No. 23-562

In the
Supreme Court of the United States

MCDONALD'S USA, LLC, and
MCDONALD'S CORPORATION,
Petitioners,

v.

LEINANI DESLANDES and STEPHANIE TURNER,
Respondents.

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

BRIEF OF THE INTERNATIONAL FRANCHISE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' WRIT OF CERTIORARI

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STATEMENT OF INTEREST

The International Franchise Association ("IFA") submits this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by McDonald's USA, LLC and McDonald's Corporation ("McDonald's").[1]

Founded in 1960, the IFA is the oldest and largest trade association in the world devoted to representing the interests of franchising. The IFA's membership includes franchisors, franchisees, and suppliers. The IFA is the only trade association that acts as a voice for both franchisors and franchisees throughout the United States and the world.

The IFA's mission is to safeguard and enhance the business environment for franchising worldwide. In addition to serving as a resource for franchisors and franchisees, the IFA and its members advise public officials across the country about the laws that govern franchising. Through its public-policy programs, it protects, enhances, and promotes franchising on behalf of more than 1,400 brands in more than 300 different industries, including restaurants.

The IFA has a strong interest in correct application of laws affecting franchises. The IFA seeks to provide this Court with relevant industry-specific context and

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[1] All parties have been notified 10 days in advance of the IFA's intent to file this amicus brief. No counsel for any party has authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members or its counsel made any monetary contribution specifically for the preparation or submission of this brief. S. Ct. R. 37.6.

practical perspectives for why the petition should be granted.

Franchise agreements are classic examples of procompetitive vertical restraints. For decades, they have supported the U.S. economy and have driven job growth. Antitrust claims challenging them have long been evaluated under the rule of reason, requiring careful analysis of their procompetitive and anticompetitive effects before they can be found unlawful.

The court below acknowledged that liability would require "careful economic analysis" of the relevant no-poach provision, yet held the *per se* rule may apply. This holding inverts the analysis required by this Court's precedent. If a restraint warrants an effects analysis, the rule of reason governs.

This erroneous decision could open floodgates for *per se* antitrust claims against franchises—in contexts far beyond restaurants or "no-poach" clauses—and must be corrected. Accordingly, the IFA submits this brief as *amicus curiae* to ask that the Court grant McDonald's petition.

SUMMARY OF THE ARGUMENT

Over the years, few collaborative ventures can claim more contributions to interbrand competition than franchises. They play an important part in supporting and building the American economy. Franchise agreements may restrain some *intra*brand competition among the franchisor and its franchisees, but they propel robust *inter*brand competition among rival franchise brands. When challenged in antitrust cases,

these vertical relationships have been evaluated under the rule of reason.

In *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699 (7th Cir. 2023), the Seventh Circuit held that the district court "jettisoned the *per se* rule too early" in analyzing no-poach provisions in McDonald's franchise agreements. Pet. App. 4a. The Court then speculated about the provisions' potential procompetitive and anticompetitive effects. *Id.* at 6a-7a. It concluded that "careful economic analysis," with "discovery" and even potentially "trial" is needed to determine whether the restraint is unlawful. *Id.* at 8a. While recognizing that "the rule of reason is out of this suit" based on the facts alleged, *id.* at 4a, the Court nonetheless remanded for consideration of whether the *per se* rule may apply. *Id.* at 8a.

This decision gets the analysis backwards. The *per se* rule is limited to a small number of horizontal restraints that, on their face, restrain competition with no redeeming virtues. Here the Seventh Circuit recognized that the alleged no-poach restraints may have both procompetitive and anticompetitive effects. Pet. App. 6a-7a. In antitrust cases, balancing these effects is the very purpose of the rule of reason, the default mode of analysis.

For many reasons, the decision is wrong. Franchise agreements have long been recognized as vertical relationships, even when they may also include horizontal restraints or have horizontal effects. Even where franchise restraints have effects on the purchase of inputs, plaintiffs must still plead and prove market definition and market power so those effects

can be assessed. In short, all roads here lead to the conclusion that the rule of reason applies.

By holding otherwise, the decision misconstrues applicable antitrust law, conflicts with precedent from this Court, and creates a split with other circuits. The Seventh Circuit's decision opens pathways for future plaintiffs to masquerade rule-of-reason claims against franchises as *per se* cases, thus escaping the duty to plead and prove relevant markets and market power. This outcome would impose substantial unwarranted antitrust litigation costs on the nation's franchises, chilling procompetitive behavior.

Application of the *per se* rule here is inappropriate. The IFA supports McDonald's petition for a writ of certiorari.

ARGUMENT

I. Franchising Drives the U.S. Economy and Promotes Interbrand Competition.

Franchising involves a "franchisor, who establishes the brand's trademark or trade name and a business system, and a franchisee, who pays a royalty and often an initial fee for the right to do business under the franchisor's name and system."[2]

This vertical collaboration is popular because the franchisee can leverage the brand recognition, infrastructure, and ongoing support of the franchisor. Franchising allows small business owners to compete and grow with the benefit of an established brand, a

[2] *What is a Franchise?*, INT'L FRANCHISE ASSOCIATION, https://www.franchise.org/faqs/basics/what-is-a-franchise.

proven business model, and a well-resourced infrastructure.[3] The franchisee unlocks "an entire system for operating the business" and may receive "site selection and development support, operating manuals, training, brand standards, quality control, a marketing strategy and business advisory support."[4] In return, the franchisee agrees to adhere to the franchisor's brand-protective standards of quality and service.[5]

These collaborative ventures are flourishing, and indeed are the engine of U.S. job growth. In 2022, there were roughly 792,000 franchise establishments generating over $800 billion in revenue and employing almost 8.5 million people.[6] In 2022, franchising added 246,000 new jobs[7] and 34% of franchises experienced

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[3] *How Franchisees Contribute to Small Business Ownership*, ENTREPRENEUR, May 5, 2022, https://www.entrepreneur.com/franchises/how-franchisees-contribute-to-small-business-ownership/426370.

[4] *What is a Franchise?*, *supra* note 2.

[5] *What is a Franchisee?*, INT'L FRANCHISE ASSOCIATION, https://www.franchise.org/faqs/basics/what-is-a-franchisee.

[6] *See Franchising in the U.S. - statistics & facts*, STATISTA, Dec. 18, 2023, https://www.statista.com/topics/5048/franchising-in-the-us/#topicOverview.

[7] *2023 Franchising Economic Outlook*, INT'L FRANCHISE ASSOCIATION AND FRANDATA, at 5, https://www.franchise.org/sites/default/files/2023-03/2023-Franchising-Economic-Report.pdf.

job growth.[8] For 2023, franchises nationwide were forecasted to add 15,000 franchising units and 254,000 new jobs, with franchise output expanding 4.2%.[9] In short, "[f]ranchising is a bedrock of the American economy." *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 441 (3d Cir. 1997).

In particular, Quick Service Restaurants (QSRs) deploy franchising models with great success. In 2022, there were approximately 192,057 QSR franchise units nationwide.[10] The franchising model is well suited to help QSR brands survive, compete and expand in a crowded interbrand QSR market. The QSR industry is fiercely competitive, with at least 50 major household-name brands competing for customers—and for employees.[11]

Franchises must find, nurture, and retain quality employees in service-focused businesses like QSRs where the customer experience is an inherent dimension of competition. As just one example, Chick-fil-A invests in "remarkably consistent and high-quality

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[8] *Identifying and Addressing Today's Labor Trends: A 2023 Study on Labor Trends in Franchising*, p. 2, INT'L FRANCHISE ASSOCIATION, https://www.franchise.org/sites/default/files/2023-02/2023%20Labor%20Survey%20Draft_V2.7%20%28002%29.pdf.

[9] *2023 Franchising Economic Outlook*, *supra* note 7, at v.

[10] *2023 Franchising Economic Outlook*, *supra* note 7, at vi.

[11] *The 2023 QSR 50: Fast Food's Leading Annual Report*, https://www.qsrmagazine.com/operations/fast-food/the-2023-qsr-50-fast-foods-leading-annual-report/.

customer service" by all its franchisees as a brand differentiator.[12] Intense interbrand competition across franchise brands yields benefits for employees as well as for customers.

Indeed, competition among franchise brands for labor is intense. In 2021, Pizza Hut had 22,000 vacancies, Starbucks had over 18,000 vacancies, and McDonald's had over 12,000 vacancies.[13] In a 2023 survey, 88% of responding QSR franchises "identif[ied] labor challenges as a major growth hurdle in QSRs," and "[t]o attract and retain talent, restaurants are looking to increase employee benefits and other incentives to increase overall job satisfaction."[14]

To address these labor shortages, franchises are increasing wages. In a recent survey, 85% of the franchisors reported store-level wage increases in 2023, and 60% anticipate wage increases in the next six months.[15]

In addition, franchisors often collaborate with their franchisees on recruitment. In 2023, 25% of franchisors said they are addressing labor shortages by supporting their franchisees' retention efforts with tactics

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[12] *How Chick-fil-A Exceeds at Customer Service*, Mindset, B. Hoogeveen, https://gomindset.com/blog/chick-fil-as-secret-sauce/.

[13] Andrew Hunter, *How the Restaurant Industry Is Competing for Talent*, HR Daily Advisory (July 6, 2021), https://hrdailyadvisor.blr.com/2021/07/01/competing-for-talent/.

[14] *2023 Franchising Economic Outlook*, *supra* note 7, at 9-10.

[15] *Id.* at 17.

such as hiring "recruiters to assist franchisees in recruitment," "creating a 'Recruiting Fund' to pool resources for all franchisees," and "giving royalty rebates for hiring of sales staff."[16]

In short, franchising is classic example of a business model that uses *intra*brand restraints to stimulate *inter*brand competition. *See Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54 (1977).

II. Franchise Agreements Should Be Evaluated Under the Rule of Reason.

A. The Rule of Reason is the Default Mode of Analysis in Antitrust Cases.

In antitrust cases, courts "presumptively appl[y] rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006).

The rule of reason requires "a fact-specific assessment of market power and market structure" aimed at assessing the challenged restraint's "actual effect on competition." *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2151 (2021) (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018)). It is a method of evaluating the competitive effects of behavior which "requires the factfinder to weigh 'all of the circumstances,'" including the "specific information about

[16] *Identifying and Addressing Today's Labor Trends*, *supra* note 8, at 20.

the relevant business" and "the restraint's history, nature, and effect[.]" *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (quoting *GTE Sylvania*, 433 U.S. at 49 and *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)).

B. The *Per Se* Rule Is Reserved for a Small Group of Horizontal Restraints that Are Manifestly Anticompetitive.

The *per se* rule is a narrow exception to the rule of reason that treats challenged restraints "as necessarily illegal," thus "eliminat[ing] the need to study the reasonableness of an individual restraint." *Leegin*, 551 U.S. at 886. "Resort to *per se* rules is confined to restraints that would always or almost always tend to restrict competition and decrease output." *Id.* at 881 (citations and quotations omitted). Accordingly, the Court "ha[s] expressed reluctance to adopt *per se* rules . . . where the economic impact of certain practices is not immediately obvious." *Dagher*, 547 U.S. at 5 (citations and quotations omitted).

In practice, the *per se* rule has been reserved for a "small group" of horizontal restraints "imposed by agreement between competitors" such as price-fixing and market allocations. *Ohio*, 138 S. Ct. at 2283 (citing *Bus. Electr. Corp. v. Sharp Electr. Corp.*, 485 U.S. 717, 723 (1988)); *Leegin*, 551 U.S. at 887 ("Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices . . . or to divide markets . . ."); *see also 1-800 Contacts, Inc. v. Fed. Trade Comm'n*, 1 F.4th 102, 115 (2d Cir. 2021) (*per se* "designation is saved for certain types of restraints, *e.g.*, geographic division of markets or horizontal price

fixing, that have been established over time to lack . . . any redeeming virtue." (internal quotation marks and citation omitted)).

A shortcut around the standard rule-of-reason assessment should not be permitted lightly. "Only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason," will the *per se* rule apply. *Leegin*, 551 U.S. at 886-87 (citations omitted); *see also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979).

Indeed, the trend over time has been to narrow rather than expand the categories of restraints subject to the *per se* rule. *See, e.g.*, *Leegin*, 551 U.S. at 907-08 (overruling precedent to hold that the rule of reason should apply to vertical resale price maintenance agreements).

C. Restraints Within Franchise Agreements Have Long Been Assessed Under the Rule of Reason.

Over the last five decades, this Court has consistently held that the rule of reason applies to vertical restraints. *Ohio*, 138 S. Ct. at 2284; *Leegin*, 551 U.S. at 907; *Nynex Corp. v. Discon*, 525 U.S. 128, 130 (1998) ("The *per se* rule is inapplicable here because this case concerns only a vertical agreement and a vertical restraint"); *Khan*, 522 U.S. 3 at 22 (overruling application of *per se* rule to vertical maximum price restrictions); *Bus. Electr.*, 485 U.S. at 735 (holding that nonprice vertical restraints are "not illegal *per se*" and

must be analyzed under the rule of reason); *GTE Sylvania Inc.*, 433 U.S. at 59 (overruling the distinction between "sale" and "nonsale" restraints in concluding vertical nonprice restraints should be analyzed under the rule of reason); *see also 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341-42 (1987) ("Our recent decisions recognize the possibility that a vertical restraint imposed by a single manufacturer or wholesaler may stimulate interbrand competition even as it reduces intrabrand competition").

It is no surprise that the seminal case on applying the rule of reason to vertical restraints arose in the franchise context—a fact highlighted by the Court itself. *GTE Sylvania*, 433 U.S. at 56-57, 57 n.26. Whereas common franchising restraints (like a customer or territorial restriction) are subject to the rule of reason, the same restrictions, if entered among direct competitors, would warrant *per se* condemnation. *See id.* at 58 n.28; *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 720 (11th Cir. 1984) ("territorial restrictions . . . are analyzed under a rule of reason, because they promote interbrand competition by allowing the franchisor or manufacturer to achieve certain efficiencies in the distribution of his goods and services."); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357-58 (9th Cir. 1982).

This Court specifically cautioned against applications of the *per se* rule in the franchise context. *See GTE Sylvania*, 433 U.S. at 57 n. 26 ("We also note that *per se* rules in this area may work to the ultimate detriment of the small businessmen who operate as franchisees."). Circuit courts have similarly warned

against careless application of antitrust rules to franchising. *Queen City Pizza*, 124 F.3d at 441 ("We do not believe the antitrust laws were designed to erect a serious barrier to this form of business organization."); *see also Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1223 (11th Cir. 2002) (collecting cases).

D. Franchise Agreements Should Be Analyzed as Vertical Restraints Even Where They Restrain Some Horizontal Competition Between Franchisors and Franchisees.

This Court has instructed courts to distinguish correctly between "vertical" and "horizontal" restraints before analyzing ancillarity. *Bus. Electr.*, 485 U.S. at 730. The *Deslandes* court characterized a no-poach restriction in a franchise agreement as "horizontal" because "McDonald's operates many restaurants itself or through a subsidiary" and "enforced the no-poach clause at those restaurants," which meant "workers at franchised outlets could not move to corporate outlets, or the reverse." Pet. App. 5a. The *Deslandes* court thus concluded a franchise-specific no-poach provision could be analyzed as a "naked" rather than "ancillary" restraint.

But the challenged no-poach provision was part of McDonald's franchise agreements—which are vertical agreements between a franchisor and its franchisees. *See GTE Sylvania*, 433 U.S. at 54-55, 57 n.26. Accordingly, the challenged provision must be analyzed as a vertical restraint subject to the rule of reason. *See Bus. Electr.*, 485 U.S. at 725, 735; *Leegin*, 551 U.S. at 881-882, *Ohio*, 138 S. Ct. at 2284.

The fact that a franchisor sells products through wholly-owned outlets in competition with its franchisees does not transform the vertical relationship into a horizontal one. Hybrid dual distribution arrangements, including in the franchising context, are commonplace. All other circuits that have considered the issue agree that an agreement between a supplier and its distributors must be evaluated under the rule of reason even where horizontal competition from dual distribution is also possible. *See PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 421 n.8 (5th Cir. 2010); *AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 531 (3d Cir. 2006); *Electronics Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 243-44 (2d Cir. 1997); *Smalley & Co. v. Emerson & Cuming, Inc.*, 13 F.3d 366, 368 (10th Cir. 1993); *Hampton Audio Elecs., Inc. v. Contel Cellular, Inc.*, 966 F.2d 1442 (4th Cir. 1992) (unpublished); *Int'l Logistics Group, Ltd. v. Chrysler Corp.*, 884 F.2d 904, 906 (6th Cir. 1989); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1230-31 (8th Cir. 1987); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1481 (9th Cir. 1986); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15, 16 (4th Cir. 1981); *see also* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 1600c2. (CCH) (noting that dual-distribution "restraints are generally tested by the rules governing ordinary vertical restraints").

Similarly, "a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement." *Bus. Electr.*, 485 U.S. at 730 n.4. Even if it may have some horizontal effects, a

franchise agreement is inherently a vertical "agreement between firms at different levels of distribution" that warrants rule-of-reason evaluation. *Id.* at 730.

E. Antitrust Challenges to Vertical Input Restraints Require Allegations of Market Power.

The Seventh Circuit focused on alleged effects in an upstream input "market" for the "purchase" of labor. It held that the no-poach provision may not be "ancillary" to the franchise agreement because "it treats benefits to consumers (increased output) as justifying detriments to workers (monopsony pricing)." *Id.* at 5. Yet it also acknowledged that market power allegations were absent here. Pet. App. 3a-4a. Again, this conclusion was error.

Market definition and market power allegations are prerequisites for challenging a vertical restraint. Vertical restraints "often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 n.7 (2018).

Indeed, the *Deslandes* court's admission that "the mobility of workers . . . makes it impossible to treat employees at a single chain as a market" highlights this problem: "monopsony pricing" is similarly "impossible" absent market power. *See, e.g.*, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007) ("Monopsony power is market power on the buy side of the market.").

Courts therefore require market definition and market power allegations in challenges to franchise input restrictions. In *Queen City Pizza*, the court declined to define a single brand market around the franchisor because doing so would cause "virtually all franchise tying agreements requiring the franchisee to purchase inputs such as ingredients and supplies" to violate antitrust law. 124 F.3d at 441.

Other courts have agreed with the Third Circuit that franchise input restrictions cannot be assumed to confer market power upon franchisors. *See, e.g. United Farmers Agents Ass'n v. Farmers Ins. Exchange*, 89 F.3d 233 (5th Cir. 1996) (refusing to infer market power from a standalone contractual requirement that agents purchase computers from defendants to access insurance policy data); *Maris Distrib.*, 302 F.3d at 1223 (refusing to infer market power from a capital restriction that barred a beer distributorship from selling equity interests to the public).

Courts therefore apply the rule of reason when analyzing franchise input restraints. *See, e.g., Ajir v. Exxon Corp.*, 185 F.3d 865 (9th Cir. 1999) (Exxon's requirement that its franchisee distributors must buy Exxon gasoline directly from Exxon was properly evaluated under the rule of reason because it was a vertical arrangement, even though Exxon competed in the horizontal market for the sale of gasoline); *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1577 (11th Cir. 1991) (agreement between food distributor and seafood restaurant franchisor not to source from a supplier of cod was properly evaluated under the rule of reason and did not harm competition).

This error has broad impact. Franchisor restraints on franchisees' input purchases (like supplies, uniforms, fixtures, signage and the like) are commonplace and central to an efficient franchise model. The rationale of this holding could expose them to *per se* challenge even where market power allegations are absent.

Condemning conduct as *per se* illegal when it could have reasonable procompetitive justifications, particularly in a context where market power is not apparent, would have chilling effects on beneficial economic behavior. *Leegin*, 551 U.S. at 894 (*per se* rule is inappropriate if it "would proscribe a significant amount of procompetitive conduct").

F. Experience With No-Poach Restraints Suggests They Cannot Be Condemned as *Per Se* Unlawful Without Assessment of Their Effects.

The courts' experience with no-poach restraints shows that they frequently serve to support procompetitive ends. Recognition of these potential benefits justifies applying the rule of reason.

Employment restraints ancillary to procompetitive collaborations are commonplace and can enhance a venture. Employment restraints are "at least potentially reasonably ancillary to joint, efficiency-creating economic activities." *Phillips v. Vandygriff*, 711 F.2d 1217, 1229 (5th Cir. 1983); *cf. Eichorn v. AT&T Corp.*, 248 F.3d 131, 146-47 (3d Cir. 2001) ("As an ancillary covenant not to compete, the no hire agreement was reasonable in its restrictions on the plaintiffs' ability to seek employment elsewhere.").

For example, an ancillary restraint on poaching may prevent one venture participant from free riding on the recruiting and training investments of another. *See Rothery Storage*, 792 F.2d at 224 (finding "the challenged agreements are ancillary in that they enhance the efficiency of that union by eliminating the problem of the free ride."). This efficiency-enhancing justification would demand rule-of-reason treatment.

The Seventh Circuit's decision has deepened a circuit split on whether the *per se* rule could apply instead. Courts in the Second, Third, Fifth, Sixth and Ninth Circuits have properly declined to evaluate no-poach clauses under the *per se* rule when they are part of broader collaborations, confirming at least that there is no consensus that such restraints are always or almost always anticompetitive. *See Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102 (9th Cir. 2021) (employee non-solicitation agreement imposed by a joint venture providing travelling nursing services was ancillary to the collaboration); *Eichorn v. AT&T Corp.*, 248 F.3d 131, 140 (3d Cir. 2001) ("no-hire agreement did not have a significant anti-competitive effect on the plaintiffs' ability to seek employment."); *Bogan v. Hodgkins*, 166 F.3d 509, 511, 515 (2d Cir. 1999) (agreement "not to recruit and hire each other's" sales agents did "not trigger *per se* treatment"); *Phillips v. Vandygriff*, 711 F.2d 1217, 1227, 1229 (5th Cir. 1983) ("agreement among savings and loan associations in Texas not to hire anyone as a managing officer without [the Commissioner's] permission" was "not a *per se* violation"); *Coleman v. Gen. Elec. Co.*, 643 F. Supp. 1229, 1243 (E.D. Tenn. 1986), *aff'd*, 822 F.2d

59 (6th Cir. 1987) (*per se* rule "wholly inapplicable" to a no-hire agreement).

Effects of these clauses are not self-evident. As one illustration, an empirical economic study concluded that "there is no evidence that the elimination of no-poaching clauses has had a statistically significant positive effect on wages of quick service restaurant workers." Daniel S. Levy, et al., *No-Poaching Clauses, Job Concentration and Wages: A Natural Experiment Generated by a State Attorney General*, ADVANCED ANALYTICAL CONSULTING GROUP, INC. 3, 30 (Jan. 23, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3524700. Among other possibilities for the result, the paper considered that "wage effects of no-poaching clauses within franchised quick service restaurants are simply countered by the large number of job opportunities that workers have across the broader labor market . . . perhaps in independent quick service restaurants, other restaurants, or other industries." *Id.*

Other studies of course may offer different perspectives on competitive impact. But that is the point. Economic effects of such clauses must be assessed on the facts under the rule of reason, not conclusively presumed.

At minimum, past experience does not "enable[] the Court to predict with confidence that the rule of reason will condemn" no-poach clauses sufficiently to warrant "a conclusive presumption that the restraint is unreasonable." *See FTC v. Superior Court Trial*

Lawyers Ass'n, 493 U.S. 411, 433 (1990) (quoting *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 344 (1982)).

G. The Seventh Circuit's Decision Acknowledged That "Economic Effects" of the Restraint Are Uncertain, Requiring Rule-of-Reason Application.

The *Deslandes* court found that evaluation of McDonald's no-poach clauses requires a "careful economic analysis," and provided alternative factual scenarios in which such a clause could "in principle justify restraints" or in contrast "could be understood as an antitrust problem." Pet App. 6a-7a.

For example, the court suggested that the scope of the no-poach restraint needs to be tailored in a reasonable manner to the costs of employee training or other benefits to allow a franchisee to recoup "training costs through lower wages" and "prevent some outlets from free riding on the contributions of others." *Id.* at 6a-7a.

This discourse describes a customary, fact-intensive rule-of-reason inquiry. If such clauses on their face could be economically justified under certain circumstances, the rule of reason must apply. The *per se* rule's application depends entirely on "whether the practice *facially* appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 19-20 (1979) (emphasis added). The *per se* rule is only "invoked when surrounding circumstances make the likelihood

of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 103–104 (1984).

Here, such further examination—as part of a "careful economic analysis"—is exactly what the court below prescribes. *Id.* at 8a. The applicable standard of review here is the rule of reason.

III. The Seventh Circuit's Decision Could Open Antitrust Litigation Floodgates for Franchises Far Beyond No-Poach Cases.

Certiorari is appropriate because the court's error may have repercussions far beyond this case. Antitrust litigation is notoriously resource-intensive, with "famously burdensome discovery." *FTC v. Actavis, Inc.*, 570 U.S. 136, 176-77 (2013) (Roberts, C.J., dissenting). This Court has recognized that "proceeding to antitrust discovery can be expensive" and "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007).

In *Twombly*, this Court made clear that courts have an important gatekeeper function under Rule 12 to dismiss antitrust complaints with deficient allegations. 550 U.S. at 556-57, 570. Under the rule of reason, plaintiffs must allege a relevant product and geographic market, market power, and anticompetitive effects. *See Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2155 (2021). Failure warrants Rule 12 dismissal before costly litigation can advance.

Thus, the mode of analysis is meaningful even at the pleadings stage.

The Seventh Circuit acknowledged that the apparent relevant market—"workers at McDonald's"—and market power were alleged only in a cursory way that was facially "not sound." Pet. App. 3a. The same deficiency was found in *Queen City Pizza* where plaintiffs defined a market specific to a single franchise brand—"Domino's-approved ingredients and supplies used by Domino's Pizza franchisees." 124 F.3d 430, 435 (3d Cir. 1997). The court there acknowledged that a single brand cannot constitute a relevant market unless it "is unique, and therefore not interchangeable with other products." *Id.* at 439; *see also Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 219 (D.C. Cir. 1986) (rejecting single-brand market).

But the Seventh Circuit here *did* find interchangeability, noting that "[p]eople who work at McDonald's one week can work at Wendy's the next, and the reverse," that "[p]eople entering the labor market can choose where to go—and fast-food restaurants are only one of many options," and "[i]f wages are too low at one chain, people can choose other employers." Pet. App. 3a. In other words, there is no alleged relevant market or market power here suggesting this single franchise's no-poach restraint can harm competition. The court properly recognized that—were the rule of reason to apply—plaintiffs' deficient allegations would have warranted dismissal. *Id.*

This part of the decision highlights its significance to franchises far beyond "no-poach" antitrust claims. Its logic might apply to any restraint on inputs to a

successful franchise (*e.g.*, limitations and exclusivity requirements for purchase of supplies, ingredients, fixtures, IT platforms, vendors, furnishings, signage, uniforms, etc.). Future plaintiffs may cite it to challenge any restraint within a franchise agreement as *per se* unlawful, as long as the restraint has a horizontal component attributable to competition between the franchisor and franchisee. They could sidestep obligations to plead a full rule-of-reason claim that otherwise may not withstand Rule 12 scrutiny. It is no exaggeration to say this litigation exposure could place the franchising industry under siege.

It would also have a chilling effect on the use of any intrabrand restraint that propels successful output expansion against rival franchises. This holding could cause overdeterrence and chill procompetitive behavior. *See Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 394 (7th Cir. 1993) ("overdeterrence" risks "imposing ruinous costs on antitrust defendants, severely burdening the judicial system and possibly chilling economically efficient competitive behavior").

Proper application of the rule of reason would limit litigation to only claims where plaintiffs allege harm to competition in a plausible relevant market with market power. Courts can and should identify whether a complaint pleads a *per se* claim on its face without the need for "careful economic analysis," "discovery," and even perhaps "trial." *Id.* at 8a.

CONCLUSION

For these reasons, the IFA urges this Court to grant McDonald's petition for a writ of certiorari.

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