No. ______

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 A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

"The rule of reason is the accepted standard for testing whether a practice restrains trade in violation" of the Sherman Act. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). Only in limited circumstances, where restraints "'always or almost always tend to restrict competition and decrease output,'" has this Court endorsed per se rules. *Id.* at 886. In the decision below, the Seventh Circuit held that a time-limited intrabrand hiring restraint in McDonald's franchise agreements was presumptively subject to per se scrutiny, even though no court has previously condemned such an agreement. The Seventh Circuit further concluded that "careful economic analysis" was needed to confirm per se treatment, while prohibiting consideration of the restraint's procompetitive impact on other markets—*e.g.*, its impact on the market for "burgers and fries."

The questions presented are: (1) Whether intrabrand hiring restraints are presumptively subject to per se Sherman Act analysis whenever they have a horizontal component; and (2) whether courts assessing a restraint under the Sherman Act must ignore procompetitive effects in related markets.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners McDonald's USA, LLC, and McDonald's Corporation were appellees in the court of appeals and defendants in the district court.

McDonald's USA, LLC, is wholly owned by McDonald's Corporation, a publicly held corporation. McDonald's Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Respondents Leinani Deslandes and Stephanie Turner were appellants in the court of appeals and plaintiffs in the district court.

Does 1–10 were defendants in the district court but not parties before the court of appeals.

RELATED PROCEEDINGS

United States District Court (N.D. Ill.):

Deslandes v. McDonald's USA, LLC, No. 17-cv-4857 (June 28, 2022, order granting judgment on the pleadings)

Turner v. McDonald's USA, LLC, No. 19-cv-5524 (June 28, 2022, order granting judgment on the pleadings)

United States Court of Appeals (7th Cir.):

Deslandes v. McDonald's USA, LLC, Nos. 22-2333, 22-2334 (Aug. 25, 2023, judgment vacating and remanding)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners McDonald's USA, LLC, and McDonald's Corporation ("McDonald's") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 81 F.4th 699. Pet. App. 1a–10a. The district court's opinions are available at 2022 WL 2316187, 2021 WL 3187668, and 2018 WL 3105955. Pet. App. 11a–87a.

JURISDICTION

The Seventh Circuit entered judgment on August 25, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

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

INTRODUCTION

Section 1 of the Sherman Act prohibits unreasonable "restraint[s] of trade." 15 U.S.C. § 1. The Court has repeatedly confirmed the "rule of reason" as the default standard for evaluating the validity of a challenged restraint. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). In an earlier era, the Court relied heavily on various per se rules of invalidity, but the Court has moved decisively away from that approach, overruling multiple cases holding

arrangements per se invalid. *See*, *e.g.*, *id.* at 907–08 (overruling per se rule of *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (overruling per se rule of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)).

In recent decades, the Court has clarified that per se treatment is appropriate only when "courts can predict with confidence that [the challenged restraint] would be invalidated in all or almost all instances under the rule of reason" because it "'always or almost always tend[s] to restrict competition and decrease output.'" *Leegin*, 551 U.S. at 886–87 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)). Such restraints must "have 'manifestly anticompetitive' effects" and "lack . . . any redeeming virtue." *Id.* at 886 (citations omitted). Accordingly, "the per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue" and its anticompetitive effect is "immediately obvious." *Id.* at 886–87.

Notwithstanding that high bar to invocation of per se analysis, the Seventh Circuit held below that a vertical intrabrand franchise hiring restraint was presumptively subject to the "*per se* rule" simply because the restraint also had "horizontal" components. Pet. App. 4a–5a. The Seventh Circuit's decision turns this Court's modern approach to per se analysis on its head. The court of appeals did not identify *any* cases establishing that restraints analogous to the one here—which barred McDonald's franchisees from hiring employees who had worked for another McDonald's restaurant in the past six months—are "almost always" unlawful under the rule of reason. To the con-

trary, after holding that per se treatment presumptively applies, the Seventh Circuit admitted that "careful economic analysis," "discovery," and perhaps even a "trial" would be necessary to assess whether the per se rule ultimately governs or whether the restraint can instead be upheld as "ancillary" to McDonald's franchise agreements. *Id.* at 8a. The court never explained how a restraint can be "*manifestly* anticompetitive" where such extensive economic analysis is required. Nor did it identify the requisite "considerable [judicial] experience" with analogous restraints that is necessary to invoke per se treatment under *Leegin*.

The Seventh Circuit then compounded its error by holding that, in analyzing whether the restraint was "ancillary"—*i.e.*, a collateral and important component of the franchising arrangement—the district court was precluded from considering the hiring restraint's effects on interbrand competition outside the labor market, including its procompetitive effects in the market for the "output of burgers and fries." Pet. App. 5a.

The Seventh Circuit's decision turns back the clock on antitrust analysis. In so doing, it breaks sharply from the decisions of other circuits holding that intrabrand franchise restraints and employee "noncompete" agreements made in conjunction with a legitimate business transaction are subject to the rule of reason, even when they have horizontal components. Given the importance of intrabrand restraints to franchise agreements, as well as the widespread use of employee noncompete clauses—both of which are prevalent throughout large parts of the economy—the Court should resolve these conflicts and confirm

that, like the vast majority of other restraints, these arrangements are subject to the rule of reason.

The Court should also resolve the separate entrenched circuit conflict on whether it is appropriate to consider the effects of a restraint across multiple markets. The Seventh Circuit's conclusion that a restraint must be analyzed only in a single market is impossible to reconcile with this Court's own antitrust analysis in multiple cases. *E.g.*, *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 115–16 (1984).

The decision below is a dramatic departure from this Court's modern antitrust jurisprudence, and enshrines wooden, formalistic rules over the holistic, economically grounded rule-of-reason analysis that this Court has repeatedly mandated. Review is warranted to resolve lingering confusion over this Court's antitrust precedent and to prevent other courts from following the Seventh Circuit's dangerous course.

STATEMENT

1. Franchising agreements are cornerstones of today's commercial landscape, combining the aspirations and hard work of individual entrepreneurs with the strength of established brands. Their value lies in ensuring quality across franchise locations, so a customer in Dallas has the same positive experience as one in Des Moines. Customer goodwill and loyalty "depend[ ] upon uniformity of operation and delivery of goods and services of consistent quality." Thomas J. Collin, *No-Hire Clauses—Ancillary Restraints for Protection of Brand Goodwill*, 41 Franchise L.J. 143, 154 (2021). In a franchise business like McDonald's, the franchisor sells its business "formula" to franchisees. *Principe v. McDonald's Corp.*, 631 F.2d 303, 311 (4th Cir. 1980). "The franchise includes 'not only

the product, service, and trademark, but the entire business format itself—a marketing strategy and plan, operating manuals and standards, quality control, and continuing two-way communication.'" Collin, *supra*, at 152 (citation omitted).

Integral to the modern franchising model are intrabrand restraints. "The franchise agreement . . . confers a constellation of rights and obligations on the franchisee, all of which are anchored in protection of trademark value and goodwill." Collin, *supra*, at 154. Such restraints—for example, exclusive territorial rights, menu specifications, and no-hire provisions—limit destructive intrabrand competition among franchisees that might undermine the overall brand and its ability to compete against other brands in the broader marketplace. Intrabrand restraints also "prevent franchisees from freeriding—offering products of sub-standard quality insufficient to maintain the reputational value of the franchise product while benefitting from the quality control efforts of other actors in the franchise system." *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 440–41 (3d Cir. 1997). Overall, "intrabrand restraints . . . strengthen the marketing and sale of goods or services against *interbrand* competitors," Collin, *supra*, at 154 (emphasis added), "the primary concern of antitrust law," *Bus. Elecs. Corp.*, 485 U.S. at 724 (quotation marks omitted).

Employee noncompete agreements have long been used in franchise agreements and a range of other procompetitive competitor collaborations, including joint ventures, staffing agreements, and sales of businesses. Noncompete agreements limit the employers from whom an employee can obtain employment, usually for a specified period of time. *See* Phillip E.

Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 1908c (2023 ed.). The Federal Trade Commission estimates that "one in five American workers—or approximately 30 million workers—is bound by a noncompete clause." FTC, *Non-Compete Clause Rule*, 88 Fed. Reg. 3,482, 3,485 (Jan. 19, 2023). Noncompete arrangements are widespread because they protect businesses from the competitive harm that can be inflicted by departing employees—including by preserving employer investments in training and protecting customer relationships. *See*, *e.g.*, M. Scott McDonald, *Noncompete Contracts: Understanding the Cost of Unpredictability*, 10 Tex. Wesleyan L. Rev. 137, 143 (2003); *see also* Richard A. Epstein, *The Application of Antitrust Law to Labor Markets—Then and Now*, 15 N.Y.U. J.L. & Liberty 327, 375–77 (2022) (discussing "obvious costs of high turnover to firms").

2. McDonald's operates one of the largest franchising systems in the world. Pet. App. 97a–98a. Its nearly 30,000 franchise restaurants serve hamburgers, fries, and milkshakes to roughly 70 million customers each day. *Id.* at 89a–90a, 97a. These restaurants employ more than 1.5 million people globally and more than 400,000 in the United States alone. *Id.* at 98a. In addition to its extensive franchise network, McDonald's also operates approximately 6,000 of its own restaurants. *Id.* at 89a–90a, 97a. One in eight Americans have worked at a McDonald's restaurant. *See* McDonald's, *McDonald's Celebrates the Powerful Fact That 1 in 8 Americans Have Worked Under the Golden Arches* (Oct. 11, 2023), https://tinyurl.com/4hk2v2k9.

A key to McDonald's remarkable success is its innovative franchise agreement. Pet. App. 90a. Before

opening a McDonald's franchise, each prospective franchisee must sign the franchise agreement and agree to comply with a series of restraints aimed at ensuring a consistent, high-quality customer experience across McDonald's locations. *Id.* Franchisees must agree, for example, to adhere to McDonald's iconic red-and-yellow color and décor scheme; to provide "a designated menu of food and beverage products"; to ensure "uniformity of food specifications, . . . facilities[,] and service"; and to follow prescribed food "preparation methods." *Id.* at 144a–145a, 155a–158a. They must also enroll all restaurant managers in McDonald's "Hamburger University" training program. *Id.* at 150a.[1]

These predominantly vertical restraints play an important role in promoting the "uniform operation of all McDonald's restaurants within the McDonald's System." Pet. App. 145a–146a. McDonald's "franchise package" "contribute[s] significantly to the overall success" of that system, and that success "is what McDonald's sells its franchisees." *Principe*, 631 F.2d at 308, 311.

From the birth of McDonald's modern franchising system in 1955 until 2017, McDonald's required franchisees to agree to an intrabrand restraint that eventually became known as "Paragraph 14." Pet. App. 112a, 141a–142a. Paragraph 14, which was publicly filed annually with the Federal Trade Commission, provided:

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[1] McDonald's standard franchise agreement and franchise disclosure document are "incorporated into the complaint by reference." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see* Pet. App. 100a, 110a.

> ***Interference With Employment Relations of Others.*** During the term of this Franchise, Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph 14 shall not be violated if such person has left the employ of any of the foregoing parties for a period in excess of six (6) months.

Id. at 158a. Paragraph 14 formed a crucial "part of McDonald's system to maintain its significant competitive advantage," *id.* at 90a–91a, by preventing one franchisee from raiding another's employees, which would have threatened the guest experience, undermined the McDonald's brand, and risked driving unhappy customers to McDonald's competitors. Paragraph 14 thus was closely tied to McDonald's historic "unified operation" and growth. *Pearse v. McDonald's Sys. of Ohio, Inc.*, 351 N.E.2d 788, 792 (Ohio Ct. App. 1975).

But given the strength of its brand and the changing business landscape, McDonald's announced in 2017—before this suit was filed—that it would stop including Paragraph 14 in its new franchise agreements and no longer enforce Paragraph 14 in existing agreements. Pet. App. 113a–114a.

3. Plaintiffs Leinani Deslandes and Stephanie Turner challenged Paragraph 14 as an allegedly unlawful restraint of trade under Section 1 of the Sherman Act. Deslandes sued McDonald's in 2017. D.Ct. Dkt. 1. Turner then filed a virtually identical lawsuit

in 2019, CA7 Dkt. 68, at McD A-74, and the two lawsuits were consolidated for discovery and coordinated for all other purposes, D.Ct. Dkt. 182.[2]

Plaintiffs alleged that Paragraph 14 suppressed wages for McDonald's workers by limiting competition for employees among McDonald's restaurants. Pet. App. 93a. They asserted two theories: that Paragraph 14 is a "per se violation of the antitrust laws," or, alternatively, that it is unlawful under an abbreviated "quick look" analysis. *Id.* at 89a, 126a. Plaintiffs did not allege that Paragraph 14 violates the Sherman Act under the rule of reason. *Id.* at 43a.

McDonald's moved to dismiss the first-filed *Deslandes* complaint for failure to state a claim under any theory of antitrust liability. D.Ct. Dkt. 26. The district court agreed with McDonald's that Paragraph 14 is not per se unlawful because the predominantly vertical restraint does not have such "predictable and pernicious anticompetitive effect, and . . . limited potential for procompetitive benefit," as to be "obvious[ly]" unlawful. Pet. App. 75a, 81a (quotation marks omitted). To the contrary, the face of the complaint showed that Paragraph 14 was "ancillary" to the procompetitive "franchise agreement," which "increased output of burgers and fries." *Id.* at 81a. The court also agreed that Deslandes had not stated a rule-of-reason claim because the complaint lacked allegations of "market power in a relevant market." *Id.* at 83a–84a. The court did not dismiss the case, however, because it determined that although "the evidence at a later stage may not support it," Deslandes

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[2] All district court docket citations are to the *Deslandes* docket, No. 17-cv-4857 (N.D. Ill.). Because the *Deslandes* and *Turner* complaints do not differ in any respect material to this petition, all complaint citations are to the operative *Deslandes* complaint.

had plausibly alleged that Paragraph 14 "might be found unlawful under quick-look analysis," which is a "short form of rule of reason analysis" used "'when an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect.'" *Id.* at 76a, 81a, 83a–84a (quoting *Agnew v. NCAA*, 683 F.3d 328, 336 (7th Cir. 2012)).

After discovery, the district court denied Plaintiffs' joint motion for class certification. Pet. App. 28a. The court explained that this Court's intervening decision in *NCAA v. Alston*, 141 S. Ct. 2141 (2021), had eliminated as a matter of law any chance that Plaintiffs' surviving quick-look theory could prevail (and, by extension, confirmed that the district court had properly rejected the stricter per se theory). Pet. App. 43a–45a. *Alston* made clear that "quick-look condemnations" should be exceedingly "rare." *Id.* at 44a (citing 141 S. Ct. at 2156). Applying *Alston*'s reasoning, the district court held that the judiciary lacked "enough experience with no-hire provisions of franchise agreements to predict with confidence that they must always be condemned," and that Plaintiffs' challenge to Paragraph 14 is therefore subject to standard "rule of reason analysis." *Id.* at 44a–45a. Because Plaintiffs had not alleged—and had affirmatively disavowed—any rule-of-reason claim, declining to amend their complaint even after the district court gave them an opportunity to do so, *Alston* doomed their effort to certify a class. *Id.*

McDonald's then moved for judgment on the pleadings or, in the alternative, for summary judgment. D.Ct. Dkt. 378. Consistent with its prior ruling, the district court again held—this time on the pleadings—that Paragraph 14 falls "in 'the great in-

between' of restraints that require rule-of-reason analysis." Pet. App. 21a (quoting *Alston*, 141 S. Ct. at 2155). The court specifically rejected Plaintiffs' renewed argument that Paragraph 14 is "unlawful *per se*," holding that "[*p*]*er se* treatment is outside quick-look treatment on either end of the spectrum" of antitrust restraints and "is, thus, even more rare than quick-look analysis." *Id.* at 21a–22a. Because Paragraph 14 was potentially procompetitive—as "part of a franchise agreement . . . that was output enhancing in the market for fast food"—it could not be condemned per se, even if it allegedly restrained competition in the labor market. *Id.* The court therefore entered judgment for McDonald's. *Id.* at 27a.

4. The Seventh Circuit vacated and remanded. Pet. App. 8a. The court of appeals concluded that while the district court had properly rejected the quick-look and rule-of-reason frameworks, it had "jettisoned the *per se* rule too early." *Id.* at 4a. In the court's view, because Paragraph 14 barred "workers at franchised outlets" from "mov[ing] to corporate outlets" operated by McDonald's itself, "or the reverse," Paragraph 14 was a "horizontal restraint" that was presumptively within the domain of "the *per se* rule." *Id.* at 4a–5a. In support, the Seventh Circuit failed to identify a single case holding analogous intrabrand hiring restraints invalid.

Rather, the Seventh Circuit conceded the possibility of procompetitive benefits: "a ban on poaching could allow [a franchisee] to recover its training costs and thus make training worthwhile to both franchise and worker." Pet. App. 7a. And the Seventh Circuit allowed that Paragraph 14 might ultimately be permitted as an "ancillary" restraint to the franchise agreement, but that determination required "careful

economic analysis" of "potentially complex questions" that could not "be answered by looking at the language of the complaint" alone, including whether Paragraph 14 actually "protect[s] franchises' investments in training" and has a reasonable "scope" to accomplish its purpose. *Id.* at 7a–8a.

The Seventh Circuit ruled out one avenue of competitive-effects inquiry, however, holding as a matter of law that benefits in the consumer market for "burgers and fries," no matter how significant, could not "justify[ ] detriments to workers" in the labor market, Pet. App. 5a—which had been the basis for the district court's conclusion that Paragraph 14 was potentially procompetitive, *id.* at 21a–22a. The court remanded for "discovery, economic analysis, and potentially a trial" to resolve whether Paragraph 14 is in fact subject to the per se rule or should instead be upheld as ancillary to the franchise agreement. *Id.* at 8a.

REASONS FOR GRANTING THE PETITION

The decision below is fundamentally incompatible with modern antitrust jurisprudence and, in particular, with this Court's repeated declaration that "[r]esort to *per se* rules is 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, 886 (2007) (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)). Here, the Seventh Circuit did not even purport to identify any requisite judicial "experience" with intrabrand hiring restraints that would enable courts to "predict with confidence that [such restraints] would be invalidated in all or almost all instances under the rule of reason." *Id.* at 886–87. It nevertheless concluded that Paragraph 14 is presumptively subject to the per se rule—

a presumption that, in the court's confused view, could be rejected only after a "careful economic analysis."

The Seventh Circuit's presumptive application of the per se rule—and its prohibition on considering cross-market justifications for intrabrand restraints—creates or deepens multiple circuit conflicts and is incompatible with decades of antitrust jurisprudence from this Court. Certiorari is warranted to reaffirm the constraints on per se antitrust analysis, reject the Seventh Circuit's blinkered approach to assessing a restraint's competitive benefits, and forestall the pernicious economic consequences of the Seventh Circuit's antiquated antitrust analysis, which will impair a variety of procompetitive economic arrangements that provide significant real-world benefits for consumers.

I. CERTIORARI IS WARRANTED TO RESOLVE THE CONFLICT OVER WHETHER INTRABRAND HIRING RESTRAINTS ARE PRESUMPTIVELY SUBJECT TO PER SE ANALYSIS UNDER THE SHERMAN ACT.

The Seventh Circuit held that because the complaint "allege[d] a horizontal restraint" between McDonald's and its franchisees, Paragraph 14 was presumptively subject to the "*per se* rule," even though it is concededly only an intrabrand hiring restraint with substantial vertical elements. Pet. App. 4a. In so doing, the decision below conflicts with numerous other circuits, which—in accordance with this Court's precedent restricting application of the per se rule—have determined that the rule of reason applies both to intrabrand restraints and to no-hire agreements, irrespective of whether they have horizontal components.

A. The Circuits Are Divided Over Whether Intrabrand Hiring Restraints Should Be Evaluated Under The Rule Of Reason Or The Per Se Rule.

Under the Sherman Act, the default "presumption" is that "a rule-of-reason standard" applies. *Bus. Elecs. Corp.*, 485 U.S. at 726; *see also Leegin*, 551 U.S. at 885. This presumption is particularly forceful where a restraint may have "procompetitive justifications," *Leegin*, 551 U.S. at 887, 889, which is true of both intrabrand restraints and employee noncompete agreements.

1. This Court has long recognized that "by reducing intrabrand competition—the competition among retailers selling the same brand"—intrabrand restraints "can stimulate interbrand competition—the competition among manufacturers selling different brands of the same type of product." *Leegin*, 551 U.S. at 890; *see also Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 (1977) (discussing "simultaneous reduction of intrabrand competition and stimulation of interbrand competition"); *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982) (same). "[E]liminat[ing] intrabrand" competition "encourages retailers to invest in tangible or intangible services or promotional efforts that aid the [brand's] position as against rival [brands]." *Leegin*, 551 U.S. at 890. For this reason, the Court has repeatedly overturned outdated precedents applying per se rules to intrabrand restraints. *See id.* at 899; *GTE Sylvania*, 433 U.S. at 58–59.

Given the emphasis on "uniformity and consistency" in the franchise setting, *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 433 (3d Cir. 1997), intrabrand restraints—such as limitations on products, pricing, employment, and territory—are a

recurring feature of franchise arrangements. These restraints "ensur[e] the brand name will continue to attract and hold customers," *id.*, thereby facilitating interbrand competition, which is "the primary concern of antitrust law," *Bus. Elecs. Corp.*, 485 U.S. at 724 (quotation marks omitted).

Accordingly, numerous circuits—including the Second, Fifth, Eighth, Ninth, and Eleventh Circuits—have held that intrabrand agreements limiting competition within a franchise family should be evaluated under the rule of reason, even where they have horizontal components. In *Bogan v. Hodgkins*, 166 F.3d 509 (2d Cir. 1999), for example, the Second Circuit refused to apply per se treatment to an "*intra* firm agreement" prohibiting franchised insurance agencies from hiring each other' s agents, notwithstanding the agreement's "primarily horizontal" nature. *Id.* at 513–16. The plaintiffs' "allegations d[id] not trigger *per se* treatment because the Agreement does not fit into any of the established *per se* categories." *Id*. at 515. Similarly, in *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705 (11th Cir. 1984) (per curiam), the Eleventh Circuit held that restrictions barring a Waffle House franchisee from expanding "beyond its franchise area" to territories allocated to others—including to the franchisor's own restaurants—should be "analyzed under the rule of reason." *Id.* at 719–20. The Eleventh Circuit rejected the argument that the per se rule should apply—even though Waffle House, by "operat[ing] restaurants" itself, was "horizontally related" to "its franchisees." *Id*. at 720.

The Fifth, Eighth, and Ninth Circuits also have applied the rule of reason to intrabrand franchise restraints. *See*, *e.g.*, *Quality Mercury, Inc. v. Ford Motor Co.*, 542 F.2d 466, 470 & n.4 (8th Cir. 1976) (applying

the "rule of reason" to claims that "horizontal competitor . . . could in its sole discretion determine if the Minneapolis market was to be serviced by another Lincoln dealership" under franchise agreement); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 695–96 (5th Cir. 1975) (franchisor's ability to "dictat[e] the sale price" of franchisee's beer distributing business "must be measured under the rule of reason standard"); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1303 (9th Cir. 1982) (applying the "rule of reason" to analyze claims that concession franchise contracts at sports stadiums violated Section 1 of the Sherman Act).

Thus, in the majority of circuits to address the issue, "arrangements restricting competition among franchisees have been tested (and often upheld) under the rule of reason," *Fraser v. MLS*, 284 F.3d 47, 58 (1st Cir. 2002), even where the franchise arrangement has horizontal components. The Seventh Circuit's holding that the "*per se* rule" presumptively applies to McDonald's intrabrand hiring restraint—because the "complaint alleges a horizontal restraint" between McDonald's and its franchisees—is in direct conflict with those decisions. Pet. App. 4a.

Only the Third Circuit has come close to siding with the Seventh Circuit, although even it has taken a mixed approach to intrabrand franchise restraints. In *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), the Third Circuit applied the "rule of reason" to a "restriction" barring "Holiday Inn franchisees' ownership of motor hotels other than Holiday Inns." *Id.* at 1246. Nonetheless, the Third Circuit went on to uphold the district court's finding of a "per se unlawful" "horizontal allocation of territories" based on the combination of this practice—preventing

franchisees from owning anything but a Holiday Inn—and a "company-town policy," under which Holiday Inn had a "general practice of not granting franchises" in cities where corporate Holiday Inn-"owned inns are located." *Id.* at 1239, 1253–54. The Third Circuit further concluded that by giving "existing franchisees" veto rights over "whether a potential competitor would be allowed to enter" a particular geographic market, Holiday Inn "enabled" an unlawful per se "horizontal market allocation." *Id.* at 1242–43.

Until the Seventh Circuit's decision here, the Third Circuit had been an outlier in treating intrabrand franchise restraints as subject to per se analysis where they feature horizontal elements. The Seventh Circuit has now deepened this long-simmering conflict, foreclosing any realistic possibility that it will be resolved without this Court's intervention.

2. The Seventh Circuit's decision also conflicts with numerous decisions applying the rule of reason to employee noncompete agreements that, like Paragraph 14, restrict the employers from whom an employee can seek employment and are made in conjunction with a legitimate business transaction.

Covenants not to compete have a long common-law history. *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711), famously upheld the validity of a covenant not to compete made in conjunction with a transfer of a bakery and formulated "a rule of reason" for assessing such restraints, Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 630 (1960). In *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), future Chief Justice Taft conducted a detailed survey of early case law and identified five circumstances in which "covenants in partial restraint of trade are generally

upheld as valid," including covenants in relation to the sale of "property or business" and covenants "by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time to service." *Id.* at 281. In such circumstances, a "covenant in restraint of trade" "is merely ancillary to the main purpose of a lawful contract" and should be upheld when it is "reasonably necessary" to the venture. *Id.* at 281–82.

In light of this history, this Court has explained that the "Rule of Reason . . . has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business." *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 689 (1978). And prior to the Seventh Circuit's decision, "there ha[d] been an unbroken line of cases holding that the validity of covenants not to compete under the Sherman Act must be analyzed under the rule of reason." *Consultants & Designers, Inc. v. Butler Serv. Grp., Inc.*, 720 F.2d 1553, 1561 (11th Cir. 1983).

The Second, Third, Sixth, Eighth, Ninth, and Eleventh Circuits have all concluded that restrictions on employee hiring made in connection with a lawful business venture should be evaluated under the rule of reason, rather than given per se treatment, even where they are alleged to have horizontal components or effects. This is because employee noncompete agreements "often serve legitimate business concerns such as preserving trade secrets and protecting investments in personnel." *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 900 (9th Cir. 1983). In *Aydin*, for example, the Ninth Circuit concluded that "[e]mployee covenants not to compete or interfere with the employer's

business after the end of the employment relationship should not be tested under the per se rule," even though the plaintiff argued that the agreement "result[ed] in a horizontal market division." *Id.*; *see also Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1111 (9th Cir. 2021) (applying rule of reason to uphold "horizontal" "non-solicitation" agreement barring subcontractor of healthcare staffing company from hiring the staffing company's nurses).

Similarly, in *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir. 2001), the Third Circuit rejected arguments that a "no-hire agreement" made in conjunction with the sale of an AT&T affiliate was a "group boycott and a horizontal price fixing conspiracy" subject to per se invalidity. *Id.* at 142. The Third Circuit identified "no Supreme Court cases nor any federal cases that have applied the per se rule in similar factual circumstances." *Id.* at 143. Instead, "courts have uniformly found that covenants not to compete should be examined under the rule of reason." *Id.* at 144. The Third Circuit likewise held that the "no-hire agreement" was "appropriately analyzed under the rule of reason." *Id.* at 143–44.

Numerous other cases have reached the same conclusion. *See Consultants & Designers*, 720 F.2d at 1561 ("post-employment restrictive covenant" was not a "group boycott" subject to "per se doctrine"); *Coleman v. Gen. Elec. Co.*, 643 F. Supp. 1229, 1242–43 (E.D. Tenn. 1986) (rejecting argument that sale "agreement between 3M and GE whereby 3M agreed not to rehire the plaintiffs for two years if they accepted employment with GE" was a "group boycott" subject to the "*per se* rule"), *aff'd*, 822 F.2d 59 (6th Cir. 1987) (per curiam); *see also United States v. Empire*

Gas Corp., 537 F.2d 296, 307 (8th Cir. 1976) ("Employee covenants not to compete" after termination of employment "have not generally been considered violative of the antitrust laws."); *Mayer Hoffman McCann, P.C. v. Barton*, 614 F.3d 893, 908 n.23 (8th Cir. 2010) (same); *Bradford v. N.Y. Times Co.*, 501 F.2d 51, 59 (2d Cir. 1974) (declining to find "employee non-competition covenant" a "per se violation" of the Sherman Act, while noting the absence of "any case holding an employee restrictive covenant to be a per se violation"); *Perceptron, Inc. v. Sensor Adaptive Machs., Inc.*, 221 F.3d 913, 919 (6th Cir. 2000) (accepting that "the legality of noncompetition covenants ancillary to a legitimate transaction must be analyzed under the rule of reason" (quotation marks omitted)); *cf. Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 213–14 (D.C. Cir. 1986) (rejecting per se invalidity of noncompete policy that barred agents and affiliates of a nationwide moving company from "handling interstate carriage" for their "own account" and applying the rule of reason instead).

While academics and even the government below have suggested that a per se rule *should* apply to employee noncompete agreements, *e.g.*, Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 Antitrust L.J. 165, 194 (2020); CA7 Dkt. 51, at 19–20, the Seventh Circuit is the only circuit to endorse that position, *e.g.*, *Aya*, 9 F.4th at 1111 (rejecting United States' arguments that courts should apply a heightened analysis to noncompete agreements). Its holding that the McDonald's franchise system's no-hire restriction is presumptively subject to per se treatment conflicts with the heretofore-uniform body of circuit precedent on this question and injects uncertainty into this previously settled area of antitrust law.

B. The Seventh Circuit's Presumption In Favor Of Per Se Treatment Contravenes This Court's Precedent.

The Seventh Circuit's holding that a predominantly vertical intrabrand hiring restraint is presumptively subject to the per se rule is especially problematic because, as this Court has made clear, per se rules are supposed to be "employed" only "after considerable experience with the type of challenged restraint." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19 n.33 (1979). Courts must be able to "predict with confidence" that the restraint "'always or almost always tend[s] to restrict competition and decrease output.'" *Leegin*, 551 U.S. at 886 (quoting *Bus. Elecs. Corp.*, 485 U.S. at 723). Here, the opposite is true. Courts—including this one—have repeatedly recognized the potential competitive benefits of intrabrand restraints and the legitimate business purposes that can be served by no-hire agreements. *See supra* pp. 14–20. Even the Seventh Circuit itself acknowledged the "potentia[l]" benefits of McDonald's intrabrand hiring restraint in "protecting franchises' investments in training." Pet. App. 7a–8a; *see also* Epstein, *supra*, at 377 (McDonald's "non-compete could well induce higher levels of training").

The Seventh Circuit's decision thus stands for the proposition that courts may mandate presumptive per se treatment even for restraints that may well provide procompetitive benefits and as to which there is no history of consistent condemnation under the rule of reason. That approach to application of the per se rule flouts this Court's modern antitrust precedents and upends hitherto-settled doctrine.

The utterly backwards nature of the Seventh Circuit's test for presumptive per se treatment is underscored by the fact that the court of appeals directed the district court on remand to undertake a "careful economic analysis" of Paragraph 14 to determine, based on "discovery" "and potentially a trial," whether it is in fact anticompetitive. Pet. App. 8a. That extensive economic analysis is fundamentally incompatible with the application of the per se rule, a central purpose of which is to "eliminate[ ] the need to study the reasonableness of an individual restraint in light of the real market forces at work." *Leegin*, 551 U.S. at 886.

Under this Court's precedents, per se rules are supposed to function as a time-saving analytic shortcut in cases where judicial experience demonstrates that a restraint is overwhelmingly likely to be unlawful. *See Leegin*, 551 U.S. at 886. Any "required" "scrutiny" in a per se case "must not merely subsume the burdensome analysis required under the rule of reason . . . or else [the court] should apply the rule of reason from the start." *Broad. Music*, 441 U.S. at 19 n.33. By holding that per se treatment is presumptively appropriate unless and until the defendant proves the contrary after "careful economic analysis," Pet. App. 8a, the Seventh Circuit has put the antitrust cart before the horse in a doctrinally indefensible manner.[3]

[3] Moreover, the Seventh Circuit erred by suggesting that a "careful economic analysis" or trial was necessary to assess whether McDonald's no-hire provision was truly ancillary to the franchise agreement. Pet. App. 8a. Courts have taken varying approaches to the threshold question whether a restraint is "ancillary" and thus subject to rule-of-reason review. *Compare Phillips v. Vandygriff*, 711 F.2d 1217, 1229 (5th Cir. 1983) (inquiring

This Court's review is warranted to reinforce the guardrails constraining application of the per se rule and to make clear that the rule does not apply, as the Seventh Circuit believed, simply because a restraint has horizontal components.

The Seventh Circuit's confusion on this score appears to reflect an unacknowledged return to an overreading of this Court's decision in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). Although the Seventh Circuit did not explicitly refer to *Topco*, "[t]he argument that horizontal eliminations of competition among legally independent persons or companies are automatically illegal, even though the restraint is ancillary to a partnership or a joint venture, rests primarily upon [*Topco*]." *Rothery Storage*, 792 F.2d at 224–25. In *Topco*, the Court applied the per se rule to an agreement allocating exclusive territories for the sale of Topco-branded products among members of a supermarket cooperative. *See* 405 U.S. at 608 ("it is clear that the restraint . . . [was] a horizontal one, and, therefore, a per se violation of § 1").

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into whether the practice was "at least potentially reasonably ancillary" (quotation marks omitted)), *with* Pet. App. 8a. The soundest practice is to presume that no-hire agreements made in conjunction with the purchase of a franchise or the sale of a business are ancillary, which is a determination that can be made on the pleadings. *See* Areeda & Hovenkamp, *supra*, §§ 1908b, 1908c (while generally "a restraint does not qualify as 'ancillary' merely because it accompanies some other agreement that is itself lawful," "noncompetition covenant[s]" made in relation to sale of a business "should carry a presumption they are ancillary to the main transaction and thus deserving of rule of reason treatment"). In such cases, how procompetitive the restraint actually is will be assessed fully in the rule-of-reason analysis. *See Aydin*, 718 F.2d at 901; *see also* Areeda & Hovenkamp, *supra*, § 1904.

Over 30 years ago, Judge Bork, writing for the D.C. Circuit, recognized "that, to the extent that *Topco* . . . stand[s] for the proposition that all horizontal restraints are illegal per se, [it] must be regarded as effectively overruled." *Rothery Storage*, 792 F.2d at 226. In particular, Judge Bork pointed to the Court's decisions in *Broadcast Music*, *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co*., 472 U.S. 284 (1985), as "reform[ing] the law of horizontal restraints," *Rothery Storage*, 792 F.2d at 226, because all three cases involved alleged horizonal restraints, yet in all three cases the Court declined to apply the per se rule, *see Broad. Music*, 441 U.S. at 19–20; *Bd. of Regents*, 468 U.S. at 98–100; *Nw. Wholesale Stationers*, 472 U.S. at 295. Rather than treating all horizontal restraints as per se invalid, the Court focused on whether particular restrictions "almost always tend to restrict competition and decrease output." *Broad. Music*, 441 U.S. at 19–20.

In so doing, the "Court returned the law to the formulation of *Addyston Pipe & Steel*":

> [A] naked horizontal restraint, one that does not accompany a contract integration, can have no purpose other than restricting output and raising prices, and so is illegal per se; an ancillary horizontal restraint, one that is part of an integration of the economic activities of the parties and appears capable of enhancing the group's efficiency, is to be judged according to its purpose and effect.

Rothery Storage, 792 F.2d at 229.

The Court's failure to overrule *Topco* expressly has generated confusion in the lower courts and perpetuated the misconception in some quarters that all horizontal restraints are presumptively subject to the per se rule. This case presents an excellent opportunity for the Court to make explicit what Judge Bork recognized four decades ago by formally overruling *Topco* and reaffirming the limited applicability of the per se rule.

II. CERTIORARI IS WARRANTED TO RESOLVE A CONFLICT OVER WHETHER COURTS MAY CONSIDER CROSS-MARKET PROCOMPETITIVE BENEFITS UNDER THE SHERMAN ACT.

In rejecting the district court's analysis of McDonald's intrabrand hiring restraint, the Seventh Circuit concluded that it was improper for the district court to consider "benefits to consumers" in the form of increased "output of burgers and fries" to "justify[ ] detriments to workers" in the labor market. Pet. App. 5a. That holding exacerbates an existing circuit conflict over whether courts may consider cross-market benefits and is inconsistent with the approach followed by this Court, which has repeatedly considered cross-market benefits as part of a holistic antitrust analysis. This now-entrenched conflict independently merits this Court's review.

A. The Circuits Are Divided Over Whether Courts Can Consider Cross-Market Effects Of Challenged Restraints.

The First, Third, and Ninth Circuits have all endorsed the consideration of cross-market benefits as part of a Sherman Act analysis.

In *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), the Ninth Circuit concluded that a restraint operating in the labor market for student athletes that restricted colleges from offering compensation for athletes' likenesses could be justified by benefits in the consumer market for viewing "college sports." *Id.* at 1058–59; *see also In re NCAA Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1243, 1258 (9th Cir. 2020) (similarly considering effects in the consumer market for viewing amateur sports when assessing restraint limiting the "education-related benefits" colleges could offer to student athletes). And just this year, the Ninth Circuit explicitly confirmed that it had "previously considered cross-market rationales when applying the Rule of Reason." *Epic Games, Inc. v. Apple Inc.*, 67 F.4th 946, 989 (9th Cir. 2023).

The First and Third Circuits have likewise recognized the appropriateness of considering cross-market benefits. In a case about an agreement to exclusively award to union shops a series of construction contracts for fast-food restaurants, the Third Circuit acknowledged that any anticompetitive effects of that restraint were felt in the market for construction labor, but nonetheless considered procompetitive effects in the separate "Pittsburgh-area fast food market." *Larry V. Muko, Inc. v. Sw. Pa. Bldg. & Constr. Trades Council*, 670 F.2d 421, 432 (3d Cir. 1982); *see also id.* at 439 (Sloviter, J., dissenting) (faulting majority for allowing "a procompetitive effect in one market [to] excuse an anticompetitive effect in another"). The First Circuit, too, has recognized that "courts should generally give a measure of latitude to antitrust defendants in their efforts to explain the procompetitive justifications for their policies and practices" across

markets, even if "balancing harms and benefits in different markets" may sometimes be difficult. *Sullivan v. NFL*, 34 F.3d 1091, 1112–13 (1st Cir. 1994).

The Seventh Circuit is not alone, however, in taking a contrary position. In *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978), the D.C. Circuit held that the NFL player draft, which restricted the ability of college football players to negotiate with and join the NFL team of their choosing, violated the Sherman Act. *See id.* at 1189. In so doing, the court refused to consider various procompetitive effects of the draft in the consumer output market, including the promotion of "playing-field equality," because those benefits did not occur in the "market for players' services." *Id.* at 1186.

Accordingly, both the Seventh and D.C. Circuits have required courts conducting antitrust analysis to blind themselves to procompetitive effects that a restraint might generate elsewhere. Only intervention by this Court can eliminate the circuits' longstanding and deepening uncertainty about whether cross-market benefits may be considered when assessing a restraint under the Sherman Act.

B. The Seventh Circuit's Decision Limiting Analysis Of Competitive Effects To A Single Market Is Erroneous.

Although this Court has never granted certiorari to address the issue squarely, its decisions are inconsistent with the Seventh Circuit's rigid refusal to consider cross-market procompetitive benefits. The basic purpose of the Sherman Act is to "outlaw only *unreasonable* restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (emphasis added). In evaluating a restraint,

courts therefore must weigh "*all* of the circumstances" of a given restraint, *Leegin*, 551 U.S. at 885 (emphasis added; quotation marks omitted)—regardless of the market in which the restraint's competitive effects occur, *see Bd. of Regents*, 468 U.S. at 104 ("[T]he essential inquiry [is] whether or not the challenged restraint enhances competition.").

Consistent with this comprehensive inquiry, the Court has considered cross-market benefits on at least two separate occasions. It first did so in *Board of Regents*, a case involving an NCAA plan to restrict its member colleges from independently contracting for televised broadcasts of their football games. *See* 468 U.S. at 94–95. Although the restraint operated in the market for televised football games, the Court expressly considered procompetitive effects of the restraint in *other* markets, such as the market for live, in-person football games (where, the NCAA argued, the restraint boosted attendance). *See id.* at 115–16. Next, in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), the Court considered benefits in the "interbrand equipment" market for photocopiers when assessing a restraint operating in the distinct markets for Kodak-brand services and parts. *See id.* at 483–84. Thus, although the Court has not formally addressed the propriety of cross-market analysis as a standalone issue, it "has considered cross-market rationales in Rule of Reason and monopolization cases." *Epic Games*, 67 F.4th at 989.[4]

[4] In *NCAA v. Alston*, 141 S. Ct. 2141 (2021), another case involving the NCAA, the Court assumed without "express[ing]" a definitive "vie[w]" that the NCAA could "justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market." *Id.* at 2155.

In conflict with the holistic analysis applied by this Court, the decision below artificially narrows the Sherman Act inquiry by precluding courts from considering potentially significant procompetitive benefits merely because they do not accrue in the same market in which the restraint operates. Under that logic, even a restraint that generates massive consumer benefits—and is thus plainly "procompetitive" and "reasonable" in any ordinary sense—is unlawful if it imposes limited costs in the labor market without creating offsetting employee benefits. That result defies the central purpose of the Sherman Act—to enhance "'consumer welfare.'" *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting Robert Bork, *The Antitrust Paradox* 66 (1978)). Both consumers and employees will ultimately pay the price: Requiring courts to focus solely on market-specific benefits will stifle innovation, leading not only to lower-quality products and services for consumers, but also to fewer employment opportunities for workers.

This is especially true in the context of ancillary restraints, which, by definition, are part of a larger "legitimate business collaboration," *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006), whose benefits and costs cut across multiple markets, *cf. Addyston Pipe & Steel*, 85 F. at 281 (discussing potential benefits of noncompete agreements beyond the labor market such as "enjoyment by the buyer" of business "good will" and "protection from the danger of . . . unjust use" of prior employee's "confidential knowledge"). When assessing an ancillary restraint, it is imperative that courts be allowed to consider its effects on multiple markets. Often, the entire purpose of an ancillary restraint is to limit competition in one market for the purpose of achieving a net procompetitive outcome in

others. By conducting a careful, comprehensive inquiry of a restraint's competitive effects across markets, courts guard against mistakenly condemning innovative or "complex business arrangements" with "often hard-to-see efficiencies," *Alston*, 141 S. Ct. at 2156, and inadvertently "chill[ing] the very conduct the antitrust laws are designed to protect," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

To the extent the Seventh Circuit's confusion may have been based on stray statements from this Court in *Topco* and *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), the Court should clarify that these dicta are not controlling. *See Topco*, 405 U.S. at 609–11 (suggesting that the Court cannot "weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector"); *Phila. Nat'l Bank*, 374 U.S. at 370 (suggesting that it is insufficient for "anticompetitive effects in one market [to] be justified by procompetitive consequences in another"). Any tension in the Court's own precedent on this issue is further reason for the Court to grant certiorari.

III. THE QUESTIONS PRESENTED HAVE FAR-REACHING LEGAL AND PRACTICAL SIGNIFICANCE.

The Seventh Circuit's dramatic expansion of the per se rule and circumscribed assessment of restraints' competitive effects inject uncertainty into the franchising landscape and pose a significant threat to other procompetitive business practices across the economy.

First, the Seventh Circuit's analytic approach calls into question a wide array of restraints commonly used by franchisors. Intrabrand restraints are ubiquitous in the franchise context because a franchisor must regulate all aspects of a franchisee's operations, including "hours of operation, cleanliness standards, management information systems, and so on," Roger D. Blair & Francine Lafontaine, *The Economics of Franchising* 129–30 (2011), to ensure "product uniformity and consistency"—the "essence of a successful nationwide . . . chain," *Queen City Pizza*, 124 F.3d at 433. In a franchise business like McDonald's (and numerous other franchised restaurants and stores), "retail locations display uniform trade dress and signage, and all goods and services offered at the locations are associated exclusively with the franchisor's trademark." Collin, *supra*, at 151.

The "restraints needed to ensure uniformity of goods and services and quality control among franchisees" are "extensive." Collin, *supra*, at 154. In addition to employee hiring rules, they can include, among many others, "resale price maintenance," *Leegin*, 551 U.S. at 889, "territorial and customer restrictions," *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1004 (5th Cir. 1981), restraints governing "supplies, inspections, and quality standards," *Queen City Pizza*, 124 F.3d at 440, and guidelines for the "location of the franchise," Francine LaFontaine & Roger D. Blair, *The Evolution of Franchising and Franchise Contracts: Evidence from the United States*, 3 Entrepreneurial Bus. L.J. 381, 415 (2009).

Here, the Seventh Circuit concluded that McDonald's predominantly vertical franchise hiring restraint

was presumptively invalid under the per se rule because McDonald's operation of its own restaurants in certain labor markets made it a "horizontal" restraint. Pet. App. 5a. But if that is sufficient for per se condemnation, then a vast number of intrabrand franchise restraints stand in jeopardy, because it is common for franchisors to own or operate their own locations. *See*, *e.g.*, *Midwestern Waffles*, 734 F.2d at 720. Supplier requirements, territorial restrictions, pricing guidelines—even standardized menus or shared loyalty programs—applicable to both franchised and corporate locations could all be called into question. This legal uncertainty will create havoc within the franchising sector, chilling business practices that have long fostered interbrand competition and forcing franchisors to opt for "second-best options to achieve sound business objectives," *Leegin*, 551 U.S. at 904, to the profound detriment of consumers. *See Banek Inc. v. Yogurt Ventures USA, Inc.*, 6 F.3d 357, 360 (6th Cir. 1993) (noting "a national franchisor's need for uniformity in its business affairs").

Second, the decision imperils the use of noncompete agreements across numerous business sectors. Such agreements not only are "in common use within the franchise industry," Collin, *supra*, at 143, but also are widely used elsewhere, with nearly 40% of U.S. labor force participants having agreed to a noncompete at some point in their career and roughly 18% being governed by one now, *see* Evan P. Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & Econ. 53, 60 (2021); *see also* FTC, *Non-Compete Clause Rule*, 88 Fed. Reg. at 3,485 (estimating that "30 million workers" are affected by noncompete provisions).

Employee noncompete agreements are common in part because they have widely recognized benefits, from increasing incentives for employers to train their employees, *e.g.*, Epstein, *supra*, at 377, to preserving "trade secrets" and "customer relationships," McDonald, *supra*, at 143; *see also* Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 Lewis & Clark L. Rev. 497, 535 (2016) (observing that noncompetes are "related to increases in firm-sponsored training, riskier [research and development] investments, and increases in firm value and the likelihood of acquisition").

Perhaps because they are so widespread, employee noncompete clauses have been the target of increasing regulatory scrutiny in recent years, both by the federal government, *see Non-Compete Clause Rule*, 88 Fed. Reg. at 3,512 (proposing to bar most employee noncompetes, including in many sales of a business), and by the States, *see*, *e.g.*, Cal. S.B. No. 699, § 2(d) (signed into law Sept. 1, 2023) (banning employers from "enter[ing] into" noncompete agreements).

Given their pervasive nature, as well as the ongoing public and governmental scrutiny, the Court should take this opportunity to clarify the standard for assessing noncompete agreements under the Sherman Act. Otherwise, under the Seventh Circuit's erroneous reasoning, carefully negotiated noncompete and nonsolicit clauses within partnership agreements, joint ventures, staffing arrangements, or business transactions could face per se condemnation. "No-hire clauses" undoubtedly may be accused of having "horizontal effects," Collin, *supra*, at 157–58, and they frequently occur in "horizontal" agreements, such as the sale of a business, Areeda & Hovenkamp, *supra*, § 1908c. By treating a restraint's "horizontal"

features as sufficient to trigger per se invalidity, the Seventh Circuit's decision will force businesses utilizing a slew of competition-enhancing nonsolicit, no-hire, or noncompete provisions to accept substantial litigation risk or to adopt different contracts and policies within the Seventh Circuit—thereby undermining the competitive efficiencies company-wide policies are designed to promote.

Finally, it is important for the viability of a range of procompetitive ancillary restraints that the Court clarify the propriety of assessing the effects of a restraint across multiple markets. The Seventh Circuit's blinkered approach, which looks only at an arbitrary subset of competitive effects, is analytically incompatible with numerous types of ancillary restraints. For example, the benefits of noncompete clauses typically occur in the consumer output market, while the costs occur in the separate labor market. *Cf.* Pet. App. 5a. If courts are required to focus only on the labor market, clauses addressing employees, staffing, or human capital would be almost invariably found unlawful. Similar obstacles would be imposed on every other ancillary restraint that affects more than one market, including clauses barring the solicitation of employees by former co-venturers, exclusive supply agreements, and shared services agreements among competitors.

In short, the Seventh Circuit's outmoded antitrust analysis will have pernicious consequences for a range of procompetitive business arrangements in a broad swath of industries. The Court should grant review to reaffirm that the rule of reason is the default mode of Sherman Act analysis—including when assessing intrabrand franchise restraints and noncompete agreements entered into as part of an efficiency-enhancing

transaction—and that cross-market effects are an essential component of that holistic, economically grounded inquiry.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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