Nos. 20-512 and 20-520

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 Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PROFESSOR THOMAS B. NACHBAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus will address the following question:

Whether the Ninth Circuit's use of a less restrictive alternatives test as part of a three-step rule of reason framework misapplies this Court's antitrust jurisprudence.

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INTEREST OF *AMICUS CURIAE*[*]

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SUMMARY OF ARGUMENT

Although this case presents difficult and complex questions of both the NCAA's unique position, *see NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984) (*Board of Regents*), and the specific restrictions at issue in this case, it is unnecessary for this Court to reach either of those questions because the courts below applied the wrong legal standard. This Court should reverse and remand for correct application of the rule of reason, as previously described in this Court's antitrust jurisprudence.

Applying antitrust's rule of reason, the district court and the court of appeals subjected the

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[*] The parties have filed with the Clerk blanket consents to the filing of amicus briefs. No party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. The University of Virginia School of Law provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the amicus curiae.) Otherwise, no person or entity other than the amicus curiae has made a monetary contribution intended to fund the preparation or submission of this brief.

challenged restraints in this case to a Ninth-Circuit-derived "three-step framework" that includes as one step a distinct, less restrictive alternatives test that asks whether the procompetitive effects produced by the restraint could be achieved by some "less restrictive alternative." Although mentioned in *dicta* in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018), this Court has never applied a less restrictive alternatives test in the rule of reason and has affirmatively rejected it in cases involving vertical restraints. *See Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58, n. 29 (1977).

Although this Court has considered alternatives, it has done so not in the course of applying the rule of reason but at an earlier stage of analysis: during evaluation of restraints under the ancillary restraints doctrine, introduced into antitrust law by *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). The ancillary restraints doctrine asks whether a restraint is "reasonably necessary" to a larger, productive transaction. But even that analysis does not involve comparisons like the less restrictive alternatives test applied by the courts below.

As applied in the rule of reason, a less restrictive alternatives test creates tremendous uncertainty and sets an impossible bar to defense of antitrust claims, placing courts in the role of regulators who are destined to revisit restraints repeatedly over time to determine whether there is still no "less restrictive alternative" to the challenged restraint. This Court has rejected just such a role for courts in antitrust cases. *See Verizon Communications, Inc. v. Law*

Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004). The district court has assumed exactly that role in this case, setting – to the dollar – the NCAA's compensation limits and retaining jurisdiction to make further revisions (which it has already done). Such regulatory oversight is not specific to this case or the NCAA; it is a necessary consequence of the less restrictive alternatives test itself, the logic of which requires courts to conduct increasingly fine-grained analysis into the restrictiveness of restraints until they identify no less restrictive one. Application of the test in the rule of reason would chill innovation, potentially either locking defendants in to the least restrictive restraint they have ever attempted or, worse, subjecting them to treble damages for adopting a restraint that actually *enhances* competition but does so in a way more restrictive than some alternative proposed by antitrust plaintiffs.

The less restrictive alternatives test also induces error in both the rule of reason and the ancillary restraints doctrine. The district court made just such an error in this case, misleading itself into allowing as to the conferences a restraint for which it had previously found *no* procompetitive justification.

Affirming the Ninth Circuit's less restrictive alternatives test would effectively abandon the approach to the rule of reason that this Court has followed since *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231 (1918), and lead to courts preemptively striking restraints that, on balance, enhance rather than harm competition. This Court should reverse and remand the case to the lower court for correct application of the rule of reason as laid out in this Court's cases.

ARGUMENT

I. The less restrictive alternatives test is not a distinct step in antitrust rule of reason analysis

A. The Ninth Circuit's three-step framework and the less restrictive alternatives test

This case stems from a challenge under the antitrust laws brought by student-athletes against the NCAA's compensation rules, which limit the amount and types of compensation that students can receive for their participation in school athletic programs. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation*, 375 F. Supp. 3d 1058, 1062 (N.D. Cal. 2019). Following *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 100 (1984) (*Board of Regents*) and an earlier Ninth Circuit case on NCAA compensation rules, *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2016), the district court analyzed the compensation rules under antitrust's "rule of reason," *In re NCAA*, 375 F. Supp. 3d at 1096, striking the rules as violations of section 1 of the Sherman Act, 15 U.S.C. § 1. *In re NCAA*, 375 F. Supp. 3d at 1109.

Under the rule of reason, which has been a staple of antitrust analysis since *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231 (1918) (*Chicago Board of Trade*), a court asks whether the anticompetitive effects of a restraint outweigh its procompetitive benefits. Although the rule of reason has developed over time, its core has remained constant since *Chicago Board of Trade*. *See American Needle, Inc. v. National Football League*, 560 U.S. 183,

203, n. 10 (2010) (citing *Chicago Board of Trade*); Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law* ¶ 1502 (4th ed. 2016) (same). Put succinctly by Justice Breyer in *California Dental Association v. FTC*, the rule of reason asks: "(1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?" *California Dental Association v. FTC*, 526 U.S. 756, 782 (1999) (Breyer, J., concurring and dissenting) (*CDA*). *See also id.* at 791 (under *Chicago Board of Trade*, "[t]he basic question is whether this, or some other, theoretically redeeming virtue in fact offsets the restrictions' anticompetitive effects").[1]

In the decision below, the court of appeals applied a "three-step framework" for applying the rule of reason, including a distinct less restrictive alternatives test. As applied in this case, under the applicable framework:

> (1) Student-Athletes "bear[ ] the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market"; (2) if they carry that burden, the NCAA "must come forward with evidence of the restraint's procompetitive effects"; and (3) Student-Athletes "must then show that any legitimate objectives can be

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[1] While Justice Breyer's formulation appeared in a four-Justice concurrence and dissent, this Court has adopted it as authoritative. *See FTC v. Actavis, Inc.*, 570 U.S. 136, 156 (2013).

> achieved in a substantially less restrictive manner."

In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation, 958 F.3d 1239, 1256 (9th Cir. 2020). The court of appeals did not cite any case of this Court for the three-step framework, relying instead on Ninth Circuit precedent. *See id.*

The court of appeals, following the district court, concluded that the plaintiffs had satisfied the first step by showing the restraints restricted the market for student-athletes, a finding the NCAA did not dispute. The NCAA, however, offered procompetitive justifications in the second step: that the restrictions preserve the amateur nature of collegiate sports and thereby enhance consumer choice. *Id.* at 1256-57.

The court of appeals, again following the district court, divided its analysis between two sets of restrictions: those on "non-cash education-related benefits" and those on "cash graduation or academic awards." *Id.* at 1251.

The district court condemned the NCAA's limits on non-cash education-related benefits because they could not be confused with a professional athlete's salary. *In re NCAA*, 375 F. Supp. 3d at 1088. Consequently, the court of appeals concluded, "[t]he record … reflects no … concrete procompetitive effect of limiting non-cash education-related benefits," *In re NCAA*, 958 F.3d at 1258, and therefore the NCAA could not limit non-cash education-related benefits at all. *Id.* at 1260. While the district court ruled the *NCAA* could not limit such benefits, it upheld, as a less restrictive alternative to the NCAA's limits, the

ability of individual *conferences* to do so, *In re NCAA*, 375 F. Supp. 3d at 1088.

With regard to cash benefits, the district court recognized that cash awards might be confused with professional compensation. *In re NCAA*, 375 F. Supp. 3d at 1088. But it also found that the NCAA had already permitted cash awards for "athletic participation" of up to $5,600 per student per year without a recognizable effect on consumer demand or the NCAA's conception of amateurism. *Id.* (On the $5,600 amount, *see id.* at 1072, 1099.) Consequently, the court concluded that it would be a viable, less restrictive alternative to allow the NCAA to cap non-athletic "graduation and academic awards" at that same level but no lower, and no lower than any cap it might impose now or in the future on athletic participation awards. *Id.* at 1087.

The court of appeals affirmed all three less restrictive alternatives: (1) no NCAA caps of education-related non-cash benefits, (2) the $5,600-or-parity-with-athletic-awards floor on NCAA caps on graduation and academic cash awards, and (3) conference regulation of education-related non-cash benefits, *see In re NCAA*, 958 F.3d at 1251-52, 1260.

The court of appeals did not cite any of this Court's cases for either the three-step framework or the less restrictive alternatives test. *See id.* at 1256. The district court acknowledged that the three-step framework was missing from this Court's rule of reason cases but noted the appearance of a three-step test in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018), and that courts "frequently rely on the treatises and other writings of Phillip E. Areeda and Herbert Hovenkamp." *In re NCAA*, 375 F. Supp. 3d at

1108. As the district court pointed out, the Areeda and Hovenkamp treatise endorses the use of a less restrictive alternatives test as "an attempt to avoid general balancing," and that balancing should only be conducted when "no viable less restrictive alternative has been established." *Id.* at 1108 (citing Areeda and Hovenkamp ¶ 1507d).

B. This Court has never adopted a less restrictive alternatives test

The less restrictive alternatives test applied below is inconsistent with this Court's antitrust jurisprudence. Although recently mentioned in *dicta*, that mention is not authoritative for a variety of reasons. The test has never been applied by this Court, even though it would have been applicable in many antitrust cases, and this Court has affirmatively rejected it in cases involving vertical restraints.

1. This Court's reference to less restrictive alternatives in *American Express* is *dicta*

The first mention of either a three-step framework or a less restrictive alternatives test in this Court is *American Express*. In that case this Court did not consider the question but rather adopted without comment or analysis a similar approach from the Second Circuit, from which the *American Express* case arose. *American Express*, 138 S. Ct. at 2284; *see also id.* at 2291 (Breyer, J., dissenting). The parties in *American Express* had stipulated to the Second Circuit formulation, *id.* at 2277, removing it as an issue in the case. Moreover, the dispute in *American Express*, on market definition, pertained only to the

first step in the Second Circuit three-step framework, *id*. at 2284; *id*. at 2291 (Breyer, J., dissenting), making this Court's reference to the third step irrelevant to the outcome. *See* Thomas B. Nachbar, *Less Restrictive Alternatives and the Ancillary Restraints Doctrine* 3 (Feb. 2, 2021 draft), https://tinyurl.com/6lqo5hr7. This Court's recitation of the three-step framework in *American Express* was an acknowledgement, not an adoption, of the Second Circuit approach. The third step, containing the less restrictive alternatives test, was not contested and was irrelevant to the outcome in *American Express*, rendering that case's mention of the less restrictive alternatives test pure *dicta*.

2. This Court has never applied a less restrictive alternatives test in previous rule of reason cases even when alternatives were clearly presented

This Court's pre-*American Express* antitrust jurisprudence offers no authority for the less restrictive alternatives test. The court of appeals did not cite any case of this Court for its approach, relying exclusively on Ninth Circuit precedent. *See In re NCAA*, 958 F.3d at 1239. Similarly, this Court in *American Express* cited only a single Second Circuit case and two treatises for that form of the rule of reason. *American Express*, 138 S. Ct. at 2284 (citing *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates*, Inc., 996 F.2d 537, 543 (2d Cir. 1993); 1 Julian von Kalinowski, *Antitrust Laws and Trade Regulation* § 12.02[1] (2d ed. 2017)); *id*. at 2291 (Breyer, J., dissenting) (citing Areeda and Hovenkamp ¶ 1507a). Examination of those sources, too, reveals that they cite none of this Court's cases for

adoption of a distinct less restrictive alternatives test. The less restrictive alternatives test is entirely a construct of a few courts of appeal and commentators. *See* Nachbar at 6-9. It has never been adopted and applied by this Court.

The absence of a less restrictive alternatives test in pre-*American Express* cases could not be more stark. In *CDA* itself, a less restrictive alternative was discussed, sparking a disagreement on the Court, but the possibility of applying a less restrictive alternatives test went unnoticed by both majority and dissent. *CDA* concerned a partial ban on advertising by dentists. *CDA*, 526 U.S. at 761-61. Although the Court did distinguish the partial ban from a total one, *id*. at 773-74, it did not then apply a less restrictive alternatives test. Justice Breyer keyed on this aspect of the majority and criticized it in other ways, *see id*. at 773-74, but nevertheless failed to comment on how the less restrictive alternative might alter the CDA's liability. *Id*. at 790. Only an explicit rejection would be clearer. The less restrictive alternatives test occurred to no one – parties, majority, or dissent – in that, or virtually any other, of this Court's antitrust cases.

3. This Court has previously rejected the less restrictive alternatives test in the context of a vertical restraint

In addition to the many rule-of-reason cases in which less restrictive alternatives are simply not mentioned, this Court affirmatively rejected them in *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). In that case, which dealt with a vertical restraint (an exclusive dealership), this Court

explicitly recognized that there might be a less restrictive alternative to the restraint and refused to consider it for the purpose of invalidating the restraint as a *per se* violation. *Id*. 58, n. 29 ("The location restriction used by Sylvania was neither the least nor the most restrictive provision that it could have used."). This case regards a horizontal restraint, but the Ninth Circuit three-step framework makes no distinction between horizontal and vertical restraints. This Court rejected a less restrictive alternatives test in *Sylvania*, but if it allows the Ninth Circuit less restrictive alternatives test to stand, it would apply equally in vertical restraint cases like *Sylvania*.[2]

C. This Court's consideration of alternatives

This Court does occasionally consider alternatives in antitrust cases, but not in a distinct less restrictive alternatives test. A typical example[3] is *Board of Regents*. In that case, the Court considered limitations on the number of football games that member schools could televise. The NCAA argued that

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[2] Other than *Sylvania*, only two separate Justices' opinions expressly mention less restrictive alternatives in antitrust. Justice Brennan endorsed them as "another pertinent inquiry" in the evaluation of vertical exclusive territories, the restraint for which they were later rejected in *Sylvania*. *See White Motor Co. v. United States*, 372 U.S. 253, 272 (1963) (Brennan, J., concurring). Conversely, then-Justice Rehnquist condemned them. *See National Football League v. North American Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of cert.).

[3] For a comprehensive discussion of antitrust cases in which this Court has considered alternatives, *see* Nachbar at 22-43.

the restrictions made the product ("high-quality college football") more attractive to fans. The Court rejected that argument, finding the plan reduced rather than increased the number of televised football games, completely undermining the NCAA's justification. *Board of Regents*, 468 U.S. at 119-20. Some commentators see in the *Board of Regents* analysis a form of less restrictive alternatives test. *See*, *e.g.*, C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 Colum. L. Rev. 927, 955 (2016); Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & Bus. 369, 372 (2016). *See generally* Nachbar at 24 (collecting sources). *Board of Regents* provides an excellent example of how this Court considers alternatives in antitrust cases and demonstrates why a less restrictive alternatives test is unworkable as a distinct step in the rule of reason.

In *Board of Regents*, the Court did consider alternatives, but they were not less restrictive ones. The Court did not conclude that the NCAA's television restraints served its productive objective more restrictively than they might if structured differently; it rejected the NCAA's restraints – on their own terms and not in comparison to some alternative form – because they did not "produce[] *any* procompetitive effects." *Board of Regents*, 468 U.S. at 114 (emphasis added). Because the television restrictions reduced output rather than increased it, *id*. at 119, there was no procompetitive justification for them at all.

In some parts of its analysis, *Board of Regents* actually considered restraints *more* restrictive than the television restraints at issue in the case. The Court decried the NCAA television restraint as too *limited* to achieve the end of competitive balancing:

> The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs, whether derived from the sale of television rights, the sale of tickets, or the sale of concessions or program advertising. … There is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity.

Id. at 119. It is hard to describe these alternatives as "less restrictive" than a limit on the number of televised games, the restriction at issue in the case.

The Court's consideration of alternatives in *Board of Regents* demonstrates why a less restrictive alternatives test is unworkable within the rule of reason. Is a restriction on the number of televised games more or less restrictive than one on the amount of donations that schools can receive (or use to support their athletic programs)? It's impossible to say.

The reason why it is generally impossible to evaluate which of two restraints is more or less restrictive is because they will frequently operate in different markets. The alternative restraints suggested in *Board of Regents* were likely less restrictive in *television* markets because they did not operate in television markets at all. They would have operated in the markets that constitute and feed

football programs (from salaries for coaches to amenities in training facilities and stadiums) or even in markets for higher education generally (by affecting the way tuition revenue might be used). Because comparing between two restraints almost always means measuring and comparing "restrictiveness" in completely different markets, doing so usually compares apples to oranges.

The problems inherent in cross-market analysis prompted one judge to write a separate concurrence below, questioning the use of cross-market analysis in the Ninth Circuit's step two (when the defendant has the burden to show procompetitive justifications). *In re NCAA*, 958 F.3d at 1269-71 (Smith, J., concurring). Exactly the same problem exists in the Ninth Circuit's step three, when the plaintiff can raise less restrictive alternatives. It is little wonder, then, that this Court has never adopted a less restrictive alternatives test as part of the rule of reason.

D. Alternatives in the ancillary restraints doctrine

The Court's analysis in *Board of Regents*, which emphasized not the availability of less restrictive alternatives but rather whether the restraint contributed to the NCAA's procompetitive justification, suggests that consideration of alternatives is better understood not as a step in the rule of reason itself but rather as part of the ancillary restraints doctrine, which precedes rule of reason analysis. *See Board of Regents*, 468 U.S. at 114 (describing ancillary restraints inquiry as a "predicate" finding); Herbert Hovenkamp, *The Rule of Reason*, 70 Fla. L. Rev. 81, 122, 140 (2018). That is

exactly how this Court viewed this portion of *Board of Regents* in its most recent case addressing the ancillary restraints doctrine: *Texaco, Inc. v. Dagher,* 547 U.S. 1, 7 (2006) (citing *Board of Regents*, 468 U.S. at 113-15).

Although not a Supreme Court opinion, later-Chief Justice Taft's opinion in the *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899), is generally acknowledged to be source of the ancillary restraints doctrine – the requirement that restraints "ancillary" to a larger, productive transaction be evaluated differently than "naked"[4] restraints, whose sole purpose is to limit competition. *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9, 20 (1979); Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 26-30 (1978). The ancillary restraints doctrine effectively channels analysis of restraints. Those that are "naked" are *per se* illegal, while those that are ancillary receive rule of reason analysis. *Polk Brothers, Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985) (Easterbrook, J.) ("A court

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[4] The word "naked" does not appear in *Addyston Pipe*. The concept of a "naked restraint" first appeared (in this Court) in *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) without citation to *Addyston Pipe*. The connection between "naked" restraints and *Addyston Pipe* was first made by this Court in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972) in a parallel citation to the use of "naked" in *White Motor Co.* Justice Stevens cemented the connection between "naked," "ancillary," and *Addyston Pipe* in his dissent in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 736 (1988) (Stevens, J., dissenting).

must distinguish between 'naked' restraints … and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote. … Covenants of this type are evaluated under the Rule of Reason as ancillary restraints … ."). *See also* Areeda and Hovenkamp ¶ 1501.[5]

Although advanced by scholars and some lower courts as part of the rule of reason, consideration of alternatives actually fits more comfortably with the ancillary restraints inquiry than within the rule of reason itself. The standard adopted by then-Judge Taft applied for determining that a restraint is ancillary is whether a restraint is "reasonably necessary." *Addyston Pipe*, 85 F. at 281. One reason why a restraint might not be "necessary" to a productive transaction is because there are other ways (more restrictive or less restrictive) the productive end could be better served. Nachbar at 79-80. But the ancillary restraints doctrine does not require anything like a comparison between the restrictiveness of two restraints; it is a limited inquiry into the connection between the restraint and some productive justification. *See id*. at 88. If the defendant establishes that the restraint is effective enough to be "reasonably necessary," the ancillary restraints inquiry should end and analysis should proceed to the rule of reason, as described in *CDA*.

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[5] In *Dagher*, this Court described restraints that are ancillary to productive transactions as "valid," suggesting they might be legal in all cases. *See Dagher*, 547 U.S. at 7. In other cases identifying a connection between a restraint and a productive purpose, this Court has applied the rule of reason to the restraint. *See*, *e.g.*, *Broadcast Music*, 441 U.S. at 9, 24.

In *NCAA*, when the Court considered alternative restraints, it denied *any* connection between the restraint and the justification. *Board of Regents*, 468 U.S. at 114-15. If the NCAA's restraints did not in fact contribute to productive activity, they were not ancillary to it and therefore were not subject to the ancillary restraints doctrine. *See* Areeda and Hovenkamp ¶ 1505a.

Despite the *American Express dicta*, this Court has never adopted and applied a less restrictive alternatives test and has previously rejected it in *Sylvania*. This Court has considered alternatives in the context of ancillary restraints analysis but not in the kind of comparative analysis required by the rule of reason. Examining how a less restrictive alternatives test would work reveals why such a test does not belong in either the rule of reason or the ancillary restraints doctrine.

II. The Ninth Circuit's less restrictive alternatives test results in misapplication of both the rule of reason and the ancillary restraints doctrine

The limitation of the consideration of alternatives to ancillary restraints analysis is not merely a matter of form. The categorical nature of the ancillary restraints analysis – a binary determination between "naked" and "ancillary" restraints – avoids the most profound problems of allowing consideration of alternatives in antitrust cases. Importing a less restrictive alternatives test into the rule of reason has the potential to collapse the ancillary restraints and rule of reason questions, allowing parties to relitigate the ancillary restraints question in the quantitative

language of balancing. Nachbar at 82. Inclusion of a less restrictive alternatives test accentuates the likelihood of error in both the rule of reason and the ancillary restraints doctrine, an error demonstrated by the opinions below.

A. The less restrictive alternatives test preempts rule of reason balancing, potentially condemning business practices that enhance competition

The Ninth Circuit's three-step framework, with its emphasis on less restrictive alternatives, poorly accommodates the balancing at the heart of the rule of reason. The district court did not cite *CDA* for its balancing test but instead cited two cases of this Court over twenty years older than *CDA* – *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978) and *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) – for a somewhat different inquiry, respectively, about the "competitive significance of the restraint" and whether a restraint is "unreasonable." *In re NCAA*, 375 F. Supp. 3d at 1096.[6] The district court did acknowledge that, if a case cannot be disposed of on the basis of the less restrictive alternatives test, it should proceed to balancing. *Id.* The court of appeals, in its recitation of the rule of reason, did not acknowledge the possibility of balancing at all. *See In re NCAA*, 958 F.3d at 1256.

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[6] The district court did cite a more recent case of this Court, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007), but not for the substance of the rule of reason. *See In re NCAA*, 375 F. Supp. 3d at 1108.

Whether or not the Ninth Circuit's three-step formulation would eventually permit balancing, what is clear is that, if the plaintiff does show a less restrictive alternative, defendants will not be offered the opportunity to demonstrate that a challenged restraint is, on balance, procompetitive. *In re NCAA*, 375 F. Supp. 3d at 1096, 1107-08. The result of the preemptive and determinative nature of the less restrictive alternatives test is that a restraint that overall enhances competition rather than harms it could result in antitrust liability, including treble damages, just because it does not do so as well as some other restraint proffered by the plaintiff. Alan Devlin, *Antitrust as Regulation*, 49 San Diego L. Rev. 823, 826 (2012).

B. The less restrictive alternatives test replicates and exacerbates the problems of rule of reason balancing

Some have suggested that a less restrictive alternatives test can be used to allow courts to avoid the problems of balancing procompetitive and anticompetitive effects. Areeda and Hovenkamp ¶ 1507d; Hemphill at 949. The district court, too, considered the less restrictive alternatives test to be superior to balancing. *See In re NCAA*, 375 F. Supp. 3d at 1108. That is a justification in tension with the rule of reason itself, which requires exactly that kind of balancing. *See CDA*, 526 U.S. at 782 (Breyer, J., concurring and dissenting) ("What are its likely anticompetitive effects? … Are there *offsetting* procompetitive justifications?"); *id.* at 791 ("The basic question is whether this, or some other, theoretically redeeming virtue in fact *offsets* the restrictions' anticompetitive effects.") (emphasis added).

But even if one thought this Court should move away from the balancing that has characterized the rule of reason for over 100 years, adopting a less restrictive alternatives test would not be the way to do it because a less restrictive alternatives test replicates and exacerbates all the problems inherent in balancing. Like rule of reason balancing, a less restrictive alternatives test requires a comparison. On its face, that comparison is simpler because it is limited to comparing two anticompetitive effects – that of the restraint vs. that of the proffered alternative – rather than comparing anticompetitive effects with procompetitive effects, as is required by rule of reason balancing. Hemphill at 952; Hovenkamp at 134. But the less restrictive alternatives test doesn't just compare the anticompetitive effects of two restraints; it compares the *relative* anticompetitive effects of two restraints – the restrictiveness of the two restraints compared to the relative procompetitive effects they provide. Gabriel A. Feldman, *Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 Am. U.L. Rev. 561, 587 (2009); Hemphill at 930. Because two different restraints can also produce different procompetitive effects, the comparison between alternative restraints re-introduces procompetitive justifications into the analysis, resurrecting the problems of rule of reason balancing more generally. Nachbar at 69-70. Thus, one proponent describes the less restrictive alternatives test as "balancing in disguise." Hemphill at 930.

The kinds of comparisons required to evaluate which of two restraints is more restrictive exacerbate problems of balancing because they frequently require comparison between markets. *See supra* at 13-14;

Nachbar at 70-73. The problems of comparing effects in different markets actually led Judge Smith to concur in the opinion below, refusing to fully join the majority because of its comparison between harms in one market and benefits in another. *In re NCAA*, 958 F.3d at 1266 (Smith, J., concurring). That disagreement, over the balancing of procompetitive effects on the market for sports with anticompetitive effects in the market for the athletes that participate in them, *id*., is an important one for antitrust, *see* Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 13 (1984), but it is a question that is inherent in, not resolved, by a less restrictive alternatives test.

C. The incremental and progressively restrictive nature of the less restrictive alternatives test sets an impossible standard of reasonableness, as demonstrated by the remedy in this case

Eschewing this Court's cases on rule of reason balancing, the district court emphasized whether the NCAA's restraints were "reasonable," *In re NCAA*, 375 F. Supp. 3d at 1096, arguably conflating the ancillary restraints and rule of reason questions.

If one were going to replace the distinct ancillary restraints and rule of reason inquiries with some other form of inquiry into the reasonableness of the restraint, it wouldn't be with a less restrictive alternatives test, which is the strictest form of "reasonableness" there is. Every restraint is irrational at the margin. In constitutional law, legislation for which there is no "rational basis" is struck as violative

of due process, a modern implementation of this Court's earlier cases requiring that legislation must be "reasonable." Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 Va. L. Rev. 1627, 1648 (2016). If this Court were to adopt anything resembling a less restrictive alternatives test for judging whether legislation satisfies the constitutional reasonableness requirement, virtually no legislation would survive the test. *See* Thomas B. Nachbar, *Rational Basis "Plus,"* 32 Const. Comm. 449, 456 (2017). The same would be true of practically any restraint. Because all restraints are somewhat over-inclusive, antitrust plaintiffs will always be successful if all they have to do is identify an alternative that is less restrictive. Areeda and Hovenkamp ¶ 1913b ("A skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements.").

Given the severity of a less restrictive alternatives test, even proponents acknowledge that there must be some leeway, or buffer, between the challenged restraint and an alternative before the existence of the alternative invalidates the challenged restraint. *See* Areeda and Hovenkamp ¶ 1913b; Hemphill at 962. But, although proponents acknowledge the need for some gap between the challenged restraint and the proffered alternative, none have been able to consistently describe that gap.

In the opinion below, the court initially described the question at its third step as whether "any legitimate objectives can be achieved in a substantially less restrictive manner." *In re NCAA*, 958 F.3d at 1256. Later in the case, the court cited a different standard: "Where 'a restraint is *patently and*

inexplicably stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it replaced with [an LRA].'" *Id*. at 1260 (quoting *County of Tuolumne v. Sonora County. Hospital*, 236 F.3d 1148, 1075 (9th Cir. 2001)). Elsewhere the court described the test as being that the alternative must be "virtually as effective" and may be implemented "without significantly increased cost." *Id*. (quoting *O'Bannon*, 802 F.3d. at 1075). The court did not attempt to reconcile these various articulations of the standard.[7]

Commentators have similarly struggled with the question of how much less restrictive an alternative must be. In the end, the Areeda and Hovenkamp loose-leaf simply gives up on the problem, declaring that "The situations are too various to permit hard and fast rules." Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 15.03 (2020). But businesses and courts do not have that luxury. Businesses must plan based on the rules, at peril of treble damages, and courts must apply the rules predictably.

The inability of either courts or commentators to describe the size of the gap between a business practice and the less restrictive alternative that renders that business practice an antitrust violation – or even how one might measure that gap – casts doubt on whether the rule can be applied predictably. The result is complete uncertainty over *how less* restrictive a less restrictive alternative must be to

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[7] On the variety of formulations used in *O'Bannon* to describe the test, *see* Nachbar at 72-73.

result in antitrust liability for defendants. Nachbar at 51-53.

The same failure of courts or commentators to articulate a limit on the less restrictive alternatives test has prompted some to decry it as a "least-restrictive-alternative" standard. *E.g.*, Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. Rev. 1265, 1337. After all, the only case in which there is *no* less restrictive alternative is if the defendant is employing the *least* restrictive alternative. Devlin at 826. The Ninth Circuit itself has explicitly rejected such a standard, *O'Bannon*, 802 F.3d at 1075; as have other courts and commentators. Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 Antitrust L.J. 337, 353 (2000); Nachbar at 62-63 (collecting sources). While a *least* restrictive alternatives standard is acknowledged to be indefensible as a matter of antitrust law or policy, any rigorously applied less restrictive alternatives test will necessarily devolve into a *least* restrictive alternatives standard by virtue of the marginally comparative nature of any analysis that asks if there is a restraint "less" restrictive than the challenged one.

The comparative nature of the test combined with the kind of market evidence offered in antitrust cases will necessarily drive courts to accept increasingly fine-grained differences between challenged restraints and their alternatives. The district court's remedy in this case is a perfect example of the problem. With regard to NCAA limits on the payment of "cash graduation and academic" awards to student-athletes, the district court permitted the NCAA to

limit them to levels no lower than the current limits on athletic awards, *In re NCAA*, 375 F. Supp. 3d . at 1087, which at the time of the litigation were set at $5,600 per student per year. *Id*. at 1072, 1099. Although the district court elsewhere explained that the NCAA should be provided "'ample latitude' to superintend college athletics, and [courts] may not 'use antitrust law to make marginal adjustments to broadly reasonable market restraints,'" *id*. at 1104 (quoting *O'Bannon*, 802 F.3d. at 1074-75), the court nevertheless specified – to the dollar – the exact limits on the NCAA's discretion. The court essentially locked in the current dollar amounts, leaving open the possibility that they could go up, but not down, from $5,600.

Such a precise limit raises the question of whether an NCAA cap on cash awards of $5,599 is "*patently and inexplicably* stricter than is necessary," *In re NCAA*, 958 F.3d at 1260, while a limit of $5,600 is not. Regardless of the phraseology, though, what is clear is that any restraint whose anticompetitive effect can be measured in dollars will require courts applying a less restrictive alternatives test to determine, in a similarly granular fashion, at what point a restraint is no more restrictive than necessary. If courts are rigorous in their analysis, courts will inexorably reach the point of allowing only the *least* restrictive alternative. That is an outcome the Ninth Circuit itself has rejected, and yet it is the outcome produced in this very case. One wonders when the plaintiffs will return with a new economic study showing that a $1,000 (or $1) increase to the current limits would not change consumer perception, rendering the current $5,600 limits an antitrust violation and subject to treble damages.

The margin is the point at which information about competitive effects is cloudiest, but that is exactly where the less restrictive alternatives test focuses all attention. The ancillary restraints doctrine, by requiring the defendant to explain the connection between a restraint and a productive transaction, Nachbar at 88-94, without scrutinizing the marginal restrictiveness of a restraint like the less restrictive alternatives test does, permits courts to consider alternatives in a rational way without collapsing into a freeform inquiry by courts into the wisdom of a restraint. It is through the ancillary restraints doctrine, not the rule of reason, that courts should consider alternatives, as this Court did in *Board of Regents*.

D. The less restrictive alternatives test transforms courts into regulators and chills innovation

The specificity of the district court's remedy virtually guarantees that there will be future challenges testing the continued validity of the NCAA's limits, both in kind and in size. That actually happened in this case, with NCAA changes allowing increased compensation being accepted by the district court as evidence that consumer perceptions of amateurism accommodate exactly such increases. *In re NCAA*, 375 F. Supp. 3d at 1106. That finding not only applied to types of compensation but even a specific amount: $5,600 per student per year. *Id*. The district court, having put itself in the position of identifying not only the validity of the NCAA's justification but also the exact dollar amount that the NCAA's justification permits, and having recognized

that both can change over time, has essentially put itself in the position as a NCAA's price regulator.

The court's supervision of the NCAA is not limited to these specific $5,600 cash payments; it will be general and down to the dollar. As the court of appeals acknowledged, this case is a follow-on to *O'Bannon*, which challenged the NCAA's compensation rules for the use of students' names, images, and likenesses. *In re NCAA*, 958 F.3d at 1247. In the present case, the plaintiffs expanded their challenge from the specific limits on compensation in *O'Bannon* to "dismantle the NCAA's entire compensation framework," *id.*, on largely the same grounds. The court of appeals correctly refused to apply *res judicata* based on *O'Bannon*, *id.* at 1253-56, but in so doing acknowledged that every new challenge to the NCAA's compensation rules will justify fresh judicial inquiry, including not just their justification but their level, since a higher limit will be a new, less restrictive alternative, as the $5,600 limit was here.

That kind of judicial regulatory tinkering has actually happened in this very case, before this appeal could even be resolved. After the court of appeals decision, a dispute arose between the parties over the exact level of the cash compensation limits. The parties returned to the district court, which set a new, higher floor ($5,980) based on new evidence. *See* Order Granting Motion for Clarification of Injunction, *In re*

NCAA, No. 14-md-02541 (N.D. Cal. Dec. 30, 2020), ECF No. 1329.[8]

This Court has rejected the use of antitrust courts as regulatory overseers. *See Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). The court of appeals itself acknowledged this tension, *In re NCAA*, 958 F.3d at 1262, but concluded that, because the compensation limits had not originated with the district court, the *Trinko* concern over courts as regulators was inapplicable. *Id.* But it's not the choice of a particular price level but rather the nature of less restrictive alternatives analysis, which invites continuous re-evaluation of practices to determine if they are still "less restrictive," that converts an antitrust court into the kind of persistent market regulator disapproved of by this Court in *Trinko*. *See* Devlin at 828 ("Literally applied, the [less restrictive alternatives] rule would eliminate the distinction between antitrust and regulation.").

The exacting, specific, and changing (with both market conditions and technology) nature of less restrictive alternatives analysis will chill innovation, both for antitrust defendants and firms wary of potential antitrust liability. For instance, in the

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[8] The district court offered a confusing "clarification" that the NCAA could lower the cap without returning to the court for permission so long as it *also* lowers athletic participation award levels. *Id.* at 6. But that clarification is at odds with the district court's own reasoning, which is that the $5,600 (now $5,980) compensation limit is consistent with the NCAA's amateurism justification. *In re NCAA*, 375 F. Supp. 3d at 1088. If the NCAA can preserve amateurism with a $5,980 floor, then anything lower would be more restrictive than necessary to do so.

present case, the NCAA is permitted to change compensation limits, but only in one direction, in favor of higher but not lower compensation. Any attempt by the NCAA to redefine its product – the amateurism recognized by the district court – by lowering compensation limits will require return to the district court in order to acquire permission to do so. *In re NCAA*, 375 F. Supp. 3d at 1110 (retaining jurisdiction).

The chilling effect of the less restrictive alternatives test extends beyond antitrust defendants to potential antitrust defendants. Devlin at 870. *See* Nachbar at 55-61. In this case, it was the NCAA's own relaxation of the compensation limits that were the less restrictive alternative relied upon by the district court. *In re NCAA*, 375 F. Supp. 3d at 1082. Potential antitrust defendants, wary that their own experimentation with relaxed restrictions will be used against them as court-enforced, one-way less restrictive alternatives, will be deterred from experimentation.

Increased scrutiny might be appropriate for a horizontal entity with market power, such as the NCAA, *see id.* at 1070, but the less restrictive alternatives test is not sensitive to the NCAA's composition, size, or market power, as a more comprehensive rule of reason analysis would be. *See CDA*, 526 U.S. at 782 (Breyer, J., concurring and dissenting) ("Do the parties have sufficient market power to make a difference?"). The less restrictive alternatives test, as described by the court of appeals, applies to antitrust defendants and restraints of all kinds, large and small, horizontal and vertical. Indeed, under Ninth Circuit precedent, the test would

apply not only in concerted action cases under 15 U.S.C. § 1 but also in cases against single firms under 15 U.S.C. § 2. *See FTC v. Qualcomm, Inc.*, 969 F.3d 974, 991 (9th Cir. 2020). Because the less restrictive alternatives test takes as a baseline the defendant's current business practices, defendants of all kinds will not only be hesitant to relax restrictions, they will be hesitant to innovate in any way that might be seen as increasing restrictions (such as through vertical intra-brand restrictions that facilitate market entry, as in *Leegin* and *Sylvania*). And, of course, once such restrictions are held to violate the antitrust laws because there are less restrictive alternatives available, other defendants will feel similarly chilled. Easterbrook at 15-16.

E. The less restrictive alternatives test causes errors in ancillary restraints analysis

The kind of "marginal restrictiveness" analysis invited by the Ninth Circuit's less restrictive alternatives test goes beyond the problem of second-guessing by courts; it invites other errors in antitrust analysis. For instance, the court below rejected the NCAA's limits on non-educational benefits because it found that they had no procompetitive effect. *In re NCAA*, 958 F.3d at 1258. But the court nevertheless allowed identical restraints to be imposed by the individual conferences. *Id.* at 1260. Why the conferences? It is true that allowing the restraint at the conference level is "less restrictive" than having it at the national level, but the court found that the restraint had *no* procompetitive effect. *Id.* at 1258 (finding "no such concrete procompetitive effect"). If there is no procompetitive justification at the national

level, there is also no procompetitive justification at the conference level – if anything, there is less justification at the conference level because restraints at that level are unlikely to affect consumer perception of collegiate athletics. Being distracted by conference-level restraints' marginally less anticompetitive effect, the court missed that, under the district court finding, those restraints were equally unjustifiable as unconnected to the NCAA's procompetitive justification. The court's willingness to allow a justification rejected at the national level to support an identical restraint at the conference level is a perfect example of the kind of incrementalist error (this time in favor of permitting restraints rather than striking them) invited by a less restrictive alternatives test.

In this way, the lower courts' inclusion of less restrictive alternatives test distracted them from the inquiry required by the ancillary restraints doctrine: whether the restraints are actually "reasonably necessary" to the procompetitive justification.

The use of a less restrictive alternatives test in antitrust analysis sets an increasingly impossible bar for antitrust defendants, effectively turns courts into antitrust regulators, chills innovation, and introduces additional opportunity for error. Given the problems inherent in a less restrictive alternatives test, it is little surprise that this Court has not adopted such a test within its antitrust jurisprudence. It should refuse to do so in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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February 2021