No. 23-562

In the Supreme Court of the United States

MCDONALD'S USA, LLC, AND MCDONALD'S CORP.,
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

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ERIC CITRON
STEFANIE OSTROWSKI
GUPTA WESSLER LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741

DEAN M. HARVEY
ANNE B. SHAVER
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Fl.
San Francisco, CA 94111
(415) 956-1000

JENNIFER BENNETT
Counsel of Record
GUPTA WESSLER LLP
505 Montgomery Street
Suite 625
San Francisco, CA 94111
(415) 573-0336
jennifer@guptawessler.com

DEREK Y. BRANDT
LEIGH M. PERICA
CONNOR P. LEMIRE
MCCUNE LAW GROUP
231 North Main Street, Suite 20
Edwardsville, IL 62025
(618) 307-6116

Counsel for Respondents

February 9, 2024

QUESTIONS PRESENTED

There are two kinds of restaurants that are branded to consumers as McDonald's: restaurants owned by the McDonald's corporation itself and restaurants owned by franchisees, who have licensed the right to use the McDonald's system in their restaurant for a period of time. Although these restaurants share a consumer-facing brand in the market for burgers and fries, in the labor market, they are distinct, competing employers. For several years, the McDonald's corporation agreed with its franchisees not to hire each other's workers. But over five years ago, McDonald's agreed to stop this practice. Other franchise chains have followed suit. This lawsuit was brought years ago by workers who alleged that McDonald's now-discontinued no-hire agreement suppressed their wages and worsened their working conditions.

The Seventh Circuit held that the complaint plausibly pleaded that when it was in force, McDonald's no-hire agreement violated the Sherman Antitrust Act. The level of antitrust scrutiny that applies to that claim, the court held, depends on whether the no-hire agreement was ancillary to McDonald's franchise agreement. It remanded to the district court to make that determination.

The questions presented are:

1. Did the Seventh Circuit err in remanding this case to the district court to determine whether McDonald's no-hire agreement was ancillary to its franchise agreement?

2. On remand, may McDonald's attempt to justify its undisputed collusion in the labor market by arguing that it enabled the corporation or its franchisees to produce more or cheaper burgers and fries?

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INTRODUCTION

To consumers, restaurants owned by the McDonald's corporation and those owned by franchisees appear to be the same brand. But as employers, they are distinct. McDonald's and each of its franchisees is a separate corporation that competes for workers in the labor market. Nevertheless, years ago, the McDonald's corporation and its franchisees agreed that McDonald's-branded restaurants would not hire each other's workers.

Like almost everyone else in the fast-food industry (and beyond), McDonald's and its franchisees have since abandoned this agreement. Over five years ago, to avoid government antitrust enforcement, McDonald's agreed never to impose or enforce a no-hire agreement again. This lawsuit, filed in 2017, is the last remaining remnant of the company's long-abandoned practice.

Judge Easterbrook's decision for the Seventh Circuit below says nothing more than what McDonald's itself recognized years ago: that agreements between separate, competing corporations not to compete for workers might violate the antitrust laws. After concluding only that the complaint here plausibly *pleads* an antitrust violation, the Seventh Circuit remanded to the district court to assess McDonald's defense that its no-hire agreement was "ancillary" to its franchise agreements—and therefore subject to the rule of reason—instead of unlawful per se.

This unremarkable decision does not merit this Court's review. McDonald's lead argument is that this Court should opine on the question that the Seventh Circuit remanded: whether its discontinued no-hire agreement is subject to the rule of reason. But it offers no convincing reason for this Court to weigh in on a factbound question the lower court did not even decide, especially when its answer is unlikely to affect anyone except the

parties to this case. After all, franchise no-hire agreements are now virtually obsolete.

Perhaps recognizing that this Court is unlikely to grant certiorari simply to absolve it of liability in this case, McDonald's incorrectly contends that the decision below "breaks sharply from the decisions of other circuits." That can't possibly be true. The Seventh Circuit is the first court of appeals to have even considered how the ancillary restraints doctrine applies to a no-hire agreement between a franchisor and its franchisees.

And the rule that Judge Easterbrook articulated in the opinion—that agreements between competitors not to compete are per se unlawful unless they are reasonably necessary to a procompetitive venture—has been black-letter law for more than a century. Not a single circuit disagrees. McDonald's does not argue otherwise. Instead, its circuit-split argument boils down to the contention that different courts applying this same rule to different restraints of trade have reached different results. That is not a circuit split. That's just the ordinary result of applying the same rule to different facts. As this Court itself has recognized, "the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers." *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2157 (2021) (quoting *Chi. Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) (Easterbrook, J.)).

Falling back, McDonald's pleads for error correction. But it's not clear what the company thinks the Seventh Circuit got wrong. McDonald's urges this Court to return the law to a time when it was clear that "a naked horizontal restraint . . . is illegal per se," but a restraint that is ancillary to a procompetitive venture is "to be judged

according to its purpose and effect." But that's exactly the rule that the Seventh Circuit articulated—the same rule that courts across the country apply.

McDonald's seems to believe that if that rule is properly applied, its no-hire agreement should be subject to the rule of reason. But nobody has yet applied that rule. That's why the Seventh Circuit remanded to the district court. At best, then, McDonald's first question presented is a request that this Court correct an asserted error in applying a well-settled legal rule to the facts of this case that no court has even made yet.

McDonald's second question presented fares no better. The company asks this Court to review a few sentences in which Judge Easterbrook noted that McDonald's cannot justify its alleged labor-market collusion by arguing that lower wages enable restaurants to sell cheaper burgers. But nobody—except, apparently, McDonald's—disputes that proposition.

No court has ever held that competitors can fix the labor market, so long as doing so allows them to lower their prices. That's because suppressing wages will *always* enable companies to produce cheaper goods. So allowing companies to collude in the labor market, as long as they reduce their prices, would be tantamount to excluding the labor market from the antitrust laws altogether—a proposition this Court has consistently rejected for at least a century. This Court should not grant certiorari to review a conclusion that no court has ever doubted.

STATEMENT

A. Legal Background

The Sherman Act prohibits every "contract," "combination," or "conspiracy" that unduly restrains trade. 15 U.S.C. § 1; *see Alston*, 141 S. Ct. at 2151. The

paradigmatic undue restraint—the "supreme evil of antitrust"—is "collusion" between competitors. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).[1]

Agreements between competitors to fix prices or to allocate markets "are so plainly anticompetitive" and "so often lack any redeeming virtue" that, ordinarily, they are "conclusively presumed illegal without further examination." *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646 (1980); *see, e.g.*, *id.*; *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 US 877, 886 (2007); *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49–50 (1990) (per curiam); *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 434–35 (1990); *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 347 (1982); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

That's true whether the agreement is between sellers competing for customers or buyers competing for supplies or labor. *See, e.g.*, *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948); *Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359, 361–65 (1926); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 2013 (2023 ed.). Either way, these

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[1] Unless otherwise specified, all internal quotation marks, emphases, alterations, and citations are omitted from quotations throughout. Citations to "Pet. App." are to the appendix submitted with the petition for certiorari; citations to "D. Ct. Dkt." are to the *Deslandes* docket in the district court, No. 17-cv-4857 (N.D. Ill.); and citations to "7th Cir. Dkt." are to the *Deslandes* docket in the Seventh Circuit, No. 22-2333.

"horizontal" agreements are generally unlawful per se. *See id.*[2]

There is, however, an exception for agreements that are "necessary" to permit a pro-competitive venture to exist "at all." *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979). This exception is known as the "ancillary restraints" defense. *Texaco Inc.*, 547 U.S. at 7. And it can be traced back to English common law. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281–82 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). The seminal American opinion outlining the defense—*Addyston Pipe*—was written by then-Judge Taft over a century ago, and is still followed today. *See id.*; Pet. 18; Areeda & Hovenkamp, *supra*, § 1905.

As that opinion explains, the ancillary restraints defense applies to horizontal restraints that are "ancillary to the main purpose" of a lawful, pro-competitive venture and "reasonably necessary" to effectuate that venture. *Addyston Pipe*, 85 F. at 281–82; *see Nat'l Soc'y of Pro. Eng'rs v. United States,* 435 U.S. 679, 689 (1978); *accord* Pet. 18. Such ancillary restraints are not per se unlawful, but instead are evaluated under the rule of reason—a fact-specific assessment of the restraint's actual effect on competition. *See Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 689.

For example, while an agreement between lawyers not to compete for clients would ordinarily be illegal per se, an agreement between partners of a law firm not to

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[2] A restraint is "horizontal" if it dictates the way that competitors "will compete with one another." *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 99 (1984). A restraint between firms "at different levels of distribution" that do not also compete with one another is "vertical." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

compete with the firm would be assessed under the rule of reason—if the agreement were reasonably necessary to the firm's existence. *See* Areeda & Hovenkamp, *supra*, § 2131c; Pet. App. 4a–5a.

To establish that a restraint is "ancillary"—and therefore subject to evaluation under the rule of reason—a defendant must demonstrate not only that the challenged restraint is included within an otherwise lawful, procompetitive venture, but also that it is "reasonably necessary" to the venture's success. *Addyston Pipe*, 85 F. at 281. Otherwise, the restraint remains a "naked" agreement between competitors not to compete, which is, by definition, unlawful. *Texaco Inc.*, 547 U.S. at 7.

B. Factual Background

1. There are over 14,000 McDonald's-branded restaurants across the United States. Pet. App. 121a. Some of these are owned by or affiliated with the McDonald's corporation itself. Pet. App. 97a. The rest are "independently owned and independently managed" franchises. Pet. App. 98a. A McDonald's franchise is, essentially, a restaurant whose proprietor has purchased the right to "use the McDonald's system for a specified period of time." Pet. App. 110a (parentheses omitted).[3]

Although McDonald's franchise and corporate-owned restaurants all represent the same brand to customers, each franchise—and the McDonald's corporation itself—is a separate employer. Pet. App. 104a, 162a. Indeed, the franchise agreement explicitly states that the McDonald's corporation and McDonald's franchisees are not "joint

[3] Because this appeal arises from a motion for judgment on the pleadings, unless otherwise specified, the facts are drawn from the operative complaint and the opinions below.

employers"—they are competitors. Pet. App. 109a–110a. Thus, each franchisee hires its own workers, sets its own wages, creates its own employment policies, maintains its own working conditions, and pays its own employees. Pet. App. 104a, 111a. The McDonald's corporation does the same for its corporate-owned stores. *See* Pet. App. 104a.

For years, these separate employers agreed not to compete for workers. Pet. App. 112a. McDonald's franchise agreements contained a no-hire clause, which stated:

> 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 [] 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.

Pet. App. 112a. McDonald's reciprocated this restraint and agreed not to hire franchisees' workers in the restaurants that the McDonald's corporation itself owned and operated. Pet. App. 113a.

Together, these agreements barred *any* McDonald's-branded restaurant—franchise or corporate-owned—from hiring anyone who worked at another McDonald's-branded restaurant absent approval from the worker's current employer. Pet. App. 112a–113a.[4] The no-hire clause applied even to workers who had already left McDonald's. For six months after a worker left a

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[4] Unless otherwise specified, we refer to these agreements together as McDonald's no-hire agreement throughout this brief.

McDonald's restaurant, no other McDonald's was permitted to hire them without their prior employer's consent. Pet. App. 7a, 13a. And the clause applied nationwide. If a McDonald's employee moved across the country, they would need their prior employer's consent to get a job at a different McDonald's-branded restaurant. Pet. App. 7a.

According to a McDonald's vice president, the business's no-hire agreement was not "reasonably necessary to accomplish" its franchise operations. 7th Cir. Dkt. 47 at 12-13. The agreement did, however, allow both corporate and franchise restaurants to pay their workers less than if they had to compete for them. Pet. App. 93a, 120a.

In 2017, the McDonald's corporation stopped including the clause in its franchise agreements. Pet. App. 69a. And in 2018, it entered into an agreement with the Washington State Attorney General that it would no longer enforce the clause in prior agreements. Pet. App. 30a. The absence of the no-hire clause did not harm McDonald's or its franchisees. In 2021, McDonald's CEO stated that McDonald's "U.S. franchisees have never been in a better financial position." David Gelles, *'Our Menu Is Very Darwinian.' Leading McDonald's in 2021*, N.Y. Times (July 2, 2021); *see also* D. Ct. Dkt. 402-7, Ex. 83 at 39 (showing that the number of franchise-owned restaurants has increased since McDonald's stopped enforcing its no-hire agreement).

2. In 2009, Leinani Deslandes began working for a McDonald's franchise owned and operated by Bam-B Enterprises. Pet. App. 105a. She initially earned $7 an hour but quickly rose through the ranks, eventually earning $12 an hour as a department manager. Pet. App. 105a.

But the working conditions at Bam-B Enterprises were untenable. The franchise required her to work overtime without paying overtime wages, scheduled her for difficult shifts that forced her to sacrifice time with her children, and failed to offer her further advancement opportunities or bonuses. Pet. App. 105a–106a. And although she devoted considerable time to a training program that would make her eligible for a promotion to General Manager, the franchise prevented her from completing the training after learning that she was pregnant. Pet. App. 106a.

Ms. Deslandes decided to look for work elsewhere. Pet. App. 106a. Because of her experience as a McDonald's manager and her partially completed training, Ms. Deslandes believed that she would be most marketable at another McDonald's-branded restaurant. She was right: When she contacted a nearby McDonald's—this one corporate-owned—its manager told her that he was interested in hiring her for a management position that paid $13.75 an hour, with the potential for a raise to $14.75 an hour after 90 days. Pet. App. 107a.

But the manager also told her that, because of McDonald's no-hire agreement, he could not consider her application unless she obtained a release from her current employer. Pet. App. 107a. Her employer denied the request, noting that she was "too valuable" to lose. Pet. App. 108a. And so Ms. Deslandes was unable to secure the higher-paying job—or a job at any other McDonald's-branded restaurant. Instead, she was left to start over in an entry-level position at a retail store that paid only $10.25 an hour. Pet. App. 108a.

3. Ms. Deslandes sued the McDonald's corporation, alleging that its no-hire agreement was a per se violation

of the Sherman Act. Pet. App. 89a.[5] But the district court held that the complaint did not plausibly allege a per se violation. Pet. App. 21a, 81a. The court recognized that the McDonald's corporation and its franchises are competing employers. Pet. App. 78a. And so, it explained, McDonald's "no-hire agreement is, in essence, an agreement" among competing employers "to divide [the] market" for workers. Pet. App. 79a. The court therefore had "no trouble concluding" that this "horizontal no-hire agreement" would ordinarily "be a *per se* violation of the antitrust laws." *Id.*

Nonetheless, the court rejected the per se rule in this case because it believed that McDonald's no-hire restraint was "ancillary to franchise agreements for" McDonald's-branded restaurants. Pet. App. 81a. In the district court's view, "[e]ach time McDonald's entered a franchise agreement, it increased output of burgers and fries," so the franchise agreement as a whole "was output enhancing and thus procompetitive." *Id.*

The court acknowledged that the no-hire restraint itself was likely unnecessary to the franchise venture. *Id.* After all, the court explained, "[t]he very fact that McDonald's has managed to continue signing franchise agreements even after it stopped including the provision in 2017 suggests that the no-hire provision was not necessary" in the first place. *Id.* But according to the district court, the restraint did not need to be reasonably necessary to the franchise venture to avoid per se illegality; it merely needed to be included in the franchise agreement. *Id.*

[5] Another McDonald's employee, Stephanie Turner, had a similar experience. She filed a similar complaint in the same district as Ms. Deslandes, and the cases were ultimately consolidated. Pet. App. 12a.

The Seventh Circuit reversed. In a decision by Judge Easterbrook—joined by Judges Wood and Ripple—the court rejected the district court's view that an otherwise-illegal horizontal restraint falls within the ancillary restraints defense simply because it "accompanies some other agreement that is itself lawful." Pet. App. 5a. To avoid per se illegality, the court held, the restraint itself must be "ancillary to the success of [the] cooperative venture." Pet. App. 4a–5a (citing *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986)).

The Seventh Circuit did not decide whether McDonald's could satisfy that requirement. The district court had dismissed on the pleadings. And the ancillary restraints doctrine is an affirmative defense, so Ms. Deslandes was not required to "anticipate and plead around" it in her complaint. Pet. App. 8a. At this stage, the court held, all that was required was that Ms. Deslandes plead "a plausible antitrust claim." *Id.* Because she had done so, the court remanded to the district court to give McDonald's the opportunity to attempt to prove its ancillary restraints defense under a proper statement of that rule. *Id.*

REASONS FOR DENYING THE PETITION

I. There is no circuit split.

A. Every court applies the ancillary restraints doctrine, and there can be no circuit split on how it applies to franchise no-hire agreements because the Seventh Circuit is the first to consider that question.

McDonald's lead argument for certiorari (at 14) is that the "circuits are divided over" how to analyze "intrabrand hiring restraints." That's not only incorrect, but also

irrelevant. McDonald's no-hire agreement is not "intrabrand" in any meaningful sense of the word.

Although McDonald's and its franchisees share a brand in the *consumer* market for burgers and fries, in the *labor* market, they are distinct. There's no dispute that each McDonald's franchise is a separate employer from each other and from the McDonald's corporation. Ms. Deslandes was not hired by the McDonald's corporation; she was hired by Bam-B Enterprises. Her wages, working conditions, and opportunities were dictated by Bam-B. At a different McDonald's restaurant, they would be dictated by the owner of that restaurant. Workers recognize these differences: That's why Ms. Deslandes sought to leave Bam-B to work for a different McDonald's owner. Labor market competition between the McDonald's corporation and its franchisees is *inter*brand, not intrabrand.

Although McDonald's tries to muddy the waters by emphasizing its vertical relationship to its franchisees, the company concedes that its no-hire agreement was a horizontal restraint. *See, e.g.*, Pet. 13. That's because it restrained McDonald's and its franchisees not in their roles as franchisor and franchisee, but in their roles as competing employers.

Thus, the actual question presented in this case is whether a no-hire agreement between competing employers can escape per se illegality simply because it's located in a franchise agreement—regardless of whether it is ancillary to a procompetitive venture. There couldn't possibly be a circuit split on *that* question because the Seventh Circuit is the first court of appeals to rule on it.[6]

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[6] In a case against Burger King, the Eleventh Circuit recently concluded that a franchise no-hire agreement could constitute "concerted action" because "Burger King and its separate and

1. McDonald's cobbles together cases involving *other* restraints in *other* contexts and argues that they somehow demonstrate a split. But, if anything, McDonald's cases only demonstrate that other circuits faced with the same question would have done exactly what the Seventh Circuit did here.

Everyone—including, apparently, McDonald's, *see* Pet. 24—agrees that horizontal agreements to fix prices or divide markets are per se unlawful, unless ancillary to a legitimate, pro-competitive agreement. *See, e.g.*, *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 63 (1st Cir. 2004); *United States v. Aiyer*, 33 F.4th 97, 115–16 (2d Cir. 2022); *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 345 (3d Cir. 2010); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1365 (5th Cir. 1980); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188–89 (7th Cir. 1985); *Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n*, 666 F.2d 1130, 1137 (8th Cir. 1981); *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021); *Drury Inn-Colorado Springs v. Olive Co.*, 878 F.3d 340, 342–43 (10th Cir. 1989); *Nat'l Bancard Corp. v. VISA USA, Inc.*, 779 F.2d 592, 601 (11th Cir. 1986); *Andrx Pharms., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 811 (D.C. Cir. 2001); *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1335 (Fed. Cir. 2010); *see also* Areeda & Hovenkamp, *supra*,

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independent franchise restaurants compete against each other . . . for employees." *Arrington v. Burger King Worldwide, Inc.*, 47 F.4th 1247, 1250 (11th Cir. 2022). But the court remanded to the district court to determine in the first instance how to analyze whether that "concerted action" is an undue restraint of trade. *Id.* at 1257. Like McDonald's, Burger King removed its no-hire clause from its franchise agreement years ago. *Id.* at 1252.

§§ 1904, 1906; Robert Bork, *The Antitrust Paradox* 262 (1978).

And everyone agrees that this rule applies even if, in addition to competing in the relevant market, the parties to the horizontal restraint *also* have some vertical relationship. Indeed, that is the key holding of Judge Bork's decision in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), which McDonald's (at 24–25) asks this Court to adopt. *Id.* at 224. This Court need not grant certiorari to adopt that rule; it already *is* the rule. *Id.*; *see, e.g.*, *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d at 345–47 (rejecting the argument that the mere existence of a "vertical arrangement" automatically subjects a horizontal restraint to the rule of reason and instead applying the ancillary restraints doctrine); *Aya Healthcare Servs.*, 9 F.4th at 1109–10 (applying ancillary restraints doctrine even though the parties were in a vertical "subcontractor-subcontractee relationship," in addition to being competitors); *Addyston Pipe*, 85 F. at 281 (recognizing that an employee non-compete agreement must be analyzed under the ancillary restraints doctrine, despite being an agreement between parties at different levels of the distribution chain).

The Seventh Circuit thus applies the same rule as every other court. Pet. 4a–5a (explaining that "[a]n agreement among competitors is not naked if it is ancillary to the success of a cooperative venture," but a "restraint does not qualify as ancillary merely because it accompanies some other agreement that is itself lawful"). McDonald's complaint, therefore, cannot be with the Seventh Circuit's legal rule. It must be that, in McDonald's view, applying that rule to the facts of this case should result in the conclusion that the company's no-

hire agreement must be evaluated under the rule of reason. *See* Pet. 3–4.

But the question of how the ancillary restraints doctrine applies to one particular long-discarded no-hire agreement is manifestly uncertworthy. And, worse, it's not even presented here. The Seventh Circuit didn't decide whether McDonald's no-hire agreement is in fact ancillary and therefore subject to the rule of reason. It merely decided that Ms. Deslandes's complaint plausibly *pleaded* a per se violation of the Sherman Act and remanded to give McDonald's the opportunity to establish its ancillary restraints defense. Any supposed circuit split on whether, ultimately, an "intrabrand hiring restraint" would satisfy the ancillary restraints doctrine is therefore not implicated here.

2. In any event, McDonald's circuit-split argument fails on its own terms. Although the company asserts a wide-ranging split over "intrabrand hiring restraints," it cites only two decisions that even arguably involve such restraints: the decision below and the Second Circuit's decision in *Bogan v. Hodgkins*, 166 F.3d 509 (1999), from twenty-five years ago. These decisions do not conflict.

The appeal in *Bogan* followed discovery and summary judgment, which revealed that—as McDonald's itself concedes (at 15)—the hiring restraint at issue was "*intra* firm." *Bogan*, 166 F.3d at 516. Managing agents of the *same* insurance company agreed not to hire employees away from other managers. *Id.* at 511 (explaining that the insurance company itself set wages). In applying the rule of reason to that scenario, the Second Circuit emphasized that it was different than the "classic *inter*firm horizontal restraint" where different companies agree not to compete for workers. *Id.* at 515 (emphasis added).

This case, on the other hand, presents the "classic" horizontal restraint. The McDonald's corporation and its franchisees are different companies that compete in the labor market. There's no reason to believe that the Second Circuit would disagree that a plaintiff who alleges that competing employers entered into a no-hire agreement plausibly pleads a per se violation of the Sherman Act. *Cf. Borozny v. Raytheon Techs. Corp.*, 2023 WL 348323, at *8 (D. Conn. Jan. 20, 2023) (explaining that *Bogan* does not apply to no-hire agreements between firms); *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 484 & n.7 (W.D. Pa. 2019) (same).

Indeed, the Second Circuit has since cited *Bogan* for the proposition that a "market division" between competing companies "with no purpose other than to limit competition" is unlawful per se. *United States v. Am. Express Co.*, 838 F.3d 179, 193–94 (2d Cir. 2016), *aff'd sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018); *see also Aiyer*, 33 F.4th at 115–16 (reiterating that the Second Circuit applies the ancillary restraints doctrine when analyzing horizontal agreements between companies not to compete). That's precisely what Ms. Deslandes alleged here.

3. Unable to demonstrate any conflict on how the ancillary restraints doctrine applies to "intrabrand hiring restraints," McDonald's looks further afield to cases that involved *either* non-intrabrand employment restraints *or* intrabrand non-hiring restraints. But even searching beyond any question that's arguably presented here, McDonald's still can't identify a conflict. Again, McDonald's cases do not demonstrate that the circuits would decide the same case differently. They demonstrate only that applying the same rule to different facts can lead to a different result.

Start with McDonald's claim (at 17–20) that the decision below somehow conflicts with "decisions applying the rule of reason to employee noncompete agreements." Despite McDonald's attempt to conflate the concepts, employee noncompete clauses and no-hire agreements are different restraints. An employee noncompete clause requires an individual employee not to compete with their employer in the market for the employer's goods or services. A no-hire agreement, on the other hand, is a conspiracy between competing employers to divide the labor market amongst themselves.

For example, a provision in a lawyer's employment contract that prohibits them from offering legal services outside their law firm is an employee non-compete agreement. An agreement between competing law firms not to hire each other's associates is a no-hire agreement. A court could easily conclude that the former is reasonably necessary to ensure the effectiveness of the firm "when competing in the market for legal services," Pet. App. 5a—and therefore is subject to the rule of reason—while the latter is merely a per se unlawful attempt to suppress wages.

There is thus no conflict between the Seventh Circuit's conclusion that McDonald's no-hire agreement is not *necessarily* ancillary and decisions that have applied the rule of reason to employee noncompete clauses. These decisions all apply the same rule. They come out differently only because they're applying that rule to different restraints applied under different circumstances.[7]

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[7] McDonald's also cites a case (at 20) involving a noncompete agreement between two corporations. *Perceptron, Inc. v. Sensor Adaptive Machs., Inc.*, 221 F.3d 913 (6th Cir. 2000). That is, of course, neither a "restriction[] on employee hiring" nor an intrabrand

Nor is there any conflict between the decision below and the few decisions McDonald's cites that actually involved no-hire agreements. As McDonald's itself recognizes, these decisions, too, applied the same ancillary restraints doctrine that the Seventh Circuit applies. Pet. 18. The restraints in these cases simply turned out to, in fact, be ancillary to a legitimate procompetitive venture. *See Eichorn v. AT&T Corp.*, 248 F.3d 131, 136, 145–46 (3d Cir. 2001) (seller's promise not to re-hire employees from spun-off company for six months was "essential" for the sale to occur at all); *Coleman v. Gen. Elec. Co.*, 643 F. Supp. 1229, 1243 (E.D. Tenn. 1986), *aff'd*, 822 F.2d 59 (6th Cir. 1987) (per curiam) (similar); *Aya Healthcare Servs.*, 9 F.4th at 1110 (no-hire restraint "ensure[d]" that protected company would "not lose its personnel during the collaboration").

McDonald's fares no better trying to manufacture a conflict with cases evaluating non-hiring intrabrand restraints. The company cites (at 15–17) a handful of decades-old cases in which a court happened to conclude that, under the circumstances of the case, the rule of reason should apply to the particular "intrabrand restraint" at issue. Even if they were from this millennium, most of these cases couldn't possibly be relevant because they either don't address horizontal restraints at all or, for some reason, the plaintiff itself chose to proceed under the rule of reason. *See, e.g.*,

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restraint. Pet. 18. But even if the case were relevant, it is merely another example of a court applying the ancillary restraints doctrine. *See Perceptron*, 221 F.3d at 919–20 (explaining that a "covenant not to compete" may only be analyzed under the rule of reason if it is "ancillary to a legitimate transaction," which requires that the covenant be "necessary to protect the covenantee's legitimate . . . interests" and "as limited as is reasonable" to do so).

Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466, 469 n.2 (8th Cir. 1976) (explaining that the court applied the rule of reason because the plaintiff did not ask the court to apply the per se rule); *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 696 (5th Cir. 1975) (applying the rule of reason to a vertical price restraint); *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291 (9th Cir. 1992) (involving a vertical exclusive-dealing arrangement, not a horizontal agreement among competitors); *Midwestern Waffles, Inc. v. Waffle Houses, Inc.*, 734 F.2d 705, 720 (11th Cir. 1984) (applying the rule of reason to a territorial allocation that the court believed "should be viewed as . . . vertical," while reaffirming that "horizontal restraint[s] of trade . . . are illegal *per se*").

McDonald's cites only one case in which a court actually considered whether a horizontal intrabrand restraint was per se unlawful, the Third Circuit's decision in *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975). But that case only demonstrates that if the Third Circuit were to consider a no-hire agreement like McDonald's, it would do exactly what the Seventh Circuit did here. *American Motor Inns* was an appeal following trial, in which the Third Circuit considered an agreement to allocate territories between Holiday Inn franchisees and Holiday Inns, Inc.—a company that both licensed Holiday Inn franchises and operated its own hotels in competition with its franchisees. *Id.* at 1254. In its role as hotel operator, the court observed, Holiday Inns, Inc. competed with its franchisees. *Id.* And a "horizontal market allocation" between competitors is ordinarily per se unlawful. *Id.* at 1254 n.85. Holiday Inns, the court held, was not "insulated" from this per se illegality, simply because it was also a franchisor and the horizontal restraint was included in a franchise agreement. *Id.* at 1253–54; *see also*

In re Ins. Brokerage Antitrust Litig., 618 F.3d at 345 (explaining that to qualify as ancillary, a horizontal restraint must be "integral" to a procompetitive venture—not just included in a contract).[8]

McDonald's claims (at 17) that the Third and Seventh Circuits are outliers, but it hasn't cited a single case that disagrees. Nor could it. As explained above, there's not a single circuit that holds that merely including a horizontal restraint in a franchise agreement is sufficient to insulate it from per se illegality.

Ultimately, the most McDonald's can demonstrate is that courts applying the same rule to different restraints under different circumstances come to different conclusions. That's not a circuit split. That's just how applying the law to facts works.

B. There is no circuit split on whether companies can justify colluding in the labor market by pointing to benefits in the consumer market.

Unable to demonstrate that any circuit would have decided this case differently than the Seventh, McDonald's tries another tack. The company seizes on two sentences in the decision below, in which Judge Easterbrook explained that companies cannot justify

[8] McDonald's notes (at 16) that the Third Circuit applied the rule of reason to a different restraint in the franchise agreement—essentially an "exclusive dealing" clause imposed by Holiday Inns, Inc. on its franchisees. *American Motor Inns*, 521 F.2d at 1246, 1250. But that restraint, standing alone, was *vertical*, not horizontal. *See id.* And in any event, to the extent there might have been confusion about the Third Circuit's rule in 1975, there is not now. The Third Circuit has since clearly held that to qualify as ancillary, a horizontal restraint must not only be included in a lawful contract; it must be necessary to the success of the venture. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 345.

collusion in the labor market by arguing that it allows them to sell more or cheaper goods. Pet. App. 5a. In other words, McDonald's and its franchises cannot fix wages in an effort to make their burgers cheaper. *See infra* Section III.3. This obvious statement, McDonald's argues (at 25), deepened a circuit split on the extent to which courts may consider "cross-market benefits" generally when evaluating the legality of a restraint of trade.

But there is no split. No circuit has ever held that companies may fix the labor market because doing so enables them to lower their prices. *Cf. Alston*, 141 S. Ct. 2141, 1267–68 (2021) (Kavanaugh, J., concurring) ("Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem."). And, more generally, the only two circuits that have even arguably ruled on cross-market balancing in any context agree: Corporations cannot excuse collusion in one market by arguing that it will benefit some other market. *See* Pet. App. 5a; *Smith v. Pro Football, Inc.,* 593 F.2d 1173, 1186 (D.C. Cir. 1978).

Although McDonald's asserts (at 25) that the First, Third, and Ninth Circuits all hold otherwise, none of these circuits have even decided the issue. In arguing to the contrary, McDonald's selectively quotes the First Circuit's decision in *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994). But what that decision actually says is that "no authority has squarely addressed [the] issue," and that it would be "more appropriately resolved in a case where it is dispositive and more fully briefed." *Id.* at 1111–12. In other words, the First Circuit did not decide the issue. *See id.*

The same is true of the Third Circuit. McDonald's cites a single decision from forty years ago, but much more recently, that court explicitly confirmed that the extent to

which "procompetitive effects in one market" can excuse "anticompetitive effects" in another remains an open question. *See King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp.*, 791 F.3d 388, 410 n.34 (3d Cir. 2015) ("It may also be (though we do not decide) that procompetitive effects in one market cannot justify anticompetitive effects in a separate market.").

So too with the Ninth Circuit. Just last year, that court recognized that it had "never expressly confronted this issue" and "decline[d]" to do so." *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 989 (9th Cir. 2023).

Thus, no circuit that has actually "expressly confronted" the issue has ruled that the Sherman Act excuses collusion in one market because that collusion might have procompetitive effects in another. This Court should not grant certiorari to consider a question that is only barely presented in this case, on which there is no disagreement.

II. The questions presented are unworthy of this Court's review, and this case would be a poor vehicle to review them.

1. It's hard to imagine a case less worthy of this Court's attention than this one. Franchise agreements are common and have been around for hundreds of years. Yet only one decision—the decision below—has ever addressed the application of the ancillary restraints defense to franchise no-hire agreements. A question that has come up once in hundreds of years is not an important question.

And whatever minimal importance the question may once have had, it lacks even that now: McDonald's ended the no-hire agreement years ago. Virtually every other franchise company has done the same. *See, e.g.*, Attorney

General of Washington, *No-Poach Initiative: Ending a Rigged System for Hourly Employees at Corporate Franchises* 3, 6–9 (2020). A decision from this Court on how to analyze no-hire clauses in franchise agreements will thus have virtually no prospective effect.

This Court should not grant certiorari to review a question that has never arisen previously and is unlikely to arise again.

2. McDonald's does not argue otherwise. Instead, it contends (at 32) that the decision below matters because it somehow imperils all restraints a franchisor might impose upon its franchisees—from standardized menus to hours of operation. That's because, according to McDonald's, the Seventh Circuit held that any horizontal restraint in a franchise agreement is "presumptively invalid under the per se rule." Pet. 32. But that is not what the court held. It did not even conclude that the no-hire agreement *in this case* would necessarily be subject to the per se rule. All the Seventh Circuit concluded was that Ms. Deslandes's complaint plausibly states a claim. Again, the court remanded to the district court to assess McDonald's ancillary restraints defense and, therefore, to decide whether the per se rule or the rule of reason should apply.

This procedural posture alone makes this case a poor vehicle for review. As it stands, no court of appeals has ever ruled on what level of antitrust scrutiny applies to any franchise no-hire agreement—including the one at issue in this case. If the Court is inclined to consider that question even though these agreements are now obsolete, it should at least wait until some lower court has tried to answer it. *See NFL v. Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (Kavanaugh, J., statement respecting denial of certiorari) (noting, in a much more consequential antitrust

case, that "the interlocutory posture" was "a factor counseling against this Court's review at this time").

McDonald's urges the Court to intervene sooner, citing a parade of horribles it claims will befall legitimate franchise agreements if Ms. Deslandes is permitted to try to prove her claim. But the rule that Judge Easterbrook articulated here is the same rule that the Seventh Circuit has applied for decades—the same rule that courts across the country have been applying for more than one hundred years. *See* Pet. App. 4a; *Polk Bros.*, 776 F.2d at 188–89 (citing *Addyston Pipe*, 85 F. at 280–83). It's the rule that McDonald's itself (at 24) says is the right rule. In the century-plus that this rule has been black-letter law, McDonald's does not cite—and we have not found—a single case holding that a fast-food corporation cannot agree with its franchisees on menu design or hours of operation.

If a future case holds that some legitimately brand-promoting restraint in a franchise agreement is per se unlawful, this Court can grant review then. But it makes no sense to grant review of a case applying settled law, at the pleading stage, to a restraint that is no longer in use—all out of fear that a future court, in a different context, will misapply that law.

McDonald's also argues (at 32–34) that this Court should grant certiorari because employee noncompete agreements are important. That's a non sequitur. As explained above, an employee noncompete is entirely different than an agreement between competing employers not to hire each other's workers. *See supra* page 17. If this Court wants to consider employee noncompete agreements, it should take a case involving one.

4. Lacking any reason that this Court should review a question the Seventh Circuit never decided in a case that will have no impact, McDonald's attempts to manufacture one. The company argues that the Court should use this case as a referendum on multi-market balancing—that is, whether it is appropriate, when analyzing a restraint of trade, to balance the anticompetitive effects in one market with potential procompetitive effects in another. But this case is a poor vehicle to consider that question. The multi-market balancing argument here would be that by colluding in the labor market, McDonald's and its franchises can sell cheaper burgers. McDonald's does not cite a single case that has ever accepted that argument—or even a single scholar or judge who has argued for that rule.

And with good reason. Even if multi-market balancing might be permissible in some circumstances, it cannot be correct that companies can fix the labor market to provide cheaper goods. *See Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1022–23 (10th Cir. 1998). Accepting that argument would be tantamount to exempting labor-market collusion from the antitrust laws entirely. *Id.* at 1023. If this Court is going to consider multi-market balancing, it should do so in a case where the argument is at least plausible.

III. The decision below is correct.

1. This Court's review is unwarranted for another reason: The Seventh Circuit got it right. It's black-letter law that while a naked agreement among competitors to suppress wages or allocate markets is per se unlawful, *see Socony-Vacuum Oil Co.*, 310 U.S. at 223, a restraint that is "ancillary to a legitimate transaction" is analyzed under

the rule of reason, *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 689. *See also Texaco*, 457 U.S. at 5, 7–8.[9]

Many principles in antitrust law are hotly contested—this one is not. It's embraced by leading legal commentators. *See* Areeda & Hovenkamp, *supra*, §§ 1904, 1906; Bork, *supra*, at 263 ("[I]t is illegal per se to fix prices or divide markets . . . only when the restraint is 'naked'—that is, only when the agreement is not ancillary to cooperative productive activity engaged in by the agreeing parties."). It's reflected in guidance issued by Democratic and Republican administrations, alike. *See* DOJ Antitrust Div. & FTC, *Antitrust Guidance for Human Resource Professionals* 3 (2016); *Avoiding Antitrust Issues in Hiring and Management*, U.S. DOJ (Nov. 12, 2020), *available at* https://bit.ly/49uf8g9. And, as explained above, it's universally applied in the circuit courts. *See supra* Part I.

Even McDonald's agrees. The company concedes that its no-hire agreement is a horizontal restraint. *See* Pet. 23. And it admits (at 24) that, although an "ancillary horizontal restraint" is subject to the rule of reason, a "naked horizontal restraint" is "illegal per se." That's precisely the rule that Judge Easterbrook articulated in the decision below. *See* Pet. App. 4a.

2. It's not entirely clear, therefore, what McDonald's believes the Seventh Circuit got wrong. At times, McDonald's seems to suggest that its no-hire agreement must necessarily be ancillary simply because it exists within the confines of a franchise agreement. But as

[9] An agreement to suppress wages is the buy-side equivalent of an agreement to fix prices. The antitrust laws apply equally to buyers and sellers. *See Anderson*, 272 U.S. at 361–65; *see generally Alston*, 141 S. Ct. 2141 (applying the Sherman Act to a restraint in the market for student-athlete compensation).

McDonald's itself recognizes elsewhere in its petition, that can't be right. *See* Pet. 18 ("[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.") (emphasis added).

As the leading antitrust treatise puts it, "it would be foolish to describe agreements . . . as ancillary *merely* because they are a part of the same document" that created a cooperative venture. Areeda & Hovenkamp, *supra*, § 1908. Such a rule would too easily permit manipulation: A cartel could insulate itself from per se scrutiny "through the simple device of attaching the cartel agreement to some other, independently lawful transaction." *Id.*; *cf. American Needle v. NFL*, 560 U.S. 183, 201–202 (2010) (rejecting an argument that would permit cartels to "evade the antitrust laws simply by creating a 'joint venture'").

As this Court has recognized, the mere fact that there is a cooperative venture is not enough. Courts must look to the substance of the restraint and its role in that venture. *See Palmer*, 498 U.S. at 47, 50 (holding that an agreement among competitors to divide territories was per se unlawful, even though the agreement was part of a larger licensing deal). "[T]he ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers." *Alston*, 141 S. Ct. at 2157 (quoting *Chi. Pro. Sports Ltd. P'ship*, 95 F.3d at 600).

Unable to seriously dispute that proposition, McDonald's searches for some other reason the Seventh Circuit was wrong to remand to the district court for consideration of McDonald's ancillary restraints defense. The only other argument the company comes up with (at 3, 21) is that courts do not have enough experience to ever

hold that a no-hire clause in a franchise agreement is unlawful per se—even if that agreement is entirely unnecessary to any procompetitive venture. But there's no dispute that a no-hire agreement is simply an agreement between competing employers to divide the labor market. And this Court has held for decades that horizontal agreements to "divide markets" are unlawful per se. *Leegin*, 551 U.S. at 886; *Palmer*, 498 U.S. at 49–50.

To the extent that McDonald's complaint is that courts do not have enough experience with these agreements in the franchise context specifically, that complaint runs headlong into this Court's precedent holding that what matters is courts' experience with the category of restraint—e.g. price-fixing, market allocation, etc.—not the particular incarnation of that restraint at issue. *See, e.g.*, *Maricopa Cnty. Med. Soc'y*, 457 U.S. at 345.

McDonald's argues (at 22) that the mere fact that some analysis might be required to determine whether a horizontal restraint is, in fact, ancillary is incompatible with ever applying the per se rule to that restraint. But McDonald's misunderstands the role of the per se rule. That rule ensures that once a court has determined that a horizontal restraint is not ancillary to a procompetitive venture, it need not try to weigh any asserted competitive benefits against the obvious harm—it is simply unlawful. But it does not obviate the need to determine whether a restraint is ancillary in the first place. And, as this Court has recognized, that might occasionally require "considerable inquiry." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999).

That said, as Judge Ripple pointed out below, it's unlikely that the inquiry here will be particularly difficult: It's hard to imagine how McDonald's could show that a

nationwide no-hire agreement that applied through a worker's entire employment at any McDonald's and six months thereafter could possibly be "reasonably necessary" to its franchise venture. *See* Pet. App. 9a. Indeed, we already know it wasn't. As McDonald's itself has proclaimed, its franchisees are doing better than ever.

3. Shifting gears, McDonald's argues (at 29) that this Court should grant certiorari to ensure that on remand, it can attempt to justify its labor-market collusion by arguing that it resulted in more or cheaper burgers. But the decision below was correct that "benefits to consumers" cannot automatically "justify[] detriments to workers." Pet. App. 5a. If it were otherwise, employers could agree to fix wages (or the price of any other input), so long as doing so allowed them to produce their product more cheaply—which, of course, it always would.

That's not the law: Horizontal agreements among buyers—including buyers of labor—are subject to antitrust scrutiny in the same way that horizontal agreements among sellers are. *See Anderson*, 272 U.S. at 361–65 (holding that a wage-fixing agreement among ship owners was per se unlawful, even though such an agreement may lower the cost of shipping). And neither this Court nor any other has ever held that companies may fix the labor market in order to sell their goods or services more cheaply. *See Alston*, 141 S. Ct. at 2167–68 (Kavanaugh, J., concurring) ("Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work.").

As long as the antitrust laws have been around, cartels have sought to justify their price-fixing or output-reducing activities by arguing that their collusion actually

benefitted society. *See FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 423–24 (1990). But the "legislative judgment" underlying the antitrust laws is that the optimal balance between, say, the price of burgers and fries and the wages of fast-food employees should be determined by competition in a free market. *Nat'l Soc'y of Pro. Eng'rs*, 45 U.S. at 695; *see also Socony-Vacuum Oil Co.*, 310 U.S. at 225 n.59 ("Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.").

McDonald's offers no justification for its contention that courts should get into the business of rebalancing those markets. As this Court explained in rejecting a similar argument decades ago, a "value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already[] by Congress." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 371 (1963); *see also In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1270 (9th Cir. 2020) (Smith, J., concurring) ("[C]ourts employing a cross-market analysis must—implicitly or explicitly—make value judgments by determining whether competition in the collateral market is more important than competition in the defined market. As the Supreme Court has warned, this is not what the antitrust laws invite courts to do.").

4. Left with no other option, McDonald's criticizes a decision that the Seventh Circuit did not write. McDonald's contends (at 23) that the decision below is an "unacknowledged return" to a world in which horizontal restraints are "automatically illegal," even where they are

"ancillary to a partnership or joint venture." But that's not what the Seventh Circuit held. The Seventh Circuit simply held that Ms. Deslandes had plausibly alleged a horizontal agreement to divide the labor market—and it remanded to the district court for a determination of whether that restraint was ancillary. Pet. App. 8a.

That's an ordinary application of the ancillary restraints doctrine—not a threat to antitrust law. At bottom, McDonald's request is for this Court to "return[] the law to the formulation of *Addyston Pipe*." Pet. 24. But the law is already there. The decision that McDonald's holds out as a model of the proper formulation of the *Addyston Pipe* ancillary restraints doctrine—Judge Bork's decision in *Rothery Storage*, 792 F.2d at 229—is the exact case that Judge Easterbrook cited in the decision below for his articulation of the doctrine.[10] Pet. App. 4a. Aside from the outcome, it's not clear how McDonald's thinks the decision below should have been different.

This Court should not grant McDonald's plea for error correction when the company cannot identify any error.

CONCLUSION

This Court should deny the petition for certiorari.

February 9, 2024 Respectfully submitted,

JENNIFER BENNETT
Counsel of Record

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[10] The Seventh Circuit did not rely on—or even cite—the opinion that McDonald's claims this Court must overrule, *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). Pet. 23–25.

GUPTA WESSLER LLP
505 Montgomery Street
Suite 625
San Francisco, CA 94111
(415) 573-0336
jennifer@guptawessler.com

ERIC CITRON
STEFANIE OSTROWSKI*
GUPTA WESSLER LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741

DEAN M. HARVEY
ANNE B. SHAVER
LIEFF CABRASER HEIMANN &
BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
(415) 956-1000

DEREK Y. BRANDT
LEIGH M. PERICA
CONNOR P. LEMIRE
MCCUNE LAW GROUP
231 North Main Street, Suite 20
Edwardsville, IL 62025
(618) 307-6116

**Not admitted in the District of Columbia; practicing under direct supervision of members*

of the D.C. Bar pursuant to
Rule 49(c)(8)

Counsel for Respondents