Nos. 04-805 and 04-814

In The
Supreme Court of the United States

TEXACO INC.,

Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Does an agreement by two competing oil companies to fix prices through a joint venture, unrelated to any purpose of the joint venture, violate Section 1 of the Sherman Act under the *per se* rule or quick look rule of reason?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

RULES AND STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

Petitioners Shell Oil Company ("Shell") and Texaco Inc. ("Texaco") formed two joint ventures to refine and sell their brands of gasoline in 1998. The ventures introduced no new products. Agreeing that their brands of gasoline were to be treated equally, Shell and Texaco retained control over how the ventures marketed the brands.

Eight months after forming the ventures, Shell and Texaco agreed with each other to take pricing discretion away from the ventures and directed them to charge the same dealer tankwagon prices for the Shell and Texaco brands of gasoline. Although Shell and Texaco had justified the ventures by alleged cost savings (none of which were passed on to consumers), charging the same prices for the brands resulted in no cost savings or efficiencies, and was not reasonably necessary to achieve any legitimate purpose of the ventures. It also was immediately followed by large price increases in markets where the ventures had dominant shares.

The United States Court of Appeals for the Ninth Circuit quite properly held that a jury could find this conduct to be *per se* unlawful price fixing in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.[1]

Now Shell, Texaco, and their various *Amici* ask this Court to ignore its decision in *Citizen Publ'g Co. v. United States*, 341 U.S. 593 (1969), and abandon over a century of antitrust jurisprudence by holding that simply because Shell and Texaco formed joint ventures, they could engage

[1] The court of appeals did not consider Respondents' alternative claim that the price fixing violated Section 1 under the "quick look" rule of reason.

in price fixing not integral to their ventures.[2] This has never been the law of this Court, and should not become so now.

1. Overview.

On January 1, 1998, Shell and Texaco combined marketing and refining assets in the western United States in a joint venture, Equilon Enterprises LLC ("Equilon"). Joint Appendix ("JA") 73 (¶ 6). On July 1, 1998, they did the same in the eastern United States through a second joint venture, Motiva Enterprises LLC ("Motiva"). JA 73 (¶ 7).[3] Equilon and Motiva marketed the Shell and Texaco brands of gasoline through licenses and Brand Management Protocols, which reserved overall control of brand marketing to Shell and Texaco and prohibited Equilon and Motiva from favoring either brand over the other. JA 77-78 (¶¶ 52-56).

Until September, 1998, Equilon and Motiva set separate and distinct dealer tankwagon prices for the Shell and Texaco brands of gasoline through their own

[2] Shell and Texaco repeatedly refer to their ventures as "lawful." Respondents, however, have never conceded the lawfulness of the joint ventures, nor has this issue ever been litigated. To the contrary, the complaint alleges that each joint venture was formed by Shell and Texaco with the purpose of fixing "prices between themselves on gasoline sold to the independent Shell and Texaco branded dealers." Joint Appendix ("JA") 23, 24 (¶¶ 80, 84). The complaint further alleges that the joint ventures were unlawful combinations to fix prices in violation of Section 1 of the Sherman Act. JA 28 (¶ 108).

[3] A third owner was Saudi Refining, Inc. ("SRI"), with which Texaco operated another joint venture, Star Enterprise, which became part of Motiva. JA 72 (¶ 4). SRI, originally a defendant, obtained summary judgment on the issue of Respondents' standing, a ruling not before this Court.

pricing departments, as Shell and Texaco had done before the ventures. JA 78 (¶¶ 55-56); Deposition of Richard Broderick, pp. 24-44.[4] At that time, Shell and Texaco agreed to require Equilon and Motiva to set the same price for the Shell and Texaco brands. 3 Record at 509-85.[5] Under the new pricing policy, dealer tankwagon gasoline prices immediately rose precipitously while the price of crude oil was falling to its lowest level since the Depression. 3 Record at 490, 586-87; 4 Record at 735-38.[6]

On June 15, 1999, Respondents, independent Shell and Texaco dealers in California, sued Shell and Texaco in the United States District Court for the Central District of California. JA 1; 1 Record at 2.[7] Respondents claimed that the agreement to fix the same price for the brands violated Section 1 under either the *per se* rule or the quick look rule of reason. After discovery and denial of a motion to dismiss

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[4] The entire deposition of Mr. Broderick is attached as Exhibit J to the Supplemental Declaration of Andrew C. Finch in Support of Defendants' Motion for Summary Judgment filed under seal in the district court on October 5, 2001 (Lower Court Docket Nos. 148-150). The certified record on appeal was filed with the court of appeals on August 22, 2003.

[5] References to ___ Record at ___ are references to Appellant's Excerpts of Record filed in the Ninth Circuit Court of Appeals on December 13, 2002. The initial number is the volume number, and the final numbers are specific page numbers in the Excerpts of Record.

[6] Exhibits 336 and 337, CDs containing dealer tankwagon and crude oil pricing data are attached at Tabs 36 and 38 of the Declaration of Daniel R. Shulman in Support of Plaintiffs' Motion for Partial Summary Judgment, Volumes 3 and 4, filed under seal in the district court on July 27, 2001 (Lower Court Docket Nos. 128-131). The certified record on appeal was filed with the court of appeals on August 22, 2003.

[7] Respondents brought suit on behalf of themselves and a class of all Shell and Texaco dealers in the United States. The issue of class certification has not been litigated and remains to be decided in the district court after this matter is remanded.

for failure to state a claim (1 Record at 1-21), the court granted summary judgment in favor of Shell and Texaco (Pet. App. at 34a-69a).[8] On appeal, the Ninth Circuit reversed, Pet. App. at 2a-33a, holding that a jury could find the conduct of Shell and Texaco to be *per se* unlawful price fixing. "Indeed," the court said, "the record is close to establishing that the price-fixing scheme was sufficiently unrelated to accomplishing the legitimate objectives of the joint venture as to justify granting the plaintiffs' [Respondents' cross-] motion for summary judgment." Pet. App. at 23a at n.16. The case was remanded for trial.

2. Formation of "The Alliance."

In March, 1996, Shell and Texaco began discussions about consolidating their "downstream" operations in the United States. JA 75 (¶ 33).[9] SRI joined the discussions because of its partnership with Texaco in the Star Enterprise joint venture. JA 72, 75 (¶¶ 4, 34). The discussions resulted in the formation of Equilon on January 1, 1998, and Motiva on July 1, 1998. JA 73 (¶¶ 6, 7). The participants in the ventures referred to the overall combination of Equilon, Motiva, and related service companies as "The Alliance." 2 Record at 237-49; Pet. App. at 4a at n.2.

Prior to The Alliance, the major players in the United States gasoline market included six major oil companies (Shell, Texaco, Exxon, Mobil, Chevron, and Amoco), each of which had a relatively stable market share of from 6 to 8

[8] References to Pet. App. are to the appendix to Texaco's certiorari petition filed in No. 04-805.

[9] "Downstream" operations are refining crude oil and marketing finished products. "Upstream" operations are exploration and crude oil production. JA 73 (¶ 12).

percent. 2 Record at 250-59. Shell, with a market share of 8 percent, had annual revenues of $18.3 billion; Texaco, with a share of 7 percent, had annual revenues of $18 billion. 2 Record at 259.

Before The Alliance, refining and marketing were profitable for both Shell and Texaco (2 Record at 260-65). Each planned cost reductions to improve downstream competitiveness and profits (2 Record at 266-67). Each believed, however, that in the absence of a combination like The Alliance, competition would force any cost savings each could independently achieve to be passed on to consumers. 2 Record at 278-94. Their solution was to stop competing and form The Alliance. JA 76, 77, 78 (¶¶ 42, 45, 58, 59); 2 Record at 295-313.

The Alliance was not a merger. Shell and Texaco continued as before, except for the specific assets contributed to The Alliance. 2 Record at 314-17. Just as they competed before The Alliance, they competed afterwards, unless specifically stated otherwise in written non-compete agreements. 2 Record at 318-402. They excluded from The Alliance all upstream business, and all non-United States refining and marketing. 3 Record at 445-51. They were permitted to acquire and operate refineries if The Alliance declined the opportunity. 3 Record at 435-44. They could continue importation of foreign oil; marketing of domestically produced unbranded fuel products The Alliance did not wish to market; trading in financial instruments; research and development; production and sale of aviation fuels, heavy fuel oils, coke, marine fuels, marine lubricants, sulfur, synthetic fuels, and natural gas; and solicitation of sales to customers located in the United States for delivery of products outside the United States. 2

Record at 130-34, 145-49, 180-85, 195-200, 403-12; 3 Record at 413-34. Where they agreed not to compete with The Alliance was the domestic sale of gasoline and related products.

Shell and Texaco retained ownership and control of their trademarks and brand names. JA 77-78 (¶¶ 52-56). Equilon and Motiva marketed the brands of gasoline under license agreements with Shell and Texaco. *Id.* The license agreements were in turn subject to "Brand Management Protocol" agreements, which required that both the Shell and Texaco brands be preserved, that they be treated equally, and that neither receive preferential treatment. *Id.*[10] A Brand Management Council of Shell and Texaco executives supervised use of the brands. *Id*.

At its formation, The Alliance had a market share of 15 percent of gasoline sales in the United States, double that of its next largest competitor. 3 Record at 470-78. In 39 states, The Alliance's share exceeded 10 percent; in 15 of those states, its share exceeded 20 percent; in three states, more than 30 percent. *Id.* On the West Coast, its share exceeded 25 percent. *Id.*

Shell and Texaco agreed that The Alliance could be dissolved at any time by mutual consent, and unilaterally by either party after five years. JA 77, ¶ 51.

[10] The Brand Management Protocols, requiring the brands to be treated equally, foreshadowed the price fixing imposed on The Alliance by Shell and Texaco. Viewed in the light most favorable to Respondents, as this evidence must be, the Protocols show that even before forming The Alliance, Shell and Texaco had agreed to fix prices, but waited to implement their agreement until after The Alliance was operational.

3. Shell and Texaco Control of The Alliance.

Members Committees consisting of Shell and Texaco executives, backed by support staffs at Shell and Texaco, governed The Alliance. 3 Record at 452-60; 4 Record at 664-88.[11] The Alliance agreements provided, "The Company Business shall be conducted by the CEO and other officers of the Company, subject to direction by, and in accordance with policies, business plans and budgets approved by" Shell and Texaco "acting by and through the Members Committee." 3 Record at 452-60. The agreements also required that "The Company Business shall be conducted in accordance with the Business Plan and the Annual Budget then in effect and the policies, strategies and standards established by the Members Committee." 3 Record at 461-69.

4. Fixing the Price of the Shell and Texaco Brands.

The Shell and Texaco brands of gasoline have always been separate and distinct products, each with its own unique package of additives. 4 Record at 711-26. The two brands have always been marketed to different customer segments, with Texaco customers tending to be more blue collar and rural, and Shell customers tending to be more affluent and urban. JA 79 (¶ 66). Consequently, Texaco-branded gasoline was generally sold at two cents below the price of other major brands, including Shell. Deposition of

[11] The Members Committee for Equilon consisted of four Shell representatives and three from Texaco; the Members Committee for Motiva consisted of two members each from Shell, Texaco, and SRI. *Id.*

Larry Burch, p. 69[12]; 1 Appellees' Suppl. Record at SER 0096.[13]

Before The Alliance, Shell and Texaco pricing departments separately and independently set dealer tankwagon prices for their brands. JA 78-79 (¶ 62). With The Alliance's formation, the Shell and Texaco pricing departments moved into Equilon and Motiva, and continued to set prices separately for the two brands for the first eight months of The Alliance, until at least September of 1998. Deposition of Richard Broderick, pp. 24-44 (*see* footnote 4, *supra*). At that point, Shell and Texaco agreed to change the pricing.

Because they were required to conduct business "in accordance with policies, business plans and budgets approved by . . . the Members Committee," Equilon and Motiva in mid-1998 prepared business plans for review by Shell and Texaco. 3 Record at 509-50. A key part of their business plans was a so-called "Strategic Marketing Initiative" (3 Record at 517-50), which was ordered by Shell and Texaco at August, 1998, Members Committee meetings, 3 Record at 520-22; and reviewed at September,

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[12] This page from the deposition of Mr. Burch is attached as page DF 00120 to Volume 1 of the Declaration of Counsel in Support of Defendants' Statement of Additional Facts Believed by Defendants to Be Uncontroverted (Submitted as Part of the Joint Stipulation of Uncontroverted Facts and Conclusions of Law), filed under seal in the district court on July 27, 2001 (Lower Court Docket Nos. 115-131). The certified record on appeal was filed with the Court of Appeals on August 22, 2003.

[13] References to ___ Appellees' Suppl. Record ___ are to the Appellees' Supplemental Excerpts of Record filed in the Ninth Circuit Court of Appeals on January 30, 2003. The initial number is the volume number, and the final number is the specific page in the Supplemental Excerpts of Record.

November, and December meetings. 3 Record at 509-19, 542-50.

The Strategic Marketing Initiative was "a look at how to move the . . . brands forward consistent with the brand protocol." 3 Record at 555. One of its "priorities" was "price optimization" or "align brand pricing," which was reviewed at the September meetings. At that time, Shell and Texaco directed Equilon and Motiva to charge the same dealer tankwagon price for the Shell and Texaco brands in each area in which the brands were priced. 3 Record at 509-16, 563-64.

The decision to fix the same price for the two brands was not merely a decision by Equilon management about pricing Equilon's products, as Shell and Texaco suggest in their briefs. It was a decision made by Shell, Texaco, and SRI for the entire Alliance, including both Motiva and Equilon, and a restraint on pricing freedom imposed on the entire Alliance. It was also a direct outgrowth of the Brand Management Protocols, executed by Shell and Texaco before forming The Alliance, in which they agreed that their brands would be "treated equally" in The Alliance. JA 78, ¶ 55.

In their pre-Alliance negotiations, Shell and Texaco knew that if antitrust regulators learned that they intended to fix prices, their proposed combination would face serious problems. Texaco executive Glenn Tilton, who sat on both Members Committees, said that Shell and Texaco could not discuss setting the same price for their brands before forming The Alliance "because of anti-trust concerns." 3 Record at 585.[14] Had the FTC learned of such a

[14] Shell had the same concerns. Before FTC review, "brand management" was not "fully developed due to Shell's fear that such discussions may have antitrust implications." Deposition of John Barnes, pp. 145-46. These pages from the deposition of Mr. Barnes are attached as

(Continued on following page)

discussion, it would have been on notice that Shell and Texaco wanted to combine so that they could fix prices and that their joint ventures were a cover for price fixing, which, of course, is exactly what occurred after The Alliance was approved and became operational.

Shell and Texaco ensured that the FTC had as little evidence as possible of their pre-Alliance discussions. An SRI memo produced in discovery disclosed that documents generated in the discussions were collected and destroyed at the end of meetings on the advice of counsel for Shell and Texaco. 1 Record at 22-26; JA 3. Evidence of any price fixing discussions that were part of the negotiations was thus destroyed and never submitted to the FTC for its review.[15]

After the Strategic Marketing Initiative was implemented, Equilon and Motiva set the same dealer tankwagon price for both the Shell and Texaco brands in each

pages DF 00029-30 to Volume 1 of the Declaration of Counsel in Support of Defendants' Statement of Additional Facts Believed by Defendants to Be Uncontroverted (Submitted as Part of the Joint Stipulation of Uncontroverted Facts and Conclusions of Law), filed under seal in the district court on July 27, 2001 (Lower Court Docket Nos. 115-131). The certified record on appeal was filed with the Court of Appeals on August 22, 2003.

[15] SRI prevailed on a motion to preclude use of this document as inadvertently produced and protected by the attorney-client privilege. The trial court ruled for SRI on the ground that advice of counsel for Shell and Texaco had been communicated to SRI "in the course of a matter of common interest and . . . was designed to further that interest." *Id*. Respondents asked the court of appeals to reverse this unwarranted and erroneous extension of the attorney-client privilege. The court never reached the issue. If this Court affirms the court of appeals, Respondents respectfully ask this Court to reverse the lower court's ruling barring use of this document. *See*, *Continental Ore. Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 708-10 (1962).

of thousands of distinct pricing areas throughout the United States. JA 78-79 (¶¶ 62, 63).

Once the brands were priced identically, the price differential of the Texaco brand disappeared, rising to the level of the Shell brand, and The Alliance sharply raised the price of both brands, even as crude oil prices were falling to historic lows. 3 Record at 490; 4 Record at 735-38; 3 Record at 586-87 (*see* footnote 6, *supra*). On September 1, 1998, the price of crude oil was stable at $12 per barrel, and fell below $10 per barrel during January and February of 1999. During this same period, Equilon raised prices for Shell and Texaco gasoline from $0.62 per gallon to $1.02 per gallon in Los Angeles, and from less than $0.60 to more than $0.90 per gallon in Portland and Seattle. In Chicago, Motiva raised brand prices from $0.55 to $0.75 per gallon. Generally, increases occurred where Equilon and Motiva had larger market shares, particularly on the West Coast. 3 Record at 586-87 (*see* footnote 6, *supra*).

Shell and Texaco justified forming The Alliance because of anticipated cost savings from their combination, estimated at $800 million per year. 4 Record at 699-705. These expected savings fell "into two buckets" – operating cost reductions from eliminating facilities and personnel that would become "redundant" because of The Alliance, and avoidance of capital expenditures Shell and Texaco would have made absent The Alliance. 3 Record at 604-05; 4 Record at 645-46. Regardless of whether these savings materialized, none were passed on to consumers through lower prices, or intended to be. 4 Record at 649-63.

No efficiencies, cost savings, or competitive benefits resulted from charging the same price for the Shell and Texaco brands of gasoline as executives of Shell, Texaco, and The Alliance testified:

Peter Bijur, Chief Executive Officer of Texaco:

Q. Did the pricing have anything to do with the cost savings?

A. No.

* * *

A. . . . Let me say something here with respect to this because I think this is important.

All the synergies, all of the cost savings and the figures which we calculated had nothing to do with pricing, nothing. [4 Record at 694-95.]

Texaco executive, Glenn Tilton:

Q. Okay. Are you aware of any cost savings or synergies that were anticipated as a result of charging the same prices for the brands in the same markets?

A. No. [4 Record at 705.]

Equilon Head of Marketing, John Darnley:

Q. Okay. Now, are you aware of any potential cost savings that were anticipated from charging the same price for the Shell and Texaco brands in the – in the same markets?

A. No. [4 Record at 703.]

Motiva Head of Marketing, Larry Burch:

Q. Okay. Now – and you mentioned that after the alliance was formed – after Motiva was formed, you implemented this policy of charging the same price for the Shell and Texaco brands in the same area?

A. Yes.

Q. Okay. Was there any cost savings or synergy that resulted from doing that?

A. No. [4 Record at 700-01.]

Motiva CEO, L. Wilson Berry:

Q. Are there any cost savings that you are aware of that are attributable to charging the same prices for the Shell and Texaco brands in the same pricing zones?

A. Not – not that I am aware of. [4 Record at 697-98.]

The Alliance developed no new products or processes that Shell and Texaco did not have as independent competitors. 3 Record at 479-89. The Alliance lasted only three years, ending in 2001 with Chevron's acquisition of Texaco.

5. The Court of Appeals' Decision.

The court of appeals reviewed a grant of summary judgment for Shell and Texaco. The district court originally denied a motion to dismiss, ruling that "price fixing can still be illegal *per se* even if it accompanies an efficient, integrated joint venture. If the joint venture could function perfectly well without price fixing, then the price fixing amounts to no more than an extraneous, anticompetitive restraint that does not merit rule of reason analysis." 1

Record at 14-15. After discovery, however, the district court granted summary judgment, finding that fixing the same prices for the Shell and Texaco brands did not violate Section 1.

Reversing the district court, the Ninth Circuit held that "whether the *per se* rule applies to a legitimate joint venture's allegedly anticompetitive conduct depends first and foremost on a determination of whether the specific restraint is sufficiently important to attaining the lawful objectives of the joint venture that the anti-competitive effects should be disregarded." 369 F.3d at 1121, Pet. App. at 22a. The proper inquiry is whether the pricing restraint is "naked" or "ancillary." 369 F.3d at 1118, Pet. App. at 16a. Here, the court of appeals found:

> The defendants have thus far failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies.

369 F.3d at 1122, Pet. App. at 23a.[16] Accordingly, a jury could find the price fixing *per se* illegal. The case was remanded for trial.

The analysis of the court of appeals was correct and consistent with this Court's precedents, and should be affirmed.

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[16] The Court rejected two professed justifications advanced by Shell and Texaco: first, that fixing prices was compelled by *Robinson-Patman* compliance, a claim apparently abandoned in this Court; and, second, that applying the *per se* rule would improperly impede joint ventures in pricing their products, the position urged in this Court. 369 F.3d at 1122-25, Pet. App. at 22a-28a. The opinion did not discuss, nor did Petitioners raise, the argument that *Copperweld* protected their price fixing.

SUMMARY OF ARGUMENT

1. Procedurally, this case presents an appeal from a summary judgment. The evidence must therefore be viewed in the light most favorable to Respondents, the parties opposing the motion, and all permissible inferences drawn in their favor. Because they cannot prevail when the evidence is viewed in the light most favorable to Respondents, Petitioners ignore or misstate the evidence and improperly ask that inferences be drawn in their favor.

2. The illegality of the oil companies' price fixing is clear under the *per se* rule or the quick look rule of reason. Through joint ventures, Shell and Texaco created a combination through which they fixed prices, pooled profits, and suppressed competition. This case is on all fours with *Citizen Publ'g v. United States*, which no party suggests should be overruled, and the result should be the same, a Section 1 violation that is "plain beyond peradventure." This case also fits exactly the model for applying the rule of reason "in the twinkling of an eye" set out in footnote 39 of *NCAA v. Board of Regents,* a substantial restraint of trade with no procompetitive justification.

3. *Copperweld* should not be extended to joint ventures. This issue was not even raised in the court of appeals, and has been waived. Shell and Texaco are asking for a protected and special status that this Court has never recognized in its prior joint venture decisions, including *Citizen Publ'g*, *NCAA*, *Timken Roller Bearing*, *Sealy*, *Topco*, *Broadcast Music*, *Maricopa County Medical Society*, and *Indiana Federation of Dentists*. Extending *Copperweld* to joint ventures is unsupported by the facts of this case, contrary to the express language of that decision, in

conflict with every other joint venture decision of this Court, and bad antitrust policy.

4. The argument that Petitioners' price fixing did not affect competition, because competition had already ended with The Alliance's formation, is contrary to the evidence and this Court's precedents holding price fixing illegal, without the need for full rule of reason treatment, where there is neither apparent nor claimed procompetitive justification for a direct restraint on price.

5. The court of appeals decision in this case is sound in its analysis and consistent with all prior precedents and scholarship treating restraints involving joint ventures, including *Citizen Publ'g*, *NCAA*, *Timken*, *Sealy*, *Topco*, *Broadcast Music*, *Maricopa Medical Society,* and *Indiana Federation of Dentists*. The court of appeals decision also is in accord with this Court's decision in *California Dental Ass'n v. FTC*, and is a proper and unexceptional application of the naked-ancillary restraint doctrine propounded in *Addyston Pipe* more than a century ago, and followed by this Court and lower courts ever since.

6. Because this case presents a direct restraint on price, for which no procompetitive justification has been offered, the restraint violates Section 1, under either the *per se* or quick look rule. This Court has always viewed restraints on pricing as suspect and suitable for *per se* or quick look treatment, and has required such restraints to be justified by some procompetitive benefit. Here, Shell and Texaco presented none. *Per se* or quick look illegality is thus mandated in this case. The true nature of the combination is apparent from the evidence that the joint ventures produced no new products; the price fixing was totally unrelated to any purpose or claimed procompetitive benefit of the ventures, which could have functioned the pricing restraint perfectly well without the price fixing

(and in fact did so); was implemented eight months after the ventures' formation; and none of the claimed cost savings of the ventures were passed on to consumers, or intended to be.

7. *Per se* or quick look illegality in this case will not chill or create uncertainty in the formation of new ventures or the operation of existing ventures. Affirmance will leave the law exactly where it has been for more than a century: if joint venture participants place restraints on pricing, such restraints must be reasonably related to the procompetitive purposes and benefits of the joint venture in order to fall within the rule of reason. Joint ventures have been able to form and function under this rule since *Addyston Pipe*, and will continue to do so.

ARGUMENT

I. This Is an Appeal From Summary Judgment, in Which Respondents Are Entitled to Have the Evidence Viewed in the Light Most Favorable to Them.

The procedural posture in which this case comes to this Court involves review of a summary judgment. Accordingly, "[t]he evidence of the nonmovant [here Respondents] is to be believed, and all justifiable inferences are to be drawn in its favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *see*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 and n.6 (1962); *see, also, Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 468-69 (1992).

These principles are important here, because Shell and Texaco misstate the record, improperly ask this Court to draw inferences in their favor, and dispute key findings that must be accepted as true for purposes of this appeal.[17] These include, first, that Shell and Texaco required The Alliance to charge the same prices for the Shell and Texaco brands; and, second, that charging the same prices for the brands was unrelated to the claimed cost savings, efficiencies, and purposes of the joint ventures, which could have functioned and did function without the price fixing. The court of appeals found genuine issues of material fact on both points. The record supports these findings.

II. The Illegality of Petitioners' Price Fixing Is Plain Beyond Peradventure.

The *per se* illegality of Petitioners' price fixing is, as this Court found in *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 135 (1969), "plain beyond peradventure." In *Citizen Publ'g*, this Court affirmed summary judgment for the Government in a Section 1 challenge to a joint venture of newspapers in Tucson, Arizona. The newspapers had entered into a joint operating agreement, establishing an "agency" in which they placed all operations except their news and editorial departments. The joint operating agreement included provisions that the newspapers would fix the agency's subscription and advertising prices, share in agency profits according to a fixed ratio, and not compete with the agency. 394 U.S. at 134. This Court found these restraints, all of which are present in this case, to be clear violations of Section 1. 394 U.S. at 135-36.

[17] The various *Amici* more or less uncritically adopt the version of the facts in the briefs of Shell and Texaco, and thus commit the same errors in misstating the record.

Indeed, this case presents circumstances more aggravated and deserving of *per se* condemnation than did *Citizen Publ'g*. There, one of the newspapers was failing, and the joint operating agreement was allegedly necessary for its preservation. Here, the refining and marketing businesses of both Shell and Texaco were profitable and in no danger of failing. There, the joint operating agreement, with a term of 25 years, had a semblance of permanence. Here, Shell or Texaco could end The Alliance after five years. There, the price fixing was an overt and express term of the joint operating agreement. Here, the agreement was secret, hidden from regulators, and implemented only after The Alliance was established.

Unequivocally, *Citizen Publ'g* answers the "Question Presented" in this appeal. When Shell asks "[w]hether pricing decisions by a lawful joint venture or its owners with respect to the venture's own products may be condemned as a *per se* violation of Section 1," Shell Opening Brief, p. i, *Citizen Publ'g* says yes. Likewise, *Citizen Publ'g* answers yes to the Government's question, "Whether an agreement between the owners of a lawful joint venture with respect to the pricing of the joint venture's products may be treated as a *per se* violation of Section 1 . . . when the joint venture's owners do not compete in the market for those products." Brief of the United States, p. i. This case is not novel or complicated. This Court faced exactly the same issues in *Citizen Publ'g* and found obvious violations. The result should be no different here.

Citizen Publ'g is directly on point and controlling. There is really no need to go further. If the oil companies wish to escape the authority of *Citizen Publ'g*, their remedy is to do what the newspaper industry did, obtain a special exemption from Congress. *See*, 15 U.S.C. §§ 1801-04.[18]

Besides asserting a *per se* claim, Respondents alleged that Petitioners' price fixing violated Section 1 under the "quick look" rule of reason, which permits a finding of illegality without the need to show market power in a relevant market, where there has been a naked restraint on price or output for which no procompetitive justification has been demonstrated, as here. *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 (1984); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459-61 (1986); Herbert Hovenkamp, *XI Antitrust Law,* ¶ 1911, pp. 296-97 (2d ed. 2005). Of particular relevance is footnote 39 in *NCAA*, in which this Court quotes with approval the following comments of Professor Areeda:

[18] Petitioners and various *Amici* make unconvincing attempts to distinguish *Citizen Publ'g*. Significantly, no one (except perhaps the Washington Legal Foundation) suggests the case be overruled. Among the efforts to distinguish *Citizen Publ'g* are contentions that the newspapers did not fix the price of venture products, but only non-venture products (Texaco Brief, p. 31; Shell Brief, p. 21; this is incorrect; the newspapers fixed subscription prices and rates for advertising sold by the joint venture); that the joint venture restraints were illegal and the venture itself unlawful because the newspapers could not have successfully merged (Brief of the United States as *Amicus Curiae* Supporting Petitioners, pp. 19-20; this contention improperly requires proof of market power as an element of *per se* unlawful price fixing; also the decree, which was affirmed, allowed the venture to continue with "modification of the joint operating agreement so as to eliminate the price-fixing, market control, and profit-pooling provisions," 394 U.S. at 135); and that the degree of integration by the newspapers in their joint venture was insufficient to avoid the *per se* rule (Chamber of Commerce *Amicus* Brief, p. 14; this factor is never mentioned, except in Justice Harlan's concurring opinion). Because *Citizen Publishing* cannot be distinguished, most of the *Amicus* briefs avoid it altogether.

> "The fact that a practice is not categorically unlawful in all or most of its manifestations certainly does not mean that it is universally lawful. For example, joint buying or selling arrangements are not unlawful *per se*, but a court would not hesitate in enjoining a domestic selling arrangement by which, say, Ford and General Motors distributed their automobiles nationally through a single selling agent. Even without a trial, the judge will know that these two large firms are major factors in the automobile market, that such joint selling would eliminate important price competition between them, that they are quite substantial enough to distribute their products independently, and that one can hardly imagine a pro-competitive justification actually probable in fact or strong enough in principle to make this particular joint selling arrangement 'reasonable' under Sherman Act § 1. The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye." P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981).

The application of Professor Areeda's example to this case could not be clearer or more compelling. Like Ford and General Motors, Shell and Texaco were major factors in the gasoline market; their joint selling eliminated important price competition between them; they were quite substantial enough to distribute their products independently; and one can hardly imagine a procompetitive justification actually probable in fact or strong enough in principle to make their arrangement reasonable under Section 1. Certainly Shell and Texaco could not imagine a procompetitive justification that would make their price fixing reasonable, though given every opportunity to do so. Added to this were demonstrated market effects: enormous price increases following the price fixing, although crude oil prices fell to historic lows. Quick look treatment is therefore also clearly warranted here.

III. *Copperweld* Should Not Be Extended to Joint Ventures; This Court Has Never Afforded Joint Ventures Special Antitrust Status, and For Good Reason.

The request of Petitioners and their *Amici* to extend *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), to joint ventures – an issue never raised in the court of appeals[19] – asks this Court to shift its paradigm in treating joint venture conduct. Until now, this Court has used the ancillary restraints doctrine under Section 1 of the Sherman Act, which posits that the venture's owners are separate actors, and asks whether venture restraints are ancillary to legitimate venture activity, even if they may affect price or output.

The oil companies invite this Court to abandon this for the alternative model of *Copperweld*, under which the venture must be treated as a single entity, and neither Section 1 nor the ancillary restraints doctrine applies to venture conduct. Instead, venture activities must be analyzed under Section 2, so that virtually every pricing decision by a joint venture, except perhaps predatory pricing, becomes lawful, because a single firm, unlike a group of firms, is free to set whatever price it wishes and reduce output accordingly.

[19] Because Shell and Texaco did not raise their *Copperweld* argument in the court of appeals, this Court should hold the issue waived and not properly before it. *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 55-56, n.4 (2002); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 386, n.5 (1989).

Extending *Copperweld* would prevent courts from evaluating agreements on a case by case basis, with an "enquiry meet for the case," as this Court has always done. *California Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999); *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 449, 466-67 (1992). Thus, in *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982), this Court could find a price-fixing agreement unlawful without holding the medical foundation implementing the agreement to be unlawful. In *NCAA v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984), this Court could condemn restrictions on telecasts of football games without holding the NCAA unlawful. In *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986), this Court could proscribe a plan to withhold x-rays without finding a trade association unlawful. And in *Citizen Publ'g*, this Court could enjoin price fixing and profit pooling but "not prevent all forms of joint operation." 394 U.S. at 135.

Extending *Copperweld* to joint ventures would mean the end of evaluating particular restraints for reasonableness based on their competitive effects. Such a drastic shift in the law is unwarranted under this Court's precedents, the facts of this case, or sound antitrust policy.

A. No protected status for joint ventures.

This Court has a long history of applying the antitrust laws to joint ventures. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969); *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); *NCAA v.*

Board of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986).

Throughout its decisions, this Court has abjured any special status for joint ventures. Where joint ventures have imposed anticompetitive restraints on price or output, not justified by procompetitive benefits, this Court has never found such restraints protected because the defendants structured their enterprise as a joint venture. As this Court said in *Timken*, 341 U.S. at 598, "Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled." In all its cases, this Court has treated joint ventures as combinations of competitors and analyzed the competitive effects, pro and con, of the restraints at issue.

Particularly apropos is this Court's comment in *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 221-22 (1940), repeated in *Maricopa County Med. Soc'y*, 457 U.S. at 346, "Nor has the Act created or authorized the creation of any special exception in favor of the oil industry. Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." That rule is, as this Court stated, " . . . price-fixing combinations which lack Congressional sanction are illegal per se . . . " 310 U.S. at 228.

B. Absence of evidentiary support.

As a factual predicate for extending *Copperweld*, Shell and Texaco repeatedly claim that the formation of The

Alliance "was a complete merger of the relevant businesses of the companies involved," "ended all competition in the relevant market between the founding companies," and eliminated Shell and Texaco as "independent centers of decisionmaking." Brief of Texaco, pp. 13, 15. The evidence, however, contradicts and fails to support these assertions. The formation of The Alliance was in no sense a merger, nor did it end all competition between Shell and Texaco or eliminate them as independent centers of decisionmaking.

Not only did Shell and Texaco keep their corporate identities, but also they retained their brand names and controlled The Alliance's marketing of products with those brand names. They also carved out numerous activities in which they retained the ability to compete with each other and The Alliance, including the sale of aviation and marine fuels and chemicals, and even the acquisition and operation of refineries The Alliance did not wish to operate itself. They maintained their separate international operations, such as gasoline marketing in Canada and Mexico, directly across the border from Alliance operations. To say that all competition was eliminated between Shell and Texaco is therefore false. What they eliminated was competition in the sale of domestic gasoline while The Alliance lasted.

Even as to domestic gasoline, they did not "end" competition. At most, they suspended it for the duration of The Alliance, which could be unwound at any time by mutual consent, and by either Shell or Texaco alone after five years. In actuality, The Alliance lasted only three years. Thus, this suspension of competition was easily reversible, was in fact easily reversed, and remained in place only so long as it served the interests of Shell and Texaco.

The ease of unwinding The Alliance, together with the retention of control over the brand names and their marketing, establishes that Shell and Texaco continued as independent centers of decisionmaking after forming The Alliance. Most telling is the nature of the pricing restraint itself. Shell and Texaco directly restrained the pricing freedom of Equilon and Motiva, but were able to offer no evidence of how this restraint served the interests of Equilon and Motiva. To the contrary, all executives testified that the pricing restraint had no connection with any claimed efficiencies, competitive benefits, or purposes of The Alliance. The interests being served by the price fixing were necessarily those of Shell and Texaco, which would be resuming domestic gasoline sales after The Alliance ended, and were continuing to sell other branded products, such as aviation fuel, while The Alliance lasted, as well as branded gasoline outside the United States. Thus, the contention that Shell and Texaco were not "independent centers of decisionmaking" is factually wrong.

The briefs of Petitioners and their *Amici* also try to minimize the scope of the restraint by treating this case as solely about Equilon and its pricing. This misrepresents both the nature and scope of the price fixing. The decision to fix the same price for the brands came from Shell, Texaco, and SRI. It included not only Equilon, which had been operating without the restraint for eight months, but also Motiva, which had just begun to do business. This was not a bottom-up decision by Equilon management; it was a top-down restraint agreed to by Shell, Texaco, and SRI, and imposed on their joint ventures. Viewed in this light, as it must be, *Continental Ore v. Union Carbide*, 370 U.S. at 710 (evidence of conspiracy must be viewed "as a whole"), this restraint was not the decision of a single company, as envisioned by *Copperweld*, but an agreement among independent centers of decisionmaking reachable under Section 1 of the Sherman Act.

C. Absence of legal authority to extend *Copperweld.*

Copperweld, by its own terms, is a narrow decision: "We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own." 467 U.S. at 767. This Court also expressly said that joint ventures "are judged under a rule of reason," 467 U.S. at 768, not that joint ventures are exempt from Section 1 as single firms. Cognizant that "§ 1's focus on concerted behavior leaves a 'gap' in the [Sherman] Act's proscription against unreasonable restraints of trade," 467 U.S. at 774-75, the Court was concerned over the extent to which its decision could widen that gap. The oil companies' requested extension of *Copperweld* to joint ventures would widen it to a chasm.[20]

[20] Lower courts have generally recognized the limits of *Copperweld* and not extended it to joint ventures. *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1147 (9th Cir. 2003); *Sullivan v. National Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994); *Advanced Health-Care Servs., Inc. v. Radford Community Hosp.*, 910 F.2d 139, 144 n.7 (4th Cir. 1990); *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 215 (D.C. Cir. 1986); *Metropolitan Intercollegiate Basketball Ass'n v. NCAA*, 337 F. Supp. 2d 563, 570 (S.D.N.Y. 2004); *Centennial School Dist. v. Independence Blue Cross,* 1994 WL 62016, *5 (unpublished) (E.D. Pa. 1994); *McNeil v. National Football League*, 790 F. Supp. 871, 879-80 (D. Minn. 1992); *but see, City of Mt. Pleasant, Iowa v. Associated Elec. Coop., Inc.*, 838 F.2d 268, 276 (8th Cir. 1988); *Healthamerica*

(Continued on following page)

In its decisions treating joint ventures, this Court has proceeded under Section 1, asking whether the restraints at issue were naked, *i.e.*, not reasonably related to any procompetitive purpose of the ventures, or ancillary, *i.e.*, reasonably necessary to achieve procompetitive venture purposes. If the former, this Court has applied *per se* or quick look treatment to find illegality. *E.g.*, *Timken*, 341 U.S. at 597-98; *Maricopa County Med. Soc'y*, 457 U.S. at 351-53; *NCAA*, 468 U.S. at 103-04. If the latter, this Court has required analysis under the full rule of reason. *E.g.*, *Broadcast Music*, 441 U.S. at 20-23; *California Dental Ass'n v. FTC*, 526 U.S. 756, 771-75 (1999).

What Petitioners propose, however, is a sea change in the law. If *Copperweld* applies to joint ventures, then Section 1 will not. Instead, *Copperweld* will require courts to draw lines and make fine distinctions over what degree of integration by joint venturers is sufficient to convey *Copperweld* protection, and what degree insufficient. Joint ventures come in all shapes and sizes and involve varying degrees of integration. This will create far more uncertainty than under the present state of the law, which provides more than adequate guidance for deciding when joint venture conduct has transgressed Section 1.

In addition, extending *Copperweld* to joint ventures would have a destabilizing effect on the precedential value of prior joint venture decisions by this and other courts. For example, if *Copperweld* applies to joint ventures, all of the analysis in *Broadcast Music* could become dictum; given a finding of sufficient integration, the blanket license would not be subject to Section 1 at all. The same

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Pennsylvania, Inc. v. Susquehanna Health Sys., 278 F. Supp. 2d 423, 434-37 (M.D. Pa. 2003).

could be said for *Timken*, *Citizen Publ'g*, *Topco*, *Maricopa County Med. Soc'y*, *NCAA*, and *Indiana Fed'n of Dentists*. Indeed, to preserve the rationale in these cases, a court would have to find *Copperweld* inapplicable before it could even look at the analysis of effects on competition, which is the real basis of each decision.

D. Against sound public policy.

As a matter of sound policy, extending *Copperweld* to joint ventures also makes no sense. Professor Hovenkamp has persuasively articulated the grounds for not doing so. Hovenkamp, *XIII Antitrust Law,* ¶ 2101 (2d ed. 2005). First, an agreement by separate firms reducing output or increasing price may be enjoined without involving the "ongoing price regulation and monitoring" associated with enjoining conduct by a single firm. Second, for a joint venture, a structural remedy is always practicable and "requires the tribunal only to enjoin the venture or else those terms of the venture posing the anticompetitive threat."[21] Third, unlike a single firm, which may have lawfully attained monopoly power, "the group of firms that eliminates price or innovation competition among themselves need not have been the first or wisest at anything," and there is little prospect of punishing firms that have been "the first, the most aggressive, or the most sagacious." Finally, "the joint venture is usually not essential

[21] An injunction in this case could have prohibited Shell and Texaco from requiring The Alliance to charge the same price for the two brands in the absence of proof that such pricing was reasonably necessary to achieving some legitimate purpose of The Alliance (a showing never made), just as the decree in *Citizen Publ'g* allowed the joint operating agreement to continue, but required its modification to exclude the practices violating Section 1, including price fixing. 394 U.S. at 135.

and can be regarded as the exceptional method of enterprise organization." Hence "injunctions against anticompetitive joint venture rules represent a far more modest intrusion into an economy that we presume to be efficient overall." *Id.,* at pp. 20-22.

Extending *Copperweld* to joint ventures would also create difficulties for private and public antitrust enforcement. This Court has observed, "'the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat' to deter antitrust violations." *American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 569 (1982); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969). Extending *Copperweld* to joint ventures will restrict private plaintiffs to claims challenging the initial formation of the venture, in which they must prove the venture's very existence unlawful through a full rule of reason or Section 7 showing.

The burden on public enforcement will be at least as great as that on private plaintiffs. The Government, in reviewing whether to permit joint ventures, will have to anticipate every conceivable restraint in which the venture could engage post-formation, or else lose its ability to challenge the restraints when they occur.[22] At present, both the FTC and the Justice Department treat joint ventures as falling within Section 1. The *Antitrust Guidelines for Collaborations Among Competitors*, Issued by the Federal Trade Commission and the U.S. Department of Justice, April 2000, do not even discuss *Copperweld*.

[22] This Court has noted the limited resources available to the Government for antitrust enforcement. *Hydrolevel*, 456 U.S. at n.10; *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979).

Section 2.4 of the *Guidelines* allows the Government to challenge restraints imposed after a venture's formation, as it did successfully in *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005). Extending *Copperweld* to joint ventures will curtail such challenges and impede the Government's ability to attach *per se* illegal conduct.

Finally, there is the decision by Shell and Texaco to structure their combination using joint ventures. Had Shell and Texaco truly wanted to be a single entity, with *Copperweld* protection, they could have merged, as they well knew. Instead, they concluded that joint ventures, which could be easily unwound, best served their interests. Their decision and its consequences ought to be respected. *Citizen Publ'g*, 394 U.S. at 141 (concurring opinion of Harlan, J.):

> In other words, if the agreement had been only slightly different it is arguable that we would have had no choice but to treat the transaction in the same way we would treat a total corporate merger. However this may be, I do not understand why the parties' decision to retain the advantages of flexibility should not be decisive for our purposes. If businessmen believe, after considering all the relevant factors, that future events may deprive their existing arrangements of utility, there is no reason why the antitrust laws should not view the transaction in a similar way.

IV. It Is Incorrect to Argue That Fixing the Price of the Shell and Texaco Brands Could Not Have Restrained Competition, Because Competition Between Shell and Texaco Had Already Ended.

As a matter of both fact and law, it is untrue that no restraint on competition resulted from fixing the prices of the Shell and Texaco brands because all competition between Shell and Texaco had already ended with the formation of The Alliance.

A. Errors of fact.

When The Alliance was formed, all competition between Shell and Texaco did not end. Even for domestic sales of gasoline, competition was at most *suspended*, not ended, so long as its suspension was in the interests of Shell and Texaco. Shell and Texaco also continued to control The Alliance's marketing of products bearing their brands. Shell could have directed Shell-branded gasoline to be marketed by The Alliance in any manner Shell deemed in its overall best interests, as could Texaco with its brand. The Alliance, however, was not free to promote either brand in its own best interests in any way that did not have its owner's approval. Thus, even had The Alliance deemed it advantageous to offer either brand as a discount brand, or discontinue either brand, it could not have done so. The applicable noncompete agreements also carved out numerous exceptions permitting competitive activities outside The Alliance by Shell and Texaco. To say that all competition had ended is therefore incorrect.

Nor is it factually accurate to say that fixing the price of the brands could not have resulted in a further restraint on competition. Fixing the price meant that when The Alliance ended, as it did after only three years, Shell and Texaco resumed their "competition" charging the same prices for their branded gasolines. This state of play, which was a direct result of price fixing through The Alliance, facilitated future collusion and price uniformity. Likewise, while The Alliance existed, having identical prices for Shell and Texaco products inside The Alliance facilitated price uniformity for products outside The Alliance, such as aviation fuel, which Shell and Texaco continued to market. Finally, fixing the same prices for the brands was a direct restraint on the ability of The Alliance to compete, and Shell and Texaco have failed to offer any explanation as to how this restraint was in The Alliance's interest.

B. Errors of law.

The restraint, moreover, was a direct restraint on price. Where an agreement directly affects prices, this Court has generally seen no need to inquire further about any effect on competition, and has treated the agreement as *per se* unlawful, even in joint ventures. *Citizen Publ'g.*, 394 U.S. at 134-35; *Timken Roller Bearing*, 341 U.S. at 597-98; *Maricopa County Med. Soc'y*, 457 U.S. at 343-57; *see, also, Topco*, 405 U.S. at 609-10. As this Court said in *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958), and reiterated in *Maricopa*, 457 U.S. at 351, the rationale for *per se* rules is in part to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable – an inquiry so often wholly fruitless when undertaken"; and one for which "courts are ill-equipped and ill-situated," *Topco*, 405 U.S. at 611-12; *see, also, FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 435 (1990), quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-26, n.59 (1940) ("Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness."); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980). This Court's rule has been since at least 1940 that "price-fixing combinations which lack Congressional sanction are illegal per se." *Socony-Vacuum,* 310 U.S. at 228 ("Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive." *Id*. at 221-22).

It is also misguided to claim that cessation of competition between Shell and Texaco is a factor favoring rule of reason treatment. Under *Maricopa County*, *Citizen Publ'g*, and *Broadcast Music*, the law is exactly the opposite. In *Maricopa County*, the price fixers sought to bring themselves within the authority of *Broadcast Music* by arguing that their price fixing was part of a procompetitive joint venture making available a new product, and involved "price fixing in only a literal sense." 457 U.S. at 355. This Court rejected the argument and distinguished *Broadcast Music* because, in making a new product available, "the blanket-license arrangement did not place any restraint on the right of any individual copyright owner to sell his own compositions separately to any buyer at any price." 457 U.S. at 355. Individual competition by venture participants constrained the joint venture's price fixing, because customers were free to deal with individual composers regarding individual compositions.

Thus, Petitioners should not escape *per se* treatment because they renounced competition with The Alliance that might otherwise have mitigated the effects of their price fixing. In *Citizen Publ'g*, such non-compete agreements were held to be a Section 1 violation "plain beyond peradventure," 394 U.S. at 135; while in *Broadcast Music*, where there were none, this Court found potential competition by composers to be an important factor favoring the rule of reason. Thus, the non-compete agreements between Shell and Texaco made their price fixing more appropriate for *per se* treatment, not less.

To exempt Petitioners from antitrust scrutiny for price fixing through The Alliance further strays from this Court's precedents by permitting a direct restraint on price without requiring any actual or apparent procompetitive justification. Here, although given every opportunity, Shell and Texaco failed to advance any procompetitive benefit or otherwise justify their price fixing as related to the claimed cost savings, efficiencies, or purposes of The Alliance. There is neither precedent nor policy to relieve them of that burden.

The Court has said, "Legal presumptions that rest on formalistic distinctions, rather than actual market realities, are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 466-67 (1992), and their effects on competition and "whether or not the challenged restraint enhances competition." *California Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999). Consequently, in every case in which this Court has considered a joint venture restraint, it has required a showing of procompetitive benefits in order to validate the restraint. *Broadcast Music*, 441 U.S. at 19-24; *NCAA*, 468 U.S. at 103-04, 109-10; *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 690-95 (1978); *Indiana Fed'n of Dentists*, 476 U.S. at 459-61.

In *Broadcast Music*, this Court denied *per se* treatment for blanket licensing of musical compositions, because the Court found that blanket licensing was integral to creation of "a different product," which carried with it substantial procompetitive benefits. 441 U.S. at 22-23. This Court observed, "Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." 441 U.S. at 23. Here, the price-fixing agreement was not necessary to market the product at all. Equilon did so for the first eight months of its existence and Motiva for its first two months without the agreement. Nor did The Alliance produce any new product, as did ASCAP, BMI, and virtually every other joint venture whose practices have not transgressed the antitrust laws.

In commenting on *Broadcast Music* in *NCAA*, this Court observed, "While joint ventures have no immunity from the antitrust laws, as *Broadcast Music* indicates, a joint selling arrangement may 'mak[e] possible a new product by reaping otherwise unattainable efficiencies.' . . . In *Broadcast Music*, the availability of a packaged product that no individual could offer enhanced the total volume of music that was sold." 468 U.S. at 113-14. Here, there was neither a new product nor any other product that Shell and Texaco could not have produced and sold individually, and were not selling and producing individually outside the ventures.

In *NCAA*, which held restraints on college football telecasts to violate Section 1 under the quick look, this Court stated that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." 468 U.S. at 110. At that time, as the Court noted, the Government agreed:

The Solicitor General correctly observes:

> "There was no need for the respondents to establish monopoly power in any precisely defined market for television programming in order to prove the restraint unreasonable. Both lower courts found . . . the NCAA television restrictions have reduced output, subverted viewer choice, and distorted pricing. Consequently, unless the

> controls have some countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power over advertising dollars. . . ."

Id., n.42. Likewise, in *Indiana Fed'n of Dentists*, this Court found illegality under the quick look for a restraint on output "[a]bsent some countervailing procompetitive virtue – such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services." 476 U.S. at 459.

Thus, where participants in a joint venture have imposed a direct restraint on price or output, with demonstrably anticompetitive effects for consumers, as here, this Court has always required some showing of a procompetitive justification for the restraint to avoid *per se* or quick look condemnation. Any suggestion that this Court depart from this well-established rule just because a venture has reached some specified level of integration should be rejected.[23]

[23] The argument also suffers from the same infirmity of application as the request to extend *Copperweld* to joint ventures, inasmuch as such a rule would inject a new level of uncertainty into antitrust jurisprudence by requiring litigants to guess and courts to decide what degree of integration is sufficient to avoid *per se* or quick look condemnation.

V. The Court of Appeals Properly Followed and Applied the Precedents of This and Other Courts in Analyzing the Pricing Restraint Imposed by Shell and Texaco on The Alliance, and in Treating the Restraint as a *Per Se* Violation of Section 1.

A. Analysis of pricing restraints by joint ventures.

Requiring a substantial procompetitive justification for price and output restraints in a joint venture follows from *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899), which treats such restraints as either ancillary, *i.e.*, reasonably necessary to achieve the lawful purposes of the joint venture, or naked, *i.e.*, having no such connection to the venture's purposes.

Every significant lower court joint venture decision has followed this Court's directive in requiring a procompetitive justification for restraints on price and output, generally by requiring a showing that any such restraint is ancillary, rather than naked. *General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594-95 (7th Cir. 1984); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 214, 224, 229 (D.C. Cir. 1986); *National Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 599, 601, 603 (11th Cir. 1986); *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 370-71 (7th Cir. 1987); *Law v. NCAA*, 134 F.3d 1010, 1021-24 (10th Cir. 1998); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (1st Cir. 2001); *Fraser v. Major League Soccer, LLC*, 284 F.3d 47, 59 (1st Cir. 2002); *Freeman v. San Diego Bd. of Realtors*, 322 F.3d 1133, 1151

(9th Cir. 2003). Where there is no showing the restraint is ancillary, courts find *per se* or quick look illegality, as in *General Leaseways*, *Premier Electrical Constr.*, *Law*, and *Freeman*. Where there is, courts uphold the restraint under the rule of reason, as in the remaining cited cases, a factor that distinguishes each of these decisions from this one.

This, of course, is exactly the approach followed here by the court of appeals in asking whether "setting one, unified price for both the Texaco and Shell brands of gasoline instead of setting each brand's price independently on the basis of normal market factors . . . is reasonably necessary to further the legitimate aims of the joint venture." 369 F.3d at 1121 (Pet. App. at 21a).

As summarized by Professor Hovenkamp, *XI Antitrust Law*, ¶ 1908b at 253 (2d ed. 2005):

> **Relevance of inclusion in presumptively efficient joint venture or other transaction.** Determining ancillarity requires the tribunal to consider *first*, whether any aspect of the defendants' [footnote omitted] association contains a significant promise of integration or cooperation yielding an increase in output. *Second*, some determination must be made whether the challenged agreement is an essential part of this arrangement, whether it is important but perhaps not essential, or whether it is completely unnecessary.

Consequently, "clearly some restraints are 'part' of efficiency-creating joint ventures and yet not sufficiently integral to the venture so as to be classified as ancillary." *Id.* at p. 259. Moreover, "express limitations on price require a close examination to ensure that they really are essential to an efficiency-producing joint venture." *Id.* at p. 264.

Professor Hovenkamp also notes that the timing of the restraint relative to the venture's formation may bear on whether the restraint is naked or ancillary. Restraints that are "tacked on after the underlying agreement has already been completed" are not intended to "facilitat[e] an output-increasing transaction," and are therefore not ancillary. *Id.*, Section 1908g at p. 275. Here, of course, although they may have secretly agreed beforehand, Shell and Texaco actually imposed their pricing restraint well after the execution of their joint venture agreements, when Equilon had been operating for eight months and Motiva for two without the restraint. This evidence strongly supports the court of appeals' conclusion that the restraint was naked, not ancillary, especially in light of the failure of Shell and Texaco to offer any procompetitive justification.[24]

Not surprisingly, some commentators view the court of appeals' decision "[a]s a case that applies these appropriate generally accepted standards," which "was correctly decided on its current record and should not be considered controversial. It provides helpful guideposts to the types of joint venture activities that trigger antitrust concerns." Bruce D. Sokler, Yee Wa Chin & Katherine E. Walsh, *A Consideration of Dagher and the Antitrust Standard for Joint Ventures*, 1 NYU Journal of Law and Business 307, 321 (2004). This article adds:

[24] *See, also, Freeman v. San Diego Board of Realtors*, 322 F.3d at 1144; *In re Polygram Holding, Inc.*, Docket No. 9298 (FTC), available at http://www.ftc.gov/os/2003/07/polygramopinion.pdf, pp. 10, 54-58, *aff'd*, 416 F.3d 29 (D.C. Cir. 2005).

> In the case of joint venture pricing activities that are not properly ancillary to the venture's legitimate purposes, *per se* illegality may result. From this perspective, *Dagher* is in the mainstream of antitrust jurisprudence and breaks no new ground. The result in *Dagher* represents an unsurprising application of generally accepted antitrust standards to competitor joint ventures. [*Id.*]

B. Application of the *per se* or "quick look" rule.

The court of appeals also properly deemed the restraint to be *per se* illegal under this Court's precedents. Even if the *per se* rule were inapplicable, however, there can be no doubt of the restraint's illegality under the quick look. *Citizen Publ'g* is of course directly on point in its application of the *per se* rule, as are *Timken* and *Maricopa County Med. Soc'y*, both of which involved joint venture price fixing. *See, also, Topco*, 405 U.S. at 609; *Sealy*, 388 U.S. at 354-56.

The analysis by the court of appeals in this case was, however, much more nuanced than a perfunctory application of the *per se* rule, and fully consistent with this Court's joint venture decisions. The court of appeals did not conclude that simply because literal price fixing had occurred, *per se* proscription was appropriate. To the contrary, it examined the degree of integration of the joint ventures and the nature and extent of resulting procompetitive benefits, here claimed cost savings. The court then properly asked whether the restraint on pricing was "reasonably necessary to further the legitimate aims" of the ventures. 369 F.3d at 1121 (Pet. App. at 21a). Only when that question was answered conclusively in the negative, by the testimony of Shell and Texaco executives, did the court find *per se* treatment appropriate. Even then, the court remanded for trial, at which Shell and Texaco will again have the opportunity to show some nexus between their price fixing and the legitimate aims of their ventures.

The methodology employed by the court of appeals closely tracks that of this Court starting with *Broadcast Music*, where this Court observed, "Although the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws, we would not expect that any market arrangements *reasonably necessary* to effectuate the rights that are granted would be deemed a *per se* violation of the Sherman Act." 441 U.S. at 19; emphasis added. The Court then looked to see whether the blanket license was "a naked restrain[t] of trade with no purpose except stifling of competition," or rather accompanied "the integration of sales, monitoring, and enforcement against unauthorized copyright use" and made possible a new product, "a market in which individual composers are inherently unable to compete fully effectively." 441 U.S. at 20-23. Having found the latter, this Court then held *per se* treatment inappropriate. Here, however, as in *Citizen Publ'g*, there was no new product, no procompetitive justification, and no individual competition by the venture owners to mitigate the effects of their price fixing. *Per se* treatment was thus mandated.

In *NCAA*, although this Court declined to apply the *per se* rule because the case involved "an industry in which horizontal restraints on competition are essential if the product is to be available at all," 468 U.S. at 100, the Court nonetheless concluded that it could apply the quick look to invalidate restraints on "price and output" that had "a significant potential for anticompetitive effects," 468 U.S. at 104, when the venture was unable to offer "some competitive justification" for the restraints. This Court said:

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement," [*Nat'l Soc'y of*] *Professional Engineers* [*v. United States*], 435 U.S. [679] at 692, 98 S. Ct., at 1365. . . . We have never required proof of market power in such a case. [Footnote omitted.] This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.

468 U.S. at 110. In *Indiana Fed'n of Dentists*, this Court applied the same principles it had used in *NCAA* and held that, under the quick look, an agreement among Indiana dentists to withhold x-rays violated Section 1 in the absence of "some competitive justification." 476 U.S. at 459-60.

The court of appeals here followed these same rules in dealing with the oil companies' restraint on price. In the absence of some competitive justification – which the oil companies failed and refused to provide – the court quite properly found the restraint to be illegal without the need for further inquiry. Although the court of appeals termed the restraint *per se* illegal and declined to reach the quick look, the result would have been exactly the same under the quick look, given the direct restraint on price and the absence of justification.

Finally, the court of appeals' decision is consistent with this Court's analysis in *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), in which this Court rejected quick look treatment for restrictions on false or misleading discount advertising. This Court stated that although quick look analysis was appropriate where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets," 526 U.S. at 770, this was not such a case because the "advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," in that the restrictions on advertising were, "at least on their face, designed to avoid false or deceptive advertising in a market characterized by striking disparities between the information available to the professional and the patient." 526 U.S. at 771 (footnote omitted).

The Court noted, as it had in *NCAA*, "there is often no bright line separating *per se* from Rule of Reason analysis." 526 U.S. at 779. The Court approved the appropriateness of both *per se* and quick look condemnation of restraints depending on the facts of the particular case, but found such condemnation inappropriate in the case before it, which involved restraints that on their face "furthered the 'legitimate, indeed procompetitive, goal of preventing false and misleading price advertising.'" 526 U.S. at 773.

In this case, however, fixing the same price for the Shell and Texaco brands in no sense facially appears to further any legitimate or procompetitive goal. To the contrary, when asked, every oil company witness expressly disclaimed any such legitimate or procompetitive justification. These disavowals, uncontradicted in the record, left the court of appeals to consider a direct restraint on price with no apparent or claimed procompetitive justification, but with demonstrable anticompetitive market effects. On this record, following this Court's decisions, the court of appeals could conclude only that such a restraint was *per se* unlawful, or, at the least, unlawful under the quick look rule of reason.[25]

The Government itself engages in exactly this type of analysis of joint ventures. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005):

> We therefore accept the Commission's analytical framework. If, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful and, in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive

[25] The court of appeals' decision was also fully in accord with the analytical framework articulated in the dissent in *California Dental*. The dissent described its analysis as embodying "four classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?" 526 U.S. at 782. The specific restraint at issue here, termed the most important consideration, was fixing the same price for the Shell and Texaco brands. Its likely and actual anticompetitive effects were "raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940), which "is illegal per se." *Id.* There were no offsetting procompetitive justifications. In such a situation, this Court has not required an inquiry into whether there is sufficient market power to make a difference, although the record in this case shows beyond question that there was such market power, as evidenced by the ensuing price increases (*e.g.*, from $0.62 to $1.02 cents per gallon in Los Angeles). Under either the majority opinion or dissent in *California Dental*, the restraint in this case merited, if not required, summary condemnation, whether under the *per se* rule or the quick look.

> benefit that plausibly offsets the apparent or anticipated harm. That much follows from the caselaw; for instance, in *NCAA* the Court held that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."

The court of appeals employed comparable reasoning here. Presented with a direct restraint on price and demonstrable anticompetitive effects, the court required Shell and Texaco to "identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm." Shell and Texaco did neither. Nor could they, first because the price restraint was unrelated to the purposes or claimed cost savings of their ventures, and second because the cost savings were never passed on and provided no benefit to consumers in any event. 4 Record at 649-63. [26]

[26] Although this Court has stated that maximizing consumer welfare is a primary purpose of the antitrust laws, *e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), this Court has also expressly ruled that claimed cost savings are not a sufficient justification for an otherwise unlawful combination. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967). When lower courts have considered such an efficiency or cost-saving defense, they have generally required some showing that any claimed cost savings will ultimately be passed on to consumers. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.D.C. 2001); *FTC v. University Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1088-89 (D.D.C. 1997); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1300-01 (W.D. Mich. 1996); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 171-72 (D.D.C. 2000); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1084-85 (D. Del. 1991); *California v. American Stores Co.*, 697 F. Supp. 1125, 1132-33 (C.D. Cal. 1988), *aff'd in part and rev'd in part on other grounds*, 872 F.2d 837 (9th Cir. 1989), *rev'd*, 495 U.S. 271 (1990); *United States v. Long Island Jewish Med. Cntr.*, 983 F. Supp. 121, 148-49 (E.D.N.Y. 1997) ("The second prong of the 'efficiencies' analysis is whether these savings would be passed on to the consumers."). Under the current state of the law and the undisputed evidence that Shell and Texaco

(Continued on following page)

Petitioners and their various *Amici* try in vain to distinguish the joint venture decisions of this Court and lower courts by arguing (1) that no case has ever found a joint venture's pricing of its own products to be unlawful; and (2) that joint venture restraints have been unlawful only when the formation of the venture itself was illegal, the joint venture was an insufficient integration of its owners, the restraints suppressed competition by venture owners outside of the joint venture, or the restraints resulted in an unlawful combination between the venture and other entities or actors. The first proposition is wrong, however, and not a single decision of this or any other court has ever drawn the distinctions urged by the second proposition.

A number of the decisions themselves involve restrictions on pricing the venture's own products. For example, in *Citizen Publ'g*, the joint venture participants fixed the

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never passed on any of their claimed cost savings to consumers, and never intended to do so, Respondents submit that the court of appeals was incorrect in observing, "[t]here is a voluminous record documenting the economic justifications for creating the joint ventures." 369 F.3d at 1111. At most, Shell, Texaco, and SRI perceived sufficient business justifications for combining, which were in their own individual interests, but not in the interests of consumers. Respondents have never conceded that the formation and existence of the ventures themselves were in any way lawful. Given that their sole justification was claimed cost savings, which this Court has never recognized as a sufficient justification for an unlawful combination; that the nature of the cost savings resulted not from any true efficiencies in the sense of being able to produce a new product or engage in a new means of production that Shell and Texaco could not have achieved individually; and that the record shows neither passing on nor an intent to pass on any of the claimed cost savings; Respondents submit that there is no basis for finding the formation or existence of the ventures to be lawful, or their claimed cost savings to justify the decision to charge the same price for the Shell and Texaco brands, which Petitioners concede to be unrelated to their claimed cost savings.

rates for the advertising space and subscriptions being offered by the venture. In *Broadcast Music*, the restraint at issue was the price set for the blanket license offered by the joint ventures. *Per se* illegality was rejected only because the blanket license was a new product for which it was necessary to set some price, unlike here where no new product was offered, and because individual composers remained free to offer individual licenses, unlike here where Shell and Texaco agreed not to compete with their ventures. In *Freeman v. San Diego Bd. of Realtors*, the restraint held *per se* unlawful was fixing the price defendants' joint venture would charge members for its services.

Thus, Petitioners' distinctions simply do not hold up, nor should they. Notwithstanding claims of enhancement of the national welfare by joint ventures – a familiar and long-standing argument of antitrust violators, which this Court has consistently rejected, *e.g.*, *Topco*, 405 U.S. at 609-10; *National Soc'y of Prof. Eng'rs*, 435 U.S. at 688-89 – joint ventures always have presented fertile ground for collusion and anticompetitive restraints. As Professor Hovenkamp has observed:

> By contrast to unilateral actions, joint ventures and other joint conduct provide greater opportunities for anticompetitive behavior. Unlike predation, which may be an expensive investment taking many years, joint ventures can be formed as quickly as cartels can, and often they can be quickly abandoned if they do not work out as planned. The opportunity to earn monopoly profits for just a few months or a year may be a sufficient motive to form a joint venture facilitating collusion.

Hovenkamp, *XIII Antitrust Law,* ¶ 2103, p. 29 (2d ed. 2005); *see, also, General Leaseways*, 744 F.2d at 594. Professor Hovenkamp's comments could not apply more directly to the facts of this case, and argue persuasively against the special dispensation Shell and Texaco seek for their price fixing.

VI. The Decision of the Court of Appeals, if Affirmed, Will in No Way Impede the Lawful Activities of Joint Ventures.

Finally, this Court should reject "the sky is falling" arguments of Petitioners and their *Amici* that affirmance of the court of appeals will chill and cast a lasting pall over the future lawful formation and operation of joint ventures. This case presents a direct restraint on price, for which no justification has been offered, unnecessary to the effective functioning of the subject joint ventures. No decision of this or any other court has ever countenanced such a restraint.

Significantly, the court of appeals' decision itself provides more than ample guidance as to how joint ventures may lawfully operate without running afoul of the *per se* rule:

> The result we reach here allows joint ventures to set prices for their products within the limits of the Sherman Act. Our analysis would be different if we confronted a joint venture in which former competitors agreed jointly to research, produce, market, and sell a new product, or a joint venture in which competitors agreed to merge their current product lines into one collective brand. Nor would we necessarily reach the same result if the defendants had independently decided to charge the same price for Texaco and Shell gasoline after conducting separate price analyses for each brand, or had they come forward with persuasive evidence that the setting of a single, fixed price was important to accomplish the legitimate aims of the joint ventures.

369 F.3d at 1124 (Pet. App. at 27a). Thus, joint venture participants need do nothing more than innovate and produce a new product, or justify the reasonable necessity for their pricing actions by showing a nexus with the purposes or procompetitive benefits of their ventures. Here, Shell and Texaco did neither. Present and future joint venture participants can surely learn from the misdeeds of Shell and Texaco without undue difficulty.

CONCLUSION

Respondents respectfully request this Court to affirm the court of appeals.

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Respectfully submitted,

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