**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 FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICUS CURIAE

The American Antitrust Institute ("AAI") is an independent non-profit organization devoted to promoting competition that protects consumers, businesses, and society.[1] *See* http://www.antitrustinstitute.org. AAI serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy.

## SUMMARY OF ARGUMENT

In 1978, Robert Bork forever altered the course of antitrust law by warning against the perils of entrusting Article III judges to make welfare tradeoffs between buyers and sellers. He found the wisdom in this proposition hiding in plain sight in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), a 19th Century opinion written by then-Judge William Howard Taft, which Bork called, in retrospect, "one of the greatest, if not the greatest, antitrust opinions in the history of the law." Robert Bork, The Antitrust Paradox 26 (1978).

Judge Bork thought Judge Taft's accomplishments in *Addyston Pipe* were "quite remarkable" because Taft "indicated clearly why, for juridical reasons, courts must not 'set sail on a sea of doubt'" by trying to weigh buyers' interest in competitive markets against sellers' interests in maintaining a monopoly. *Id.* at 29.

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[1] The parties have lodged blanket consents with the clerk. No counsel for a party has authored this brief in whole or in part, and no person other than amicus curiae has made a monetary contribution to fund its preparation or submission. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions.

Judge Bork explained that "if the court attempts to weigh both values, to arbitrate a price between the competitive and the monopolistic, it will find that there are no criteria whatever to guide its decision." *Id*. at 80. In other words, a judge tasked with determining "how much each of [the] two groups 'deserves' at the expense of the other . . . can relate the decision to nothing more objective than his own sympathies or political views." *Id*. Judges lack discoverable and manageable standards to answer the question.

The NCAA and its member institutions ("Petitioners") now ask this Court to undertake the mirror image of this inquiry. They ask the Court to weigh buyers' interest in maintaining a *monopsony* against sellers' interest in competition, and to arbitrate a price between the competitive and the *monopsonistic*. The buyers are the NCAA and its member institutions. The sellers are Student-Athletes ("Respondents"), who sell their labor as an input into college sports products that, under monopsony compensation rules, afford them no "pay," as that term is defined by the NCAA. *See* Pet. App. 8a–10a.

The lower courts permitted Petitioners to attempt to justify the anticompetitive harm they caused to Respondents in labor markets on the basis of claimed procompetitive effects in product markets for college sports. Pet. App. 35a n.14. Antitrust scholars call this "multi-market balancing." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 352c (4th & 5th eds. 2013–20). By allowing it, the lower courts erred. "Questions of policy are not submitted to judicial determination." *Maryland v. United States,* 460 U.S. 1001, 1106 (1983). And the question "which market is more deserving of competition?" is invariably a question of policy. *See Addyston Pipe*, 85 F. at 284.

One hundred and thirty years ago, when it enacted the Sherman Act, Congress chose competition as the rule of trade over monopoly or monopsony. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 187–88 (1944) ("Congress has made that choice. It has declared that the rule of trade and commerce should be competition, not combination."). It could have simplified things by limiting the Act's protections to discrete groups of market participants, such as buyers or sellers. But it chose instead to protect market competition itself. *See, e.g., Ohio v. American Express Co.*, 138 S. Ct. 2274, 2303 (2018) ("The antitrust laws were enacted for 'the protection of *competition*, not *competitors*.'") (citation omitted); *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices.").

Accordingly, the text of the Sherman Act, and more than a century of this Court's precedent, leave no doubt that the antitrust laws protect "competition" not only in output markets, but also in input markets, including labor markets. *See infra* Part I.B, n.6. And no court of law can trade off a legally cognizable interest in input-market competition against a legally cognizable interest in output-market competition, including in a joint-venture case. The question is one of policy, and the answer has been given already, by Congress.

1. The Court cannot decide this case on the basis argued by Petitioners. The district court found as a factual matter that Respondents established harm to competition in an input market. However, Petitioners have abandoned the argument that their claimed joint venture, or a reasonably ancillary restraint, promotes rather than destroys competition in this market.

Rather, they argue that unrebutted harm to competition in the input market should be tolerated for the sake of competition in an output market.

Courts cannot entertain this argument. They have neither authority from Congress nor justiciable means to allocate competition among discrete parts of the economy. The text of the Sherman Act, and the Court's precedent in input-market and joint-venture cases, make this abundantly clear. So do the principles underlying the Court's state-action cases, which hold that private market participants must be actively supervised and acting pursuant to a sovereign state's clearly articulated policy before being permitted to displace the national policy favoring competition.

Petitioners' argue further that courts *should* set sail on a sea of doubt in joint-venture cases, as a matter of good policy, because doing so will help prevent beneficial joint ventures from being mistakenly condemned. Even putting aside that Petitioners have never established that they have a joint venture in this litigation, the argument is wrong and unsupported. Antitrust law recognizes a single-market efficiency defense that renders a multi-market defense unnecessary. And, notwithstanding the multitude of joint ventures that, like the NCAA, restrain trade in both input markets and output markets, Petitioners have not cited a single case where multi-market balancing was needed to rescue a beneficial aspect of a lawful joint venture.

Here, Petitioners made a strategic choice to waive their argument that their compensation rules tend to promote rather than destroy competition in the labor market, preferring to focus instead on the claimed benefits to the schools and the sports' fans who enjoy the

contests. But this Court should not upend antitrust law to save the NCAA from the consequences of its litigation strategy. Continued reliance on a single-market efficiency defense is more than adequate to protect lawful joint ventures that restrain trade in multiple markets, without saddling courts with the impossible responsibility to "arbitrate a price" between the competitive and the monopolistic or monopsonistic.

2. Petitioners' alternative approach is to ask the Court to allow private joint venturers to displace competition in discrete parts of the economy by fiat. The Court should reject the invitation to create a "product-design" exception to the ancillary restraints framework. Rather than appeal the factual findings of the trial court for clear error, Petitioners seek to avoid factual issues entirely by means of a formalistic decision rule that departs from the substantive ancillary restraints analysis typically applied to joint ventures.

This Court has repeatedly rejected such entreaties and emphasized that "substantive analysis" and "economic realities" should guide judges' hands in antitrust cases. If the Court accepts Petitioners' dubious claim to joint-venture status, the labor restraint at issue in this case should be evaluated, as it was below, according to whether and to what degree, as a factual and economic matter, it is necessary to effectuate the procompetitive purpose of the joint venture and, ultimately, by its effect on competition in the market(s) in which it operates.

## ARGUMENT

This case comes before the Court as an input-market case masquerading as a joint-venture case. Respondents allege an unlawful restraint of trade in the labor market where athletes sell their services to

colleges and universities, an input market. Petitioners respond that the labor-market restraint is necessary for the existence of what they describe as a joint-venture product, although Respondents correctly observe that the claim to joint-venture status was never proven at trial or found by the district court. NCAA Br. 17; *see* Resp. Br. 36–37. Petitioners argue that their claimed joint-venture product has procompetitive effects in the consumer market for college sports, an output market. Pet. App. 18a (restraint "drives consumer interest in college sports").

To be sure, there is little doubt that horizontal restraints on competition are an important part of college sports. This Court has recognized as much in the past. *See Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 113 (1984). But if Petitioners' *labor*-market restraint is an important part of college sports and promotes competition, as they maintain, their argument on appeal can show only that it promotes competition in the *output* market. That showing would say nothing about whether the restraint or the claimed joint venture promotes competition in the input market—the only market where trade is alleged to be restrained unreasonably.

To show that their labor-market restraint promotes competition in the labor market at step two of the rule of reason, Petitioners had to show that the restraint, or their product (if it is a joint-venture product), improves price, output, quality, choice, or innovation in the labor market.

They attempted to do so below but abandoned that argument on appeal. Pet. App. 18a n.8 ("consumer interest in college sports" is "the only [justification] raised on appeal"; "[t]he district court rejected the

NCAA's other proffered justification (abandoned on appeal): The challenged rules purportedly enhance student-athletes' college education …."); Pet. App. 35a n.14 ("The parties have agreed that the relevant market is the market for Student-Athletes' labor, while the market to be assessed for pro-competitive effects is the market for college sports.").[2] Petitioners now ask the Court, instead, to permit unrebutted harm to competition in a labor market *because* it allegedly benefits competition in a product market.

The Court cannot do so. The Court does not have authority to sacrifice competition in a labor market for the sake of competition in a product market. Even if it did have authority, judges have no justiciable means of determining which markets, and market participants, are more deserving of competition in discrete parts of the economy, and by how much. "Even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments." *Baker v. Carr*, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting) ("To charge courts with the task of accommodating the incommensurable factors of policy" is to attribute "omnicompetence to judges"); *see also* Bork, *supra*, at 79. ("[T]here is no

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[2] Petitioners argue in this Court that their restraint enhances "member schools' educational mission," NCAA Br. 31, and they suggest that this benefit to universities provides a second-order benefit to "student-athletes' personal development and education." *Id.*; *see also id.* at 33 (claiming product "offers myriad benefits to student athletes"). However, Petitioners do not challenge the Ninth Circuit's finding that they waived their argument that the restraint promotes rather than destroys competition in the labor market. Pet. App. 18a n.8.

economics, no social science, no systematized knowledge of any sort that can provide the criteria for making such a trade-off decision."); *see also* Br. of Georgia et al. in Support of Petitioners 6 ("[T]he NCAA, along with Congress and state legislatures …, not federal district courts, are best positioned to protect student-athletes while also ensuring the continued health of college sports.").

As an alternative to offering cognizable proof of a justification at step two of the rule of reason, Petitioners ask the Court to give sports joint ventures outcome-determinative discretion to define which restraints survive step four.[3] But there is no basis in antitrust law for the "product-design" exception sought by Petitioners. Such an exception would contravene antitrust law's commitment to assessing the economic realities of arrangements in light of the facts of the particular case and would replace it with the type of formalism antitrust law typically eschews.

Where legitimate joint venturers assert that a restraint on the unintegrated activities of the claimed venture is necessary to effectuate the venture's procompetitive purpose, that assertion is properly evaluated using the ancillary restraints framework.

Petitioners' effort to avoid the ancillary restraints analysis by characterizing their labor restraint as a "product-design" decision does nothing but shift the substantive analysis required from the question of whether the restraint is ancillary to the question of

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[3] The NCAA does not formally request an antitrust exemption, but Respondents correctly observe that it asks for a liability standard that would allow it to nullify a fact finder's contrary rule of reason analysis. *See* Resp. Br. 2–3. The only difference between this standard and an exemption appears to be rhetorical.

whether the restraint is, in fact, a "product-design" decision. In either case, Petitioners cannot and should not be allowed to avoid the necessary inquiry into whether the restraint is, in fact, necessary to achieve the procompetitive purpose of the joint venture—the inquiry that the district court made and the Ninth Circuit affirmed.

## I. THE COURT CANNOT DECIDE THIS CASE ON THE BASIS ARGUED BY PETITIONERS

The judicial inquiry into the reasonableness of a trade restraint does not permit inquiry into the reasonableness of *the competition* that it restrains. Congress enacted the Sherman Act based on "faith in the value of competition." *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951). "It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources…. But even were that premise open to question, the policy unequivocally laid down by the Act is competition." *Board of Regents*, 468 U.S. at 104 n.27 (1984) (quoting *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4–5, 78 (1958)). And it is "[a] national policy of such a pervasive and fundamental character" as to be "an essential part of the economic and legal system." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992). Accordingly, the Court has recognized that "Congress exercised all the power it possessed under the Commerce Clause when it approved the Sherman Act." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 111 (1980).

### A. Federal Courts Lack the Authority and Ability to Weigh Competition Against Incommensurable Values

Since the 19th Century, legions of losing antitrust defendants have appealed to this Court to sacrifice competition in service of a greater good. A common refrain is that the Court should sacrifice competition for the sake of a higher social calling. *See, e.g.*, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 419 (1990) (competition should be sacrificed for the sake of securing legal representation for indigent defendants); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 463 (1986) (for the sake of public health); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (for the sake of public safety); *Northern Securities Co. v. United States*, 193 U.S. 197 (1903) (for the good of the stock market); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 369 (1897) (White, J., dissenting) (for the good of the railroad industry).

The Court has invariably greeted this argument as "nothing less than a frontal assault on the basic policy of the Sherman Act." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695. It has explained that, "[e]ven assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *Id.*; *see also Crescent Amusement Co.*, 323 U.S. at 187–88; *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927). Allowing "a defense based on the assumption that competition itself is unreasonable … would create the 'sea of doubt' on which Judge Taft refused to embark in *Addyston Pipe*, 85 F. at 284, and which this Court has firmly avoided ever since." *Id.* at 696.

### B. Competition in Input Markets Is Incommensurable with Competition in Output Markets

Another common refrain is that the Court should sacrifice competition in one market for the sake of competition in another market. *See, e.g., Board of Regents*, 468 U.S. at 115 (competition in the market for televised football games should be sacrificed for the sake of competition in the market for live football games); *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 351 (1982) (competition in health services markets should be sacrificed for the sake of competition in health insurance markets); *United States v. Addyston Pipe & Steel Co.*, 78 F. 712, 713–15 (C.C.E.D. Tenn. 1897), *rev'd* 85 F. 271 (1898) (Taft, J.), *aff'd* 175 U.S. 211 (1899) (competition in some geographic markets for cast-iron pipe should be sacrificed for the sake of competition in all geographic markets for cast-iron pipe). But in cases involving input-market harms and claimed output-market benefits, the question "which market is more deserving of competition?" is the same sea of doubt as the question "how much competition is in the public interest, and how much is not"? *Addyston Pipe*, 85 F. at 284.

The statutory text of the Sherman Act, and a century of case law, hold unequivocally that antitrust law protects competition in both input markets and output markets. *See, e.g., Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019) ("A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs—both to downstream consumers and to upstream suppliers—when the retailer's unlawful conduct affects both the downstream and upstream markets."); *Weyerhaeuser Co. v. Ross-Simmons*

*Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007) (applying same "predatory pricing" standard to "predatory bidding … on the buy side or input side of a market"); *Mandeville Island Farms,* 334 U.S. at 236 ("The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers…. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.") (citations omitted).[4] It follows that courts cannot weigh competition in output markets against competition in input markets.

Economists disagree about whether multi-market balancing is even theoretically possible in an administrable and sensible way. *Compare, e.g.*, Gregory J. Werden, *Cross-Market Balancing of Competitive Effects: What is the Law and What Should It Be*, 43 J. Corp. L. 119 (2017) (multi-market balancing can be "feasible" in the sense that "[o]ver the course of a trial presenting opposing competitive effects in different markets, the fact finder is apt to develop a clear view on which predominates. A jury never need explain why

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[4] Likewise, the law has always protected input-market competition for labor, specifically. *See, e.g., Anderson v. Shipowners Ass'n of Pac. Coast*, 272 U.S. 359, 363 (1926) (wage fixing violates the Sherman Act); *see also* Dep't of Justice Antitrust Div. & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals 4 (2016) (naked wage fixing and no-poaching agreements are per se illegal and prosecuted criminally); Areeda & Hovenkamp ¶ 352c ("Antitrust law addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of goods, so also it seeks to do the same for buyers and sellers of employment services.").

it takes a particular view, and a judge can cite any contrast between the opposing effects that the record and common sense support."), *with* Jonathan B. Baker, The Antitrust Paradigm 191 (2019) ("The judicial prohibition against multi-market welfare trade-offs has an obvious administrability justification.… Once the analysis extends beyond the market in which harm is alleged, there may be no principled stopping point short of undertaking what is unrealistic if not impossible: a general equilibrium analysis of harms and benefits throughout the entire economy.").

But two important points supersede any economic disagreements. First, courts cannot selectively allocate legally cognizable interests in competition for "juridical rather than economic" reasons. Bork, *supra*, at 27. The problem is that "there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition." *Addyston Pipe*, 85 F. at 283; *see* Bork, *supra*, at 80. "[W]e think of such value trade-offs as the very essence of politics," and "[w]e then typically reserve the choice for legislative determination …." *Id.*

Accordingly, this Court has held that "[i]f a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this … is a decision that must be made by Congress and not by private forces or by the courts." *United States v. Topco Assocs.*, 405 U.S. 596, 612 (1972); *see also United States v. Phila. Nat'l Bank*, 374 U.S. 321, 371 (1963) (an "ultimate reckoning of social or economic debits and credits" is "[a] value choice of such magnitude" as to be "beyond the ordinary limits

of judicial competence, and in any event has been made for us already, by Congress").[5]

The second important point is that a non-justiciable political question is inextricably linked to the decision whether "to subject discrete parts of the economy" to private ordering rather than competition, as the Court's state-action jurisprudence illustrates. *Ticor*, 504 U.S. at 632. In our dual federalist system, the Court has explained, even *sovereign* actors are prohibited from conferring "deference to private price-fixing arrangements." *Id*. at 633. Rather, to displace competition with regulation by private market participants in discrete parts of the economy, a sovereign entity must clearly articulate its intent to displace competition and provide "active supervision" to ensure that private regulation "will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Id*. at 635.

If sovereign actors cannot substitute private price-fixing arrangements for competition without a clear legislative mandate and careful oversight, surely the standard for lower federal courts to do so must be at least as high.

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[5] In *Ohio v. American Express*, the Court clarified that *Topco* does not "forbid[] any restraint that restricts competition in part of the market." 138 S. Ct. at 2290 n.10. That unexceptional proposition is fully consistent with the rule of reason and the single-market efficiency defense discussed *infra* and does not apply to this case. *See In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.*, Nos. 14-md-02541-CW, 14-cv-02758-CW, 2018 WL 1524005, at 7–8 (N.D. Cal. Mar. 28, 2018).

### C. Multi-Market Balancing Is Unnecessary Because Lawful Joint Ventures Promote Competition in the Markets Where They Restrain Trade

Petitioners also make a policy argument that if the Court does not set sail on a sea of doubt, the nation's myriad of enormously beneficial joint ventures will be put in peril. NCAA Br. 50. But the onus is on them to support this counterintuitive claim. And they do not cite a single case in which a Court has had to weigh effects across markets to preserve even in a single beneficial joint venture. We are not aware of any.

Multi-market balancing, or "an offset defense," as former FTC Chairman Pitofsky has labeled it, is unnecessary because efficient collaborations can always be justified by benefits in the same markets where they restrain trade. Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 Geo. L.J. 195, 246 (1992) ("In the United States, an offset defense for mergers and joint ventures will not be considered" because "it is difficult to imagine many situations in which the advantages of an offset defense could not be achieved by the introduction of an efficiency defense."). "If inefficient firms combine, they are not going to be stronger competitors because they have combined their inefficiencies." *Id*. Accordingly, "[g]iven the special complications of an offset defense, including the difficulties of measuring and trading off competitive effects in separate markets, an efficiency defense makes more sense." *Id*.[6]

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[6] The weight of scholarship is in accord with Chairman Pitofsky that the prohibition on multi-market balancing is sound policy in light of the single-market efficiency defense. *See, e.g.*, Areeda & Hovenkamp ¶ 972a ("The general argument favoring an efficiency

Unsurprisingly, then, lawful joint ventures frequently restrain trade in multiple markets, including both input markets and output markets. And when restraints are challenged in one of the markets, courts uphold them when they tend to promote competition in the market where the restraint is challenged. *See, e.g., Texaco Inc. v. Dagher*, 547 U.S. 1, 3 (2006) (joint venture to both refine and sell gasoline in the western United States challenged and upheld on the basis of downstream effects alone). Likewise, when the restraint is challenged in both markets, courts will uphold them when they tend to promote competition in both markets. *See Broadcast Music, Inc. v. Columbia*

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defense does not justify the merger that is prima facie illegal in one market at the same time that it achieves substantial economies in a different market."); Baker, The Antitrust Paradigm, *supra*, at 191 (discussing administrability problems, added litigation complexity, discovery expense, and the lack of a coherent limiting principle once analysis moves beyond the market where harm is alleged); *see also* Bork, *supra*, at 27–30, 79–84 (explaining inherently political nature of the question and juridical impossibilities). One commentator argues that the prohibition would be better operationalized as a presumption rather than a rule. Daniel A. Crane, *Balancing Effects Across Markets*, 80 Antitrust L.J. 397, 397–98 (2015). Another commentator, Gregory Werden, makes an economic argument in favor of multi-market balancing, but Werden is refuted by Baker. *Compare* Werden, *Cross-Market Balancing of Competitive Effects, supra*, *with* Baker, The Antitrust Paradigm, *supra*, at 292 n.51; *see also* Areeda & Hovenkamp, *supra*, ¶ 972a ("An economic case can be made" for multi-market balancing but "[a]part from a rare exceptional case, the arguments seem too weak to withstand the statutory, administrative, and practical reasons against it."). Werden does not address the Separation of Powers and juridical concerns raised by Judge Taft, Judge Bork, and others, except to suggest that judges could craft their opinions to obscure their rationales for trading off competition to favor some markets and market participants over others. Werden, *supra*.

*Broadcasting System, Inc.*, 441 U.S. 1, 21 (1979) ["*BMI*"] (blanket license caused "substantial lowering of costs" which was "potentially beneficial to both sellers and buyers").

The infamous *Appalachian Coals* case is illustrative. The Court approved a cartel-like exclusive-selling arrangement among producers of bituminous coal after the government challenged its effects in both the input and output markets. The producers made a multi-market balancing argument that the input-market restraint would allow for "a better and more orderly marketing of the coal." 288 U.S. at 36. The case is "widely considered wrongly decided." Jonathan B. Baker, *Taking the "Error" Out of Error-Cost Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L.J. 1, n.95 (2015). *See, e.g.*, Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 St. John's L. Rev. 1, 15 (1998) ("Commentators criticized the Court's opinion as ignoring economic reality" and "[i]t became a relic"); Philip Areeda & Louis Kaplow, Antitrust Analysis 190 (5th ed. 1997) ("*Appalachian Coals* is often regarded today as an aberration of the 1930s"); *accord* Richard A. Posner & Frank H. Easterbrook, Antitrust 126 (1981).

But even there, the Court did not accept the argument that the claimed beneficial output-market effects excused harmful input-market effects. The Court was careful to analyze the consumer and producer markets separately and found that the arrangement failed to produce an anticompetitive effect in either market. *Compare id.* at 373 ("(2). The question thus presented chiefly concerns the effect upon prices"), *with id.* at 375 ("(3). The question remains whether, despite the foregoing conclusions [regarding the effect on prices], the fact that the defendants' plan eliminates competition

between themselves is alone sufficient to condemn it."); *see also* Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 Antitrust L.J. 713, n.114 (2014) ("[T]he Court kept its focus on competition" and "stressed that the joint selling agency made no attempt 'to limit production' and that, had it done so, other producers easily could have made up for the reduced production.").

Petitioners also warn that the mere possibility of antitrust liability threatens to chill lawful joint ventures absent multi-market balancing. NCAA Br. 20–21. But lawful joint ventures are rarely challenged, precisely because they tend to promote rather than destroy competition in the various markets where they restrain trade. *See, e.g.*, Fed. Trade Comm'n & U.S. Dep't of Just., Antitrust Div., Antitrust Guidelines for Collaborations Among Competitors, Preamble, at 1 (April 2000) ["Competitor Collaboration Guidelines"] ("[I]n the last two decades, the federal antitrust agencies have brought relatively few civil cases against competitor collaborations."). Where lawful joint ventures restrain trade in both input and output markets and promote competition that benefits the trading parties on both sides, neither has an economic incentive to challenge them.

Moreover, Petitioners chilling argument ignores that joint venturers are capable of engaging in naked horizontal collusion—the "supreme evil of antitrust." *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). Indeed, this Court has found that Petitioners have done so before, under the aegis of their claimed joint venture. *Board of Regents*, 468 U.S. at 120. Far from seeking to discourage challenges to naked horizontal restraints, federal antitrust law takes pains to induce them. *See, e.g.,*

*Ill. Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977) (concentrating treble-damage recoveries in direct purchasers pursuant to "longstanding policy of encouraging vigorous private enforcement of the antitrust laws.").

Petitioners' arguments also ignore the blizzard of sound policy justifications that favor prohibitions on multi-market balancing. Scholars as respected and diverse as Robert Bork and Robert Pitofsky point out that the prohibition is justified on the basis of juridical considerations, administrative considerations, economic considerations, to reduce complexity, to reduce discovery costs, faithfulness to the text of the Sherman and Clayton Acts, and, most importantly, to avoid nonjusticiable policy questions in accordance with the Separation of Powers. Faithful adherence to the national policy favoring competition in both input and output markets puts the onus for crafting antitrust exemptions and making utilitarian political trade-offs on the legislature, where it belongs. *Maricopa,* 457 U.S. at 354 ("[B]y adhering to rules that are justified in their general application, … we enhance the legislative prerogative to amend the law"); *cf. Ticor*, 504 U.S. at 632 ("Continued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls.").

Petitioners were well aware that they could have argued on appeal that their restraints on athlete compensation promote competition in the labor market. Indeed, this Court paved the way for such an argument in *Board of Regents*, 468 U.S. at 102 (noting NCAA's "actions widen consumer choice—not only the choices available to sports fans but also those available to athletes"), and Petitioners even attempted the

argument in the district court and lost. Pet. App. 18a n.8, 35a n.14.

For reasons only they know, Petitioners chose not to argue on appeal that the Student-Athletes who generate the revenues that fund college sports are benefitted by not being paid for their labor, and to focus instead on the demand for college sports among the universities and fans who enjoy the games. Congress, the Separation of Powers, the statutory text, precedent, and sound policy prevent this Court from rescuing Petitioners from the consequences of their strategic decision. Petitioners' multi-market balancing argument is yet another frontal assault on the basic policy of the Sherman Act.

## II. THE COURT SHOULD NOT CREATE A SPECIALIZED "PRODUCT-DESIGN" EXEMPTION FROM THE GENERAL LAWS OF ANTITRUST

As an alternative to proving that their labor-market restraint promotes competition in the labor market, Petitioners ask the Court to upend antitrust law. Antitrust law consists of broadly applicable principles favoring competition, not narrow rules attempting to deterministically engineer markets. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 689 ("The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition.") (citations omitted). Moreover, modern antitrust law, in particular, "eschew[s] … formalistic distinctions … in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *American Needle, Inc. v. National Football League*, 560 U.S. 183,

191 (2010). Should the Court reach the merits of Petitioners' claims, it should reject the invitation to create a "product-design" exemption for joint venturers as exactly the sort of "formalistic distinction" and narrow rule that antitrust avoids. Instead, the Court should affirm the court below's application of the existing ancillary restraints framework.

Petitioners argue that, as joint venturers, their "product-design" decisions should be beyond the purview of the antitrust laws to condemn. But, under antitrust law, there is no precedent or reason to afford "product-design" decisions special treatment. Rather, they can and should be evaluated under the framework that applies to all collaborations between competitors. How that framework applies to a particular case is informed by the economic realities of the collaboration and the other facts of the case, not by arbitrary labels.

Petitioners ask the Court to dispense with the ancillary restraints analysis and balancing under the rule of reason that would otherwise apply to their collaboration, and to substitute an "abbreviated deferential review," for any agreement between the member schools that is "reasonably related" to defining the college sports product. NCAA Br. 14. This attempt to radically re-write the rules of competitor collaborations in the guise of a "product-design" rule should be rejected.

The so-called "product-design" immunity sought by Petitioners is precisely the sort of "formalistic distinction" that this Court has long "eschewed … in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *American Needle*, 560 U.S. at 191.

Petitioners seek to replace analysis of the economic reality of the situation with an appeal to superficial characterization. Moreover, their argument denies the diversity of forms that a joint venture may take; "product-design" may be at the core of some joint ventures and not others. Areeda & Hovenkamp ¶ 2132c ("Joint ventures are as diverse as contract law permits….").

Moreover, Petitioner's proposed standard would not meaningfully add to the analysis of collaborations between competitors. Petitioners argue not that their wage restraint is reasonably necessary to effectuate the procompetitive purpose of their collaboration—i.e., ancillary—but that because it is "reasonably *related*" to a "product-design decision," and product design is an area where joint venturers require discretion, it is unreachable under §1 of the Sherman Act.

Even assuming arguendo that the first prong of the Petitioner's argument is correct, the second prong is without basis in antitrust law and at odds with all of the cases Petitioner cites in support. Neither "core activities" of joint ventures nor "ancillary restraints" enjoy immunity (or "abbreviated deferential review") from antitrust scrutiny. Both are subject to the rule of reason, albeit with differing burdens and presumptions. "If the venture is obviously efficient and the price fix or output restriction is an integral part of the venture, then the court may have to perform some fairly delicate balancing." Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1, 5 (1995) (discussing *BMI*, 441 U.S. 1). Petitioners' attempt to substitute "abbreviated deferential review" for "delicate balancing" should be rejected.

The first prong of Petitioners' argument is equally misguided. Labeling the wage restraint a "product-design" decision (or worse, "reasonably related to a product-design decision") does nothing but obscure the inquiry into the relevant question for antitrust law: is the coordination necessary (reasonably or absolutely) to the procompetitive purpose of the joint venture and, if so, does the procompetitive benefit of the restraint outweigh its anticompetitive harms? *See* Competitor Collaboration Guidelines, *supra*, at 9 ("[L]abeling an arrangement a 'joint venture' will not protect what is merely a device to raise price or restrict output; the nature of the conduct, not its designation, is determinative.").

Even if one accepts that it is necessary for a given procompetitive collaboration to make "product-design" decisions, antitrust law still allows (indeed, demands) inquiry to whether a restraint is in fact a "product-design" decision, an ancillary restraint, or "simply an unnecessary, output-limiting appendage." Areeda & Hovenkamp ¶ 1908b (discussing *Board of Regents*, 468 U.S. 85).

Petitioners argument that what is facially a wage restraint on a labor market is actually a "product-design decision" in the product market still rests ultimately on a foundation of substantive facts about the nature of the venture and the relevant markets. Namely, the connection between the wage restraint in the labor market and the asserted independent demand for the college sports product that supplies the procompetitive justification for the NCAA collaboration in the first place.

This factual inquiry into the connection between a so-called "product-design" decision and the

procompetitive justification for the venture is particularly important in cases such as this one, where the restraint operates on a market where the collaborators would otherwise remain independent competitors, notwithstanding their joint endeavor.

This Court has already recognized that the NCAA and its member schools compete to recruit athletes. *Board of Regents*, 468 U.S. at 99 ("The NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes."). The undeniable implication of this is that NCAA members remain independent centers of decisionmaking with respect to recruiting overall, notwithstanding their collaboration in producing college sports. *Id.* ("By participating in an association which prevents member institutions from competing against each other on the basis of price…, the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another."). *See also*, *American Needle*, 560 U.S. at 201 ("The teams remain separately controlled, potential competitors with economic interests that are distinct from [the joint venture's] well-being.").

Accordingly, when examined for its substance and stripped of the formalistic labels they seek to apply, Petitioners' argument that this reduction in competition is an integral part of their ability to produce a procompetitive college sports product is nothing more than an argument that the wage restraint is ancillary. As such, there is no need for this Court to create any special "product-design" exception and the courts below properly applied the ancillary restraints framework and correctly subjected this restraint to the Rule of Reason.

## CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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