Nos. 04-805 and 04-814

In the Supreme Court of the United States

TEXACO, INC., PETITIONER
v.
FOUAD N. DAGHER, ET AL.

SHELL OIL COMPANY, PETITIONER
v.
FOUAD N. DAGHER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether an agreement between the owners of a lawful joint venture with respect to the pricing of the joint venture's products may be treated as a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, when the joint venture's owners do not compete in the market for those products.

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INTEREST OF THE UNITED STATES

The Department of Justice and the Federal Trade Commission (FTC) have primary responsibility for enforcing the federal antitrust laws. The FTC reviewed the transaction that created the joint ventures at issue in this case. See *In re Shell Oil Co.*, 125 F.T.C. 769 (1998); FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868 (1997). More generally, the agencies share a strong interest in the proper application of the per se rule in civil and, in the case of the Department of Justice, criminal enforcement proceedings.

domestic downstream assets to those joint ventures and ceased competing in the downstream U.S. markets. *Id.* at 5a, 37a.

Petitioners continued to compete with each other in their domestic "upstream" operations (*e.g.*, those operations involving the exploration and production of crude oil), in their foreign operations, and in operations unrelated to refining and marketing gasoline (*e.g.*, their chemical, aviation fuels, and marine fuels businesses). See Pet. App. 5a, 56a. In addition, each company "re-
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brief primarily addresses Equilon, although the same analysis would apply equally to its sister venture, Motiva.

[3] Shell has since bought out Texaco's interest in Equilon and Motiva, in accordance with the conditions that the FTC imposed on the 2002 combination of Texaco and Chevron. See *In re Chevron Corp.*, No. C-4023 (FTC Jan. 2, 2002) <http://www.ftc.gov/os/2002/01/chevron order.pdf>. The FTC pointed out at that time that "[a]ll assets in each portion of the Alliance already are under common ownership and control, and divestiture of these interests to Shell * * * would closely maintain the situation that currently exists." FTC, *Analysis to Aid Public Comment*, 66 Fed. Reg. 48,143 (2001).

some point, "a decision was made" that Equilon would sell Shell-branded and Texaco-branded gasoline at the "same price in the same market areas," leaving to Equilon the determination of that price. *Id.* at 6a.

Petitioners provided as part of their alliance that Equilon's profits (or losses), as well as Motiva's, would be divided between petitioners in a fixed ratio based on the assets each contributed to the ventures. Pet. App. 5a. Thus, each petitioner's returns were determined by the ventures' total profits and not by the relative sales of Shell-branded or Texaco-branded gasoline. Each joint venture was terminable by mutual consent at any time, or unilaterally after five years (subject to specified notice provisions). *Ibid.*

The FTC and four western state attorneys general investigated the transactions. Pet. App. 5a. The FTC issued a complaint alleging that the combinations, as originally proposed, would violate Section 7 of the Clayton Act, which prohibits mergers and acquisitions the effect of which "may be substantially to lessen competition." 15 U.S.C. 18. See *In re Shell Oil Co.*, 125 F.T.C. 769, 769-777 (1998). The FTC and petitioners entered into a consent agreement that mandated divestiture of certain assets and related relief to prevent undue concentration in certain downstream markets, but did not impose any restrictions on pricing decisions respecting the joint ventures' sale of Shell and Texaco products. See *id.* at 778-811.

2. The district court granted petitioners summary judgment, holding in relevant part that respondents had "failed to raise a triable issue of material fact" on whether petitioners have engaged in per se unlawful "price fixing." Pet. App. 68a. The court noted that respondents had "eschewed an exhaustive rule of reason

analysis" and instead asserted liability only "under the

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[4] The court assumed that petitioners reached an agreement to unify prices at the formation of their alliance. See Pet. App. 13a ("the

companies fixed the prices * * * by agreeing *ex ante* to charge the exact same price for each"); *id.* at 19a (noting evidence "that the decision to unify the pricing of the Texaco and Shell brands was made contemporaneously with the formatio

furthering the legitimate aims of the joint venture—a relationship that justifies the otherwise prohibited price restraints." *Id.* at 27a. "Thus far," the court concluded, petitioners had failed to produce evidence "demonstrating that their price fixing scheme was ancillary rather than naked." *Ibid.* Second, the court rejected respondents' claim that the challenged agreement was intended to avoid potential suits for price discrimination under the Robinson-Patman Act, 15 U.S.C. 13, on the ground that the Robinson-Patman proscriptions were "unquestionably * * * inapplicable." *Id.* at 25a.

Judge Fernandez dissented in relevant part. Pet. App. 28a-33a. He observed that Equilon, rather than petitioners, competed in the business of refining, transporting, and marketing gasoline in the western United States. Equilon "ran the refinery; it had the research facilities; it transported products; and it dealt with the station operators and other buyers. It also priced the products, and set the same price for *its* Shell and Texaco brands." *Id.* at 29a. In his view, "nothing more radical is afoot than the fact that an entity * * * prices its own products." *Id.* at 31a-32a.

SUMMARY OF ARGUMENT

A. The court of appeals fundamentally erred in holding that petitioners

such as agreements among competitors to fix prices, allocate markets, or limit output. The pricing agreement at issue here does not qualify because that agreement, as distinct from the decision to create the joint venture, did not eliminate any competition between petitioners in the sale of their respective brands.

Petitioners' formation of Equilon—a legitimate joint venture—effectively merged their downstream operations, giving that entity control over the sale of both Texaco-branded and Shell-branded gasoline and terminating petitioners' prior competition with respect to the refining and sale of gasoline in the western United States. Petitioners' challenged agreement, as co-owners of Equilon, that Equilon would set a unitary price for the distinct brands of gasoline did not alter the fact that petitioners were no longer competitors. Petitioners could have agreed to market a single brand of Equilon

efficiency-enhancing integration of economic activity to which it is reasonably related.

The ancillary restraints doctrine has been applied to restrictions on joint venture partners' conduct outside the venture, and to rules affecting venture membership, which may be viewed as concerted refusals to deal. But the doctrine does not apply to an agreement that does not itself eliminate any competition. In particular, it has no proper role when a challenged restraint affects only a legitimate joint venture's *own* conduct as a competitor in the market, especially when the joint venture partners do not separately participate in that market. Contrary to the court of appeals' premise, the owners of a legitimate joint venture are not required to assume the burden of demonstrating that each decision about the joint venture's conduct is reasonably necessary to achieve the venture's purposes, and their failure to do so does not convert each such decision into a restraint of trade subject to the per se rule.

C. Extending per se condemnation to agreements that do not "always or almost always tend to restrict competition and decrease output," *BMI* v. *CBS, Inc.*, 441 U.S. 1, 19-20 (1979), would deter lawful conduct and constrain efficiency-enhancing commercial undertakings. In this case, subjecting a legitimate joint venture to per se condemnation for setting a pricing policy for the venture's own products would needlessly interfere with the venture's pricing decisions and pointlessly impair efficient competition to the detriment of consumers. Moreover, the court of appeals' expansion of the per se rule potentially undercuts that rule's value in facilitating effective enforcement of the antitrust laws. The Department of Justice's criminal enforcement program depends on a sharp demarcation between conduct

evaluated under the rule of reason and conduct that is unlawful per se. Subjecting agreements among joint venture participants that likely are not anticompetitive to per se condemnation would blur that demarcation and undermine the rationale for the per se rule.

ARGUMENT

AN AGREEMENT BETWEEN THE OWNERS OF A LEGITIMATE JOINT VENTURE RESPECTING THE PRICING OF THE JOINT VENTURE'S PRODUCTS IS NOT SUBJECT TO PER SE CONDEMNATION

The court of appeals mistakenly condemned as per se invalid an agreement between owners of a lawful joint venture respecting the pricing of the joint venture's own products, ruling that the agreement is unlawful per se unless the owners can justify it as an ancillary restraint that reasonably furthers the legitimate aims of the venture. The court's decision reflects a fundamentally flawed understanding of the proper role of per se analysis and the ancillary restraints doctrine. That decision, which threatens to chill efficiency-enhancing ventures that promote vigorous competition and benefit consumers, should be reversed.

A. The Court Of Appeals Improperly Extended Per Se Analysis To An Agreement That Does Not Restrain Competition

1. This Court has properly construed the Sherman Act to confine the role of per se rules in identifying anticompetitive activity. The rule of reason is the "prevailing standard of analysis" under the Sherman Act, and any departure from that standard "must be based upon demonstrable economic effect rather than * * * upon formalistic line drawing." *Continental T.V., Inc.* v.

GTE Sylvania Inc., 433 U.S. 36, 49, 59 (1977). See Business Elecs. Corp.ndBun—8 Tc[ecs. Corp.

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[5] See also BMI v. CBS, Inc., 441 U.S. 1, 19-20 (1979) (per se treatment appropriate when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output").

[6] Texaco argues that Section 1 of the Sherman Act does not apply at all to the conduct alleged in this case because respondents in fact challenge the pricing decisions of the joint venture, not a pricing

agreement between petitioners. Texaco Pet. 10-13, 18-22; Texaco Supp.

"price-fixing." Pet. App. 16a. See *id.* at 26a-27a ("The question is whether two former * * * competitors may create a joint venture in which they unify the pricing, and thereby *fix* the prices, of two of their distinct product brands."). The court's characterization inaccurately portrays the substance of the agreement at issue by substituting an inapt label in place of an analysis of the agreement's significance and effect. See *BMI* v. *CBS, Inc.*, 441 U.S. 1, 8 (1979) ("easy labels do not always supply ready answers").[7]

Petitioners' agreement was not "price fixing" as that term is "generally used in the antitrust field," *BMI*, 441 U.S. at 9, because it did not eliminate any competition that would otherwise have existed between competitors. Equilon's *formation* eliminated all price and non-price competition between petitioners with respect to the refining and r6.4(9i-9.a)6.c5 TD[(g.4(d rsoli5.5(e a)-7(m)-10.3.9(m)-10.2(t12 Tw

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[7] In *BMI*, this Court rejected the argument that participants in a legitimate joint venture engage in price fixing subject to the per se rule when they set the price at which the venture sells its products to third parties. The Court noted that such a practice cannot be categorically described as "'plainly anticompetitive' and very likely without 'redeeming virtue.'" 441 U.S. at 9. As the Court observed, "[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." *Ibid.* See *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 356 (1982) (blanket license in *BMI* "was not a species of the price-fixing agreements categorically forbidden by the Sherman Act").

[8] Respondents observe that petitioners' alliance could be unwound at some point. See Br. in Opp. 10. But that observation does not alter

the analysis in this case. The district court recognized that, in light of petitioners' extensive financial commitments and operational integration, the mere existence of termination provisions in the Equilon and Motiva joint ventures did not call into question either venture's legality. Pet. App. 58a-60a. Moreover, the court of appeals did not suggest that the pricing policy for Equilon was likely to affect any activity after a hypothetical unwinding. As a general matter, all

[9] While it is conceivable that a pricing agreement among joint venture participants could affect competition outside the joint venture, neither the court of appeals nor respondents have identified any such anticompetitive activity in this case. For example, if a joint venture is a supplier of inputs to the venture participants, the venture can conceivably facilitate a cartel by artificially inflating the venture participants' input costs. But no one has suggested such a relationship between the joint venture and the venture participants here. And because the two joint venture participants did not have a vertical relationship in the domestic downstream markets—neither sold gasoline or pipeline services to the other—they were not postured to enter into a per se unlawful vertical price fixing agreement. Cf. *Dr. Miles Med. Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911). Petitioners did continue to compete outside their joint ventures' spheres. Pet. App. 56a; Shell Pet. 3. Respondents, however, have not argued that the agreement to unify Equilon's prices of Texaco-branded and Shell-branded gasoline affected competition in those other markets. For example, there is no indication that petitioners used the pricing agreement to manipulate the value of the companies' trademarks or to facilitate price fixing in markets where the two companies continued to compete. See *BMI*

[10] See FTC, *Analysis to Aid Public Comment*, 62 Fed. Reg. 67,868

[11] Section 1.3 of the *Competitor Collaboration Guidelines*, note 8, *supra*, spells out the conditions under which a competitor collaboration "ordinarily" should be treated as a horizontal merger and analyzed under the agencies' *Horizontal Merger Guidelines*:

> (a) the participants are competitors in that relevant market; (b) the formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market; (c) the integration eliminates all competition among the participants in the relevant market; and (d) the collaboration does not terminate within a sufficiently limited period [ordinarily, ten years] by its own specific and express terms.

Competitor Collaboration Guidelines § 1.3 (footnotes omitted). (The

In re Shell Oil Co., 125 F.T.C. 769, 769-777 (1998). The FTC and petitioners consequently entered into a consent agreement that mandated divestiture of certain assets and related relief to prevent such harm, but did not impose any restrictions on pricing decisions respecting the joint ventures' sale of Shell and Texaco products. See *id.* at 778-811.

The court of appeals in this case did not question the

place participant. See *Maricopa County Med. Soc'y*, 457 U.S. at 356 ("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" are "regarded as a single firm competing with other sellers in the market"). The decision at that point should be no more subject to per se condemnation than the decision to market a single brand of Equilon gasoline at a certain price. This Court's decision in *Copperweld*, which makes clear that the independent conduct of a unitary economic actor cannot give rise to Section 1 liability, would preclude any application of Section 1 in that context. See *Copperweld*, 467 U.S. at 771.

d. Because petitioners' lawful formation of the joint venture—and not their alleged pricing agreement—eliminated competition between petitioners, the court of appeals' and respondents' reliance on *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), is misplaced. See Pet. App. 17a-20a; Supp. Br. in Opp. 9 n.8. In *Citizen Publishing*, an Arizona city's only two daily newspapers formed a jointly owned entity to set prices collectively and pool profits, while each newspaper retained its separate corporate identity and continued to produce its own news and editorial content. 394 U.S. at 133-134. The United States challenged the newspapers' agreement, which was intended "to end any

[12] Furthermore, the decision in *Citizen Publishing* predates this Court's elaboration of the limits of the per se rule. See *NCAA*, 468 U.S. at 100-104; *BMI*

[13] The court of appeals noted that respondents also asserted a "quick look" theory, but it declined to reach that theory of liability. Pet. App. 7a, 13a n.7. Quick look analysis, however, is available only when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anti-competitive effect on customers and markets." *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). Respondents offer nothing beyond the formalistic "price fixing" label to explain why or how petitioners' agreement to unify Equilon's prices, independent of the joint venture agreement itself, could have an "anticompetitive effect on customers and markets." Their quick look theory, therefore, should be dismissed as well. See *Indiana Fed'n of Dentists*, 476 U.S. at 455, 460-461 (1986) (dentists formed "federation" for the "primary purpose" of suppressing competition on a particular service, and factfinder had found "proof of actual detrimental effects" from that practice); *NCAA*, 468 U.S. at 106-108 (the "anticompetitive consequenc-0.044 .3(f(n)8.8m2.9157 06(i)14.i3(c)-w).8(f)k3a3.8(f).i4"f(4 .3(f(l)9
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[14] "To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.), cert. denied, 479 U.S. 1033 (1987). "The classic 'ancillary' restraint is an agreement by the seller of a business not to compete within the market." *Business Elecs. Corp.*, 485 U.S. at 729 n.3.

[15] *See Rothery Storage & Van*, 792 F.2d at 227 (restraint was "reasonably necessary"); *Addyston Pipe*, 85 F. at 290-291 (must be

The purpose of the ancillary restraints doctrine is thus to determine whether an agreement that would otherwise be condemned as a per se invalid restraint of trade should instead be analyzed under the rule of reason as part of an efficiency-enhancing integration of economic activity.[16] The doctrine serves an important role in distinguishing legitimate cooperative activity from sham undertakings designed to disguise "an old-fashioned price fixing cartel." Pet. App. 50a. The federal enforcement agencies, for example, apply the per se rule to agreements "of a type that always or almost always tend to raise price or reduce output," and the Department of Justice may prosecute them criminally, but the agencies apply the rule of reason when "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." *Competitor Collaboration Guidelines* § 3.2. The court of appeals' hypothetical example of two soft drink companies entering into a joint research venture accompanied by an agreement to fix the price at which each sells its own unrelated products, Pet. App. 16a, illus-

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320 (2d ed. 2005) ("An ancillary restraint is one that is reasonably related to a joint venture or transaction that, at least upon initial examination, promises to increase output, reduce costs, improve product quality, or otherwise benefit consumers.").

[16] See *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 689 (1978) (the rule of reason "has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction"). See also *Addamax Corp.* v. *Open Software Found.*, 152 F.3d 48, 51-52 (1st Cir. 1998); *Rothery Storage & Van*, 792 F.2d at 224; *Polk Bros.* v. *Forest City Enters., Inc.*, 776 F.2d 185, 188-190 (7th Cir. 1985); 11 Hovenkamp, *supra*, ¶ 1908a at 251-252.

[17] See also SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 968 (10th

partnership must demonstrate the reasonable necessity of agreed-upon territorial restrictions on advertising by the former partners. See *Blackburn* v. *Sweeney*, 53 F.3d 825 (7th Cir. 1995). Truck leasing companies agreeing to provide service for each others' trucks must demonstrate the reasonable necessity of adopting territorial restrictions on leasing competition. See *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984).[18]

2. The court of appeals' invocation of the ancillary restraints doctrine is an aberrant departure from settled law. This case does not involve either of the classic examples of joint venture ancillary restraints—namely, agreements restraining joint venture membership or member conduct *outside* of the joint venture. Nor does it involve any other type of concerted activity that would normally be subject to analysis under the per se rule. Instead, the court below applied the ancillary restraints doctrine to an agreement relating solely to the joint venture's *own* conduct. The government is unaware of any other case in which the ancillary restraints doctrine has been so applied.

Respondents argue otherwise, but the cases that they cite do not support their position. See Supp. Br. in Opp. 6. Contrary to respondents' suggestion, the ancil-

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[18] See also *NFL* v. *North Am. Soccer League*, 459 U.S. 1074, 1077-1078 (1982) (Rehnquist, J., dissenting from denial of certiorari) (applying ancillary restraints doctrine to a sports league's restraint on members' ownership of other sports teams); *Polk Bros.*, 776 F.2d at 188-190 (applying ancillary restraints doctrine to limitation on which products joint venturers could sell in their adjacent retail stores); *Rothery Storage & Van*, 792 F.2d at 223-230 (applying ancillary restraints doctrine to prohibition against moving company's agents using joint venture property for non-venture business).

lary restraints doctrine played no role in this Court's decision in *BMI*. This Court held without regard to that doctrine that the rule of reason, rather than the per se rule, governed the blanket licensing agreements at issue in that case. See 441 U.S. at 18-24. In *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir.), cert. denied, 540 U.S. 940 (2003), the court emphasized that the joint venture partners whose agreement was condemned as unlawful per se remained competitors and that the challenged agreements restrained co c“p5(e)-6.mpeid con-

[19] In *National Bankcard*, the banks formed a joint venture credit card system but continued to compete against each other for the patronage of consumers and merchants. The challenged agreement, by setting a uniform rate for handling each others' credit card transactions, restrained the banks as competitors. The court of appeals determined that the challenged agreement was ancillary because it "represent[ed] one such rule establishing a 'necessary' term, without which the system would not function," 779 F.2d at 602, and therefore applied the rule of reason.

[22] The courts have ample authority to examine restraints relating to

festly anticompetitive," *GTE Sylvania*, 433 U.S. at 49-50, threatens to 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. The court of appeals' erroneous approach also could undercut the per se rule's value in facilitating effective enforcement of the antitrust laws. Per se rules establish bright-line tests that identify consistently pernicious conduct, thereby deterring unlawful behavior and providing clear guidance to businessmen and antitrust counselors. The court of appeals' decision both blurs the bright line and sweeps too broadly, thereby casting a shadow over decisions of numerous businesses and interfering with efficient antitrust enforcement.

Given the potentially serious consequences that attach to per se violations—including criminal and civil enforcement—private economic actors are entitled to know in advance what is per se unlawful and what is not. Production joint ventures, such as Equilon, are increasingly common and often have substantial procompetitive potential. See *Competitor Collaboration Guidelines* Preamble; *id.* § 2.1; 13 Hovenkamp, *supra*, ¶ 2121, at 125-127. The prospect of per se condemnation—and the accompanying risk of treble-damages liability—for conduct that may be integral to the operation of such a venture, such as pricing the products it sells, would no doubt chill procompetitive conduct.[23]

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[23] See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441 (1978) ("procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment").

The Department of Justice itself has a particularly strong governmental interest in maintaining a sharp demarcation between conduct subject to the per se rule and that subject to the rule of reason. Effective criminal prosecution of hardcore cartel conduct—such as horizontal price fixing, bid rigging, and market allocation—would be immensely more difficult if defendants were permitted to complicate jury trials with extended arguments about the reasonableness of such practices.

Courts, agencies, and the business community likewise need to have confidence that the per se rule is applied only to conduct that is always—or virtually always—anticompetitive. Otherwise, courts may b i bu [illegible]

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