Nos. 04-805 and 04-814

IN THE

Supreme Court of the United States

TEXACO INC.,
Petitioner,
v.
FOUAD N. DAGHER *ET AL.*,
Respondents.

SHELL OIL COMPANY,
Petitioner,
v.
FOUAD N. DAGHER *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER SHELL OIL COMPANY'S OPENING BRIEF

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QUESTION PRESENTED

Whether pricing decisions by a lawful joint venture or its owners with respect to the venture's own products may be condemned as a per se violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to these consolidated proceedings are Petitioners Shell Oil Company (No. 04-814) and Texaco, Inc. (No. 04-805), both defendants below, and the following Respondents, all plaintiffs below: Fouad N. Dagher; Bisharat Enterprises Inc.; Alfred Buczkowski; Esequiel Delagado; Mahwash Farzaneh; Nasser El-Radi; G.G.&R. Petroleum Inc.; H.J.F. Inc.; Kaleco Co.; Carlos Marquez; Sami Merhi; Edgardo R. Parungao; Ron Abel Serv. Center, Inc.; Gullermo Ramirez; Jerry's Shell Serv. Center, Inc.; Leopoloo Ramirez; Nazar Sheibaini; Sitara Management Corporation; Tinsel Enterprises Inc.; Quang Truong; Steven Ray Vezerian; Los Feliz Shell, Inc.; and Nassim Hanna. Saudi Refining Inc. was a defendant below but secured judgment in its favor on other grounds.

Petitioner Shell Oil Company is wholly owned by Shell Petroleum, Inc., a Delaware corporation, which is wholly owned by Shell Petroleum N.V., The Hague, The Netherlands. Shell Petroleum N.V. is owned 60% by Royal Dutch Petroleum Company, The Hague, The Netherlands, and 40% by The Shell Transport and Trading Company Limited, London, England. Royal Dutch Petroleum Company is a public company whose majority shareholder is Royal Dutch Shell plc, The Hague, The Netherlands (and of whose stock no other entity owns 10% or more). The Shell Transport and Trading Company Limited is wholly owned by Royal Dutch Shell plc.

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The opinion of the Court of Appeals (Pet. App. 1a-35a) is reported at 369 F.3d 1108. The District Court's opinions (Pet. App. 36a-74a) are unreported.[1]

JURISDICTION

The Court of Appeals entered its judgment on June 1, 2004. The court denied a timely petition for panel and en banc rehearing on September 15, 2004. Pet. App. 75a. The petition for a writ of certiorari was timely filed on December 17, 2004, and granted on June 27, 2005. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

STATEMENT

In 1998, Petitioners Shell Oil Company (Shell) and Texaco, Inc. (Texaco) formed two joint ventures that merged the companies' respective domestic gasoline refining and marketing operations and therefore eliminated competition between Shell and Texaco in the United States gasoline business. The Federal Trade Commission and several States allowed the formation of the joint ventures, and the legality of the ventures themselves has not subsequently been challenged in this or any other proceeding.

Respondents are Shell- and Texaco-branded service station

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[1] References to Pet. App. are to the appendix to Shell's certiorari petition, No. 04-814.

operators who purchased gasoline from Equilon. On behalf of a purported class of service station operators, Respondents alleged that Shell and Texaco violated Section 1 of the Sherman Act by agreeing that each joint venture would charge the same wholesale price in a given geographic trade area for the Shell and Texaco brands of gasoline now sold exclusively by that joint venture. Expressly disclaiming any reliance upon a full rule of reason theory, Respondents contended that this alleged agreement constituted a per se violation of Section 1. The District Court rejected the per se theory of liability and entered summary judgment in favor of Shell and Texaco. In a 2-1 opinion, the Court of Appeals reversed.

A. Factual Background

This case concerns two joint ventures formed by Shell and Texaco in 1998. The first, Equilon Enterprises LLC ("Equilon"), merged Shell's and Texaco's gasoline refining and marketing operations (so-called "downstream" operations) in the western United States. The second, Motiva Enterprises LLC ("Motiva"), in which Saudi Refining Inc. ("SRI") was also a partner, merged the parties' downstream operations in the eastern United States. Shell and Texaco continued to compete with each other in their domestic "upstream" operations (oil and gas exploration and production) and in both upstream and downstream operations internationally. Once Equilon and Motiva came into existence, however, Shell and Texaco no longer separately refined or marketed branded gasoline in the United States and thus no longer competed with each other in downstream domestic operations.[2]

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[2] Both courts below held that the Respondents lacked standing to pursue claims against SRI with respect to Motiva's operations because they purchase gasoline from Equilon, not from Motiva (Pet. App. 7a, 9a-11a, 69a), a determination Respondents have not

As the District Court found, Equilon was a legitimate, economically integrated joint venture, formed to reap cost savings and operating efficiencies of up to $800 million. Pet. App. 3a, 49a, 65a. That finding was undisputed by Respondents and accepted by the Court of Appeals. It was also supported by uncontroverted evidence showing that Shell and Texaco contributed substantial assets to the joint venture (including refineries, pipelines, terminals, lubricant plants, research laboratories, and thousands of service stations), and that Shell and Texaco agreed that the gains and losses of the venture would be allocated in proportion to the assets contributed to Equilon by each of the parent corporations (56% to Shell, 44% to Texaco). JA 76. Shell and Texaco each contributed its brand name to Equilon, by granting Equilon an exclusive license to sell gasoline under that brand name in the Equilon territory. Pet. App. 65a-66a.

Shell and Texaco presented their plans for the joint venture to the Federal Trade Commission, which conducted a detailed year-long investigation. Antitrust regulators in California, Hawaii, Oregon, and Washington also reviewed the proposed venture. After completing their investigations, all of these entities let the plans proceed, subject to certain limited modifications that were made. Pet. App. 3a.

After formation, Equilon itself (not Shell or Texaco) owned, refined and marketed the gasoline that it sold in the western United States under the Shell and Texaco brand names. Equilon likewise set the wholesale prices for the gasoline that it sold. Prices in each trade area were set based on conditions in that particular trade area. JA 79. The independent service station operators continued to determine, on their own, the prices to charge consumers for Shell- and Texaco-branded gasoline at the pump. JA 79.

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challenged here. Thus, only Respondents' claim against Equilon remains at issue, and this brief will largely refer to Equilon alone.

To steer clear of potential issues under the Robinson-Patman Act, which prohibits price discrimination for products of "like grade and quality" (15 U.S.C. § 13(a)), Equilon established a policy of charging the same wholesale price for a particular grade of Shell-branded gasoline as it charged for the same grade of Texaco-branded gasoline when it sold both brands in the same geographic trade area. The two brands are identical except for their brand names and additive packages.[3]

By setting the same wholesale prices for Shell- and Texaco-branded gasoline in each trade area in which it sold both brands, Equilon avoided the litigation costs and risks associated with potential Robinson-Patman Act claims by service station operators such as plaintiffs here.

B. The Lower Courts' Rulings

Respondents sued under Section 1 of the Sherman Act, 15 U.S.C. § 1, alleging that Shell and Texaco had engaged in an unlawful "price fixing" conspiracy through Equilon's pricing policy. Respondents waived any claim that Equilon's charging the same price for Shell- and Texaco-branded gasoline had any anticompetitive effect within a relevant market, as would be required under rule of reason analysis. Instead, Respondents alleged that Equilon's pricing policy constituted per se unlawful "price fixing" by Shell and Texaco.

Following extensive discovery, the parties filed cross-motions for summary judgment. The District Court granted summary judgment for Shell and Texaco. The court rejected

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[3] This Court has held that products are not differentiated for Robinson-Patman Act purposes by separate brand identities (*FTC* v. *Borden Co.*, 383 U.S. 637, 645-46 (1966)), and the Federal Trade Commission has held that "chemical analysis" is not the "important competitive factor" in retail gasoline distribution (*In the Matter of Standard Oil Co.*, 49 F.T.C. 923, 952 (1953), *vacated on other grounds, Standard Oil Co.* v. *FTC*, 233 F.2d 649 (7th Cir. 1956)).

Respondents' argument that Equilon's setting its wholesale prices for its own products could be condemned without regard to actual competitive effects in a relevant market.[4] The court noted that all joint ventures "must, at some point, set prices for the products they sell." Pet. App. 43a-44a. Adoption of Respondents' theory, the court reasoned, would effectively result in "a per se rule against joint ventures between companies that produce competing products." Pet. App. 45a. Indeed, as the District Court observed, Respondents "would only allow joint ventures to establish prices for products that were somehow fundamentally new or different from those made by the parents."[5] Pet. App. 44a. The District Court also found it irrelevant that Equilon charged the same wholesale prices for its two brands when it sold both brands in the same trade area: "Whether Equilon and Motiva charge the same or different prices for both brands, each literally 'fixes' a price where [Shell and Texaco] formerly set prices independently. Yet they and every other joint venture must, at some point, set prices for the products they sell." Pet. App. 43a.

The Ninth Circuit reversed, holding that Equilon's pricing policy could be per se illegal unless Shell and Texaco showed that the *particular* pricing decision – that is, charging the same price for the two brands in a trade area, not just the

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[4] Respondents also asserted a "quick look" theory. The District Court rejected that theory, Pet. App. 60a, and the Court of Appeals declined to reach it, Pet. App. 7a, 13a n.7.

[5] The District Court also noted: "Shell, Texaco and SRI did not jointly agree pre- or post-formation on one universal price that would be applied nationally through Equilon and Motiva. Furthermore, they had no reason to compete because once Equilon and Motiva were formed, Shell, Texaco and SRI no longer competed in the market for Shell and Texaco branded gasoline, either amongst themselves or against the ventures in the United States." Pet. App. 44a.

unified setting of prices for both brands – was "reasonably necessary" to achieve the efficiencies that led to Equilon's creation.

With respect to the threshold question whether Section 1, which addresses only concerted action, applied at all, the majority acknowledged that, "for some purposes at least," joint ventures that consist of a true pooling of assets and sharing of risks are to be considered "single firm[s] competing with other sellers in the market." Pet. App. 16a (internal quotations omitted). The majority also acknowledged that Equilon involved just such a "collective assumption of risk and resource pooling," and that Equilon was a "legitimate," efficiency-enhancing joint venture. Pet. App. 4a-5a. It was also undisputed that no unified pricing was implemented until Equilon formally came into existence. JA 78-79. The majority nevertheless concluded that Section 1 applied to Equilon's pricing of its own products because it found that there was a factual dispute whether the decision to price the brands the same had been made "immediately before" the ventures' actual formation rather than "shortly thereafter." Pet. App. 4a-5a.[6] The majority concluded that, if the pricing decision had been made prior to the ventures' actual formation, it "was not a decision made by a single economic entity – it was a decision made by competitors."

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[6] Some of the Ninth Circuit's generalized language does not distinguish between the formation of Equilon, which took place as of January 1, 1998 (JA 73), and the formation of Motiva, which took place six months later, as of July 1, 1998 (JA 73). But the Ninth Circuit notes only evidence that the pricing decision preceded *Motiva's* formation. Pet. App. 5a ("There is some evidence in the record establishing that the decision to set one price for the two brands was conceived of in the SMI even before *Motiva* was formed.") (emphasis added). The court does not cite any evidence that the decision preceded Equilon's formation or that it preceded Shell's and Texaco's agreement to form Equilon and Motiva. *See* Pet. App. 5a.

Pet. App. 19a n.11.

With respect to the issue of what mode of analysis to apply under Section 1 – per se or rule of reason – the majority observed that price fixing "is the quintessential example of a *per se* violation of § 1." Pet. App. 14a. The court acknowledged, however, that, in the context of economically integrated joint ventures, Section 1's "blanket prohibition on price fixing . . . cannot be read literally." Pet. App. 15a. For example, as this Court held in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), "[w]hen two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Id.* at 9. Moreover, when restraints that might otherwise be subject to per se condemnation are ancillary to a legitimate joint venture (*i.e.*, are "reasonably necessary to further the legitimate aims of the joint venture," Pet. App. 21a), they are analyzed under the rule of reason. *See, e.g.*, *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101-03 (1984).

The Ninth Circuit held that the manner in which Equilon set the prices for its own products here could not be deemed "reasonably necessary to further the legitimate aims of the joint venture." Pet. App. 21a. In so holding, the court focused on the fact that Equilon set "one, unified price for both the Texaco and Shell brands of gasoline" and then inquired whether that particular pricing decision was reasonably necessary to further the aims of the venture. Pet. App. 21a. While purporting to acknowledge that "joint ventures may price their products," the majority framed the question as "whether two former (and potentially future) competitors may create a joint venture in which they unify the pricing, and thereby *fix* the prices, of two of their distinct product brands." Pet. App. 27a-28a.

Judge Fernandez dissented. He noted that, upon Equilon's formation, it was Equilon, not Shell and Texaco, that competed in the business of refining, transporting, and marketing gasoline in the western United States. Pet. App. 31a-32a. And, as he noted, Equilon, not Shell and Texaco, "manufactured, inventoried, transported, and marketed the products" and thus set the price "for *its* Shell and Texaco brands." Pet. App. 31a, 32a. Judge Fernandez concluded that Equilon's setting the prices for its own products was not just reasonably necessary, but "integral," to the legitimate aims of the joint venture:

> "In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services?"

Pet. App. 34a. In Judge Fernandez's view, the majority's "price-fixing" label was plainly inapplicable.

SUMMARY OF ARGUMENT

The formation of the Equilon and Motiva joint ventures to realize economies of scale and other efficiencies eliminated all competition between Shell and Texaco in the United States branded gasoline business. As the District Court found, "once Equilon and Motiva were formed, Shell, Texaco and SRI no longer competed in the market for Shell and Texaco branded gasoline, either amongst themselves or against the ventures in the United States." Pet. App. 44a. The formation of these joint ventures was reviewed by the Federal Trade Commission and numerous state antitrust regulators and is not challenged in this action. The business decisions that are challenged in this action relate exclusively to the pricing of products owned and controlled by the joint ventures, and those decisions did not restrict any aspect of the independent business of either Shell or Texaco. The challenged decisions therefore could not and did not restrict any competition that continued to exist once the two concededly lawful joint ventures were formed.

These facts mean that, for the following reasons, the challenged restraints are not per se illegal under Section 1 of the Sherman Act and the Ninth Circuit's decision must be reversed.

1. As this Court has repeatedly held, the Sherman Act contains a "basic distinction between concerted action and independent action." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767 (1984); *see Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). The conduct of a single firm is governed not by Section 1, which Respondents rely on here, but by Section 2 alone. *Copperweld*, 467 U.S. at 767.

Likewise, Section 1 does not apply to the joint conduct of entities that have "a complete unity of interest" with respect to the economic activity in question. *Copperweld Corp.*, 467 U.S. at 770-71. Thus, even if the pricing policy here had been agreed upon by Shell and Texaco rather than decided upon by venture management, Section 1 should not apply. Such an agreement would merely constitute collective decision making of partners in a joint venture about the business of that venture, where the partners are merging all of their relevant business activities and therefore do not compete with the venture. In those circumstances, the partners have a complete unity of interest – they are acting exclusively as the co-owners of a single business – and any agreement would not restrict competition any more than do agreements between a parent corporation and its wholly owned subsidiary. Section 1 therefore does not apply to the alleged agreement by Shell and Texaco about their joint venture's pricing of its own products.

2. Even if Section 1 of the Sherman Act did apply, the per

se rule would not. The rule of reason is the presumptive mode of analysis under Section 1. The per se rule applies only where a restraint is one that "would always or almost always tend to restrict competition and decrease output." *National Collegiate Athletic Assn.*, 468 U.S. at 100. The setting of prices for multiple products of a single economically integrated joint venture cannot be per se illegal under Section 1 of the Sherman Act. Because such products are not in competition with each other for purposes of Section 1 analysis, joint venture decisions about the prices for such products neither restrict competition nor decrease output, regardless of whether those decisions are made by venture management or the venture's owners.

a. Because the formation of the joint ventures here lawfully eliminated all competition between the Shell and Texaco brands of gasoline in the wholesale market, any alleged agreement by Shell and Texaco with respect to their ventures' wholesale pricing of those brands could not restrict competition. Such an agreement would not be an "agreement[] among competitors to fix prices on their individual goods or services," *Broadcast Music*, 441 U.S. at 8, and therefore would not be per se illegal "horizontal price fixing," *National Collegiate Athletic Assn.*, 468 U.S. at 99-100. It does not matter whether such an agreement were reached "immediately before" actual formation of the joint ventures or "shortly thereafter," because it is undisputed that any such agreement would have taken effect only after the joint ventures had been formed and, thus, after competition between the brands at wholesale had ceased. Because the alleged agreement did not restrict competition that would otherwise have existed, it cannot be per se illegal. At most, such an agreement would be subject to evaluation under the rule of reason.

b. The Ninth Circuit's application of the per se rule squarely conflicts with this Court's decision in *Broadcast Music, Inc.* In *Broadcast Music,* the Court held that, if a joint venture is legitimate, the establishment of prices for the products of that joint venture is not per se illegal price-fixing. Setting of prices for the venture's own products is "a necessary consequence of the integration necessary to achieve [the venture's] efficiencies." *Id.* at 21.

c. The Ninth Circuit erred in applying the "ancillary restraints" doctrine. That doctrine is relevant only where the challenged conduct restricts competition that would otherwise continue to exist between the joint venture partners, or between the venture and one or more of the partners, after the formation of the venture. For example, an agreement that joint venture partners will not sell non-venture products in competition with the venture would properly be analyzed under the ancillary restraints doctrine. Here, by contrast, once Equilon was formed, neither Shell nor Texaco competed in the same business as the joint venture, and the alleged agreement therefore could not restrict competition that would otherwise have existed. Moreover, even if the ancillary restraints doctrine applied here, *Broadcast Music* establishes that the setting of prices for a joint venture's products is sufficiently related to the business of a joint venture to render the restraint challenged here "collateral and subordinate" to the venture and therefore beyond the purview of the per se rule.

3. A rule that decisions by a lawful joint venture or its owners with respect to the prices for that venture's own products may be per se illegal would chill the formation of legitimate, pro-competitive joint ventures. Joint ventures are an increasingly common form of business organization that can significantly increase efficiency and benefit consumers. The Ninth Circuit's unprecedented extension of the per se rule to the pricing decisions of such ventures would deter companies from engaging in these efficiency-enhancing activities. Moreover, because the per se rule is itself a creation of the courts, it is properly the responsibility of the courts, not Congress (as the majority below suggested, Pet.

App. 28a-29a), to ensure that the per se rule is applied in a manner that is fair, efficient, and consistent with antitrust policy, economic theory and this Court's precedents.

ARGUMENT

I. SECTION 1 DOES NOT APPLY TO DECISIONS BY A JOINT VENTURE OR ITS OWNERS ABOUT THE JOINT VENTURE'S OWN PRODUCTS, WHERE THE OWNERS DO NOT OTHERWISE COMPETE IN THE MARKET.

A threshold question in any Section 1 case is whether the challenged restraint should be classified as that of a single entity (or the economic equivalent of a single entity) or of multiple entities. Section 1 "reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between separate entities." *Copperweld Corp.*, 467 U.S. at 768; *see Monsanto*, 465 U.S. at 761. Section 1 does not reach "[t]he conduct of a single firm," which "is governed by § 2 alone and is unlawful only when it threatens actual monopolization." *Copperweld*, 467 U.S. at 767. The more exacting standard that applies to concerted action reflects Congress' judgment that there is a greater risk to competition with "a sudden joining of two independent sources of economic power previously pursuing separate interests." *Id.* at 769, 771. By contrast, where there is no such joining of separate interests, companies should be able to compete vigorously without having their "every action [subjected] to judicial scrutiny for reasonableness." *Id.* at 775.

In *Copperweld*, the Court applied this rule to the joint conduct of a parent corporation and its wholly owned subsidiary, holding that an agreement between such entities should not be classified as concerted action for purposes of Section 1. Although the parent and its wholly owned subsidiary in *Copperweld* were legally separate entities, they had "a complete unity of interest" and coordination between them therefore did "not represent a sudden joining of two independent sources of economic power previously pursuing separate interests." *Id.* at 770-71.

This Court has further indicated that the operation of the business of a legitimate joint venture should be treated, for Section 1 purposes, as the conduct of a single firm, not concerted action. In *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332 (1982), this Court stated that a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . is regarded as a single firm competing with other sellers in the market." *Id.* at 356; *see* VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1478c, at 325 (2d ed. 2003) ("[o]nce a venture is judged to have been lawful at its inception and currently, decisions that do not affect the behavior of the participants in their nonventure business should generally be regarded as those of a single entity rather than the parents' daily conspiracy"). As a result, decisions with respect to the operation of a fully-integrated business venture are not subject to Section 1 scrutiny at all. *Copperweld*, 467 U.S. 767-68; *Maricopa*, 457 U.S. at 356; *City of Mt. Pleasant* v. *Associated Elec. Coop.*, 838 F.2d 268, 276-77 (8th Cir. 1988); *Nurse Midwifery Assocs.* v. *Hibbett*, 918 F.2d 605, 616 (6th Cir. 1990); *see also Chicago Professional Sports Limited Partnership* v. *NBA*, 95 F.3d 593, 600 (7th Cir. 1996).

Nor should Section 1 apply to the collective decision-making of partners in a joint venture about the business of that venture, where the partners are merging all of their relevant business activities. The logic behind treating the collective conduct and decisions of multiple entities as "single firm conduct" under Section 1 is that, in certain circumstances – such as that of parent and wholly owned subsidiary – the various entities have identical economic interests with respect to the relevant business. They do not represent "two independent sources of economic power . . . pursuing separate interests" but have "a complete unity of interest." *Copperweld*, 467 U.S. at 771. Because they are not pursuing separate economic interests and are not competing with each other, there is no possibility that an agreement between them will restrict competition.

This logic applies with full force to the collective decision-making of partners in a fully-integrated joint venture, such as decisions by Shell and Texaco about the business of Equilon. *Cf. id.* at 776 ("the appropriate inquiry requires us to explain the logic underlying Congress' decision to exempt unilateral conduct from Section 1 scrutiny, and to assess whether that logic similarly excludes the conduct of a parent and its wholly owned subsidiary.") Because the formation of such a joint venture will itself eliminate all relevant competition between the partners, a decision about the operation of the venture, once formed, cannot further restrict competition and is therefore not a proper subject of Section 1 inquiry. Here, the formation of Equilon (which *was* a "sudden joining of two independent sources of economic power" and therefore properly subject to Section 1 scrutiny)[7] itself eliminated all competition between Shell and Texaco with respect to the domestic gasoline business. A decision about the post-formation operation of that venture should therefore not be subject to scrutiny under Section 1.

Moreover, it does not matter whether such a decision is

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[7] Under the *Antitrust Guidelines For Collaboration Among Competitors*, 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000) (available at <www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>) promulgated by the FTC and the Department of Justice, the venture would be analyzed under the same standards as a merger, because the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market, ends all competition between the participants in that market, and lasts for a sufficiently long period. *Id.* § 1.3 & App. Ex. 1.

made before rather than after the venture formally comes into existence. Indeed, in forming a joint venture, there are any number of decisions that must be made about how the joint venture should operate. Those decisions help the parties evaluate potential operating efficiencies of the venture and the necessary terms of its operation. So long as such a decision relates solely to the post-formation operation of the venture, there is a "complete unity of interest," and the decision itself cannot restrict competition.

Here, the Ninth Circuit ignored this fundamental principle, focusing instead on what it identified as a factual dispute whether the decision to unify the pricing of the Shell and Texaco brands was made "immediately before" the formation of the ventures or "sometime shortly thereafter." Pet. App. 4a, 5a. It is undisputed, however, both that the decision was not made before the parties had agreed to form the joint ventures and that the decision related exclusively to the post-formation business of the ventures. Thus, at the time of the decision, Shell and Texaco had identical interests with respect to their future business: both Shell's and Texaco's gains or losses would depend entirely on the *overall* profitability of the joint ventures, without regard to relative sales of Shell- and Texaco-branded gasoline; and, because neither Shell nor Texaco would continue to market branded gasoline in the United States, the operation of the joint ventures could not affect the profitability of their separate businesses. Moreover, if operational planning for a complex new joint venture had to await actual formation of the venture to avoid antitrust risk, the result would be a significant disruption – here, to the detriment of consumers and, as a significant portion of the nation's gasoline supply is involved, the American economy. *Cf. Copperweld,* 467 U.S. at 773 ("Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability.").

At the time the decisions about Equilon's pricing of Shell and Texaco-branded gasoline were made, Shell and Texaco had a complete unity of economic interest with respect to those decisions. Like coordination between two corporate affiliates, coordination between Shell and Texaco in this circumstance did not "represent a sudden joining of two independent sources of economic power previously pursuing separate interests" but rather represented conduct of the co-owners of a single business. Such coordination is neither "concerted action," *see Copperweld*, 467 U.S. at 769-78, 781, nor "an agreement among competitors on the way in which they will compete with one another," *National Collegiate Athletic Assn.*, 468 U.S. at 99. Accordingly, Section 1 of the Sherman Act should not apply.

II. PRICING DECISIONS BY A LAWFUL JOINT VENTURE OR ITS OWNERS WITH RESPECT TO THE VENTURE'S OWN PRODUCTS CANNOT BE PER SE ILLEGAL UNDER SECTION 1 OF THE SHERMAN ACT.

Even if Section 1 of the Sherman Act did apply, the per se rule certainly would not. The fundamental question in any case under Section 1 is whether competition has been unreasonably restrained by the defendants. This Court has consistently held that, in answering that question, the rule of reason is the presumptive mode of analysis, while the per se rule should be applied only in very limited circumstances. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49, 58-59 (1977) (the rule of reason is the "prevailing standard of analysis," any departure from which "must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing"); *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988) ("there is a presumption in favor of a rule-of-reason standard"). The per se rule may be applied only to an agreement that "facially appears to be one that would always or almost always tend to restrict competition and decrease output." *National Collegiate Athletic Assn.*, 468 U.S. at 100; *see also State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997) ("predictable and pernicious anti-competitive effect[s]" as well as "limited potential for pro-competitive benefits" are prerequisites to application of per se rule) (citing *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958)). The crucial question is whether the challenged restraint is one that will almost invariably and without justification *reduce competition that would otherwise exist*. If not, there is no basis to apply the per se rule.

One of the categories of restraints to which the Court has said that the per se rule may properly be applied is "agreements among competitors to fix prices on their individual goods or services," *Broadcast Music*, 441 U.S. at 8, otherwise known as "horizontal price fixing" agreements, *National Collegiate Athletic Assn.*, 468 U.S. at 100. The Court has emphasized, however, that the phrase "price fixing" is merely "a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable," that "[l]iteralness is overly simplistic and often overbroad," and that the question is not simply "whether two or more potential competitors have literally 'fixed' a 'price'." *Broadcast Music*, 441 U.S. at 9. Thus, while "agreements among *competitors* to fix prices on their *individual goods or services* are among those concerted activities that the Court has held to be within the per se category," *id.* at 8 (emphases added), "[w]hen two *partners* set the price of *their* goods or services they are literally 'price fixing,' but they are *not per se* in violation of the Sherman Act," *id.* at 9 (emphases added). This is true because, as this Court has recognized, "[t]he aim and result of every [illegal] price-fixing agreement, if effective, is the elimination of one form of competition," *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397 (1927), but partners' pricing their jointly-owned goods or services does not eliminate any form of competition.

A. An Agreement By Joint Venture Partners With Respect To The Prices Of Multiple Products That Are Owned By Their Joint Venture Does Not Restrict Competition For Purposes Of Section 1.

When *competitors* jointly set the prices of their *individual goods*, they eliminate price competition that would otherwise exist between those goods. That is generally per se illegal "horizontal price fixing."[8] By contrast, when *partners* jointly set the prices of *the partnership's goods*, they do not eliminate competition at all, because those goods are not in competition with each other. Therefore, even if Section 1 applies to such joint setting of prices for partnership goods, this is not "price fixing" subject to the per se rule.

If the Ninth Circuit's decision were the law, it would be per se illegal, for example, for three lawyers who agreed to form a new law firm, but who had previously competed, to agree on the rates that they would charge for their services once the law firm was operational. Under the Ninth Circuit's reasoning, that would be per se illegal price fixing among former competitors. Any such result would be self-evidently absurd, and the only courts ever to have considered the issue have roundly (and quite correctly) rejected it. *See Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 n.10 (D.C. Cir. 1986) (Bork, J.) ("Although literally price fixing among competitors, fee schedules imposed by a law

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[8] *See National Collegiate Athletic Assn.*, 468 U.S. at 99-100 (defining a horizontal agreement as "an agreement among competitors on the way in which they will compete with one another"); *Augusta News Co.* v. *Hudson News Co.*, 269 F.3d 41, 47 (1st Cir. 2001) ("The only price-fixing agreements that are condemned *per se*, with one narrow exception (minimum resale price-fixing), are agreements (1) between competitors (2) as to competing products or services (3) where, in addition, the agreement is not part of a larger economic venture.").

partnership are accepted, even taken for granted."); *Polk Bros., Inc.* v. *Forest City Enterprises, Inc.*, 776 F.2d 185, 190 (7th Cir. 1985) ("The partners of a newly-formed law firm agree on fees and allocate subjects of specialty and clients among them; this 'price fixing' and 'market division' do not become unlawful just because the firm is new.").

Here, the Ninth Circuit analyzed the Equilon pricing policy as an agreement between "competitors" that could constitute per se illegal price fixing. Pet. App. at 19a n.11. In so doing, the Ninth Circuit failed to appreciate the significance of its own finding that, once the Equilon and Motiva joint ventures were formed, there would be and was no further competition between Texaco- and Shell-branded gasoline. Pet. App. 4a ("The creation of the alliance ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline."); *see* Br. in Opp. 10 ("[Shell and Texaco] continued to exist and compete with each other . . . *except [in] the United States*") (emphasis added).

Because the formation of the joint ventures – reviewed by the government and not challenged by Respondents – eliminated all competition between the two brands of gasoline, an agreement with respect to the prices that the joint ventures would subsequently charge for those two brands could not restrict competition that would otherwise have existed and therefore would not be "horizontal price fixing." *See National Collegiate Athletic Assn.*, 468 U.S. at 99-100. Such an agreement could not be anti-competitive at all, far less have "such predictable and pernicious anticompetitive effect" as to be per se illegal under this Court's decisions. Such an agreement would not be "an agreement among competitors on the way in which they will compete with one another." *National Collegiate Athletic Assn.*, 468 U.S. at 99; *see also Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 649 (1980) (*per curiam*) (holding that "horizontal price fixing" is illegal per se and defining "horizontal agreements" as those "among competitors imposing one kind of voluntary restraint or another on their competitive freedom").

Indeed, the elimination of all competition between Shell and Texaco through the formation of legitimate, pro-competitive joint ventures fundamentally distinguishes this case from three of this Court's decisions on which the Ninth Circuit relied. In *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951), the Court applied the per se rule because the "joint venture" was a mere sham designed to mask a naked horizontal agreement to allocate territories. *Id.* at 597 ("That the trade restraints were merely incidental to an otherwise legitimate 'joint venture' is, to say the least, doubtful."). Here, in contrast, the joint venture at issue is indisputably *bona fide*.

Similarly, in *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332 (1982), the Court found a purported joint venture among physicians to be per se illegal because the venture consisted *solely* of the physicians' agreement on the maximum prices they would charge for particular procedures. The venture was not truly integrated for antitrust purposes, because it was "not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." *Id.* at 356. As noted above, it is undisputed that Equilon was an economically integrated joint venture, with Shell and Texaco sharing the risks and rewards of the venture in proportion to the substantial assets each contributed. J.A 76. The Court expressly recognized in *Maricopa* that, where a physicians' agreement is accompanied by a true economic integration – such as "[i]f a clinic offered complete medical coverage for a flat fee, the cooperating doctors would have the type of partnership arrangement in which a price-fixing agreement among the doctors would be perfectly proper." *Maricopa*, 457 U.S. at 357.

Finally, in *Citizen Publ'g Co.* v. *United States*, 394 U.S.

131 (1969), the two daily newspapers in Tucson, Arizona, created an operating entity to set advertising and subscription rates for both newspapers but did not contribute their core operations – the news and editorial units – to the venture. The venture therefore set agreed-upon prices for output that the venture did not own. Here, by contrast, Equilon owned the entirety of the combined downstream operations and did not have a role in pricing *any* non-venture output. Application of the per se rule is therefore inappropriate. *See* XI Herbert Hovenkamp, *Antitrust Law* ¶ 1908e, at 263-64 (2d ed. 2005) (so long as joint venturers do not "enter into any agreement to fix the price of their nonventure output," no charge of per se illegality is appropriate).

The Ninth Circuit, as noted above, based its decision in part on the assumption that there was a disputed issue of fact whether the decision to price the two brands the same at wholesale in the same trade area was made "immediately before the formation of the joint ventures or sometime shortly thereafter." Pet. App. 4a-5a. But the timing of such a decision, as opposed to when it would take effect, is irrelevant to the proper mode of Section 1 inquiry, just as it is irrelevant to whether the decision is subject to Section 1 scrutiny at all. It is undisputed that any such decision was to *take effect* only after each joint venture had been formed and was operational – that is, only after all competition between the two brands had already ceased. There is no allegation or evidence of any agreement whatsoever with respect to the prices to be charged for any product at a time when that product was owned or controlled by any entity other than one of the joint ventures. Thus, even assuming an agreement with respect to *post-formation* pricing was reached "immediately before" the actual formation of the joint ventures, such an agreement would not have restricted competition and therefore could not conceivably be per se illegal.

Simply put, if Section 1 applies to the conduct at issue here, the proper mode of analysis is under the rule of reason.[9] Because Respondents expressly disclaimed any reliance on such a theory, the failure of their per se theory necessitates reversal.[10]

B. The Ninth Circuit's Application Of The Per Se Rule Is Flatly Inconsistent With This Court's Decision In *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

The Ninth Circuit's ruling is flatly inconsistent with this Court's decision in *Broadcast Music, Inc.*, 441 U.S. 1, where the Court rejected application of the per se rule to the pricing of a joint venture's products. The Ninth Circuit treated Equilon's pricing policy for the products it sold as a naked agreement between competitors to fix prices. But, as in *Broadcast Music*, Equilon's setting of the prices for its own goods was clearly part of a cooperative venture that had the potential to increase output through cost savings and efficiency gains, and it was a necessary consequence of that integration. Indeed, without setting the prices at which its

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[9] Indeed, "[i]f the *per se* rule were applied to joint ventures a paradoxical result would emerge: ventures would be treated more harshly than mergers, although mergers clearly have greater potential for diminishing competition." Carl Shapiro and Robert D. Willig, ON THE ANTITRUST TREATMENT OF PRODUCTION JOINT VENTURES, 4 J. Econ. Perspective 113, 119 (1990).

[10] Although Respondents asserted a "quick look" theory below, the District Court rejected that theory for the same reasons that it rejected application of the per se rule, Pet. App. 60a, and the Court of Appeals declined to reach the quick look theory, Pet. App. 7a, 13a n.7. "Quick look" analysis is available only when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets." *California Dental Assn.* v. *FTC*, 526 U.S. 756, 770 (1999). As demonstrated above, the agreement challenged here could not have had any anticompetitive effect.

goods would be sold, Equilon could not have accomplished its purpose at all.

Broadcast Music involved a joint venture of composers, writers and publishers that sold blanket licenses to perform any and all of the copyrighted musical compositions owned by a member or affiliate. *Id.* at 4-7. Fees for the blanket licenses did not directly depend on the amount or type of music used. A television network alleged that the system by which the fees were set constituted price fixing that was per se illegal under Section 1 of the Sherman Act. *Id.* at 6. After the district court dismissed the complaint, the Court of Appeals reversed. *Id.* at 7.

This Court reversed the Court of Appeals and expressly rejected the argument that participants in a legitimate joint venture engage in per se illegal price fixing when they set the price at which the venture sells its products to third parties. As the Court stated, in language equally applicable here, "[w]hen two partners set the price of their goods and services they are literally 'price fixing,' but *they are not per se in violation of the Sherman Act.*" *Id.* at 9 (emphasis added). The Court added that "[j]oint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." *Id.* at 23.

Here, as in *Broadcast Music*, the joint venture itself was indisputably not a "naked [restraint] of trade with no purpose except stifling of competition" but was instead "one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Id.* at 20. And here, as in *Broadcast Music*, the setting of prices for the joint venture's products was "a necessary consequence of the integration necessary to achieve these efficiencies." *Id.* at 21; *see* XI Herbert Hovenkamp, *Antitrust Law* ¶ 1908e, at 237 (2d ed. 2005) (where a joint venture makes one or more products, "[o]nce [those products] are manufactured[,] they are jointly owned, and cannot be sold without an agreement between the owners as to the price that will be charged for them"). Under *Broadcast Music*, therefore, any agreement by Shell and Texaco about the pricing of their joint ventures' products cannot, as a matter of law, be per se illegal.[11]

Two decisions by the Courts of Appeals further demonstrate the correct application of *Broadcast Music* in the current context. In *Augusta News*, the plaintiff brought an action under Section 1 of the Sherman Act against a joint venture formed by wholesale newspaper and magazine distributors to service the regional needs of large chain retailers. The plaintiff argued that the joint venture's practice of paying up-front fees to chain retailers on a per-store basis constituted a form of price fixing and was therefore per se illegal. 269 F.3d at 47.

The First Circuit squarely rejected this contention. The

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[11] *Broadcast Music* further demonstrates that the Ninth Circuit's reliance on this Court's decision in *Citizen Publ'g* was misplaced. To the extent that *Citizen Publ'g* might be read for the proposition that pricing or other horizontal restraints that are related to the products of an otherwise legitimate joint venture are per se illegal, the opinion is inconsistent with *Broadcast Music* and other subsequent decisions by this Court that have repudiated the initial suspicion of joint ventures that reached its apex with this Court's 1972 decision in *United States* v. *Topco Associates*, 405 U.S. 596 (1972), three years after *Citizen Publ'g* was decided. *See Augusta News*, 269 F.3d at 48 (noting that, notwithstanding *Topco*, "it is [now] commonly understood that per se condemnation is limited to 'naked' market division agreements, that is, to those that are not part of a larger pro-competitive joint venture"); *Rothery Storage*, 792 F.2d at 224-29 (noting that *Topco*'s per se condemnation of all horizontal restraints, even if they are ancillary to a partnership or joint venture, had been overruled by this Court's decisions in *Broadcast Music*, *National Collegiate Athletic Assn.* and *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985)).

court acknowledged that the joint venture consisted of "local distributors who were at least potential rivals," and that by combining to seek regional customers the local distributors "might be viewed as acting through [the joint venture] to 'agree' on up-front payments to the buyers." *Id.* at 48. Nonetheless, the court held that this could not be deemed conduct that was per se illegal because "it is a standard form of joint venture for local firms to combine to provide offerings . . . that none could as easily provide by itself, *and a joint venture often entails setting a single price for the joint offering*." *Id.* (emphasis added). A joint venture's price setting could be found unlawful in some circumstances, the court concluded, but only under the rule of reason standard, which the plaintiff in *Augusta News* (like plaintiffs here) did not even attempt to satisfy. *Id.*

The Eleventh Circuit reached the same conclusion in *National Bancard Corp.* v. *Visa U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986). There, the plaintiff alleged that Visa (essentially a joint venture comprised of member banks) had violated Section 1 of the Sherman Act "by fixing certain bank credit card interchange rates." *Id.* at 593. The plaintiff argued that, because the member banks "individually can and should negotiate the interchange fee," Visa's setting of the fee "amounts to horizontal price fixing and is per se violative of Section 1 of the Sherman Act." *Id.* at 596. Relying on this Court's decision in *Broadcast Music*, the Eleventh Circuit held that the interchange fee could not be declared per se illegal but instead had to be analyzed under the rule of reason. 779 F.2d at 601-02. The court concluded that Visa's setting of the fee "must be weighed under the rule of reason" because "the restraint is 'a necessary consequence of the integration necessary to achieve [the] efficiencies'" created by the joint enterprise. *Id.* at 602 (quoting *Broadcast Music*, 441 U.S. at 21).

Although the Ninth Circuit made passing references to *Broadcast Music* and acknowledged that "joint ventures may price their products," Pet. App. 27a, the court attempted to avoid the clear import of *Broadcast Music* by focusing on the fact that, in the Ninth Circuit's words, "the defendants here did not simply consolidate the pricing decisions within the joint ventures – they *unified* the pricing of the two brands from the time the alliance was formed by designating one individual in each joint venture to set a single price for both brands." Pet. App. 23a (emphasis in original); *see also* Pet. App. 28a ("The question is whether two former (and potentially future) competitors may create a joint venture in which they unify the pricing, and thereby *fix* the prices, of two of their distinct product brands.") (emphasis in original).

But it is wholly irrelevant to the Section 1 analysis that Shell and Texaco allegedly agreed that Equilon would set the same, rather than different, wholesale prices for the joint ventures' two brands of gasoline in the same trade area. Indeed, the Ninth Circuit's reliance on the setting of the same price for the two brands demonstrates a fundamental misunderstanding of antitrust law. This Court's precedents make plain that the actual levels of prices – whether they are high or low, reasonable or unreasonable, the same or different – are irrelevant to the legality of an agreement concerning them. *See Catalano*, 446 U.S. at 647 ("It is no excuse that the prices fixed are themselves reasonable."); *Trenton Potteries Co.*, 273 U.S. at 397-98 (reasonableness of price set by agreement is irrelevant).[12]

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[12] Thus, for example, and contrary to the analysis by the Ninth Circuit below, the Court in *Broadcast Music* did *not* engage in any inquiry concerning the necessity for the specific prices the association there set for its blanket licenses. The Ninth Circuit's scrutiny of the *specific prices* Equilon set for its products, as a basis for determining whether the *per se* rule applied, is also at odds with cases from other Courts of Appeals. The First Circuit in *Augusta News* and the Eleventh Circuit in *National Bancard* analyzed only whether jointly establishing some price (whatever that price might be) could be condemned as per se illegal. Neither suggested that

It would be just as anti-competitive (and therefore just as much per se illegal price-fixing) for two competitors to agree that one will charge $2.00 for its product while the other charges $1.00 as for them to agree both to charge $1.50 (or any other price). Indeed, it would be equally anti-competitive and illegal for them to agree to formulas that each would use to calculate their prices. Thus, if it were per se illegal for joint venture partners to agree to charge the *same* price for two joint venture products, it would equally be per se illegal for them to agree to charge two *different* prices for those products or even to agree to the formulas that would be used to calculate the prices of each. Notwithstanding the Ninth Circuit's hollow assurance, it would no longer be true under that court's holding that "joint ventures may price their products." *See* Pet. App. 27a.

C. The Ninth Circuit Misapplied The Ancillary Restraints Doctrine To This Case.

As demonstrated above, the decision to unify the pricing of Equilon's products did not reduce competition and therefore did not constitute "price fixing" as this Court has defined that term for purposes of Section 1 of the Sherman Act. Assuming otherwise, however, the Ninth Circuit held that "the issue . . . is whether the price fixing is 'naked' (in which case the restraint is [per se] illegal) or 'ancillary' (in which case it is not)." Pet. App. 16a. Under the ancillary restraints doctrine, "some agreements which restrain competition may be valid if they are 'subordinate and collateral to another legitimate transaction and necessary to make that transaction effective.'" *Los Angeles Mem'l Coliseum Comm'n* v. *NFL*, 726 F.2d 1381, 1395 (9th Cir. 1984) (quoting Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775, 797-98 (1965)), *cert.*

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the specific level of those prices would be relevant to the Section 1 analysis.

denied, 469 U.S. 990 (1994).[13] Thus, according to the Ninth Circuit, "we must . . . decide whether the defendants' conduct . . . is reasonably necessary to further the legitimate aims of the joint venture." Pet. App. 21a; *see also* Pet. App. 22a ("whether the *per se* rule applies to a legitimate joint venture's allegedly anticompetitive conduct depends first and foremost on a determination of whether the specific restraint is sufficiently important to attaining the lawful objectives of the joint venture that the anti-competitive effects should be disregarded.") Purporting to apply this standard, the Ninth Circuit held that Shell and Texaco had not demonstrated the pricing decision was "ancillary" rather than "naked" and that the decision might therefore be per se illegal. Pet. App. 28a.

The Ninth Circuit's application of the ancillary restraints doctrine to this case was without foundation in law or common sense. Courts have regularly applied the ancillary restraints doctrine to agreements respecting the conduct of joint venture participants *outside* the scope of the joint venture, but not to restraints on a joint venture's *own* conduct concerning its *own* products.

The alleged agreement here between the owners of a concededly efficiency-enhancing joint venture to unify the pricing of the separately-branded products made and sold by the joint venture was not collateral to the joint venture, but integral to it. In that circumstance, the ancillary restraints doctrine does not even come into play, because the fundamental Section 1 principles explained above compel the threshold conclusion that, if Section 1 applies at all, the agreement is not per se illegal. Even if it were proper to apply the ancillary restraints doctrine here, however, that doctrine would likewise compel the conclusion that the per se

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[13] *See also Rothery Storage*, 792 F.2d at 224 ("The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose.").

rule is inapplicable.

In *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U. S. 211 (1899), then Judge (later Chief Justice) Taft introduced the ancillary restraints doctrine into antitrust law. As examples of these types of "ancillary" or "subordinate and collateral" restraints, Judge Taft identified the following:

> [A]greements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time to [sic] service.

Id. at 281. Each of these types of restraint involves a restriction on competition *outside* the four corners of any collaborative business. That is, each involves competition that, but for the restraint in question, would have continued to exist notwithstanding the formation of the collaborative venture or other contract between the parties – not an aspect of the operation of a collaborative business itself.

The same is true of the joint venture restraints that this Court addressed in *National Collegiate Athletic Assn.*, 468 U.S. 85 (1984). There, the Court invalidated a National Collegiate Athletic Association rule that limited the number of football games each school could televise and essentially fixed the price the networks paid to televise each game. *Id.* at 105-07, 113, 120. Neither the formation nor operation of the NCAA itself involved or required any such restraint; to the contrary, the television rules were adopted decades after the

NCAA was formed and began operations. *Id.* at 88-94. Thus, those rules restricted competition among the joint venture partners that could exist (and had existed) notwithstanding the existence of the joint venture itself. The Court did not expressly apply the "ancillary restraints" doctrine in *National Collegiate Athletic Assn.*, but its analysis closely tracked that doctrine. While recognizing that "[h]orizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal per se' approach," the Court held that the television rules were not subject to per se invalidation, because they were related (although not necessary) to the operation of a legitimate collaborative venture. *Id.* at 100-01 (noting that the case involved "an industry in which horizontal restraints on competition are essential if the product is to be available at all."). The Court nonetheless invalidated them under the rule of reason because they reduced competition that would otherwise have persisted among NCAA member schools, even after the venture was formed, and the NCAA had not proven that the rules were reasonably necessary to achieve any of the pro-competitive benefits of the venture. *Id.* at 101.

Lower federal courts have, since *Addyston Pipe*, applied the ancillary restraints doctrine to evaluate the legality of agreements among joint venture partners to restrict competition among them that would otherwise have continued to exist notwithstanding the formation of the joint venture itself. The courts in these cases applied the rule of reason to restraints that were arguably related to the operation of the joint venture, even if the restraints would have been subject to per se condemnation outside the joint venture context. For example, members of a credit card joint venture have been allowed to attempt to demonstrate the reasonable necessity, under the ancillary restraints doctrine, of an agreement not to issue competing credit cards. *See United States* v. *Visa U.S.A., Inc.*, 344 F.3d 229, 243 (2d Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004). Joint venturers in the construction and operation of a building to house adjoining retail stores have been allowed to defend, under the ancillary restraints doctrine, an agreement not to sell competing goods within the building. *See Polk Bros.*, 776 F.2d 185.[14] Members of a joint venture among moving companies have been allowed to show the reasonable necessity of a prohibition on the use of the joint venture's equipment to provide competing services. *Rothery Storage*, 792 F.2d 210.[15] And, a prohibition on member banks issuing rival

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[14] *Polk Bros.* involved a horizontal restraint on competition that would have been deemed illegal per se outside the context of a legitimate joint venture, since it involved two competitors agreeing not to compete with one another in the sale of specified products from their adjoining stores. *Id.* at 187. The Seventh Circuit rejected the district court's condemnation of this restraint as illegal per se because the restraint was ancillary to a bona fide joint venture between the two companies. The court stated: "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." *Id.* at 188-89. The restraint at issue in *Polk Bros.* was part of a legitimate joint endeavor – namely, the construction of adjoining stores offering complementary lines of products for the home – and the restraint promoted the success of the venture because without it the two companies would not have entered into the venture in the first place, given the legitimate "free riding" concerns that existed there. *Id.* at 190. The court therefore applied the rule of reason. *Id.*

[15] In *Rothery Storage*, the court confronted a rule imposed by Atlas (a network of independent moving companies that the court likened to a "complex partnership") which prohibited Atlas affiliates from handling interstate carriage for their own accounts as well as for Atlas. *Id.* at 212-13. The court acknowledged that Atlas's policy "may be characterized as a boycott, or a concerted refusal to deal," since it "involves an agreement not to deal with those who do not comply with Atlas' policy." *Id.* at 215. But the court held that this restraint on competition could not be deemed illegal per se because it was ancillary to an efficiency-enhancing joint enterprise, "in the

credit cards had to be tested under the rule of reason, not the per se rule.[16] *See Worthen Bank & Trust Co.* v. *National BankAmericard Inc.*, 485 F.2d 119 (8th Cir. 1973). In each instance, the challenged agreement restricted competition that could and would otherwise have continued to exist notwithstanding the formation and operation of the joint venture itself.[17]

The ancillary restraints doctrine has no application where, as here, the challenged restraint is an integral part of the operation of the joint venture itself and does not in any way

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sense that it serves to make the main transaction more effective in accomplishing its purpose." *Id.* at 224.

[16] In *Worthen*, the Eighth Circuit reversed the district court's holding that a BankAmericard bylaw prohibiting member banks from issuing rival MasterCharge cards could be declared *per se* illegal as a form of group boycott. The court held that, although group boycotts are "[a]mong those types of agreements which have been classified as per se violations," the challenged bylaw had to be "tested at trial under the 'rule of reason'" because it was a restraint ancillary to the joint venture's operation. 485 F.2d at 124, 125; *see also SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958, 964-65 (10th Cir. 1994) (upholding, under rule of reason, similar Visa bylaw prohibiting member banks from issuing Discover cards, and noting that this Court's cases have "clarif[ied] the inappropriateness of automatically invoking *per se* scrutiny of a joint venture's alleged antitrust violation").

[17] Under the ancillary restraints doctrine, lawyers dissolving their partnership have been required to prove the reasonable necessity of territorial restrictions on advertising by the former partners following dissolution. *See Blackburn* v. *Sweeney*, 53 F.3d 825 (7th Cir. 1995). And this Court has said that "[t]he classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market." *Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 729 n.3 (1988). In those situations, the challenged restraint would necessarily relate to competition beyond the confines of any collaborative business, because no such business would exist at the time that the restraint was effective.

restrict competition outside the joint venture.[18] In this circumstance, the only relevant antitrust question is whether the *formation* of the joint venture is lawful under Section 1 of the Sherman Act and Section 7 of the Clayton Act. If – as here – it is, decisions by the joint venture partners concerning the joint venture's own business cannot be per se illegal under Section 1, without regard to the ancillary restraints doctrine.

Moreover, even if substantive scrutiny were appropriate here under the ancillary restraints doctrine, any Shell and Texaco agreement about the pricing of Equilon's two brands of gasoline would unquestionably qualify as an ancillary restraint that must be evaluated under the rule of reason, not the per se rule. Just as setting a price for the blanket license in *Broadcast Music* was a "necessary consequence" of the joint venture there, 441 U.S. at 21, joint setting of prices for Equilon's products was a necessary consequence of the formation of the venture. *See National Bancard*, 779 F.2d at 602; *see, e.g.*, XIII Herbert Hovenkamp, *Antitrust Law* ¶ 2132c, at 179-80 (2d ed. 2005) ("[The] joint setting of a price may often be necessary in cases of joint ownership of the good or service being sold. When joint owners are also competitors, the result is literally 'price fixing,' but it is a form of price fixing that should, when bona fide, be examined under the rule of reason."). As such, it is beyond dispute that any pricing decisions at issue were at least "subordinate and collateral" to a legitimate joint venture and therefore subject, at most, to analysis under the rule of reason.

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[18] For that reason, the Court need not address the circumstances under which a joint venture restraint that is not integral to operation of the venture itself and restricts competition *outside* the venture may nevertheless be subject to the rule of reason, rather than the per se rule.

III. APPLICATION OF THE PER SE RULE HERE WOULD CHILL THE FORMATION OF EFFICIENT, PRO-COMPETITIVE JOINT VENTURES.

Joint ventures and other similar cooperative enterprises are an increasingly common form of business organization. Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 Wm. & Mary L. Rev. 871, 873 (1994) (noting that "the number of new strategic alliances in the United States has nearly doubled in each of the last ten years"). Joint ventures offer companies the ability to reap the efficiency-enhancing benefits of joint activity in circumstances where a complete merger of all of their operations is either undesirable or infeasible. *Antitrust Guidelines For Collaboration Among Competitors*, 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000) § 2.1 ("consumers may benefit from competitor collaborations in a variety of ways," including "allow[ing] [a joint venture's] participants to better use existing assets" – for instance, by facilitating "the attainment of scale or scope economies beyond the reach of any single participant"); XIII Herbert Hovenkamp, *Antitrust Law* ¶ 2104a, at 40 (2d ed. 2005) ("Joint ventures are presumably good things because they reduce firms' costs of enabling the firms to do things that they could not otherwise do *or to do them better*.") (emphasis added).

Application of the per se rule here would chill legitimate and beneficial economic activity by raising the specter of per se liability for efficiency-enhancing joint ventures that unite formerly competing products under common ownership and pricing control. Indeed, if so basic an activity as pricing products sold by a single, concededly legitimate, integrated joint venture were deemed not just subject to Section 1, but potentially per se illegal, it is hard to understand what actions by the joint venture could *not* be in question. This is a significant danger created by the Ninth Circuit's unprecedented extension of the per se rule. *See Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("false condemnations" under the antitrust laws "are especially costly, because they chill the very conduct the antitrust laws are designed to protect") (internal quotation marks omitted). Businesses cannot risk "the severe sting of antitrust liability" (Pet. App. 34a (Fernandez, J., dissenting)) posed by the treble damages and attorneys' fees available under Section 1 of the Sherman Act.

As this Court implicitly recognized in *Trinko,* this is properly the concern of the judiciary in the first instance. *Cf. Trinko*, 540 U.S. at 410-12. The Ninth Circuit disclaimed any concern or responsibility for the real-life effects of its ruling, asserting that "it does not matter whether the particular application of the *per se* rule appears inefficient or unfair," and that "if [this] individual application of the *per se* rule is economically inefficient, that concern must be addressed to Congress, not the judiciary."[19] Pet. App. 13a, 28a-29a. These comments reflect a fundamental misunderstanding of the derivation of the per se rule and of the federal courts' obligation to define the proper scope of that rule. The Sherman Act does not provide that any conduct is "per se" illegal. Rather, the Sherman Act provides that "every"

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[19] In so stating, the Court of Appeals ignored the fact that the agencies charged by Congress with enforcing these laws have in fact already concluded that application of the per se rule is inappropriate in these circumstances. In their recently promulgated *Antitrust Guidelines For Collaboration Among Competitors*, 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000), the Antitrust Division of the Department of Justice and the Federal Trade Commission stated: "If . . . participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, *even if it is of a type that might otherwise be considered per se illegal*." *Id.* at § 3.2.

contract, combination or conspiracy "in restraint of trade" is illegal. 15 U.S.C. § 1. This Court has repeatedly said, however, that only "unreasonable" restraints are illegal. *E.g.*, *State Oil Co.*, 522 U.S. at 10 ("Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' this Court has long recognized that Congress intended to outlaw only unreasonable restraints.") The per se rule is a *judicial creation* – a radically abbreviated means, to be used only in extraordinary situations, to determine that a particular restraint is "unreasonable." Federal courts have an obligation to ensure that the rule is not applied in a manner that is either unfair or inefficient. *See generally*, *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 459-60 (1986). This Court should reverse the judgment of the Ninth Circuit, which is based on an application of the per se rule that is not only unfair and inefficient but also contrary to sound antitrust policy and prior decisions of this Court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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