Nos. 20-512, 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 *AMICI CURIAE* ANTITRUST LAW AND BUSINESS SCHOOL PROFESSORS IN SUPPORT OF PETITIONERS

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February 8, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF THE *AMICI CURIAE*

This brief is submitted on behalf of professors of antitrust law, sports law, business administration, and economics with an interest in the proper application of antitrust principles to business conduct ("Amici").[1] Amici include leading professors and lecturers at some of the nation's top law schools, business schools, and economics departments who have analyzed the proper application of antitrust law and economics in industries across the world.

Amici submit this brief to provide the Court with their views on why existing case law—including from this Court—and sound economic principles require rejecting the least restrictive alternative test that the Ninth Circuit applied here. The Ninth Circuit and Respondents disavow such a test, but the Ninth Circuit nonetheless adopted it in this case. If permitted to stand, the Ninth Circuit's rule would inappropriately discourage parties from forming procompetitive joint ventures simply because an antitrust lawyer could conceive of a slightly more procompetitive version of the venture in the future.

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[1] Pursuant to Supreme Court Rule 37.6, Amici state that this brief was prepared in its entirety by Amici and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than Amici and their counsel. Amici are listed in the Appendix to this brief. This brief is filed with the consent of the parties.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision below adopts an improper approach that would substantially expand the power of the courts to regulate business conduct and discourage beneficial procompetitive arrangements, under the guise of applying the antitrust Rule of Reason.

It is well-accepted that after a plaintiff proves anticompetitive effects from the challenged conduct at step one of the Rule of Reason, and the defendant identifies procompetitive benefits from the conduct at step two, the plaintiff at step three must prove the existence of a substantially less restrictive but equally effective alternative to a challenged restraint, or otherwise establish that on balance the restraint is unreasonable despite its procompetitive effects. Here, however, the Ninth Circuit erred at step three because it ultimately required the defendants to show that their conduct was the least restrictive approach available. The Ninth Circuit's decision conflicts with how the Rule of Reason's burden-shifting framework has been applied historically. Further, it contradicts an overwhelming body of precedent, scholarship, and guidance warning against imposing such a "least restrictive alternative" requirement.

In effect, the Ninth Circuit's decision permits antitrust plaintiffs to commandeer the judiciary and use it to regulate and modify routine business conduct, so long as a plaintiff's attorney or district judge can imagine a less restrictive version of the conduct. In turn, the heightened risk that joint ventures and other procompetitive agreements may be deemed unlawful and subject to treble damages

liability simply because they could have operated in a marginally less restrictive manner is likely to chill beneficial business conduct. This Court should rule in favor of the Petitioners and hold that step three of the Rule of Reason does not require defendants to prove their conduct is the least restrictive conduct possible; instead, plaintiffs must prove the existence of a viable, substantially less restrictive, and equally effective alternative.

ARGUMENT

The Ninth Circuit below broke from the Rule of Reason and general antitrust law in how it imposed the burden of proof. Although the Ninth Circuit found that the NCAA's amateurism rules had procompetitive effects (*see In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1260 (9th Cir. 2020)) and stated that plaintiffs bore the burden at "step three" of the Rule of Reason to prove that a substantially less restrictive but equally effective alternative to the NCAA's rules exists (*see id.* at 1257, 1260), in fact the court of appeals required the *defendants* to show that each one of their rules limiting compensation for student-athletes was the least restrictive rule available. *See id.* at 1261 ("[T]he NCAA presented no evidence that demand will suffer if schools are free to reimburse education-related expenses"), 1262 ("The NCAA fails to explain why the cumulative evidence . . . was insufficient.").

Specifically, even though the Ninth Circuit found that the defendants' suite of amateurism rules had legitimate, procompetitive effects, the court placed the burden on the defendants to prove that "each type of challenged rule" (*id.* at 1259) was necessary. The

court proceeded to rewrite certain of the defendants' rules to make them less restrictive, on the grounds that the revised rules, such as "uncapping certain education-related benefits" and permitting conferences to set individual limits on education-related benefits, would be "virtually as effective as the challenged rules." *Id.* at 1252, 1260–61.

By evaluating each of the NCAA's rules separately and holding that each rule must be necessary to achieve the proposed procompetitive objectives, the Ninth Circuit in effect required the defendants to show that they had adopted the most procompetitive—or the least restrictive—version possible of the challenged restraints. *See id.* at 1259 (affirming district court's holding that defendants must show "the procompetitive effects achieved by each type of challenged rule"), 1264 ("A defendant may escape antitrust liability despite inflicting harm if a court determines that the restraint has a procompetitive effect, and a proposed LRA eliminating that restraint is not viable."). Having thus revised the standard in plaintiffs' favor, the Ninth Circuit ruled for the plaintiffs. *Id.* at 1263.

This Court should find that the Ninth Circuit erred in its application of the Rule of Reason because general antitrust and economic principles, as well as the history of the Rule of Reason, have established that plaintiffs must show a "substantially less restrictive" but equally effective alternative at step three. Because the district court and the Ninth Circuit instead placed the burden at step three on the defendants, these courts' decisions should be reversed.

I. The Rule of Reason Places the Ultimate Burden of Proof on the Plaintiff—The Ninth Circuit's Burden Shift at Step Three Was Improper

In evaluating conduct pursuant to the antitrust Rule of Reason, courts apply a three-step burden shifting framework: first, plaintiff bears the burden to show substantial anticompetitive effects in a well-defined market; second, the defendant must show that the allegedly unlawful conduct has procompetitive benefits; and third, the plaintiff can overcome the defendant's showing, and establish liability, if it can prove that a viable and substantially less restrictive, yet equally effective, alternative to the conduct exists. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).[2] If the plaintiff fails to show there is a viable

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[2] This Court apparently has never held that step three of the Rule of Reason requires considering less restrictive alternatives, rather than simply weighing anticompetitive effects against procompetitive benefits to determine whether a challenged restraint is in fact unreasonably anticompetitive. *See* Thomas Nachbar, *Less Restrictive Alternatives and the Ancillary Restraints Doctrine* 35 (Va. Pub. L. and Legal Theory Research Paper No. 2020-76, Va. L. and Econ. Research Paper. No. 2020-18, November 2, 2020) ("Although references to alternatives are present in the Supreme Court's antitrust jurisprudence, their appearance is spotty at best. Prior to the *American Express* dicta, the Court had never included a less restrictive alternatives test in its articulation of the rule of reason, and most rule of reason cases do not mention them at all. Based on that record alone, inferring that the rule of reason requires consideration of less restrictive alternatives is at the very least strained."),

and substantially less restrictive alternative, then courts will typically weigh the anticompetitive effects against the procompetitive benefits to determine if the conduct is an "unreasonable" restraint of trade under the Sherman Act. *See, e.g.*, *Am. Ad Mgmt. v. GTE Corp.*, 92 F.3d 781, 791 (9th Cir. 1996) ("[T]he fact finder must balance the restraint and any justifications or pro-competitive effects of the restraint in order to determine whether the restraint is unreasonable." (quoting *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1445 (9th Cir. 1988))).

This burden-shifting framework has been in place for decades and utilized by nearly every Circuit. *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009) (collecting cases using a burden-shifting approach when applying the Rule of Reason). The Ninth Circuit's inexplicable diversion from this established precedent was unwarranted and unwise.

Indeed, by shifting the burden of proof from the plaintiff to the defendant at step three, the Ninth

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3723807.

In fact, this Court appears to have disclaimed consideration of a less restrictive alternative in *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 n.29 (1977) ("The location restriction used by Sylvania was neither the least nor the most restrictive provision that it could have used."). Nevertheless, Amici proceed by assuming that the Court would adopt such a test and explain why the Ninth Circuit's application of it improperly positions courts as micro-managers of conduct long thought to be procompetitive, while empowering litigants to second-guess virtually all collaborative conduct and subject such collaborations to lengthy and costly antitrust litigation.

Circuit turns one of the basic tenets of civil procedure on its head by, in effect, shifting the ultimate burden of persuasion to the defendant. At step three of the Rule of Reason, the courts are tasked with evaluating conduct that appears to have an ambiguous overall effect: while the plaintiff has shown that the alleged restraint has anticompetitive effects, the defendant has also shown that the conduct has procompetitive effects. *See, e.g.*, *Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421, 438 (3d Cir. 2016). Before engaging in any balancing of those effects, the courts have consistently looked to see if there is a reasonable alternative to the alleged restraint. *See United States v. Brown Univ.*, 5 F.3d 658, 679 (3d Cir. 1993) ("Once a defendant demonstrates that its conduct promotes a legitimate goal, the plaintiff, in order to prevail, bears the burden of proving that there exists a viable less restrictive alternative."); *see also NHL Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469 (6th Cir. 2005) (describing plaintiff's burden to "show that any legitimate objectives can be achieved in a substantially less restrictive manner"). To do so, the courts have focused on the plaintiff's arguments, because the plaintiff has the ultimate burden of persuading the factfinder that the challenged restraint is unlawful (i.e., that it is unreasonable, either because a substantially less restrictive alternative exists, or because the conduct's anticompetitive effects swamp its procompetitive benefits). *See N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 45 (2d Cir. 2018) (rejecting antitrust challenge where plaintiff failed to prove "the equivalent viability" of its proffered alternative restraints); *see also Am. Steel Erectors,*

Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 815 F.3d 43, 71 (1st Cir. 2016) (upholding lower court grant of summary judgment to defendants where plaintiffs failed to "bear the ultimate burden of proving their [Sherman Act] claims"); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 319 (3d Cir. 2010) ("Plaintiffs' obligation to show the existence of a horizontal agreement is not only an ultimate burden of proof but also bears on their pleadings.").

Indeed, it is axiomatic that the plaintiff, not the defendant, bears the burden of proof on its claim. *See Am. Steel Erectors*, 815 F.3d at 72 ("Plaintiffs bear the ultimate burden of proving their claims." (citation omitted)); *cf. United States v. Baker Hughes, Inc.*, 908 F.2d 981, 983 (D.C. Cir. 1990) (Thomas, J.) (in Clayton Act § 7 context, holding that the burden of proof at the final step "merges with the ultimate burden of persuasion, which remains with the [plaintiff] at all times"). The Ninth Circuit's decision to place the burden on the defendant flies in the face of long-standing jurisprudence that defendants bear no burden of persuasion vis-à-vis liability. This shift would empower courts to hold defendants liable for conduct that the plaintiff has not proven to be anticompetitive. As such, this Court should reject the Ninth Circuit's rule and hold that, at step three, defendants are not required to persuade the fact-finder that no less restrictive alternative exists.

II. The Ninth Circuit's Procedural Error Was Compounded by Its Incorrect Formulation of the Alternatives Test

The Ninth Circuit would allow a plaintiff to prevail on the merits solely because a defendant failed to prove that its alleged restraint was the least restrictive alternative. But other circuit courts routinely reject antitrust challenges where the plaintiff merely shows that the defendant could have achieved its goals using a different and marginally less restrictive alternative. *See, e.g.*, *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 860 (1st Cir. 1984) (holding "defendant [is] not required to adopt the least restrictive means . . . but merely means reasonably suited to that purpose"); *Fleer Corp. v. Topps Chewing Gum*, 658 F.2d 139, 151 n.18 (3d Cir. 1981).

Instead, the plaintiff must show that an alternative restraint is achievable and substantially less restrictive, yet equally effective. In what Amici believe to be the leading statement of the principle, the Third Circuit writes,

> In a rule of reason case, the test is not whether the defendant deployed the least restrictive alternative. Rather the issue is whether the restriction actually implemented is "fairly necessary" in the circumstances of the particular case, or whether the restriction "exceeds the outer limits of restraint reasonably necessary to protect the defendant."

Am. Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1248–49 (3d Cir. 1975); *see also NHL Players Ass'n*, 419 F.3d at 469 (describing plaintiff's burden to

"show that any legitimate objectives can be achieved in a substantially less restrictive manner"); *Flegel v. Christian Hosps. Ne.–Nw.*, 4 F.3d 682, 688 (8th Cir. 1993) ("The plaintiff, driven to this point, must then try to show that any legitimate objectives can be achieved in a substantially less restrictive manner, and the court then weighs the harms and benefits to determine if the behavior is reasonable on balance."); *Gregory v. Fort Bridger Rendezvous Ass'n*, 448 F.3d 1195, 1205 (10th Cir. 2006) ("[T]he plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner." (citation omitted)).

The Rule of Reason's general requirement that plaintiffs at step three identify a "substantially less restrictive" alternative fulfills multiple, important purposes. *See MLB Props. v. Salvino, Inc.*, 542 F.3d 290, 341 (2d Cir. 2008) (Sotomayor, J., concurring); *Expert Masonry, Inc. v. Boone Cnty., Ky.*, 440 F.3d 336, 343 (6th Cir. 2006) (requiring plaintiffs to "show that any legitimate objectives can be achieved in a substantially less restrictive manner." (citation omitted)).

First, this rule protects the role of the courts. The least restrictive alternative test the Ninth Circuit adopted would require courts to act as quasi-regulators of business conduct, second-guessing business decisions in any area where a plaintiff has challenged conduct as anticompetitive. But Courts should avoid adopting rules that require them to act as central planners. *See* Herbert J. Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J. L. & BUS. 369, 376 (2016) (critiquing the decision of the district court

involved in *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) for administering a "less restrictive alternative" test that was "really nothing more than disguised price administration"); *cf. Verizon Comm'cns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (courts are "illsuited" to "act as central planners, identifying the proper price, quantity, and other terms of dealing"); Lars Noah, *When Constitutional Tailoring Demands the Impossible: Unrealistic Scrutiny of Agencies?*, 85 GEO. WASH. L. REV. 1462, 1468 (2017) (observing that the least restrictive alternative inquiry in constitutional law "lacks predictability and may invite judges to conceal value-laden judgments"); *FDIC v. Castetter*, 184 F.3d 1040, 1044 (9th Cir. 1999) ("The general purpose of the business judgment rule is to afford directors broad discretion in making corporate decisions and to allow these decisions to be made without judicial second-guessing in hindsight.").

Recognizing the challenge presented to courts and businesses by a least restrictive alternative test, courts, scholars, and the Department of Justice all agree that courts should not adopt that test. *See Rothery Storage & Can Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227–28 (D.C. Cir. 1986) ("We do not believe, however, that . . . the Supreme Court intended that lower courts should calibrate degrees of reasonable necessity. That would make the lawfulness of conduct turn upon judgment of degrees of efficiency."); Phillip E. Areeda, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 10 (Fed. Jud. Center 1981) ("[T]o require the very least restrictive choice might interfere with the legitimate objectives at issue without, at the margin, adding that

much to competition."); Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 380 (2001) ("Step 3 does not impose a 'least restrictive alternative' requirement that would encourage judicial second guessing of business judgments. To the contrary, it defers to business judgments about what is necessary to remove impediments to productive exchanges and integrations. To prevail at this stage, a plaintiff would have to overcome a presumption of reasonableness of any restraint that has been demonstrated to have the requisite nexus to a productive transaction." (citation omitted)); U.S. Dep't of Justice & FTC, *Antitrust Guidelines for Collaborations Among Competitors* § 3.2 (2000) (plaintiff's proffered alternatives must be "practical, significantly less restrictive means" of achieving the procompetitive aim or else they should be disregarded).

Second, requiring a defendant to prove that a restraint is the least restrictive means of achieving its goal makes it nearly impossible for the defendant to succeed. This rule not only would impose on antitrust defendants the titanic burden of proving a universal negative,[3] it also would empower antitrust plaintiffs

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[3] As commentators have long noted, the general tendency of courts to avoid requiring proof of a negative is more accurately regarded as hostility to requiring proof of a universally quantified statement. *See* Kevin W. Saunders, *The Mythic Difficulty in Proving a Negative*, 15 SETON HALL L. REV. 276

to invalidate virtually all collaborations, no matter how procompetitive, merely by dreaming up marginal ways to make them slightly more competitive. *See Smith v. Pro Football,* 593 F.2d 1173, 1215 (D.D.C. 1978) (MacKinnon, J., concurring in part, dissenting in part) ("In evaluating less restrictive alternatives as a matter of law, it is difficult to imagine what kind of draft would be valid if the existence of a less restrictive alternative would automatically render the present draft unreasonable. Some less restrictive alternative can always be imagined.") Indeed, "[a] skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements." Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 1913b (4th ed. 2018). And a skilled plaintiffs' lawyer would have little difficulty finding attorneys' fees and treble damages to be sufficient incentive to challenge virtually all such collaborations, thus ensuring that the most direct consequence of the Ninth Circuit's application of the Rule of Reason would be a flood of antitrust litigation, followed by a reduction in collaborative enterprises and the negative effects of that reduction.

This consequence follows from the fact that the Ninth Circuit's ruling is not limited to the NCAA's "amateurism" rules. Instead, the Ninth Circuit's opinion as written applies to all forms of joint ventures and procompetitive collaborations and thus

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(1984-1985). It is far preferable to require plaintiffs to prove an existential statement (e.g., that at least one less restrictive alternative exists) than to force defendants to disprove a universal statement (e.g., that none of the many theoretical less restrictive alternatives exists).

is likely to disincentivize those arrangements. *See, e.g.*, U.S. Dep't of Justice & FTC, *supra*, at 1 (2000) (warning that making it too easy to condemn "agreements among actual or potential competitors may deter the development of procompetitive collaborations").

The Ninth Circuit's decision has sweeping implications for antitrust enforcement and may call into question collaborations and joint ventures across a host of areas including healthcare, pharmaceutical development, information technology, consumer electronics, and manufacturing. According to the Ninth Circuit's approach, any court is empowered to re-write the rules of any industry before it so long as the plaintiff can conjure a slightly less restrictive alternative to the conduct being challenged, including, for example, asserting that a joint venture's product is priced too high. *But see Texaco Inc. v. Dagher*, 547 U.S. 1, 6–7 (2006) ("As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price."). The potential exposure to treble damages for such conduct is likely to chill otherwise procompetitive arrangements, thus contradicting the ultimate goal of the antitrust laws: promoting competition.

* * * * *

In applying the "least restrictive alternative" test, the Ninth Circuit's decision discourages a broad swath of beneficial, innovative, and collaborative conduct by disregarding the Rule of Reason's requirement that the ultimate burden is on the plaintiff to prove anticompetitive effects and, if

necessary, the existence of a reasonable less restrictive alternative—not the defendant to prove its conduct is as procompetitive as possible. *See King Drug Co. of Florence, Inc. v. SmithKline Beecham Corp.*, 791 F.3d 388, 409 (3d Cir. 2015) (antitrust laws do not require "that parties must reach the most procompetitive [arrangement] possible"). Further, as discussed above, joint ventures are generally regarded as lawful and procompetitive, and experience does not support subjecting joint ventures to the type of strict antitrust review applied by the Ninth Circuit.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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