No. 26-10394

In the United States Court of Appeals for the Fifth Circuit

X CORP.,

Plaintiff-Appellant,

v.

MARS, INCORPORATED; CVS HEALTH CORPORATION; NESTLE SA; NESTLE USA, INCORPORATED; ABBOTT LABORATORIES; COLGATE-PALMOLIVE COMPANY; LEGO A/S; LEGO BRAND RETAIL, INCORPORATED; PINTEREST, INCORPORATED; TYSON FOODS, INCORPORATED; SHELL USA, INCORPORATED; SHELL BRANDS INTERNATIONAL AG; ORSTED SERVICES A/S,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Texas, No. 7:24-cv-114

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rules 29.2 and 28.2.1, Amici Curiae the Chamber of Commerce of the United States of America and the National Association of Manufacturers make the following supplemental statement of interested persons. In addition to the persons and entities listed in the certificates of interested persons filed by the parties and other amici curiae, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amici Curiae

- The Chamber of Commerce of the United States of America
- National Association of Manufacturers

Counsel for Amici Curiae

- Lauren Willard Zehmer, Covington & Burling LLP
- Alexander J. Cave, Covington & Burling LLP

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record certifies that the Chamber of Commerce of the United States of America ("Chamber") is a nonprofit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held corporation has 10% or greater ownership in the Chamber. Undersigned counsel of record also certifies that the National Association of Manufacturers ("NAM") is a

nonprofit trade association. The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM.

Date: November 10, 2026

/s/ Lauren Willard Zehmer
Lauren Willard Zehmer

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INTEREST OF AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all fifty states and in every industrial sector. Manufacturing employs nearly 13 million people, contributes $3.0 trillion to the economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation, fostering the innovation that is vital for this economic ecosystem to thrive. The NAM is the voice of the

* This brief is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of all parties. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici curiae state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici curiae, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Chamber and the NAM submit this amicus brief to address one question: whether the alleged conduct in this case should be judged under the *per se* rule or the rule of reason.[1] Thousands of Chamber and NAM members belong to trade associations, standard-setting bodies, certification programs, and joint ventures that adopt common definitions, common measurement protocols, and common quality specifications. Those members plan their conduct in advance, and they need to know whether routine collaboration of that kind carries exposure to *per se* condemnation and treble damages under 15 U.S.C. § 15. In keeping with the Supreme Court's clear shift in guidance in recent decades, the vast majority of conduct—including most concerted refusals to deal—should be analyzed under the rule of reason. The conduct here does not come within the narrow circumstances under which an alleged group boycott merits *per se* condemnation.

[1] The Chamber and the NAM take no position on any other issue in this appeal, including whether X plausibly has alleged antitrust injury or failed to state a claim under the rule of reason.

INTRODUCTION AND SUMMARY OF ARGUMENT

In recent decades, the Supreme Court has sharply limited the circumstances in which conduct may be held *per se* unlawful under the antitrust laws. Under its guidance, antitrust claims generally are subject to the rule of reason except for the most obviously anticompetitive restraints that courts can condemn without examining their actual competitive effects or justifications. A rule of reason analysis requires plaintiffs to demonstrate that a defendant's conduct causes anticompetitive effects and that those effects outweigh any procompetitive benefits. Consistent with those principles, precedent from the Supreme Court and this Court limits *per se* treatment of alleged concerted refusals to deal, including "group boycotts," to a narrow category of cases involving horizontal competitors with market power or control of an essential element of competition, where the restraint has no plausible procompetitive justification.

In this case, however, *per se* treatment is unwarranted because the allegations satisfy none of these criteria. X alleges that a group of firms acting within a trade association conspired together to agree not to purchase advertising on X's social media platform. The agreement X alleges, though, is not one among horizontal competitors, but rather a set of companies in a variety of unrelated industries (including, for instance, a candy maker, a toy maker, an energy company, and a pharmacy chain). Nor did this small group enjoy market power or control of a

critical input—they could not and did not force any other firm to stop advertising on X, and their business was anything but essential to X, given the company's broad base of advertising customers. And finally, the alleged agreement had plausible procompetitive benefits. Defendants explain that the alleged objective was not to influence prices or push a competitor out of the market, but rather to develop standards that could reduce transaction costs for advertisers and platforms and improve online advertising for advertisers and platforms alike. *See, e.g.*, Appellees' Br. 62–63 (citing ROA.501–02, 504–05).

This Court should decline to water down the important limits on the *per se* rule, and it should instead apply the rule of reason. Failure to enforce those limits at the pleading stage in particular imposes serious costs on businesses and the broader economy. It opens the door to sweeping and expensive antitrust discovery—with its "unusually high" costs, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007)—with no need for a plaintiff to plausibly allege a relevant market, market power, or harm to competition. It pressures defendants to enter lopsided settlements rather than incur those costs and, ultimately, risk treble damages before a jury. And it deters procompetitive conduct that the antitrust laws exist to encourage.

In reviewing the district court's dismissal order, the Court should thus make clear that *per se* treatment for concerted refusals to deal is reserved for a narrow category of antitrust claims and is not applicable here.

ARGUMENT

I. Recent Supreme Court and Fifth Circuit Precedent Makes Clear That Antitrust Claims, Including Concerted Refusal to Deal Claims, Are Generally Subject to the Rule of Reason, Not *Per Se* Condemnation.

Antitrust law provides two basic rules of liability: the rule of reason and the *per se* rule. In cases under Section 1 of the Sherman Act, the rule of reason demands that courts "consider whether the particular agreement at issue in fact operates as an unreasonable restraint on competition." *Tunica Web Advert. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 411–12 (5th Cir. 2007). And it allows for liability "only if the plaintiff shows that [the agreement] actually had an adverse effect on competition." *Id.* at 412. The *per se* rule, by contrast, imposes liability without "the usual proof that the agreement at issue is actually anticompetitive in the particular case." *Id.* Put another way, if a given "category[] of restraint[]" is subject to the *per se* rule, it is "necessarily illegal." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

Historically, the Supreme Court condemned a broad range of conduct as *per se* unlawful. For example, vertical agreements on resale prices—those between actors at different levels in a market, such as manufacturers and distributors or retailers, as opposed to rivals who compete horizontally at the same level—were always illegal. *See Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407–09 (1911) (agreements setting minimum resale prices); *Albrecht v. Herald Co.*,

390 U.S. 145, 152–53 (1968) (agreements setting maximum resale prices). So were vertical territorial restraints limiting where a product could be sold once purchased by a distributor or retailer. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967). The Court also historically placed group boycott claims in "the forbidden category," where defendants were not to be "saved by allegations that [their conduct] [was] reasonable in the specific circumstances," and conduct was prohibited "[e]ven when [it] operated to lower prices or temporarily to stimulate competition." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959).

For decades now, however, the Court has been steadily narrowing "the forbidden category" of *per se* unlawful restraints. For example, it overruled *Schwinn* in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), holding that vertical territorial restrictions should be subject to the rule of reason rather than the *per se* rule and warning that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than … formalistic line drawing." *Id.* at 58–59. Then, in *State Oil Co. v. Khan*, 522 U.S. 3 (1997), the Court overruled *Albrecht*, applying the rule of reason rather than the *per se* rule to maximum resale price agreements and explaining that "we have expressed reluctance to adopt *per se* rules with regard to 'restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.'" *Id.* at 11 (quoting *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458–59 (1986)). And most

recently, in *Leegin*, the Court overruled *Dr. Miles* and held that the rule of reason should apply to minimum resale price maintenance. In doing so, the Court squarely rejected the notion that "*per se* illegality is the rule rather than the exception," *Leegin*, 551 U.S. at 895, and confirmed instead that "[t]he rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1," *id.* at 885.

The result of these developments is that the bar for subjecting an alleged restraint to *per se* treatment is now exceedingly high. "Resort to *per se* rules," the Court has warned, "is confined to restraints … 'that would always or almost always tend to restrict competition and decrease output.'" *Id.* at 886 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)). The restraint must be of a type that is "manifestly anticompetitive" and devoid of "any redeeming virtue." *Id.* at 887 (first quoting *GTE Sylvania*, 433 U.S. at 50; then quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985)). And given "the inherent limits" on courts' ability to "master an entire industry" and the fact "that there are often hard-to-see efficiencies attendant to complex business arrangements," courts must be all but certain that this test is satisfied before concluding that *per se* treatment is appropriate. *NCAA v. Alston*, 594 U.S. 69, 89 (2021). Doing so is only appropriate if courts have developed "considerable experience with the type of restraint at issue" and are thus able to "predict with

confidence that it would be invalidated in all or almost all instances under the rule of reason." *Leegin*, 551 U.S. at 886–87.

Few restraints satisfy these demanding standards. Consistent with that approach, the Court repeatedly has declined to displace the rule of reason and expand the scope of the *per se* rule. *See, e.g.*, *Alston*, 594 U.S. at 89–93 (rejecting *per se* treatment of student athlete compensation limits); *Texaco Inc. v. Dagher*, 547 U.S. 1, 5–6 (2006) (same, as to joint venture's pricing). And in practice, *per se* condemnation now reaches only the most flagrant of restraints, such as "horizontal agreements among competitors to fix prices or to divide markets." *Leegin*, 551 U.S. at 886 (citation omitted); *see also, e.g.*, *Ohio v. Am. Express Co.*, 585 U.S. 529, 540–41 (2018).

The Court's clear shift from *per se* liability to the rule of reason for antitrust claims extends to alleged concerted refusals to deal. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), the Court—even years before *Leegin* articulated its warning against overzealous application of the *per se* rule—identified the considerations that "defin[e] the category of concerted refusals to deal that mandate *per se* condemnation." *Id.* at 293–94. Recognizing that the implications of conduct labeled "group boycott" may be "far from certain," the Court stressed the need for "care" in application of the *per se* rule to such claims. *Id.* at 293–94.

The Court explained that *per se* unlawful group boycotts "generally involve[] joint efforts by a firm or firms to disadvantage competitors"—*i.e.*, horizontal rivals—by foreclosing "relationships the competitors need in the competitive struggle." *Id.* at 294 (citation omitted). The boycott participants, in other words, must "cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete," or otherwise "possess[] a dominant position in the relevant market." *Id.* And, consistent with the foundations of *per se* liability, there must be no "plausible arguments" that the boycott "enhance[s] overall efficiency." *Id.* In short, as with other antitrust claims, the Court demanded unusual "circumstances" indicating that the "likelihood of anticompetitive effects" resulting from the boycott "is clear" and "the possibility of countervailing procompetitive effects is remote" for the *per se* rule to apply. *Id.*

One year after *Northwest Wholesale Stationers*, the Court again declined to force an association's conduct into "the 'boycott' pigeonhole" and "invok[e] the *per se* rule." *Ind. Fed'n of Dentists*, 476 U.S. at 458. Rather, the Court warned that the category of *per se* unlawful group boycotts "is not to be expanded indiscriminately" and "has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." *Id.* And in *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998), the

Court reiterated that "precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors." *Id.* at 135.

The Court has been especially reluctant to apply *per se* rules to alleged boycotts involving plausibly procompetitive "cooperative arrangements," like joint purchasing cooperatives and trade groups. *Nw. Wholesale Stationers*, 472 U.S. at 295. In *Northwest Wholesale Stationers*, for example, the Court explained that "[w]holesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively," and that "unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion [from the cooperative] is virtually always likely to have an anticompetitive effect is not warranted." *Id.* at 296. And in *Indiana Federation of Dentists*, the Court expressed hesitance more broadly to "condemn rules adopted by professional associations as unreasonable *per se*." 476 U.S. at 458.

This Court has followed the Supreme Court's lead. *See, e.g.*, *Quadvest, L.P. v. San Jacinto River Auth.*, 187 F.4th 745, 758 (5th Cir. 2026) (noting courts' "reluctance to adopt *per se* rules" (citation omitted)); *Gross v. Mem'l Hosp. Sys.*, 789 F.2d 353, 355–56 (5th Cir. 1986) (declining to apply the *per se* rule to an alleged group boycott). In the leading case—*Tunica Web Advertising v. Tunica Casino Operators Ass'n*, 496 F.3d 403 (5th Cir. 2007)—this Court declared the "group boycott" label "only minimally useful since many arrangements that are literally

concerted refusals to deal have potential efficiencies and are judged under the rule of reason." *Id.* at 414 (quoting *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 61 (1st Cir. 2004)). The Court further explained that "a necessary precondition for a *per se* unlawful group boycott is that it must be 'horizontal,' *i.e.*, it must involve an agreement among firms that ordinarily compete with one another at the same level of the market." *Id.* at 412 (quoting *NYNEX*, 525 U.S. at 135). And drawing on the Supreme Court's guidance, it identified the factors that separate *per se* unlawful concerted refusals to deal from those subject to the rule of reason: "(1) whether the [participants] hold a dominant position in the relevant market; (2) whether the [participants] control access to an element necessary to enable [the alleged victim] to compete; and (3) whether there exist plausible arguments concerning pro-competitive effects." *Id.* at 414–15.

Taken together, Supreme Court and Fifth Circuit precedent identify three core features of a concerted refusal to deal warranting *per se* condemnation: (1) the participants must be direct horizontal competitors; (2) they must hold market power or control an input the target needs; and (3) the conduct must be plainly anticompetitive, with no plausible procompetitive justification. In addition, courts must be especially careful not to stray beyond those bounds in cases involving cooperative arrangements like trade associations or joint ventures.

II. The Alleged Conduct Is Subject to the Rule of Reason, Not the *Per Se* Rule.

The allegations here do not implicate the narrow circumstances in which the *per se* rule applies. The complaint describes an alleged boycott by a small group of firms who sell products in a range of unrelated markets. The complaint, however, fails to plausibly allege that the defendants are direct horizontal competitors with either market power or control over an essential input to X's business. Nor does the complaint plausibly allege that the defendants had an economic objective to harm competition. Every hallmark of a *per se* unlawful group boycott is thus missing, and in adjudicating Defendants' motion to dismiss, the Court should therefore apply the rule of reason.

A. The Alleged Agreement Is Not a Horizontal Agreement Among Direct Competitors.

As noted, and as X acknowledges (at 27), "a necessary precondition for a *per se* unlawful group boycott is that it must be 'horizontal,' *i.e.*, it must involve an agreement among firms that ordinarily compete with one another at the same level of the market." *Tunica*, 496 F.3d at 412 (quoting *NYNEX*, 525 U.S. at 135). In other words, the participants must be "direct competitors." *NYNEX*, 525 U.S. at 135.

Past group boycott cases provide useful examples of economic actors that "ordinarily" and "direct[ly]" compete in the relevant sense. For example, in *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), the Supreme Court held

that the *per se* rule applied where a group of criminal defense lawyers who competed with one another for the same court-appointed criminal defense work conspired "to obtain higher prices for their services" through a "concerted refusal" to accept such appointments unless granted such an increase. *Id.* at 422–23. That conspiracy, the Court explained, amounted to a "horizontal arrangement among … competitors … on price and output." *Id.* at 423. Likewise, in *Tunica*, an alleged agreement among a group of casinos that competed for the same gaming customers in the same Mississippi market was held "clearly … horizontal," as "the casinos [were] direct competitors of one another." 496 F.3d at 412. In each case, the alleged boycott participants sold the same thing to the same customers, and so "ordinarily" and "direct[ly]" competed with each other. *Id.*; *NYNEX*, 525 U.S. at 135.

Although the defendants in this case all purchase online advertising, ROA.531–32, they do not "ordinarily" or "direct[ly]" compete in the relevant sense, because they operate in a wide range of unrelated markets. Rather, the defendants are businesses spanning a host of industries, including a manufacturer of medical and healthcare products, a consumer-products company, a protein producer, an energy company, and a wind-power developer. ROA.531–32 (describing each defendant's cessation or curtailment of advertising after October 2022).

X suggests that the agreement is horizontal because these companies all bid for social media advertising. ROA.537; X Br. 30. But an agreement among a small

group of customers purchasing advertising impressions to market unrelated downstream products bears little resemblance to the "paradigmatic boycott" involving "collective action among a group of competitors that may inhibit the competitive vitality of rivals." *NYNEX*, 525 U.S. at 135–36 (citation omitted). Treating such an arrangement as subject to the *per se* rule reads "ordinarily" and "direct" out of the test for identifying "horizontal" agreements. *Tunica*, 496 F.3d at 412; *NYNEX*, 525 U.S. at 135.

The absence of ordinary and direct competition matters because these GARM members would not have suffered any business harm if others among them kept advertising on X. *Contra* X Br. 30. Take Lego as an example. Lego could have chosen to cease its advertising on X regardless of whether others chose to do the same. Doing so would not have "yield[ed] important advertising opportunities" to its ordinary and direct competitors in the toy business. X Br. 30. Indeed, it is implausible that Lego's business would have been meaningfully affected by whether Colgate, Shell, CVS, Nestlé, Pinterest, Tyson Foods, or Abbott Laboratories continued advertising on X after Lego decided to leave. This distinguishes the alleged conduct from the type of group boycott in which a group of competitors band together to force a supplier to lower prices or drive a competitor out of the market.

B. The Alleged Boycott Participants Had Neither Market Power nor Control of a Critical Input.

Even if the alleged agreement were horizontal, that alone would not "mean that the agreement is *per se* unlawful." *Tunica*, 496 F.3d at 414. After all, for any restraint to be subject to *per se* treatment, courts must, after "considerable experience with the type of restraint at issue," be able to "predict with confidence" that it will essentially always fail under the rule of reason. *Leegin*, 551 U.S. at 886–87. In the context of alleged concerted refusals to deal, that requirement can be satisfied only if the participants hold a "dominant position"—*i.e.*, possess market power collectively—or control some critical "supply, facility, or market" without which the victim cannot feasibly compete. *Nw. Wholesale Stationers*, 472 U.S. at 294; *accord Tunica*, 496 F.3d at 414–15; *see also MM Steel, L.P. v. JSW Steel (USA) Inc.*, 806 F.3d 835, 848 n.7 (5th Cir. 2015) (noting applicability of this rule to boycotts organized by cooperative and professional organizations).

The historical cases again provide helpful illustrations. In *Trial Lawyers Ass'n*, the lawyers who conspired not to accept court appointments constituted "about 90 percent" of the lawyers who regularly did so. 493 U.S. at 416. In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the New York Stock Exchange ordered its members to disconnect the private telephone wires linking them to Silver's nonmember firms—connections Silver "needed in order to compete." *Id.* at 347. In *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656

(1961), a trade association of gas utilities, pipeline companies, and burner manufacturers refused to approve Radiant's gas burner, and the utilities refused to supply gas to any burner lacking approval—leaving Radiant's burners with no fuel. *Id.* at 658–60. In *Associated Press v. United States*, 326 U.S. 1 (1945), the AP's bylaws let members block competing newspapers from joining, cutting those papers off from "the chief single source of news." *Id.* at 18. And in *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941), garment makers controlling more than 38 percent of the market—and over 60 percent in some price ranges—refused to sell to retailers that carried copies of their designs. *Id.* at 462, 467. In each case, the boycotting group controlled something the target could not do without.

Again, the situation X alleges here is markedly different. The GARM members who allegedly stopped advertising on X hold no dominant market position: only a small share of World Federation of Advertisers ("WFA") members belonged to GARM, ROA.496–97, and fewer still are alleged to have ceased their purchases, ROA.531–32. In other words, according to the complaint's own allegations, the vast majority of X's massive advertising customer base continued to buy from X, and even some GARM members continued to advertise. *See* X Br. 51 (acknowledging that "not every GARM member joined the conspiracy").

Nor do the defendants control an input X needs to compete. To be sure, advertising revenue is important to X's business model. But the 18 advertisers

actually alleged to have participated in the conduct at issue could not and did not stop anyone else from advertising on X. And the complaint does not plausibly allege that the spending of these particular companies was somehow essential to X's business operations—nor could it, given the thousands of other companies to which X can and did sell advertising impressions.

By necessity, then, X focuses on WFA and GARM as wholes. In attempting to allege a dominant market position or control of advertising revenue, it points to WFA members' share of global brand-advertising spending and the influence GARM as a whole purportedly exercised over Meta. X Br. 31. But those allegations say nothing about the competitive significance of the conduct actually at issue here: decisions by a small group of firms from disparate industries to stop advertising on X. The complaint does not plausibly allege that this particular group of companies somehow "hold[s] a dominant position in the relevant market" or "control[s] access to an element necessary to enable [X] to compete," *Tunica*, 496 F.3d at 414, and thus X has not plausibly alleged a restraint that is "manifestly anticompetitive," *Leegin*, 551 U.S. at 886 (quoting *GTE Sylvania*, 433 U.S. at 50).

C. Defendants Point to Plausible Procompetitive Benefits of the Alleged Conduct.

Unlike horizontal price-fixing or market allocation agreements, concerted refusals to deal are not the sort of conduct that is always and inherently anticompetitive. On the contrary, as this Court has noted, "many … concerted

refusals to deal have potential efficiencies." *Tunica*, 496 F.3d at 414. And that is especially true of conduct involving "cooperative arrangements" like joint ventures and trade groups, which typically increase economic efficiency and make markets *more* competitive. *Nw. Wholesale Stationers*, 472 U.S. at 295; *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) (collective standard-setting "can have significant procompetitive advantages"); *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 776 F.3d 321, 329 (5th Cir. 2015) (such standards are often "essential to 'creating the product'"). The conduct alleged here—allegedly channeled through GARM, a cooperative advertising standard-setting initiative among companies of all sorts—is no exception. Because defendants point to "plausible arguments" that this alleged conduct "enhance[s] overall efficiency," it is subject to the rule of reason, not the *per se* rule. *Nw. Wholesale Stationers*, 472 U.S. at 294.

Companies understandably care what content appears beside their ads. A toy company, for example, trying to attract young children and their parents does not want its ad next to alcohol-related content. ROA.505. Yet negotiating placement terms separately for every advertisement on every platform was costly, inefficient, and burdensome for all involved, including X. ROA.498–99, 505. Indeed, conducting "thousands of individual negotiations" like that may have proved a "virtual impossibility" for all involved. *Broad. Music, Inc. v. Columbia Broad. Sys.,*

Inc., 441 U.S. 1, 20 (1979). Accordingly, GARM and its members—including platforms in general, and X specifically—responded by developing common definitions of unsuitable content, common ways to measure it, and independent verification. ROA.501–03. Shared standards like these can lower transaction costs for buyers and sellers alike, and an arrangement that cuts costs that way is not a naked restraint of the sort that warrants *per se* condemnation. *Broad. Music*, 441 U.S. at 20–21; *see also Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999) (dental association's advertising restrictions "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition"); *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 388, 393 (8th Cir. 2007) (standards that protect the "public image" of industry participants "may be legitimately procompetitive" as they "could promote consumer confidence in the industry as a whole"). That platforms including X participated in GARM further indicates that its efforts were widely understood to help improve online advertising for *both* sides of the market. ROA.500, 516.

X responds that "any legitimate business-based justification … is severely undermined by the fact that X's brand safety practices equaled or surpassed GARM's Brand Safety standards." X Br. 32. But to begin with, that argument addresses only one type of procompetitive benefit; it fails to appreciate that the alleged conduct might significantly lower transaction costs. And the argument sidesteps the relevant

question, which is whether there exist "plausible arguments" that the practice is of a *sort* that is "*intended* to enhance overall efficiency and make markets more competitive." *Tunica*, 496 F.3d at 413–14 (emphasis added) (quoting *Nw. Wholesale Stationers*, 472 U.S. at 294).

The absence of an apparent economic or anticompetitive motive further confirms that the alleged conduct does not fall within the narrow category of concerted refusals to deal that are *per se* illegal. Although the victim of a boycott need not be a competitor of the participants, *id.* at 413–14 (citing *Trial Laws. Ass'n*, 493 U.S. at 422–23), the participants must generally still be pursuing some anticompetitive aim, such as fixing prices above or below the competitive level, *see Nw. Wholesale Stationers*, 472 U.S. at 294. In *Trial Lawyers Ass'n*, for example, the boycotting lawyers' "undenied objective" was "economic advantage" and the immediate object was a higher hourly rate for their own services. 493 U.S. at 426; *see also id.* at 427; *compare NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982) (noting that the boycott's purpose "was not to destroy legitimate competition"); *Allied Tube*, 486 U.S. at 508 (observing that the *Claiborne* boycotters "did not stand to profit financially from a lessening of competition").

As the district court found, X alleged "a conspiracy driven by advertisers not to further X-competitor social media companies' interests but to pursue their own collective interests as to where they place their advertisements." ROA.2446. The

court further emphasized that the alleged participants "merely decided that they would not buy from X for their own advertising needs, notwithstanding if X sold advertising space to anyone else." ROA.2448. And Defendants allegedly paid higher prices for advertising from other social media companies. ROA.2444. The conduct thus bears little resemblance to the paradigmatic *per se* illegal boycott undertaken to drive a competitor out of the market or force a supplier to lower prices.

In sum, the conduct alleged here lacks every hallmark of a *per se* unlawful group boycott. The participants do not ordinarily and directly compete with one another; the complaint does not allege that they had market power or control over any input X needs; and the alleged conduct was plausibly procompetitive and not intended to secure an economic advantage or other anticompetitive objective. Under controlling Supreme Court precedent and *Tunica*, each of those characteristics—and especially when considered all together—takes the alleged conduct outside the narrow category of *per se* unlawful group boycotts.

III. Unwarranted Application of *Per Se* Rules Harms Businesses and Consumers Alike.

It is critical that courts carefully heed the strict limits on *per se* liability. Failure to do so imposes serious costs on both businesses and consumers and undermines the function the antitrust laws are meant to serve: separating anticompetitive conduct from procompetitive conduct and deterring the former while encouraging the latter.

In a case subject to the *per se* rule, there is no need for any "elaborate inquiry as to the precise harm [the conduct] ha[s] caused or the business excuse for [its] use." *MM Steel*, 806 F.3d at 848 (quoting *United States v. Gen. Motors Corp.*, 384 U.S. 127, 146 (1966)). And accordingly, if the *per se* rule applies, a case may survive a motion to dismiss even if the plaintiff fails to allege any of the factual matter normally required to show harm to competition, including actual anticompetitive effects. *See, e.g.*, *New Orleans Ass'n of Cemetery Tour Guides & Cos. v. New Orleans Archdiocesan Cemeteries*, 56 F.4th 1026, 1036 (5th Cir. 2023).

Allowing plaintiffs that free pass into discovery outside the narrow circumstances in which the *per se* rule is appropriate has staggering costs. "[P]roceeding to antitrust discovery can be expensive," and the prospect of that expense "[would] push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Twombly*, 550 U.S. at 558–59. And the prospect that a jury might find liability—thus triggering the antitrust laws' treble-damages remedy, 15 U.S.C. § 15(a)—magnifies that pressure. These dynamics both increase the costs of litigation that would otherwise occur and encourage plaintiffs to bring "frivolous suits against legitimate practices" that they otherwise would not. *Leegin*, 551 U.S. at 895. The result of both effects is to artificially increase litigation costs for businesses. And those increased costs, like any other, ultimately are borne by the very consumers *per se* rules purport to protect, who pay higher prices as a result.

Nor is that the only way consumers suffer. Overinclusive *per se* rules cause firms to "forgo legitimate and competitively useful conduct rather than risk treble damages" in the first place. *Bus. Elecs.*, 485 U.S. at 727–28; *see also, e.g.*, *NYNEX*, 525 U.S. at 135–36 (observing that applying *per se* rule to ordinary supplier switching would "discourage firms from changing suppliers—even where the competitive process itself does not suffer harm"). In other words, as the Supreme Court has put it, applying *per se* rules where unwarranted "prohibit[s] procompetitive conduct the antitrust laws should encourage." *Leegin*, 551 U.S. at 895; *accord Alston*, 594 U.S. at 99.[2] And because procompetitive conduct *is* pro-consumer conduct, consumers face higher prices, lower quality, and less choice as a result.

* * *

For all the reasons explained above, the alleged conduct here does not satisfy the criteria the Supreme Court and this Court have identified for an alleged group boycott to be *per se* unlawful. The Court therefore should be careful not to open the door to sweeping and burdensome antitrust discovery—and thereby risk the "counterproductive" result of deterring potentially procompetitive conduct, *Leegin*,

[2] This concern is especially pronounced to the extent *per se* rules are applied to restraints involving cooperative arrangements like trade groups and joint ventures, which are "not usually unlawful." *Broad. Music*, 441 U.S. at 23; *see also, e.g.*, *Nw. Wholesale Stationers*, 472 U.S. at 295.

551 U.S. at 895—simply because a plaintiff alleges an agreement that it describes by the "minimally useful" label of "group boycott," *Tunica*, 496 F.3d at 414.

CONCLUSION

In reviewing the district court's dismissal order, the Court should hold that the alleged conduct is subject to the rule of reason.

Date: November 10, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Lauren Willard Zehmer
Lauren Willard Zehmer

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5,641 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

I further certify that: (1) any required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission of this document is an exact copy of any corresponding paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus-scanning program and is free of viruses.

Date: November 10, 2026

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