No. 20-2848

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

HOST INTERNATIONAL, INC.,
Plaintiff-Appellant,

v.

MARKETPLACE, PHL, LLC,
Defendant-Appellee.

On Appeal from the United States District Court for the
Eastern District of Pennsylvania, Hon. John M. Gallagher
Case No. 2-19-cv-02036

**BRIEF OF THE RESTAURANT LAW CENTER,
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT**

Angelo I. Amador
RESTAURANT LAW CENTER
2055 L Street, NW, 7th Floor
Washington, DC 20036
(202) 492-5037
aamador@restaurant.org

Gabriel K. Gillett
Counsel of Record
Kelsey L. Stimple
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 840-7220
ggillett@jenner.com

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Amicus curiae certifies that it has no outstanding shares or debt securities in the hands of the public, and does not have a parent company. No publicly held corporation has a 10% or greater ownership in *amicus curiae*.

/s/ Gabriel K. Gillett

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT REGARDING CONSENT

All parties consent to the filing of this *amicus* brief.[1]

IDENTITY AND INTEREST OF *AMICUS*

The Restaurant Law Center (the "Law Center") is a public policy organization affiliated with the National Restaurant Association, the world's largest foodservice trade association. The industry is comprised of over one million restaurants and other foodservice outlets employing over 15 million people. Restaurants and other foodservice providers are the nation's second-largest private-sector employers. Through regular participation in *amicus* briefs on behalf of the industry, the Law Center provides courts with the industry's perspective on legal issues significantly impacting it and highlights the potential impact of pending cases like this one.

Amicus and its members have a significant interest in the core issue raised in this case: whether, pursuant to an agreement with a beverage company, a monopolist may impose in leases for airport concession space a restrictive "pouring rights" provision that prohibits vendors from selling beverage brands supplied by a competing beverage provider.

---

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus* states that no party's counsel authored this "brief in whole or in part"; that no party or party's counsel "contributed money that was intended to fund preparing or submitting the brief"; and that no person other than the *amicus*, its members, or its counsel "contributed money that was intended to fund preparing or submitting the brief." *Id*.

The district court permitted MarketPlace to impose that provision in a lease for commercial concession space at Philadelphia International Airport ("PHL") because, in the district court's view, "the relevant geographic market" for that product "is the world." Dkt. 32 at 9. As a result, the district court reasoned, vendors that dislike the restriction can avoid it simply by choosing to lease space at other airports. But that view misunderstands market and industry realities by improperly treating all airports across the world as interchangeable commodities. The district court's opinion also disregards that market definition is a complex, fact-intensive determination to be evaluated "in the context of each case in acknowledgement of the commercial realities of the industry under consideration." *Borough of Lansdale v. Phila. Elec. Co.*, 692 F.2d 307, 311 (3d Cir. 1982); *see Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962).

The "pouring rights" provision harms competition, and the restaurants that *amicus* represents, by limiting the products restaurants can offer their customers and by frustrating their efforts to provide customers with a consistent and predictable experience across all locations. There is no procompetitive justification for the provision, which negatively impacts passengers and vendors. *Amicus* therefore submits this brief to encourage this Court to reverse the lower court's decision and remand for further proceedings.

SUMMARY OF ARGUMENT

I. The key question in this case is whether Host International, Inc. can avoid MarketPlace, PHL, LLC's "pouring rights" provision, which forces vendors at PHL to offer beverage brands they otherwise would not offer, by substituting concession space at PHL for space at other airports.

The answer is no. Companies consciously choose where they operate their businesses based on a variety of factors. Demand, demographics, regulatory burden, and business strategy, among other things, guide siting decisions. Companies do not necessarily operate the same business profitably in one location that they operate elsewhere. When a business model is tailor-made for a particular location, it cannot simply be transplanted to a new place to avoid a monopolist's reach.

This holds true in the airport leasing context. Space in one airport cannot be substituted for space in another just because both locations are airports. Businesses that lease space at airports, and the customers they serve, do not see airports as fungible. Nor do courts or regulators. *See, e.g.*, *Alaska Airlines, Inc. v. U.S. Dep't of Transp.*, 575 F.3d 750, 760-61 (D.C. Cir. 2009); *Indianapolis Airport Auth. v. Am. Airlines, Inc.*, 733 F.2d 1262, 1267 (7th Cir. 1984); *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1129 (6th Cir. 1981); *In re Hertz Global Holdings, Inc.*, 156 F.T.C. 1, 2-3 (2013). Airports differ in many economically significant ways, including in their structure, operations, commercial offerings, and the number and type of people they serve. As a result, a business well-suited for one airport may not be appropriate in another, and a prospective lessee cannot trade space in one airport for space in another.

So too in the context of the restaurant and foodservice industry, where location is critical. Whether a company is large and international or small and local, it cannot simply relocate a business geared to serve a particular clientele in a particular area when a monopolist flexes its market power. And regardless of a restaurant company's size, defining the relevant geographic market to encompass the entire world may effectively immunize anticompetitive contractual restrictions so long as these restrictions are not imposed on every contract everywhere.

II. Tying arrangements have long been suspect under the antitrust laws. Often they restrain competition unfairly by requiring customers who want to buy one product to also buy a second—a tied product that the customer otherwise would not have purchased.

That is precisely what the pouring rights provision does at PHL. By requiring businesses wishing to lease space at PHL to agree to serve only the beverage brands chosen by MarketPlace in exchange for a hefty payment—and not the brands chosen by the market via consumer demand—the provision harms restaurants that have worked hard to carefully curate a customer experience and to offer a consistent, predictable, high-quality product at locations both inside and outside the airport.

This provision also sharply limits consumer choice by artificially forcing the airport's captive customers to purchase a beverage that they otherwise might not have chosen.

Especially now, as restaurants are facing unprecedented economic and operational challenges posed by government shutdown orders and adapting to a COVID-19 world, it is critical that the Court remove anticompetitive barriers which negatively impact this important American industry. Times are particularly tough for restaurants at airports, where traffic is down dramatically and where operations cannot be shifted outdoors. Restaurant and foodservice businesses have shown time and again that they can thrive in the face of adversity. But doing so will be all the more difficult if monopolists like MarketPlace are permitted to impose anticompetitive lease terms that hamstring restaurants (and harm their customers) by restricting their operations and their ability to meet customer demand.

ARGUMENT

I. The "World" Is Not A Proper Market For "Airport Concession Space" For Purposes Of Antitrust Analysis.

For any brick-and-mortar business, one of its first and most important decisions is "location, location, location." It first identifies an opportunity in a specific geographic market and then builds its business there—not the other way around. The idea that the entire "world" is a single relevant geographic market for airport concession space misses this basic, intuitive point.

By deeming "the world" the relevant market for airport concession space, the district court treated all airport space as the same. Accordingly, the district court found that a company like Host could avoid the pouring rights provision at PHL by simply leasing space at the airport in Fayetteville or Fukuoka instead of Philadelphia. The district court failed to recognize that idiosyncrasies of airports, restaurants, and airport restaurants—not to mention substantial legal authority—support treating PHL as a single geographic market.

A. To Define The Relevant Market, The Key Question Is Whether A Buyer (Host) Can Avoid A Tying Arrangement (Pouring Rights Provision) By Buying The Product (Space At PHL) Elsewhere.

Two markets are relevant here: the *product* market and the *geographic* market. The former focuses on the item that a consumer wants to purchase (here, retail space at PHL), to which the seller has tied another item the consumer does not want to purchase (here, a certain brand's beverages).

The latter focuses on the area in which the relevant product is sold. In this context, the relevant geographic market is the area of competition within which significant substitution occurs and the Court considers where a buyer "may rationally look for the goods or services he seeks." *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 212 (3d Cir. 2005); *see also Lifewatch Servs. Inc., v. Highmark Inc.*, 902 F.3d 323, 337 (3d Cir. 2018) (noting the relevant market's outer boundaries '"are determined by reasonable interchangeability of use' of a particular product within a particular geographic area" (citation omitted)). This involves a fact-intensive inquiry, as the relevant market must '"correspond to the commercial realities' of the industry." *Brown Shoe Co.*, 370 U.S. at 336-37 (citation omitted). Whether the customer can buy a different product in a different geographic market, or even the same product in a different geographic market, is not relevant to the analysis.

More concretely: can airport concession businesses seeking to lease space at PHL instead substitute space in another airport if the lease terms at PHL become untenable? No. Space at PHL is a product that is unlike space at other airports, and space at other airports is not a substitute for space at PHL. As a result of MarketPlace's actions, businesses seeking to lease airport concession space at PHL are therefore forced to accept a tying arrangement that requires them to agree to offer a beverage brand that they otherwise would not have offered if they had the option. That is why the arrangement violates the antitrust laws.

B. Retail Space Is Not Fungible Across Airports.

In the real world that matters for antitrust analysis, companies do not treat concession space at other airports as interchangeable with space at PHL. Because each airport presents unique demographics, regulations, and business structures, the market to lease space at one airport is distinct from the market to lease space at another one. The entire "world" is not a relevant geographic market for purposes of airport concession space.

Business practicalities and applicable regulations differ depending on where an airport is located. To begin, airports present different business opportunities based on their physical structure—for example, the arrangement of terminals, amount of retail space before security checkpoints, and accessibility to the destination city. Some airports require unionized workers, while others may not.[2] A prospective tenant's ability to negotiate lease terms may also vary by airport, as some airports directly exercise control over leasing on their premises, while others (like PHL) contract out concession management.[3] Different airports may also offer different incentives to encourage travelers to spend money at airport businesses.[4] The upshot is that a company generally interested in leasing space at airports does not treat all airports the same because from a business perspective they are not.

The nature and amount of passenger traffic at an airport also impacts commercial opportunities. Demand and demographics are key drivers of business success, and they differ dramatically depending on location. A space in a small

---

[2] *See* Chris Opfer, *Airports Offer New Frontier in Union Fights*, Bloomberg Law (Feb. 13, 2018), https://news.bloomberglaw.com/daily-labor-report/airports-offer-new-frontier-in-union-fights.

[3] *See* Arthur D. Little, *Mastering Airport Retail Roadmap to New Industry Standards* at 10 (2009), https://www.adlittle.com/sites/default/files/viewpoints/ADL_Mastering_Airport_Retail.pdf.

[4] *See* Kevin Rozario, *London's Heathrow Warns 2,000 Retail Jobs Are At Risk If Tax-Free Shopping Is Scrapped*, Forbes (Dec. 12, 2020), https://www.forbes.com/sites/kevinrozario/2020/12/12/londons-heathrow-warns-2000-retail-jobs-are-at-risk-if-tax-free-shopping-is-scrapped/?sh=8847730290ac.

regional airport that makes sense for one business venture may make little sense for another, and even less sense for a business designed to serve customers more likely to frequent a large international hub that receives more consistent and cosmopolitan foot traffic. Even among similarly sized airports, the cultural tastes of the potential clientele vary widely around the globe in the same way that they vary between neighborhoods in a single city.

Nor is airport space interchangeable merely because concession companies operate in multiple airports across the world and in theory could shift capital from one project to another. A company's ability to lease space in different locations does not prevent a monopolist in either location from charging supracompetitive rates for the space it controls. And because the two geographic markets are distinct, the price-raising monopolist in one location does not risk being undercut by a monopolist in another location because the buyer cannot avoid the increase by choosing to go to the other location. In other words, a company cannot avoid a price increase at PHL by choosing to lease space at another airport.

The Fourth Circuit explained why in *It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676 (4th Cir. 2016). There, a regional concert promotor claimed that a large national promotor "violated the Sherman Antitrust Act by engaging in monopolization, tying arrangements, and exclusive dealing in the music concert industry." *Id.* at 680. The court held that the relevant market was not national, even though the large company was national, because "[c]oncertgoers will typically not travel out of their region to attend a concert in response to higher ticket prices in their area." *Id.* at 682. Concert promotion therefore requires "relevant local knowledge and local contacts." *Id.* Putting on a show in Asheville is not the same as putting on a show in Los Angeles—they are in distinct relevant markets. So too, here, where operating concession space at PHL is not the same as operating concession space in other airports. PHL is a distinct relevant geographic market.

Ample legal authority supports the view that a single airport—not the world—may be the relevant geographic market for purposes of antitrust analysis. Multiple courts have reached that conclusion. *See, e.g.*, *Alaska Airlines*, 575 F.3d at 760-61; *Indianapolis Airport Auth.*, 733 F.2d at 1267; *Bell*, 660 F.2d at 1129.[5] So have regulators. *See, e.g.*, *In re Hertz Global Holdings*, 156 F.T.C. at 2-3 (treating each airport as a relevant market for purposes of airport car rentals); *In re Schwartz*, 126 F.T.C 366 (1998) (treating single airport as relevant market for purposes of in-flight catering services); *United States v. United Cont'l Holdings, Inc.*, No. 15-07992 (D.N.J. Nov. 10, 2015) (treating single airport as relevant market for purposes of airline flight slots); *United States v. BBA Aviation plc*, 81 FR 7144-03, 2016 WL

[5] *See also, e.g.*, *Continental Airlines, Inc. v. United Airlines, Inc.*, 120 F. Supp. 2d 556, 568 (E.D. Va. 2000); *Pinehurst Airlines, Inc. v. Resort Air Servs., Inc.*, 476 F. Supp. 543, 551 (M.D.N.C. 1979).

493141 (D.O.J. 2016) (Proposed Final Judgment and Competitive Impact Statement). The relevant geographic market for competition among airlines is city pairs (*i.e.*, flights from one city to another)—not all the possible flight permutations in the world—because "few passengers would fly to a different city than their desired destination in response to a price increase."[6] So too with companies looking to lease commercial retail space within the airport.

C. Restaurant And Foodservice Businesses, Including Those Operating In An Airport, Do Not Necessarily Treat Different Locations As Substitutes.

Far from seeing real estate across the entire "world" as interchangeable, restaurants also choose where to operate based on the specific characteristics of the location.

A restaurant's location is an essential element of its identity and a key ingredient in its recipe for success.[7] In a sector known for tight margins, restaurant owners and operators thoughtfully select and utilize their physical location to draw in a particular clientele. Among other things, restaurateurs assess the eating habits

---

[6] Alexa Naumovich, *Domestic Airline Mergers and Defining the Relevant Market: From Cities to Airports*, 83 J. Air L. & Com. 839, 844 (2018); *See* U.S. Gov't Accountability Off., GAO-14-515, *Airline Competition: The Average Number of Competitors in Markets Serving the Majority of Passengers Has Changed Little in Recent Years, but Stakeholders Voice Concerns about Competition* (2014).

[7] *See How to Start a Restaurant*, Entrepreneur, https://www.entrepreneur.com/article/73384 (last visited Feb. 16, 2021).

and disposable income of the nearby population, the property taxes and local regulations, and the fit with the nearby businesses and broader neighborhood.

Restaurant operators also consider location when designing a concept to draw the level of revenue needed to support the necessary staff and operations. Some locations may be best suited for quick-serve or fast casual models, while others may be a better fit for table service. Still other locations may cater to restaurants designed to serve as a hub for take-out or delivery, or to serve no diners at all on premises. Space at those locations are therefore not necessarily part of the same relevant geographic market.

The geographic area surrounding a restaurant is similarly important. Restaurant dining is an experience, and location plays a crucial role in that experience. A high-end vegetarian restaurant, for example, will perform differently based on whether it is sited in a strip mall next to a hardware store or in a walkable, mixed-use neighborhood. What works in that strip mall may not be viable near a retirement community or in a college town. The same is true within a city: what might work for Rittenhouse Square may not work for Reading Terminal Market. The point is that, for restaurant and foodservice companies, real estate across the world is not interchangeable and so real estate across the world cannot be treated as a single geographic market.

This is true for small and independent restaurant businesses. At bottom, a company's success depends on demand for its product at the specific location where it is being offered. For small and independent restaurants, the question is whether the market in a specific geographic area where the company operates will adequately support the business, not whether there is some other place in the world where the business could succeed. Just because a restaurateur could in theory locate on some other real estate elsewhere in the world does not make the world a valid geographic area.

Location-specific distinctions are also important for large restaurant companies with multiple locations. A single brand may design versions of its restaurants that vary significantly based on the specific location where each restaurant operates. But those variations—whether a full service restaurant, drive-thru, café, or kiosk—are not interchangeable. A company seeking opportunities to expand a particular version of its restaurants will not look in areas where that version cannot survive. For any new venture, a large company considers the same basic factors as a mom-and-pop, including local taste, foot traffic, costs, regulations, and competition. Even a large restaurant cannot actually relocate its operations to a different area merely because that different area exists.

Restaurants with operations in airports think about location the same way as those outside airports. Airports strive to curate a unique retail experience and create a sense of place that distinguishes one airport from another.[8] Many airports have programs to help their local small businesses.[9] MarketPlace understands this well, as it touts its consulting services in this area. At San Francisco International Airport, for example, MarketPlace was responsible for "tenant outreach, leasing, construction management and start-up management of the food & beverage program" in the International Terminal.[10] It "carefully crafted" the food and beverage program to showcase the "quality and diversity of the San Francisco Bay Area's favorite restaurants to the traveling public" and "create a truly memorable San Francisco experience."[11]

Because of trends like these, airport retail locations have become increasingly connected to their adjacent cities—with their unique cultures and business opportunities for a restaurant. *Cf.* Josh M. Bernstein, *Local Beer Is Trending at an Airport Near You*, The Points Guy (Nov. 18, 2017), https://thepointsguy.com/2017/11/local-beer-trends-at-airports/ ("Drinking local beers in an airport, you can know

---

[8] *See, e.g.*, Sarah Firshein, *The History of the TWA Hotel, Preserving an Icon*, Curbed NY (July 23, 2019), https://ny.curbed.com/2019/7/23/20696897/twa-hotel-jfk-airport-new-york-history-preservation.

[9] *See* Tammy La Gorce, *The Struggle and Payoff of Setting Up Shop in an Airport*, N.Y. Times, Mar. 1, 2017, https://www.nytimes.com/2017/03/01/business/smallbusiness/doing-business-at-an-airport.html.

[10] MarketPlace Development, *Previous Airport and Airline Concession Projects*, (2019), https://www.marketplacedevelopment.com/projects/airport-consulting/.

[11] *Id.*

where you are without looking out the window.”). That further reinforces that the world is not a single geographic market for airport concession space, and that space at one airport cannot necessarily be substituted with space at another.

II. The District Court’s Decision Harms The Restaurant And Foodservice Industry At A Time When It Needs Relief, Not More Restrictions.

A. “Pouring Rights” Tying Arrangements Harm Restaurants And Their Customers.

As economists and courts have long explained, tying arrangements often stifle competition and harm consumers. Through a tying arrangement, a monopolist can force customers to buy a less-desired “tied” product that the customer otherwise might not purchase of its own volition. *See* Daniel A. Crane, *Tying and Consumer Harm*, Competition Pol’y Int’l. 8, no. 2 (2012) (describing how “[t]ying arrangements can harm consumer interests in three broad ways that could be relevant under the antitrust laws: when they exclude competitors, facilitate cartel arrangements, or extract surplus from consumers”).

Tying arrangements present acute challenges in the restaurant context. Restaurant and foodservice companies carefully curate a customer experience and strive to provide the consistent, predictable, high-quality products and services that the customers expect. From fine dining to fast food, meeting a customer’s expectations is critical.

That is even more true when it comes to a foundational aspect of the restaurant and foodservice industry: the food and drink on offer. Restaurants that typically serve a particular product at most locations cannot meet customer expectations if certain of their locations are contractually mandated to offer something different. Many restaurants proudly and consciously tout their relationships with suppliers and purveyors of certain products, recognizing that "the other companies you choose to hang around with say a lot about your own brand."[12] "Many of Dairy Queen's Blizzards, for example, are cobranded with candy and cookie brands like Heath Bar and Oreo because these brands improve quality perceptions and make the products more special." Likewise, "Energy Kitchen, the 'home of healthy burgers and wraps,' serves Honest Tea and Diet Coke but not regular-calorie soda" to "help the chain promote the healthy choices [it] wants to be known for."[13] An academic study even concluded that consumer drink preferences may be strong enough that repeated exposure to a less-favored brand may negatively impact "life satisfaction" and break up a relationship.[14]

---

[12] Denise Lee Yohn, *It's A Partnership, Not Charity*, QSR Magazine (July 2011), https://www.qsrmagazine.com/denise-lee-yohn-qsrs-marketing-guru/its-partnership-not-charity.

[13] *Id.*

[14] *See* Danielle J. Brick et al., *Coke vs. Pepsi: Brand Compatibility, Relationship Power, and Life Satisfaction*, J. of Consumer Rsch., Vol. 44, pp 991-1014 (2018), https://academic.oup.com/jcr/article-abstract/44/5/991/3896334.

Control over a product and customer experience is critical for multi-location or franchised brands. Because "[u]niformity of product and control of its quality cause the public to turn to franchise restaurants," *Burger King Corp. v. Stephens*, 1989 WL 147557, at *10 (E.D. Pa. Dec. 6, 1989), the value of the brand a franchisee chooses to affiliate with is directly impacted by a franchisor's ability to maintain consistency and quality. Customers likewise take comfort in knowing that their experience with a specific brand will be the same regardless of the location. Yet the tying arrangement here frustrates that consistency, undermines predictability, and creates business risk by varying a customer's experience depending on whether she visits a location at an airport or elsewhere. And if that experience is negative, it risks harm to goodwill by potentially causing customers to erroneously associate dissatisfaction with an experience at one location with the expected experience at other locations.

This is particularly important for airport locations, which many businesses specifically use as advertisement for their other locations. As one restaurant owner put it, "[a]ll the passengers who might not have known you were there, in your city, find out about you at the airport." La Gorce, *supra* note 9 at 14. Because of their foot traffic and diverse customer base, airports represent a "valuable marketing opportunity for restaurant brands" and "can pay off even if the restaurant is operating even or at a loss."[15] If the airport location cannot accurately reflect the restaurant's brand, this benefit largely disappears.

B. Especially Now, The Restaurant Industry Needs Flexibility To Thrive And Best Serve Customers.

The harm caused by the tying arrangement at issue here adds an extra burden on the restaurant and foodservice industry at a time when it is fighting for survival amid unprecedented economic and operational challenges posed by government shutdown orders and adapting to a COVID-19 world.

In good times, restaurants anchor the economy and culture of strong communities. The industry is comprised of over one million restaurants and other foodservice outlets employing over 15 million people. Consumer spending at restaurants has a multiplier effect too. Every dollar spent at table-service restaurants returns nearly two dollars to the state's economy and supports the public finances by contributing substantial tax revenue. A single restaurant also has a positive impact beyond its specific operations, as it contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses like hotels.[16]

---

[15] Anna Roth, *Why Running a Good Airport Restaurant Is So Difficult*, Eater (Nov. 18, 2015), https://www.eater.com/2015/11/18/9750940/airport-restaurants.

[16] Eric Amel et al., *Independent Restaurants Are a Nexus of Small Businesses in the United States and Drive Billions of Dollars of Economic Activity That Is at Risk of Being Lost Due to the COVID-19 Pandemic* (June 10, 2020).

Restaurants are also cultural centers, creating unique neighborhood identities and driving commercial revitalization.[17] Restaurants "bring stability to the neighborhoods in which they are located" and they "pay property taxes and have a vested interest in seeing that their neighborhoods continue to grow and thrive so that their own businesses will flourish." *LMP Servs., Inc. v. City of Chicago*, 2019 IL 123123, ¶ 18. That is true of the many small (often family-owned) restaurants that make up the vast majority of the industry. They are "a vibrant part of the community and bring a long-term sense of cohesiveness and identity to the area." *Id.*

The restaurant industry remains a shining example of upward mobility. Eight in ten restaurant owners say their first job in the industry was an entry-level position. Even more restaurant managers say the same.[18] In addition, restaurants provide opportunities for historically disadvantaged communities. There are more women and minority managers in the restaurant industry than in any other industry,[19] and restaurants provide opportunity for immigrants to the United States—not only for employment, but also business ownership.[20]

---

[17] *Id.* at 13.

[18] Nat'l Restaurant Ass'n, *Factbook: 2020 State of the Restaurant Industry* 7 (Feb. 2020).

[19] *Id.*

[20] Americas Soc'y et al., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015).

Today, the industry is more at risk than ever before as restaurants have suffered catastrophic financial losses and continue to face unprecedented challenges.[21] As of April 2020, over eight million restaurant employees nationally—nearly two-thirds of the restaurant workforce—had been laid off or furloughed. By May, almost 40% of all restaurants across the country were shuttered, and the industry lost over $80 billion in sales. Economists predict those numbers will only continue to rise, and the industry will have lost almost $250 billion in revenues in 2020.[22]

Conservatively, researchers estimate 15% to 20% of restaurants will permanently close nationwide.[23] Already, more than 110,000 restaurants—17% of restaurants in the country—have closed permanently or long-term.[24] These closures can be devastating to communities. Nearly 90% of adults say "restaurants are an important part of their community."[25] And just as open restaurants have a positive

---

[21] Nat'l Restaurant Ass'n, *COVID-19 Update: The Restaurant Industry Impact Survey* (Apr. 20, 2020).

[22] *Id.*

[23] Danny Klein, *It Will Take Years for the Restaurant Industry to Recover*, FSR Magazine (June 2020).

[24] Joanna Fantozzi, *'Free-fall': 10,000 restaurants have closed over the past three months, according to the National Restaurant Association*, Nation's Restaurant News (Dec. 7, 2020).

[25] Bruce Grindy, *Consumers are Worried their Restaurants will not Survive the Pandemic*, Nat'l Restaurant Ass'n (Aug, 18, 2020), https://www.restaurant.org/articles/news/consumers-are-worried-restaurants-will-not-survive.

impact on the communities where they operate, the closure of restaurants reverberates throughout communities—impacting employees and other local businesses and industries as well.

The numbers for independent restaurants are even more dire, with up to 85% at risk for closure.[26] "Virtually every kind of restaurant is suffering," the National Restaurant Association explained, including "the corner diner, the independents, [and] the individual owners of full-service restaurant chains."[27]

The situation at airports is particularly difficult for restaurants and foodservice companies. Operating an airport restaurant is expensive—deliveries often have to be accepted (and the restaurant therefore needs to be staffed) in the middle of the night; some airports require expensive insurance policies; and rents are especially high.[28] But the expense may be worthwhile because airports typically have "hundreds of thousands of people walking by" and circumstances such as layovers and delayed flights create a "captive audience" that can be very profitable for restaurants. *See* La Gorce, *supra*. As noted above, airports also present an important marketing

---

[26] Heather Lalley, *Report: Up To 85% of Independent Restaurants Could Close Due To Pandemic*, Rest. Bus. (June 11, 2020).

[27] Nat'l Restaurant Ass'n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020), https://restaurant.org/news/pressroom/press-releases/association-statement-on-congressional-recess-with.

[28] *See* Roth, *supra* note 15.

opportunity, including for small businesses by effectively serving as an advertisement for a flagship store.

That is not the situation today, as restaurants in airports are left with high costs and very little reward. In the wake of COVID-19, the number of passengers on world flights was down by nearly 2.7 billion, or 60%.[29] This translates to a massive decrease in the number of potential customers for airport vendors. Many airport restaurants remain closed, and some that have opened have "shifted to lower capacity because of less customer traffic and to allow for social distancing in tight airport stalls." Kelly Yamanouchi, *Workers for Airport, Airline Contractors Endure Job Turmoil*, AviationPros (Feb. 1, 2021). In Atlanta's Hartsfield-Jackson International Airport, for example, only 37 of its 347 concessions were open in April 2020 and as of February 2021 some restaurants remain closed. *Id.* Airport restaurants exist at the cross section of two industries that are among the most negatively impacted by the coronavirus.

CONCLUSION

Imposing restrictions like the "pouring rights" tying arrangement at issue here harms businesses and consumers. Although the arrangement serves to increase prices for leases at PHL, customers for those leases cannot escape the increase by

[29] Int'l Civil Aviation Org., *Effects of Novel Coronavirus (COVID-19) on Civil Aviation: Economic Impact Analysis* (Feb. 17, 2021), https://www.icao.int/sustainability/Documents/Covid-19/ICAO_coronavirus_Econ_Impact.pdf.

relocating. There is no comparable product in the Philadelphia area or elsewhere, because commercial retail space at airports is not fungible. The result is that the monopolist (here, MarketPlace) can impose burdensome conditions that require customers (here, Host) to agree to serve beverages irrespective of market demand. That harms Host, its customers who operate restaurants, and in turn their customers as well. The district court's order should be reversed and the case remanded for further proceedings.

Dated: February 17, 2021

Respectfully submitted,

/s/ Gabriel K. Gillett

Angelo I. Amador
RESTAURANT LAW CENTER
2055 L Street, NW, 7th Floor
Washington, DC 20036
(202) 492-5037
aamador@restaurant.org

Gabriel K. Gillett
Counsel of Record
JENNER & BLOCK LLP
Kelsey L. Stimple
353 N. Clark Street
Chicago, IL 60654
(312) 840-7220
ggillett@jenner.com

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a) and 32(g), and Local Rules 31.1(c) and 28.3(d), the undersigned counsel certifies as follows:

1. I am a member of the bar of this Court.

2. This brief complies with the type-volume limitation of Rule 29(a)(5) because the brief contains 5,065 words, excluding the parts of the brief exempted by Rule 32(f).

3. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because the brief was prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

4. The text of the electronic brief is identical to the text in the paper copies.

5. A virus detection program, Microsoft Security Essentials, has been run on the file and no virus was detected.

I understand that a material misrepresentation may result in the Court's striking the brief and imposing sanctions. If the Court so desires, I will provide an electronic version of the brief and/or copy of the work or line print-out.

Dated: February 17, 2021

Respectfully Submitted,

/s/ Gabriel K. Gillett
Gabriel K. Gillett

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Seven paper copies of the foregoing brief were sent to the Clerk's Office via UPS overnight delivery, delivery service prepaid. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: February 17, 2021

/s/ Gabriel K. Gillett
Gabriel K. Gillett