Nos. 22-2333 & 22-2334

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

LEILANI DESLANDES & 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, No. 17-cv-04857 & 19-cv-05524 (Alonso, J.)

Brief of *Amici Curiae* Open Markets Institute, National Legal Advocacy Network, and Towards Justice in Support of Plaintiffs-Appellants

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-2333 & 22-2334

Short Caption: LEILANI DESLANGES, et al. v. McDonald's USA LLC, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Open Markets Institute

N/A

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Interest of *Amici Curiae*[1]

The Open Markets Institute (OMI) is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

The National Legal Advocacy Network is a legal non-profit organization dedicated to shifting the balance of power towards greater equity in our economy and society through empowering systematically marginalized people and challenging entrenched racial discrimination, sexual harassment, exploitative workplace practices and predatory business schemes. NLAN has worked closely with state agencies in Illinois to end the use of unlawful no-poach and no-hire agreements which have the effect of weakening bargaining power of workers and creating exploitative working conditions.

Towards Justice is a non-profit legal organization that uses impact litigation, policy advocacy, and collaboration with workers and workers' organizations to build worker power and advance economic justice. Towards Justice's advocacy has focused specifically on the use of unfair methods of competition to strip workers of their bargaining power. Among other litigation efforts in this space, Towards Justice litigated the first recent case involving the use of no-poach and no-hire agreements between fast food franchisees. *Bautista, et al. v. Carl Karcher Enterprises, LLC*, BC649777 (L.A. Super. Ct., Feb. 8, 2017).

Employers should not be permitted to collude against their workers. No-solicitation, no-hire, and other restraints on labor mobility deprive workers of fair competition for their services and thereby depress wages and benefits. Further, by foreclosing the most promising outside employment options, they limit workers' effective ability to leave discriminatory and abusive work environments. The

[1] All parties consented to the filing of this brief. No counsel for any party authored this brief in whole or part. Apart from *amici curiae*, no person contributed money intended to fund the brief's preparation and submission.

Sherman Act and other antitrust laws have a central role to play in policing collusion among employers and promoting fair conduct in all markets, including labor markets. The antitrust laws can help ensure fair wages and dignity on the job for workers.

Summary of Argument

McDonald's and its franchisees established and enforced a collusive system to restrict their employees' labor market freedom, thereby unfairly and illegally robbing them of bargaining power. McDonald's USA and its franchisees are independent business that opted to collude against their workers, instead of competing for their services. Under the no-solicitation and no-hire provisions in McDonald's franchise agreements, McDonald's workers could not take their skills and experience to another McDonald's restaurant, even when they were offered higher wages and promised better treatment.

This collusive arrangement inflicted significant injuries on workers. It is estimated to have cost each of the affected workers, on average, annual wages equal to one month's car payment or rent for many of them. Brian Callaci, Sérgio Pinto, Marshall Steinbaum & Matt Walsh, *The Effect of No-poaching Restrictions on Worker Earnings in Franchised Industries* 11 (2022). And this research does not take account of the non-wage harms that flow from these sorts of impediments to worker mobility. Under this scheme employees skilled in McDonald's extensive and brand-specific systems are not able to leverage that expertise and experience to demand fair treatment or predictable schedules that allow them to go to doctor's appointments or parent-teacher conferences. Some of those employees may even be stuck in abusive employment relationships, with no way out except to attempt to start their careers over again.

McDonald's and its franchisees agreed not to compete for their workers' services. The restraints at issue here functioned as market allocation agreements among rivals. In a familiar form of market allocation, a group of conspirators "allocate customers . . ., so that each customer faces a monopoly seller." *Hammes v. AAMCO Transmissions, Inc*., 33 F.3d 774, 782 (7th Cir. 1994) (Posner, J.). Instead of allocating customers here, McDonald's franchisees and McDonald's owned and operated restaurants effectively allocated workers. Each McDonald's worker faced a monopoly buyer of their services among the many McDonald's restaurants in their community. In practice, under the restraint, two independent McDonald's franchisees "reserve[d] one market for one and another for the other." *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 50 (1990) (per curiam).

McDonald's employees had (and have) skills of special value to other McDonald's restaurants. In the course of their employment, McDonald's workers acquire and develop skills that are particular to McDonald's way of preparing and serving food and conducting business. These skills are most relevant and marketable to other McDonald's restaurants. A McDonald's employee has firm-specific skills that can be used at and are of value to another McDonald's, but less so to Burger King or Taco Bell.

The facts in this case show that no-solicitation and no-hire agreements are not necessary to protect investment in employee training. Since discontinuing the use of these restraints in 2018 as part of a nationwide settlement with the attorney general of Washington State, McDonald's and its franchisees continue to train workers to prepare and serve food and manage restaurants. The fast-food chain continues to grow at a healthy clip. In the United States, sales at McDonald's restaurants "in the fourth quarter of 2021 grew 13.8 percent from a year earlier – the highest increase ever[.]" Julie Creswell, *McDonald's, Now with Higher Prices, Topped $23 Billion in Revenue in 2021*, N.Y. Times (Jan. 27, 2022), https://www.nytimes.com/2022/01/27/business/mcdonalds-earnings.html.

In general, employers have superior, less restrictive methods of retaining workers. They can ensure a loyal, productive workforce through good wages, regular raises and promotions, and fair treatment on the job. Indeed, the district court judge in this case acknowledged these methods of employee retention in a June 2018 order partly denying the defendants' motion to dismiss. A-15. In a healthy labor market in which they compete for workers' services, employers should feel constant pressure to keep workers content as a means of ensuring they do not leave for greener pastures.

In contrast to these methods of protecting proprietary information, non-competes are "the wrong tool for the job." Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 Wm. & Mary L. Rev. 873 (2010). On the one hand, they are overbroad. Non-competes restrain worker mobility: Employers restrict workers from finding work that fits their skills and experience, pays well, provides better benefits, and is at a convenient location, because of their purported aim of protecting business information even if it is dated or trivial. At the same time, non-competes are too narrow. They do not prevent, for example, the unauthorized, covert disclosure of trade secrets to competitors. They are poorly targeted for their ostensible purpose.

If the Court deems the restraints "horizontal," the per se rule should apply. Agreements not to compete among rivals have long been per se illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). The courts have consistently held that agreements not to compete among competing buyers are illegal in the same way such agreements among competing sellers are illegal. *E.g.*, *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.); *Vogel v. Am. Soc. of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.).

Given their real harms and specious justifications, the restraints at issue warrant per se condemnation, even if the Court labels them "vertical." Even as the Supreme Court generally adopted the rule of reason for vertical non-price restraints in manufacturer-distributor relations in 1977, it acknowledged that certain such restraints may warrant per se treatment. *Cont'l T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 58-59 (1977).

The no-solicitation and no-hire agreements used by McDonald's functioned as an airtight system of worker allocation. The restraints have a "pernicious effect on competition and lack . . . any redeeming virtue" and therefore should be "illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

Alternatively, the Court should apply a rule of presumptive illegality or "quick-look" test to the restraints. The Supreme Court wrote that "quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained." *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). In a similar spirit, the D.C. Circuit held such a test is appropriate "[i]f, based *upon economic learning and the experience of the market*, it is obvious that a restraint of trade likely impairs competition[.]" *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005) (emphasis added). Given the research documenting the harms of restraints on workers' mobility and their dubious justifications, this Court should, at a minimum, apply a presumption of illegality. To rebut this presumption, McDonald's should be required to document with empirical evidence the offsetting benefits of the anti-worker restraints in the same labor markets—and not be permitted to rely on offsetting benefits, whether theoretical or real, in downstream product markets. Such cross-market balancing is for Congress, not the courts, to undertake. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 611 (1972).

Argument

I. The No-Solicitation and No-Hire Restraints Limited Competition Among Rival Employers and Injured the Affected Workers

The restraints between McDonald's and its franchisees prohibited restaurants from hiring each other's workers. The contractual provision[2] barred a franchisee from recruiting or hiring someone who had worked for another McDonald's anywhere in the past six months. In other words, a McDonald's franchisee could not recruit and hire workers who currently or recently worked at another McDonald's, whether they were owned and operated by McDonald's or a franchisee. McDonald's franchisees who did recruit or "poach" a worker from another McDonald's restaurant risked being terminated by McDonald's and losing their valuable franchise in which they have typically invested hundreds of thousands of dollars or more.

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[2] In 2018, McDonald's voluntarily removed this provision from its franchise agreements and subsequently entered a binding nationwide legal settlement with the Attorney General of Washington State. Press Release, Washington State Office of the Attorney General, AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide (July 12, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers.

The contracts functioned as a restraint on competition among rival employers. Each McDonald's restaurant had protection against another McDonald's restaurant recruiting and hiring one of their employees. One franchisee could not compete against another McDonald's for staff.

While the restraint was initiated by McDonald's and contained in its franchise agreement, it was horizontal in functional character. Franchisees complied with and helped enforce the restraints against each other. For instance, in employment applications, they specifically asked whether a candidate had worked at another McDonald's restaurant in the past six months. If an applicant, such as the plaintiffs in this case, indicated they had worked for a McDonald's in the past six months, franchisees refused to consider them for a position unless they received a "letter of release" from the McDonald's that employed them.

These restraints functioned as market allocation agreements among rivals. In a familiar form of market allocation, a group of conspirators "allocate customers . . ., so that each customer faces a monopoly seller." *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994) (Posner, J.). Instead of allocating customers here, McDonald's franchisees and McDonald's owned and operated restaurants effectively allocated workers. Each McDonald's worker faced a monopoly buyer of their services among the many McDonald's restaurants in their community. In practice, under the restraint, two independent McDonald's franchisees "reserve[d] one market for one and another for the other." *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 50 (1990) (per curiam).

McDonald's employees had (and have) skills of value to other McDonald's restaurants. In the course of their employment, McDonald's workers acquire and develop skills that are particular to McDonald's way of preparing and serving food and conducting business. These skills are most relevant and marketable to other McDonald's restaurants. By learning McDonald's special system, McDonald's employees can, at least according to McDonald's, advance within the McDonald's brand. According to McDonald's, "it can be so much more than a job. It can be a career." Lifelong Learning, Career Growth and Professional Achievement Served Here at McDonald's, November 17, 2020, https://corporate.mcdonalds.com/corpmcd/en-us/our-stories/article/OurStories.skills-served-here.html. In other words, a McDonald's employee has firm-specific skills that can be used at and are of value to another McDonald's, but less so to Burger King or Taco Bell.

The district court offered an erroneous analogy and downplayed the system-specific skills that McDonald's employees acquire and develop during their employment. The court suggested that choosing to work at McDonald's as opposed to another fast-food employer was like choosing a flavor of ice cream. A-64-65. But that is not how McDonald's sees it, and certainly not how McDonald's employees see it. McDonald's specific system presents a distinctive opportunity for professional advancement. The restraints here narrow this path by preventing employees from seeking out McDonald's restaurants that will allow that advancement and provide higher pay and better treatment.

The restraint injured plaintiffs-appellants and other McDonald's workers. Through the no-solicitation and no-hire restraints, McDonald's robbed its employees, especially experienced employees, of one of their most attractive outside employment options. They had skills most coveted by another McDonald's restaurant. Due to the no-solicitation and no-hire restraints, however, they could not find employment there for at least six months after leaving their current position. Without the restraint, experienced and distinguished employees such as the plaintiffs would have enjoyed greater competition for their services.

Instead, McDonald's effectively restricted their options to seek employment outside McDonald's restaurants or to stay at their current McDonald's or to seek employment elsewhere. Pursuing the first option would mean losing the economic benefits of their McDonald's-specific skills. As a result, some workers chose to stay at their current McDonald's, notwithstanding possible discrimination, abuse, and other mistreatment on the job.

For McDonald's restaurants, the restraints were a double-edged sword. On the one hand, they could not recruit and hire the most skilled employees. But for the restraints, franchisees would have been free to recruit and hire workers and competed for their services. And this was not merely a theoretical possibility. As in this case, franchisees did want to recruit staff from other McDonald's restaurants. On the other hand, with workers being deprived of one of their top outside options, restaurants faced a lower risk of losing current employees and thereby felt less pressure to offer fair wages, raises, and bonuses and improve working conditions.

Empirical research confirms that franchisor restrictions on mobility harm workers. Between July 2018 and January 2020, 235 fast-food chains, including McDonald's, entered a binding commitment with the Attorney General of Washington State to discontinue the use of no-poach agreements in their franchise contracts across the country, not only in Washington. Statistical analysis of these settlements found that elimination of the no-poach agreements raised the wages of affected workers by approximately 3 percent. Brian Callaci, Sérgio Pinto, Marshall Steinbaum & Matt Walsh, *The Effect of No-poaching Restrictions on Worker Earnings in Franchised Industries* 9-10 (2022). For these workers, many of whom are struggling to meet their basic needs, Michael Sainato, *'How Are We Supposed to Live?': Fast-food Workers Squeezed by Inflation*, Guardian (July 3, 2022), https://www.theguardian.com/business/2022/jul/03/fast-food-workers-inflation, this wage effect translated to more than $800 in increased annual earnings. Callaci, Pinto, Steinbaum & Walsh*, supra,* at 11

The implications of the research are clear. Through the no-solicitation and no-hire agreements, McDonald's and its franchisees formed "a combination . . . for the purpose and with the effect of . . . fixing, pegging, or stabilizing the price" of their workers' services. *United States v. Socony-Vacuum Oil Co*., 310 U.S. 150, 223 (1940).

Research on other functionally similar restraints on labor market mobility, such as non-compete clauses, also finds an adverse effect on workers' wages and wage growth over time. *E.g*., Michael Lipsitz & Evan Starr, *Low-Wage Worker and the Enforceability of Noncompete Agreements*, 68 Mgmt. Sci. 143 (2022). For example, one of the leading studies on the effects of non-competes on workers found that increased enforceability of these contracts under state law is associated with lower wages. Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & Econ. 53, 80 (2021). A 2022 study found that Oregon's prohibition on non-competes for low-wage workers increased wages by as much as 14%-21%. Lipsitz & Starr, *supra,* at 144. A study that examined the effects of Hawaii's prohibition on non-compete clauses for information technology workers found that this reform raised wages for new hires 4.2% relative to tech workers in other states. Natarajan Balasubramanian et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, 57 J. Hum. Res. S349, S351 (2022).[3]

II. The Business Justification for No-Solicitation, No-Hire, and Other Restraints on Employee Mobility Is Specious

Whereas the injuries to workers from these contracts are real and documented, the justification for no-solicitation, no-hire, and other restraints on employee mobility is unpersuasive. Firms like the defendants-appellees and employers generally contend they should be free to use these restraints to protect trade secrets, customer lists, and investment in employee training. In the absence of restraints on worker mobility, the employers' story goes that employees could take valuable information from their current job and put it to use at a rival employer or their own enterprise. In other words, employees can free ride, or facilitate free riding, on their employer's proprietary information. According to this theory, if employers cannot use restraints on employee mobility to protect against free riding, employers would not have the incentive to train their employees, develop customer lists, and produce other valuable intangibles. This rationale has multiple deficiencies.

In the context of basic employee training, the free riding justification for employee restraints has limited relevance. Employers have an interest in training their workers. In the absence of appropriate training, a worker may be incapable of performing the basic job responsibilities. A worker who cannot do their job cannot generate revenues and profits for their employer. For example, franchisees need managers to carry out the commands of the operations manual, and must train them to perform this job, regardless of whether they leave in six weeks or six months. Accordingly, under these circumstances, even if a worker leaves and allowed their new employer to "free ride" on their previous employer's job training, the previous

[3] Other studies find similar negative effects on wages. *See, e.g.*, Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. Econ., & Org. 376 (2011); Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete*, 72 ILR Rev. 1 (2019).

employer would likely continue to invest in training their workforce because they derive enough benefit from doing so.[4]

The facts in this case show that no-solicitation and no-hire agreements are not necessary to protect investment in employee training. Since discontinuing the use of these restraints in 2018, McDonald's and its franchisees continue to train workers to prepare and serve food and manage restaurants. The fast-food chain continues to grow at a healthy clip. In the United States, sales at McDonald's restaurants "in the fourth quarter of 2021 grew 13.8 percent from a year earlier – the highest increase ever[.]" Julie Creswell, *McDonald's, Now with Higher Prices, Topped $23 Billion in Revenue in 2021*, N.Y. Times (Jan. 27, 2022), https://www.nytimes.com/2022/01/27/business/mcdonalds-earnings.html.

Employers have superior, less restrictive methods of retaining workers. They can ensure a loyal, productive workforce through good wages, regular raises and promotions, and fair treatment on the job.[5] Laura Alexander & Steven C. Salop, *Antitrust Worker Protections: Rejecting Multi-Market Balancing as a Justification for Anticompetitive Harms to Workers* 20-21 (2022), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3465&context=facpub. Indeed, the district court judge in this case acknowledged these methods of employee retention in a June 2018 order partly denying the defendants' motion to dismiss. A-15. Following the discontinuation of no-solicitation and no-hire provisions in hundreds of fast-food franchise contracts, franchisees appear to have used higher wages as a method of employee retention. Callaci, Pinto, Steinbaum & Walsh, *supra*, at 9-10. In a healthy labor market in which they compete for workers' services, employers should feel constant pressure

[4] As a matter of neoclassical economic theory, which informs free riding arguments in antitrust law, firms should only be given sufficient incentive to undertake some socially beneficial activity, such as employee training. They do not need to, and should not, receive maximal incentives. Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 Colum. L. Rev. 257, 276 (2007).

[5] Empirical evidence indicates that employers use coercive labor mobility contracts to substitute for the less restrictive methods available to them: one recent study found that increased enforceability of non-competes reduces the returns to job tenure. Starr, *supra*, at 3.

to keep workers content as a means of ensuring they do not leave for greener pastures.

For higher-ranking workers, employers can offer fixed-term employment contracts that commit both parties to the relationship for a fixed period. Espen R. Moen & Åsa Rosén, *Does Poaching Distort Training?*, 71 Rev. Econ. Studs. 1143 (2004). They can opt out of the default at-will employment rule and, for instance, offer these employees just cause protections in return for agreeing to remain with the employer for a specified time. *See, e.g.*, *Duldulao v. Saint Mary of Nazareth Hosp. Ctr.*, 115 Ill. 2d 482, 488-89 (1987). These contracts define labor relations in professional sports in the United States.

To the extent firms need to safeguard valuable business information, they have several less restrictive and more potent means of protection under statutory law. They can use trade secret and copyright law. These laws feature strong remedies, including fines and prison sentences for individuals who disclose trade secrets without authorization and willfully engage in copyright infringement. 18 U.S.C. § 1832; 17 U.S.C. § 506.

Employers also have contractual tools besides restraints on worker mobility. For example, they can use *targeted* non-solicitation agreements to prevent salesperson from using customer lists when they leave for a rival or start a competing business.

In contrast to these methods of protecting proprietary information, non-competes are "the wrong tool for the job." Viva R. Moffat, *The Wrong Tool for the Job: The IP Problem with Noncompetition Agreements*, 52 Wm. & Mary L. Rev. 873 (2010). On the one hand, they are overbroad. Non-competes restrain worker mobility with the purported aim of protecting business information even if it is dated or trivial. For instance, a worker who has been with their employer for ten years—and generated substantial revenues and profits for the company—can be locked into place by a non-compete because the employer wants to guard job training materials provided to the worker years earlier. At the same time, non-competes are too narrow. They do not prevent, for example, the unauthorized, covert disclosure of trade secrets to competitors. They are poorly targeted for their ostensible purpose.

The empirical evidence undercuts the prevention of free-riding justification for no-solicitation, no-hire, and other functionally similar contracts. In general, if these restraints primarily served the purpose of preventing free-riding and aligning the incentives of employees with employers by encouraging the provision of training and sharing of information, rather than merely an exercise of raw monopsony power, workers subject to these contracts would receive higher wages, as employers would share some portion of the increased output with workers.

But that is not what the empirical research shows: If there is a mutually beneficial effect on worker productivity, it is overwhelmed by the wage-depressing effect. *Supra* Part I. One empirical study of low-wage workers' experience with non-compete clauses concluded that employers are using these contracts as a wage-suppression device, not as a training protection instrument. Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J. Hum. Res. 689, 721 (2022). What is more, even if mobility restrictions encouraged employers to invest in employee training by preventing free riding, the same economic models predict they decrease the incentives of workers to invest in their own training. Garmaise, *supra*, at 376.

III. The Anti-Worker Restraints Used by McDonald's Should Be Per Se or Presumptively Illegal

The restraints at issue should be per se or presumptively illegal. Section 1 of the Sherman Act outlaws "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade[.]" 15 U.S.C. § 1. Instead of relying on formalistic labels such as "horizontal" or "vertical" and permitting them to drive its analysis, the Court should recognize the actual adverse economic effects on workers and acknowledge the specious justification for these contracts. Accordingly, per se or presumptive illegality is the appropriate legal rule for these contracts.

A. The Court Should Treat the Restraints Used by McDonald's as Per Se Illegal

If the Court deems the restraints "horizontal," the per se rule should apply. Agreements not to compete among rivals have long been per se illegal.[6] *Socony*, 310 U.S. at 223. As the Supreme Court wrote in 2007, "Restraints that are per se unlawful include horizontal agreements among competitors . . . to divide markets." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). Further, the courts have consistently held that agreements not to compete among competing buyers are illegal in the same way such agreements among competing sellers are illegal. *E.g.*, *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.); *Vogel v. Am. Soc. of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.).

Although the restraints are formally vertical, that is not the end of the inquiry. McDonald's included the no-solicitation and no-hire provisions in contracts with franchisees. The Court should examine the operation of these restraints, not merely the terms of the franchise agreements. The Eighth Circuit noted the judicial imperative to look beyond written documents in evaluating restraints of trade:

> Perhaps there are aspiring monopolists foolish enough to reduce their entire anticompetitive agreement to writing, which would make the answer easy. But most would-be monopolists probably can be expected to display a bit more guile, jotting down only a few seemingly common terms while sealing their true anticompetitive agreement with a knowing nod and wink. *In re Wholesale Grocery Products Antitrust Litigation*, 752 F.3d 728, 734 (8th Cir. 2014).

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[6] The defendant cannot label the restraints "ancillary" and thereby assert it is entitled to rule of reason treatment. Function, not form, carries the day. Otherwise, illegal restraints could be embedded in a larger economic arrangement as a means of escaping antitrust law's per se rules. And in this case, contrary to the district court's conclusion, the restraints at issue were not necessary for the franchise arrangement to function and therefore *not* ancillary to McDonald's franchise system. *Blackburn v. Sweeney*, 53 F.3d 825, 828-29 (7th Cir. 1995); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.). Since dropping its no-solicit and no-hire provisions in franchise agreements as part of a nationwide settlement with the Washington Attorney General in 2018, McDonald's has continued to add franchisees and to thrive in general. Creswell, *supra*.

Even putting aside McDonald's owned restaurants competing against franchisees in some labor and product markets, the restraints here had an important horizontal element. The franchisees played a critical role in enforcing them against each other by, for instance, not hiring each other's workers without express consent from the restaurant that employed them. As such, they operated as horizontal market allocation agreements for workers' services and should be per se illegal.

If the Court deems the restraints "vertical," it should still apply a rule of per se illegality. To be sure, the rule of reason is the default analytical framework in federal antitrust cases involving vertical non-price restraints, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018), and has been for more than 40 years. In 1977, the Supreme Court generally adopted the rule of reason for vertical non-price restraints in manufacturer-distributor relations. *Cont'l T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977). That decision, however, does not compel the application of the rule of reason to *every* vertical non-price restraint, as the district court assumed. A-43.

Certain vertical non-price restraints can and should be per se illegal. The Court in *Sylvania* reserved the possibility that "particular applications of vertical restrictions" may warrant "per se prohibition" when "based upon demonstrable economic effect." *Id.* at 58-59. In other words, *Sylvania* established the rule of reason as the default analytical framework for non-price vertical restraints but recognized that per se treatment may be warranted for specific non-price vertical restraints.

Given their real harms and specious justifications, the restraints at issue, even if the Court labels them "vertical," warrant per se condemnation. A former chairman of the Federal Trade Commission argued that vertical restraints that instituted "airtight . . . customer allocation" among rival retailers warranted per se treatment under *Sylvania*. Robert Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restraints*, 78 Colum. L. Rev. 1, 22 (1978). The no-solicitation and no-hire agreements used by McDonald's functioned as an airtight system of worker allocation. An extensive body of research shows the serious harms to workers from restraints on their labor market mobility, whereas their theoretical justification is specious and "not likely to prove significant." *Arizona v.*

Maricopa Cty. Med. Soc., 457 U.S. 332, 351 (1982). *See also supra* Parts I and II. The restraints have a "pernicious effect on competition and lack . . . any redeeming virtue" and therefore should be "illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

B. The Court's Decision in *Toys "R" Us* Supports Application of a Per Se Rule

This Court upheld the application of the per se rule in a case involving parallel vertical agreements. In 2000, it affirmed the Federal Trade Commission's per se condemnation of vertical restraints between major toy manufacturers and a leading toy retailer in which the former agreed to restrict their sale of toys to rapidly growing competitors of the retailer. *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000). Toys "R" Us and the manufacturers jointly instituted a boycott of discount rivals of Toys "R" Us. The Court upheld the FTC's treatment of this conduct as per se illegal. *Id.* at 937.

The Commission's opinion described the conduct as a blend of vertical and horizontal coordination. Toys "R" Us secured commitments from toy manufacturers not to sell their full range of toys to competing retailers and spurred the toy manufacturers to coordinate with each other. *In re Toys R Us, Inc.*, 126 F.T.C. 415, 612-13 (1998).

In treating the conduct as per se illegal, the FTC examined its effects and justification. The boycott slowed the growth of toy sales at rivals, which had been increasing their toy sales rapidly before Toys "R" Us and the manufacturers orchestrated their boycott. *Id.* at 600. Toys "R" Us contended it instituted the vertical restraints and boycott to ensure protection against free riding on services provided by Toys "R" Us. *Id.* The Commission found that the purported services had limited value in the toy retail market and that Toys "R" Us had been compensated by toy manufacturers for the bona fide services it offered. *Id.* at 603-06. Given the effects of the boycott on toy sales by rivals of Toys "R" Us and the unpersuasive justification, the Commission treated the challenged behavior—

vertical restraints reinforced by horizontal coordination among toy manufacturers —as a per se illegal group boycott. *Id*. at 607-08.

The facts in *Toys "R" Us* support the application of a per se rule here. McDonald's instituted vertical restraints on recruitment and hiring that were backed up with horizontal policing by franchisees, such as a refusal to hire workers at another McDonald's unless that restaurant expressly authorized it. The contracts restrained horizontal competition among McDonald's restaurants for securing and retaining the services of employees and likely had adverse effects on workers' wages. Callaci, Pinto, Steinbaum & Walsh, *supra*, at 9-10. Further, McDonald's did not need to use these restraints to protect its investment in worker training. It had less restrictive alternatives for safeguarding its worker development and retaining workers, including offering higher wages. *Deslandes*, 2018 WL 3105955 at *8.

As in *Toys "R" Us*, the restraints at issue operated as a per se illegal violation. In *Toys "R" Us*, it was a group boycott; here, it was horizontal market allocation among rivals.[7] Given the parallels between the facts in the two cases, this Court apply a per se rule to the restraints

C. If the Court Believes Per Se Condemnation Is Not Warranted, It Should Apply a Rule of Presumptive Illegality

Alternatively, the Court should treat the restraints as presumptively illegal. In light of the documented harms from the restraints, such burden-shifting is warranted. Indeed, this standard would be in line with cases in which the Supreme Court, this Court, and other courts of appeals have adopted a presumptive illegality or "quick look" framework. For instance, the Supreme Court wrote that "quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained." *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999).

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[7] The per se rule governing horizontal market allocation is stronger than the per se rule governing group boycotts. Whereas the former is always illegal and does not require a showing of power, group boycotts today are per se illegal when the orchestrating firm has some degree of power in a relevant market. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 298 (1985).

This Court wrote that a quick-look test is appropriate "where no elaborate industry analysis is required to demonstrate the anticompetitive character of an agreement, and proof of market power is not required." *Agnew v. NCAA*, 683 F.3d 328, 336 (7th Cir. 2012) (internal quotations omitted). In a similar spirit, the D.C. Circuit wrote:

> If, based *upon economic learning and the experience of the market*, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful and, in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005) (emphasis added).

Given the research documenting the harms of restraints on workers' mobility, this Court should, at a minimum, apply a presumption of illegality.

A presumption of illegality should not be easy to overcome. McDonald's should be permitted to rebut this presumption only by "show[ing] empirical evidence of procompetitive effects," *Cal. Dental*, 526 U.S. at 775 n.12, not merely by asserting them. And it should *not* be allowed to justify its anti-worker restraints by documenting offsetting "procompetitive effects" in downstream product markets, but only in the same labor market in which the restraints operate. Balancing effects across different markets is for Congress—not the courts—to do. The Supreme Court was clear in rejecting such social cost-benefit analysis by the judiciary: "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 611 (1972).

Conclusion

For the foregoing reasons, the Court should reverse the district court's judgment on the pleadings in favor of the defendants-appellees.

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Dated: November 9, 2022

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I hereby certify that, on this date, I caused a true and correct copy of the foregoing to be served on counsel of record for all parties via ECF.

/s/ Chris Williams

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Dated: November 9, 2022