintiffs *disclaimed* joint and several liability during the trial because of the JSA's limitation on available damages. *See* No. 1:16-cv-08637 (N.D. Ill. Oct. 22, 2023), ECF No. 6995.

II. The JSA Order Cannot Be Reviewed Effectively on Appeal From Final Judgment

Although the Seventh Circuit made no such claim, Respondents contend the JSA Order can be reviewed effectively on appeal from a final judgment. It cannot.

If a plaintiff accedes before final judgment to a settlement applying the challenged JSA provisions, that plaintiff will be unable to appeal the JSA Order at the end of the case. Respondents concede that point. *See* BIO at 21.

If a plaintiff elects to not settle under the distorted settlement conditions created by the JSA, and proceeds to final judgment on the merits, there is a significant risk the courts will find an appeal of the JSA Order non-justiciable at that point (*e.g.*, due to purported mootness or lack of standing). Respondents claim otherwise, but offer no explanation or citation to authority about how a challenge to the JSA Order would be justiciable at that juncture. *See* BIO at 20.

Respondents' Brief in Opposition is conspicuously silent. As the Petition observed: "The JSA Defendants featured the J&S Negation Provision in their compact for a reason—*to use it*." Petition at 21.

Instead, it is near-certain that the JSA Order will be *unreviewable* at the conclusion of the case.

III. The Seventh Circuit's Holding that the Interests at Stake in the JSA Order are Insufficiently Important for Collateral Order Jurisdiction Conflicts With this Court's Long-Standing Antitrust Jurisprudence

Respondents inaccurately claim "the collateral order doctrine is reserved for protection of only the most significant constitutional rights." BIO at 1. The Court has never limited the doctrine to review of orders concerning constitutional rights, let alone only "significant" ones. *See*, *e.g.*, *Shoop v. Twyford*, 596 U.S. 811, 817 n.1 (2022) (holding the collateral order doctrine reaches "[t]ransportation orders issued under the All Writs Act" because they "create[] public safety risks and burdens on the State that cannot be remedied after final judgment").

The collateral order doctrine *is* limited to "important" questions. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). And that is the doctrinal requirement about which the Seventh Circuit has gone astray. The sole basis for the Order dismissing Petitioners' appeal for lack of appellate jurisdiction was the Seventh Circuit's conclusion that the interests impacted by the JSA Order were insufficiently important. That holding, in a precedential decision, is in profound conflict with this Court's long-standing antitrust jurisprudence—"encouraging vigorous private enforcement of the antitrust laws," *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977), "to vindicate the important *public*

interest in free competition." *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 502 (1969) (emphasis added), including with the imposition of joint and several liability. *See* Petition at 12-16. A district court order permitting significant interference with private enforcement of federal antitrust laws, such as the JSA Order, implicates an important, concrete, public interest—not an "abstract" one, *Mohawk*, 558 U.S. at 108.

Unable to reconcile this Court's antitrust jurisprudence with the Seventh Circuit's holding about the insufficient importance of the interests at stake in the JSA Order, Respondents offer the irrelevant observation that this Court has not "held that an order sustaining a judgment-sharing agreement was immediately appealable under the collateral order doctrine." BIO at 12. So what? While the collateral order doctrine is narrow, a district court order separate from the merits which permits significant interference with private enforcement of federal antitrust laws implicates an interest sufficiently important to warrant immediate appellate review under the established contours of the doctrine.

IV. This Court's Review is Required to Prevent Significant Interference With Private Antitrust Enforcement

This Court has repeatedly explained: "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are 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." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

Respondents do not deny this Court has granted (and should grant) certiorari to consider questions important to federal antitrust laws and their enforcement without waiting for conflicts among courts of appeals to emerge. *See* Petition at 24-25. Instead, they suggest review should be limited to after a final judgment. *See* BIO at 10. However, the Question Presented here can be *only* considered now. Post-judgment appeal of the Seventh Circuit's erroneous holding that the interests implicated are insufficiently important to satisfy the collateral order doctrine would not be justiciable after final judgment.

The purpose and effect of the JSA is to weaken or displace joint and several liability as a feature of the federal antitrust regime governing this case. The JSA makes explicit that joint and several liability is a primary target, and Respondents told the District Court their JSA sought to "ameliorate the impact of joint and several liability on the settlement dynamic." The District Court acknowledged the efficacy of the challenged JSA provisions. *See* Pet. App. at 12a.

Respondents' self-servingly claim "[t]here is no greater interest at stake in th[e] Petition than the Seventh Circuit's application of the collateral order doctrine to the facts of this case." BIO at 9. That is false. The Seventh Circuit's precedential order is controlling law in that court and the district courts subject to its jurisdiction. Moreover, antitrust defendants and their counsel are watching. If the Seventh Circuit's Order letting the JSA operate is left unreviewed by the Court, defendants in antitrust

cases across the country will have carte blanche to enter into compacts like the one at issue here, dramatically tilting the playing field in Section 1 cases in their favor—arrogating to themselves the ability to alter the framework for private antitrust enforcement enacted by Congress.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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