UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

TARAH KYE BOROZNY, ANTHONY DeGENNARO, RYAN GLOGOWSKI, ELLEN McISAAC, SCOTT PRENTISS, ALEX SCALES, AUSTIN WAID-JONES, NICHOLAS WILSON, and STEVEN ZAPPULLA, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

RAYTHEON TECHNOLOGIES CORPORATION, PRATT & WHITNEY DIVISION; AGILIS ENGINEERING, INC.; BELCAN ENGINEERING GROUP, LLC; CYIENT, INC.; PARAMETRIC SOLUTIONS, INC.; and QUEST GLOBAL SERVICES-NA, INC.,

Defendants.

Case No. 3:21-cv-1657-SVN

STATEMENT OF INTEREST OF THE UNITED STATES

DOHA MEKKI
Principal Deputy Assistant Attorney General

MAGGIE GOODLANDER
Deputy Assistant Attorney General

DAVID B. LAWRENCE
Policy Director

DANIEL E. HAAR
STRATTON C. STRAND
JARED T. BOND
Attorneys

Counsel for the United States of America

INTEREST OF THE UNITED STATES

The United States submits this statement under 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice "to attend to the interests of the United States" in any suit pending in federal court.

The United States enforces the federal antitrust laws and has a strong interest in their correct application. This case addresses the antitrust laws' application to agreements among employers not to solicit or hire each other's employees. The United States brings enforcement proceedings against employers and individuals who enter into nonsolicitation or no-hire agreements, and it is currently prosecuting *United States v. Patel, et al.*, No. 3:21-cr-220 (VAB) (D. Conn.), which charges several individuals in connection with the conduct alleged in this action. *Id.*, ECF 20. The United States has submitted statements of interest or *amicus curiae* briefs in multiple matters addressing the antitrust laws' application to nonsolicitation or no-hire agreements. *See, e.g.*, *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, No. 20-55679, Doc. 14 (9th Cir. Nov. 19, 2020); *In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, No. 1:21-cv-00305, ECF 91 (N.D. Ill. Dec. 9, 2021). The United States submits this statement to respectfully urge the Court to reconsider its conclusion in its Ruling and Order on Defendants' Motion to Dismiss ("Slip Op.") that "Plaintiffs are required to plead a relevant market regardless of whether the complaint states a claim for a *per se* or rule of reason violation." Slip Op. at 22 n.6. The United States takes no position on the truth of Plaintiffs' allegations or any other issue in this case.

BACKGROUND

Plaintiff aerospace workers brought this putative class action alleging that Defendants violated Section 1 of the Sherman Act, 15 U.S.C. § 1, "by secretly agreeing to restrict their

competition in the recruitment and hiring of aerospace engineers and other skilled workers in the jet propulsion systems industry." Slip Op. at 1. This Court denied motions to dismiss, holding in relevant part that Plaintiffs plausibly alleged a naked, horizontal market allocation "in which Defendants supposedly divided the labor of Aerospace Workers amongst themselves," *id.* at 14, which "could constitute a *per se* violation of the Sherman Act," *id.* at 17, 20. Nevertheless, relying primarily on *Bogan v. Hodgkins*, 166 F.3d 509 (2d Cir. 1999), this Court concluded that "Plaintiffs are required to plead a relevant market regardless of whether the complaint states a claim for a *per se* or rule of reason violation." Slip Op. at 22 n.6. Plaintiffs moved for reconsideration, ECF 584, and that motion is pending.

ARGUMENT

Because this Court held that the complaint plausibly alleges a naked, horizontal market allocation subject to the *per se* rule, Slip Op. at 14, 17, 20, market definition is not required, and Second Circuit precedent does not dictate otherwise. Put simply, market definition is a tool to assess the potential for actual adverse effects on competition, whereas *per se* illegal conduct is categorically condemned without regard to competitive effects in a particular case.

I. MARKET DEFINITION IS NOT AN ELEMENT OF A *PER SE* VIOLATION OF SECTION 1

Section 1 of the Sherman Act prohibits agreements that unreasonably restrain trade. 15 U.S.C. § 1; *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018). Restraints of trade "can be unreasonable in one of two ways." *Am. Express*, 138 S. Ct. at 2283. Some restraints are unreasonable *per se* based on their inherently anticompetitive "nature and character." *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 64–65 (1911); *see, e.g.*, *NCAA v. Alston*, 141 S. Ct. 2141, 2156 (2021). Such *per se* unlawful restraints include agreements among competitors to fix prices or allocate markets. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886

(2007); *see, e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) ("[P]rice-fixing agreements are unlawful *per se* under the Sherman Act . . . ."); *United States v. Aiyer*, 33 F.4th 97, 115 (2d Cir. 2022) ("[B]id rigging—which is simply another form of horizontal price fixing—is a *per se* violation of the Sherman Act."). "Restraints that are not unreasonable *per se* are judged under the 'rule of reason,'" which generally requires "a fact-specific assessment of 'market power and market structure . . . to assess the [restraint]'s actual effect' on competition." *Am. Express*, 138 S. Ct. at 2284 (alterations and omission in original) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)).

Because "the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition," *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460 (1986), "courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market," *Am. Express*, 138 S. Ct. at 2285. But restraints subject to the *per se* rule are "unlawful on [their] face." *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 50 (1990) (per curiam); *see also Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 351 (1982) (holding *per se* unlawful agreements are subject to "facial invalidation"). As the Supreme Court has explained, "[w]hatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *Socony-Vacuum*, 310 U.S. at 224 n.59; *id.* at 221 (explaining that having "reasonableness" as "an issue in every price-fixing case" would be anathema to the Sherman Act); *see also, e.g.*, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998) (holding that the *per se* rule "do[es] not require proof that an agreement . . . is, in fact, anticompetitive in the particular circumstances"); *Copperweld*, 467 U.S. at 768 ("Certain

agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused.").

It follows that market definition—which aids in assessing whether a restraint has the potential for actual adverse effects on competition—is not required to prove the illegality of restraints the Supreme Court has held to "violate the [Sherman] Act without proof of unreasonableness." *United States v. Koppers Co.*, 652 F.2d 290, 293 (2d Cir. 1981). Indeed, the Supreme Court has explained specifically that the *per se* rule avoids "'an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable,'" including "the enormous complexities of *market definition*." *FTC v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411, 430 (1990) (emphasis added) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)). And it repeatedly has recognized that, under the *per se* rule, there is no "need to study the reasonableness of an individual restraint in light of the real market forces at work." *Leegin*, 551 U.S. at 886.

Consistent with these principles, the Second Circuit does not require market definition to condemn restraints as *per se* illegal. As the Second Circuit recently reiterated in a criminal case, under the *per se* rule, "the government 'need prove only that [the offense conduct] occurred in order to win [its] case, there being *no other elements to the offense* and no allowable defense.'" *Aiyer*, 33 F.4th at 115 (alterations in original) (emphasis added) (quoting *Koppers*, 652 F.2d at 294); *see id.* at 118 n.17 ("[I]n a *per se* case, resulting anticompetitive effects need not be proved."); *see also Concord Assocs., L.P. v. Ent. Props. Tr.*, 817 F.3d 46, 53 & n.5 (2d Cir. 2016) (analyzing market definition only after holding that the alleged restraint did not state "a *per se* violation of the Sherman Act," which would have "relieve[d] the plaintiffs from the

requirement of demonstrating a market-wide anticompetitive effect"); *United States v. Apple, Inc.*, 791 F.3d 290, 321 (2d Cir. 2015) (explaining that "case-by-case analysis [of competitive effects] is unnecessary" in *per se* cases); *cf. US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 55 (2d Cir. 2019) ("The first step of the *rule of reason analysis*, then, requires the identification of the 'consumers in the relevant market . . . .'" (emphasis added) (quoting *Am. Express*, 138 S. Ct. at 2284)).

Other circuits agree. "When a per se violation such as horizontal price fixing has occurred, there is no need to define a relevant market . . . ." *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 986 (9th Cir. 2000); *accord Liu v. Amerco*, 677 F.3d 489, 493 (1st Cir. 2012) ("But market size and definition would not matter . . . if [Defendant's] alleged proposal to fix prices had been accepted" because "price fixing is a per se offense."); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 316 (3d Cir. 2010) ("Under the per se standard, plaintiffs are relieved of the obligation to define a market and prove market power."); *Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008) ("The *per se* standard recognizes there are some methods of restraint that are so inherently and facially anti-competitive that an elaborate and burdensome inquiry into a demonstrable economic impact on competition in a relevant market is not required."); *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1119 (10th Cir. 2008) ("Horizontal price fixing and group boycott, however, are per se violations, so [Plaintiff's] failure to allege a relevant market is not fatal to these claims."); *All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc.*, 135 F.3d 740, 747 n.12 (11th Cir. 1998) (explaining that if the restraint "is deserving of per se treatment the case ends" and "plaintiffs-appellants must win," but that if "the rule of reason applies," the court must "defer to the determination of the jury—that plaintiffs-appellants failed to establish the relevant

market"); *TV Signal Co. of Aberdeen v. AT&T*, 617 F.2d 1302, 1309 n.8 (8th Cir. 1980) ("No proof of relevant market is required under section 1 where a per se violation is established."); *cf., e.g.*, ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases, Ch. 2C, Instructions 1–3 (2016) (*per se*-market-allocation instructions, which do not list market definition as an element).[1]

II. THE PRECEDENTS THIS COURT RELIED UPON DO NOT DICTATE OTHERWISE

In accepting Defendants' argument that "Plaintiffs are required to plead a relevant market regardless of whether the complaint states a claim for a *per se* or rule of reason violation," this Court relied (at 22 n.6) on the Second Circuit's decision in *Bogan* and three district-court cases. Those cases, however, do not dictate such a rule.

A. *Bogan* is Distinguishable and Limited to Group Boycotts

As this Court noted, *Bogan* stated that "'it is an element of a *per se* case to describe the relevant market.'" Slip Op. 22 n.6 (quoting *Bogan*, 166 F.3d at 515). But *Bogan* could not have meant that statement to have the breadth this Court ascribed to it—namely, as applying to all categories of conduct the Supreme Court has held to be condemned without a case-specific regard to "the real market forces at work." *Leegin*, 551 U.S. at 886. Instead, *Bogan* made that statement in analyzing a group-boycott claim, and the statement is best understood as applying specifically to that context.

Bogan considered whether an agreement among the general agents of the same insurance company not to recruit and hire each other's sales agents—what the court deemed an "*intra* firm" restraint—should be characterized as *per se* unlawful. 166 F.3d at 511, 515. The court

[1] To be sure, to state a *per se* claim, a plaintiff must allege that the restraint was among actual or potential competitors. *See Palmer*, 498 U.S. at 49–50; *see also* Slip Op. at 14. But that is a far cry from rule-of-reason market definition.

quickly rejected arguments that the agreement was a territorial, customer, or supplier allocation—without making any mention of market definition. *Id.* at 515. The court then turned to what it deemed the plaintiffs' "strongest argument"—namely, "that the Agreement may be a group boycott." *Id.* Acknowledging that "[t]he scope of the *per se* rule against group boycotts is a recognized source of confusion in antitrust law," the court reaffirmed that not all group boycotts are *per se* illegal, *id.* (citing *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 298 (1985)), and found that the agreement at issue did not "fit the *classic* model of a group boycott" that is *per se* illegal. *Id.* (emphasis added).

The remainder of the court's discussion, which it introduced with its market-definition statement, focused on whether the agreement nevertheless could be considered one of "those boycotts that have been held illegal *per se*" because its "anticompetitive effect on the market" is "obvious." *Id.* at 515 (citation omitted); *see also id.* at 515–16 (considering, in the alternative, whether the plaintiffs had identified a distinct submarket in which the agreement could have had an "obvious anticompetitive effect"); *Patel*, No. 3:21-CR-220 (VAB), 2022 WL 17404509, at *10 n.2 (D. Conn. Dec. 2, 2022) (noting that *Bogan* "focused its discussion on determining if the alleged agreement was a group boycott").

Bogan's statement about market definition makes sense in this context. Having noted the Supreme Court's caution "against 'indiscriminately' expanding 'the category of restraints classed as group boycotts,'" 166 F.3d at 514 (quoting *Ind. Fed'n of Dentists*, 476 U.S. at 458), and having found that the agreement was not a "classic" group boycott, the court looked to market definition—a description of "the relevant market in which we may presume the anticompetitive effect would occur," *id.* at 515—to determine whether the agreement still could qualify as a *per se* illegal boycott because of its "obvious" anticompetitive effects, *id.* That inquiry comports

with the court's description of group-boycott law. *See Bennett v. Cardinal Health Marmac Distribs., Inc.*, No. 02-cv-3095 (JG), 2003 WL 21738604, at *4 (E.D.N.Y. July 14, 2003) (citing *Bogan* for the proposition that, "[i]n the Second Circuit, when the anticompetitive effects on the relevant market are not obvious or 'clearly apparent,' courts have denied group boycotts or concerted denials *per se* treatment").[2]

Bogan's statement about market definition makes no sense, however, if interpreted as addressing *per se* conduct like price fixing and market allocation. The court made no mention of market definition in ruling that the agreement did not qualify as a territorial, customer, or supplier allocation. 166 F.3d at 515. The cited portions of the cases the court relied upon for its market-definition statement did not even deal with Section 1, *id.* (citing *Belfiore v. N.Y. Times Co.*, 826 F.2d 177, 180–81 (2d Cir. 1987); *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 840 (2d Cir. 1980)); they dealt instead with monopolization claims under Section 2.[3] And any such interpretation would be at odds with the court's description of abbreviated rule-of-reason (or quick-look) analysis, which the court said "*avoid[s] examining the relevant market*, market power, and anticompetitive effect." 166 F.3d at 514 n.6 (emphasis added). The court cannot have thought that market definition is unnecessary for quick-look condemnation but

[2] Indeed, as *Bogan* also noted, 166 F.3d at 514, the Supreme Court generally has limited *per se* illegal group boycotts to those "in which firms with *market power* boycott suppliers or customers in order to discourage them from doing business with a competitor," *Ind. Fed'n of Dentists*, 476 U.S. at 458 (emphasis added) (citing *Nw. Wholesale*, 472 U.S. 284). And market power generally "cannot be evaluated unless [a court] first defines the relevant market." *Am. Express*, 138 S. Ct. at 2285 n.7.

[3] As the Supreme Court observed in *Socony-Vacuum*, "[t]he existence or exertion of power to accomplish the desired objective . . . becomes important only in" monopolization cases under Section 2. 310 U.S. at 224 n.59. "Only a confusion between the nature of the offenses under those two sections . . . would lead to the conclusion that power to fix prices was necessary for proof of a price-fixing conspiracy under § 1." *Id.*

necessary for the quickest look of all—*per se* condemnation of naked, horizontal restraints like price fixing and market allocation.

In short, *Bogan*'s statement is best viewed as applying only to its group-boycott analysis. Alternatively, if interpreted to require market definition as an element of all *per se* claims, *Bogan* would be flatly inconsistent not only with Supreme Court precedent, but also with *Koppers*, which held that, in a case alleging conduct falling within the *per se* rule, "the plaintiff need prove only that [the conduct] occurred in order to win his case, there being no other elements to the offense and no allowable defense." 652 F.2d at 294 (internal quotation marks omitted). In that event, this Court would be bound to follow *Koppers*, the earlier precedent. *See Tanasi v. New All. Bank*, 786 F.3d 195, 200 n.6 (2d Cir. 2015) ("Where a second panel's decision seems to contradict the first, and there is no basis on which to distinguish the two cases, we have no choice but to follow the rule announced by the first panel.").

B. The District-Court Cases are Distinguishable and Limited to Group Boycotts

Besides *Bogan*, this Court also cited three district-court cases. Slip Op. at 22 n.6. In addition to being non-precedential, *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011), those cases relied primarily on *Bogan*, and each, like *Bogan*, addressed a group-boycott claim. *See PharmacyChecker.com, LLC v. Nat'l Ass'n of Bds. of Pharmacy*, 530 F. Supp. 3d 301, 347 (S.D.N.Y. Mar. 30, 2021) (applying *Bogan* "to evaluate whether Plaintiff has alleged a group boycott that merits per se treatment"); *Singh v. Am. Racing-Tioga Downs Inc.*, No. 3:21-cv-0947 (LEK/ML), 2021 WL 6125432, at *2, *4 (N.D.N.Y. Dec. 28, 2021) (evaluating alleged "group boycott in violation of 15 U.S.C. § 1"); *Downtown Music Publ'g LLC v. Peloton Interactive, Inc.*, 436 F. Supp. 3d 754, 761, 763 (S.D.N.Y. Jan. 29, 2020) (evaluating "alleged concerted

refusal to license copyrighted works to Peloton"). They thus do not support a broader reading of *Bogan*'s market-definition statement.

CONCLUSION

The United States respectfully requests that this Court reconsider footnote six of its ruling and clarify that market definition is not an element of Plaintiffs' *per se* market-allocation claim.

Respectfully submitted,

DOHA MEKKI
Principal Deputy Assistant Attorney General

MAGGIE GOODLANDER
Deputy Assistant Attorney General

DAVID B. LAWRENCE
Policy Director

DANIEL E. HAAR
STRATTON C. STRAND
JARED T. BOND
Attorneys

Dated: February 13, 2023

/s/ Jared T. Bond
JARED T. BOND (phv207109)
U.S. Department of Justice, Antitrust Division
950 Pennsylvania Ave NW, Room 3224
Washington, DC 20530
Telephone: (202) 550-1092
Email: jared.bond@usdoj.gov

Counsel for the United States of America

CERTIFICATE OF SERVICE

I certify that on February 13, 2023, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

/s/ Jared T. Bond
JARED T. BOND (phv207109)