No. 23-562

IN THE
Supreme Court of the United States

MCDONALD'S USA, LLC, AND
MCDONALD'S CORPORATION,

Petitioners,

v.

LEINANI DESLANDES AND STEPHANIE TURNER,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The disclosure statement included in the petition remains accurate.

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Plaintiffs fail to come to terms with the Seventh Circuit's stark departure from this Court's modern antitrust jurisprudence. While they paint this case as "an ordinary application" of established antitrust principles, Opp. 31, Plaintiffs never directly grapple with the Seventh Circuit's flawed conclusion that an *intra*brand hiring restraint in a predominantly *vertical* franchise agreement is presumptively subject to a "*per se* rule" of invalidity, Pet. App. 4a—a presumption that can only be confirmed (or overturned) via "discovery, economic analysis, and potentially a trial," *id.* at 8a. Instead, Plaintiffs try to put the cart before the horse by claiming that the real issue is whether McDonald's restraint was ancillary—an issue that does not even arise when, as here, there is no basis for per se treatment in the first place.

The Seventh Circuit's approach gets the per se rule backward. Pet. 21–22. Per se antitrust analysis is the *exception*, not the norm. It is an analytical shortcut designed to eschew time-consuming analysis where "courts can predict with confidence" based on "considerable experience" "that [a restraint] would be invalidated in all or almost all instances under the rule of reason." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–87 (2007). While Plaintiffs describe the decision below as "unremarkable," Opp. 1, they—like the Seventh Circuit—fail to identify the requisite "experience" to justify application of the per se rule in the *intrabrand* setting—where this Court has repeatedly rejected per se treatment, *see Leegin*, 551 U.S. at 899. And while disclaiming a circuit conflict, Plaintiffs identify no other case holding that "careful economic analysis" is needed to

determine whether a per se rule will be applied. Pet. App. 8a.

Plaintiffs' response to the second question presented is equally flawed. Plaintiffs argue that consideration of a restraint's cross-market benefits is categorically impermissible, Opp. 21, while ignoring decisions from this Court and other circuits "consider[ing] cross-market rationales when applying the Rule of Reason," *Epic Games, Inc. v. Apple Inc.*, 67 F.4th 946, 989 (9th Cir. 2023). The Seventh Circuit's refusal to consider a hiring restraint's procompetitive benefits in the consumer market, the lens through which noncompete and similar horizontal restraints have been judged for decades, endorses a blinkered, incomplete assessment of the restraint's effects.

Finally, Plaintiffs predictably contend that this case is unimportant because McDonald's has eliminated the hiring restraint from its franchise agreement. But, as the *amicus* briefs filed in support of the petition underscore, these questions have far-reaching significance for a wide range of procompetitive competitor collaborations—in the franchise setting and well beyond.

The Court should grant certiorari.

I. CERTIORARI IS WARRANTED TO RESOLVE WHETHER INTRABRAND HIRING RESTRAINTS ARE PRESUMPTIVELY SUBJECT TO PER SE ANALYSIS.

Plaintiffs' opposition is riddled with misdirection: it sidesteps the Seventh Circuit's deviation from this Court's precedent on per se invalidity, mischaracterizes McDonald's primarily vertical intrabrand re-

straint, and ignores the clear conflict with other circuits on how to treat both intrabrand franchise restraints and hiring restraints more generally.

A. Throughout their opposition, Plaintiffs try to reframe the Seventh Circuit's holding as a garden-variety application of "black-letter law" that horizontal restraints "are per se unlawful unless they are reasonably necessary to a procompetitive venture." Opp. 2. But the restraint at issue here is not "the 'classic' horizontal restraint." *Id.* at 16. It is a predominantly vertical hiring restraint—imposed by a franchisor on its franchisees—that arises in the intrabrand setting (because McDonald's and its franchisees all do business and advertise employment under the McDonald's brand) with some horizontal components (because McDonald's sometimes operates its own restaurants). Pet. App. 158a.

Despite these vertical and intrabrand features, the Seventh Circuit held that, because of its horizontal aspect, McDonald's hiring restraint was presumptively illegal under the "*per se* rule," Pet. App. 4a—a reflexive conclusion that hearkens back to outdated per se reasoning in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972). More recently, however, this Court has emphasized that it "presumptively applies rule of reason analysis," *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006), even where a restraint has horizontal elements, *see Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979).

Critically, the Seventh Circuit reached its per se conclusion without identifying any judicial experience showing that such a restraint "'would always or almost always tend to restrict competition and decrease output.'" *Leegin*, 551 U.S. at 886 (citation omitted). Far from projecting "confidence" that the restraint

"would be invalidated in all or almost all instances under the rule of reason," *id.* at 886–87, the Seventh Circuit acknowledged that the effect of the restraint was uncertain and "require[d] careful economic analysis," Pet. App. 7a–8a.

In Plaintiffs' view, judicial inexperience with the restraint at issue weighs against certiorari "because the Seventh Circuit is the first court of appeals to rule on it." Opp. 12. But Plaintiffs' (inaccurate) characterization of the case law only underscores why the Seventh Circuit should have applied the rule of reason, which governs absent judicial experience demonstrating that restraints "'almost always'" "have 'manifestly anticompetitive' effects." *Leegin*, 551 U.S. at 886 (citations omitted).

Plaintiffs also erroneously conflate the question that McDonald's has asked this Court to address—whether the per se rule is inapplicable to intrabrand hiring restraints with horizontal components—with the question that the Seventh Circuit directed the district court to decide on remand—whether McDonald's hiring restraint was ancillary to a procompetitive agreement. Opp. 15. This is misdirection. There is no need to address ancillarity, because a predominantly vertical intrabrand restraint (as opposed to a purely horizontal interbrand restraint) should never have been presumed subject to the per se rule at all. *See Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 901 (9th Cir. 1983) ("ancillarity . . . '*remove[s] . . . the* per se *label* from restraints otherwise falling within the category'" (emphasis added; citation omitted)).

The impropriety of viewing per se treatment as presumptively appropriate here is manifest from the Seventh Circuit's determination that "careful economic analysis," "discovery," and "potentially a trial"

are needed to determine the restraint's competitive effects. Pet. App. 8a. Such detailed analysis is incompatible with per se treatment, which "is reserved for only those agreements that are 'so plainly anticompetitive *that no elaborate study of the industry is needed*.'" *Dagher*, 547 U.S. at 5 (emphasis added; citation omitted). The Seventh Circuit's approach would create an unprecedented, unworkable amalgamation of the per se rule and the rule of reason. *See Broad. Music*, 441 U.S. at 19 n.33 (per se "scrutiny . . . must not merely subsume the burdensome analysis required under the rule of reason").

Even if the Seventh Circuit's holding is analyzed through the lens of the ancillary restraints doctrine as Plaintiffs propose, it is equally worthy of review. Courts are divided over the test for whether a restraint is "ancillary." *See* Pet. 22 n.3; *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 922 F.3d 713, 726–27 & n.8 (6th Cir. 2019) (collecting cases illustrating circuit conflict over whether ancillarity test is that the restraint is "*necessary*" to a broader arrangement, or that there is merely "a *plausible* procompetitive rationale for the restraint"). Most circuits follow the latter approach, *Elizabeth Place*, 922 F.3d at 727, but the court below did not even acknowledge it, let alone apply it. And the Seventh Circuit created a further circuit conflict by treating ancillarity as a defense that McDonald's must establish. *Compare id.* (rejecting argument that defendants "bear the burden of proving that a challenged restraint is procompetitive, and therefore ancillary"), *with* Pet. App. 8a.

Regardless, it is well recognized that covenants not to compete in "franchise contracts" and "hiring agreements" "should carry a presumption that they

are ancillary to the main transaction and thus deserving of rule of reason treatment." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 1908c (2023 ed.). Plaintiffs do not identify any other case holding that a full-blown evidentiary inquiry is required to assess the threshold question of ancillarity, which would then need to be repeated if the rule of reason were found to apply. The Seventh Circuit's multiple departures from precedent warrant review.

B. Plaintiffs also try to reframe the restraint at issue. First, they argue that McDonald's hiring restraint "is not 'intrabrand' in any meaningful sense of the word" because "McDonald's and its franchisees" are supposedly "*inter*brand" competitors "in the *labor* market." Opp. 12.

Plaintiffs' contention runs afoul of both precedent and logic. "[I]ntrabrand competition" is "the competition among retailers selling the same brand." *Leegin*, 551 U.S. at 890. McDonald's restaurants compete against each other for customers to sell McDonald's-brand burgers and fries, just as they compete against each other for employees to work under the Golden Arches. As Plaintiffs concede, competition to sell burgers and fries does not make McDonald's restaurants interbrand competitors. Opp. 12.

There is no reason to treat their competition to attract employees differently. Like McDonald's menu restrictions and décor requirements, its hiring restraint was designed to "reduc[e] intrabrand competition" for employees to "stimulate interbrand competition" with other quick-serve restaurants, the "'primary purpose'" of antitrust law. *Leegin*, 551 U.S. at 890 (citation omitted). Because the hiring restraint

here was intrabrand, the Seventh Circuit's presumptive application of the per se rule directly conflicts with the Second Circuit's decision in *Bogan v. Hodgkins*, 166 F.3d 509 (2d Cir. 1999), which evaluated an "intrafirm" restraint barring franchised insurance agencies from hiring each other's agents under the rule of reason. *Id.* at 511–13, 515.

Second, Plaintiffs repeatedly contend that McDonald's "concedes that its no-hire agreement was a horizontal restraint." Opp. 12, 16, 26. To the contrary, McDonald's has consistently maintained (Pet. 7, 9, 21, 31) that the hiring restraint was *vertical* because McDonald's imposed it as franchisor upon its franchisees. To be sure, it had a horizonal element because McDonald's owns some restaurants, but that does not eliminate its primarily vertical attributes.

C. The combination of vertical and horizontal components in an intrabrand franchise restraint has fostered confusion among the circuits. *Compare*, *e.g.*, *Bogan*, 166 F.3d at 513, 515 (even assuming that intrabrand hiring restraint with "vertical elements" was "primarily horizontal," "*per se* illegal treatment" was improper); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 719–20 (11th Cir. 1984) (per curiam) (treating territorial allocations as "vertical" and subject to "rule of reason," even though franchisor owned restaurants subject to restraints), *with Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1253–54 (3d Cir. 1975) (applying per se rule where Holiday Inn "function[ed] as a [vertical] franchisor as well as a [horizontal] motel operator"); Pet. App. 2a, 4a.

Far from arising "once in hundreds of years," Opp. 22, the courts of appeals are regularly confronted with how to treat so-called "hybrid restraints" with vertical

and horizontal components, as cases decided since the filing of the petition illustrate. Unlike the Seventh Circuit, the Fourth Circuit recently held that a "hybrid restraint" with "horizontal and vertical" components was subject to the "'presumption in favor of a rule-of-reason standard.'" *United States v. Brewbaker*, 87 F.4th 563, 576–79 (4th Cir. 2023) (citation omitted); *accord Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop., Inc.*, 89 F.4th 430, 441 (3d Cir. 2023) ("hybrid scheme" that fell "in between" a "purely horizontal or vertical arrangement" was subject to "rule of reason"). This frequently recurring question warrants resolution by this Court. *See Brewbaker*, 87 F.4th at 576 ("[D]oes the *per se* rule apply to such a hybrid restraint? The Supreme Court has not yet told us.").

D. Plaintiffs' other attempts to diminish the circuit conflict also fail. They fault McDonald's for citing "cases that involved *either* non-intrabrand employment restraints *or* intrabrand non-hiring restraints." Opp. 16. But the lower courts are divided both over how to treat intrabrand franchise restraints, *see* Pet. 14–17, *and* how to treat hiring restraints included in other potentially procompetitive agreements, *see id.* at 17–20. Because the Seventh Circuit's decision implicates both categories, that is more reason to grant review.

Plaintiffs seek to differentiate, in particular, between cases involving "employee noncompete clauses" and "no-hire agreements." Opp. 17. That is a manufactured distinction; both are covenants not to compete, as *United States v. Addyston Pipe & Steel Co.* first made plain. 85 F. 271, 281 (6th Cir. 1898) (both covenants by "buyer" not to compete with business "seller" and covenants by an "agent not to compete

with his . . . employer" are "generally upheld"). Following *Addyston Pipe*, courts have typically evaluated both types of agreements in the same manner—using the "Rule of Reason." *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 689 (1978); *e.g.*, *United States v. Empire Gas Corp.*, 537 F.2d 296, 307 (8th Cir. 1976) ("[c]ovenants of these two types have not generally been considered violative of the antitrust laws"). The Seventh Circuit's presumptive application of the per se rule conflicts with both lines of precedent.

II. CERTIORARI IS WARRANTED TO RESOLVE WHETHER COURTS MAY CONSIDER CROSS-MARKET PROCOMPETITIVE BENEFITS.

Plaintiffs' efforts to discount the second question presented fare no better. Far from an "obvious" proposition, Opp. 21, the Seventh Circuit's holding that it is inappropriate to consider the cross-market "benefits to consumers" in assessing McDonald's hiring restraint, Pet. App. 5a, deepens a long-extant circuit conflict.

Plaintiffs argue that the law is settled that restraints in one market cannot justify "procompetitive effects in another." Opp. 22. But they never acknowledge that this Court has repeatedly considered the cross-market benefits of restraints. *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 115–16 (1984); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 483–84 (1992).

Plaintiffs resort to selective quotations to obscure the circuit conflict, misleadingly quoting *Epic Games* as holding that the Ninth Circuit has "never expressly confronted this issue," Opp. 22, but omitting the rest of the quotation: "we *have* previously considered cross-

market rationales when applying the Rule of Reason," 67 F.4th at 989 (emphasis added). And Plaintiffs ignore those earlier Ninth Circuit decisions, *e.g.*, *O'Bannon v. NCAA*, 802 F.3d 1049, 1058–59 (9th Cir. 2015); *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1243, 1258 (9th Cir. 2020), as well as a decision from the Third Circuit that examined the impact of a labor restraint on 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).

Plaintiffs also fail to recognize that cross-market analysis is integral to the ancillary-restraints doctrine on which the Seventh Circuit remanded. That doctrine requires courts to assess a restraint in light of the broader "legitimate and competitive purposes of the business association" imposing it. *Dagher*, 547 U.S. at 7; *e.g.*, *Empire Gas Corp.*, 537 F.2d at 308 (faulting plaintiff for failing to provide evidence of the "effect of [labor] covenants on competition in the [liquified petroleum] *retail* market" (emphasis added)).

Plaintiffs point to recent Third Circuit dicta suggesting that whether cross-market benefits should be evaluated "remains an open question," Opp. 22 (citing *King Drug Co. of Florence v. Smithkline Beecham Corp.*, 791 F.3d 388, 410 n.34 (3d Cir. 2015)), and to a similar observation by the First Circuit, *id.* at 21 (citing *Sullivan v. NFL*, 34 F.3d 1091, 1111 (1st Cir. 1994)). But the unsettled nature of this frequently recurring question is exactly why this Court's review is warranted. *See Epic Games*, 67 F.4th at 989 (this Court's precedent "is not clear").

III. THE QUESTIONS PRESENTED HAVE FAR-REACHING SIGNIFICANCE.

Finally, Plaintiffs argue that this case lacks sufficient importance to justify review. They emphasize that "[a]ll the Seventh Circuit concluded was that [Plaintiffs'] complaint plausibly states a claim," while remanding for further factual development. Opp. 23. But that is precisely the problem: The Seventh Circuit held that Plaintiffs have plausibly alleged that McDonald's intrabrand franchise hiring restraint is per se invalid without making any showing that such restraints "'almost always tend to restrict competition.'" *Leegin*, 551 U.S. at 886 (citation omitted). That is a dramatic expansion of the per se rule that upends decades of antitrust jurisprudence and exposes defendants to the "potentially enormous expense of discovery"—and accompanying settlement pressures—in antitrust class actions that should have been dismissed on the pleadings. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

Plaintiffs emphasize that McDonald's has eliminated the hiring restraint from its franchise agreements. Opp. 22. Similar intrabrand restraints, however, are pervasive in the franchise context because they are how franchisors protect their brand. *See* Pet. 5, 31. And it is common for franchisors both to franchise new stores and operate their own competing locations. *E.g.*, *Waffle House*, 734 F.2d at 719–20. If intrabrand franchise restraints are presumptively unlawful whenever they have horizontal components, as the Seventh Circuit held, that will profoundly impair the $800 billion franchise industry. *See* IFA Br. 5, 22.

Moreover, notwithstanding Plaintiffs' attempts to cabin the Seventh Circuit's reasoning, Opp. 24, the

implications of its decision extend beyond the franchise setting to noncompete agreements in a range of industries, *see* Pet. 33. Those ubiquitous agreements are essential to preserving employers' trade secrets and customer relationships, and, until now, "have uniformly . . . be[en] examined under the rule of reason." *Eichorn v. AT&T Corp.*, 248 F.3d 131, 144 (3d Cir. 2001).

Finally, especially in the context of labor restraints, it is critical that courts be permitted to evaluate cross-market effects. Because, as Plaintiffs note, a "no-hire agreement" viewed in isolation would typically be "unlawful per se," Opp. 28, where such restraints are part of broader procompetitive arrangements like franchise agreements, courts must be able to analyze the restraint in relation to the purposes and effects of the arrangement as a whole. By requiring courts to assess labor restraints in a vacuum, the Seventh Circuit's decision returns to the formalistic, antiquated antitrust analysis repeatedly disavowed by this Court and chills productive, efficiency-enhancing collaborations.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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