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.

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Respondents.

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

BRIEF OF *AMICI CURIAE* ANTITRUST ECONOMISTS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

This brief[1] is submitted on behalf of a group of economists ("Supporting Economists"), listed in the

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution

Appendix, with decades of experience assessing collaborations, product design and innovation, particularly in the antitrust context. Supporting Economists also have extensive academic and practical experience in assessing whether and to what extent certain forms of judicial scrutiny and action in antitrust matters can undermine incentives to form or invest in procompetitive collaborations. Supporting Economists have an interest in ensuring that the antitrust laws are applied to collaborations, or any firms, in a manner that promotes consumer welfare and is not likely to undermine incentives to form and enhance procompetitive collaborations.

INTRODUCTION AND SUMMARY OF ARGUMENT

When considering joint ventures and other collaborations, the Sherman Act should be invoked only to analyze the competitive effects of the collaboration rather than as a tool to redesign the collaboration's product or business model. The Sherman Act does not authorize federal courts to alter a product—here, college athletics—because a judge or jury believes that the interests of an input provider—here, student athletes—would be better served with a different product design. The Sherman Act fosters innovation and promotes investment incentives when collaborations are free to test their product designs and business models without the risk of being second-guessed by courts or juries. This Court has rightly warned against using the Sherman Act as a device for central planning. *Verizon Commc'ns, Inc.* v. *Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). While that principle

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intended to fund its preparation or submission. All parties have consented to the filing of this brief.

often is invoked to protect unilateral competitive conduct under Section 2 of the Sherman Act, 15 U.S.C. § 2, its economic foundations apply equally to the fundamental business decisions of procompetitive ventures under Section 1. *Id.* § 1. *See generally* Howard H. Chang, David S. Evans & Richard Schmalensee, *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223, 262-268 (1998).

Petitioner NCAA is undeniably a procompetitive collaboration that creates amateur athletic competitions. *Nat'l Collegiate Athletic Ass'n* v. *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101-102 (1984) (*NCAA*) (noting that "the NCAA seeks to market a particular brand of football—college football," and highlighting that the amateur "character and quality of the 'product' . . . cannot be preserved except by mutual agreement" of NCAA members). When (as below here) antitrust courts—with their powers to award treble damages and order injunctive relief—effectively oversee product design or business models themselves, the incentives to innovate and respond to marketplace forces are seriously undermined, ultimately harming consumers. *See* Chang, *et al.*, *supra*, 1998 Colum. Bus. L. Rev. at 266-267.

Even if antitrust courts were to have a role under the Sherman Act in scrutinizing, and even modifying, internal product design decisions (as the courts below did here), it is particularly important to ensure that the definition and application of so-called "less restrictive alternatives" do not undermine innovation and investment incentives or otherwise harm consumer welfare. Less restrictive alternative analysis should not be a roving mandate for antitrust courts to impose limitations on product designs simply because the

court or a private plaintiff can conjure up some alternative design that it thinks is "fairer" or more advantageous to a particular supplier or constituency or even one that the plaintiff or court believes is "better." Antitrust cases are not product focus groups.

The Sherman Act tests the *reasonableness* of a restraint, not whether it is the "least" restrictive approach that might be adopted. *See, e.g.*, *Am. Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1248 (3d Cir. 1975) ("In a rule of reason case, the test is not whether the defendant deployed the least restrictive alternative."); *see also Nat'l Football League* v. *N. Am. Soccer League*, 459 U.S. 1074, 1079 (1982) (Rehnquist, J., dissenting from the denial of certiorari) ("The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity.").

Here, however, while asserting that standard, both the district court and Ninth Circuit effectively applied a "least" restrictive alternative approach without placing any burden on Respondents to show that the alternative approach could preserve the NCAA's conception of its own product design. Nor, importantly, did the Ninth Circuit even consider whether its self-made alternative would just as likely harm consumer welfare in the "but for world"—i.e., whether the same output and quality of amateur athletic competitions would likely exist *throughout the NCAA* under the court's self-defined remedy. Such an economic inquiry is essential to ensure that supposedly less restrictive alternatives enhance rather than harm consumer welfare. A court's tinkering and assumptions, no matter how well intentioned, are not a substitute for this economic analysis of the but-for world.

ARGUMENT

I. INNOVATION IS PROMOTED WHEN ECONOMIC ACTORS HAVE THE FREEDOM TO DESIGN AND CREATE THEIR OWN PRODUCTS AND BUSINESS MODELS.

Innovation, whether as a result of "creative destruction," Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* 81-86 (1942), or through iterative evolution, is a critical force in our economy. Accordingly, firms must have the freedom to create products and business models as they see fit in response to consumer demand; this inherently promotes both consumer welfare and total welfare.

The NCAA's product, amateur college athletic competitions, is just such a product. Whether measured by consumer demand or any other metric, it is one of the most successful products in the history of our economy. It represents a prime example of creating and adapting a product to a changing marketplace. In particular, as supply of and demand for college sports transitioned to television—and now to the complexities of our digital economy—the NCAA's consistent and growing popularity reflects a product ("amateur sports" played by students and identified with the academic tradition) that continues to generate enormous consumer interest. Moreover, it appears without dispute that the NCAA, while in control of the design of its own athletic products, has preserved their integrity as *amateur* sports, notwithstanding the commercial success of some of them, particularly Division I basketball and Bowl Subdivision football. And even the less commercially successful sports that the NCAA and its member institutions offer have the same product design rules.

The courts below, and Respondents themselves, offer an approach suggesting that antitrust courts can tinker with the design of products and improve the outcomes for input providers without affecting the popularity of the product or dramatically altering its character. *See, e.g.*, Opp. to Cert. at 7 ("the critical factor that 'drives demand' for college sports today is not the lack of compensation but rather the athletes' status as *students* at a particular school"); *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1258 (9th Cir. 2020) (*Grant-in-Aid II*) (noting District Court's conclusion that athletes would still be students absent the challenged rules); *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1082, 1101 (N.D. Cal. 2019) (*Grant-in-Aid I*) (same). But that *ex post facto* reasoning misses the central economic decision facing creators of joint ventures. "It is very easy to underestimate the risks faced by entrepreneurs in the creation of new products and industries, to forget that what is obvious now may have been very much in doubt when decisions had to be made and money had to be put on the table." Chang, *et al.*, *supra*, 1998 Colum. Bus. L. Rev. at 264. The NCAA rules are not new. They were developed long ago, when intercollegiate athletics were different, and they were designed for all sports, not just those that have subsequently become commercially successful.

Ex post interventions of the type in which the lower courts engaged here will inevitably affect *ex ante* incentives. Judicial treatment of joint venture actions will have significant influence on how entrepreneurs view formation of new joint ventures. Condemnation of practices, particularly product design practices,

after the fact raises the actual or expected costs of adopting the same or similar practices for others contemplating investments. For those activities in which the joint venture or limited collaboration is the only viable organizational structure—intercollegiate athletics is but one example—the risk that product design decisions will be condemned may well cause entrepreneurs to forego experimentation with product design that would otherwise benefit consumers or bypass creation of otherwise procompetitive ventures altogether. *Id.* at 266. Either outcome is inconsistent with the policy of the Sherman Act. *See United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 441 n.17 (1978) (noting that excessive deterrence in the antitrust context does "not necessarily redound to the public's benefit"); *see also Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (noting that "mistaken inferences" in antitrust cases can "chill the very conduct the antitrust laws are designed to protect"); *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.) ("[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.")

The rules challenged here, again, are a good example. A common set of participation rules facilitates, among other things, competitions between teams in different leagues and the creation of national tournaments and championships without the need for thousands of repetitive individual negotiations of such rules that would otherwise be necessary to create the games or events. *See Broad. Music, Inc.* v. *Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979) (noting significant transaction costs attendant with thousands of individual negotiations). Over many years, the NCAA

has continually adjusted its eligibility and participation rules to prevent colleges from pursuing their own interests—which certainly can involve "pay to play"—in ways that would conflict with the procompetitive aims of the collaboration. In this sense, the NCAA's amateurism rules are a classic example of addressing negative externalities and free riding that often are inherent or arise in collaborations—particularly for the large Division I programs involved in this case. That these rules may be modified from time to time should be viewed as a benefit of the collaboration, which provides the flexibility to alter the product design as commercial needs, such as changes in consumer tastes, or non-commercial imperatives, such as the educational missions of universities, evolve.

If and when Congress perceives inequities or related concerns in intercollegiate athletics, such as differing opportunities for men and women, it can, and has, addressed them through specific legislation. *See* 20 U.S.C. § 1681 *et seq*. But, even then, it has never mandated any particular product design. Rather, it has left colleges and universities, acting through governing bodies such as the NCAA, to establish the parameters of intercollegiate athletic competition, just as they do with any other part of their educational programs. Nothing in the Sherman Act itself or in this Court's antitrust jurisprudence suggests that judges or juries are empowered to alter those design decisions.

A. Innovation Incentives Are No Less Important for Collaborations Than Other Business Firms, and Perhaps More So.

Absent the collaborative nature of the NCAA, it would have been difficult for the lower courts to

insinuate themselves into the NCAA's product design decisions. Section 1 would not apply to the unilateral design of a product, including the design of amateur athletic competitions.

Because the collaboration framework allows for application of Section 1 of the Sherman Act, 15 U.S.C. § 1, courts may be tempted, as here, to assess and modify product designs or business models. Economically, that is a mistake: antitrust courts are no more likely to improve innovation and investment incentives when addressing internal product design decisions of collaborations than they are for unitary firms. *See, e.g.*, *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 6 (2006) (treating internal pricing decisions of a joint venture as "little more than price setting by a single entity"); *Trinko*, 540 U.S. at 408 (noting that courts are "ill suited" to determine the price, quantity, and other terms of dealing); Chang, *et al.*, *supra*, 1998 Colum. Bus. L. Rev. at 267 (noting that practices permitted by the courts may not be as efficient as those chosen by the venturers themselves). This is especially true when, as here, the amateur product cannot be created by any one institution alone and can only retain its essential amateur design if universities coordinate with each other in making rules to preserve the product's amateur characteristics. *Am. Needle, Inc.* v. *Nat'l Football League*, 560 U.S. 183, 202 (2010) (noting that a sports league's need to "cooperate in the production and scheduling of games" justifies "a host of collective decisions"); *NCAA*, 468 U.S. at 102 (noting that the integrity of the product of college football "cannot be preserved except by mutual agreement," including on such matters as player compensation).

B. There Is a Critical Difference Between Product Design and Restraints Relating to Marketing or Selling a Product.

From an economic perspective, the most important distinction at issue in this case is that between the fundamental design or parameters of a product, and separately, any restraints relating to the inputs for the product or to the product's output. Indeed, absent a clear delineation of that distinction, courts could apply the Sherman Act to a collaboration's or firm's chosen product characteristics or business model when no restraints or exclusionary behavior are even in play. *See Dagher*, 547 U.S. at 7-8 (distinguishing joint venture restrictions "on nonventure activities" from "core activity of the joint venture itself"); *NCAA*, 468 U.S. at 117 (distinguishing between challenged restrictions on football telecasts and "rules defining the conditions of the contest, the *eligibility of participants*, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture") (emphasis added). Permitting judges and juries to apply the Sherman Act to such decisions will inevitably create uncertainty and, in turn, undermine innovation and investment incentives across any number of industries and collaborative ventures. In these circumstances, antitrust courts would be making public policy regarding the desirability of a product with particular features rather than ferreting out unilateral conduct or agreements that restrict output, raise prices, or reduce innovation to the detriment of consumers.

By contrast, it makes perfect economic sense for antitrust courts to scrutinize firms and collaborations when they create *restraints that go beyond the product design itself*. On the output side—and assuming for

purposes here only that the NCAA is not viewed as a single entity—this could include an assessment of broadcast restrictions for the NCAA's amateur competitions. *NCAA*, 468 U.S. at 117. And while the input side might be more complicated to dissect, certainly there is a difference between what the NCAA determines are its product's amateur characteristics (i.e., rules concerning eligibility and ensuring that student-athletes are not "paid to play") and restraints that are independent of the product design—for example, if the NCAA (hypothetically) were to institute a draft of high school athletes or to agree on compensation for university employees. *Cf. Law* v. *Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998). These latter examples do not go to the essential amateur nature of the product, while the former do.

This critical distinction, however, was lost on the courts below. The inevitable result was an application of the rule of reason that attacks basic product design decisions and inevitably conflicts with the Sherman Act's consumer welfare focus.

II. THE NINTH CIRCUIT'S DECISION INVITES LOWER COURTS TO INTERFERE WITH BASIC PRODUCT DESIGN.

A. The Lower Court Should Never Have Reached the "Full" Rule of Reason.

Because the lower courts made no distinction between a product's design and what may properly be viewed as an independent restraint or exclusionary behavior related to inputs or outputs, they never undertook any threshold inquiry into whether the full rule of reason was necessary or appropriate in the case. Instead, both the district court and Ninth Circuit treated the product itself as facially anticompetitive

in an input market for student-athletes' "labor." *Grant-in-Aid II*, 958 F.3d at 1256-57; *Grant-in-Aid I*, 375 F. Supp. 3d at 1066-70. From that ill-conceived foundation, those courts then essentially presumed that the NCAA's amateur product was itself anticompetitive under Section 1.

Apart from the legal shortcomings of such a starting point, *NCAA*, 468 U.S. at 101-102 (noting that NCAA's product-defining rules allow for the marketing of a product that would not otherwise exist and widens consumer choice), that analytical premise lacks any economic basis. The economic starting point should be the observation that there is enormous demand for amateur athletics and, hence, rules preserving and refining the product's core amateur characteristics should be considered inherently output enhancing and procompetitive. *Id.* Such a starting point—together with the essentiality of coordinating on the parameters of what is amateurism—mandates an entirely different analysis that dispenses with such antitrust challenges quickly rather than, as here, the courts' presumption that the rules defining the product are facially anticompetitive. *Deppe* v. *Nat'l Collegiate Athletic Ass'n*, 893 F.3d 498, 501-502 (7th Cir. 2018) (NCAA bylaws presumptively procompetitive when "clearly meant to help maintain the 'revered tradition of amateurism in college sports' or the 'preservation of the student-athlete in higher education'") (quoting *Agnew* v. *Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 342 (7th Cir. 2012)); *McCormack* v. *Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1345 (5th Cir. 1988) (dismissing at the pleading stage a challenge to NCAA bylaws limiting compensation of athletes and rejecting an argument the NCAA must "distill[] amateurism to its purest form"); *see also Am. Needle*, 560

U.S. at 202 ("NFL teams . . . must cooperate *in the production* and scheduling of games") (emphasis added); *Nat'l Football League* v. *Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, J., respecting denial of certiorari) ("antitrust law likely does not require that the NFL and its member teams compete against each other with respect to television rights"). Thus, properly characterized, the burden would be on the plaintiff to allege and demonstrate that the challenged "restraints" are independent of the product's fundamental—indeed essential—design. Such an inquiry can be carried out efficiently at the pleading stage, especially when potential false positives are likely to lead to an enormous amount of wasteful litigation aimed at the product design decisions of collaborations, concerns that are more properly for policy makers.

Moreover, from an economic perspective, the lack of what is, in essence, judicial regulation has always distinguished U.S. antitrust law—and its related protection of investment and innovation incentives—from competition-law regimes in many other jurisdictions. In the United States, innovators, including those operating through collaborations, have been free to create products and business models as they desire, subject only to any regulation that may apply. *Cf. FTC* v. *Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020). And while collaborations may be subject to antitrust risk for implementing certain output or input restraints, their product design decisions have heretofore only been judged by the market. This freedom to create and modify (as desired) products and business models without the risk of judicial second-guessing (coupled with treble damages and injunctive relief) safeguards significant innovation and investment incentives

across industries and is a bedrock principle of the United States economy. Courts apply the law; they do not make or implement policy. Yet that is precisely what happened in this case.

Indeed, acting more like regulators, the lower courts treated the NCAA's basic product design as inherently anticompetitive, pushing forward with a full rule of reason that sent the parties into a morass of inquiries that were not (and were never intended to be) structured to scrutinize basic product design decisions and their hypothetical alternatives. Because that inquiry was unrestrained and untethered to any input or output restraint, the application of the rule of reason in this case necessarily devolved into a quasi-regulatory inquiry, which antitrust law eschews. *See Chicago Pro. Sports Ltd. P'ship* v. *Nat'l Basketball Ass'n*, 95 F.3d 593, 597 (7th Cir. 1996) (rejecting district court's analysis concerning the NBA's imposition of a fee on out-of-market telecasts because it read "like the ruling of an agency exercising a power to regulate rates"); *see also Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.) ("antitrust courts normally avoid direct price administration, relying on rules and remedies . . . that are easier to administer").

B. Applying Less Restrictive Alternative Analysis to Product Design Undermines Innovation Incentives for Collaborations and All Other Firms.

The Ninth Circuit's decision also undermines innovation incentives in another respect: the court took it upon itself to create and impose its own less restrictive alternative. In the product design area, that, too, is a form of judicial second-guessing that inevitably

undermines innovation incentives here and across industries.

The Ninth Circuit's approach creates economic uncertainty and stifles innovation. Under its analysis, if a court believes that it can redesign a product or business model in a way that benefits one or more market participants, it is free to do so under the guise of less restrictive alternative analysis. Again, this type of after-the-fact speculation inevitably creates disincentives for businesses to form collaborations, invest in product design and development and continually innovate, as a court may use injunctive relief to revise those decisions and impose different models—models that the collaborations did not choose and that may have made them uneconomical. Moreover, a court may also impose treble damages for prior product design decisions by allowing juries to imagine product designs that they believe would be better.

This case is a classic illustration. NCAA members want to offer a particular type of athletic product—an amateur athletic product that they believe is consonant with their primary academic missions. By doing so, as this Court has recognized, they create a differentiated offering that widens consumer choice and enhances opportunities for student-athletes. *NCAA*, 468 U.S. at 102. These same institutions have drawn lines that they believe balance their desire to foster intercollegiate athletic competition with their overarching academic missions. Both the district court and the Ninth Circuit have now said that they may not do so, unless they draw those lines differently. Yet neither the district court nor the Ninth Circuit determined that the lines the NCAA has drawn reduce the output of intercollegiate athletics or ascertained whether their judicially-created lines would expand that

output. That is not the function of antitrust courts, but of legislatures. *Chicago Pro. Sports*, 95 F.3d at 597 (noting that the "antitrust laws do not deputize district judges as one-man regulatory agencies" and that "[u]nless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem").

C. If Less Restrictive Alternative Analysis Applies to Product Design, Then Courts Must Assess the Effect on Both Product Quality and Marketwide Consumer Welfare.

To the extent less restrictive alternative analysis is even relevant to product design, this case highlights a significant economic defect in the lower courts' approach. In particular, less restrictive alternative proposals and analyses effectively are "but for" or counterfactual inquiries premised on the notion that legitimate objectives can be equally promoted or protected (or even improved) with a different and supposedly "less restrictive" set of agreements or contract restraints.[2]

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[2] While the Ninth Circuit (and Respondents) paid lip service to the notion that the burden remained on Respondents to show that a proposed "less restrictive alternative" could achieve the same procompetitive objective of preserving amateurism as the NCAA's challenged rules, the decision below does the opposite. First, by requiring that the NCAA prove that each type of challenged rule relating to amateurism be independently essential to preserving the difference between intercollegiate and professional sports, the decision below misapprehends the role of "essentiality" in rule of reason analysis: the fact that NCAA members must coordinate on rules for preserving amateurism should lead courts easily to approve precisely this type of coordination. *Am. Needle*, 560 U.S. at 203 ("depending upon the concerted

The promotion of consumer welfare remains the overarching objective of the Sherman Act. *Ohio* v. *Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (quoting *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 886 (2007)). Accordingly, it makes sense that any asserted—or here, imposed—less restrictive alternative should be reviewed economically for its effect on consumer welfare versus leaving the challenged restraints in place.

Here, that was not done. It does not appear Respondents offered any evidence to demonstrate that their preferred less restrictive alternative would promote consumer welfare with the same scope and impact as the NCAA's challenged rules. Neither did the lower courts make any assessment of how judicially forcing a change in the NCAA's fundamental amateurism rules may affect (i) the overall (or particular) output of all NCAA sports contests across all divisions

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activity in question, the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye'") (quoting *NCAA*, 468 U.S. at 110 n.39). "Essentiality" does not mean that each rule must itself be essential in its own right to keep the NCAA different from professional sports. Second, the Ninth Circuit's approach is effectively a "least restrictive alternative" requirement. Once the court concluded that the NCAA must prove that each rule is itself essential, it became quite easy for it to decide that a slight tweak or adjustment to the rule would equally suffice. That reasoning creates a standard by which courts can, and as the lower courts did here, continually second-guess procompetitive restraints with easily asserted alternatives until, in theory, a supposedly "less" restrictive one is found. That process inevitably leads to a "least" restrictive alternative approach as courts substitute their business judgments for those of the collaborators. Despite that reality, the Ninth Circuit's decision does not even analyze the competitive effects of its self-created and supposedly less restrictive alternative on the NCAA's product across sports and divisions.

and sports, (ii) the quality of those contests, and (iii) the educational and sports-related experiences of all student-athletes at NCAA institutions. The enormous consumer demand for some amateur sports and some schools creates strong incentives for universities on their own to deviate from the rules fundamental to creating amateur sport. Without those rules to control the actions of a few, the NCAA's fundamental product is threatened overall. *NCAA*, 468 U.S. at 102 (noting "the integrity of the [NCAA's] 'product' cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed").

At a minimum, any proposed less restrictive alternative must be examined economically to determine if overall output would be reduced, overall quality would be reduced, or overall student-athlete experiences would be negatively affected. Moreover, that inquiry cannot be cabined to those sports that are commercially successful but must be considered across the full breadth of the sports to which the challenged rules apply. Without doing so, a court cannot ascertain if the less restrictive alternative is, in fact, less restrictive while meeting the collaboration's legitimate and procompetitive objectives. It can only be so in any relevant antitrust sense if the alternative does not compromise consumer welfare when compared with the challenged restraint. Absent such a standard, courts can substitute their own views on how the NCAA's (or any collaboration's) product should be designed or the organization run without accounting for the likely effects on the output of the collaboration's product, student-athletes, or consumers who enjoy amateur athletic competitions that the NCAA's rules create.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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