## November 10, 2022

### ATTORNEY GENERAL KWAME RAOUL LEADS BIPARTISAN COALITION OF ATTORNEYS GENERAL OPPOSING NO-POACH HIRING AGREEMENTS

***Raoul Files Amicus Brief as Part of Ongoing Work to Protect Workers from Unlawful Anticompetitive Labor Practices***

**Chicago** — Attorney General Kwame Raoul led a bipartisan coalition of 21 attorneys general filing an amicus brief challenging "no-poach" provisions — which restrict the rights of workers to move from one franchise to another in the same restaurant chain — used by McDonald's in its franchise agreements.

The workers in this case contend that, until 2017, McDonald's required all McDonald's franchisees to sign agreements that contained a provision prohibiting them from hiring workers who worked for any McDonald's restaurant currently or in the prior six months. Raoul and the collation argue that such agreements violate federal antitrust laws and interfere with workers' ability to seek better employment opportunities, wages and benefits.

"No-poach agreements allow employers to take advantage of workers by trapping them in low-paying jobs and limiting their ability to seek better employment opportunities," Raoul said. "I am committed to holding companies accountable when they engage in unlawful employment practices that prevent employees from seeking opportunities that allow them to better support themselves and provide for their families."

Raoul and the coalition are asking an appeals court to reject a series of opinions siding with McDonald's and against the workers. The brief notes that, in recent years, state attorneys general across the United States have focused on antitrust violations in labor markets and that enforcement actions against companies that use such agreements have led to higher wages for workers. The attorneys general argue that the lower court's ruling in this case would sharply limit their ability to combat no-poach agreements.

The brief builds on Attorney General Raoul's efforts to advocate for workers and fight unlawful employment practices. In June, Attorney Raoul filed a lawsuit against several staffing agencies and their mutual client over allegations that they interfered with temporary workers' ability to seek better employment opportunities with other staffing agencies. In July 2020, Raoul filed a similar lawsuit in the Circuit Court of Cook County, alleging that three staffing agencies and their client conspired to eliminate competition and harm temporary workers in Illinois by interfering with their ability to seek better employment opportunities and better wages and benefits. In June, the Attorney General won an initial victory in that case when the Illinois Appellate Court agreed that the temporary staffing industry could not use a loophole to avoid state antitrust protections. The ruling has implications for temporary staffing agencies throughout the state, which will now face greater potential for antitrust enforcement actions under Illinois law.

Attorney General Raoul encourages workers who believe their rights have been violated to call his Workplace Rights Hotline at 1-844-740-5076, or file a complaint by visiting the Attorney General's website.

Raoul was joined in filing the brief by the attorneys general of California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island and Washington.

Nos. 22-2333 and 22-2334

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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| LEINANI DESLANDES and STEPHANIE TURNER,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>MCDONALD'S USA LLC, et al.,<br><br>Defendants-Appellees. | ) | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division<br><br>No. 1:17-cv-04857<br>No. 1:19-cv-05524<br><br>The Honorable JORGE L. ALONSO, Judge Presiding. |

**BRIEF OF AMICI CURIAE ILLINOIS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, HAWAII, IDAHO, MARYLAND, MASSACHUSETTS, MINNESOTA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, AND WASHINGTON IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL**

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## IDENTITY AND INTEREST OF AMICI STATES

The Amici States of Illinois, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Idaho, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, and Washington submit this brief in support of plaintiffs-appellants Leinani Deslandes and Stephanie Turner (collectively, "plaintiffs") under Federal Rule of Appellate Procedure 29(a)(2).

As enforcers of both federal and state antitrust law, state attorneys general have significant interests in ensuring the antitrust laws protect their residents from anticompetitive practices. That includes enforcing federal and state antitrust laws against anticompetitive conduct in markets for labor. In Amici States' view, no-hire agreements (or provisions) like the kind at issue here—agreements between multiple employers not to hire, or "poach," each other's employees or former employees—are anticompetitive and, as a general matter, violate federal and state antitrust laws. Consistent with that judgment, multiple Amici States have acted to protect workers within their respective jurisdictions by initiating investigations, enforcement actions, and—where necessary—litigation against entities that use no-hire agreements to the detriment of workers. Amici States' experience combatting agreements of this kind shows that these restraints depress wages and limit worker mobility, as discussed further below.

This case involves antitrust claims brought against the fast-food corporation McDonald's by a putative class of former McDonald's workers. The workers contend

that McDonald's until 2017 required all McDonald's franchisees to sign a franchise agreement that contained a no-hire provision prohibiting franchisees from seeking to employ workers who currently worked for any McDonald's restaurant, or who had done so in the prior six months. The district court, in a series of opinions, rejected plaintiffs' claims. As relevant here, the district court reasoned that plaintiffs' argument that the no-hire provisions were *per se* illegal under the Sherman Act failed as a matter of law because the provisions were ancillary to a broader pro-competitive agreement and because the provisions did not reflect any agreement between the competing franchisees themselves.

The district court's decision to dismiss plaintiffs' claims to the extent they were premised on a *per se* theory was flawed in multiple respects. The district court misapplied bedrock principles of antitrust law, including the ancillary restraints doctrine and hub-and-spoke conspiracy law. And it assumed the role of the factfinder, dismissing plaintiffs' claims as a matter of law rather than allowing them to proceed past the pleadings. These errors are important to Amici States because, if affirmed, they have the potential to distort the applicable caselaw in this and other circuits on the appropriate treatment of no-hire agreements under federal antitrust law. This, in turn, could impede Amici States' ability to protect their residents by enforcing both federal and state antitrust laws against companies that utilize no-hire agreements. For these reasons, Amici States request that the Court reverse the decision below.

## ARGUMENT

### I. States Have Successfully Acted To Protect Workers Within Their Jurisdictions By Enforcing The Antitrust Laws To Police The Use Of No-Hire Agreements.

Amici States, acting through their attorneys general, protect their residents from unfair and anticompetitive conduct by enforcing antitrust law. Amici States do so by enforcing both federal and state antitrust statutes. Congress has authorized state attorneys general to bring antitrust actions under federal law to protect their residents from anticompetitive conduct. *See* 15 U.S.C. §§ 15c(a)(1), 26; *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 447 (1945). Almost all States have also enacted their own statutes that police anticompetitive conduct, which state attorneys general likewise enforce.[1] Although these statutes often parallel federal law, they can stretch "broader in range and deeper in reach," providing the States a unique avenue of safeguarding competition, workers, and consumers. *In re Cipro Cases I & II*, 348 P.3d 845, 872 (Cal. 2015) (describing California's Cartwright Act); *see also, e.g.*, *FTC v. Shkreli*, 581 F. Supp. 3d 579, 640-41 (S.D.N.Y. 2022) (in federal-state antitrust action, awarding $64.6 million in disgorgement under state law only).

In their roles as enforcers of federal and state antitrust laws, several Amici States have focused in recent years on policing antitrust violations in labor markets—the markets that govern what jobs are available to their residents and on

[1] Amici States have accomplished that end by enacting either antitrust statutes or consumer protection laws that apply to anticompetitive conduct. *See, e.g.*, 740 ILCS 10/1 *et seq.* (Illinois); Cal. Bus. & Prof. Code § 16700 *et seq.* (California); N.Y. Gen. Bus. Law § 340 *et seq.* (New York).

what terms. Although historically a less active area of antitrust enforcement, labor markets exhibit many of the same features as traditional markets for goods, and thus are properly analyzed using the traditional tools of antitrust law. *See, e.g.*, *Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359, 365 (1926) (applying antitrust law to labor markets); Org. for Econ. Co-operation & Devel., *Competition in Labour Markets* 15-20 (2020) (describing how features of monopsony in labor markets can parallel features of monopoly in traditional products markets).[2] For example, wage-fixing agreements (that is, agreements between multiple employers to set wages at an artificial rate rather than compete for labor) are simply another form of agreement between competitors to fix prices. *See United States v. Jindal*, No. 20-cr-00358, 2021 WL 5578687, at *4-6 (E.D. Tex. Nov. 29, 2021). Such an agreement—an agreement between competitors, often to divide up a market in some way—is a *horizontal* restraint on trade, and is generally unlawful under federal and state antitrust law. (By contrast, an agreement between a firm and one of its suppliers or distributors is a *vertical* restraint.) As relevant here, agreements not to hire a competitor's employees "operate as [horizontal] market-division agreements." 12 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 2013a (4th ed. 2019 & 2022 supp.); *see also United States v. DaVita Inc.*, No. 21-cr-00229, 2022 WL 266759, at *5-6 (D. Colo. Jan. 28, 2022) (same). That is, in such a case, two entities are agreeing to divide a market between one another rather than compete within it, whether they are allocating products, consumers, or

[2] https://www.oecd.org/competition/competition-in-labour-markets-2020.pdf.

territories (in the case of an ordinary market-division agreement) or allocating labor (in the case of a no-hire agreement). 12 Areeda & Hovenkamp, *supra*, ¶ 2030a. As a result, these "'anti-poaching' agreements," like other market-division agreements, are generally "illegal *per se*" under federal and state antitrust law. *Id.* ¶ 2013b.

To determine whether conduct violates federal (and many States') antitrust law, courts apply one of three analytical frameworks, which are generally referred to as "rule of reason," "quick look," and "*per se*" analysis. *Agnew v. NCAA*, 683 F.3d 328, 335 (7th Cir. 2012); *see also, e.g.*, *In re Delta Dental Antitrust Litig.*, 484 F. Supp. 3d 627, 633 (N.D. Ill. 2020). As relevant here, the *per se* analysis applies where a "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Agnew*, 683 F.3d at 336. *Per se* violations "are illegal as a matter of law for reasons of efficiency; in essence, it is simply not worth the effort or resources" for a court to engage in a more fulsome analysis, like the rule of reason, "when the Court can predict with confidence" that the conduct is unlawful. *Id.* (cleaned up). Generally, horizontal agreements (between two competitors in a market) fall under the *per se* rule. But an agreement between a firm and one of its suppliers or distributors—a vertical agreement—is generally analyzed under a rule-of-reason analysis. *See Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977).

Like agreements between firms to divide markets for goods, no-hire agreements harm markets and their participants, and accordingly courts have often found them *per se* unlawful under federal and state antitrust laws. *See* 12 Areeda &

Hovenkamp, *supra*, ¶ 2013b. No-hire agreements (also called no-poach agreements) "are compacts between employers not to hire workers from each other." Evan Starr, Econ. Innovation Group, *The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements* 2 (Feb. 2019).[3] Such agreements "can limit turnover and reduce labor market competition," and some have posited that their use by large employers may have contributed to "sluggish" relative wage growth. Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* 20-21, Nat'l Bur. of Econ. Res. Working Paper No. 24831 (2018).[4] Further, beyond the harm to the workers themselves, these agreements generally "impair full and free competition in the supply of a service or commodity to the public." *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 336 (7th Cir. 1967). For these reasons, many courts have held that no-hire agreements may constitute *per se* violations of federal and state antitrust law. *See, e.g.*, *DaVita*, 2022 WL 266759, at *8 ("[I]f naked non-solicitation agreements or no-hire agreements allocate the market, they are per se unreasonable"); *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 481 (W.D. Pa. 2019) (holding competitors' alleged "agree[ment] to not hire each other's employee[s]" *per se* unlawful, at motion-to-dismiss stage, and equating it to "agreement to allocate their employees to minimize competition for the employees"); *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013) (holding that allegations of a no-hire agreement were presumptively governed by the *per se* rule).

[3] https://eig.org/wp-content/uploads/2019/02/Non-Competes-Brief.pdf.

[4] https://www.nber.org/system/files/working_papers/w24831/w24831.pdf.

Over the last decade, many Amici States have devoted significant time and energy to policing companies' use of no-hire agreements, arguing successfully that these agreements violate federal and state antitrust law. Illinois, for instance, has sued multiple temporary staffing firms for restraining labor markets and depressing wages through anticompetitive no-hire agreements. *Illinois v. Elite Staffing, Inc.*, No. 2020 CH 05156 (Ill. Cir. Ct., Cook Cty.); *Illinois v. Alternative Staffing, Inc.*, No. 2022 CH 05069 (Ill. Cir. Ct., Cook Cty.). These suits allege that the agencies in question worked together with an employer to ensure that the agencies did not poach any employees assigned by any agency to work at the employer, thus eliminating the need for the agencies to compete for workers, for instance by offering better wages or working conditions. *See* Press Release, Office of the Ill. Attorney General, *Attorney General Raoul Files Lawsuit Against Staffing Agencies For Use Of No-Poach Agreements* (June 6, 2022).[5] The businesses' alleged arrangement resembles the claim at issue here, in that a vertically situated third party—i.e., a customer or supplier, as opposed to a direct competitor—facilitated a no-hire agreement between competitors. And in one of these suits, the Illinois Appellate Court recently held that the presence of a vertically situated conspirator did not bar *per se* treatment of the Attorney General's claim, permitting the case to proceed. *See State v. Elite Staffing, Inc.*, 2022 IL App (1st) 210840, ¶ 24, *appeals allowed*, Nos. 128763 & 128767 (Ill. Sept. 28, 2022).

[5] https://illinoisattorneygeneral.gov/pressroom/2022_06/20220606.html.

Washington State has also invested significant resources in policing labor markets, having established an initiative in 2018 focused on franchises' use of no-hire provisions in franchise agreements. Washington's attorney general investigated every national franchisor corporation with three or more locations in the State and, where necessary, initiated enforcement action to ensure that those corporations stopped using agreements with such provisions. Press Release, Wash. Office of the Attorney General, *AG Report: Ferguson's Initiative Ends No-Poach Practice Nationally At 237 Corporate Franchise Chains* (June 16, 2020) (hereinafter "Press Release, *AG Report*").[6] The State also filed a lawsuit against one franchisor, Jersey Mike's, that had initially refused to comply with the state's requests; the lawsuit argued that the company's no-hire provision was illegal under both a *per se* analysis and a quick look analysis, and the court denied Jersey Mike's motion to dismiss, which had contended that the restraint should be analyzed under the rule of reason. Press Release, Wash. Office of the Attorney General, *Judge Rejects Jersey Mike's Motion To Dismiss AG Ferguson's No-Poach Lawsuit* (Jan. 28, 2019).[7] To date, more than 237 franchisors have formally committed to stop enforcing no-hire provisions in existing franchise agreements and to stop including such provisions in new franchise agreements, both in Washington and nationwide. Press Release, *AG Report*, *supra*.

[6] https://www.atg.wa.gov/news/news-releases/ag-report-ferguson-s-initiative-ends-no-poach-practices-nationally-237-corporate.

[7] https://www.atg.wa.gov/news/news-releases/judge-rejects-jersey-mike-s-motion-dismiss-ag-ferguson-s-no-poach-lawsuit.

Other States have also taken significant action in this area. California, for instance, obtained a nearly $4 million settlement and injunctive relief in 2014 against eBay for implementing a no-hire agreement that the State alleged was *per se* illegal. *See California v. eBay, Inc.*, No. 5:12-cv-5874 (N.D. Cal. Sep. 3, 2015) (ECF No. 85). As here, the no-hire agreement robbed employees both of higher pay and new opportunities; the parties' settlement agreement both barred eBay from effecting no-hire agreements going forward and secured restitution for the harmed employees. *Id.* More recently, fourteen states acting in concert obtained consent decrees with eight national fast-food franchisors that bar the companies from using no-hire agreements to prevent workers from relocating between franchisees in the same chain. *See, e.g.*, Press Release, Office of the Ill. Attorney General, *Attorney General Raoul Reaches Agreement To End Use Of No-Poach Agreements* (Mar. 2, 2020).[8] The settlement requires the franchisors to stop enforcing any no-hire agreements, amend their franchising agreements to remove no-hire provisions, inform employees of these changes, and report any attempts by franchisees to limit employees' intrafranchise mobility to the attorneys general. *Id.* The investigation into these anticompetitive agreements also spurred at least one other major fast-food franchisor to confirm publicly that it never used no-hire agreements. *Id.*

[8] https://illinoisattorneygeneral.gov/pressroom/2020_03/20200302.html. The States taking this action were Illinois, California, the District of Columbia, Iowa, Maryland, Massachusetts, Minnesota, North Carolina, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Vermont.

The States' work in this area demonstrates that no-hire agreements harm workers and, contrary to the argument pressed by McDonald's in the district court, provide no pro-competitive benefit. Washington's enforcement campaign against franchise no-hire agreements increased the wages of previously restricted workers by 3% and improved their labor mobility. Brian Callaci et al., *The Effect of No-poaching Restrictions on Worker Earnings in Franchised Industries* 11 (July 16, 2022) (unpublished manuscript) (assessing the impact of Washington's no-hire enforcement campaign econometrically).[9] And Washington's experience is no outlier: Enforcement actions against no-hire agreements and prohibitions on non-compete agreements have consistently raised wages. *E.g.*, Matthew Gibson, IZA Inst. of Labor Econ., *Employer Market Power in Silicon Valley* 25 (Nov. 2021) (finding that a Justice Department enforcement campaign against Silicon Valley no-hire agreements raised wages by 2.4%, and by more for certain large firms)[10]; *see also* Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 Mgmt. Sci. 143, 143 (2021) (finding that eliminating non-compete agreements in Oregon grew wages by 2 to 3% on average, and likely more among employees previously bound by non-competes).

The States' enforcement efforts also show that franchises do not *need* no-hire agreements. A significant portion of the franchisors to whom Washington issued process in its no-hire initiative had never included any form of a no-hire provision in

[9] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4155577.

[10] https://docs.iza.org/dp14843.pdf.

their franchise agreements. *See* Amicus Curiae Brief by the Attorney General of Washington 9, *Stigar v. Dough Dough, Inc.*, No. 18-cv-00244 (E.D. Wa. filed March 11, 2019) (ECF No. 36) (hereinafter "*Stigar* Amicus") (stating that as of March 2019, "nearly 1/3 of the franchisors the State [of Washington] issued process to did not include and have never included any form of a no-poach provision in their franchise agreements"); *see also* Krueger & Ashenfelter, *supra*, at 27-28 (listing 65 franchises across industries that, as of 2015, did not employ no-poaching restrictions). And Washington's investigation prompted many franchisors to cease enforcement of no-hire provisions voluntarily and remove them from future contracts, suggesting that there had been no business need for those provisions in the first place. *See Stigar* Amicus, *supra*, at 9. The efforts made by many States in this area, that is, have not only yielded significant benefits for those States' residents; they also illustrate the lack of meaningful pro-competitive benefits that no-hire agreements produce for anyone—including the franchisors.

As the preceding discussion reflects, many States have devoted resources in recent years to enforcing federal and state antitrust law to protect their residents from no-hire provisions, premised in part on their experience that such provisions inhibit working conditions for workers and serve no pro-competitive purposes. In Amici States' view, the use of no-hire provisions is *per se* unlawful under federal and state antitrust law, as many courts have concluded. *Supra* p. 6. The district court's decision rejecting plaintiffs' *per se* theory on the pleadings is erroneous, as discussed below. *Infra* pp. 12-23. If affirmed, moreover, the district court's decision would

have serious consequences for Amici States' ability to enforce both federal and state antitrust laws. State attorneys general have the authority to enforce federal antitrust law, 15 U.S.C. §§ 15c(a), 26, but the district court's decision would impose sharp limits on States' ability to enforce federal law against no-hire agreements. And because federal courts' interpretations of federal antitrust law influence state courts' interpretations of state antitrust law, *see, e.g.*, *Anheuser Busch, Inc. v. Abrams,* 520 N.E.2d 535, 539 (N.Y. 1988) (explaining that state antitrust statute "should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result"); *Sickles v. Cabot Corp.*, 877 A.2d 267, 275 (N.J. Super. App. Div. 2005) (state antitrust statute must "be construed in harmony" with federal law); *see also In re Juul Labs, Inc., Antitrust Litig.,* 555 F. Supp. 3d 932, 961, 965-66 (N.D. Cal. 2021) (applying a federal court's reading of Illinois antitrust law to the Sherman Act and, implicitly, to the antitrust laws of four other States), the district court's reasoning, if affirmed, could also lead state courts to impose similar restrictions on state antitrust statutes, to the detriment of Amici States and their residents.

## II. The District Court Erred In Rejecting Plaintiffs' *Per Se* Theory On The Pleadings.

Plaintiffs—two former McDonald's workers, on behalf of a putative class of former employees—alleged in their complaint that the company's practice of using no-hire agreements was *per se* unlawful under the Sherman Act. The district court rejected that argument on the pleadings, first concluding, on McDonald's motion to dismiss, that Deslandes' Sherman Act claim was not viable to the extent it rested on

a *per se* theory, SA13-14, and then granting McDonald's motion for judgment on the pleadings with respect to that aspect of plaintiffs' claims for substantially the same reasons, SA63.[11] Those decisions are flawed in multiple respects. They misapply basic principles of antitrust law, including the ancillary restraints doctrine and the law of hub-and-spoke conspiracy. And they improperly assume the factfinder's role, resolving key factual questions upon which plaintiffs' *per se* arguments rest against them on the pleadings rather than letting the case proceed to summary judgment or a jury.

### A. The district court misapplied bedrock principles of antitrust law.

The district court misapplied basic principles of antitrust law in rejecting plaintiffs' *per se* arguments. First, the district court rejected those arguments on the basis that the no-hire provisions in question were "ancillary" to a broader agreement, but did so without applying a key element of the relevant legal test—whether the provisions were "reasonably necessary" to a greater pro-competitive venture. Second, the district court ignored McDonald's alleged role as the "hub" of an antitrust conspiracy with its franchisees (the "spokes"), instead concluding that, in a franchise system structured by vertical contracts, a horizontal conspiracy between individual franchisees categorically cannot exist. Both conclusions were erroneous and constitute grounds for reversal.

[11] Entries on the district court's docket in No. 1:17-cv-04857 are cited "Doc." and the short appendix is cited "SA."

*1. The ancillary restraints doctrine*

First, the district court erred in rejecting plaintiffs' *per se* argument on the ground that the so-called "ancillary restraints" doctrine applied, and thus rule-of-reason analysis was required. SA13. To the contrary, because plaintiffs alleged that the no-hire provisions in question were not reasonably necessary for any competitive purpose (for instance, to attract potential franchisees or ensure that the McDonald's franchise system functioned), *see* Doc. 180-1 at 4 (¶ 2) ("The agreement was not reasonably necessary to, and did not contribute to the success of, any legitimate procompetitive benefit or joint venture . . . ."); *see also* Doc. 32 at 25-26 (¶¶ 105-09) (to similar effect)—an allegation the district court expressly found credible, SA13—the district court erred in applying the ancillary restraints doctrine to grant McDonald's claims on the pleadings.

As discussed, *supra* p. 6, as a general matter, because no-hire agreements between competitors divide up labor markets, they are *per se* unlawful under federal and state antitrust law. *See, e.g.*, *FTC v. Sup. Ct. Trial Lawyers Ass'n,* 493 U.S. 411, 422 (1990) (deeming *per se* illegal a boycott among competing firms aimed at influencing pay rates); *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d at 481 (holding alleged agreement among competitors "to not hire each other's employee[s]" *per se* unlawful at motion-to-dismiss stage). The ancillary restraints doctrine provides an exception to this general rule. That doctrine distinguishes between so-called "naked" agreements not to compete (which do nothing but suppress competition) and so-called "ancillary" agreements not to compete, which

promote some other, lawful agreement. *See, e.g.*, *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985) ("A court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote."). Under the doctrine, an "ancillary" restraint is subject to rule-of-reason analysis, and is not *per se* unlawful. *Id.*

The district court applied this rule to reject, at the motion-to-dismiss stage (and again on McDonald's motion for judgment on the pleadings), plaintiffs' *per se* theory, SA13, SA63, but it misapplied the doctrine in doing so. As one court recently explained, to escape *per se* treatment under the ancillary restraints doctrine, a restraint "must be (1) subordinate and collateral to a separate, legitimate transaction," and "(2) reasonably necessary to achieving that transaction's pro-competitive purpose." *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021) (cleaned up); *accord, e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 345-46 (3d Cir. 2010); *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1339 (Fed. Cir. 2010) (en banc); *MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 338-39 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment) ("[A] restraint that is unnecessary to achieve a joint venture's efficiency-enhancing benefits may not be justified based on those benefits."). This Court's precedent is to the same effect: As the Court explained in *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), the ancillary restraints doctrine applies only when a covenant not to compete is "necessary" to the pro-competitive purpose of some broader agreement, *id.* at 828,

not merely when it was adopted in connection with such an agreement. *See also Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984) (rejecting application of ancillary restraint doctrine where defendants identified "no reason . . . why cooperation requires" competitors to adopt rule not "to compete with each other in leasing trucks").

The district court wholly failed to ask whether the no-hire provisions were "reasonably necessary" to some pro-competitive purpose, *Aya*, 9 F.4th at 1109; *see also Blackburn*, 53 F.3d at 828, and in doing so misapplied the ancillary restraints doctrine. Plaintiffs alleged that the no-hire provisions were *not* reasonably necessary for any competitive purpose, *e.g.*, Doc. 180-1 at 4 (¶ 2)—a necessary element of their claim that the provisions were *per se* unlawful and not valid ancillary restraints. But the district court ignored that question entirely, appearing to reason instead that, because the no-hire provisions were simply *part of* (that is, a literal component of) a separate agreement that served pro-competitive purposes, they were "ancillary" to that agreement for purposes of the ancillary restraints doctrine. SA13-14. But that reasoning cannot be squared with *Blackburn*, which rejected an analogous attempt to deem "ancillary" a non-compete agreement that was allegedly entered in relation to, but was not "necessary" to, a pro-competitive agreement. 53 F.3d at 828-29. And it would permit the ancillary restraints exception to swallow the *per se* rule, allowing competitors to simply embed restraints that would otherwise be *per se* unlawful into any agreement with a pro-competitive purposes (and, in doing so, escape *per se* treatment).

Because plaintiffs alleged that the no-hire provisions were not reasonably necessary for some pro-competitive purpose, the district court should have denied McDonald's motions to dismiss and for judgment on the pleadings to the extent they concerned plaintiffs' *per se* arguments, and instead permitted plaintiffs' claims to go past the pleadings stage. Indeed, the district court's own reasoning makes clear that even the court found plaintiffs' allegations on this score plausible: In concluding that plaintiffs had not pled a viable claim that the no-hire provisions were *per se* unlawful under the Sherman Act, the district court observed that "[t]he very fact that McDonald's has managed to continue signing franchise agreements even after it stopped including the provision in 2017 suggests *the no-hire provision was not necessary* to encourage franchises to sign." SA13 (emphasis added). But that is the very reason that, as plaintiffs explained, the no-hire provisions at issue here qualified as a *per se* violation of the Sherman Act. The district court erred in disregarding this allegation and rejecting plaintiffs' *per se* arguments at the case's threshold.

*2. Hub-and-spoke conspiracy law*

The district court made a second legal error in adjudicating McDonald's motion to dismiss (and its subsequent motions): It limited the scope of plaintiffs' *per se* theory to those markets in which McDonald's franchisees compete with fast-food locations actually owned directly by McDonald's, reasoning that only in such markets would the no-hire provisions operate as *horizontal* restraints, as opposed to *vertical* restraints. SA10-11, SA42-43. But plaintiffs alleged the existence of a hub-and-spoke conspiracy—i.e., not merely an agreement between McDonald's and individual

franchisees not to compete for labor, but an agreement between the individual franchisees themselves not to do so. The district court erred in disregarding these allegations.

As discussed, *supra* p. 4, antitrust law distinguishes between *horizontal* restraints on trade (i.e., agreements between competitors), which are generally *per se* unlawful, and *vertical* restraints on trade (i.e., agreements between firms and their suppliers or distributors), which are generally analyzed under a rule-of-reason analysis. An agreement between a company and its franchisee generally imposes a vertical restraint, not a horizontal one. But when a company uses vertical agreements to facilitate an agreement among multiple competitors—such as, in this case, McDonald's franchisees—that arrangement embodies a horizontal restraint subject to *per se* treatment as well. *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 936 (7th Cir. 2000). This arrangement often takes the form of a hub and spoke. Under the legal principles applicable in this area, if a plaintiff shows that the "spokes" (the ostensible competitors whose conduct is being facilitated by the "hub") were "aware of each other" and did "something in furtherance of some single, illegal enterprise," *United States v. Bustamante*, 493 F.3d 879, 886 (7th Cir. 2007) (citation omitted), the overall arrangement is viewed as horizontal, not vertical, and so *per se* treatment is appropriate. In such a case, the plaintiff has established that "a rim . . . connect[s] the spokes together." *Id.*

Plaintiffs here plausibly alleged the existence of a hub-and-spoke conspiracy between McDonald's and its franchisees. Plaintiffs alleged that "McDonald's *and its*

*franchisees* have agreed not to compete among each other for employees," specifically by agreeing to be bound by standard no-hire provisions—which were otherwise against the individual franchisees' self-interest—that each franchisee "kn[ew]" would also bind every other franchisee in the McDonald's network. Doc. 32 at 21 (¶¶ 84-85) (emphasis added); Doc. 180-1 at 22 (¶¶ 84-85) (same). And by adhering to the no-hire provision—i.e., by not hiring competitors' employees without receiving a "release[]" from those competitors, Doc. 32 at 17-18 (¶¶ 68-70), 22 (¶¶ 87-88); Doc. 180-1 at 7-8 (¶ 19), 18-19 (¶¶ 66-69), 23 (¶¶ 87-88)—franchisees' conduct supports the inference of a horizontal agreement. *See Toys*, 221 F.3d at 936. Plaintiffs thus plausibly alleged not only an agreement between McDonald's and its franchisees not to compete with each other for workers, but also an agreement that would bind each franchisee not to compete with every other franchisee—a "rim" to connect the spokes.

The district court appeared to reason, at both the motion-to-dismiss stage and at later stages, that plaintiffs' *per se* theory, to the extent it was viable at all, could apply only in markets where McDonald's franchisees competed with outlets owned by McDonald's itself, rather than with each other, because only in those markets would the no-hire provisions operate as a horizontal restraint (i.e., between McDonald's and its "competitors"). SA10-11, SA42-43. In doing so, however, the district court ignored not only the basics of hub-and-spoke conspiracy law (which plaintiffs explained, Doc. 40 at 17-19), but multiple recent opinions rejecting motions to dismiss antitrust claims premised on allegations that a corporation facilitated a horizontal agreement among its franchisees not to compete for labor (a practice that

plaintiffs in each case alleged was *per se* unlawful). *See, e.g.*, *In re Papa John's Emp. & Franchisee Emp. Antitrust Litig.*, No. 18-cv-00825, 2019 WL 5386484, at *7 (W.D. Ky. Oct. 21, 2019) (denying defendants' motion to dismiss where company facilitated horizontal conspiracy among franchisees "not to compete for labor"); *Blanton v. Domino's Pizza Franchising LLC*, No. 18-cv-13207, 2019 WL 2247731, at *5 (E.D. Mich. May 24, 2019) (same). That error, too, warrants reversal by this Court.

### B. The district court improperly assumed the factfinder's role.

Finally, the district court compounded the legal errors described above by resolving key factual questions dispositive to plaintiffs' claims at the threshold of the case, namely on McDonald's motion to dismiss (and, later, on its motion for judgment on the pleadings). *See Active Disposal, Inc. v. City of Darien*, 635 F.3d 883, 886 (7th Cir. 2011) (holding that analysis of motion to dismiss "rests on the complaint, and [courts] construe it in the light most favorable to the plaintiffs, accepting as true all well-pleaded facts alleged and drawing all permissible inferences in their favor"); *Adams v. City of Indianapolis*, 742 F.3d 720, 727-28 (7th Cir. 2014) ("A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is governed by the same standards as a motion to dismiss for failure to state a claim under Rule 12(b)(6).").

Although whether *per se* or rule-of-reason analysis applies to an antitrust claim is generally a question of law, that question is often "predicated on a factual inquiry." *Nat'l Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 779 F.2d 592, 596 (11th Cir. 1986) (citing *NCAA v. Bd. of Regents*, 468 U.S. 85, 104-06 (1984)). Here,

the question whether a *per se* analysis applied to plaintiffs' Sherman Act claims (as plaintiffs maintained) turned on multiple "factual inquir[ies]," *id.*, of exactly this kind, including (a) whether the no-hire agreements were "reasonably necessary" to some pro-competitive purpose, *Aya*, 9 F.4th at 1109, and (b) whether McDonald's orchestrated a hub-and-spoke conspiracy among its franchisees, *see Bustamante*, 493 F.3d at 886. *See supra* pp. 13-20. Indeed, courts frequently deny motions to dismiss asserting the ancillary restraints doctrine on exactly this ground, reasoning that the doctrine generally requires an "inherently fact-specific inquiry that is difficult to determine with certainty at the motion to dismiss stage." *Snow v. Align Tech., Inc.*, 586 F. Supp. 3d 972, 979 (N.D. Cal. 2022); *accord Delta Dental*, 484 F. Supp. 3d at 635 (noting "the difficulty of answering [the ancillarity] question at the pleadings stage"); 2 Areeda & Hovenkamp, *supra*, ¶ 305e ("Often, however, the decision about which rule is to be employed will await facts that are developed only in discovery.").

Here, plaintiffs plausibly alleged all of the factual premises that they were required to in order to avoid dismissal on the pleadings. They pled that the no-hire agreements were not reasonably necessary to any pro-competitive purpose. *See* Doc. 180-1 at 2 (¶ 2); *see also* Doc. 32 at 25-26 (¶¶ 105-09). And they pled that McDonald's orchestrated a hub-and-spoke conspiracy among its franchisees. *See* Doc. 32 at 17-18 (¶¶ 68-70), 21-22 (¶¶ 84-91); Doc. 180-1 at 7-8 (¶ 19), 18-19 (¶¶ 66-69), 23 (¶¶ 87-88); *see also* Doc. 40 at 17-19. Thus, the district court should have followed the lead of other recent franchise cases and refused to reject plaintiffs' *per se* arguments at the outset of the case. *See, e.g.*, *Blanton*, 2019 WL 2247731, at *4 ("declin[ing] to

announce a rule of analysis" at the motion-to-dismiss stage on the ground that "[m]ore factual development [wa]s necessary"); *Papa John's*, 2019 WL 5386484, at *9 (explaining that "more factual development is necessary before a standard of review is selected.").[12]

Instead, the district court assumed for itself the factfinder's role. It held based on the pleadings that the no-hire provisions were "ancillary to franchise agreements" because the agreements (although not the provisions) were "output enhancing and thus procompetitive." SA13. On that basis, the court reasoned, the no-hire provisions "cannot be deemed unlawful *per se*." *Id.* But even setting aside the error in the court's legal reasoning—its focus on the alleged pro-competitive benefits of the franchise agreements, as opposed to whether the no-hire provisions were reasonably necessary to secure those benefits, *supra* pp. 14-17—the court erred in resolving that question at all, given that plaintiffs plausibly alleged that the provisions had no such effect, *supra* p. 21. Similarly, the district court held at the motion-to-dismiss stage that plaintiffs had pled a *per se* theory, if at all, only to the extent that McDonald's competed directly with the franchisees, SA10-11, SA42-43, overlooking plaintiffs' allegations that the franchisees had entered into a horizontal conspiracy, too, *supra* p. 18, and effectively resolving that question of fact on the pleadings. This error

[12] *See also, e.g.*, *eBay*, 968 F. Supp. 2d at 1040; *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012) (explaining that the decision which standard of analysis to apply "is more appropriate on a motion for summary judgment"); *Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1131, 1133 (N.D. Cal. 2005) (declining to decide on a motion to dismiss whether rule of reason applied because question whether a restraint is naked or ancillary is "quintessentially one of fact").

compounded the district court's failure to articulate and apply the appropriate legal standards, and warrants reversal.

## CONCLUSION

For these reasons, this Court should reverse the district court's judgment.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation in Circuit Rule 29 because it contains 5,796 words (excluding the parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii)). This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface (12-point Century Schoolbook) using Microsoft Word.

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November 9, 2022

**CERTIFICATE OF FILING AND SERVICE**

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

All participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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