IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DONALD CONRAD, on Behalf of Himself and All Others Similarly Situated, Plaintiff, v. JIMMY JOHN'S FRANCHISE, LLC, *et al*., Defendants.	Case No. 3:18-cv-00133-NJR

PLAINTIFF'S RESPONSE TO JIMMY JOHN'S
NOTICE OF SUPPLEMENTAL AUTHORITY

Jimmy John's attempts to twist a unanimous win for the *plaintiffs* in *Alston* into an endorsement of the No-Poach Agreement at issue in this case. According to Jimmy John's, *Alston* reversed a century of hornbook antitrust law and "makes clear" that even "admitted horizontal wage-fixing by interbrand competitors with proven (not disputed) anticompetitive effects is appropriately analyzed under the Rule of Reason." Doc. 237 at 2. This argument is, to put it bluntly, ludicrous. Horizontal wage-fixing, and other agreements not to compete in the labor setting, have long been rejected under the antitrust laws. *Alston* itself cites approvingly to *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411 (1990), Op. 23, which applied the *per se* standard to a horizontal agreement regarding lawyer compensation. *See also* Kavanaugh Concurrence at 3 ("Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work.") Whatever "complexity" exists in Jimmy John's franchising system, it is irrelevant to assessing the legality of a labor restraint that is unnecessary to a legitimate collaborative purpose. "[T]he ability of McDonald's franchises to

coordinate the release of a hamburger does not imply their ability to agree on wages for counter workers[.]" Op. 18 (quoting *Chicago Professional Sports Ltd. Partnership v. National Basketball Assn.*, 95 F.3d 593, 600 (7th Cir. 1996)).

Like the NCAA in *Alston*, Jimmy John's "is free to argue that, because of the special characteristics of its particular industry, it should be exempt from the usual operation of the antitrust laws—but that appeal is properly addressed to congress." Op. 24 (edits and quotation omitted). "But until congress says otherwise, the only law it has asked us to enforce is the Sherman Act, and that law is predicated on one assumption alone—competition is the best method of allocating resources in the Nation's economy." *Id.* (quotation omitted).

Further, even in the specific and unusual context of NCAA athletics, where the product itself consists of performed coordination among competing schools, *Alston* acknowledges that the quick look standard may be appropriate depending upon the nature of the restraint. Op. 16. *Alston* substantial relies upon *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984), in which the Supreme Court applied the quick look standard to condemn the NCAA's plan to televise college football. An unusual aspect of *Alston* is that the *defendant* invoked the quick look test as a path to immunity, rather than the plaintiff as a method to establish violation. "While *Board of Regents* did not condemn the NCAA's broadcasting restraints as *per se* unlawful, it invoked abbreviated antitrust review as a path to condemnation, not salvation." Op. 19. It was only this unusual invocation of the quick look test *by the defendant* that *Alston* rejected, and only given the particular facts at issue there. *Alston* confirms "[w]hether an antitrust violation exists depends on a careful analysis of market realities. If those market realities change, so may the legal analysis." *Id.* at 21. The legal decision whether to apply the rule of reason, quick look, or *per se* standard turns on what the facts show at the merits

stage.

Under *Alston*, just as before, a plaintiff must show anticompetitive effects. Op. 24-25. Under the *per se* test, such effects are presumed for market divisions among competing employers. *Cf. id.* at 14, 19. Under the rule of reason, such effects must be proven, but the degree and manner of proof "can vary depending on the circumstances." *Id.* at 25 (rule not "a rote checklist" nor "inflexible substitute for careful analysis"). *Alston* confirms the quick look test may also provide "a path to condemnation" when a restraint resembles one normally unlawful *per se*. *Id.* at 19.

Finally, Jimmy John's also incorrectly asserts that *Alston* requires review of whether suppressed Class wages somehow yields benefits in the market for Jimmy John's sandwiches. In fact, the Supreme Court expressly stated that it was not adopting such a requirement because the parties had not presented the question to the Court. Op. 15 (explaining that some *amici* had challenged the suitability of a cross-market analysis but "the parties before us do not pursue this line" and "we express no views on [such issues]"). There is no reason to believe that such cross-market analysis would be necessary, or even relevant. "All of the restaurants in a region cannot come together to cut cooks' wages on the theory that 'customers prefer' to eat food from low paid cooks. . . . Or to put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition." Kavanaugh Concurrence at 3-4.

Dated: July 7, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List. I also caused to be transmitted to all counsel of record copies of under seal filings.

/s/ *Dean M. Harvey*
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