Nos. 22-2333 and 22-2334

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LEINANI DESLANDES and STEPHANIE TURNER,
on behalf of herself and all others similarly situated,

Plaintiffs-Appellants,

v.

McDONALD'S USA, LLC, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, Nos. 1:17-cv-04857 & 1:19-cv-05524.
The Honorable Jorge L. Alonso, Judge Presiding.

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE URGING REVERSAL IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Pursuant to Fed. R. App. P. 26.1 and Cir. R. 26.1, the American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it. No law firm has appeared, or is expected to appear, for amicus curiae in this matter.

s/ Randy M. Stutz

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INTEREST OF AMICUS CURIAE1

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[2]

SUMMARY OF ARGUMENT

For decades, defendants McDonald's USA, LLC, and McDonald's Corp. ("Defendants" or "McDonald's"), the owners of the McDonald's franchise as well as 5-10% of McDonald's restaurants ("McOpCos"), routinely entered horizontal agreements with independently-owned McDonald's franchise restaurants ("Independents") to limit the hiring of restaurant employees. SA-27–28. Independents signed a uniform provision in franchise contracts ("Paragraph 14") in which they promised not to hire restaurant employees from any other McDonald's

[1] All parties consent to the filing of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amicus curiae or its counsel—has contributed money that was intended to fund preparing or submitting this brief.

[2] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. Certain members of AAI's Board of Directors or Advisory Board, or their law firms, represent Plaintiffs-Appellants, but they played no role in AAI's deliberations with respect to the filing of the brief.

restaurant in the United States, including McOpCos. SA-28. From June 2013 to July 2018, the McOpCos allegedly reciprocated by agreeing not to hire restaurant employees from Independents. *See* Pl.'s Br. at 9–10 (citing ECF 270-14 at 54:20-55:23; ECF 403 ¶¶ 7, 9-11). Collectively, throughout the United States, all Independents and all McOpCos allegedly agreed not to hire current restaurant workers from each other's restaurants indefinitely, and also for a period of six months after the workers' termination. *Id.*

While the reciprocal, nationwide "no-poach" agreement was allegedly in effect, restaurant employees had no way of suspecting their current and putative future employers had struck bargains to limit their employment prospects. In this way, a horizontal no-poach agreement is unlike an employee-noncompete agreement. A noncompete is a vertical agreement negotiated directly between the employer and the employee. When presented with a noncompete provision during employment negotiations, the employee can choose to turn down the job or try to bargain for better employment terms in exchange for acceptance. Such bargaining can be efficient if it facilitates the formation of employment contracts that could not otherwise be formed. *See Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 189 (7th Cir. 1985).

A horizontal no-poach agreement, by contrast, is an agreement among rival employers. The employee is not a party to the agreement. When the employee accepts the job and triggers a commitment from putative future employers to forego competition for her services, she is unaware she has done so. And, unlike an

employee who has negotiated for a noncompete clause, she gains nothing in the bargain.

By colluding with each other instead of negotiating with their employees, the employers can limit employee mobility and wages (1) more easily, because the employees have no knowledge they are being limited, and (2) more profitably, because they do not have to give the employees anything in exchange for the limits. And, the agreement cannot facilitate the formation of employment contracts that would not otherwise be formed. Because the employees are not parties to the agreement, the agreement affects only employment contracts that are formed independently.

Horizontal no-poach provisions concealed in fast-food franchise contracts gained notoriety from a New York Times story published in 2017. Rachel Abrams, *Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue*, N.Y. Times, Sept. 28, 2017, at B1. The news was greeted as a scandal. Within the year, ten State Attorneys' General launched investigations. Rachel Abrams, *'No-Poach' Deals for Fast-Food Workers Face Scrutiny by States*, N.Y. Times, July 9, 2018, at B3. The Washington Attorney General's Office also launched an initiative seeking to immediately eliminate the provisions. Wash. State Att'y Gen.'s Off., *No-Poach Initiative: Ending a Rigged System for Hourly Employees at Corporate Franchises* 3 (June 2020). Within two years, the Washington Attorney General's Office persuaded more than 200 companies to promptly and voluntarily eliminate or agree to not enforce no-poach provisions covering low-wage employees in franchise

contracts nationwide. *Id.* at 5–9 (listing companies). McDonald's, acting both on behalf of its McOpCos and through its contractual relationship with Independents, was among the first to agree to do so. *See* Jackie Wattles, *7 Fast Food Chains Agree to End 'No-Poach' Rules*, CNN Bus. (July 12, 2018), https://money.cnn.com/2018/07/12/news/companies/no-poach-fast-food-industry-wages-attorneys-general/index.html (McDonald's was "pleased to cooperate" with Attorney General Ferguson).

Plaintiffs-Appellants are restaurant employees who challenge the nationwide McDonald's no-poach agreement as a Sherman Act violation. They allege the agreement allocated the hiring market for all workers at all McDonald's restaurants, without regard to duration of employment, experience level, training, or skill. Defendants argue in response that the no-poach agreement is procompetitive because it promotes employee training. They argue that, by eliminating hiring competition, the no-poach agreement encourages individual franchisees to make "franchise-specific" training investments, because it assures them that they will not lose their individual investments to competing McDonald's employers offering superior terms. *See* McDonald's USA, LLC & Washington Attorney General, Assurance of Discontinuance, *In re Franchise No-Poaching Provisions*, No 18-2-17229 (Wash. King Cnty. Sup. Ct. July 12, 2018) ("[I]n McDonald's view, paragraph 14 was adopted to encourage franchisees to make the investments necessary to develop well-trained, high-quality and stable workforces in their restaurants."); *see also* Def's Mem. Supp. Summ. J. at 2; SA-23–24.

The district court held that the agreement to restrain hiring of employees was ancillary to the franchise contract and therefore subject to the rule of reason. SA-63. It granted judgment on the pleadings to McDonald's after applying the "full blown" rule of reason, which requires a showing of market power. *Id.* The district court believed it was implausible that McDonald's has market power in labor markets comprised of McDonald's outlets. SA-65. However, the district court committed numerous errors.

The district court's first error was to classify a horizontal no-poach agreement as an ancillary restraint based solely on the fact that the agreement is part of an otherwise procompetitive franchise contract. SA-35; SA-63. Courts do not move horizontal market allocation agreements out of the per se category of antitrust offenses so casually. They first inquire whether the putatively ancillary agreement is reasonably related to, and reasonably necessary to achieve efficiencies generated by, the main transaction. *Infra* Part I.

The district court's threshold error is especially problematic because the ancillary restraints doctrine strikes an important balance between (1) preserving the administrative benefits of the per se rule, and (2) protecting against unwarranted condemnations of efficient, integrative business activity. The challenge is that the per se rule minimizes the administrative burden associated with punishing irredeemable, hard-core antitrust offenses, but certain efficient, integrative business activity requires horizontal agreements that can be mistaken for such offenses. The ancillary restraints doctrine distinguishes between the two.

However, if the doctrine is not applied carefully, courts run the risk of throwing out the baby and keeping the bathwater. That is what the district court did here. By wrongly moving a hard-core antitrust offense out of the per se category without completing an ancillary restraints analysis, the district court made the most forgiving possible assessment of the most unambiguously harmful conduct.

Because the district court failed to apply the ancillary restraints doctrine, it failed to recognize that the no-poach agreement is not ancillary. The no-poach agreement is neither reasonably related to, nor reasonably necessary to realize efficiencies from, the procompetitive elements of franchising. For reasons discussed *infra*, it is superfluous to its claimed purpose, facially overbroad, and does not contribute to franchise-specific training investments. As such, the no-poach agreement is a naked restraint. The district court should have drawn that conclusion, cut off further inquiry, and applied the per se rule, in that order.

After wrongly bypassing the per se rule, the district court compounded its threshold error by proceeding straight to the full blown rule of reason. Courts applying the rule of reason no longer "locate the appropriate analysis, and the concomitant burden of proof, by reference to the vestigial line separating per se analysis from the [full blown] rule of reason." *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005). What is required, rather, is an "enquiry meet for the case." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999). When a court performs a 'quick look' and deems it appropriate to move a horizontal market allocation agreement out of the per se category, it is "not based on a lack of judicial experience

with this type of arrangement." *NCAA v. Bd. of Regents*, 468 U.S. 85, 100–01 (1984). Horizontal market allocation is "inherently suspect" because it has "already been convicted in the court of consumer welfare." *Polygram*, 416 F.3d at 37. Accordingly, courts no longer reflexively move horizontal market allocation from the per se category all the way across the spectrum of analyses to the "full blown" rule-of-reason category, which requires a showing of market power. Because horizontal market allocation is anticompetitive "on its face," it does not require a showing of market power for the plaintiff to make out a prima facie case that it is unreasonable. *Bd. of Regents*, 468 U.S. at 113.

Finally, the district court erred again in its application of the full blown rule of reason, which was hardly "full blown." Ironically, the court's cursory analysis in approving the restraint was a form of the "quick look" analysis that the court purported to a reject—it was a "quick look approval" rather than a "quick look condemnation." *See* SA-62–63 (characterizing case as unfit for a quick look). The court also wrongly based its conclusions about market power on speculation about market share, without addressing Plaintiffs' direct evidence. The direct evidence of market power belies the district court's bald conclusion that market power is implausible in a labor market comprised of workers who sell labor to McDonald's outlets.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY MOVED A NAKED HORIZONTAL MARKET ALLOCATION AGREEMENT OUT OF THE PER SE CATEGORY

The district court moved a horizontal market allocation agreement out of the per se category of antitrust offenses without completing an ancillary restraints analysis. The district court recognized that ancillary restraints must be "'part of a larger endeavor whose success they promote.'" SA-63 (quoting *Polk Bros.*, 776 F.2d at 188–89). However, the court found only that the no-poach provisions were "part" of the McDonald's franchise arrangement. SA-63 ("The alleged restraint was specifically alleged to be part of a franchise agreement, which is to say it was ancillary" and "[t]hus, the restraint is not per se unlawful[.]"). The district court did not find that the provisions promote the arrangement's success. SA-35 ("Each time McDonald's entered a franchise agreement, it increased output of burgers and fries," but "[t]hat is not to say the [no-poach] provision itself was output enhancing.").

Being "part" of an efficiency enhancing arrangement is not enough to move a horizontal restraint out of the per se category. Indeed, "it would be foolish to describe agreements…as ancillary *merely* because they are a part of the same document" as an efficiency-enhancing joint venture. Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1908b (5th ed. Cum. Supp. 2022). "Such a rule could protect cartels from the heightened scrutiny attending naked restraints through the simple device of attaching the cartel agreement to some other, independently lawful

transaction." *Id.*; *see United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899) (The restraint must be "merely ancillary to the main purpose of a lawful contract, *and* necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract.") (emphasis added); *accord Cline v. Frink Dairy Co.*, 274 U.S. 445, 462 (1927).

Accordingly, as a first step in the ancillary restraints analysis, "some determination must be made whether the challenged agreement is an essential part of th[e] arrangement, whether it is important but perhaps not essential, or whether it is completely unnecessary." Areeda & Hovenkamp, Antitrust Law ¶ 1908b. "[T]he 'essentiality' query made at this early stage considers whether the challenged restraint is an inherent feature of the joint venture at all, or simply an unnecessary, output-limiting appendage." *Id.*

The district court here did not make the required essentiality determination at an early stage or any other; it declared the no-poach provision ancillary simply because it is written "on the same piece of paper" as the franchise agreement. *Id.* That was error. "Clearly some restraints are 'part' of efficiency-creating joint ventures and yet not sufficiently integral to the venture so as to be classified as ancillary." *Id.*; *see Bd. of Regents*, 468 U.S. at 109 (horizontal agreement was a "naked" restraint notwithstanding that it was part of a procompetitive NCAA collaboration).

Ignoring the threshold essentiality determination, as the district court did, contravenes the basic purpose of the ancillary restraints doctrine. The per se rule

against horizontal market allocation and other hard-core antitrust offenses is "justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result." *United States v. Container Corp. of Am.*, 393 U.S. 333, 341 (1969) (Marshall, J., dissenting). In particular, "to the benefit of everyone involved," the per se rule "avoids the necessity for an incredibly complicated and prolonged economic investigation." *Broad. Music, Inc. (BMI) v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 n.11 (1979) (internal quotation omitted); *see also* Robert H. Bork, The Antitrust Paradox 269 (1978) (If the parties "were allowed to…introduce[e] the enormous complexities of market definition" into every cartel case, then "[t]here would be no net gain from such trials. In fact, the only result would be to make the prosecution of output-reducing cartels more difficult, rendering the law less effective.").

Courts therefore do not abandon the administrative advantages of the per se rule in favor of a more searching rule-of-reason inquiry simply because defendants invoke the words "ancillary restraint." *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Assoc.*, 744 F.2d 588, 595 (7th Cir. 1984) (Posner, J.) ("The per se rule would collapse if every claim of economies from restricting competition, however implausible, could be used to move a horizontal agreement not to compete from the per se to the Rule of Reason category."). Rather, courts undertake an *analysis*. And because the ancillary restraints analysis serves as a screening mechanism to determine whether the economies of the per se rule can be realized in a case, the analysis must proceed in prescribed steps that minimize the threatened loss of

those economies at the earliest stage. The district court here not only skipped important steps, but it skipped the entire analysis.

A. The No-Poach Agreement Is Unnecessary and Overbroad

The first step in an ancillary restraints analysis must be the aforementioned essentiality query. Courts must ask whether there is a "plausible connection between the specific restriction and the essential character of the [main transaction]." *Gen. Leaseways*, 744 F.2d at 595; *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.) ("Of course, the restraint imposed must be related to the efficiency sought to be achieved."). If "the organic connection between the restraint and the cooperative needs of the enterprise that would allow us to call the restraint a merely ancillary one is missing," then the ancillary restraints inquiry necessarily must end and the per se rule must be applied. *Gen. Leaseways*, 744 F.2d at 595; *Polk Bros.*, 776 F.3d at 188 (If "a quick look reveals that 'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output,'" then a court should "cut off further inquiry.") (quoting *BMI*, 441 U.S. at 19). The horizontal no-poach provision in McDonald's franchise contracts fails this threshold test at the first step because it serves no purpose related to franchising.

McDonald's argument that the no-poach provision "promotes" franchise-specific training investments does not survive basic scrutiny. Separate provisions of the same franchise contract already *require* specified levels of training for employees of McDonald's choosing. *See, e.g.*, SA-4; McDonald's USA, LLC,

Franchise Disclosure Document, Ex. B., Franchise Agreement, ¶ 6 ("Franchisee acknowledges the importance of quality of business operation among all restaurants in the McDonald's System and agrees to enroll…managers, present and future, at Hamburger University or at such other training center as may be designated by McDonald's from time to time."); *id.*, Item 6, Restrictions on Sources of Products and Services, at 19 ("[F]ood preparation…requirements and standards are provided to you in our Operations and Training Manual and through other publications provided to our franchisees.").

The mere fact that McDonald's *could* directly contract with franchisees to require specified levels of training for employees of its choosing shows there are less restrictive (and more direct) methods for McDonald's to ensure adequate franchise-specific training without resorting to anticompetitive horizontal no-poach agreements. *See* Donald J. Polden, *Restraints on Workers' Wages and Mobility: No-Poach Agreements and the Antitrust Laws*, 59 Santa Clara L. Rev. 579, 604 (2020) (discussing "contractual methods" for protecting training investments "short of outright restraints on worker mobility"). However, the fact that McDonald's *does* impose such training requirements—in the very same franchise contracts that feature the no-poach provision no less—renders the no-poach provision the quintessential "output-limiting appendage" to those contracts. *See* Areeda & Hovenkamp, Antitrust Law ¶ 1908b. An otherwise-anticompetitive contract provision that "promotes" something the same contract already requires is superfluous. The provision serves no purpose connected to "the legitimate fruits" of

the franchise contract. *Addyston Pipe*, 85 F. at 282. The requirement provisions provide for the legitimate fruits of a well-trained workforce at each specific franchise location, and the no-poach provision serves only to stifle competition.

The no-poach provision also is facially overbroad. To be valid as an ancillary restraint, a covenant not to compete must be "as limited as is reasonable to protect the covenantee's interests." *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981) *cert. denied*, 455 U.S. 921 (1982). By "requir[ing] that the agreement eliminating competition be no broader than the need it serves," the ancillary restraints doctrine provides "a measuring rod for confining [its application] to the scope of its reason for existence." Bork, The Antitrust Paradox at 266; *see Addyston Pipe*, 85 F. at 282 ("The main purpose of the contract suggests the measure of protection needed," and "if the restraint exceeds the necessity presented by the main purpose of the contract, it is void[.]"); *Nat'l Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 779 F.2d 592, 601 (11th Cir. 1986) (A restraint may be subject to the rule of reason if it is "no broader than necessary to accomplish its procompetitive goals."); *Bd. of Regents v. NCAA*, 707 F.2d 1147, 1153 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984) ("[T]he agreement must be capable of increasing the effectiveness of th[e] cooperation and no broader than necessary for that purpose.").

First, the no-poach provision is egregiously overbroad in its duration. It prevents a current McDonald's restaurant employee from moving to another restaurant even years or decades after the franchisee has long since recouped its full investment in training the employee. Even if the hiring restraint could

"promote" franchise-specific training investments that the franchise contract already requires, which it cannot, there is no conceivable "free-rider" or other justification for freezing employees in place at the same franchise location *forever*. At some point in the employment relationship, the franchisee necessarily recoups its training investment in the employee, yet the no-hiring agreement persists indefinitely for as long as the individual remains an employee, indifferent to that recoupment. *See Gen. Leaseways*, 744 F.2d at 595 (condemning a horizontal market division as *per se* illegal after a quick look, because "no reason has been suggested" why an otherwise procompetitive agreement to provide reciprocal truck-leasing services required participants not to compete with each other in leasing trucks); *Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995) (applying per se rule where defendants claimed a restraint was ancillary to a procompetitive partnership dissolution that had already begun when the restraint was entered).

Second, the no-poach provision is overbroad insofar as it applies to newly hired, entry-level crew members. Entry-level employees receive only entry-level training, which is unavoidable training. No employer can afford to hire an employee without explaining how to perform the job. Thus, as the district court found and McDonald's does not dispute, the instructions McDonald's provides on "restaurant maintenance, customer service and how to operate each food preparation station" are instructions that crew members "*must* learn" to perform an entry-level job at any McDonald's restaurant. SA-40 (emphasis added). Because such entry-level training is unavoidable, it cannot be "promoted" by a restraint,

ancillary or otherwise. *See* Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, 57 J. Human Resources 324, 335 (2022) ("[T]he efficient level of training would have been provided absent the no-poaching agreement[.]"). Accordingly, the no-poach provision cannot possibly be an ancillary restraint as applied to these workers, yet the restraint covers them and limits their wage growth and mobility indefinitely, beginning on day one of their employment.

Finally, the no-poach agreement also is overbroad as applied to McOpCos. Because McOpCos are wholly owned subsidiaries of McDonald's, the only theoretical value of including them in the agreement is to prevent *McDonald's itself* from hiring workers away from Independents. But, McDonald's has suggested no reason why it would need an agreement to prevent such hiring. It could simply issue a unilateral instruction to McOpCos not to hire from Independents. As applied to McOpCos, then, the agreement serves no purpose other than to limit workers' mobility and stifle competition for their labor. It does nothing to prevent Independents from losing training investments that a unilateral no-hiring policy would not have prevented.

When a horizontal market allocation agreement appended to another contract is unnecessary and overbroad, it is a naked, *per se* illegal market allocation. *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) (Restraints that have "no purpose except stifling of competition" are "naked"). The district court therefore erred by failing to cut off the inquiry into the no-poach agreement

at the first step. It should have done so and promptly applied the per se rule, just as this Court did in *General Leaseways* and *Sweeney*. However, even if the court had mistakenly concluded that the restraint should survive the first step, the restraint also should have failed at the second step of the ancillary restraints analysis.

B. The No-Poach Agreement Does Not Contribute to Efficiency

If a court cannot conclude at the first step that a restraint, on its face, is an "output-limiting appendage" to the main transaction, then the court reaches the second step in the ancillary restraints analysis. The second step is an inquiry into whether the challenged restraint makes a necessary contribution to the efficiency generated by the main transaction. The purpose of undertaking the second step in the inquiry, again, is to preserve the economies of the per se rule if doing so does not sacrifice legitimate efficiencies generated by the main transaction. There is nothing gained, and much lost, if a facially anticompetitive restraint is condemned only after a more searching rule of reason inquiry rather than before.

A putatively ancillary restraint contributes sufficiently to the efficiencies generated by the main transaction if it is reasonably necessary to generate those efficiencies. *Sweeney*, 53 F.3d at 828 (The question is whether the covenant is "necessary for the [main transaction] and the resulting potential increase in competition"); *Aya Healthcare Servs. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021) (The covenant must be "'reasonably necessary' to achieving [the main] transaction's pro-competitive purpose") (internal citation omitted); *Rothery*

Storage, 792 F.2d at 227–28 ("reasonably necessary"); *NaBanco*, 779 F.2d at 601 ("reasonably necessary"); *Addyston Pipe*, 85 F. at 281 ("reasonably necessary"); *see also* U.S. Dept. of Just. & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors at 4 (2000) (The government does not apply the per se rule if the agreement is "reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity."). A reasonably necessary restraint makes an "important" contribution to the main transaction's efficiencies. *Polk Bros.*, 776 F.2d at 190 ("The covenant…played an important role in inducing the two retailers to cooperate.").

Because the ancillary restraints doctrine is a screening mechanism, the inquiry under the second step is not a question of degree. *Rothery Storage*, 792 F.2d at 227–28 (Lower courts do not need to "calibrate degrees of reasonable necessity."); *cf. BMI*, 441 U.S. at 19 n.33 ("The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason, or else we should apply the rule of reason from the start.") (citation omitted). It asks only whether, as a factual matter, the challenged restraint "promoted enterprise and productivity." *Polk Bros.*, 776 F.2d at 189. A defendant's burden is therefore limited to showing that the challenged restraint is necessary to generate the efficiencies realized by the main transaction, not that the efficiencies necessarily outweigh the harms. *Bus. Forms Finishing Serv. v. Palmer*, 452 F.2d 70, 74 (7th

Cir. 1971) ("The covenantee has the burden of justifying the restraint on competition…as…limited and ancillary to a valid business purpose.").[3]

Here, McDonald's has, by its own hand, foreclosed the required showing. Since voluntarily eliminating the no-poach provisions from its franchise contracts at the behest of the Washington Attorney General in 2018, McDonald's continues to require specified levels of training in its franchise contracts, but it has not replaced whatever "promotional" function the no-poach provisions purportedly served. *See,* McDonald's USA, LLC, Franchise Disclosure Document, Ex. B., Franchise Agreement, ¶ 14 (May 1, 2022) (stating only that the text of Paragraph 14 has been "INTENTIONALLY DELETED"). McDonald's has not, for example, attempted to use less restrictive alternatives such as voluntary non-compete agreements in service of the purported goal of "promoting" franchise-specific investments in entry level training. *See* Polden, 59 Santa Clara L. Rev. at 603. It simply eliminated the provisions and continues to require specified levels of training directly, using

[3] The Sixth Circuit recently split from this Circuit by placing the burden on the plaintiff to anticipate and disprove an ancillary-restraints defense. *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health System*, 922 F.3d 713, 727–28 (2019). That opinion is an outlier, however. To our knowledge, all other circuits join this Circuit in allocating the burden of establishing an ancillary-restraints defense to the defendant. *See, e.g.*, *Princo Corp. v. ITC*, 616 F.3d 1318, 1354 (Fed. Cir. 2010); *Bd. of Regents.*, 707 F.2d at 1154 n.9; *Alston Studios, Inc. v. Lloyd V. Gress & Assocs.*, 492 F.2d 279, 283 (4th Cir. 1974). The Sixth Circuit's approach is especially misguided because the burden of proving procompetitive justifications rests with the defendant under the rule of reason. *Alston*, 141 S. Ct. at 2160. It is anomalous to give the burden of showing procompetitive justifications to defendants in rule of reason cases but to plaintiffs in ancillary restraints cases, because the rule of reason *applies* in ancillary restraints cases if the restraint does in fact prove ancillary. *See also* Andrew I. Gavil, Burden of Proof in U.S. Antitrust Law, *in* 1 Issues in Competition L. and Pol'y 125, 156 (ABA Section of Antitrust Law 2008) ("[T]he evidence of efficiencies is almost always likely to be in the control of the defendants," which "justifies at least the imposition of a burden of production.").

alternative provisions of the franchise contract that squarely address training requirements.

With the perfect clarity of more than four years of hindsight, then, McDonald's has confirmed what should have already been clear at the first step of the ancillary restraints analysis: Its horizontal no-poach agreement is not reasonably necessary to "promote" investments in franchise-specific training for McDonald's workers. The no-poach agreement is unnecessary, overbroad, and makes no contribution to achieving franchise-specific training investments.

II. A PLAINTIFF ALLEGING HORIZONTAL MARKET ALLOCATION NEED NOT PLEAD MARKET POWER TO MAKE OUT A PRIMA FACIE CASE UNDER THE RULE OF REASON

After failing to apply the ancillary restraints doctrine and wrongly abandoning the per se rule, the district court erred further by requiring plaintiffs to plead market power as an essential element of a prima facie case of horizontal market allocation under the rule of reason. SA-44. "[A] plaintiff who proves that the defendants got together and agreed to…restrict[] output…has made a prima facie case that the defendants' behavior was unreasonable. He need not prove market power." *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1007 (7th Cir. 2012) (Posner, J.). This Court interprets the Supreme Court's decision in *Board of Regents* to hold that "any agreement to reduce output…requires some justification—some explanation connecting the practice to [procompetitive effects]." *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992). *Board of Regents* thus instructs this Court to rely on the "inherently suspect" or

"quick look condemnation" framework when applying the rule of reason to horizontal market allocation. *See Polygram*, 416 F.3d 29 at 37 (A "rebuttable presumption of illegality arises…from the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare."); *Alston*, 141 S. Ct. at 2155 ("[F]or restraints at opposite ends of the competitive spectrum…a quick look is sufficient for approval or condemnation.")

The Court in *Board of Regents* confirmed that, when horizontal market allocation is moved out of the per se category on any given set of facts, it is *not* because courts lack "considerable experience with the type of restraint at issue" or cannot "predict with confidence that it would be invalidated in all or almost all instances." *Alston*, 141 S. Ct. at 2156 (internal quotation omitted); *see Bd. of Regents*, 468 U.S. at 100–101 (Application of the rule of reason is "not based on a lack of judicial experience with this type of arrangement."). Indeed, no other practice stands more clearly convicted in the court of consumer welfare. *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (Posner, J.). Thus, notwithstanding that the per se rule may not apply, horizontal market allocation remains anticompetitive "on its face" under the rule of reason, and such "hallmarks of anticompetitive behavior place upon [the defendant] a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." *Bd. of Regents*, 468 U.S. at 113.

The district court rejected a "quick-look condemnation" because it believed it "cannot say that it has enough experience with no-hire provisions of franchise agreements" to find them facially anticompetitive and inherently suspect. A-37–38. However, it is incorrect. Much as "price-fixing labor is price-fixing labor," *Alston*, 141 S. Ct. 2167 (Kavanaugh, J., concurring), allocating labor markets is allocating labor markets. *Marshfield Clinic*, 65 F.3d at 1415 ("It would be a strange interpretation of antitrust law that forbade competitors to agree on what price to charge, thus eliminating price competition among them, but allowed them to divide markets, thus eliminating all competition among them."); *see Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 544 (10th Cir. 1995) (Antitrust law addresses employer conspiracies controlling employment terms for the same reasons it addresses conspiracies involving the buying or selling of goods.).

It is no defense that horizontal market allocation occurs in a unique industry setting. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 689 (1978) ("The early cases…foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition.") (citations omitted). Nor is it a defense that horizontal market allocation occurs among buyers rather than sellers. *Khan v. State Oil Co.*, 93 F.3d 1358, 1361 (7th Cir. 1996) (Posner, J.) (Monopsony pricing "is analytically the same as monopoly or cartel pricing and so treated by the law."); *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ, 2022 U.S. Dist. LEXIS 16188, at *7–8 (D. Colo. Jan. 28, 2022) ("[T]hat makes no difference."). The district court therefore erred.

After wrongly abandoning the per se rule, it should have applied the "inherently suspect" or "quick look condemnation" framework.

In choosing instead to require a showing of market power, the district court purported to follow *Polk Brothers*. *See* SA-66. However, it misunderstood what *Polk Brothers* teaches. *Polk Brothers* was a "quick-look approval" case. *Alston*, 141 S. Ct. at 2155–56 (citing *Polk Bros.*, 776 F.2d at 191, as an example of a quick-look approval); *see infra* Part III. The district court itself correctly concluded that a quick-look approval was *not* warranted here. SA-37. Accordingly, the court should have paused to consider the appropriate rule-of-reason inquiry. Instead of reflexively proceeding to a full-blown market power inquiry, it should have consulted binding Supreme Court precedent that demands a different approach.

In *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999), the Supreme Court explained that, where a quick look condemnation is unwarranted, "it does not follow that every case attacking a less obviously anticompetitive restraint…is a candidate for plenary market examination." *Id.* at 779. The Court rejected the lower court's reliance on a quick look condemnation, but it vacated and remanded with instructions to perform a more searching inquiry into anticompetitive effects *without* requiring proof of market power. 526 U.S. at 781. The Court explained that "our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear." *Id.* "What is required, rather, is an enquiry meet for the case, looking to the circumstances,

details, and logic of a restraint." *Id.* at 781. "'[T]he quality of proof required should vary with the circumstances.'" *Id.* at 780.

In *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006), which postdated *Polk Brothers*, the Court drew a distinction between restraints that are "core" and "ancillary" to joint ventures, and it held that core restraints are reviewed under the rule of reason. *Id.* at 8 (likening core restraints to agreements that are "'necessary to market the product at all'") (quoting *BMI*, 441 U.S. at 23). If *Dagher* had been in effect when *Polk Brothers* was decided, it would have been controlling. *Polk Brothers* could only be decided using a quick-look approval because it was a "core restraints" case. *See Polk Bros.*, 776 F.2d at 190 ("[T]he covenant not to compete was not merely ancillary"—"the lease and land sale would not have been made by Polk Bros. absent an agreement not to compete." "Only by exalting Webster's Third over the function of antitrust law could a court determine that a restraint is not [subject to the rule of reason] because it was so important to the productive undertaking.") (internal quotation omitted). *Dagher* makes clear that courts may *only* consider a quick-look approval in a "core restraints" case, *not* in a case involving non-core restraints like the no-poach agreement here. *See Dagher*, 547 U.S. at 7 (citing favorably to *Bd. of Regents* in explaining application of ancillary restraints doctrine to non-core restraints).

Together, *California Dental* and *Dagher* make clear that, when reviewing a horizontal restraint that is not "core" to the main transaction, courts should apply an "enquiry meet for the case" rather than proceed by rote to an expensive and

unnecessary "detailed market analysis." *Cal. Dental*, 526 U.S. at 779, 781; *Polygram*, 416 F.3d at 36 (rejecting an "attempt to locate the appropriate analysis, and the concomitant burden of proof, by reference to the vestigial line separating per se analysis from the [full blown] rule of reason"). Where horizontal market allocation is concerned, this Court has recognized that *Board of Regents* lights the path to that appropriate enquiry. *See In re Sulfuric Acid*, 703 F.3d at 1007 ("[E]ven if a challenged practice doesn't quite rise to the level of per se illegality, it may be close enough to shift to the defendant the burden of showing that appearances are deceptive[.]") (citing *Bd. of Regents*, 468 U.S. at 109–10).

After wrongly abandoning the per se rule and wrongly foregoing the "inherently suspect" or "quick-look condemnation" framework, the district court therefore erred again by reflexively requiring proof of market power in a challenge to a horizontal restraint that is not "core" to the main transaction. If the no-poach provision here proves procompetitive, the reason will not be that horizontal market allocation has suddenly become capable of having a procompetitive effect on its own; it will *only* be because the market allocation agreement proves as a factual matter to be reasonably necessary to realize the benefits produced by the main transaction. The only open questions under the rule of reason, then, are whether the challenged restraint is in fact reasonably necessary to realize the benefits of the main transaction, whether there are less restrictive alternatives, and whether any cognizable benefits the main transaction generates in the labor market outweigh

measurable harms in the labor market. *See Alston*, 141 S. Ct. at 2160–62.[4] Under a quick look version of the rule of reason *or any other*, market power has no bearing on any of those questions and does not belong in the enquiry.

III. PLAINTIFFS PLEADED FACTS PLAUSIBLY SUGGESTING MARKET POWER

Because the district court misread *Polk Brothers*, it also applied a faulty "full blown" rule of reason analysis, which was cursory rather than full blown. SA-64–65. The Court in *Alston* explained why *Rothery Storage* and *Polk Brothers* are examples of valid quick-look approvals. Those cases were decided on summary judgment and after a full trial, respectively, and they were based on proffered market share evidence. *See Alston*, 141 S. Ct. at 2155–56 (noting that, in *Rothery Storage* the joint ventured commanded "between 5.1 and 6% of the relevant market" and therefore was incapable of impairing competition). The plaintiffs here do not and need not rely on market share evidence to prove market power. They can rely

[4] The Court should emphatically reject Defendants' invitation to consider "cross-market procompetitive benefits," Def's Mem. Supp. Summ. J. at 5; *see* SA-41, which would weigh labor market harms against claimed *product* market benefits. If a federal court engages in "multi-market balancing," it "sets sail on a sea of doubt" and violates the Separation of Powers. *Addyston Pipe*, 85 F. at 284; *see* Brief for the American Antitrust Institute as Amicus Curiae in Support of Respondents 4, 11–12, *NCAA v. Alston*, 141 S. Ct. 2141 (2021) (Nos. 20-512, 20-520), 2021 U.S. S. CT. BRIEFS LEXIS 637, at *6–7, *16-21; *see also Alston*, 141 S. Ct. at 2155 (citing approvingly to AAI amicus brief). Defendants falsely claim the Supreme Court sanctioned multi-market balancing in *Alston*, *see* Def's Mem. Supp. Summ. J. at 5, but the Court could not have been clearer that it did not do so. *Id*. at 2155 ("The parties before us do not pursue this line"; "we express no views … [and] focus only on the objections the NCAA *does* raise.") (emphasis in original).

on direct evidence. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) ("The plaintiffs can make this showing directly or indirectly.").

The district court held that, on the pleadings, "the idea" that Ms. Deslandes and Ms. Turner "sold their labor in [a] market that was limited to McDonald's outlets is implausible," because "[t]hey could have sold their labor to other buyers." SA-65. The second proposition may be true, but the first does not follow from it. While McDonald's employees are not indentured, their freedom to take their chances elsewhere in the job market says nothing about "whether it is possible" for McDonald's restaurants, collectively, "to engage in anticompetitive practices." *Vasquez v. Ind. Univ. Health, Inc.*, 40 F.4th 582, 585 (7th Cir. 2022) (Wood, J.).

Here, there are numerous facts from which a reasonable factfinder could infer that McDonald's restaurants, collectively, had the power to engage in anticompetitive practices. The most obvious is the fact that they did so. McDonald's implemented a horizontal market allocation agreement for a reason. "'Very few firms that lack power to affect market prices will be sufficiently foolish to enter into conspiracies to fix prices. Thus, the fact of agreement defines the market.'" *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 435 n.18 (1990) (quoting Bork, The Antitrust Paradox at 269); Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 Ind. L. J. 1031, 1035 (2019) (The fact of a no-poach agreement shows the participating firms are competitors in the same labor market and that they had enough market power to make the agreement profitable.). Another salient fact is that, as discussed *supra*,

the injured workers had no way to suspect that their wages were being artificially suppressed, because the no-poach provision was concealed in franchise contracts to which they were not parties. *See Superior Court Trial Lawyers*, 493 U.S. at 434–35 ("For reasons including…information failures,…a small conspirator may be able to impede competition over some period of time" and "the period can be long enough to inflict real injury[.]").

Even if McDonald's was wrong to believe the no-poach agreement would be effective, surely a firm's creation and enforcement of a horizontal market allocation agreement warrants taking the firm's own judgment at full face value. That judgment warrants an inference of market power on the pleadings.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 29 as it contains 6,979 words, excluding the parts of the brief that are exempted by the rules. It complies with the type-face requirements because it has been prepared using Microsoft Word in a proportionally spaced typeface in Century Schoolbook type that is 12 points in the body of the brief, and 11 points in footnotes.

/s Randy M. Stutz

Dated: November 9, 2022

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

s/ Randy M. Stutz