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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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

WILLIAM L. MONTS III
HOGAN LOVELLS US LLP
555 Thirteenth St, N.W.
Washington, D.C. 20004

BRUCE D. OAKLEY
Counsel of Record
HOGAN LOVELLS US LLP
609 Main Street
Suite 4200
Houston, TX 77002
(713) 632-1400
bruce.oakley@hoganlovells.com

Counsel for Amici Curiae

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of a group of economists ("Supporting Economists"), listed in Appendix A, 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 not applied to collaborations, or any firms, in a manner that does not promote consumer welfare, but instead is likely to significantly undermine incentives to form and enhance procompetitive collaborations.[1]

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of Record for all parties received notice at least 10 days prior to the due date of *amici's* intention to file this brief. All parties have consented to the filing of this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

It is important for this Court to clarify that, when considering collaborations, the Sherman Act should be invoked only to analyze the competitive effects of the collaboration and not 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 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 second-guessing by courts or juries. This Court has rightly warned against using the Sherman Act as 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 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 Evans & Richard Schmalensee, *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*, 1998 Colum. Bus. L. Rev. 223, 262-68 (1998). Petitioner NCAA is undeniably a procompetitive collaboration that creates amateur athletic competitions. *NCAA* v. *Board of Regents*, 468 U.S. 85, 101-02 (1984) (noting that "the NCAA seeks to market a particular brand of football—college football"—and the amateur character and "quality of the 'product' . . . cannot be preserved except by mutual agreement"). The design of products, even those offered by joint ventures of competitors, is best left to the venture itself. But when antitrust courts—with their power 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 266-67.

Even if antitrust courts 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 is not a roving mandate for antitrust courts to impose limitations on product designs 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. 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."); *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 the plaintiffs 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 likey 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 musings 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 ability 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 and demand of 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 Football Subdivision football. Even the less commercially successful sports that the NCAA and its member institutions offer have the same product design rules. When Congress has perceived inequities or other concerns in intercollegiate athletics, such as differing opportunities for men and women, it has addressed them through legislation. *See* 20 U.S.C. § 1681 *et seq.* But 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.

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 the collaboration context.

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

Here, however, because of the collaboration framework and application of Section 1 of the Sherman Act, 15 U.S.C. § 1, courts may be tempted to assess and modify product designs or business models. That is what happened here and, economically, it 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). This is especially true where, as here, the amateur product cannot be created by any one college alone, and further, can only retain its essential amateur design if colleges 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 Making 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 the product's output. Indeed, absent such 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 5-6 (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 that undermines 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, as opposed to ferreting out agreements or unilateral conduct that restricts output, raises prices, or reduces innovation to the detriment of consumers.

It makes perfect economic sense, of course, 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. *Id*. 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. This latter example would not go to the essential nature of the product, while the former examples 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 HERE 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 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." *In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1256-57 (9th Cir. 2020); *In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1066-70 (N.D. Cal. 2019). From that ill-conceived foundation, those courts 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 101-02 (noting that NCAA's product-defining rules allow for the marketing of a product that would not otherwise exist and widen consumer choice), that analytical premise lacks an 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—suggests 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, 501-02 (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.*, No. 19-1098, 2020 WL 6385695, at *1 (U.S. Nov. 2, 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 may be called judicial regulation distinguishes the U.S. antitrust laws—and its related protection of investment and innovation incentives—from those in many other jurisdictions. In the United States, innovators, including those operating through collaborations, know that they are free to create products and business models as the 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 will only be 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 economic 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 All Firms and Collaborations.

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 there is no assurance that a court will not 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. The institutions that are members of the NCAA 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 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, 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 also highlights an area of the law that is in significant need of economic input, structure, and clarification. 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) pay 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 the 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 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

Yet, this case highlights economic flaws in less restrictive analysis that should be addressed, especially when a court, through an injunction, compels a change in a product's design or characteristics. The promotion of consumer welfare remains the over-arching 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 plaintiffs offered any evidence to demonstrate that any 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 and sports, (ii) the quality

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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.

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"). Therefore, 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. Without doing so, a court cannot ascertain if the less restrictive alternative is, in fact, less restrictive. 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 petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM L. MONTS III
HOGAN LOVELLS US LLP
555 Thirteenth St, N.W.
Washington, D.C. 20004

BRUCE D. OAKLEY
Counsel of Record
HOGAN LOVELLS US LLP
609 Main Street
Suite 4200
Houston, TX
(713) 632-1400
bruce.oakley@hoganlovells.com

Counsel for Amici Curiae

NOVEMBER 18, 2020

APPENDIX

APPENDIX: LIST OF *AMICI CURIAE*[1]

Rosa Abrantes-Metz, NYU Stern School of Business

Michael I. Cragg, The Brattle Group

Daniel L. McFadden, University of California, Berkeley

Janusz A. Ordover, NYU Stern School of Business

Richard L. Schmalensee, Massachusetts Institute of Technology

[1] This brief presents the views of the individual signatories. Their institutional affiliations are listed for identification purposes only