No. 17-1113

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

RAFAEL DE LA CRUS, LEOVEGILDO VILCHEZ GUERRA, LIBER VILCHEZ GUERRA, ESLIPER HUAMAN, AND RODOLFO LLACUA, on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

WESTERN RANGE ASSOCIATION, MOUNTAIN PLAINS AGRICULTURAL SERVICE, MARTIN AUZA SHEEP CORPORATION, NOTTINGHAM LAND AND LIVESTOCK, LLLP, TWO BAR SHEEP CORPORATIONS, LLC, CUNNINGHAM SHEEP COMPANY, AND DENNIS RICHINS, DBA DENNIS RICHINS LIVESTOCK

Defendants-Appellees.

Plaintiffs-Appellants' Petition for Panel Rehearing and *En Banc* Review

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Brief of Amicus Curiae Open Markets Institute in Support of Plaintiffs-Appellants' Petition for Panel Rehearing and *En Banc* Review

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Open Markets Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

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

SUMMARY OF ARGUMENT

The Sherman Act protects sellers of goods and services (including workers, who sell labor) from powerful purchasers. Under well-established precedent, collusion among horizontal rivals, whether sellers or buyers, is illegal, regardless of the vehicle through which the collusion is implemented. Accordingly, the Supreme Court has outlawed employers' efforts to suppress wages through concerted action. By ignoring decades of Supreme Court precedent, this Court's decision undercuts the Sherman Act's protection of workers and other sellers and

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

threatens to legalize employer cartels—indeed all cartels—conducted through a joint venture.

The Plaintiffs-Appellants, who are shepherds from Peru and came to the United States on temporary agricultural visas, perform essential work for the multimillion-dollar American sheep ranching industry. They allege that they are the victims of an employer cartel orchestrated by sheep ranchers and their associations (the Defendants-Appellees). Using the Western Range Association and Mountain Plains Agricultural Services, sheep ranchers in several Western states collusively suppressed wage offers made to the Plaintiffs-Appellants. The Defendants-Appellees, through this cartelistic conduct, robbed the shepherds of an opportunity to earn competitive wages for their demanding and skilled work.

The protection of sellers, including workers, has been a consistent purpose of the Sherman Act. Workers and other sellers have a right to participate in markets free of trade restraints. *Radovich v. National Football League*, 352 U.S. 445, 453-54 (1957); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007); *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019). In accordance with Supreme Court precedent, this Court has stated that "[m]onopsonistic practices by buyers are included within the practices prohibited by the Sherman Act." *Campfield v. State Farm Mutual Automobile Insurance Co.*, 532 F.3d 1111, 1118 (10th Cir. 2008).

The prohibition on horizontal collusion has been a defining feature of Sherman Act jurisprudence. It dates to the Sherman Act's early years. *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 341-42 (1897). Price fixing, market allocation, and similar limits on horizontal competition between independent firms are per se illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); *United States v. Sealy, Inc.*, 388 U.S. 350, 357-58 (1967); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam). Importantly, function trumps form: collusion done through a corporation or other special association composed of competitors is still illegal. *American Needle, Inc. v. National Football League*, 560 U.S. 183, 191 (2010).

Under the Sherman Act, workers and other sellers are entitled to participate in a market free from collusive practices by buyers of their goods and services. Under the Sherman Act, "a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers." *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.). This protection against collusion is essential for all workers, including low-wage workers, seeking fair wages. *See Law v. NCAA*, 134 F.3d 1010, 1022 (10th Cir. 1998) ("[A buyer-side] cartel ultimately robs the suppliers of the normal fruits of their enterprises.").

In affirming the district court's ruling in favor of the defendants, this Court opened the door to legalizing employer cartels—and potentially all cartels—that are implemented through a joint venture. In defiance of the Supreme Court directive that "the machinery employed by a combination for price-fixing is immaterial," *Socony*, 310 U.S. at 223, this Court elevated form over function and ignored the ongoing agreement to delegate wage-setting authority to the ranchers' associations. The Court's decision gives competing employers and all rival firms a playbook for evading the Sherman Act's ban on collusion among competitors.

ARGUMENT

I. The Sherman Act Prohibits Employer and Other Buyer-Side Cartels

The Sherman Act protects workers and other sellers of goods and services from buyers' restraints of trade.[2] Price-fixing and other collusion among rivals is a restraint of trade under the Sherman Act and illegal irrespective of how it is implemented. Given the Sherman Act's protection of sellers, the courts have applied this rule against horizontal collusion to buyers, such as employers, and given workers and other sellers the right to participate in fair, competitive markets.

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[2] The protection of sellers from trusts and monopolies was an important theme in the congressional debates leading up to the passage of the Sherman Act. Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 Antitrust L.J. 707, 714 (2007). For example, Senator Sherman condemned the trusts for their power over both buyers and sellers and stated "[t]hey regulate prices at their will, depress the price of what they buy and increase the price of what they sell." 21 Cong. Rec. 2461 (1890).

A. The Sherman Act Protects Workers and Other Sellers from Restraints of Trade

Since the early years of the Sherman Act, the Supreme Court has held that the law protects sellers from restraints of trade. In *Swift & Co. v. United States*, 196 U.S. 372 (1905), the Supreme Court affirmed a district court decision and injunction against stockyard owners that had collusively suppressed the price of cattle paid to ranchers. The Court in a subsequent buyer-side price-fixing case affirmed that the Sherman Act protects purchasers and sellers, among others. *See Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers."). It stated, "The Act is comprehensive in its terms and coverage, protecting *all who are made victims* of the forbidden practices by whomever they may be perpetrated." *Id.* (emphasis added).

The protection of sellers has been a consistent purpose of the Sherman Act. For instance, the Supreme Court held that a football player-coach who alleged a group boycott of his services had the right to take his claim to trial. *Radovich v. National Football League*, 352 U.S. 445, 453-54 (1957). More recently, the Court in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* treated buyer-side power as symmetric with seller-side power. *See* 549 U.S. 312, 320 (2007) ("Monopsony power is market power on the buy side of the market. As such, a

monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a 'buyer's monopoly.'" (citation omitted)).

In a decision from earlier this year, the Supreme Court held that a monopolistic intermediary inflicts *distinct* injuries on purchasers and sellers. It held that both classes have the right to recover antitrust damages from the monopolist. *See Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019) ("[S]ome downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a 'common fund[.]') (citation omitted).

This Court, in accordance with Supreme Court precedent, has held the Sherman Act protects workers and other sellers. It has stated that "[m]onopsonistic practices by buyers are included within the practices prohibited by the Sherman Act." *Campfield v. State Farm Mutual Automobile Insurance Co.*, 532 F.3d 1111, 1118 (10th Cir. 2008). This protection is not conditioned on consumer injury: buyer-side anticompetitive conduct injuring sellers is actionable even in the absence of harm to consumers. *Telecor Communications, Inc. v. Southwestern Bell Telephone Co.*, 305 F.3d 1124, 1133-34 (10th Cir. 2002); *Law v. NCAA*, 134 F.3d 1010, 1022 (10th Cir. 1998).

B. Collusion by Employers and Other Purchasers Is Illegal

Given the Sherman Act's protection of sellers, the Supreme Court and this Court have prohibited collusive conduct among employers and other buyers of goods and services. Importantly, this ban applies regardless of the form through which the collusive conduct is implemented. Whether done through a special association or other means, collusion among employers and other buyers is illegal under the Sherman Act.

The prohibition on horizontal collusion has been a defining feature of Sherman Act jurisprudence. It dates to the Sherman Act's early years. *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 341-42 (1897). Price fixing, market allocation, and similar limits on horizontal competition between independent firms are per se illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); *United States v. Sealy, Inc.*, 388 U.S. 350, 357-58 (1967). This prohibition has been consistently affirmed over the history of the Sherman Act. *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam).

Collusion done through a corporation or other special association of competitors is still illegal. This elevation of function over form is a longstanding rule. In 2010, the Supreme Court wrote, "[W]e have repeatedly found instances in which members of a legally single entity violated § 1 [of the Sherman Act] when the entity was controlled by a group of competitors and served, in essence as a

vehicle for ongoing concerted activity." *American Needle, Inc. v. National Football League*, 560 U.S. 183, 191 (2010). Regardless of form, what triggers suspicion under the Sherman Act is "depriv[ing] the market place of independent centers of decisionmaking." *Id.* at 190. The Court has admonished attempts to launder collusion among competitors through special forms or labels. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609 (1972). *See also Timken*, 341 U.S. at 598 ("Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled.").

Under the Sherman Act, workers and other sellers are entitled to participate in a market free from collusive practices by buyers of their goods and services, including employers. Under the Sherman Act, "a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers." *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.). The Supreme Court has condemned employer associations that served as vehicles for collusion against workers. *Anderson v. Shipowners' Association of Pacific Coast*, 272 U.S. 359, 362, 365 (1926). This Court has also held that collusion among otherwise competing employers in an association is illegal. *Law*, 134 F.3d at 1020, 1024. This protection

against collusion is essential for all workers, including low-wage workers, seeking fair wages. *See id.* at 1022 ("[A buyer-side] cartel ultimately robs the suppliers of the normal fruits of their enterprises."); Suresh Naidu, Eric A. Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536, 597-98 (2018) (summarizing allegations of employer collusion against high-tech professionals, nurses, and fast food workers).

II. The Panel's Decision Legalizes Employer Cartels—and Cartels in General—Through Joint Ventures

In affirming the district court's ruling in favor of the defendants, this Court defied precedent and legalized employer cartels—and possibly all cartels—that are done through a competitor association or other joint venture. In defiance of the Supreme Court directive that "the machinery employed by a combination for price-fixing is immaterial," *Socony*, 310 U.S. at 223, the Court elevated form over function and ignored the ongoing agreement to delegate wage-setting authority to the ranchers' associations. The Court's decision grants competing employers and other rival firms a playbook for evading the Sherman Act's ban on competitor collusion. All they need to do is form a competitor association and set wages or other terms by hiring as a group.[3]

[3] The Court also adopted an erroneous rule that only *enforceable* collusion implemented through an association is illegal. This standard is plainly contrary to Sherman Act precedent. Price-fixing arrangements are illegal even in the absence

The Plaintiffs-Appellants' complaint attacks the delegation of wage-setting authority to entities "controlled by a group of competitors and served, in essence as a vehicle for ongoing concerted activity." *American Needle*, 560 U.S. at 191. Critically, the complaint does not challenge the associations themselves as walking conspiracies, as this Court suggested. Instead, it challenges *specific* conduct on behalf of otherwise competing ranch-employers—the joint setting of all initial wage offers to Plaintiffs-Appellants. The Supreme Court has struck down *particular* restraints adopted by associations of competitors, while recognizing that the associations *in general* are not violations of the Sherman Act. *Associated Press v. United States*, 326 U.S. 1, 18-19 (1945); *Sealy*, 388 U.S. at 356-58; *Topco*, 405 U.S. at 611-12.

This Court flouted Supreme Court precedent on the Sherman Act and elevated "formalistic distinctions" over "functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *American*

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of an enforcement mechanism and even if parties fail to honor the terms of their collusive scheme. *Socony*, 310 U.S. at 224 n.59; *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969). *See also Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980) ("[W]hen a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful per se."); *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 656 (7th Cir. 2002) (Posner, J.) ("An agreement to fix list prices is . . . a per se violation of the Sherman Act even if most or for that matter all transactions occur at lower prices.").

Needle, 560 U.S. at 191. This Court held that Plaintiffs-Appellants must, at the pleading stage, allege facts indicating an agreement among competitors, *beyond* the existence of a "vehicle for ongoing concerted activity." *Id.* This is incorrect. The Supreme Court has held that "an instrumentality" of competitors is an agreement under the Sherman Act. *Sealy*, 388 U.S. at 354, 356-58. *See also Topco*, 405 U.S. at 609 (similar fact pattern).

The Court's decision gives employers and all competitors a playbook for colluding against workers and other market participants. For example, employers can establish an association for engaging in coordinated activity and delegate joint wage setting power to it. Under this Court's holding, this collusive conduct is legal so long as the association does not have an enforcement mechanism against defecting members. By qualifying the prohibition on horizontal collusion in this fashion, this Court threatens to deprive workers, suppliers, and consumers of a fair marketplace free of collusive practices.

CONCLUSION

This Court's decision subverts the Sherman Act's protection of workers against employer collusion, as well as its protection of consumers and businesses against collusion in all markets. Accordingly, this Court should grant the Plaintiffs-Appellants petition and order either panel rehearing or *en banc* review.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Circuit Rule 29(b) because the brief contains 2,577 words, excluding the parts of the brief exempted by Fed. R. App. 32(f).

2. This brief complies with the typeface and type style requirements of Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word, in 14 point Times New Roman font.

/s/ Brian Gonzales
Brian Gonzales

Counsel for Open Markets Institute

Dated: September 13, 2019

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing document:

a) all required privacy redactions have been made per 10th Cir. R. 25.5;

b) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

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/s/ Brian Gonzales
Brian Gonzales

Counsel for Open Markets Institute

Dated: September 13, 2019

CERTIFICATE OF SERVICE

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

/s/ Brian Gonzales
Brian Gonzales

Counsel for Open Markets Institute

Dated: September 13, 2019