No. _____

In The
Supreme Court of the United States

STEPHEN IRELAND M.D.
Petitioner

v.

BEND NEUROLOGICAL ASSOCIATES LLC, *et al.*
Respondents

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case centers on petitioner's claim that defendants violated § 1 of the Sherman Act by forming a conspiracy among multiple, independent neurology practices that drove a competing neurologist, Petitioner/Plaintiff Stephen Ireland, M.D. ("Ireland"), and his clinic, Neurology of Bend ("NOB") from the Bend, Oregon neurology market, decreasing the output of neurologic services and injuring competition and patient welfare by reducing or eliminating access to neurologic care in that market.

The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision to grant summary judgment to defendants on Ireland's antitrust claim. The court held that Ireland failed to raise a genuine dispute as to whether the defendants intended to unreasonably restrain trade or as to whether their conduct caused actual injury to competition. App. A at 2a.

In a civil antitrust case, *U.S. v. Diebold, Inc.*, 369 U.S. 654 (1962) (per curiam), and in *Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam) this Court summarily reversed summary judgment because the lower courts failed properly to acknowledge the plaintiffs' evidence.

The question presented is:

Whether the Ninth Circuit's decision, by failing properly to acknowledge the evidence Ireland presented, has so far departed from the proper application of the summary judgment standard that this Court should intervene and summarily reverse the decision to prevent it from undermining the fundamental objectives of antitrust law.

LIST OF PARTIES

Petitioner:

- Stephen Ireland M.D.

Respondents:

- Bend Neurological Associates LLC, an Oregon Limited Liability Company
- Bend Memorial Clinic, P.C., an Oregon Professional Corporation
- Michael Bell M.D., P.C., an Oregon Professional Corporation
- Michael Bell M.D., an Individual
- David T Schloesser M.D., P.C., An Oregon Professional Corporation
- David Schloesser M.D., an Individual
- Laura J Schaben M.D., P.C., an Oregon Professional Corporation
- Laura Schaben M.D., an Individual
- Francena Abendroth M.D., an Individual
- Craigan Griffin M.D., an Individual
- Gary Buchholz M.D., an Individual
- Gary D Buchholz M.D., P.C., an Oregon professional corporation

LIST OF PROCEEDINGS

United States Court of Appeals, Ninth Circuit

No. 21-35337

Stephen Ireland, M.D., *Plaintiff-Appellant*, v. Bend Neurological Associates, et al., *Defendants-Appellees.*

Final Opinion: April 5, 2023

Rehearing Denied: July 19, 2023

United States District Court, District of Oregon

No. 16-cv-02054

Stephen Ireland, M.D., *Plaintiff*, v. Bend Neurological Associates, et al., *Defendants*

Final Order: July 19, 2021

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The memorandum and judgment of the court of appeals were entered on April 5, 2023. *Ireland v. Bend Neurological Associates, LLC*, 2023 WL 2783240, (C.A.9 (Or.), 2023) (App. A at 1a)

The opinion, order, and judgment of the district court were entered on March 31, 2021. *Ireland v. Bend Neurological Associates, LLC*, 2021 WL 1229937, 2021, (D.Or., 2021) (App. B at 3a)

JURISDICTION

A timely petition for rehearing was denied on July 19, 2023 (App. C at 19a). Justice Kagan granted an extension to file through December 16, 2023, which landing on the weekend, extends to December 18, 2023. Sup. Ct. No. 23A289. The jurisdiction of the U.S. Supreme Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY REGULATIONS INVOLVED

Pertinent provisions of the Sherman Antitrust Act, 15 U.S.C. § 1; The Clayton Antitrust Act, 15 U.S.C. § 15; 15 U.S.C. § 22; 28 U.S.C. § 1131; 28 U.S.C. § 1137; 28 U.S.C. § 1367; 28 U.S.C. § 1254(1); 42 U.S.C. § 1395nn.(b)(2); and 45 C.F.R. § 60.12 are reproduced in the appendix to the petition. (App. D at 20a; App. E at 25a).

STATEMENT OF THE CASE

I. Factual Background[1]

Ireland is a neurologist who practiced at Neurology of Bend ("NOB") in Bend, Oregon, from 1992 until August 2015. App. Q at 130a ¶ 4.

Defendants Bell, Schaben, and Schloesser are neurologists who practiced at Bend Neurological Associates ("BNA"). App. Y at 155a. Defendants Abendroth and Griffin are neurologists who practiced at Bend Memorial Clinic ("BMC"). *Id.* Defendant Buchholz is a neurologist who left his Bend solo practice and joined BMC in April 2014. App. L at 111a [2-ER-198:22–200:1]. Ireland and defendants held privileges at St. Charles Medical Center-Bend ("SCMC-Bend"), the only hospital in Central Oregon with neurologists on its medical staff. App. Q at 130a ¶ 5; App. K at 105a [2-ER-135:2–12].

SCMC-Bend rules and regulations required physicians to provide "round the clock" coverage for their patients. App. R at 135a § 5 a. If called for an urgent medical problem, physicians were required to "physically attend the patient at the bedside within forty (40) minutes." App. R at 135a § 5 b. The rules provided that "[r]epeated failure of the active medical staff member to provide adequate and timely coverage of patients *shall* result in loss of hospital privileges." App. R at 135a § 5 c (emphasis added). To lessen the burden of "call," for many years, Ireland and defendants shared call coverage responsibility. App. K at 105a [2-ER-141:15–21].

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[1] Ireland incorporates by reference the factual background in his opening brief. App. F at 43a–52a.

In June 2013, defendants jointly sent two letters to Ireland, announcing their decision to terminate the existing call-sharing arrangement with him.[2] App. BB at 161a–162a. Defendants made clear that their refusal to share call extended not only to Ireland, but also his clinic, NOB, and therefore to any practitioner hired by Ireland's practice. *Id.* Defendants' refusal to share call comprised all neurologists on the SCMC-Bend medical staff capable of sharing call with Ireland.[3] App. K at 107a–108a [2-ER-164:25–165:9]; App. Y at 155a–156a.

As a result, beginning July 2013, Ireland was forced to provide continuous, 24-7-365, call coverage for his patients. App. R at 135a, § 5 a. Practically, such coverage is impossible for any single provider to maintain over the long run due to sick days, travel for continuing education, and other obligations. Sooner or later, that provider will be unable to make it to the hospital in time, thus jeopardizing his medical staff privileges and entire career.[4]

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[2] Defendant Buchholz did not sign the letters but testified that he agreed to join defendants in terminating their call-coverage arrangement with Ireland. App. L at 112a [2-ER-206:18–207:11].

[3] When neurologists, Drs. Gregory Ferenz and Steven Goins, moved to Bend and began working at BMC, defendants made sure that they participated in the concerted refusal to share call. App. O at 123a [3-ER-462:1–10]; App. K at 108a [2-ER-165:18–166:10]; App. Y at 155a–156a; App. X at 154a.

[4] Hospitals are required to report the loss or restriction of medical staff privileges to the National Practitioner Data Bank and the state medical board. 45 CFR § 60.12 (App. E 25a–29a). Physicians are required to report adverse actions on clinical

Faced with this eventuality, in the summer of 2015, Ireland was forced to close NOB and relocate to a practice in Idaho where he has shared call coverage. App. Q at 132a ¶ 17. After Ireland's departure, the number of neurologists practicing in the Bend neurology market decreased from seven to six and the number of neurology clinics decreased from three to two. App. N at 120a [3-ER-418:6–11, 418:21–419:2]; App. AA at 159a–160a.

By November 2016, a little over a year after Ireland closed his practice, the demand for neurology services in the Bend market far outstripped the supply, causing BNA to refuse to see large numbers of patients referred to their clinic and BMC to close its practice to new patients. App. CC at 163a; App. O at 125a [3-ER-514:6–8]; App. M at 116a [3-ER-298:11–24]; App. DD at 171a ¶ 5.

II. Procedural Background

Ireland filed the underlying action in October 2016, alleging violations of the Sherman Act and intentional interference with economic relations ("IIER"). App. FF at 174a–209a.

The district court had jurisdiction for the Sherman Act claim under 15 U.S.C. §§ 15 (App. D at 20a) and 22 (App. D at 21a) and 28 U.S.C. §§ 1131 (App. D at 21a) and 1137 (App. D at 21a). It had jurisdiction for the IIER claim under 28 U.S.C. § 1367 (App D at 22a).

The district court granted defendants' motions to dismiss. *Ireland v. Bend Neurological Assocs., LLC, et*

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privileges when they apply for or renew hospital privileges, state medical licenses, contracts with health insurance plans, and employment. App. S at 136a–146a.

al 2017 WL 3401268. On appeal Ninth Circuit upheld the dismissal of a per se violation of the Sherman Act, but reversed and remanded on Ireland's "rule of reason" Sherman Act claim, as well as his claim for IIER. *Ireland v. Bend Neurological Assocs., LLC*, 748 F. App'x 166, 167-68 (9th Cir. 2019).

On remand, the parties filed cross motions for summary judgment. App. B at p. 8a. The district court granted summary judgment to defendants after concluding that Ireland failed to demonstrate a prima facie violation of section one of the Sherman Act. 2021. Specifically, the court ruled that Ireland presented no evidence that defendants' conspiracy "was motivated by a desire to curtail competition." App. B at p. 11a. In a footnote, the district court also asserted that Ireland "failed to establish an actual injury to competition." *Id.* The district court further held that, even if Ireland established that defendants conduct harmed the market, his claim would fail under the mandatory balancing test because defendants' allegation, that they acted to "maintain the quality of patient care," established that "any anticompetitive harm [was] offset by . . . procompetitive effects." App. B at p. 14a. The district court granted summary judgment of Ireland's IIER claim based on its assertion that "the record reflects no direct evidence that defendants acted with improper purpose." App. B at 16a.

In a memorandum decision made without the benefit of oral argument, the court of appeals affirmed the district court's grant of summary judgment of Ireland's § 1 claim. It held, without providing additional explanation or factual summary, that: "[t]he district court properly granted summary judgment for defendants on Ireland's 'rule of reason'

Sherman Act claim because Ireland failed to raise a genuine dispute of material fact as to whether defendants either intended to harm or unreasonably restrain competition or as to whether defendants actually caused an injury to competition." App. A at 2a. The court of appeals also held that the district court properly granted summary judgment for defendants on Ireland's IIER claim because Ireland "failed to raise a genuine dispute of material fact as to whether defendants intentionally interfered with a professional or business relationship through improper means or for an improper purpose." *Id.*

REASONS FOR GRANTING THE PETITION AND SUMMARILY REVERSING THE COURT OF APPEALS' DECISION

I. Introduction

The Supreme Court has a critical role in providing guidance and ensuring uniformity in the application of the summary judgment standard. When a lower court misapplies the summary judgment standard in an antitrust case, it risks subverting the fundamental goal of antitrust enforcement — "preserving free and unfettered competition as the rule of trade." *Northern Pacific R. Co. v. United States,* 356 U.S. 1, 4 (1958).

In *U.S. v. Diebold, Inc.*, a civil antitrust case, this Court summarily reversed the lower court's grant of summary judgment because the lower court failed to view the "underlying facts . . . in the light most favorable to the party opposing the motion." 369 U.S. 654, 655 (1962) (per curiam).

In *Tolan v. Cotton*, this Court summarily reversed summary judgment because "the lower court failed

properly to acknowledge key evidence offered by the party opposing that motion." The Court explained that "while this Court is not equipped to correct every perceived error coming from the lower federal courts, we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents." 572 U.S. 650, 659 (2014) (per curiam) (internal quotation marks and citations omitted). The Court held that "the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor'" (*Tolan*, 572 U.S. at 651 (2014) (per curiam) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

Although *Tolan*, addressed issues related to qualified immunity, the Court pointed out that the rule that "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment. . . . is not a rule specific to qualified immunity; it is simply an application of the more general rule that a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan*, 572 U.S. at 656–57 (quoting *Anderson*, 477 U.S. at 249).

This Court has repeatedly held that "in a civil action under the Sherman Act, liability may be established by proof of *either* an unlawful purpose or an anticompetitive effect." *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 243 (1980) (emphasis in the original); *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978);

Summit Health Ltd. v. Pinhas, 500 US 322, 330 (1991).

Ireland presented evidence that not only raises a genuine dispute about these material facts, but convincingly proves both. This evidence includes unambiguous admissions of an intent to restrain competition and of injury to competition and patient welfare taken directly from defendants' emails and deposition testimony. *Infra.* Based on this evidence, it is hard to imagine that a reasonable jury would not return a verdict in Ireland's favor on both of these issues. *See Anderson*, 477 U.S. at 248 (explaining that a dispute of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.")

To maintain the integrity and effectiveness of antitrust law, it is imperative that lower courts rigorously apply established legal standards and conduct thorough examinations of the evidence before rendering decisions.

The lower courts' failure properly to acknowledge and assess the evidence presented in this case undermines the fundamental principles of fairness and due process upon which our legal system is built. It also allows for the potential erosion of antitrust law enforcement, as it opens the door to questionable practices and adverse consequences that contravene the broader goals of preservation of competition and market fairness.

By affirming the district court's grant summary judgment without appropriate scrutiny, the court of appeals sanctions a process that can discourage future litigants from pursuing antitrust claims, weakening the ability to hold anticompetitive behavior account-

able. This would not only have repercussions for individual litigants but also impede the public interest in maintaining fair and competitive markets.

In light of these concerns, it is imperative that the Court summarily reverse the court of appeals' decision, as doing so would not only rectify the injustice faced by the petitioner but also send a clear and necessary message about the importance of upholding the standards of summary judgment in antitrust law enforcement.

II. The Evidence Establishes That There Is a Genuine Dispute of Material Fact as to Whether Defendants Intended to Harm or Restrain Competition.[5]

A. The background — BNA orchestrated the concerted refusal to share call when they were faced with financial stress and needed to eliminate competition for patient referrals and neurologists to join their clinic.

In March 2013, BNA moved their practice to a new office building with room for two additional neurologists and an MRI suite that housed a new MRI. App. N at 117a–118a [3-ER-355:12–18]. As a result, BNA acquired $3,362,362.32 of debt, over $1,120,000.00 for each neurologist. App. W at 153a; App. O at 123a-124a [3-ER-470:21–471:6]. Defendant Bell testified that, at the same time, the Centers for Medicare and Medicaid Services ("CMS") drastically reduced reimbursement

[5] Ireland incorporates by reference the facts and arguments related to defendants' intent to restrain competition presented in his opening brief. App. F at 62a–73a.

for MRI procedures by "roughly three fold,". App. O at 124a [3-ER-472:13–17]. On May 2, 2013, Schaben complained that her check was "pretty puny" and that the overhead was high. App. V at 151a.

BNA operated their MRI under the in-office ancillary services exception to "Stark" law. App. N at 118a [3-ER-364:18–21]. This meant that BNA's MRI could only accept referrals from the three neurologists practicing at BNA. 42 U.S.C. § 1395nn.(b)(2) (App. D 22a–24a). The small number of providers who could refer to BNA's MRI under this exception accentuated the adverse financial effects of CMS's payment cuts.

Schaben testified that recruiting more neurologists would increase referrals to BNA's MRI and reduce their substantial overhead. App. K at 109a [2-ER-172:13–22]. Bell testified: "In a high overhead practice . . . with an MRI, definitely it's tough to float without a large number of MRI's." App. O at 124a [3-ER-475:15–17].

At the time BNA moved into their new office building and MRI facility, Ireland, BMC, and BNA were all recruiting neurologists to join their clinics. App. Q at 134a ¶ 69; App. GG at 210a [FER-112:15-113:5]; App. N at 117a [3-ER-350:8–18], 119a [3-ER-391:5–7]; App. Q at 131a, ¶ 13; App. EE at 173a. Ireland's attempts to recruit competed with BNA's.

It was in this setting that BNA enlisted BMC and Buchholz in a coordinated refusal to continue to share call with Ireland and his clinic. App. K at 107a [2-ER-161:4–10]; App. O at 125a [3-ER- 500:7–10]; App. L at 113a [2-ER-246:8–13].

B. Schloesser testified that he sought BMC's cooperation in a coordinated refusal to

share call to interfere with Ireland's ability to recruit neurologists for NOB.

On March 13, 2013, in the first document that mentions the boycott, Schloesser sent an email to his BNA partners suggesting that they enlist BMC neurologists in a coordinated refusal to share call with Ireland, stating he saw "no reason to support and even encourage [Ireland's] practice *in the event that he recruits*."[6] App. N at 118a [3-ER-381: 3–6] (emphasis added). The only "support" defendants provided Ireland was sharing call. *Id* [3-ER-381:14-17].

At deposition, Schloesser admitted that he intended to enlist the cooperation of the BMC neurologists to interfere with Ireland's ability to recruit neurologists for NOB. App. N at 118a–119a [3-ER-385:2–386:20].

This admission establishes that defendants intended to restrain trade, rendering the Ninth Circuit's decision to affirm summary judgment inappropriate. *McLain*, 444 U.S. 232, 243 (1980).

C. Defendants extended their coordinated group boycott to NOB, as well as Ireland personally, to hinder his ability to recruit other neurologists.

Both letters defendants sent to Ireland announcing their boycott explicitly stated that they would refuse to share call with Ireland's clinic, NOB, as well as

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[6] Schloesser's statement clearly indicates that, at the outset, BNA's plans for a concerted refusal to share call was a coordinated group boycott — a concerted refusal to deal that has a goal beyond simply refusing to cooperate.

Ireland personally. App. BB at 161a-162a. Schaben testified that defendants intended to refuse to share call with any neurologist Ireland recruited. App. K at 109a [2-ER-175:15–20].

The explicit inclusion of Ireland's clinic meant that any neurologist who joined NOB would share call with just one other neurologist, Ireland, rather than a minimum of six other neurologists if they joined one of defendants' clinics. App. AA at 159a–160a. Griffin admitted that "call burden is definitely a factor . . . [that] would influence" his decision to join a neurology practice. App. M at 116a [3-ER-323:20–22]. Defendants' coordinated conduct placed Ireland at a significant disadvantage in competing for recruits.[7]

By including NOB in their boycott, defendants eliminated competition from NOB for neurologists to join their clinics. They also eliminated competition for patient referrals to their clinics from the neurologists NOB would have otherwise recruited and took away Ireland's only chance for obtaining call coverage, furthering their goal of eliminating Ireland and NOB from the market.

D. Correspondence demonstrates that defendants sought to eliminate Ireland and his clinic, NOB, from the market, not just from their shared call arrangement.

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[7] In early 2013, Ireland and Dr. Gregory Ferenz exchanged emails about the possibility of Ferenz joining NOB. App. GG at 210a [FER-112:15-113:5]. Ireland realized that, because of the recruiting disadvantages he faced after defendants explicitly targeted his clinic, further attempts to recruit Ferenz would be futile. Ferenz ended up joining BMC in the summer of 2013. App. AA at 159a.

Ireland reached out to Schloesser to discuss a possible settlement. App. U at 150a. Schloesser shared this information with Schaben, who responded: "hopefully the end is near--for [Ireland's] practice in Bend at least." App. U at 149. When Schloesser informed Schaben that it appeared Ireland intended to continue to practice in Bend, Schaben responded: "Oh, that sucks." *Id.*

Schaben's comments clearly indicate an intention to drive Ireland and NOB from the market. These comments, alone, are sufficient to raise a genuine issue as to intent, making summary judgment of Ireland's § 1 claim inappropriate. *See Beltz Travel Serv. v. Int'l Air Trans. Ass'n,* 620 F.2d 1360, 1367 (9th Cir. 1980) ("[T]he action of any of the conspirators to restrain or monopolize trade is, in law, the action of all.") (internal quotation marks and citations omitted).

E. Defendants researched the consequences their conduct held for Ireland and knew that it would likely force him from the market.

Griffin testified that "when we talked with the hospital they clarified that . . . you would need to continue to provide coverage for your assigned patients . . . 24- hours seven-day-a-week." App. M at 115a [3-ER-264:23–265:7]. Griffin admits that "being on call 24/7 would not be conducive to a good quality of life as a physician." App. M at 116a [3-ER-331:13–14]. He testified that if he were in a similar situation to Ireland, he "would find a new job in another location where [he] had the support that [he] needed." App. M at 116a [3-ER-325:14–18].

This testimony clearly reveals that Griffin understood that defendants' boycott would likely force Ireland from the market, meeting not only the civil standard but also the criminal standard for intent. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978) ("[T]he perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent.")

This is another undisputed fact that renders summary judgment inappropriate.

F. Deposition testimony establishes that BNA coerced BMC and Buchholz into joining the boycott; Abendroth testified that this was the reason she joined the boycott.

Abendroth testified that BNA told BMC that, if BMC continued to share call with Ireland, BNA would terminate its call-sharing arrangement with them: App. J at 103a–104a [2-ER-103:13–23].

Abendroth testified that the reason she joined the boycott was that, if she had not, she would have more days on call:

> Q. [Ireland] So, if you had any reason of any kind to stop sharing call with me, why did you combine with the other neurology practice?
>
> A. [Abendroth] So, it was a situation in which there were several options for call coverage sharing, and I had to consider which options would be best for myself, my family, and my practice, and the options were . . . Griffin and I doing call on our own or doing call on our own and with you, or doing call with the other clinic

> ourselves without sharing call with you. App. J at 103a [2-ER-99:11–24].

While the increased call burden that Abendroth would have faced, had she continued to share call with Ireland and BNA had made good on its threat, was not nearly as substantial as the increased call burden Ireland experienced due to the defendants' boycott, it was nevertheless sufficient to ensure her cooperation. This fact underscores the importance of shared call coverage for neurologists practicing in Bend.

Defendant Buchholz, when asked during his deposition why he couldn't have continued to share call with Ireland as well as BNA and BMC, replied: "Could I have? Presumably. . . . Unless the group said that if I covered your patients, I wouldn't be part of their group" App. L at 113a [2-ER-210:12–21].[8]

G. The fact that Defendants conspired provides evidence of an intent to restrain trade.

In *American Tobacco Co. v. U.S.*, this Court held that "[w]here the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy." 328 U.S. 781, 809 (1946). *See Oltz v. St. Peter's Cmty. Hosp.*, 861 F2d 1440, 1449 (9th Cir 1988) (evidence of a conspiracy among Oltz'

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[8] The fact that BMC and Abendroth were coerced into joining the conspiracy does not relieve them of liability. *See United States v. Paramount Pictures*, 334 U.S. 131, 161 (1948) ("[A]cquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.")

direct competitors was held to "furnish the necessary intent for a section one claim.")

In determining whether defendants conspired "[t]he crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (internal citations and quotation marks omitted).

Direct evidence proves that defendants' combined conduct stemmed from an agreement. This evidence includes: correspondence defendants sent Ireland announcing their intention to combine to refuse to share call, defendant emails documenting their conspiracy, and deposition testimony in which defendants explicitly admit to the conspiracy. App. BB at 161a–162a; App. Y at 155a–156a; App. L at 112a [2-ER-206:18–207:11]; App. K at 105a–106a [2-ER-146:5–10]. Neither the district court nor the court of appeals dispute that Ireland presented evidence that established that defendants conspired.

Nonetheless, defendants assert that they did not conspire because their "independent decisions resulted in a mutual agreement." App. JJ at 217a. Even if true, this assertion is nothing more than an admission that their conduct stemmed from an agreement. But BMC's and Buchholz' decisions cannot be genuinely characterized as "independent" when they were coerced to join the conspiracy. *Supra.*

If BNA had a legitimate reason to stop sharing call with Ireland, they could have done so independently. But BNA realized that only by combining all the neurologists capable of sharing call in a concerted refusal to share call with Ireland, and extending that refusal to his clinic, could they be sure that their

conspiracy would have enough market power over shared call coverage to drive Ireland's clinic out of business — market power that they did not possess before they coerced the other defendants to join their coordinated group boycott.

H. BNA ordered Dr. Steven Goins, a neurologist who joined BMC after the boycott began, not to share call with Ireland.

When Goins began practicing at BMC, Bell, a BNA neurologist, sent Goins an email instructing him: "Steve, please note when Dr. Ireland is on call the BNA/BMC doc in parentheses covers both our clinics while Dr. Ireland covers his own and E.R./unassigned. We do not cover his clinic ever." App. X at 154a.

Bell's clear intention was to deprive Ireland of any possibility of shared call coverage, even to the point of ordering a newly arrived competitor that he was not to cover Ireland's patients "ever."

I. Defendants threatened to report Ireland to the hospital administration to pressure Ireland to resign his hospital privileges.

Ireland asked defendants whether they would cover his patients in the "rare instances" when he needed to leave town. App. Z at 157a–158a. Schloesser drafted an email response, refusing Ireland's request and indicating that defendants would "notify the administration if [Ireland were] unavailable." App. T at 147a–148a. The draft email closed with the following sentence: "If you choose to resign your hospital privileges, this is one way to avoid your

obligations."[9] App. T at148a. Schloesser circulated the draft email to Bell, who responded that he "would omit" the last sentence. App.T at 147a.

Abendroth ultimately responded to Ireland, stating that if Ireland were "not available to respond in a timely manner [to see his patients], the Medical Staff president would be notified . . . and an EMS [event management system] report filed." App. G at 100a. Defendants testified that such reports can lead to the loss or restriction of a practitioner's medical staff privileges, damaging or even ending their career. App. O at 123a [3-ER-460:14–17]; App. L at 112a–113a [2-ER-208:10–18]. Thus, as defendants knew, any reasonable doctor would eventually choose to relocate rather than face that constant threat to their career. App. Q at 132a–133a ¶ 65.

J. BNA initiated the concerted refusal to share call when Ireland became vulnerable to its effects as a solo practitioner.

Ireland and defendants shared call for many years. BNA organized the coordinated group boycott only

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[9] Ireland could not afford to resign his hospital privileges and continue to practice in Bend. Health insurance plans required that contracted physicians provide continuous coverage of patients who were members of their plans. App. K at 106a [2-ER-151:20–152:4], App K at 107a [2-ER-154:25–155:15]; App. J at 104a [2-ER-125:23–126:5]. Because out-of-pocket costs are higher for patients when they see providers who are "out of plan," many patients are unwilling to see a physician who is not contracted with their health plan. App. K at 106a [2-ER-147:17–148:8]; App. J at 104a [2-ER-128:11–19]; App. N at 117a [3-ER-343:22–25].

after Ireland became a solo practitioner and vulnerable to its effects.

* * *

The lower courts failed to acknowledge any of the evidence of intent Ireland presented. But many of these facts, by themselves, would lead a reasonable jury to return a verdict for Ireland on the issue of intent, rendering summary judgment of his § 1 claim inappropriate. *McLain*, 444 U.S. at 243 (*supra*). Taken together, especially when viewed in the light most favorable to Ireland, they are even more compelling.

II. The Evidence Establishes That There Is a Genuine Dispute of Material Fact as to Whether Defendants' Conduct Actually Injured Competition and Patient Welfare.[10]

In *Ohio v. Am. Express Co.*, this Court held that "[d]irect evidence of anticompetitive effects would be proof of actual detrimental effects [on competition], such as reduced output, increased prices, or decreased quality in the relevant market." (internal quotation marks and citations omitted) (alterations in the original). 138 S. Ct. 2274, 2284 (2018).

Citing *Oltz* 861 F2d 1440 (9th Cir 1988) where "exclusion of a single nurse anesthetist was tantamount to a reduction in competition where a

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[10] Ireland incorporates by reference the facts and arguments related to the actual injury to competition and patient welfare that are presented in his opening brief. App. F at 73a–82a.

single hospital's service area was the relevant geographic market and the exclusion reduced the number of competing anesthesia service providers from five to four," the Ninth Circuit held that "convergence of injury to a market competitor and injury to competition is possible when the relevant market is both narrow and discrete and the market participants are few." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F2d 504, 508–09 (9th Cir 1989).

Like the Helena, Montana anesthesia market, the relevant market in *Oltz*, the Bend neurology market was narrow and discrete, a single hospital's service area was the relevant geographic market and the market participants were few.[11]

The record contains ample evidence that, in the narrow and discrete Bend market for inpatient and outpatient neurologic services, defendants' conduct reduced the output of those services, decreasing the quality of care by severely restricting or eliminating access to neurologic care.

A. A year after Ireland left Bend, its major newspaper published an article that reported that access to neurologic care in Bend had become severely restricted —

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[11] The hospital rule that requires that a physician must attend a patient at the bedside within 40 minutes when they are called for an urgent medical problem (*supra* p. 2) defines the outer boundary of the relevant geographic market as a radius equal to a 40-minute travel time to SCMC-Bend. The relevant service market for this action is the market for inpatient and outpatient neurologic services.

defendants admit to the harm to patient welfare described in the article.

On November 5, 2016, a little over a year after Ireland was forced to close NOB, Bend's major newspaper, THE BULLETIN, published a full-page article titled "Neurologists in short supply in Bend." App. CC at 163a. The article stated that the supply of neurologists in the Bend area was "woefully short of demand," resulting in "wait times of weeks if not months." App. CC at 164a.

The article quoted Bell: "It's been brutal. We've had to turn away all kinds of stuff . . . We have literally had to close our doors to 95 percent of dementia referrals to keep the doors open for more urgent problems." App. CC at 164a–165a. In reference to this statement, Bell testified that "it was a challenge to accommodate" dementia patients who wanted to see a neurologist. App. O at 125a [3-ER- 514:6–8]. He also testified that it would have been helpful to have more neurologists in town to meet the demands that were present in November of 2016. App. O at 125a [3-ER-519:10–13].

The article quoted Griffin, a BMC neurologist, regarding the increased wait times: "That's really not ideal. . . I feel like I'm compromising the quality of care I'd like to provide patients." App. CC at 165a

In the article, BMC neurologist, Dr. Steven Goins is quoted: "We've been so busy we had to shut down our practice to new referrals about three months ago." 166a. Goins declared under penalty of perjury that the quoted statements from the article were accurate. App. DD at 171a–172a ¶ 5. In reference to Goins'

statement, Griffin testified that BMC was "closed to new patients." App. M at 116a [3-ER-298:11–24].

B. The injuries to patient welfare were directly related to Ireland's elimination from the market.

The reduced access to neurology care and resulting harm to patient welfare, reported in THE BULLETIN and admitted to by defendants, all occurred within a year after Ireland's departure when the only change in neurology providers was that the Bend market had one less neurologist — Ireland — and one less neurology clinic — NOB. App. AA at 159a–160a. App. Q 130a ¶ 4.

C. The reduced access to care meant that patients had to travel hundreds of miles to see a neurologist or go without neurologic care.

Defendants testified that, while Ireland continued to practice in Bend, those patients BNA and BMC refused to see were often referred to Ireland. App. K at 109 [2-ER-188:18–21]; App. N at 121a [3-ER-447:2–5], App. N at 121a [3-ER-453:19–25]. After Ireland left Bend, defendants testified that those patients they refused to see would have to travel to another city in another part of Oregon to see a neurologist. App. K at 109a–110a [2-ER-188:22–189:2]. They listed the Oregon cities of Portland, Salem, Eugene, Klamath Falls and Hood River as the alternatives. App. N at 122a [3-ER-454:6–9], [3-ER-454:24–25], [3-ER-455:8–9]. Getting to these cities requires travel over high mountain passes that can be difficult to navigate in the fall, winter, and spring. The

closest is Eugene, which, according to Google Maps, is a 5-hour round-trip drive from Bend in good weather.

Thus, after NOB closed, patients who did not have the physical ability or financial means to make such a trip had to go without neurologic care. But whether a patient, who could not be seen in Bend, saw a neurologist in one of the cities listed by defendants or had to give up seeing a neurologist altogether, they represent a decrease in the output of neurologic services provided in the relevant market and an injury to those patients' welfare.

D. Defendants conduct injured patient welfare by increasing wait times.

Defendants testified that the addition or subtraction of one neurologist from the Bend neurology market had a significant effect on patient wait times. App. M at 115a [3-ER-277:5–14]. When patients experience long wait times, the quality of their care is compromised. Lengthy delays can result in patients suffering for an extended period before receiving necessary treatment. Moreover, delays in diagnosis and treatment may lead to permanent disability or even death.

A little more than a year after Ireland left Bend, wait times increased to the point where the problem was reported in THE BULLETIN.

E. Defendants' conduct had a disproportionate adverse effect on access to care for patients with Medicaid and Medicare health insurance.

In 2016, the first full year after Ireland left Bend, BNA saw 216 fewer Medicaid patients (approximately

30% less) than in 2015. App. P at 127a. This decrease in the number of Medicaid patients seen by BNA occurred even though NOB was no longer around to see its established Medicaid patients, BMC was not accepting new patients, and the percentage of Medicaid-insured patients in the rapidly growing Bend neurology market was increasing. App. P at 128a.

Almost all dementia patients have Medicare or Medicaid health insurance. Therefore, BNA's refusal to see "95 percent" of these patients had a disproportionate adverse effect on patients with those types of insurances.

G. Defendants' conduct injured competition and consumer welfare by causing some patients and referring providers to lose their preferred neurologist.

In *Oltz,* the Ninth Circuit held that "actual detrimental effects on competition" could be found in the fact that defendants' conspiracy eliminated an anesthesia provider that some patients and physicians preferred. 861 F.2d at 1448. In *Poller v. Columbia Broadcasting System, Inc.* this Court held that the argument "that there is no violation of the antitrust laws because the public will still receive the same service, . . . has been foreclosed by this Court's decision in *Klor's, Inc., v. Broadway-Hale Stores*, 359 U.S. 207 (1959)." *Poller*, 368 U.S. 464, 473 (1962).

Defendants testified that, when a patient was referred to a Bend neurologist, it meant that the patient or the referring provider preferred that neurologist. App. O at 125a–126a [3-ER-534:6–18]. After NOB closed, those patients who preferred

Ireland, or whose referring provider preferred Ireland, could not see him without traveling more than 300 miles. App. Q 130a ¶ 4

* * *

As was true for the evidence Ireland presented related to defendants' intent to restrain trade, none of the evidence Ireland provided concerning injury to competition and patient welfare was acknowledged by the lower courts. But that evidence, even if not viewed in the light most favorable to Ireland, would clearly allow a reasonable jury to return a verdict for Ireland on the issue of actual injury to competition and consumer welfare. The court of appeals' decision reflects a clear misapprehension of the summary judgment standards set forth in this Court's precedents and should be reversed.

III. Defendants' Assertion That They Acted Out of Concern for Patient Safety Is a Pretext. App. JJ at 221a.

The district court accepted defendants' assertion that they acted to ensure patient safety, holding that "in balancing the harms and benefits of Defendants' conduct, . . . any anticompetitive harm was offset by the procompetitive effects of Defendants' effort to maintain the quality of patient care that it provides." App. B at 14a (internal quotation marks, alterations, and citations omitted).[12]

The district court performed this "balancing" without acknowledging any of the evidence Ireland

[12] The court of appeals did not proceed to the balancing step.

presented of the anticompetitive effects of defendants' conduct.

Moreover, Ireland has never harmed the care of any patient. Therefore, defendants have not provided any evidence that he has.

Defendants' assertion that continuing to share call with Ireland *might* harm their patients is a conclusory allegation that they attempt to support by vilifying Ireland with additional conclusory allegations.

None of defendants' allegations of potential harm to patients appear anywhere in the record until after Ireland warned defendants that their conduct violated antitrust law and Schloesser, after meeting with an attorney, asked Abendroth and Bell to come up with justifications for their conduct. App. N at 122a [FER 47:9-15].

Further, evidence from defendants' emails and deposition testimony establishes that these allegations are pretexts:

1. Schloesser's deposition testimony not only establishes that defendants' allegation, that they acted out of concern for patient care, is a pretext but also admits that defendants' conduct injured patient welfare:

> Q. [Ireland] [H]ow was neurologic care for patients improved in Bend by your combining with the other neurologists to refuse to share call with me?
>
> A. [Schloesser] . . . I think you're a good neurologist. I think if a good neurologist leaves town it's not a positive. . . . So, to answer your question, sure, a good doc leaves it's a negative. App. N at 120a–121a [3-ER- 434:13–435:4].

2. Abendroth testified that the reason she joined the boycott was that BNA coerced them to do so. *Supra.*

3. Defendants' testimony reveals that they were concerned, not with patient safety, but with the possibility that Ireland would suggest different diagnoses or treatments for their patients:

- Schloesser testified: "we didn't have, being — feeling like we could trust you, that you are not going to, you know, do your thing and try to be the smartest man in the room on Monday, prove everyone else wrong." App. N at 120a [3-ER-404:12-15].
- Bell testified: "you enjoy catching me with my pants down, you enjoy diagnosing patients with — or differing in my opinion on the diagnosis of patients." App. O at 125a [3-ER-495:3–5].

Defendants' concern for the possibility that Ireland would suggest different diagnoses or treatments for their patients does not provide a procompetitive justification. Instead, it advocates for risking patient welfare so that defendants can save face. It is anti-competitive.

4. Concern for the quality of Ireland's care could not explain why defendants extended the group boycott to Ireland's clinic as a whole (as opposed to only Ireland himself) and would not explain why BNA coerced the other neurologists to join their boycott. *Supra.*

5. Griffin testified that Ireland's patient care was "more than adequate." App. M at 115a [3-ER- 255:24–256:1].

6. Griffin asked Ireland to cover his patients just a few weeks before he joined the boycott. App. M at 114a–115a. [3-ER-253:1–254:6]. Griffin asked Ireland to cover his patients before he asked co-conspirators Bell and Buchholz. *Id.* Ireland was not his last choice.

7. Buchholz and Abendroth asked Ireland to cover their clinic patients just months before the boycott began. App. I at 102a; App. HH at 211a–212a.

8. Schloesser testified that, "when [he and Ireland] were cross-covering each other [he] didn't have any problems." App. N at 120a [3-ER-404:4–5].

9. Defendants threatened that, if they had to cover one of Ireland's patients, they would report him to the medical staff, a report that they testified would jeopardize Ireland's privileges and his career, not just in Bend, but nationwide. *Supra* at 22.

But they did not report him for alleged conduct that they claim posed a risk to their patients' safety.

Defendants were not concerned with Ireland's coverage of *their* patients; they were concerned with making sure Ireland had no coverage for *his* patients.

10. Defendants cite the *American Medical Association (AMA) Code of Medical Ethics* 9.4.4 ethics opinion concerning disruptive physicians to suggest that Ireland was a disruptive physician. App. JJ at p. 217a. This opinion provides that disruptive physician complaints should be evaluated by a review body that provides notification, protects due process, monitors for improvement, and whose members recuse themselves for conflicts of interest. App. KK at 218a-220a. SCMC-Bend, like almost all hospitals, has a peer review process that fits these guidelines.

If defendants truly believed that Ireland disrupted patient care, they could have reported him to the hospital and initiated such a peer-review process. But that would not have allowed them to achieve their goal, which was not to ensure patient safety but to eliminate Ireland and his clinic as competitors.

* * *

None of these facts, which clearly indicate that defendants' allegation that they stopped sharing call with Ireland to prevent patient harm is a pretext, were acknowledged by the district court. The district court erred in accepting defendants' conclusory allegation that they acted to ensure patient safety as a basis for granting summary judgment.

It should be for the jury to decide whether defendants acted to restrain trade or to ensure patient safety.

As this Court held:

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles. . . . It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury, which so long has been the hallmark of "evenhanded justice." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

IV. The Evidence That Establishes Ireland's Sherman Act Claim Establishes His Claim for Intentional Interference With Economic Relations.

The core of Ireland's IIER claim aligns seamlessly with his federal antitrust claim.

Under Oregon state law, to establish IIER, a plaintiff must demonstrate that the defendant intentionally interfered with a professional or business relationship through improper means or for an improper purpose. *McGanty v. Staudenraus*, 321 Or. 532, 901 P.2d 841, 535 (1995).

The evidence that establishes Ireland's § 1 claim establishes that defendants intentionally interfered with Ireland's economic relations through the improper means of a coordinated group boycott for the improper purpose of restraining trade — both "wrongful by reason of a statute" — § 1 of the Sherman Act. *Top Service Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 209 (Or., 1978).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and summarily reverse the court of appeals' decision.

Respectfully submitted, this 18th day of December 2023.

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