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No. 15-

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IN THE
Supreme Court of the United States

PRIME HEALTHCARE SERVICES, INC.,

Petitioner,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION;
SERVICE EMPLOYEES INTERNATIONAL UNION –
UNITED HEALTHCARE WORKERS WEST;
KAISER PERMANENTE; KAISER FOUNDATION
HEALTH PLAN, INC.; KAISER FOUNDATION
HOSPITALS; AND SOUTHERN CALIFORNIA
PERMANENTE MEDICAL GROUP, INC.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

EDWARD S. SCHEIDEMAN

Counsel of Record

JOSEPH A. TURZI

COLLEEN HANRAHAN

DLA PIPER LLP (US)

500 Eighth Street, N.W.

Washington, D.C. 20004

(202) 799-4000

edward.scheideman@dlapiper.com

Counsel for Petitioner Prime

Healthcare Services, Inc.

QUESTIONS PRESENTED

1. Whether the Ninth Circuit failed to follow this Court's precedent by not applying the *per se* standard to a horizontal conspiracy in violation of the Sherman Act between two labor unions, their leadership, and their members, where the unions forfeited their limited antitrust immunity by colluding with a nonlabor entity.

2. Whether the Ninth Circuit erred by not applying the *per se* standard to the conduct of a hospital that participated in and facilitated the horizontal non-exempt collusion of two labor unions, their leadership, and their members in violation of the Sherman Act.

PARTIES TO THE PROCEEDINGS

1. Prime Healthcare Services, Inc., Petitioner on review, was the plaintiff-appellant below.

2. Service Employees International Union; Service Employees International Union—United Healthcare Workers West; Kaiser Permanente; Kaiser Foundation Health Plan, Inc.; Kaiser Foundation Hospitals; and Southern California Permanente Medical Group, Inc., Respondents on review, were defendants-appellees below.

RULE 29.6 STATEMENT

Prime Healthcare Holdings, Inc., a Delaware corporation, is the parent corporation of petitioner Prime Healthcare Services, Inc. No publicly held corporation owns 10% or more of the stock of Prime Healthcare Services, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	vi
INTRODUCTION	1
OPINIONS BELOW	7
JURISDICTION	7
STATUTES INVOLVED	7
STATEMENT OF THE CASE	7
A. Kaiser And The Unions Form Their Unlawful Conspiracy	10
B. The Unions Uphold Their End Of The Conspiracy By Targeting Kaiser's Competitors.....	14
C. The Conspiracy Targets Its Newest Threat—Prime	16
D. The Conspiracy Injured Competition And Prime	17
E. Proceedings Below	17
REASONS FOR GRANTING THE PETITION..	19
I. Application Of The Rule of Reason By The Court Of Appeals Conflicts With This Court's Precedent And Furtheres A Circuit Split.....	19

TABLE OF CONTENTS—Continued

	Page
A. Application Of The Rule Of Reason To The Conspiracy Conflicts With This Court's Decisions In <i>Socony-Vacuum</i> , <i>Connell Construction</i> , <i>Allen Bradley</i> , And <i>Hutcheson</i>	21
1. The <i>Per Se</i> Rule Applies To Price Fixing.....	21
2. The Unions Lost Their Limited Antitrust Immunity Because They Conspired With Kaiser, A Nonlabor Entity, To Restrain Competition In A Market.....	23
B. Application Of The Rule of Reason To Kaiser's Vertical Participation In The Conspiracy Conflicts With This Court's Precedent And Furthers A Circuit Split	26
II. The Issues In This Case Present An Opportunity To Bring Clarity To Fundamentally Misunderstood And Often Misapplied Principles Of Labor Antitrust Law	29
CONCLUSION	34
APPENDIX	
APPENDIX A: Opinion of the United States Court of Appeals for the Ninth Circuit, March 2, 2016	1a

TABLE OF CONTENTS—Continued

	Page
APPENDIX B: Opinion of the United States District Court for the Southern District of California, July 25, 2013	6a
APPENDIX C: Sherman Act, Section 1, 15 U.S.C. § 1	41a

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Ackerman-Chillingworth v. Pacific Elec. Contractors Ass'n</i> , 579 F.2d 484 (9th Cir. 1978).....	25
<i>Allen Bradley Co. v. Local Union No. 3, Int'l Brotherhood of Elec. Workers</i> , 325 U.S. 797 (1945).....	<i>passim</i>
<i>Bausch & Lomb Optical Co.</i> , 108 N.L.R.B. 1555 (1954)	6, 7, 31, 32
<i>Berman Ents. Inc. v. Local 333, United Marine Div., ILA</i> , 644 F.2d 930 (2d Cir. 1981)	25
<i>Business Elecs. Corp. v. Sharp Elecs. Corp.</i> , 465 U.S. 717 (1988).....	21
<i>Catalano, Inc. v. Target Sales, Inc.</i> , 446 U.S. 643 (1980).....	22
<i>Connell Const. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100</i> , 421 U.S. 616 (1975).....	<i>passim</i>
<i>Food Lion, Inc. v. UFCW</i> , 103 F.3d 1007 (D.C. Cir. 1997)	34
<i>H.A. Artists & Assoc., Inc. v. Actor's Equity Ass'n</i> , 451 U.S. 704 (1981).....	27
<i>Harlem Rivers Consumers Coop.</i> , 191 N.L.R.B. 314 (1971)	32
<i>Interstate Circuit, Inc. v. United States</i> , 306 U.S. 208 (1939).....	4, 20, 26, 28
<i>Klor's, Inc. v. Broadway-Hale Stores, Inc.</i> , 359 U.S. 207 (1959).....	4, 20, 26, 28

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Larry V. Muko, Inc. v. Southwestern Pennsylvania Bldg. & Constr. Trades Council,</i> 609 F.2d 1368 (3rd Cir. 1979).....	30
<i>Larry V. Muko, Inc. v. Southwestern Pennsylvania Bldg. & Constr. Trades Council,</i> 670 F.2d 421 (3rd Cir. 1982).....	25
<i>Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,</i> 551 U.S. 877 (2007).....	21
<i>Loewe v. Lawlor,</i> 208 U.S. 274 (1908).....	23
<i>MM Steel, L.P. v. JSW Steel (USA) Inc.,</i> 806 F.3d 835 (5th Cir. 2015).....	22, 28
<i>Nat’l Elec. Contractors Ass’n, Inc. v. Nat’l Constructors Ass’n,</i> 678 F.2d 492 (4th Cir. 1982).....	27
<i>Pony Express Courier Corp.,</i> 297 N.L.R.B. 171 (1989)	32
<i>R.D. Anderson Construction Co. v. Hankamer,</i> 117 L.R.R.M. (BNA) 2774 (D. Kans. Sept. 13, 1983).....	30
<i>S.-E. Coal Co. v. Consolidation Coal Co.,</i> 434 F.2d 767 (6th Cir. 1970).....	25, 27
<i>State Oil Co. v. Kahn,</i> 522 U.S. 3 (1997).....	21

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.</i> , 530 F.3d 204 (3rd Cir. 2008).....	28, 29
<i>Toys “R” Us, Inc. v. FTC</i> , 221 F.3d 928 (7th Cir. 2000).....	28, 29
<i>Tunis Bros. Co. v. Ford Motor Co.</i> , 763 F.2d 1482 (3rd Cir. 1985).....	22
<i>United Mine Workers v. Pennington</i> , 381 U.S. 657 (1965).....	3, 20, 23
<i>United States v. Apple, Inc.</i> , 791 F.3d 290 (2d Cir. 2015)	28, 29
<i>United States v. Enmons</i> , 410 U.S. 396 (1973).....	4
<i>United States v. General Motors Corp.</i> , 384 U.S. 127 (1966).....	4, 20, 26, 28
<i>United States v. Hutcheson</i> , 312 U.S. 219 (1941).....	3, 20, 23
<i>United States v. Socony-Vacuum Oil Co.</i> , 310 U.S. 150 (1940).....	<i>passim</i>
<i>USS-POSCO Industries v. Contra Costa Cty. Bldg. & Constr. Trades Council</i> , 31 F.3d 800 (9th Cir. 1994).....	5, 6, 30, 33
<i>Ward v. Apple Inc.</i> , 791 F.3d 1041 (9th Cir. 2015).....	22

STATUTES

15 U.S.C. §§ 1, 2	<i>passim</i>
15 U.S.C. § 17	23

TABLE OF AUTHORITIES—Continued

	Page(s)
28 U.S.C. § 1254(1).....	7
29 U.S.C. § 101, <i>et seq.</i>	23

PETITION FOR WRIT OF CERTIORARI

Prime Healthcare Services, Inc. ("Prime") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

For many years, Kaiser Foundation Hospitals (collectively, along with Respondents Kaiser Permanente, Kaiser Foundation Health Plan, Inc., and Southern California Permanente Medical Group, "Kaiser") and its labor unions, led by the Service Employees International Union, its leadership, and members ("SEIU") along with the Service Employees International Union – United Healthcare West, its leadership and members ("UHW") (collectively, the "Unions"), have operated an alliance designed to advance their mutual interests by excluding from the market any competitors. Kaiser, a union-dominated hospital system, has enjoyed a protected market position because of the Unions' ability to misuse their favored position under labor law to exclude, or at least severely damage, any hospitals whose business models provided consumers with greater choice, lower cost, and higher quality service. By conspiring to eliminate such competitors, the alliance allows Kaiser to charge supra-competitive prices for its services and, in turn, pay union members supra-competitive wages.

That the conspiracy is all that props up Kaiser's particularly inefficient business model is illustrated by the fact that in virtually all cases where it has sought to operate without the benefit of its illegal alliance with the Unions, Kaiser has failed. The result is that over 80 percent of Kaiser's business is in the State of California, where UHW is based and where

SEIU and the alliance is well-established. Even there, however, Kaiser's model is so inefficient that non-union or lower cost hospitals like Prime continue to pose a threat to both Kaiser's business model and the Unions' supra-competitive wages. The antitrust conspiracy represented by the alliance seeks to stabilize and fix Kaiser's pricing structure and the Unions' wage scale by excluding from the market competitors, such as Prime, that have lower cost structures and better service.

Through their conspiracy, the Unions and Kaiser successfully attacked lower cost market entrants by having the Unions engage in "corporate campaigns" against them. Through these "campaigns," the Unions would undertake a sustained and relentless assault on these new threats by, for example, threatening executives, publicizing allegations of Medicare fraud or other improprieties, blocking hospital acquisitions, issuing "reports" filled with patient care horror stories, undertaking sham lobbying and sham litigation, and prompting or otherwise initiating state and federal investigations. Kaiser, in furtherance of the conspiracy and to facilitate its success, funded the Unions' actions, compensated the Unions' leadership for their role in the conspiracy, and undertook efforts to ensure that competing unions would not represent Kaiser employees.

In every case, the assaults on Kaiser's competitors continued until the entrants agreed to adopt the higher cost wage structure of Kaiser. The conspiracy was largely successful and prior market entrants, such as Columbia/HCA (now HCA), Tenet Healthcare Corporation ("Tenet"), and Catholic Healthcare West ("CHW") (now Dignity Health), succumbed to the conspiracy and adopted the wage and pricing model of

Kaiser and the Unions. When Prime entered the market as yet another low cost healthcare provider, the conspiracy placed Prime directly in its sights, employing many of the same tactics in furtherance of the same goal.

Respondents' unlawful conspiracy to fix and maintain prices is a *per se* violation of Section 1 of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). The conspiracy included: (i) a horizontal conspiracy between the healthcare workers represented by the Unions (who compete among themselves for wages and benefits), the leadership of the Unions, and the Union entities themselves to fix and maintain prices; and (ii) a vertical conspiracy consisting of the horizontal conspirators and Kaiser, who assists and facilitates the horizontal conspiracy.

By virtue of the Unions having combined with Kaiser, a nonlabor entity, to restrict competition in the market, they lost the limited immunity afforded labor unions from the antitrust laws. *Connell Const. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 625-26 (1975); *Allen Bradley Co. v. Local Union No. 3, Int'l Brotherhood of Elec. Workers*, 325 U.S. 797, 808-10 (1945); *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). As such, the Unions remained nothing more than a naked price fixing conspiracy, a *per se* violation of the Sherman Act. *Allen Bradley*, 325 U.S. at 810 (agreement among employers and union members that was not protected by the labor exemption was equivalent to a horizontal price-fixing agreement); *United Mine Workers v. Pennington*, 381 U.S. 657, 665-66 (1965) (*per se* treatment where a group of employers and a labor

union conspired to affect competition in the employers' market).

Kaiser's participation in and facilitation of the conspiracy as a facially vertical participant also warrants *per se* condemnation. *Allen Bradley*, 325 U.S. at 808-10; see also *United States v. General Motors Corp.*, 384 U.S. 127, 145 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939).

The Ninth Circuit, however, without any analysis or justification, ignored the *per se* analysis. Instead, it proceeded to analyze both the horizontal conspiracy and vertical conduct which facilitated the horizontal non-exempt conspiracy under the rule of reason. The Ninth Circuit's doing so marked a clear departure from this Court's precedent, and evidenced a circuit split with respect to the standard of scrutiny given to vertical facilitators of horizontal conspiracies.

The Ninth Circuit's application of the rule of reason not only threatens to harm competition and the national economy, but also ignores the reality of a conspiracy between labor unions and an employer. Labor unions receive extensive protections under labor law, freeing them to engage in conduct that otherwise would be deemed unlawful. Unions may tortiously interfere with business relations, engage in boycotts, target disfavored employers for economic ruin, and may even disparage to the point of destruction the product or services of an employer whose employees the union represents or seeks to represent. Unions receive unique protection from criminal extortion laws. *United States v. Enmons*, 410 U.S. 396, 411 (1973). And of course, a union may effectively put an employer out of business through a strike.

The protections afforded to unions which take these actions alone represent a delicate balance between preserving competition and collective bargaining. But no such balancing is necessary where a union uses its privileged position in the market place to conspire with a competitor and to do on its behalf what the competitor is prohibited from doing itself. This case involves a vicious campaign of both personal and business reputational attacks, with the alliance threatening economic destruction to its "enemies" absent their acquiescence to its business model. It relies on the ability of a labor union to misuse the protections afforded by labor law to exercise direct power to achieve the ends of the conspiracy.

The conduct of a union in this context is much more egregious than other conduct found by the courts to constitute *per se* violations of the antitrust laws. This is because unions are privileged to attack a competitor with the express object of removing it from the market. A rule of reason analysis simply makes no sense where unions abuse that privilege to conspire with a non-labor actor to impose harm that is targeted, direct, specific, and stems from the type of conduct the antitrust laws have recognized as *per se* unlawful.

Nor is it an answer that employees or the union ultimately may derive some benefit from the unlawful activity. Even the Ninth Circuit itself recognized in *USS-POSCO Industries v. Contra Costa County Building & Construction Trades Council*, 31 F.3d 800, 807 (9th Cir. 1994), that such a broad definition of a union's self-interest goes too far:

In the broadest sense, everything a union does serves its self-interest. But *Hutcheson* requires that it act in pursuit of its *legitimate* self-interest. Whether the interest in question

is legitimate depends on whether the ends to be achieved are among the traditional objectives of labor organizations. Thus, if a union forces employers to funnel money into a commercial enterprise from which the union derives profits; or if it forces the employer to hire the union president's spouse; or if a union is involved in illegal activities unrelated to its mission, such as dealing drugs or gambling, those would not be objectives falling within the union's legitimate interest. In such cases, the unions "cease to act as labor groups."

Id. Wherever the line may be, the combination between the Unions and Kaiser at issue in this case goes far beyond it, existing to insure a protected market for one participant, in order to produce anti-competitive benefits for both.

A rule of reason analysis also undermines the process of good faith collective bargaining that National Labor Relations Act seeks to advance. Unions tend to be industry-focused and even when they are not, they often represent employees in more than a single plant or company. For collective bargaining to operate effectively, competitors in an industry must know that a union is working to advance the interests of their employees, and not their competitors. As the National Labor Relations Board has recognized, when a union advances the interest of a competitor, the machinery of collective bargaining breaks down. *Bausch & Lomb Optical Co.*, 108 N.L.R.B. 1555, 1559 (1954). The NLRB has recognized that it is irrelevant whether the union is engaged in such misconduct—the mere perception that it may do so is destructive to collective

bargaining. *Id.* at 1562. It makes little sense to evaluate whether a conspiracy which misuses the representation and collective bargaining process of labor law in order to destroy competitors is reasonable.

This Court should grant the petition, and confirm that labor unions and an employer who conspire to restrict competition in a market by fixing prices are subject to the *per se* standard of scrutiny under anti-trust jurisprudence.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-5a) was not selected for publication by the court of appeals, but is available at 2016 WL 806110. The decision of the district court (App. 6a-40a) is available at 2013 WL 3873074.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2016. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, is reproduced at App. 41a.

STATEMENT OF THE CASE

Kaiser historically has been a high-cost provider in the health care industry, a condition that arose from the fact that Kaiser was created as a healthcare organization focusing on union members. (ER84, ¶ 57.)¹

¹ “ER” refers to Plaintiff/Appellant’s Excerpts of the Record filed with the Court of Appeals in conjunction with Appellant’s Opening Brief. The paragraph citations are to Prime’s First Amended Complaint (“FAC”), included in the Excerpts of the Record.

As a result, Kaiser's labor force has been union-dominated since its inception. (ER85, ¶ 63.) Because the hospital industry is labor-intensive, Kaiser's union dominance resulted in overall operating costs that were significantly higher than those at other non-union hospital systems and in other industries and businesses. (ER84, ¶ 56.)

For the majority of its history, Kaiser's high labor costs did not pose any significant competitive disadvantage because of the reimbursement structure of the healthcare industry. Specifically, reimbursement for Medicare and Medicaid patients to hospitals like Kaiser was historically done on a "cost-plus" basis. (ER84, ¶ 57.) This meant that Kaiser was reimbursed based on its actual costs, and therefore, simply passed on its higher costs to its patients and the taxpayers. (ER84, ¶ 59.) As long as Kaiser was able to pass on its labor costs in this manner, the Unions could maintain their density at Kaiser facilities and realize wages higher than their competitors.

Kaiser's business model faltered when Congress changed the reimbursement scheme for Medicare and Medicaid. Specifically, in 1982 Congress replaced the cost-plus model with the more efficient prospective per-case reimbursement system ("PPS"). Under this PPS system, the government reimbursed health care organizations at a fixed amount, regardless of costs. (ER84-85, ¶ 60.) This meant that Kaiser could no longer simply pass on its higher costs to the patient or the government. (ER85, ¶ 62.)

The new system rewarded Kaiser's more efficient competitors. (ER85, ¶ 61.) The result was predictable – lower cost for-profit health care providers aggressively increased their market share at Kaiser's expense. (ER91, ¶ 84.) During the late 1980s and early 1990s,

Kaiser was incurring massive losses – in excess of \$250 million as its excessive labor costs and practices crippled its ability to compete in this new market. *Id.*

Initially, Kaiser attempted to adapt to the new competitive landscape by addressing its uncompetitive legacy labor costs. (ER91, ¶ 84.) Kaiser sought to do so in two ways: (1) increasing revenue through expansion into other geographic markets and (2) attempting to bring its uncompetitive labor costs in line with the market.

Both efforts, however, resulted in failure. Kaiser lost in excess of \$900 million in the few short years of its expansion effort, and eventually closed most of the locations it had opened outside of California. (ER120, ¶ 192.) Kaiser's attempts to negotiate new labor contracts brought Kaiser into direct conflict with its unions, leading to years of labor-management discord, strikes, and adversarial campaigns against Kaiser by the Unions. (ER88-89, 91, ¶¶ 74-76, 84.)

While vehemently opposed to any concessions, the Unions ultimately recognized that their problem was not Kaiser, but Kaiser's competition. To address this problem, the Unions adopted a strategy focused on working with Kaiser to create market conditions that would permit Kaiser to pay supra-competitive wages and benefits. (ER86-87, ¶¶ 66, 68.) The approach was simple, if inelegant: the Unions and their allies would become the club that would eliminate any competitive threats to Kaiser. Kaiser, for its part, would use its union-gifted market dominance to establish above-market costs and pass on some of those excess profits to the Unions in the form of direct payments and supra-competitive wages for its members. *Id.*

Of course, for the Unions' market dominance strategy to work, they would either have to establish insurmountable barriers to entry by competitors or impose on those competitors excessively high costs similar to those of Kaiser's. (ER87, ¶ 69.) The Unions pursued this objective primarily in three ways, by: (1) insisting in collective bargaining negotiations that competitors adopt Kaiser's failing model; (2) advocating through regulatory, legislative, and public relations for Kaiser's failing business model; and, (3) where increasingly successful competitors refused to bend to the Unions' demands, to engage in a vicious corporate campaign to destroy the competitor by forcing it to adopt the same uncompetitive business model. (ER121-23, 127, 138-49, ¶¶ 198-205, 221-23, 263-99.)

A. Kaiser And The Unions Form Their Unlawful Conspiracy

The genesis of the joint Kaiser-SEIU/UHW market domination strategy was the formation in 1995 of a coalition of the various separate unions representing Kaiser workers in California. (ER90, ¶ 80.) At the time, the coalition sought to address the disunity among unions, which put them at a disadvantage in dealing with Kaiser and its cost-cutting efforts. *Id.* Initially, the coalition pursued two potential tracks for dealing with Kaiser—an adversarial strategy and a partnering strategy. (ER90, ¶ 81.)

Recognizing that Kaiser represented the largest unionized health care provider, the SEIU-controlled coalition soon concluded that attacking Kaiser would have negative unintended consequences and result in permanent damage to the SEIU's broader objectives. (ER90, ¶ 82.) Nonetheless, the unions were making it known that they were preparing a coordinated,

corporate campaign to attack Kaiser's business, something that greatly concerned Kaiser. (ER91, ¶ 85.) These concerns led to high-level discussions between Kaiser and the unions to solve their differences. Soon, those talks turned to forming what the conspirators termed a new "partnership" to advance their collective interests, specifically by dealing with the threat that a competitive market represented to Kaiser. (ER91, ¶ 86.)

The discussions ultimately culminated in a pivotal meeting in December of 1995 at the Dallas-Ft. Worth Airport between coalition officials, including then AFL-CIO President John Sweeney ("Sweeney") and Kaiser's Chief Executive Officer David Lawrence ("Lawrence"). (ER92, ¶ 89). That meeting, described by Lawrence as a "make-or-break meeting," concluded with the parties reaching an agreement to work together to achieve market domination for Kaiser through elimination of competitive threats. (ER92-93, ¶ 92.)

Once the conspiracy was formed, the conspirators spent the next two years reaffirming and refining their agreement and solidifying their commitments to each other. (ER92-93, ¶¶ 91-92.) In 1997, the conspiracy was documented in a written agreement, which the parties acknowledged "explicitly excluded" collective bargaining. (ER93, 96, ¶¶ 93-95, 104.) The written agreement was fairly open in its conspiratorial goals, stating expressly that its purpose was to "*[a]ssist Kaiser Permanente in achieving and maintaining market leading competitive performance.*" (ER93, ¶ 95.) (emphasis added). Another express goal was to "[e]xpand Kaiser Permanente's members in current and new markets, including designation as a provider of choice for all labor organization in the area

we serve.” *Id.* Throughout the years, Kaiser and the Unions have reaffirmed the conspiracy through additional regular meetings, agreements and renewed commitments. In each subsequent agreement, the parties re-committed themselves to the goals of the conspiracy:

- 2000: Parties agreed that the conspiratorial agreement would “serve as the blueprint for making [Kaiser] the employer and care provider of choice” (ER99, ¶ 116.); this agreement was the product of meetings between the Kaiser partnership group (“KPPG”)—“the highest level decision making body” within Kaiser and representatives from the SEIU-controlled coalition. (ER99, ¶ 114.)
- 2002: Conspirators agreed to fully support the “partnership” as the central operational strategy to achieve market domination for Kaiser and deemed the agreement “essential to the well-being of [Kaiser]” (ER100, ¶¶ 120-22.); this agreement was the product of August 21 and November 6, 2002 meetings between, among others, Kaiser Chief Executive Officer and Chairman of the Board George Halvorson, Kaiser Executive Director Jay Crosson, and coalition Executive Director Peter DiCicco (“DiCicco”) (ER100, ¶ 119.)
- 2005: Agreement would serve as a “blueprint for making [Kaiser] the employer and care provider of choice[,]” reaffirmed the parties’ commitment to “use their influence, to the greatest extent possible” in support of the goals of the conspiracy, and

specifically called for the SEIU's "full participation in the decision making forums and processes at every level of the organization [Kaiser]" (ER102, 107, ¶¶ 131-32, 150.); the 2005 agreement was reached during meetings between February and June of 2005 between senior Kaiser management and labor leaders including DiCicco and Leslie Margolin ("Margolin"), Kaiser Senior Vice President for Workforce Development (ER101-02; ¶¶ 126-29.)

- 2010: Agreement expressly stated that the unions were involved in all aspects of Kaiser's business, and committed to aggressively increasing Kaiser's market share (ER106-108, ¶¶ 149-51.); this agreement was negotiated during meetings between March and April of 2010 between the coalition's lead negotiator John August ("August") and the Senior Vice President of Kaiser's National Labor Relations, Chuck Columbus ("Columbus") (ER103-04, ¶¶ 136-140.)
- 2012: Agreement committed Kaiser to "[h]old [the partnership] accountable for achieving [Kaiser's] growth initiatives." (ER109-111, ¶¶ 156, 158, 160-62, 164.); this agreement was negotiated during meetings held between March and May of 2012 between, among others, Kaiser operations, human resources, and labor relations executives Arlene Peasnell, Don Bruzzi, Bill Caswell, and Dennis Dabney and SEIU-controlled coalition leaders including August and Dave Regan. (ER109-10, ¶¶ 158-160.)

To facilitate the conspiracy, Kaiser agreed to provide the Unions (including their members and leaders) with supra-competitive wages and other favorable employment terms, tens of millions of dollars of cash into various union slush funds through a Labor Management Partnership Trust, sham employment for certain union leaders and members, sham loans, and office space. (ER115-19, ¶¶ 173-87.) Kaiser's agreement to fund the conspiracy itself meant the provision of tens of millions of dollars to the Unions for their support of, and participation in, the conspiracy. (ER115-18, ¶¶ 173, 175-76, 177-82.)

Kaiser also facilitated the conspiracy by illegally interfering with NLRB elections held at Kaiser during the fall of 2010 in an effort to prevent its employees from selecting new union representation. (ER129-30, ¶¶ 229-31.) To protect its co-conspirator's stronghold over its employees, Kaiser threatened employees that it would not provide contractually-bargained for benefits if they elected the new union over the SEIU-UHW. (ER129-30, ¶ 231.) Just months earlier, during a similar election process, Kaiser was deemed to have acted illegally by refusing benefits to members after they voted in favor of a new union over the SEIU. (ER130, ¶ 232.) A judge found Kaiser's actions so egregious that they were "inherently destructive" of employee rights. *Id.* Again, Kaiser engaged in this conduct to facilitate the conspiracy and to advance the interests of its co-conspirators.

B. The Unions Uphold Their End Of The Conspiracy By Targeting Kaiser's Competitors

Not coincidentally, consistent with the formation of the conspiracy, the Unions' behavior changed from attacking Kaiser to attacking Kaiser's competitors.

(ER92, ¶ 92.) In 1995, the same year as Kaiser and the Unions reached their agreement at the Dallas-Ft. Worth meeting, the Unions launched their “Code Columbia” campaign. (ER122, ¶ 201.) The target of the Code Columbia campaign was Columbia Healthcare (“Columbia/HCA”), which was rapidly expanding. (ER121-22, ¶ 200.)

The campaign followed a pattern of attacks that would become typical of the conspiracy, and which included allegations of Medicare and Medicaid fraud, the blocking of hospital acquisitions, and the issuance of false “reports” of poor patient care. The campaign was successful and Columbia/HCA eventually succumbed to the pressure and entered into an agreement with the SEIU raising its labor wages and benefits. *Id.*

Subsequently, Tenet, through a similar growth strategy as Columbia/HCA, became the nation’s second largest for-profit hospital chain. (ER122, ¶ 202.) Tenet, with its largest market being in California, became a significant threat to Kaiser and the Unions. *Id.* Once again, the Unions, to eliminate competition for their co-conspirator, attacked Tenet using their playbook tactics of false allegations of billing fraud and poor patient care. *Id.* Tenet, like Columbia, was unable to endure the conspiracy’s attacks and ultimately struck a deal with the SEIU in 2003 to raise Tenet’s cost structure by increasing wage rates and benefits for its labor force making it less of a market threat to Kaiser. *Id.*

In the early 2000s, the conspiracy targeted a hospital chain sponsored by nine orders of Catholic nuns, CHW. (ER122-23, ¶ 203.) CHW had grown from 12 hospitals to the “largest not-for-profit health care system in the West.” *Id.* Its success made it the latest

threat to the conspiracy and, again, the conspiracy employed the same tactics and allegations. *Id.* Like the conspiracy's prior targets, CHW was unable to absorb these attacks and was forced to reach an agreement with the SEIU. And once again that agreement raised CHW's cost structure making it less competitive with Kaiser and resulting in another threat eliminated. *Id.*

C. The Conspiracy Targets Its Newest Threat-Prime

Having succeeded in eliminating Columbia/HCA, Tenet, and CHW as threats by raising their cost structures, the conspiracy next targeted Prime. Prime entered the market in 2001 with the purchase of its first hospital. Its business model, unlike Kaiser's, is based on offering quality care on a fee-for-service basis to consumers. (ER132, ¶ 241.) In short, it offers a larger array of better services at lower prices for the consumer.

The conspiracy again employed the same tactics, such as baseless allegations that Prime was failing to meet California's seismic safety standards. (ER139-40, ¶¶ 265-66.) Additional escalating attacks followed including, once again, ginned up and false propaganda reports containing allegations of fraudulent billing practices and poor patient care at Prime hospitals. (ER142-45, ¶¶ 277-287.) Other attacks involved sham lobbying and litigation to specifically target Prime's business, and threats by Kaiser to members of its HMO health plan over use of non-Kaiser facilities, including those controlled by Prime. (ER136-37, 152, ¶¶ 256, 312.)

D. The Conspiracy Injured Competition And Prime

The purpose and effect of Respondents' conspiracy is to injure competition in the market by fixing prices of services charged to consumers at hospitals and charged by unions. This has lessened competition, reduced choices for patients, raised costs for Kaiser's competitors, and reduced the quality and quantity of medical service available to the general public, while at the same time enabling Kaiser to acquire, maintain, and expand its market share and monopoly power in the relevant markets. (ER156-59, ¶¶ 324-34.) Prime, as a competitor of Kaiser in the market and a purchaser of the labor of healthcare workers, has also been injured by Respondents' conspiracy and anti-competitive conduct. (ER159-60, ¶¶ 336-38.) Prime's antitrust injuries include, but are not limited to, payment of higher than competitive wages for healthcare workers in the relevant market, loss of actual and potential customers, lost profits, loss of business goodwill, and the loss of the opportunity to freely compete in the market. (ER159-160, ¶¶ 336.)

E. Proceedings Below

On November 15, 2011, Prime sued the Unions and Kaiser alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. (Dist.Ct.Dkt. No. 1.)

On September 21, 2012, Prime filed its first amended complaint. (Dist.Ct.Dkt. No. 46.) Prime's principal Section 1 allegations asserted that the Unions, their leadership, and membership, who had lost their exemption from the antitrust laws by combining with a nonlabor entity, engaged in a horizontal price fixing conspiracy that was a *per se* violation of Section 1 of the Sherman Act. Further, the Unions

then combined with a vertical participant to the conspiracy, Kaiser, who participated in and facilitated the conspiracy—also a classic *per se* violation of Section 1. (ER81, ¶¶ 42-44.) On October 26, 2012, Kaiser and the Unions filed motions to dismiss. (Dist.Ct.Dkt. Nos. 57, 59.) On November 27, 2012, the Unions filed an amended motion to dismiss. (Dist.Ct.Dkt. No. 64.)

The district court granted the motions to dismiss on July 25, 2013 finding, as to Prime’s Section 1 claim, that Prime had failed to sufficiently allege an illegal conspiracy or agreement and that under the “rule of reason” standard, Prime did not show intent to restrain trade or actual injury to competition. App. 30a-33a. The district court also dismissed Prime’s Section 2 claim. App. 36a-39a.

The court declined to apply the *per se* rule because it found that Prime did not sufficiently allege the type of economic deprivation or anticompetitive effects or the manifestly anticompetitive conduct afforded *per se* treatment under Section 1. App. 27a-30a. Further, the district court held that Defendants’ activities did not fall under the categories of conduct subject to the *per se* rule, and that Prime did not allege the Unions were a “horizontal combination of competitors organized to exclude direct competition.” *Id.* In reaching this conclusion, the district court misapplied the precedent of this Court establishing the criteria for application of the *per se* rule and ignored the allegations in the FAC demonstrating that the conduct of the Unions, their leadership and their membership was not protected under any of the labor exemptions to the antitrust laws.

The Ninth Circuit affirmed the district court. App. 1a-5a. In doing so, it ignored entirely the critical issue

of which antitrust standard of scrutiny should apply to the conspirators' conduct. Indeed, its decision includes no discussion or analysis of either the *per se* rule or the rule of reason. App. 4a. The Ninth Circuit simply affirmed the district court's Section 1 holding on a single ground—that Prime did not sufficiently plead facts showing that the Unions and Kaiser harmed competition in the market – a factor considered under the rule of reason analysis. *Id.* Further, the Circuit Court affirmed the district court's ruling with respect to Prime's Section 2 claim also on a single ground—that Prime's allegations failed to plead the market dominance necessary for monopoly power. App. 4a-5a.

REASONS FOR GRANTING THE PETITION

I. Application Of The Rule of Reason By The Court Of Appeals Conflicts With This Court's Precedent And Furthers A Circuit Split

This case presents a critical issue regarding the intersection of antitrust and labor law when labor unions, their leaders and members conspire with an employer to restrict competition and fix prices at which an employer charges for its services and union members charge for theirs. In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 223, this Court held that price fixing is *per se* illegal under the Sherman Act. The Ninth Circuit's application of the rule of reason to both the horizontal conduct of the unions and the vertical conduct of Kaiser in furtherance of the conspiracy was clear error.

It is beyond dispute that labor unions are horizontal combinations to fix prices and restrain trade, and that only the so-called "statutory" and "non-statutory"

antitrust exemptions insulate their conduct from condemnation under the Sherman Act. It is similarly beyond dispute that when unions conspire with a nonlabor entity to impose direct restraints on competition, they immediately forfeit this limited antitrust immunity. *Connell Const.*, 421 U.S. at 625-26; *Allen Bradley*, 325 U.S. at 808-10; *United States v. Hutcheson*, 312 U.S. at 232.

Here, having conspired with Kaiser to lessen competition and fix prices, the Unions lost their limited antitrust exemption, and their conspiracy between themselves and Kaiser to fix prices and restrain trade was a classic *per se* violation of Section 1 of the Sherman Act. *Allen Bradley*, 325 U.S. at 810 (agreement among employers and union members that was not protected by the labor exemption was equivalent to a horizontal price-fixing agreement); *Pennington*, 381 U.S. at 665-66 (*per se* treatment where a group of employers and a labor union conspired to affect competition in the employers' market). Kaiser, having participated in and facilitated the horizontal conspiracy through facially vertical conduct, is equally subject to *per se* condemnation. *United States v. General Motors*, 384 U.S. at 145; *Klor's, Inc.*, 359 U.S. at 212; *Allen Bradley*, 325 U.S. at 808-10; *Interstate Circuit*, 306 U.S. at 227.

The Ninth Circuit's application of the rule of reason to both the Unions' horizontal conduct and Kaiser's facially vertical conduct not only conflicts with controlling decisions of this Court, but also furthers a division in the circuits with respect to whether a vertical participant who facilitates a horizontal conspiracy warrants *per se* condemnation. The Ninth Circuit's flawed ruling threatens procompetitive conduct, the exact conduct the antitrust laws were enacted to protect.

A. Application Of The Rule Of Reason To The Conspiracy Conflicts With This Court's Decisions In *Socony-Vacuum*, *Connell Construction*, *Allen Bradley*, And *Hutcheson*

1. The *Per Se* Rule Applies To Price Fixing

Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.” 15 U.S.C. § 1. The Court has long recognized that only unreasonable restraints on trade violate Section 1 and, moreover, that the rule of reason is the accepted standard for testing whether a particular restraint violates Section 1. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). Under the rule of reason, the factfinder weighs all the circumstances of the case and balances the procompetitive and anticompetitive effects of the restraint at issue. *Id.* at 885-86.

The rule of reason, however, does not govern all restraints, and some types of restraints are deemed *per se* unlawful in violation of Section 1. *Id.* at 886 (quoting *State Oil Co. v. Kahn*, 522 U.S. 3, 10 (1997)). By treating categories of restraints as necessarily illegal, the *per se* rule “eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work.” *Id.* at 886 (citing *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 465 U.S. 717, 723 (1988)). Application of the *per se* rule is appropriate for restraints that “always or almost always tend to restrict competition and decrease output.” *Id.* at 886 (quoting *Business Elecs. Corp.*, 465 U.S. at 723). Such restraints include agreements among competitors to fix, raise, depress, peg or stabilize prices in a market. *Socony-Vacuum*, 310 U.S.

at 223. Indeed, price-fixing conspiracies traditionally have been, and remain, the “archetypal example” of a *per se* unlawful restraint on trade. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980).

Per se condemnation is appropriate to every participant in a horizontal price fixing conspiracy. The Sherman Act states that “[e]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty.” 15 U.S.C. § 1. As such, once a restraint on trade is found to violate Section 1, all participants in the conspiracy to restrain trade are liable for the violation. *See Socony-Vacuum*, 310 U.S. at 253-54; *MM Steel, L.P. v. JSW Steel (USA) Inc.*, 806 F.3d 835, 844 (5th Cir. 2015) (“[P]arties who knowingly join an antitrust conspiracy, like any conspiracy, are liable to the same extent as other conspirators.”); *Ward v. Apple Inc.*, 791 F.3d 1041, 1048 (9th Cir. 2015) (“Antitrust conspirators are liable for the acts of their co-conspirators.”); *Tunis Bros. Co. v. Ford Motor Co.*, 763 F.2d 1482, 1491 (3rd Cir. 1985), *judgment vacated on other grounds*, 475 U.S. 1105 (1986) (“Those who, with knowledge of the conspiracy, aid or assist in carrying out the purposes of the conspiracy make themselves parties thereto and are equally liable to or guilty with the original conspirators”).

Here, the Ninth Circuit departed from *Socony-Vacuum* by incorrectly applying the rule of reason to the conspiracy. Indeed, the Ninth Circuit did not even consider whether the *per se* rule might even apply in the first instance, let alone whether it applied to both the horizontal and facially vertical aspects of the conspiracy. This clear contravention of this Court’s precedent was compounded by the Ninth Circuit’s additional failure to recognize that the Unions lost

their limited statutory immunity from the antitrust laws because they conspired with Kaiser, a nonlabor entity, to restrict competition in the market.

2. The Unions Lost Their Limited Antitrust Immunity Because They Conspired With Kaiser, A Nonlabor Entity, To Restrain Competition In A Market

Because a union is nothing more than a cartel of laborers combining to fix, stabilize, peg, or increase labor wages, the federal courts began applying the Sherman Act to unions shortly after its enactment by Congress. *See, e.g., Loewe v. Lawlor*, 208 U.S. 274, 292 (1908) (holding that a labor union itself constitutes a conspiracy in violation of Sherman Act). Largely in response to complaints by unions regarding the Sherman Act's application to them, Congress created a limited exemption from the antitrust laws for labor unions through the Clayton Act, 15 U.S.C. § 17, and the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* These two statutes became "[t]he basic sources of organized labor's exemption from the federal antitrust laws." *Connell Const.*, 421 U.S. at 621-22.

"These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws." *Id.* (citing *United States v. Hutcheson*, 312 U.S. at 662). This has been referred to as labor's "statutory" exemption from the antitrust laws. However, this "statutory" exemption is limited, and does not "exempt concerted action or agreements between unions and nonlabor parties." *Id.* (citing *Pennington*, 381 U.S. at 662). Put simply, because the

unions combined with a nonlabor entity, Kaiser, the limited “statutory” immunity does not apply.

This Court also has recognized a “nonstatutory” immunity attendant to some agreements between unions and employers, even though employers are “nonlabor” parties. Specifically, in order to accommodate congressional policy favoring collective bargaining under the National Relations Labor Act (“NLRA”), and the congressional policy favoring free competition in the business market, this Court has held that “some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.” *Id.* (citing *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965)). However, this nonstatutory exemption does not apply in a number of circumstances including when, like here, a union and a nonlabor party agree to restrain competition in a business market. *Connell Constr.*, 421 U.S. at 622-23 (citing *Allen Bradley*, 325 U.S. at 806-11).

Having conspired with Kaiser, a nonlabor entity, to both eliminate competitors in the market and fix the prices of wages and services, the Unions lost their limited exemption from the antitrust laws. The result is that the Unions are an unprotected naked horizontal conspiracy of workers, union leaders, and union entities unlawfully fixing prices in a market. This is a *per se* violation of Section 1 standing alone. See *Socony-Vacuum*, 310 U.S. at 223. This horizontal conspiracy then went one step further, conspiring with Kaiser, a facially vertical participant, to restrain competition and fix prices in the market.

Despite what this Court identified in *Allen Bradley* as a *per se* violation of the Sherman Act, the Ninth Circuit applied the rule of reason to all aspects of the conspiracy. It did so without even discussing, much

less considering the *per se* rule. In so doing, the Ninth Circuit failed to follow this Court's precedent which holds that having lost their antitrust exemption by virtue of combining with Kaiser to restrain competition, the *per se* rule applies to the unions and to Kaiser's vertical conduct as well. See *Allen Bradley*, 325 U.S. at 808-10, *Connell Const.*, 421 U.S. at 622-23.

This case also presents an issue that has divided the circuits for many years, and which this Court has not yet addressed. The unresolved division in the circuits is whether the *per se* rule applies to all non-exempt union combinations as a matter of course. Compare *S.-E. Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767, 775 (6th Cir. 1970) ("when a labor union and an employer enter into a plan or scheme of the type which results in the union losing its exemption from liability under the antitrust law, that plan or scheme is by definition an unreasonable restraint") with *Larry V. Muko, Inc. v. Southwestern Pennsylvania Bldg. & Constr. Trades Council*, 670 F.2d 421, 427-28 (3rd Cir. 1982) (traditional antitrust principles should be applied to challenged restraint, including whether *per se* rule or rule of reason should be applied); *Ackerman-Chillingworth v. Pacific Elec. Contractors Ass'n*, 579 F.2d 484, 491-92 (9th Cir. 1978) (same); see also *Berman Ents. Inc. v. Local 333, United Marine Div., ILA*, 644 F.2d 930, 936 (2d Cir. 1981) (assuming without discussion that the rule of reason was applicable to a union's alleged conspiracy with an employers' association).²

² The Ninth Circuit failed to even apply its own formulation articulated in *Ackerman-Chillingworth*—that traditional antitrust principles should be applied once it is determined that union activity falls outside the labor exemption. Had it done so,

B. Application Of The Rule of Reason To Kaiser's Vertical Participation In The Conspiracy Conflicts With This Court's Precedent And Furthers A Circuit Split

Prime alleged below that Kaiser knowingly participated in and facilitated the conspiracy. First and foremost, Kaiser funded the Unions' actions to the tune of millions of dollars. Kaiser also compensated the Unions' leadership for their role in the conspiracy and took steps to ensure that competing unions would not supplant its co-conspirators in representing Kaiser's employees.

Because Kaiser knowingly participated in and facilitated a conspiracy which is *per se* illegal under the Section 1 of the Sherman Act, it is likewise deemed to be guilty of violating Section 1. 15 U.S.C. § 1. The fact that Kaiser was positioned in a facially vertical relationship to the Unions neither alters this outcome nor confers rule of reason scrutiny on Kaiser's conduct in the conspiracy.

This Court has long made clear that, when a horizontal combination is subject to *per se* condemnation, a vertical participant joining, participating, or otherwise facilitating that conspiracy is likewise subject to *per se* condemnation. *See United States v. General Motors*, 384 U.S. at 145; *Klor's, Inc.*, 359 U.S. at 212-213; *Interstate Circuit*, 306 U.S. at 225-227.

This Court has reached the same conclusion when faced with union-employer conspiracies involving ver-

it would have readily concluded that, having lost the antitrust exemption, the *per se* rule applied because the object of the conspiracy was to fix prices.

tical and horizontal elements. Indeed, given the horizontal nature of labor unions and the loss of their limited antitrust exemption upon combining with an employer, *per se* condemnation of an employer's conduct is even more compelling. For example, in *Allen Bradley*, this Court held that an agreement among employers and union members that was not protected by the labor exemption was equivalent to a horizontal price-fixing agreement. 325 U.S. at 810; *see also H.A. Artists & Assoc., Inc. v. Actor's Equity Ass'n*, 451 U.S. 704, 716 (1981) ("A business monopoly is no less such because a union participates, and such participation is a violation of the Act.") (quoting *Allen Bradley*, 325 U.S. at 811).

Consistent with this precedent, the Sixth and Fourth Circuits have applied *per se* treatment to union-employer conspiracies designed to eliminate competition or fix prices. *See S.-E. Coal*, 434 F.2d at 775 (agreement between labor union and employee to impose agreed upon wages and royalties upon smaller non-union coal producers to eliminate those producers from the market would be *per se* violation of Section 1); *Nat'l Elec. Contractors Ass'n, Inc. v. Nat'l Constructors Ass'n*, 678 F.2d 492, 501 (4th Cir. 1982) (where union-employer conspiracy called for union to take action that would increase the costs of employers' competitors, that agreement was a *per se* violation of Section 1).

Outside the "union-employer" context, other circuits have similarly followed this Court's precedent holding that where a vertical entity participates in, or otherwise facilitates a horizontal conspiracy among competitors, that vertical participant does not escape *per se* condemnation simply by virtue of its vertical relationship. For example, only recently, the Second Circuit

held that where the objective or type of restraint a vertical participant agrees to impose is horizontal and *per se* illegal, like price fixing, the fact that a participant stands in a vertical relationship makes no difference—*per se* condemnation of the vertical actor is appropriate as well. *United States v. Apple, Inc.*, 791 F.3d 290, 322-24 (2d Cir. 2015); *see also Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 932 (7th Cir. 2000); *MM Steel*, 806 F.3d at 849.

The Third Circuit, however, outside the “union-employer” context has departed from this Court’s precedent holding that the rule of reason is the appropriate level of scrutiny where a vertical participant joins and facilitates a horizontal price fixing conspiracy. Specifically, in *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3rd Cir. 2008), a manufacturer facilitated and participated in a horizontal agreement among dealers not to compete on price by agreeing to punish dealers that cheated on the arrangement. *Id.* at 219-20. Although the horizontal agreement was held to be *per se* unlawful, the Third Circuit applied the rule of reason to the vertical participant’s conduct. In doing so, the court flatly held that “[t]he rule of reason analysis applies even when, as in this case, the plaintiff alleges that the purpose of the vertical agreement ... is to support illegal horizontal agreements...” *Id.* at 225.

Here, the Ninth Circuit departed from *General Motors*, *Klor’s*, *Interstate Circuit*, and *Allen Bradley* by applying the rule of reason, without any analysis or justification for doing so, to not only the horizontal agreement between the Unions, but also to the combination in its entirety which included Kaiser as a vertical participant. In doing so, the Ninth Circuit joined the Third Circuit in departing from the Second

Circuit, Seventh Circuit, Sixth Circuit, Fourth Circuit, and this Court's precedent in holding that rule of reason inquiry is appropriate where a vertical participant joins and facilitates a horizontal price fixing conspiracy.

The Ninth Circuit's decision here, as well as the Third Circuit's decision in *Toledo Mack*, cannot be reconciled with *Apple* and *Toys "R" Us*. Had this case arisen in either the Second or Seventh Circuit (or any other circuit following this Court's precedent in *Allen Bradley*, *General Motors*, *Klor's*, and *Interstate Circuit*), Kaiser and the Unions' conduct would have been assessed under the *per se* standard. Indeed, an even stronger case for *per se* treatment exists in this case because the Unions, having lost their limited antitrust immunity by virtue of combining with Kaiser, are themselves nothing more than cartels, a *per se* violation of Section 1.

II. The Issues In This Case Present An Opportunity To Bring Clarity To Fundamentally Misunderstood And Often Misapplied Principles Of Labor Antitrust Law

Although labor issues under the Sherman Act are as old as the Act itself, and this Court has on many occasions addressed these issues, substantial confusion and disagreement exists regarding the application of antitrust laws to labor actors. The lack of clarity on where to strike the balance between labor policy and the application of the Sherman Act to combinations involving labor and non-labor entities has led to decisions which are often decided based on policy and not law. As one dissenting circuit judge observed, outcomes in this area often are driven by a decision maker's "political, sociological, and economic

philosophies” *Larry V. Muko, Inc. v. Southwestern Pennsylvania Bldg. & Constr. Trades Council*, 609 F.2d 1368, 1377-78 (3rd Cir. 1979) (Aldisert, J., dissenting). The result has been the creation of a body of authority that one court has defined as “confused.” *R.D. Anderson Construction Co. v. Hankamer*, 117 L.R.R.M. (BNA) 2774, 2776 (D. Kans. Sept. 13, 1983).

While the Sherman and Clayton Acts introduced a great debate regarding whether antitrust laws should apply to labor, the fact is that antitrust law always has applied to labor. What this Court has recognized are two limited antitrust exemptions for labor which, generally speaking, apply only so long as labor does not carry out its objectives by means of a conspiracy with nonlabor parties. Once labor does so combine, the exemptions are lost, and what remains is an unprotected price fixing conspiracy. *Allen Bradley*, 325 U.S. at 808-10; *USS-Posco Indus.*, 31 F.3d at 806-7. As such, basic antitrust principles mandate the application of a *per se* rule once the exemptions are found not to apply.

The confusion in the law has been created by the lower courts’ reluctance to apply these principles, and instead casting about for ways to evaluate labor antitrust claims based on the legitimacy of labor’s objectives. Because no basis exists to apply such an analysis to the naked market restraint represented by labor, the rule of reason has in practice become merely a back-door method of reinstating labor’s antitrust exemption where it should not exist. That result is evident in the Ninth Circuit’s application of a rule of reason analysis to determine that there was no injury to competition, despite the existence of a price fixing conspiracy.

Indeed, the district court's decision illustrates precisely this error, conflating the analysis of whether the Unions were properly pursuing a labor objective with whether they were pursuing those claimed interests through the unlawful means of an antitrust conspiracy. This error is evident in the district court's finding that the Unions' campaign activities could not have injured competition under the rule of reason because the Unions were "engaged in traditional union activities to pressure non-labor entities to become unionized." App. 35a.³

This oft-repeated confusion results from the courts attempting to strike a balance between national labor policy and the antitrust laws. In many cases, the need for an accommodation and balancing make for "hard cases." However, no balance need be struck where, as here, the conspiracy is between labor unions and an employer which seeks to disadvantage its competitors. In such case, labor law and antitrust law are in perfect alignment.

Where a union conspires with an employer in the marketplace, it has by definition a conflict that precludes its pursuit of any labor objective as respects competitors of that employer. As the National Labor Relations Board (NLRB) has recognized, where a union "has acquired a special interest which may well be at odds with what should be its sole concern—that of representing the interests of Respondents' employees," such a conflict "renders almost impossible the operation of the collective bargaining process." *Bausch*

³ This analytical error was compounded by the district court's improper determination, at the Rule 12 stage, of the factual issue of whether the union activity constituted traditional union activities.

& Lomb Optical Co., 108 N.L.R.B. at 1559. *Bausch & Lomb Optical Co.*, involved a factual situation where the union had become a competitor of the employer, a situation no different as a practical matter from a union becoming a *de facto* competitor by allying itself with the interests of one employer above all others. See, e.g., *Harlem Rivers Consumers Coop.*, 191 N.L.R.B. 314 (1971) (union agent held “equity-like” interest in the business of a competitor); *Pony Express Courier Corp.*, 297 N.L.R.B. 171 (1989) (union agent provided consulting services to the employer’s competitor).

The NLRB’s conflict of interest cases illustrate that the conflict between labor and antitrust law simply does not exist in cases where labor has allied itself with an employer in the very industry where it seeks to represent the employees of competitors. The antitrust violation arises at the same point at which a union’s labor law rights are extinguished. In other words, the combination with an employer which gives rise to the unlawful antitrust conspiracy also makes illegitimate a union’s attempt to represent the employees of competitors.

Clarity on the issues presented in this case also is needed because unions have blurred the distinction between acting as an employee representative and advocating for specific or favored business operations. For example, the BlueGreen Alliance bills itself as uniting the largest labor unions with environmental groups to address the issues of “climate change and environmental hazards” in “an interconnected global economy.” BlueGreen Alliance/ About Us; <http://www.bluegreenalliance.org/about> (last visited May 26, 2016). It claims to focus on developing:

. . . commonsense solutions to our environmental challenges in a way that creates and maintains quality, family-sustaining jobs across the economy. Our staff and supporters design public policies, perform research, and run public education and advocacy campaigns to advocate for practical solutions; facilitate dialogue between environmentalists, union members and other stakeholders; and educate America's labor union members and environmentalists about the economic and environmental impacts of climate change and the job-creating opportunities of environmental protections.

Id. Such pursuits necessarily affect how businesses should be run and regulated because how to resolve environmental issues, and in particular deal with the complex issues of climate change, is a central challenge for all businesses. This nonlabor activism by labor unions translates into picking winners and losers in a competitive marketplace. The Court should clearly delineate when these nonlabor activities receive the special antitrust treatment only afforded to labor unions acting as labor unions.⁴

Additionally, over the past thirty (30) years, unions have turned away from the organizing and bargaining framework of the NLRA and increasingly turned to "corporate campaign" tactics.

⁴ Such a determination would be consistent with the limited nature of the labor exemptions. Indeed, the Ninth Circuit in *USS-POSCO Industries* recognized that giving all of the activities of a labor union the cover of the labor exemptions would strain those exemptions past their breaking point. 31 F.3d at 807.

[T]he term [corporate campaign] encompasses a wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. These tactics may include, but are not limited to, litigation, political appeals, and requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public.

Food Lion, Inc. v. UFCW, 103 F.3d 1007, 1014 (D.C. Cir. 1997). In other words, the unions no longer focus on the workplace, but rather seek to change the entire competitive environment within which the employer operates. Where, as in this case, these tactics are used to advance the interests of a specific competitor in the marketplace, they can distort the market far more than any mere combination of competitors.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD S. SCHEIDEMAN

Counsel of Record

JOSEPH A. TURZI

COLLEEN HANRAHAN

DLA PIPER LLP (US)

500 Eighth Street, N.W.

Washington, D.C. 20004

(202) 799-4000

edward.scheideman@dlapiper.com