No. 20-512, -520

In the Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Petitioner,

v.

SHAWNE ALSTON, ET AL.,

Respondents.

AMERICAN ATHLETIC CONFERENCE, ET AL.,

Petitioners,

v.

SHAWNE ALSTON, ET AL.,

Respondents.

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

BRIEF OF OPEN MARKETS INSTITUTE, COLOR OF CHANGE, NATIONAL EMPLOYMENT LAW PROJECT, STRATEGIC ORGANIZING CENTER, TOWARDS JUSTICE, AND SCHOLARS OF ECONOMICS AND LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Open Markets Institute (OMI) is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

Color Of Change is the nation's largest online racial justice organization that helps people respond effectively to injustice in the world around us. As a national online force driven by 7 million members, we move decision-makers in corporations and government to create a more human and less hostile world for Black people in America.

The National Employment Law Project (NELP) is a non-profit legal organization with fifty years of experience advocating for the employment rights of workers in low-wage industries. NELP's areas of expertise include the workplace rights of workers, and the ways in which companies use unilaterally imposed labels and structures on their workers to carve themselves out of workplace protection laws. NELP collaborates closely with community-based worker centers, unions, and academics, litigated, and participated as *amicus* in numerous cases addressing

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

the rights of contingent workers under federal and state laws in federal and state and the U.S. Supreme Court. NELP has submitted testimony to the U.S. Congress and state legislatures on numerous occasions. NELP has an interest in this case because of the possible implications to workplace laws, workers, and our society.

The Strategic Organizing Center (SOC) is a democratic federation of labor unions representing millions of working people. The organization strives to ensure that every worker has a living wage, benefits to support their family and dignity in retirement. The SOC advocates not just for jobs, but for good jobs: safe, equitable workplaces where all employees meaningfully participate in the decisions affecting their employment. The SOC believes that robust antitrust enforcement and regulation can bring more equity to the balance of power between working people and those who profit from their labor.

Towards Justice is a non-profit legal organization that uses impact litigation, policy advocacy, and collaboration with workers and workers' organizations to advance economic justice and attack systemic impediments to worker power. Our litigation on behalf of workers addresses a range of important workplace issues, including workplace safety and health, systemic racial discrimination, misclassification, the abuses of forced arbitration, exploitation of the foreign guest worker programs, and forced labor. Towards Justice has supported workers in litigating several cases under the antitrust laws that have sought to protect the notion that one of the pillars of workplace dignity is workers' right to shop between employers for better treatment.

Marshall Steinbaum is assistant professor of economics at the University of Utah. He researches market power in labor markets and more generally, including its applications in antitrust, labor regulation, higher education, and other policy areas.

Sanjukta Paul is assistant professor of law and Romano Stancroff Research Scholar at Wayne State University. Her work on antitrust and labor has appeared or is forthcoming in the Yale Law Journal, UCLA Law Review, Law & Contemporary Problems, and the Berkeley Journal of Employment & Labor Law, and her book in the same area will be published by Cambridge University Press.

Veena Dubal is professor of law at the University of California, Hastings College of the Law. Her research focuses on the intersection of law and social change in the work context. She joined the Hastings Faculty in 2015, after a post-doctoral fellowship at Stanford University (also her undergraduate alma mater). Prior to that, she received her J.D. and Ph.D. from UC Berkeley, where she used historical and ethnographic methodologies to study workers and worker collectivities in the San Francisco taxi industry. Her work on taxi workers, Uber drivers, and Silicon Valley tech workers has been featured in top-ranked law reviews and featured in the local and national media.

SUMMARY OF ARGUMENT

The Sherman Act protects sellers of goods and services, including workers who sell their labor, from powerful purchasers. Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 Antitrust L.J. 707, 714 (2007). Senator Sherman himself stated that trusts and monopolies

"regulate prices at their will, depress the price of what they buy and increase the price of what they sell." 21 Cong. Rec. 2461 (1890). Accordingly, "[t]he [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). To ensure protection of upstream market participants, antitrust analysis under the rule of reason is carefully circumscribed. It "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978).

The Ninth Circuit undercut both the Sherman Act's protection of sellers and this Court's guidance on analyzing restraints of trade. The respondents—current and former college basketball and football players—sell their athletic services to the member colleges of the National Collegiate Athletic Association (NCAA). They allege that the NCAA and its member colleges collusively restrained intercollegiate competition for their athletic services by capping compensation for players at the cost of attendance and thereby deprived them of the right to earn competitive pay for their hard work and talent.[2] Once the college athletes established a *prima facie* case under the rule

[2] The players generate billions in annual revenues for the NCAA and its member colleges. A fair market for their athletic services ultimately requires both competition among colleges and collective organizations for players. In general, labor markets serve workers best when employers compete for their skills and workers exercise collective power through labor unions.

of reason,[3] the district court allowed the NCAA to rebut this presumption by showing benefits to other groups, such as viewers of college sports, and credited one of these justifications: purported viewer interest in college sports on account of limited player compensation. The Ninth Circuit affirmed the district court's ruling, including its balancing of harms to the college athletes from the NCAA's trade restraints against their supposed benefits to viewers of college sports.

In accordance with congressional intent, since the early years of the Sherman Act, this Court has consistently held that the law protects sellers from restraints of trade and monopolistic practices. In *Swift & Co. v. United States*, 196 U.S. 375 (1905), this Court upheld the antitrust liability of stockyard owners who had collusively suppressed the price of cattle paid to ranchers. In a later buyer-side price-fixing case, this Court stated explicitly that the Sherman Act protects both purchasers and sellers: "The Act is comprehensive in its terms and coverage, protecting *all who are made victims* of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms*, 334 U.S. at 236 (emphasis added). More recently, this Court held that a monopolistic intermediary inflicts *distinct* injuries on purchasers and sellers, and that both groups have the right to recover antitrust damages from the monopolist. *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019).

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[3] This Court has held that the NCAA's horizontal restraints on a downstream market (television broadcast of football games) should be evaluated under the rule of reason and not subject to per se invalidation. *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 86 (1984).

To assure the Sherman Act's protection of multiple groups of economic actors, courts, in a rule of reason analysis, should look only at a restraint's effects in the market where the plaintiffs either offer their services or purchase their goods. They should *not* "sacrifice competition in one portion of the economy for greater competition in another portion[.]" *United States v. Topco Associates, Inc.*, 405 U.S. 596, 611 (1972). Accordingly, the rule of reason is limited to a challenged restraint's costs and benefits for only the injured class. The Court made this clear in *National Society of Professional Engineers*:

> Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.
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> * * *
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> [T]he purpose of [antitrust] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

435 U.S. at 688, 692. In the wake of *Professional Engineers*, a court of appeals applied the rule of reason to a labor-market restraint in professional sports and rejected an unbounded rule of reason. *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1186 (D.C. Cir. 1978).

From an institutional perspective, the courts are ill-equipped to engage in a broad cross-market cost-benefit analysis under the rule of reason. In consequence, "to make the delicate judgment on the

relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required." *Topco*, 405 U.S. at 612. Because such balancing requires evaluating numerous considerations, the task should be undertaken by democratically accountable legislators, rather than claimed by judges. In his concurrence below, Judge Smith warned against balancing harms and benefits in separate markets, writing that, to do so, courts "must—implicitly or explicitly—make value judgments by determining whether competition in the collateral market is more important than competition in the defined market." Pet. App. 64a (No. 20-512). As the *Topco* Court recognized, "[p]rivate forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking." 405 U.S. at 611.

Under the Ninth Circuit's articulation of the rule of reason, firms with market power can inflict harm on sellers through restraints of trade and monopolization and defend themselves by showing benefits to another group. This type of balancing sacrifices sellers' right to a fair, competitive marketplace in order to serve downstream customers. The court gave powerful purchasers significant freedom to disempower workers and other sellers through restraints of trade so long as they can show offsetting gains to another group, here viewers of college sports. As such, firms would be permitted to maintain their buy-side restraints in partial or full measure—injuring one group of economic actors in the name of benefitting another.

In this case, the results are especially perverse. Under the Ninth Circuit's ruling, colleges are given broad latitude to deprive athletes of the right to earn a fair, competitive wage to satisfy the purported

preferences of sports fans. This expansive rule of reason "leads to the abhorrent result of allowing purchasers of labor to unlawfully exploit one class of people (in this case, predominantly African American college athletes) for the purpose of benefiting another, presumably a more important class of people (the consumers of college athletics, in particular the viewers of televised men's football and basketball games)." Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 Marq. Sports L. Rev. 331, 366-67 (2005).

In evaluating the challenged restraint, the courts below should have limited their rule of reason analysis to the effects on college basketball and football players—and not considered the effects on other groups. Once the college athletes established their *prima facie* case, the district court should have considered only the presumptively illegal restraint's offsetting benefits to the injured college athletes themselves. The restraint's supposed benefits to other groups, such as viewers of college sports, should have been disregarded. This bounded approach ensures that the Sherman Act fully protects sellers of goods and services, such as the college athletes here, from purchasers' restraints of trade.

Equally important, a rule of reason analysis does not need to be exhaustive under all circumstances. Sometimes, it can "be applied in the twinkling of an eye." *Board of Regents*, 468 U.S. at 109 n.39. The NCAA's restraints resemble those that have condemned under an abbreviated rule of reason

analysis. Indeed, the NCAA's restraints at issue would be per se illegal, but for (arguably) *Board of Regents*.[4]

The Tenth Circuit affirmed a "quick look" condemnation of the NCAA's restraints capping the compensation of assistant coaches in men's basketball. *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010, 1020 (10th Cir. 1998). Courts have also invalidated restraints that limit horizontal competition between actual or potential competitors without a full rule of reason inquiry. *See, e.g.*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 37 (D.C. Cir. 2005) ("An agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement between competitors, which would ordinarily be condemned as per se unlawful."). Given the close resemblance between per se illegal horizontal agreements and the NCAA's restraints, an abbreviated rule of reason is warranted here—and sufficient to invalidate the NCAA's compensation restrictions. *Law*, 134 F.3d at 1020.

Contrary to the assertions of the NCAA and its conferences, this Court has long held that labels such as "joint venture" cannot immunize horizontal collusion from the Sherman Act. The relevant question for courts concerns not the label but the restraint's substance. A joint venture is subject to antitrust scrutiny under Section 1 of the Sherman Act if "the agreement joins together 'independent centers of

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[4] Because plaintiffs argue for affirmance based on the lower courts' rule of reason analysis, no issue of per se condemnation is raised on this appeal. Thus, for now the NCAA has dodged a bullet. *See, e.g., Anderson v. Shipowners Assn. of Pacific Coast*, 272 U.S. 359 (1926).

decisionmaking.'" *American Needle, Inc. v. National Football League*, 560 U.S. 183, 196 (2010). So, merely creating a joint venture does not immunize all arrangements between the parties involved from antitrust scrutiny. *Id.* at 199. Rather, "[w]e seek the central substance of the situation, not its periphery, and in this pursuit, we are moved by the identity of the persons who act, rather than the label of their hats." *United States v. Sealy, Inc.*, 388 U.S. 350, 353 (1967). Applying this principle, this Court has "repeatedly" found a Section 1 violation when a single entity was "controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *American Needle*, 560 U.S. at 191.

The NCAA's appeal to "amateurism" is equally unhelpful to its position. As with its joint venture argument, by repeating "amateurism" to justify its restraints on player compensation, the NCAA again obscures substance with labels. This Court's language in *Board of Regents* about amateurism is dictum—an observation about the character of NCAA intercollegiate athletics that was not necessary nor relevant to the holding in the decision. *Board of Regents*, 468 U.S. at 129 (invalidating restrictions on television broadcasting of college football games). This dictum is not nearly enough to displace the antitrust laws. "[R]epeals by implication are not favored," *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). *See also California v. FPC*, 369 U.S. 482, 485 (1962) ("Immunity from the antitrust laws is not lightly implied.").

The NCAA's history of trade restraints against college athletes also offers no defense. Long-standing violation of the Sherman Act—or of any law for that matter—is no basis for claiming either immunity or even a right to more limited legal oversight: "a history

of concerted activity does not immunize conduct from § 1 scrutiny." *American Needle*, 560 U.S. at 198. The restraint on competition among potential rivals—here, competition among NCAA members for athletic talent—is itself sufficient for antitrust condemnation. *See Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam) (ruling that market allocation schemes are illegal "regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other.").

If this Court were to allow the NCAA to use labels and its own history to justify its conduct, the Sherman Act would become a dead letter. By adopting benign-sounding labels for their illegal conduct and invoking their history of lawbreaking as a defense, firms and associations of firms could unilaterally exempt themselves from the Sherman Act and other antitrust laws. Enabling private prerogative to override federal legislation would make a mockery of the rule of law. *See Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951) ("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."), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Accordingly, when Congress seeks to authorize competitor coordination otherwise illegal under the antitrust laws, "it has done so *expressly by legislation*." *Associated Press v. United States*, 326 U.S. 1, 14 (1945) (emphasis added). This prerogative of Congress should be respected here.

ARGUMENT

I. The Sherman Act Protects Workers and Other Sellers from Purchasers' Restraints of Trade and Monopolistic Practices

The Sherman Act protects sellers of goods and services from powerful purchasers. In enacting the law, Congress aimed to safeguard the freedom of workers, farmers, and other sellers from monopolies and trusts. *See* Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 Antitrust L.J. 707, 714 (2007) ("The legislative history leaves no doubt that Congress intended to protect sellers victimized by trusts and other conduct within the scope of the Sherman Act's prohibitions."). Indeed, because these powerful corporations exploited farmers, workers, and business proprietors, they were the principal opponents of the trusts and monopolies and fought for antitrust legislation at the federal and state levels in the late nineteenth century. David Millon, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219, 1226 (1988). *See generally* Hans B. Thorelli, The Federal Antitrust Policy 143-52 (1955). Given this clear congressional intent and historical context, this Court has long held that the antitrust laws protect sellers from buyers' restraints of trade and monopolization.

Floor remarks from the Sherman Act debates illustrate Congress's intent to protect sellers. Senator Sherman condemned the trusts for their power over both buyers and sellers: "They regulate prices at their will, depress the price of what they buy and increase the price of what they sell." 21 Cong. Rec. 2461 (1890). Senator George, a leading proponent of antitrust legislation, similarly attacked the trusts' power as both purchasers and sellers:

> They operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business and they decrease the cost of raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell.

21 Cong. Rec. 1768 (1890). *See also* 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman) (A trust can "command[] the price of labor without fear of strikes, for in its field it allows no competitors.").

Reflecting this legislative interest in the autonomy and well-being of sellers, members of Congress repeatedly cited the beef trust for its dominance over both ranchers and consumers. The Senate even established a special committee to investigate it. John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 Fordham L. Rev. 2425, 2435 (2013). Addressing the power of the beef trust, Representative Taylor asserted, "This monster robs the farmer on the one hand and the consumer on the other." 21 Cong. Rec. 4098 (1890). In a similar spirit, Senator Allison observed that "there is a combination in the city of Chicago which not only keeps down the price of cattle upon the hoof, but also . . . make[s] the consumers of beef pay a high price for that article." 21 Cong. Rec. 2470 (1890).

In accordance with Congress's intent, this Court, since the early years of the Sherman Act, has held that the law protects sellers from restraints of trade and monopolistic practices. In *Swift & Co. v. United States*, 196 U.S. 375 (1905), the Court affirmed the liability of stockyard owners who had collusively suppressed the price of cattle paid to ranchers. The

Court also condemned a cartel of shipping employers for suppressing wages. *Anderson v. Shipowners' Ass'n of Pacific Coast*, 272 U.S. 359, 362, 365 (1926).

In a subsequent buyer-side price-fixing case, the Supreme Court reiterated that the Sherman Act protects both purchasers and sellers:

> The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, *protecting all who are made victims* of the forbidden practices by whomever they may be perpetrated.

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (emphasis added).

Applying this principle of protecting all victims of antitrust violations, including sellers, this Court held that a football player-coach who alleged a group boycott of his services had the right to take his claim to trial. *Radovich v. National Football League*, 352 U.S. 445, 453-54 (1957). Two years later, the Court affirmed a judgment holding that a boxing association had improperly monopolized the market for championship contests by imposing exclusivity contracts on the leading fighters. *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 262-63 (1959).

The Sherman Act's protection of sellers has not diminished over time, as seen in more recent decisions. In a predatory bidding case, the Court recognized buyer-side power as symmetric with seller-side power: "Monopsony power is market power on the buy side of the market. As such, a monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a 'buyer's monopoly.'"

Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320 (2007) (citations omitted).

And in a 2019 decision, this Court re-iterated the antitrust protection of sellers, recognizing that a monopolistic intermediary inflicts *distinct* injuries on purchasers and sellers. Both have the right to recover antitrust damages from the monopolist:

> [S]ome downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a common fund . . . .

Apple Inc. v. Pepper, 139 S. Ct. 1514, 1525 (2019).

Applying these precedents, the lower courts have held that the Sherman Act protects sellers. The Tenth Circuit struck down NCAA rules that capped compensation for assistant coaches in men's basketball, writing that a buyer-side "cartel ultimately robs the suppliers of the normal fruits of their enterprises." *Law v. National College Athletic Ass'n*, 134 F.3d 1010, 1022 (10th Cir. 1998). Similarly, the Ninth Circuit described buyer-side collusion as follows:

> When horizontal price fixing causes buyers to pay more, or sellers to receive less, than the prices that would prevail in a market free of the unlawful trade restraint, antitrust injury occurs. This is seen most often in claims by overcharged buyers; as to underpaid sellers it is less common in the reported cases, but is equally true.

Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 988 (9th Cir. 2000). *See also, e.g.*, *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.) ("[A] horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers."); *West Penn Allegheny System, Inc. v. UPMC*, 627 F.3d 85, 105 (3d Cir. 2010) ("Highmark's improperly motivated exercise of monopsony power . . . was anticompetitive and cannot be defended on the sole ground that it enabled Highmark to set lower premiums on its insurance plans."); *Vogel v. American Society of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.) ("[B]uyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal per se.").

II. The Ninth Circuit's Application of the Rule of Reason Subverts the Sherman Act's Protection of Workers and Other Sellers and Permits Courts to Engage in Unbounded Balancing

The Ninth Circuit's application of the rule of reason undermines the Sherman Act's protection of sellers and is inconsistent with this Court's guidance on applying the rule of reason. The court of appeals compared the proven harms of the challenged restraints to the college athletes, sellers of their services, against the purported benefits to viewers of college sporting events, consumers in this case. By engaging in this cross-market balancing, the court of appeals undercut the Sherman Act's protection of sellers.[5] This type of balancing also contravenes this

[5] This case bears no factual resemblance to *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018), in which this Court permitted a rule of reason analysis that took account of effects on two

Court's directive that the rule of reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978).

A. The Ninth Circuit's Application of the Rule of Reason Subordinates Sellers' Interests to Customers' Interests

While holding that the NCAA's restraints injured college athletes, the Ninth Circuit weighed this injury to the athletes against asserted benefits to viewers of college sports. To be sure, the court did *not* credit most of the NCAA's proffered benefits to viewers (or the athletes). However, the court did conclude the NCAA established that sports fans value college sports, in part, because of the tight restrictions on player compensation, in contrast to professional sports in which caps on player compensation are limited or non-existent. In other words, the court balanced the demonstrated injury to college athletes against the benefit to viewers of college sports.

Under the Ninth Circuit's formulation of the rule of reason, firms with market power can inflict harm on sellers through restraints of trade and monopolization and defend by showing offsetting benefits to another group, such as downstream purchasers of a different product altogether. Firms can be found liable, but subject to only a limited remedy, as the NCAA was here. Powerful purchasers would

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distinct groups affected by the restraint. Unlike American Express, the NCAA does not "facilitate a single, simultaneous transaction"—in *American Express*, between cardholders and merchants—in a "transaction" created "simultaneous[ly]" each and every time the restraint operated. *Id.* at 2286.

have significant freedom to disempower workers and other sellers and deprive them of a fair, competitive income through restraints of trade so long as they could show offsetting gains to their customers or another group. Equally troubling, under this formulation of the rule of reason, defendants can potentially escape liability entirely if they can demonstrate that their restraint's benefits to another group exceed the harm to workers or other sellers.

Instead of protecting college athletes in full measure, the Ninth Circuit subordinated their interests to the interests of sports fans. This Court has made clear that the Sherman Act protects workers and other sellers of services just as much as it protects customers and end-user consumers. *See* Part I, *supra*. The court of appeals' decision, however, grants significant latitude to firms to injure sellers through restraints of trade, provided that they can establish offsetting benefits to another group.

This type of balancing sacrifices sellers' right to a fair marketplace in order to serve buyers' purported preferences. In his concurrence, Judge Smith wrote that this balancing "leave[s] Student-Athletes with little recourse under the antitrust laws. . . . and thus denie[s] the freedom to compete and, in turn, of compensation they would receive in the absence of the restraints." Pet. App. 66a (No. 20-512). Here, the results are especially indefensible. Under the Ninth Circuit ruling, colleges are given broad latitude to deprive athletes of the right to earn a fair, competitive wage to satisfy the supposed preferences of members of the viewing public. The expansive rule of reason "leads to the abhorrent result of allowing purchasers of labor to unlawfully exploit one class of people (in this case, predominantly African American college athletes) for the purpose of benefiting another,

presumably a more important class of people (the consumers of college athletics, in particular the viewers of televised men's football and basketball games)." Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 Marq. Sports L. Rev. 331, 366-67 (2005).

B. This Court Has Directed the Lower Courts to Refrain from Unbounded Cost-Benefit Analysis Under the Rule of Reason

The Ninth Circuit's decision also is contrary to this Court's directive against broad, cross-market cost-benefit analysis under the rule of reason. Rejecting judicial measuring of social debits and credits through the Sherman Act, this Court wrote: "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 611 (1972).

To assure the Sherman Act's protection of multiple classes, the rule of reason is restricted to a challenged restraint's costs and benefits for only the affected class in the relevant market. The rule of reason's lens is circumscribed, not unbounded:

> Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.

* * *

> [T]he purpose of [antitrust] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

Professional Engineers, 435 U.S. at 688, 692.[6]

Shortly after *Professional Engineers*, the D.C. Circuit applied the rule of reason to a labor market restraint in professional sports and rejected unbounded rule of reason analysis. *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1186 (D.C. Cir. 1978). Although Pro Football's draft was "anticompetitive in its effect on the market for players' services," the league argued it produced "playing-field equality among the teams," "better entertainment for the public," "higher salaries for the players," and "increased financial security for the clubs." *Id.* at 1186. Because these supposedly "procompetitive" benefits did "not increase competition in the economic sense of encouraging others to enter the market and to offer the product at lower cost," *id.*, they could not be balanced

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[6] Consider this Court's adoption of the rule of reason for vertical restraints governing retail markets. These decisions have *not* broadened the scope of the rule of reason. Instead, the Court considers the relevant costs and benefits borne by or accruing to the directly affected group—merchants or consumers affected by the vertical restraints. *See, e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-59 (1977) (holding vertical non-price restraints subject to the rule of reason and, in effect, requiring gains in interbrand competition to be weighed against reduction in intrabrand competition in the relevant consumer product markets); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 897-99 (2007) (same with respect to minimum vertical price restraints).

against the draft's anticompetitive effect. "This," the court of appeals wrote, was "precisely the type of argument that the Supreme Court only recently ha[d] declared to be unavailing" in *Professional Engineers*. *Smith*, 593 F.2d at 1186.

Likewise, in evaluating the legality of mergers under the Clayton Act, this Court has restricted the scope of analysis. The Court held that "a merger the effect of which may be substantially to lessen competition is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963) (citation omitted).

From an institutional perspective, the courts are ill-equipped to engage in a broad cost-benefit analysis through the rule of reason. This Court has recognized that such balancing requires a weighing of values and evaluating economic, political, and social considerations—a task appropriately reserved for legislators:

> If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the

> judgment of the elected representatives of the people is required.

Topco, 405 U.S. at 611-12. This type of cost-benefit analysis also introduces significant administrative difficulties and risks severely weakening antitrust law. Daniel A. Crane, *Balancing Effects Across Markets*, 80 Antitrust L.J. 397, 409-10 (2015). *See also* Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 Vand. L. Rev. 1, 21-22 (2016) (observing the difficulties of balancing costs and benefits to different groups).

In his concurrence below, Judge Smith, warned that this balancing is inevitably fraught with peril. Courts "must—implicitly or explicitly—make value judgments by determining whether competition in the collateral market is more important than competition in the defined market." Pet. App. 64a (No. 20-512). Likewise, the D.C. Circuit rejected open-ended cost-benefit analysis in condemning professional football's draft: "The draft's 'anticompetitive evils,' in other words, cannot be balanced against its 'procompetitive virtues,' and the draft be upheld if the latter outweigh the former." *Smith*, 593 F.2d at 1186.

Through an unbounded rule of reason, the district court, and thereafter the Ninth Circuit, made policy choices appropriately reserved for legislators who, unlike judges, are democratically accountable. In balancing the restraint's harms to college athletes against its benefits to viewers of college sports, the court of appeals improperly chose "to sacrifice competition in one portion of the economy for greater competition in another portion[,]" *Topco*, 405 U.S. at 611, and usurped legislative prerogatives.

III. The Ninth Circuit Should Have Considered Only the Restraint's Harms and Benefits to College Basketball and Football Players

The court of appeals should have limited its rule of reason analysis of the NCAA's restraints to the effects on college basketball and football players. This approach ensures that the Sherman Act fully protects sellers, as this Court's precedents establish. It also ensures that the federal courts avoid making open-ended judgments that they are ill-equipped to make and that are appropriately entrusted to the legislature. Indeed, because the NCAA's restraints—horizontal limits on player compensation—amount to wage-fixing agreements among employers, they should be summarily condemned under the rule of reason in the "twinkling of an eye." *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 109 n.39 (1984).

Once the college athletes established a *prima facie* case, the court of appeals should have evaluated only offsetting benefits of the restraints, if any, to them. The court should have confined its analysis to credible benefits in the affected market—the market for college basketball and football players' services. It should not have considered the NCAA's argument that the challenged restraints benefit college sports fans. The question whether restraints on college athletes' compensation increase, for example, the value of college sports to viewers falls outside of a proper rule of reason analysis.[7]

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[7] While the college athletes presented three relevant labor markets, showed that the petitioners dominated all three markets, and demonstrated that the NCAA's restraints harmed them, the college athletes could have also made out a *prima facie*

A bounded rule of reason analysis ensures that the Sherman Act protects "*all* who are made victims" of antitrust violations, including sellers of services such as the college athletes here. *Mandeville Island Farms*, 334 U.S. at 236 (emphasis added). This approach would prevent the NCAA and other powerful buyers from injuring college athletes and other sellers through restraints of trade and overcoming presumptive illegality by showing benefits to another group. By considering only harms and benefits to sellers, this rule of reason analysis places sellers on an equal footing with buyers under the Sherman Act—as Congress intended, and as this Court's precedents hold it does. As so bounded, the rule of reason not only "protect[s] the economic freedom of participants in the relevant market[,]" *Knevelbaard Dairies*, 232 F.3d at 988 (quoting *Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538 (1983)), but also entrusts broader economic, social, and political judgments to Congress and state legislatures.

A rule of reason analysis need not be exhaustive under all circumstances, but can, sometimes, "be applied in the twinkling of an eye." *Board of Regents*, 468 U.S. at 109 n.39. *See also California Dental Association v. FTC*, 526 U.S. 756, 781 (1999). The NCAA's restraints resemble those condemned with an

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case by showing the NCAA's restraints had adverse effects, such as reduced compensation for college basketball and football players, in the labor markets. *See FTC v. Ind. Federation of Dentists*, 476 U.S. 447, 460-61 (1986) (citations omitted) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.").

abbreviated analysis under the rule of reason. The Tenth Circuit affirmed a "quick look" condemnation of the NCAA's restraints capping the compensation of assistant coaches in men's basketball. *Law*, 134 F.3d at 1020, 1024. Other courts have similarly invalidated restraints that limit horizontal competition between actual or potential competitors without a full reason of reason inquiry. For instance, the D.C. Circuit stated that "[a]n agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement between competitors, which would ordinarily be condemned as per se unlawful." *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 37 (D.C. Cir. 2005).

Given the close resemblance between these per se illegal horizontal agreements and the NCAA's restraints, at most an abbreviated rule of reason analysis is warranted here. *See Law*, 134 F.3d at 1020 (applying quick look rule of reason "where the plaintiff shows that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more favorable to the defendant than otherwise would have resulted from the operation of market forces.").[8]

IV. The NCAA Cannot Evade the Sherman Act by Using Special Labels or Citing A History of Trade Restraints

The NCAA and its conferences invoke "joint venture," "amateurism," and the history of the intercollegiate system to defend their existing

[8] Indeed, but for the framing of the issues in this Court and an expansive reading of dictum in *Board of Regents*, the NCAA's restraints should fall as per se illegal. *See* p. 9, n.4, *supra*.

restraints of trade and immunize them from the antitrust laws. But these arguments are unavailing. Antitrust defendants cannot use special labels or invoke a history of violation to justify restraining trade. If this Court were to adopt the position of the NCAA and its conferences, it would empower corporations to unilaterally escape the prohibitions of antitrust law or to limit its application merely by using special labels. Exemptions are the province of Congress—not of private parties or the federal judiciary.

This Court has long held that labels such as "joint ventures" cannot immunize horizontal collusion from the Sherman Act. The relevant question for courts is substance, not labels. A joint venture is subject to Sherman Act scrutiny if "the agreement joins together 'independent centers of decisionmaking.'" *American Needle, Inc. v. National Football League*, 560 U.S. 183, 196 (2010). As the Court wrote in *American Needle*, which involved the National Football League and concerted action among its teams: "Any joint venture involves multiple sources of economic power cooperating to produce a product. . . . But that does not mean that necessity of cooperation transforms concerted action into independent action." *Id.* at 199.

Accordingly, in deciding whether parties have run afoul of the Sherman Act, courts "seek the central substance of the situation, not its periphery, and in this pursuit, we are moved by the identity of the persons who act, rather than the label of their hats." *United States v. Sealy, Inc.*, 388 U.S. 350, 353 (1967). Thus, on many occasions this Court has applied antitrust scrutiny where a single entity was "controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *American Needle*, 560 U.S. at 191.

The NCAA's appeal to "amateurism" is equally unhelpful to properly resolving this case. Like the joint venture label, "amateurism" obscures, rather than clarifies, the substance of the NCAA's restraints on player compensation. These restraints are the product of "ongoing concerted activity" by competitors on player compensation—and, therefore, typically condemned as illegal under the per se rule or, at most, under a "quick look" analysis. And they are not rescued by this Court's language in *Board of Regents* about amateurism, which is dictum—an observation about the character of NCAA intercollegiate athletics that was not necessary nor relevant to the decision's holding. *Board of Regents*, 468 U.S. at 129 (invalidating rules restricting television broadcasting of college football games). This dictum is not nearly enough to displace the antitrust laws.

"[R]epeals by implication are disfavored," *United States v. Borden Co.*, 308 U.S. 188, 198 (1939), and antitrust immunity "is not lightly implied." *California v. FPC*, 369 U.S. 482, 485 (1962). The presumption against repeal by implication is strong when the potential conflict is between the *federal* antitrust laws and a *federal* regulatory scheme. "Only where there is a plain repugnancy between the antitrust and regulatory provisions will repeal be implied." *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682 (1975) (cleaned up). This presumption should be absolute when a private litigant like the NCAA seeks to evade the antitrust laws by claiming a conflict between the *federal* antitrust laws and its own *private contractual* scheme.

Similarly, the NCAA's long history of trade restraints against college athletes is no defense. A long-standing violation of the Sherman Act—or of any law for that matter—is no basis for claiming immunity or

even a right to more limited legal scrutiny: "a history of concerted activity does not immunize conduct from § 1 scrutiny." *American Needle*, 560 U.S. at 198. The restraint on competition among potential rivals—here, competition among NCAA members for athletic talent—is itself sufficient for antitrust condemnation. As this Court has held, market allocation agreements are per se illegal, "regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other." *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam). *See also Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1149 (9th Cir. 2003) ("Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself."); *City of Mt. Pleasant v. Associated Electric Co-op., Inc.*, 838 F.2d 268, 276 (8th Cir. 1988) (holding that, in cases under Section 1 of the Sherman Act, a critical inquiry is whether "any two of the defendants are, or have been, actual or *potential* competitors") (emphasis added).

If this Court were to allow the NCAA to use labels and its own history to justify its conduct, the Sherman Act would become a dead letter. Firms and associations of firms could unilaterally exempt themselves from the Sherman Act and other antitrust laws by adopting benign-sounding labels for their illegal conduct and invoking their history of lawbreaking. Enabling private prerogative to override federal legislation would make a mockery of the rule of law. *Timken Roller Bearing Co. v. United States* recognized as much:

> 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.

341 U.S. 593, 598 (1951), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Because "[p]rivate forces are too keenly aware of their own interests in making such decisions," *Topco*, 405 U.S. at 611, they cannot be entrusted with legislative judgments.

The scope of the antitrust laws is a matter for Congress to decide. When Congress wishes to authorize competitor coordination otherwise impermissible under the antitrust laws, "it has done so expressly by legislation." *Associated Press v. United States*, 326 U.S. 1, 14 (1945). This prerogative of Congress should be respected here. *See also Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

CONCLUSION

The Sherman Act protects sellers of goods and services, including workers, from buyers' restraints of trade. In applying the rule of reason, the Ninth Circuit subverted the Sherman Act's protection of sellers of goods and services and disregarded this Court's guidance against turning the rule of reason into an unbounded social cost-benefit analysis. While the Ninth Circuit correctly affirmed the NCAA's Sherman Act liability, it should have evaluated only the challenged restraint's harms and benefits to the college athletes—and not considered its effects on

other groups. Because the court of appeals concluded that the challenged restraints had no benefit to college basketball and football players, the court should have enjoined all NCAA compensation restraints and not searched for a less restrictive alternative under the rule of reason.

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