Appeal Nos. 14-16601, 14-17068

In The United States Court of Appeals For the Ninth Circuit

EDWARD O'BANNON, JR.,
ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant-Appellant,

v.

ELECTRONIC ARTS, INC.; COLLEGIATE LICENSING COMPANY,
Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NO. 09-CV-03329 (WILKEN, C.J.)

BRIEF OF TWENTY-SIX SCHOLARS OF ANTITRUST AND SPORTS LAW IN SUPPORT OF APPELLEES, SUPPORTING AFFIRMANCE

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Interest of Amici Curiae

The undersigned (collectively *Amici*) are twenty-six professors of antitrust and sports law, who share an interest in effective competition policy in sports and other markets. Our specialties differ, and we hold varying perspectives, but we each consider affirmance important to correct a serious injury well within the concerns of antitrust law.[1]

We also desire to explain our differences with certain respected colleagues, who have submitted two opposing briefs as *Amici Curiae*.[2]

Summary of Argument

Appellant's opening brief is a remarkable document. While *Amici* can agree that "[t]his case is . . . about . . . how to regulate intercollegiate athletics . . . [and] who should [do it]," NCAA Br. at 2, we think Appellant rather misapprehends American law in

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[1] All parties have consented to the filing of this brief. No party, party's counsel, or other person, other than *Amici* and their counsel, authored any part of it or contributed money to fund its preparation or submission. Fed. R. App. Proc. 29(c)(5).

[2] Specifically, the Brief for Antitrust Scholars as *Amici Curiae* in Support of Appellant, filed by Wilson Sonsini Goodrich & Rosati ("Wilson Sonsini Br."), and the Brief for Law and Economics and Antitrust Scholars as *Amici Curiae* in Support of Appellant, filed by The Konkurrenz Group ("Konkurrenz Br.").

appointing itself in place of the U.S. Congress. Congress has already decided the question, in a way open to neither Appellant nor the courts to doubt, and its decision is that the primary American regulator for all sectors is competition. The sale of education and the sale of sports entertainment, along with most other businesses, fall well within that rule. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) ("the [law's] premise [is] that the unrestrained interaction of competitive forces will yield . . . the lowest prices, the highest quality and the greatest material progress . . . But even were that premise open to question, the policy unequivocally laid down by the Act is competition"); ABA SECTION OF ANTITRUST LAW, HANDBOOK ON THE SCOPE OF ANTITRUST 13-17 (2014) ["SCOPE HANDBOOK"]. Appellant happens not to be the first defendant to argue that its special circumstances require something different. Defendants of all kinds have so pled since the law's very beginning, and, on the whole, they have found little judicial sympathy. *Id.* at 3-9 & n.11. So, with respect, it is actually quite "appropriate" for antitrust to determine whether a product "could still be commercially popular if it became something different," NCAA Br. at 60, and specifically if it became less constrained by a conspiracy of its sellers.

On a more specific level, Appellant and its amici raise only one question that does not just re-litigate the facts or depend on very

unlikely legal theories of applicability[3] or injury.[4] They question whether the district court correctly applied the rule of reason, and in

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[3] Appellant briefly argues that the challenged rules are not even subject to antitrust, *see* NCAA Br. at 32-35, despite having waived the argument below, *see* Pls. Br. at 35. It cites to support in opinions of the Third and Sixth Circuits, *see* NCAA Br. at 32-35 (citing *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998), and *Bassett v. NCAA*, 528 F.3d 426 (6th Cir. 2008)), but they are grossly incorrect as a matter of law, see, e.g., PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1260b (2d ed. 2000) ("No knowledgeable observer could earnestly assert that big-time college football programs" are not commerce subject to the Sherman Act); SCOPE HANDBOOK, *supra*, at 13-17; Marc Edelman, *The District Court Decision* in O'Bannon v. National Collegiate Athletic Association: *A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2341-42 (2014).

Indeed one of Appellant's own principal authorities rejects the argument emphatically. *Agnew v. NCAA*, 683 F.3d 328, 340 (7th Cir. 2012).

[4] Appellant's challenge to antitrust injury is odd indeed. *See* NCAA Br. at 35-43; Konkurrenz Br. at 5-21. Aside from its preclusion by Circuit law, *see* NCAA Br. at 38 (acknowledging conflict with *Keller v. Electronic Arts, Inc.*, 724 F.3d 1268 (9th Cir. 2013)), it depends on the claim that elite college athletes, whose talent is the principal input in a several-billion-dollar industry, could find no way to capitalize on the value of video broadcast. That seems unlikely. In any case, "[i]t is enough that the illegality is shown to be a material cause of the injury; plaintiff need not exhaust all possible alternative sources of injury," *Zenith Radio Corp. v. Hazeltine Res., Inc.*, 395 U.S. 114, 114 n.9 (1969), and, therefore, the factfinder may "conclude as a matter of just and reasonable inference" that plaintiff was injured so long as there is "proof of defendant's wrongful acts and their tendency to injure," *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264 (1946). Moreover, the antitrust

particular whether it properly analyzed the rule's requirement of "less restrictive alternatives" ("LRA").

Amici urge affirmance for three principal reasons. First, we elaborate a point above, to dispel Appellant's suggestion that antitrust somehow does not belong here. Second, we show that ordinary rule of reason treatment was appropriate. Relying rather daringly on a case that it overwhelmingly lost, Appellant asks this Court to find within *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984), a rule that its "amateurism" or "eligibility" restraints are "valid . . . as a matter of law." NCAA Br. at 14, 22. *Board of Regents* did not say that, and even Appellant's own *amici* admit it. *See* Wilson Sonsini Br. at 5 & n.2.

Last, but most important, having shown that no special rule applies, we show ample grounds to affirm within the district court's opinion. Of fundamental importance is the court's finding that anticompetitive harm outweighed the minor benefits that Appellant could show. That alone, on any statement of the rule of reason, was a sufficient basis for liability. (And plaintiff does not then just lose, contrary to view apparently taken by Appellant and its *amici*, because it did not offer some satisfactory LRA.)

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injury requirement is more lenient where only injunctive relief is sought. *Cargill, Inc. v. Monfort of Colo, Inc.*, 479 U.S. 104, 111 (1986); 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 799-800 (7th ed. 2012).

Appellant and its *amici* would fail to discredit that result with the purported technical missteps they claim to have found, even if there actually were any. If there, it would at least be understandable. Leading current works on the rule of reason suggest it remains confused and controversial in its details, in part because it has undergone substantial change without very clear Supreme Court guidance, because full rule of reason cases virtually never reach the merits, and because, as a result, appellate elaboration remains fairly sparse. *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 829-31, 834-36 (2009) ["Carrier, *Empirical Update*"]; Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561 (2009). Indeed, the present case has generated not one, or even two, but three separate law professors' briefs, collecting the views of more than forty academic specialists, and we differ on its details. But missteps by the district court, to whatever extent they even occurred, would also be a poor basis for reversal. The opinion discloses a perfectly adequate basis on which to affirm.[5] Failure to do so, for no more than quibbles

[5] Noted scholars have already said so in the law review literature, and the analysis here largely tracks theirs. *See* Edelman, *supra* note 3, at 2338-43; Stephen F. Ross & Wayne S. DeSarbo, *A Rapid Reaction to O'Bannon: The Need for Analytics in Applying the Sherman Act to Overly Restrictive Joint Venture Schemes*, 118 PENN STATE L. REV. PENN STATIM (forthcoming 2015), available at http://www.pennstatelawreview.org/penn-statim /a-rapid-reaction-to-obannon-the-need-for-analytics-in-applying-the-

suggested by Appellant and its *amici*, would waste years of litigation and a three-week trial on the merits, addressing an injury well within the law's concerns.[6]

Argument

I. THESE PLAINTIFFS' PROTECTION IS A FITTING ANTITRUST OBJECTIVE, A FACT UNCHANGED BY APPELLANT'S NON-ECONOMIC VALUE JUDGMENTS

To some large extent Appellant has attempted to make this something other than the relatively easy fact case that it is, and to make it about whether antitrust has any business regulating Appellant's affairs. It does.

Appellant and its members may well be the storied and public-regarding actors that Appellant describes, and Amici need enter no disagreements whether its work was well or badly motivated. *Cf.*

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sherman-act-to-overly-restrictive-joint-venture-schemes/. Also, see generally Daniel E. Lazaroff, *The NCAA and Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329 (2007).

[6] Courts should affirm on any available alternative grounds, where the record is adequate and the only meaningful disputes are legal. *Golden Nugget, Inc. v. American Stock Exchange, Inc.*, 828 F.2d 586, 590 (9th Cir. 1987); *Jewel Cos., Inc. v. Pay Less Drug Stores Nw., Inc.*, 741 F.2d 1555, 1564-65 (9th Cir. 1984). The court below compiled an extensive record after many years of litigation and a full trial on the merits, and Appellant raises no meaningful dispute of material fact.

Pls. Br. at 4-9. There remains more than enough proof of harms of concern to the Sherman Act, among the aims of which is to stop coerced wealth transfers. *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871 (1999) (leading article, showing wealth transfer to have been a primary evil at which Sherman Act aimed). As a Nobel Prize-winning economist once wrote, Appellant's "self-righteous rhetoric and ostensible good intentions . . . fail to hide its monopoly power and the inequities it fosters," Gary S. Becker, *The NCAA: A Cartel in Sheepskin Clothing*, BUSINESS WEEK, Sept. 14, 1987, at 24, and the nation's leading work on monopsony says that its rules just "transfer[] wealth from poor ghetto residents to rich colleges. At the same time, it manages to maintain the moral high ground by convincing the majority that such controls are good and payment is evil." ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS 1 n.3 (2010).

Such a matter is ripe for antitrust attention, and Appellant's many value arguments actually just prove that fact more clearly. Very nearly its first words on appeal state its fear that if it cannot constrain "the commercial pressures of college sports," then "an avocation [might] become a profession . . . ." NCAA Br. at 2. Such a thing may or may not occur, but it doesn't matter. As a celebrated first principle of antitrust, preventing such an outcome is precisely

the kind of policy judgment that private persons are not permitted to make. *See*, *e.g.*, *Nat'l Soc'y Prof'l Eng'rs v. United States*, 435 U.S. 679, 690 (1978) (quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 65 (1911) ("restraints of trade within the purview of the statute . . . [can]not be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts, or the wisdom or want of wisdom of the statute which prohibited their being made.")). So, to fear "commercial pressures," and seek antitrust clemency because exposure to one's competitors threatens values other than price, quality, or output, is just to concede that one is engaged in a business, properly subject to the discipline of markets.

And so, in effect, the elite, rarified athletics at issue are a business in all but name, which only by historic accident happened to find its roots in universities. Or at least they are as far as the federal antitrust laws are concerned, and only its dictates matter here.[7] *Board of Regents* itself affirmed as a fact that "the NCAA and

[7] Appellant begs rather a large question in assuming that it can just declare that its product is an "amateur" product, and then, by tautology, ban anything at odds with it. *Board of Regents* admittedly said that some restraints are needed "if the product is to be available at all." 468 U.S. at 101. But could Appellant have simply announced that its product was "non-televised football," and then banned all broadcasts because, otherwise, non-televised football would not "be available at all"? *Board of Regents* suggests not. Under antitrust, it is markets responsive to consumer tastes that determine whether a product will be sold and in what form. *See id.* at 116-17 (rejecting

its member institutions are . . . organized to maximize revenues," and are "[no] less likely to restrict output [to maximize profit] . . . than would be a for-profit entity," 468 U.S. at 101 n.22. And as a business, it generates several billion dollars per year, extracted from the players that principally generate it, in exchange only for scholarships valued at most at about $30,000 per year, and often much less. *See* Stephen F. Ross, *Radical Reform of Intercollegiate Athletics: Antitrust and Public Policy Implications*, 86 TUL. L. REV. 933, 954 n.54 (2012).

Appellant does not explain why it needs clemency that many other unusual or "special" markets are not given. Antitrust applies without limitation to sports in general, *Int'l Boxing Club of N.Y. v. United States*, 358 U.S. 242 (1959), and to higher education, *United States v. Brown Univ.*, 5 F.3d 658, 665-66 (3d Cir. 1993) (so holding, and applying ordinary rule of reason, because "[t]he exchange of money for services . . . is a quintessential commercial transaction."); *see also Mass. Sch. of Law v. ABA*, 107 F.3d 1026 (3d Cir. 1997); *United States v. ABA*, 934 F. Supp. 435 (D.D.C. 1996), and it makes no difference that a defendant may take non-profit form, *Board of Regents*, 468 U.S. at 101 n.22. So why are college *sports* so special? Higher education in general is surely as delicate and freighted with

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Appellant's goal of protecting live game attendance from competition from televised games, because it rested improperly "on a fear that the product will not prove sufficiently attractive").

public concern, and it is sold for the most part by non-profit and public-spirited entities. But where schools conspire on scholarships they must face at least ordinary rule of reason scrutiny. *Brown University*, 5 F.3d at 679.[8] And as for the commercializing pressures to which Appellant mainly points, why are college sports so different than all the other markets in which young talent is valued? As Becker asked, "[w]ould anyone advocate a cap on the earnings of young traders on Wall Street so that they don't get into trouble from having a lot of money?" Becker, *supra*, at 24.

Of course, there could be reasons actually relevant to antitrust why Appellant's restraints should be permitted—that is, there could be *procompetitive* justifications. But knowing whether there are is the whole purpose of the rule of reason. Appellant was given the full benefit of it below, and it lost.

II. THE ORDINARY RULE OF REASON APPLIES

As a preliminary matter, Appellant disputes even that the ordinary rule of reason should apply. While it is not clear exactly

[8] As if confirming these points by *inclusio unius*, Congress later explicitly exempted the scholarship agreements in *Brown University*, but only very narrowly. *See* SCOPE HANDBOOK, *supra*, at 357-58 (discussing Need-Based Education Act); *see also Board of Regents*, 468 U.S. at 106 n.28 (drawing a similar inference from Congress's adoption of a narrow exemption for televised professional football).

what rule this Court is supposed to find in *Board of Regents*,[9] Appellant apparently believes that case to have held its rules for "amateurism" or "eligibility" to be *per se* legal.[10] It further believes that courts may revisit that rule under no circumstances, no matter how much times change, or how much evidence or economic theory might show the speculative, *a priori* dicta in *Board of Regents* to have been factually incorrect. It says the rule is so sacred that only the Supreme Court or Congress could change it.[11]

Board of Regents did not say any of that. That is fairly clear on the face of it. Why would the Court adopt a *sui generis* rule

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[9] Appellant mainly claims that its eligibility or amateurism restraints are "valid . . . as a matter of law," NCAA Br. at 14, 22, apparently meaning that they are *per se* legal. In perhaps slightly different terms it sometimes says they are merely "procompetitive as a matter of law," *id.* at 24, suggesting that they could still be overcome by a satisfactory LRA. At some other times it uses presumption language, as when it says those rules should be judged in the "twinkling of an eye," *id.* at 27-28, and among the lower court cases it cites, none describes Appellant's *Board of Regents* dicta as creating more than a presumption. *See*, *e.g.*, *Agnew*, 683 F.3d at 341 (some NCAA rules are "presumptively procompetitive"). Finally, at still other times it says only that "full rule-of-reason analysis is inappropriate," *id.* at 43.

[10] *See* NCAA Br. at 14 (purporting *Board of Regents* to hold NCAA amateurism rules "procompetitive and therefore valid under the Sherman Act as a matter of law").

[11] *See* NCAA Br. at 28 ("even if college sports has changed so dramatically since *Board of Regents* that the Supreme Court's analysis no longer holds, the district court (and this Court) would still be bound by the decision.").

governing perhaps one or a handful of defendants, in a case in which it was not even in issue or required for decision, precluding further consideration of matters that remain hotly disputed among economists?[12] And why would the Court do so in an age in which it so strongly prefers fulsome fact evaluation in antitrust, and disfavors *per se* rules? *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007); *Continental TV, Inc. v. GTE Sylvania*, Inc., 433 U.S. 36, 58-59 (1977).

It makes much more sense to read the dicta in question as just the Court's explanation why it would soften its treatment for certain restraints, when under some decades of prior law they would have been illegal *per se*. Presumably, the Court elaborated a bit because of the exceptional ferment in the law of Sherman Act § 1 at the time, and the uncertainty the Court itself had caused. *See*, *e.g.*, Lawrence A. Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 CAL. L. REV. 835 (1987). The Court merely explained—in language, incidentally, that was not the unmitigated praise that

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[12] If the conflicting expert views in this case itself were not proof enough, consider the competing amicus briefs of economists filed in *American Needle*. *Compare American Needle, Inc. v. NFL*, 2009 WL 4247983 (2009) (Brief of Amici Curiae) (brief of fifteen eminent economists reviewing substantial theoretical and empirical evidence supporting defendant), *with American Needle, Inc. v. NFL*, 2009 WL 3090453 (2009) (Brief of Amici Curiae) (brief of twenty other, similarly eminent economists, reviewing similarly substantial evidence, but supporting plaintiff).

Appellant implies[13]—that it found enough uncertainty in the *possibly* special economics of sports leagues to give Appellant the benefit of a little bit of doubt. *See* 468 U.S. at 101-03, 117. The Court explicitly offered the passage most crucial to Appellant only to explain "[o]ur decision not to apply a *per se* rule . . . ." *Id.* at 117.

In other words, the "ample latitude" that Appellant requires, *id.* at 119, is only something less than *per se* treatment. Full rule of reason, a standard much more forgiving than the very strict, quick-look treatment Appellant actually got in *Board of Regents*, is "ample latitude."

Furthermore, despite Appellant's characterizations, the lower courts do not read *Board of Regents* to hold any sports league rules to be *per se* legal, and even Appellant's short list of citations give it only limited and problematic support. Its principal case, *Agnew v. NCAA*, 683 F.3d 328 (7th Cir 2012), suggests only that when a league

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[13] The Court found Appellant to be a profit-maximizing entity as dangerous to markets as any other, 468 U.S. at 101 n.23, one holding not only "market" but "monopoly" power at least as to television broadcast rights, *id.* at 111, and accordingly stressed that whatever "good motives [it might have] will not validate an otherwise anticompetitive practice," *id.* n.22. Moreover, the same Court—indeed, the same Justice—would later write that while "two teams are needed to play a football game, not all . . . cooperation [is] necessary . . . . Members of any cartel could insist that their cooperation is necessary to produce the 'cartel product' and compete with other products." *American Needle, Inc. v. NFL*, 560 U.S. 183, 199 n.7 (2010).

restraint concerns "eligibility," courts have "license" to find for defendant early on, because such restraints are "presumptively procompetitive." *Id.* at 342. Moreover, even were the slate truly clean in the Ninth Circuit, this Court should not follow a case like *Agnew*. It merely affirmed a dismissal, on the bare pleadings, whereas the court below made well supported findings suggesting that *Agnew*'s a *priori* assessment of league restraints may have been quite wrong. *Agnew* further depends on an unworkable distinction based on concepts—"amateurism" and "eligibility"—with no obvious boundaries, and it would not simplify or rationalize litigation as is suggested.[14]

But in any case, the slate is not clean. Appellant's reading of *Board of Regents* is directly precluded by Circuit law. *Hairston v. Pac. 10 Conf.*, 101 F.3d 1315, 1319 (9th Cir. 1996), applied the full rule of reason to a factually indistinguishable restraint—penalties for violation of amateurism rules—without discussion of any presumptions or special rules, and it cited *Board of Regents* as authority for it. *Id.* at 1318-19. *See also Tanaka v. Univ. S. Cal.*, 252 F.3d 1059, 1062-63 (9th Cir. 2001) (applying full rule of reason to Pac 10

[14] Virtually any restraint could be said in some sense to benefit "amateurism." In *Board of Regents* itself, a nearly naked output restraint held illegal under a very strict, quick-look review was defended by three different judges as useful to preserve amateurism. 468 U.S. at 120-36 (White, J., dissenting) (joined Justice Rehnquist); 707 F.2d 1147, 1163 (Barrett, J., dissenting).

Conference restraint on student-athlete transfers among conference member schools).

And finally, even were some such presumption to apply here, it wouldn't actually matter. It does not make a bench verdict reversible that a court could have foreshortened fact inquiry under a presumption, but instead gave plaintiff the benefit of trial. That would be tantamount to allowing challenge to a verdict because a court denied dismissal or summary judgment. Such challenge is not permitted in this Circuit. *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1358-59 (9th Cir. 1987) ("it would be . . . unjust to deprive a party of a . . . verdict after the evidence was fully presented").

III. THIS COURT SHOULD AFFIRM THE FINDING OF LIABILITY UNDER THE RULE OF REASON

Finally, there being no standard of per se legality or pro-defendant quick look or any other special rule, what remains is to ask whether full rule of reason analysis was appropriately performed below.

A. The Findings Below Sufficiently Support Liability Under the Rule of Reason, However They May Have Been Explained

The undersigned Amici do not all agree on all doctrinal details surrounding rule-of-reason analysis, and hardly could we. Leading scholars find its details still quite confused and uncertain. *See*

Carrier, *Empirical Update*, *supra*, at 829-31, 834-36; Feldman, *supra*. We agree, however, that the approach below was generally sound and that the result plainly can and should be affirmed, either as the district court actually explained, or on adequate alternative grounds sufficiently supported in its findings. *See* Edelman, *supra*, at 2338-43 (explaining sufficiency of opinion's evidentiary support); Ross & DeSarbo, *supra* (same).

In general terms, as Appellant and its *amici* concede, *see* NCAA Br. at 43-44; Wilson Sonsini Br. at 4-5, the three-part burden-shifting framework deployed below is established in the caselaw of both this Circuit, *see O'Bannon*, 7 F. Supp. 3d at 985 (*quoting Tanaka*, 252 F.3d at 1063), and the other Circuits, 1 ANTITRUST LAW DEVELOPMENTS, *supra* note 4, at 70-80; Carrier, *Empirical Update*, *supra*, at 829-31, 834-36; Feldman, *supra*, at 581-86.

Amici agree further that the case was largely over at step two of the three-step analysis. The following explanation of the result is an adequate basis to affirm, and is fully supported by the court's findings. Having found Plaintiffs to meet their prima facie burden on anticompetitive harm, the district court rejected almost all of Appellant's rebuttal for want of proof.[15] And though it found there

[15] The court rejected entirely the goals of competitive balance and increased opportunity for sports play, rejecting Appellant's evidence that its restraint produced any such benefits. 7 F. Supp. 3d at 973-79, 981-82.

to be two minor benefits from the entirety of the challenged restrictions, it found both of them too small to outweigh the harm of an outright ban on licensing revenue. Specifically: (1) While the court found amateurism to "play a limited role in driving consumer demand" for college sports, that "might justify a restriction on *large* payments,"[16] that benefit "[could] not justify the rigid prohibition on compensating student-athletes . . . with any share of licensing revenue . . . ." 7 F. Supp. 3d at 1001 (emphasis added). (2) The court likewise found that integration of student-athletes into their campus communities could improve the education product they purchase, but found Appellant's outright ban "[not] necessary to achieve these benefits." Therefore, while "[l]imited restrictions on student-athlete compensation may help schools achieve this narrow procompetitive goal[,] . . . the NCAA may not use [it] . . . to justify its sweeping prohibition on any student-athlete compensation . . . from licensing revenue . . . ." *Id.* at 1003.

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[16] Strictly speaking, this finding reflects some tension in the caselaw, as it uses a benefit in one market to justify harms in another. *Compare Sullivan v. NFL*, 34 F.3d 1091, 1110 (1st Cir. 1994) (benefits in the marketing of football could justify harms in the market for NFL club securities), with *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (benefit of competitive balance in marketing of football cannot justify labor market restraints). It would hardly matter, however, because if the court were wrong it would just mean that this justification failed entirely. Appellant not surprisingly leaves it unchallenged.

At that point, the case was over. Liability had been found, because, while not all of Appellant's justifications were completely rejected, none of them could overcome the damage of an outright ban on licensing revenue. All that remained was a remedy. And while there followed discussion of "less restrictive alternatives"—a discussion on which Appellant and its *amici* focus much attention, *see* NCAA Br. at 44-45; Wilson Sonsini Br. at 6-16—its sole purpose was to justify the remedy. As such, that discussion is irrelevant here, for three reasons. (1) District courts enjoy broad remedial discretion in antitrust. *Pac. Coast Ag. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1126, 1209 (9th Cir. 1975); 1 ANTITRUST LAW DEVELOPMENTS, *supra* note 4, at 801-02. (2) The court did no more than adopt a remedy recommended by Plaintiffs. *See* 7 F. Supp. 3d at 1004. (3) Appellant has explicitly waived any challenge to the remedy on this appeal. *See* NCAA Br. at 5 (issues presented).

Shortly after this discussion, the court said something perhaps somewhat confusing, but that is also easy to explain. It said that Appellant had "produced sufficient evidence" to have "met its burden under the rule of reason" and therefore that "the burden shift[ed] back to Plaintiffs . . . ." 7 F. Supp. 3d at 1004. But there is no real confusion. The court actually only said that "preventing schools from paying . . . *large sums of money*" could produce some benefit, and accordingly Appellant "met its burden . . . [only] *to that extent* . . . ." *Id.* (emphasis added).

B. Appellant and Its Amici Fail to Discredit the Analysis Below

Whatever differences Appellant or its *amici* may have with the opinion's language, they are matters of non-material detail at best and some are seriously incorrect. They identify no meaningfully reversible, non-harmless error of law in the court's analysis.

First, this Court should reject their varying versions of the burden-shifting formula, because they would gut the rule of reason. Their several verbal formulations actually change subtly throughout their papers, in ways that could differ in material respects,[17] and they are further confused by apparent mischaracterizations of what the district court actually held.[18] But they seem ultimately to imply

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[17] Wilson Sonsini Br. at 2 (arguing that Appellant met its burden by showing its restraint to "*bear a reasonable relationship*" to legitimate benefit); *id.* (arguing that Appellant "met its burden of *establishing a link* between [its] restrictions" and legitimate benefit); *id.* at 2-3 (arguing that the "restrict[ion] . . . was *reasonably necessary* to the [procompetitive] justifications"); *see also id.* at 7 (quoting, as proof that Plaintiffs were required to show LRA, district court's finding that Appellant "produced sufficient evidence to support an inference that some circumscribed restrictions . . . may yield procompetitive benefits") (emphasis added in all cases).

[18] Both Appellant and the Wilson Sonsini Brief appear at times to claim that the district court found Appellant fully to have justified an outright ban on licensing revenue through two of its proposed justifications. *See* Wilson Sonsini Br. at 12 (claiming the district court to have "found [Appellant's restraint] reasonably necessary to a valid business purpose."); *cf.* NCAA Br. at 54 ("the district court found the challenged rules [to] have procompetitive benefits," triggering Plaintiff's duty to prove an LRA). The district

that a defendant can meet its burden by putting on any evidence, of any kind or character, see NCAA Br. at 54; Wilson Sonsini Br. at 2-3, 7, that relates to some possible business justification, no matter how far removed from the actual restraint at issue in the antitrust litigation.[19] On that view, no plaintiff could win without proof of some LRA that meets this Circuit's standards.[20]

That is not the law, nor could it be. Any defendant can imagine some legitimate goal for any restraint, and can come up with some evidence for it. Thus, a plaintiff might show serious anticompetitive injury, with overwhelming evidence, but then lose because it was

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court explicitly held that Appellant's outright ban on licensing revenue was *not* supported by any of its proposed justifications, even the two that it did not reject entirely. *See* 7 F. Supp. 3d at 1001, 1003.

[19] At one point they rather oddly cite a leading current paper for this claim, even though that paper argues emphatically for quite the opposite. *See* Wilson Sonsini Br. at 10 n.4 (citing Feldman, *supra*, which argues that LRA should be removed entirely as a dispositive element of the rule of reason, and used only for limited evidentiary purposes).

[20] In this Circuit an LRA must be "substantially less restrictive" than the challenged restraint, it must be "virtually as effective in serving the [defendant's] legitimate objective," and it must be able to do all that "without significantly increased cost." *County of Tuolumne v. Sonora Community Hosp.*, 236 F.3d 1148, 1159-60 (9th Cir. 2001); *see* Feldman, *supra*, at 585 (noting this Circuit's uncommonly tough LRA requirement). Academic *amici* claim, on top of all that, that it must also use some different "method" than the challenged restraint, though they do so without support. Wilson Sonsini Br. at 12.

rebutted by some speculative possibility of sparsely supported benefit, and then failed to dream up an LRA satisfactory under this Circuit's test.

Requiring proof of an LRA is only logically plausible if there is some balancing of plaintiff's and defendant's proof that occurs before or separate from the obligation to show an LRA. Requiring it as a separate, necessary, dispositive obligation, regardless of the quality of defendant's evidence, would permit illogical outcomes like those above. Moreover, this Court seems fairly clearly to have rejected such a view already. Where plaintiff has carried its initial burden, it does not just lose the case even if it fails completely to show an adequate LRA. If that occurs, "[then] we [simply] reach the balancing stage." *County of Tuolumne*, 236 F.3d at 1160; Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1343-44 ["Carrier, *Real Rule of Reason*"].

And indeed, many sports antitrust cases have done just what the district court did here. They recognized that defendants' legitimate interests might warrant *some* sort of reasonable restraint, but found the challenged ones to be overly restrictive. In none of these cases did the court insist that the plaintiff demonstrate some precise alternative.[21]

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[21] *See*, *e.g.*, *Mackey v. NFL*, 543 F.2d 606, 621 (8th Cir. 1976) (recognizing certain possible benefits, but holding restraint illegal because they could have been achieved with LRA); *Chi. Prof'l Sports*

So, if Appellant and its *amici* mean that a defendant wins when it can put on any rebuttal evidence, against any plaintiff that cannot or does not show a sufficient LRA, they are mistaken. If that is not what they mean, then they acknowledge that defendant must make some actual, meaningful evidentiary showing to the satisfaction of the trier of fact. In fact Appellant's *amici* do seem to acknowledge that a defendant loses if it "fail[s] to proffer *and support* a valid justification after competitive harm has been shown." Wilson Sonsini Br. at 8 (emphasis added). But the district court explicitly found Appellant to fail at its burden in just that way, as a matter of fact, with respect to both the justifications that were not rejected completely. *See* 7 F. Supp. 3d at 1003-04.

Second, academic *amici* say the district court "read what amounts to a '*least* restrictive alternative' inquiry into the rule of reason." Wilson Sonsini Brief at 3 (emphasis added). But as was carefully explained in a leading paper, cited in that brief itself, *see id.* at 10 n.4 (citing Feldman, *supra*), the distinction between "less" and "least" restrictive alternatives is purely semantic and unimportant.

Ltd. P'ship. v. Nat'l Basketball Ass'n, 874 F. Supp. 844, 861 (N.D. Ill. 1995), *rev'd on other grounds*, 95 F.3d 593 (7th Cir. 1996) (holding outright restraints illegal, though recognizing some legitimate benefit, because of possibility of LRAs, including team salary caps, revenue sharing, and the college draft); *McNeil v. NFL*, 1992 WL 315292, at *5 (D. Minn. 1992) (instructing jury that restraint would be illegal, even if some benefit were shown, if benefits could be achieved by restraints used in other sports).

Logically, so long as a plaintiff can win by showing some less restrictive alternative, then no restraint is safe from challenge unless it is the least restrictive one. See Feldman, *supra*, at 584-86, 605-06; Carrier, *Real Rule of Reason*, *supra*, at 1337-38.

C. Criticism of the LRA Analysis Adds No Basis for Reversal

In the end, Appellant and its *amici* appear to be most frustrated by the regulatory character of the district court's injunction. We express no opinion on that matter, except that it has no relevance on this appeal. Liability was properly found without it, and Appellant waived challenge to it. If anything, those frustrations go to whether LRA analysis should be part of the rule of reason at all, and some have urged it should not be. *See* Feldman, *supra*, at 586-624 (arguing that LRA is incorrigibly problematic, appears to have no basis in Supreme Court authority, and should be discarded). But whatever may be the right course as a matter of policy, this case would be the wrong forum to resolve it, as the LRA remains a component of the analysis under Circuit law, and in any case it has nothing to do with the finding of liability. Even if the LRA were discarded entirely, Appellant would have lost this case for failure to rebut the finding of anticompetitive harm. As the district court held, Plaintiffs' showing of harm outweighed even the two procompetitive effects that it did not reject completely. At that point, the case was at an end.

Conclusion

There being sufficient independent grounds to affirm the finding of liability, in a case with an ample record and no meaningful disputes of fact, and in which only liability and not remedy is contested, this Court should affirm. It should do so even if it agrees that there may be technical uncertainties or imperfections in the district court opinion.

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Certificate of Brief Length

The undersigned counsel for *Amicus Curiae* Antitrust Scholars in Support of Appellees, certifies that this brief complies with the requirements of Fed. R. App. P. 32(a)(7)(B) in that it is printed in 14 point, proportionately spaced Book Antiqua font utilizing Microsoft Word 2010 and contains 6155 words, including headings, footnotes, and quotations.

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CERTIFICATE OF COMPLIANCE

I certify that:

a. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6,155 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

b. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it was prepared in Microsoft Office Word in 14-point, proportionally spaced Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief for Antitrust Scholars as *Amici Curiae* in Support of Appellees to be served on all counsel of record via the appellate CM/ECF system on this 21st day of November 2014.

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