No. 23-562

# In the Supreme Court of the United States

MCDONALD'S USA, LLC, ET AL., PETITIONERS

*v.*

LEINANI DESLANDES, ET AL., RESPONDENTS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR INTERNATIONAL CENTER FOR LAW & ECONOMICS AS *AMICUS CURIAE* SUPPORTING PETITIONERS


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**TABLE OF CONTENTS**

Interest of *Amicus Curiae* .............................................. 1

Summary of Argument .................................................. 2

Argument ........................................................................ 4

I. The Seventh Circuit Flipped The Rule Of Reason Presumption On Its Head ........................ 5

A. The Rule Of Reason Presumptively Applies.............................................................. 5

B. The Lack Of Judicial Experience Here Precludes *Per Se* Condemnation ..................... 7

II. Intrabrand No-Poach Provisions In Franchise Agreements Tend To Be Procompetitive ............ 11

A. Paragraph 14 Was Designed, Implemented, And Functioned Chiefly As A Vertical Restraint ...................................... 11

B. Economic Literature Does Not Support *Per Se* Condemnation Of This Type Of Restraint.................................................... 14

III. Courts Analyzing Competitive Effects Of No-Poach Restraints In Labor Markets Need Not Ignore The Downstream Impacts On Product Markets.............................................................. 20

Conclusion .................................................................... 22

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*Bogan* v. *Hodgkins*,
166 F.3d 509 (2d Cir. 1999) .................................. 9

*Broad. Music, Inc.* v. *Columbia Broad. Sys., Inc.*,
441 U.S. 1 (1979) ............................................. 9, 10

*Bus. Elecs. Corp.* v. *Sharp Elecs. Corp.*,
485 U.S. 717 (1988) ........................................... 2, 7

*Concord Assocs., L.P.* v. *Ent. Props. Trust*,
817 F.3d 46 (2d Cir. 2016) ..................................... 7

*Continental T.V., Inc.* v. *GTE Sylvania Inc.*,
433 U.S. 36 (1977) ........................................ 12, 13

*Craftsmen Limousine, Inc.* v. *Ford Motor Co.*,
363 F.3d 761 (8th Cir. 2004) .................................. 8

*E. Food Servs., Inc.* v. *Pontifical Cath. Univ. Servs. Ass'n*,
357 F.3d 1 (1st Cir. 2004) ..................................... 7

*Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*,
504 U.S. 451 (1992) .................................... 4, 20, 21

*Epic Games, Inc.* v. *Apple Inc.*,
67 F.4th 946 (9th Cir. 2023) ................................ 20

*Innovation Ventures, LLC* v. *Custom Nutrition Laboratories, LLC*,
912 F.3d 316 (6th Cir. 2018) ............ 7

*Kestenbaum* v. *Falstaff Brewing Corp.*,
514 F.2d 690 (5th Cir. 1975) ............ 9

*Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*,
551 U.S. 877 (2007) ............ 2, 3, 5, 6, 16, 21

*Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*,
475 U.S. 574 (1986) ............ 5

*Midwestern Waffles, Inc.* v. *Waffle House, Inc.*,
734 F.2d 705 (11th Cir. 1984) ............ 9, 12

*Nat'l Soc'y of Pro. Eng'rs* v. *United States*,
435 U.S. 679 (1978) ............ 10

*NCAA* v. *Alston*,
141 S. Ct. 2141 (2021) ............ 4, 5, 20, 21

*NCAA* v. *Bd. of Regents of Univ. of Okla.*,
468 U.S. 85 (1984) ............ 20

*Nw. Wholesale Stationers, Inc.* v. *Pac. Stationery & Printing Co.*,
472 U.S. 284 (1985) ............ 6

*Ohio* v. *Am. Express Co.*,
138 S. Ct. 2274 (2018) ............ 3, 6, 12, 21, 22

*Paladin Assocs., Inc.* v. *Mont. Power Co.*,
328 F.3d 1145 (9th Cir. 2003) ................................ 8

*Polk Bros.* v. *Forest City Enters., Inc.*,
776 F.2d 185 (7th Cir. 1985) ................................ 15

*Quality Mercury, Inc.* v. *Ford Motor Co.*,
542 F.2d 466 (8th Cir. 1976) ................................ 9

*Standard Oil Co. of N.J.* v. *United States*,
221 U.S. 1 (1911) ................................ 5

*Sullivan* v. *NFL*,
34 F.3d 1091 (1st Cir. 1994) ................................ 20

*Texaco, Inc.* v. *Dagher*,
547 U.S. 1 (2006) ................................ 5

*Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*,
676 F.2d 1291 (9th Cir. 1982) ................................ 9

*United States* v. *Brewbaker*,
No. 22-4544, 2023 WL 8286490 (4th Cir. Dec. 1, 2023) ................................ 13, 15

*United States* v. *Int'l Harvester Co.*,
274 U.S. 693 (1927) ................................ 16

*United States* v. *Microsoft Corp.*,
253 F.3d 34 (D.C. Cir. 2001) ................................ 16

*Wilcox* v. *First Interstate Bank of Oregon, N.A.*,
815 F.2d 522 (9th Cir. 1987) ................................ 16

*Will* v. *Comprehensive Acct. Corp.*, 776 F.2d 665 (7th Cir. 1985) .......... 11

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Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law (5th ed. 2023) .......... 6

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Herbert Hovenkamp, *The Rule of Reason*, 70 Fla. L. Rev. 81 (2018) .......... 5

Arturs Kalnins and Francine Lafontaine, *Multi-Unit Ownership in Franchising: Evidence from the Fast-Food Industry in Texas*, 35(4) The RAND J. Econ. 747 (2004) .......... 14

Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise* Sector, 57 J. Hum. Res. S324 (2022). .................................. 16

Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, 10 Handbook of Antitrust Economics 391 (Buccirossi ed., 2008) .................................................................... 12

Francine Lafontaine & Margaret E. Slade, *Transaction Cost Economics and Vertical Market Restrictions—Evidence*, 55(3) The Antitrust Bulletin 587 (2010). ..................................................... 12

G. Frank Mathewson & Ralph A. Winter, *The Economics of Franchise Contracts*, 28 J.L. & Econ. 503 (1985) ................ 11

Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 Antitrust L.J. 461 (2000) .......................................... 10

Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. Pa. L. Rev. 953 (1979) ............................................................ 15

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**BRIEF FOR INTERNATIONAL CENTER FOR LAW & ECONOMICS AS *AMICUS CURIAE* SUPPORTING PETITIONERS**

## INTEREST OF *AMICUS CURIAE*[1]

The International Center for Law & Economics ("ICLE") is a nonprofit, non-partisan global research and policy center aimed at building the intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law and economics methodologies, as well as the results of economic research, to inform public policy debates, and it has longstanding expertise in antitrust law. It has filed *amicus* briefs in this Court and others around the country. *See, e.g.*, *Apple*,

[1] Pursuant to S. Ct. Rule 37.2(a), counsel for all parties have been notified about the filing of this brief. No counsel for a party authored this brief in whole or in part and no person or entity other than *amicus*, its members, or counsel made a monetary contribution to its preparation or submission.

*Inc.* v. *Epic Games, Inc.*, No. 23-344 (U.S.); *United States* v. *Am. Airlines Grp. Inc.*, No. 23-1802 (1st Cir.); *Giordano* v. *Saks Inc.*, No. 23-600 (2d Cir.).

ICLE respectfully submits that the decision below undermines the economic foundations of antitrust law by presuming that a potentially procompetitive restraint is *per se* unlawful, rather than analyzing the restraint under the default rule of reason. The Court should grant the petition for a writ of certiorari to clarify that the type of restraint at issue here is presumptively procompetitive and thus subject to the rule of reason.

ICLE scholars have written extensively on issues closely related to this case, and respectfully submit that their expertise will help clarify the economic problems with the decision below and highlight the reasons for the Court to grant certiorari.

## SUMMARY OF ARGUMENT

This Court has clearly and repeatedly recognized that "[t]he rule of reason is the accepted standard for testing whether a practice restrains trade in violation of [Sherman Act] § 1" and that *per se* prohibitions are "confined to restraints … 'that would always or almost always tend to restrict competition and decrease output.'" *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885–86 (2007) (quoting *Bus. Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)). The decision below cannot be reconciled with those important principles.

The Seventh Circuit committed at least three errors that threaten the economic foundations of antitrust law and are worthy of this Court's attention.

*First*, the Seventh Circuit inverted the strong presumption in favor of rule of reason analysis—a presumption that is critical in preventing antitrust law

from deterring productive and beneficial conduct. Plaintiffs can overcome that presumption, but only when they show that the challenged restraint falls squarely within a class or category that "always or almost always" harms competition. *Leegin*, 551 U.S. at 885–86. For a court to make that prediction with confidence, it must have sufficient experience with the restraint. Here, the Seventh Circuit turned settled law on its head. From a *dearth* of experience, the court of appeals reasoned that a *per se* claim was plausible and sustainable. This approach threatens to chill interbrand competition.

*Second*, the Seventh Circuit sustained a *per se* challenge to a restraint that has significant procompetitive virtues. The challenged contractual provision was designed, and chiefly functioned, as a *vertical* restraint. The economic literature shows that intrabrand vertical restraints tend to benefit competition. While there are circumstances under which certain vertical restraints can be anticompetitive, there is no literature demonstrating that they are typically anticompetitive. In the franchise context, intrabrand vertical restraints strengthen the franchise's brand overall and thus foster competition. The existence of *some* horizontal aspects or applications of such a restraint, moreover, does not negate these procompetitive virtues. The rule of reason fosters consideration of such issues, whereas the Seventh Circuit's decision curtails it.

*Third*, the Seventh Circuit held that positive effects on consumers cannot justify a restraint in the labor market. This holding is in deep tension with this Court's admonition that antitrust analysis focus on "the commercial realities" of a business or industry rather than on "formalistic distinctions." *See Ohio* v. *Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018) ("*AmEx*") (quoting

*Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992)). Second, the decision below is at odds with this Court's teaching that "reasonableness" is a holistic endeavor, which incorporates consideration of *consumer* welfare. *See NCAA* v. *Alston*, 141 S. Ct. 2141, 2151 (2021). As petitioners explain, a growing circuit split on this fundamental, analytical issue warrants this Court's immediate attention.

**ARGUMENT**

Former McDonald's employees challenged a provision in the McDonald's franchise agreement ("Paragraph 14") that once allegedly restricted franchisees' ability to hire employees from other McDonald's restaurants for a limited period of time.

The district court entered judgment on the pleadings, dismissing the plaintiffs' claims. Pet. App. 12a. It declined to condemn Paragraph 14 as *per se* unlawful, in part because the court lacked judicial experience with the type of intrabrand franchise "no-poach" provision at issue, and it could not say with confidence that the restraint would always or almost always harm competition. Pet. App. 21a. The claims failed under the rule of reason due to the plaintiffs' failure to allege a relevant market in which they sold their labor or in which McDonald's had market power. Pet. App. 19a.

The Seventh Circuit vacated and remanded. Pet. App. 8a. Although it agreed that the complaint failed to allege a violation under the rule of reason, the Seventh Circuit held that the lower court "jettisoned the *per se* rule too early"—not because of case law demonstrating the type of restraint at issue was manifestly *anti*competitive (there is none)—but because the potential procompetitive benefits of the provision raised "complex questions" that required "careful economic analysis."

Pet. App. 4a, 8a. In other words, the Seventh Circuit held that the *per se* rule applies as the default presumption, even when the class of restraint that is challenged may have procompetitive justifications. Even though the primary operation of the challenged restraint is vertical, the court focused on its horizontal aspects. Further, the Seventh Circuit held that the only procompetitive benefits relevant to assessing the challenged provision were benefits in the labor market, not those in the associated product market. Pet. App. 5a.

## I. The Seventh Circuit Flipped The Rule Of Reason Presumption On Its Head

The substantive issue in this case is whether an intrabrand franchise hiring restraint should be evaluated under the rule of reason framework or the *per se* approach. While the court of appeals opted for *per se* analysis, this Court's precedents demand the application of the rule of reason.

### A. The Rule Of Reason Presumptively Applies

Whether a restraint violates § 1 "'presumptively' calls for . . . 'rule of reason analysis.'" *Alston*, 141 S. Ct. at 2151 (citing *Texaco, Inc.* v. *Dagher*, 547 U.S. 1, 5 (2006), and *Standard Oil Co. of N.J.* v. *United States*, 221 U.S. 1, 60-62 (1911)). That is, "[t]he rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1." *Leegin*, 551 U.S. at 885; *see also* Herbert Hovenkamp, *The Rule of Reason*, 70 Fla. L. Rev. 81, 83 (2018) ("Courts evaluate most antitrust claims under the 'rule of reason.'").

The rule of reason presumption is critical from an economic perspective because it eschews rigid and categorical rules that tend to result in "false positives" that penalize beneficial conduct. *See, e.g.*, *Matsushita Elec.*

*Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (false condemnations "are especially costly, because they chill the very conduct the antitrust laws are designed to protect"). Instead, the rule of reason allows courts to assess *actual* effects, providing for nuanced economic analysis, tailored to the particular restraint in the relevant market. *See AmEx*, 138 S. Ct. at 2284 ("The rule of reason requires courts to conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition." (cleaned up)).

By contrast, the *per se* rule risks chilling procompetitive conduct by enabling plaintiffs to skip over their normal evidentiary burdens—*i.e.*, establishing anticompetitive effects in a relevant market—and also blocking defendants from coming back with evidence of procompetitive justifications. *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 1509c (5th ed. 2023) (observing that *per se* analysis "dispenses with costly proof requirements, such as proof of market power," but consequently "produces a certain number of false positives").

Accordingly, plaintiffs must clear a high bar in order to invoke *per se* condemnation. They must "present a *threshold* case that the challenged activity falls into a category likely to have predominantly anticompetitive effects." *Nw. Wholesale Stationers, Inc.* v. *Pac. Stationery & Printing Co.*, 472 U.S. 284, 298 (1985) (emphasis added). Moreover, a plaintiff can sustain a *per se* challenge at the pleading stage only if she can first show that "courts have had considerable experience with the type of restraint" alleged and its predominantly anticompetitive nature. *Leegin*, 551 U.S. at 886. That show-

ing is a logical prerequisite because, without such experience, the court cannot make accurate predictions about the overall effects of a restraint on competition—much less say that the restraint will "always or almost always tend to restrict competition and decrease output.'" *Id.* at 885–86 (quoting *Bus. Elecs.*, 485 U.S. at 723).

When plaintiffs do not plausibly allege that the restraint falls within a predominantly anticompetitive category and show that courts have the requisite experience to condemn the challenged practice, courts must reject application of the *per se* rule at the pleading stage. *See, e.g.*, *Concord Assocs., L.P.* v. *Ent. Props. Trust*, 817 F.3d 46, 53 n.5 (2d Cir. 2016); *E. Food Servs., Inc.* v. *Pontifical Cath. Univ. Servs. Ass'n*, 357 F.3d 1, 4 (1st Cir. 2004). That does not mean the underlying claim necessarily fails; rather, a plaintiff's inability to establish the prerequisites to *per se* treatment leads to analysis of the challenged conduct under the rule of reason.

The plaintiff's burden is onerous by design. Given the attendant risks that improper *per se* condemnation has on the economy, a plaintiff must be able to show that a "restraint *clearly and unquestionably* falls within one of the handful of categories that have been collectively deemed per se anticompetitive." *Innovation Ventures, LLC* v. *Custom Nutrition Laboratories, LLC*, 912 F.3d 316, 340–41 (6th Cir. 2018) (emphasis added). If a plaintiff cannot make that showing, it has not overcome the presumption, and the rule of reason applies instead.

### B. The Lack Of Judicial Experience Here Precludes *Per Se* Condemnation

The district court correctly concluded that courts lack sufficient experience with the particular type of re-

straint at issue to say with confidence that the challenged provision would almost always harm competition. Pet. App. 21a. Despite ample opportunity to do so, respondents never came forward with cases holding that intrabrand no-poach agreements are manifestly anticompetitive.

In vacating and remanding, the Seventh Circuit believed that the district court had "jettisoned the *per se* rule too early." Pet. App. 4a. That is wrong. The district court merely recognized that the plaintiffs failed to carry *their* burden at the pleading stage to overcome the presumption in favor of the rule of reason. The district court applied precisely the presumption it was supposed to apply.

To the extent the Seventh Circuit thought that the plaintiffs *had* overcome the presumption in favor of the rule of reason because "[t]he complaint alleges a horizontal restraint" (Pet. App. 4a), the court was also mistaken. As explained below, Paragraph 14's no-poach provision was a predominantly *vertical* restraint with procompetitive benefits in the product market. If the court had considered either of these factors, it would have recognized—at the least—the *potential* for procompetitive benefits, and thus would have applied the rule of reason. *See Craftsmen Limousine, Inc.* v. *Ford Motor Co.*, 363 F.3d 761, 776 (8th Cir. 2004) ("[W]hen determining whether to apply the rule of reason analysis … the issue is not whether the restrictions were procompetitive, but whether they could be."); *Paladin Assocs., Inc.* v. *Mont. Power Co.*, 328 F.3d 1145, 1154-55 (9th Cir. 2003) ("When a defendant advances plausible arguments that a practice enhances overall efficiency and makes markets more competitive, per se treatment is inappropriate, and the rule of reason applies.").

Even putting those mistakes aside, it is not enough to label a restraint "horizontal" and presume it is *per se* unlawful—because not all horizontal restraints are *per se* unlawful. *See Broad. Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) ("Not all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints"); Areeda & Hovenkamp, *supra*, ¶ 1902a (although horizontal agreements are more "suspect," that "does not mean that all or even most horizontal agreements are unlawful, or that they should be discouraged"). It was thus critical for the Seventh Circuit to determine whether *that particular* class of allegedly horizontal restraints—*i.e.*, intrabrand no-poach agreements—is manifestly anticompetitive.

But neither respondents nor the Seventh Circuit cited or relied on any precedent holding that such agreements are always or almost always anticompetitive. Pet. App. 1a–10a. To the contrary, most federal courts that have analyzed similar intrabrand restraints have done so under the rule of reason, recognizing their potential procompetitive virtues. *See Bogan* v. *Hodgkins*, 166 F.3d 509 (2d Cir. 1999); *Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F.2d 690, 695–96 (5th Cir. 1975); *Quality Mercury, Inc.* v. *Ford Motor Co.*, 542 F.2d 466, 470 & n.4 (8th Cir. 1976); *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291, 1303 (9th Cir. 1982); *Midwestern Waffles, Inc.* v. *Waffle House, Inc.*, 734 F.2d 705 (11th Cir. 1984).

More problematically, the Seventh Circuit itself recognized that this type of restraint is potentially procompetitive, pointing out that "[c]ommon training and job classifications could in principle justify restraints on

poaching." Pet. App. 6a; *see also* Pet. App. 7a–8a (acknowledging the potential benefits of Paragraph 14 in "protecting franchises' investments in training"). Based on the existence of these potential benefits—and the simultaneous *absence* of cases showing guaranteed anticompetitive effects—the Seventh Circuit stated the case raised "complex questions" that would ultimately require "careful economic analysis." Pet. App. 8a.

Ironically, the court of appeals' own reasoning shows why the rule of reason, and only the rule of reason, must apply in this case. The rule of reason *is* the careful economic analysis the Seventh Circuit envisioned. *See* Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 Antitrust L.J. 461, 488–89 (2000) ("[T]here is, of course, only one way to gain the information necessary to categorize such restraints properly: full-blown rule of reason scrutiny in an environment receptive to claims that such restraints may, in fact, further competition."). By contrast, the *per se* rule the court of appeals imposed applies only when agreements "are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *Nat'l Soc'y of Pro. Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978). The *per se* rule does not apply in situations—like this—when the court had "never examined a practice like this one before." *Broad. Music*, 441 U.S. at 10.

Accordingly, this Court should grant certiorari to clarify how the rule of reason presumption operates at the pleading stage, particularly when there is a lack of judicial experience with the challenged restraint. When courts flip the default presumption and improperly apply *per se* rules, they *preclude* careful economic analysis of new types of restraints—even though the economic

analysis, in the end, may prove the restraints to be beneficial to competition. In that way, the decision below creates a substantial risk of chilling productive behavior and warrants this Court's review.

## II. Intrabrand No-Poach Provisions In Franchise Agreements Tend To Be Procompetitive

Far from being universally condemned, the type of restraints at issue—*i.e.*, intrabrand franchise no-poach agreements—are, as a class, *not* manifestly anticompetitive. That is another reason that *per se* condemnation is inappropriate and this Court's review is warranted.

### A. Paragraph 14 Was Designed, Implemented, And Functioned Chiefly As A Vertical Restraint

Franchise agreements are vertical arrangements between the franchisor and its franchisees, which operate at different levels of the supply chain. *See Will* v. *Comprehensive Acct. Corp.*, 776 F.2d 665, 670 n.1 (7th Cir. 1985) ("A franchiser and its franchisees are part of a business organization not altogether different from vertical integration." (citing G. Frank Mathewson & Ralph A. Winter, *The Economics of Franchise Contracts*, 28 J.L. & Econ. 503 (1985))); *see also* Areeda & Hovenkamp, *supra*, ¶ 2033 (noting that franchisor market division is "strongly presumed to be vertical rather than horizontal").

Such vertical restraints are typically not a threat to competition; to the contrary, they are "a customary and even indispensable part of the market system" and "not even presumptively 'suspect.'" Areeda & Hovenkamp, *supra*, ¶ 1902d. For that reason, vertical restraints are subject to the rule of reason, as this Court has repeat-

edly held. *See, e.g.*, *AmEx*, 138 S. Ct. at 2284; *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 54–59 (1977).

Economic research further explains how and why vertical restraints are procompetitive. Reviewing the empirical and theoretical literature on vertical restraints, Francine Lafontaine and Margaret Slade observe that:

> [T]he empirical evidence concerning the effects of vertical restraints on consumer well-being is surprisingly consistent. Specifically, it appears that when manufacturers choose to impose such restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision.

Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, 10 Handbook of Antitrust Economics 391, 408-09 (Buccirossi ed., 2008); *see also* Francine Lafontaine & Margaret E. Slade, *Transaction Cost Economics and Vertical Market Restrictions—Evidence*, 55(3) The Antitrust Bulletin 587 (2010).

Just as a manufacturer may impose vertical restraints on its distributors in order to promote interbrand competition, so too may a franchisor impose restraints on its franchisees through the standard franchise contract. Such restraints are procompetitive, as they enhance the franchise brand overall and in that way promote *inter*brand competition. *See Midwestern Waffles*, 734 F.2d at 720 (franchise restraints "promote interbrand competition by allowing the franchisor or manufacturer to achieve certain efficiencies in the distribution of his goods and services").

The record here clearly indicates that Paragraph 14 was such a restraint. It was originally designed—and in large part operated—as a vertical restraint. In 1955, McDonald's included in its franchise agreement the predecessor to the Paragraph 14 restriction as part of an initial bundle of brand standards that were intended to enhance the McDonald's brand overall. Pet. App. 46a–47a. The terms of the agreement were consistent across franchisees, but not implemented by those franchisees *qua* competitors. Pet. App. 46a, 141a–142a.

Even assuming that Paragraph 14 had *some* horizontal elements, moreover, that alone would be an insufficient basis to ignore the vertical aspects. For purposes of determining the appropriate framework of analysis, a court cannot simply disentangle the component parts of the arrangement. As this Court has explained, "problems in differentiating vertical restrictions from horizontal restrictions" do not alone "justify a *per se* rule." *GTE Sylvania*, 433 U.S. at 58 n.28. Rather, a court must look at the *entire* commercial relationship between the contracting parties—here, the franchisor and franchisees. A court should not "parse" the various components to isolate the competitive effects. *See United States* v. *Brewbaker,* No. 22-4544, 2023 WL 8286490, at *8 (4th Cir. Dec. 1, 2023). Doing so would ignore the economic realities of the commercial venture, which overall may prove to be productive. *Ibid.*

Thus, the court of appeals should have recognized that this predominantly vertical franchise relationship had significant procompetitive benefits, as most vertical restraints do; and, in recognition of those potential benefits, it should have rejected application of a *per se* rule.

### B. Economic Literature Does Not Support *Per Se* Condemnation Of This Type Of Restraint

Because franchise arrangements function vertically and within one brand, it is no surprise that economic research shows there are legitimate procompetitive rationales to include "no-poach" requirements in standard franchise agreements. By contrast, there is no peer-reviewed economic literature (and certainly no economic consensus) demonstrating that these types of restraints are always anticompetitive.

#### 1. Economic Literature Reveals The Procompetitive Benefits Of Intrabrand Franchise Restraints

The economic literature shows that the franchise business model has the potential to generate significant procompetitive efficiencies.

First, local business owners may have various advantages in the operation of specific outlets, including familiarity with local labor markets; whereas a national franchisor "may be more efficient at organizing supply chains, marketing, and other tasks that involve scale, national information, or [that are] otherwise inherently common across retail outlets." C.A.J.A. 129; *see also* Arturs Kalnins and Francine Lafontaine, *Multi-Unit Ownership in Franchising: Evidence from the Fast-Food Industry in Texas*, 35(4) The RAND J. Econ. 747, 749 (2004) ("[F]ranchisees may possess special expertise in operating units in particular types of markets."). Kalnins and Lafontaine note that "a number of [economic] models have proposed franchisees' knowledge of local market conditions as a reason for franchisors to use franchising." *Ibid.*

Second, and relatedly, intrabrand restraints in franchise agreements can address a particular risk posed by

the franchisor/franchisee relationship: while each franchisee stands to benefit from the success of the franchise as a whole, its main goal is still to maximize its own profits, even at the expense of other franchisees. *See, e.g.*, Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. Pa. L. Rev. 953, 956 (1979). Thus, a franchisee's individual interest in acquiring experienced labor might favor "poaching" employees from neighboring franchisees that have already invested in training their workers, even at the expense of the larger franchise system. The benefits of poaching ultimately accrue to the poacher, who bears only a very small share of the harm done to the brand. This is the classic "free-rider" problem.

Courts have recognized that parties in productive ventures can seek to prevent or mitigate the risks that the ventures may create, including the risks of free-riding. As the Seventh Circuit has explained, businesses may collaborate for the benefit of consumers without "cutting [their] own throat." *Polk Bros.* v. *Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985); *see also Brewbaker,* 2023 WL 8286490, at *12. Agreements that "limit free riding" are procompetitive insofar as they "encourage investment." Areeda & Hovenkamp, *supra*, ¶ 2134b. Because intrabrand no-poach restraints encourage such investment, they have legitimate, procompetitive benefits—and should be evaluated under the rule of reason.

#### 2. There Is A Dearth Of Literature On The Actual Effects Of Intrabrand No-Poach Agreements

While there are legitimate, procompetitive reasons for franchisors to impose intrabrand no-poach rules, there is a dearth of literature on the *actual* effects of this

class of restraint. Indeed, *amicus* is not aware of any published empirical literature illustrating the average or likely effects that these restraints have on competition. Thus, there is insufficient economic evidence to conclude that they are manifestly anticompetitive.

To *amicus*' knowledge, there is currently only one paper published in a peer-reviewed journal that addresses this question—but the paper's primary empirical conclusion is only that "no-poach" restrictions are included in "58 percent of major franchisors' contracts." Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, 57 J. Hum. Res. S324, S324 (2022). Krueger and Ashenfelter also found that such restraints vary by industry and are (or were in 2016) common among quick-serve restaurant franchises like McDonald's. *Id.* at S327-29. The prevalence of this type of restraint counsels in favor of caution—and in favor of rule of reason analysis—to the extent there is a risk of chilling a common procompetitive behavior. Indeed, widespread industry adoption may be evidence that the restraint is, in fact, procompetitive. *See United States* v. *Microsoft Corp.*, 253 F.3d 34, 92–93, 95 (D.C. Cir. 2001) ("ubiquity" of a practice should give courts "reason to pause," as condemning a "common practice," as *per se* unlawful "may cast a cloud over . . . innovation"); *cf. Leegin*, 551 U.S. at 897 (the number of manufacturers that adopt a practice "can provide important instruction"); *Wilcox* v. *First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 526 (9th Cir. 1987) (following the prevailing practice in an industry "does not establish any suppression of competition or show any sinister domination" (quoting *United States* v. *Int'l Harvester Co.*, 274 U.S. 693, 708–09 (1927))).

To be sure, Krueger and Ashenfelter offer some theoretical discussion suggesting that such agreements "can limit turnover and reduce labor market competition." Krueger & Ashenfelter, 57 J. Hum. Res. at S338. But their theoretical claim is just that, theoretical. They do not employ any causal design or econometric analysis of franchise employee wage data, and their paper did not establish—nor even purport to establish—that employers generally have or exercise antitrust-relevant market power to affect competition. Indeed, while Krueger and Ashenfelter expressed interest in the question of whether such agreements "can meaningfully alter employer market power," they themselves note that "systematic evidence on the impact of nopoaching agreements on workers' pay and within-franchise job mobility *is unavailable*." *Id.* (emphasis added). These theoretical considerations thus warrant, first, careful empirical study and, then, a more fulsome, evidence-based examination—but only the rule of reason would permit such rigorous analysis, whereas a *per se* rule prevents it.

#### 3. This Type Of Restraint Is Unlikely To Have Anticompetitive Effects

Although there is a dearth of evidence on actual economic effects, it is worth noting that it is highly unlikely that these types of intrabrand franchise restraints would have substantial anticompetitive effects in the labor markets in which they operate.

Only an employer with market power could use nopoach restrictions to artificially limit turnover. Yet there is no reason to believe fast-food employers possess such market power. Recent data show that the turnover in the quick-service sector is incredibly high, at around 144%—which means that if a restaurant has a total of 30 people on staff at any given time, it faced about 43

departures in the last year alone. *See* Chris Brunau, *Turnover and Retention Rates for QSR Businesses,* Daily Pay (Nov. 15, 2022), https://tinyurl.com/46jb27yd. And while the Bureau of Labor Statistics ("BLS") has not published seasonally-adjusted quit rates for quick-serve restaurants specifically, it has found that the seasonally-adjusted "quits rate" for the broader accommodation and food services industry was 5.8% as of October 2022—higher than any other industry. *See* BLS, *Economic News Release, Job Openings and Labor Turnover*, Table 4 (Dec. 5, 2023), https://www.bls.gov/news.release/jolts.htm. Moreover, when restaurant workers quit, they frequently leave the restaurant industry altogether, creating high numbers of job openings for new entrants into restaurant employment. *See* BLS, *Occupational Outlook Handbook, Food and Beverage Serving and Related Workers* (Sept. 6, 2023), https://www.bls.gov/ooh/food-preparation-and-serving/food-and-beverage-serving-and-related-workers.htm.

Thus, despite the prevalence of no-poach restrictions in quick-serve restaurants, there is still very high turnover in the labor market. That suggests that the franchises imposing those restraints do *not* have market power to restrain mobility (or, in turn, wages). And that makes sense practically, given the large number of interchangeable, substitute employers at which such employees can work.

These macroeconomic observations are also reflected in the facts of this case. The district court and the court of appeals both expressly noted that Paragraph 14 did not in any way constrain the ability of current or recent McDonald's employees to accept work at a competing quick-serve restaurant (or limit the ability of those other

employers to hire McDonald's employees). As the court of appeals observed, "[p]eople who work at McDonald's one week can work at Wendy's the next, and the reverse," and "[p]eople entering the labor market can choose where to go—and fast-food restaurants are only one of many options." Pet. App. 3a; *see also* Pet. App. 57a.

Indeed, petitioners' expert, Dr. Kevin Murphy, observed that one of the named plaintiffs had some *fifty* quick-serve restaurants within only three miles of her home and 517 quick-serve restaurant employers (besides McDonald's) within ten miles of her home. C.A.J.A. 322–23. Hence, petitioners' share of the market in which that plaintiff sold her labor was extremely low. There did not appear to be any submission to the contrary or a submission suggesting that the plaintiff was locked into McDonald's employment for any other reason.

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The decision below short-circuits rule of reason analysis in favor of *per se* condemnation; but a review of the available economic literature shows that the type of restraint here is likely to be procompetitive—and it certainly does not establish that such restraints are always or almost always anticompetitive. This highlights the risks of allowing *per se* claims to go forward when the plaintiffs fail to carry their burden at the pleading stage. Rather than condemn anticompetitive conduct, the decision below will ultimately chill interbrand competition by making such restraints more costly to undertake.

### III. Courts Analyzing Competitive Effects Of No-Poach Restraints In Labor Markets Need Not Ignore The Downstream Impacts On Product Markets

In justifying its decision to apply *per se* analysis, the court of appeals held that benefits in the relevant *output* market—the market for "burgers and fries"—cannot counterbalance purported harms in an *input* market—"detriments to workers"—produced by the challenged restraint. Pet. App. 5a. The court of appeals believed that this Court's decision in *Alston* required that conclusion. *Ibid.* That is incorrect, and the Court should grant the petition to clarify as much.

Although this Court has not squarely decided the question, it has considered cross-market rationales in rule of reason and monopolization cases. *See Kodak*, 504 U.S. at 482–84 (relevant market of Kodak-brand service and parts; procompetitive rationale in market for photocopiers); *NCAA* v. *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104–08, 115–17 (1984) (relevant market of college football television; procompetitive rationale of protecting the market for college football tickets); *see also Epic Games, Inc.* v. *Apple Inc.*, 67 F.4th 946, 989 (9th Cir. 2023), *pets. for cert. filed*, No. 23-337 (Sept. 29, 2023) and No. 23-344 (Oct. 2, 2023); *Sullivan* v. *NFL*, 34 F.3d 1091, 1113 (1st Cir. 1994).

*Alston* does not hold to the contrary. In *Alston*, this Court "t[ook] as given" that "the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market." 141 S. Ct. at 2155. Although "[s]ome *amici* argue[d]" otherwise, the Court "express[ed] no views on" this issue. *Ibid.* Moreover, *Alston* "involve[d] admitted horizontal price fixing in a market where the defendants exercise monopoly control." *Id.* at 2154. The

Court "t[ook] as given" that the NCAA enjoyed market power, that it used its market power to artificially suppress athlete compensation, and that "decreases in compensation also depress participation by student-athletes in the relevant market—so that price and quantity are both suppressed." *Ibid.* (citing 12 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 2011b, p.134 (4th ed. 2019)). Yet even against that backdrop, and in addressing a labor-market restraint, the Court emphasized that its "goal is to distinguish between restraints with anticompetitive effect that are harmful to the *consumer* and restraints stimulating competition that are in the consumer's best interest." *Id.* at 2151 (emphasis added) (quoting *AmEx*, 138 S. Ct. at 2284).

This Court's decision in *AmEx* illustrates the full-picture approach antitrust law demands. There, the Court considered a "two-sided transaction market[]," with merchants on one side and credit card holders on the other. *AmEx*, 138 S. Ct. at 2287. The Court held that "the definition of the relevant market must correspond to the commercial realities of the industry," and that courts must therefore "combine [the] products or services" offered to both "merchants and cardholders" into "a single market." *Id.* at 2285–86 (cleaned up). In so holding, the Court reinforced the principle that "'[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.'" *Id.* at 2285 (quoting *Kodak*, 504 U.S. at 466–67); *see also Leegin*, 551 U.S. at 885-86 (noting that "reasonableness" analysis examines "all of the circumstances").

The Seventh Circuit's decision breaks from these cases insofar as it categorically *excludes* the product

market from its analysis, thereby *maintaining* "formalistic distinctions" between related markets. *AmEx*, 138 S. Ct. at 2285. The approach avoids "actual market realities" and the *overall* economic impact of the challenged restraint. The court of appeals got the analysis backward by adopting a rule that *repudiates* all cross-market effects and thereby risks condemning restraints that are, on net, procompetitive.

This Court should grant review to correct that mistake and to provide clarity regarding the circuit split on this issue. *See* Pet. 25–27 (collecting cases). Economic arrangements should be measured by their *overall* competitive effects, factoring in their effects on consumer welfare. An overly formalistic repudiation of "cross-market" effects risks condemnation of restraints that are, on balance, beneficial to both competition and consumers.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2023