

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 LAW AND BUSINESS SCHOOL
PROFESSORS IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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INTEREST OF THE *AMICI CURIAE*

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

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

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

SUMMARY OF THE ARGUMENT

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

It is well-accepted antitrust jurisprudence that the third step of the Rule of Reason requires the plaintiff to prove the existence of a substantially less restrictive, but equally effective, alternative to a challenged restraint. Here, however, the Ninth Circuit ultimately required the defendants to show that their conduct was the least restrictive approach available. That was a fundamental error. The Ninth Circuit's decision both conflicts with how the Rule of Reason has been applied historically and contradicts an overwhelming body of scholarship and guidance warning against imposing such a "least restrictive alternative" requirement.

In effect, the Ninth Circuit's decision permits antitrust plaintiffs to commandeer the judiciary and use it to regulate and modify routine business conduct, so long as that conduct is not the least restrictive conduct imaginable by a plaintiff's attorney or district judge. In turn, the risk that procompetitive ventures may be deemed unlawful and subject to treble damages liability simply because they could have operated in a marginally less restrictive manner is likely to chill beneficial business conduct. This Court accordingly should grant the Petition to review the Ninth Circuit's decision.

ARGUMENT

In evaluating conduct pursuant to the antitrust Rule of Reason, courts typically apply a three-step burden shifting framework: first, plaintiff bears the burden to show substantial anticompetitive effects in a well-defined market; second, the defendant must show that the allegedly unlawful conduct has procompetitive benefits; and third, the plaintiff can overcome the defendant's showing, and establish liability, if it can prove that a viable and substantially less restrictive, yet equally effective, alternative to the conduct exists. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). If no such alternative is available, then courts will weigh the anticompetitive effects against the procompetitive benefits to determine if the conduct is an “unreasonable” restraint of trade under the Sherman Act. *See, e.g., Am. Ad Mgmt. v. GTE Corp.*, 92 F.3d 781, 791 (9th Cir. 1996) (“[T]he fact finder must balance the restraint and any justifications or pro-competitive effects of the restraint in order to determine whether the restraint is unreasonable.”) (quoting *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1445 (9th Cir. 1988)).

The *amici* write to express concern with how the Ninth Circuit applied the relative burdens at step two and step three of the Rule of Reason test. Although the Ninth Circuit found that some NCAA rules had procompetitive effects (*see In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig. (“Alston”)*, 958 F.3d 1239, 1260 (9th Cir. 2020) (noting that some NCAA rules “preserve demand to the extent they prevent unlimited cash payments akin to professional salaries”)), and stated that the burden was on the

plaintiffs at step three of the Rule of Reason to prove a substantially less restrictive but equally effective alternative (*see id.* at 1257, 1260), in fact the court of appeals required the *defendants* to show that their particular limits on compensation for student athletes were the least restrictive available restraints. *See id.* at 1261 (“the NCAA presented no evidence that demand will suffer if schools are free to reimburse education-related expenses”).

Specifically, even though the Ninth Circuit found that the defendants’ amateurism rules had legitimate, procompetitive effects, the court placed the burden on the defendants to prove that “each type of challenged rule” (*id.* at 1259) was necessary. The court proceeded to rewrite certain of the defendants’ rules to make them less restrictive, on the grounds that the revised rules, such as “uncapping certain education-related benefits” and permitting conferences to set individual limits on education-related benefits, would be “virtually as effective as the challenged rules.” *Id.* at 1252, 1260-61.

By evaluating each of the NCAA’s rules separately and holding that each rule must be necessary to achieve the proposed procompetitive objectives, the Ninth Circuit in effect required the defendants to show that they had adopted the most procompetitive version—or the least restrictive alternative—of the challenged restraints. *See id.* at 1259 (affirming district court’s holding that defendants must show “the procompetitive effects achieved by each type of challenged rule”). Because it found that defendants could not meet this burden, the Ninth Circuit ruled for the plaintiffs. *Id.* at 1263.

However, numerous other circuits have refused to hold that a plaintiff can prevail under the Rule of Reason simply by showing that the alleged restraint was not absolutely necessary to achieve the proffered procompetitive justifications. Instead, courts require only that the restraint be reasonably or fairly necessary and routinely reject antitrust challenges where the plaintiff merely shows that the defendant could have achieved its goals using a different and marginally less restrictive alternative. For example, in what *amici* believe to be the leading statement of the principle, the Third Circuit indicated,

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

Am. Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1248-49 (3d Cir. 1975).

Indeed, when assessing an allegedly unlawful restriction, courts should require plaintiffs to identify a “substantially less restrictive” alternative. *See MLB Props. v. Salvino, Inc.*, 542 F.3d 290, 341 (2d Cir. 2008) (Sotomayor, J., concurring). Such a rule makes sense: courts are not regulators of business conduct and should avoid being asked by plaintiffs to become central planners. Herbert J. Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J. L. & BUS. 369, 376 (2016) (critiquing the district court at hand in *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) for

administering a “less restrictive alternative” test that was “really nothing more than disguised price administration”); *cf. Verizon Comm’cns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (courts are “illsuited” to “act as central planners, identifying the proper price, quantity, and other terms of dealing”); Lars Noah, *When Constitutional Tailoring Demands the Impossible: Unrealistic Scrutiny of Agencies?*, 85 GEO. WASH. L. REV. 1462, 1468 (2017) (observing that the least restrictive alternative inquiry in constitutional law “lacks predictability and may invite judges to conceal value-laden judgments”).

But that is what the least restrictive alternative test the Ninth Circuit adopted would require: courts would be forced to act as quasi-regulators of business conduct, second-guessing business decisions in any area where a plaintiff has challenged conduct as anticompetitive. However, the judicial branch is not suited for that task. *Cf. FDIC v. Castetter*, 184 F.3d 1040, 1044 (9th Cir. 1999) (“The general purpose of the business judgment rule is to afford directors broad discretion in making corporate decisions and to allow these decisions to be made without judicial second-guessing in hindsight.”).

Recognizing the challenge presented to courts and businesses by a least restrictive alternative test, courts, scholars, and the Department of Justice all agree that such a rule is not appropriate. *See Rothery Storage & Can Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227-28 (D.C. Cir. 1986) (“We do not believe, however, that . . . the Supreme Court intended that lower courts should calibrate degrees of reasonable necessity. That would make the lawfulness of conduct

turn upon judgment of degrees of efficiency.”); Phillip E. Areeda, THE “RULE OF REASON” IN ANTITRUST ANALYSIS: GENERAL ISSUES at 10 (1981) (“[T]o require the very least restrictive choice might interfere with the legitimate objectives at issue without, at the margin, adding that much to competition.”); Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 380 (2001) (“Step 3 does not impose a ‘least restrictive alternative’ requirement that would encourage judicial second guessing of business judgments. To the contrary, it defers to business judgments about what is necessary to remove impediments to productive exchanges and integrations. To prevail at this stage, a plaintiff would have to overcome a presumption of reasonableness of any restraint that has been demonstrated to have the requisite nexus to a productive transaction.” (citation omitted)); U.S. Dep’t of Justice & FTC, *Antitrust Guidelines for Collaborations Among Competitors* § 3.2 (2000) (plaintiff’s proffered alternatives must be “practical, significantly less restrictive means” of achieving the procompetitive aim or else they should be disregarded).

Moreover, requiring a defendant to prove that a restraint is the least restrictive means of achieving its goal makes it nearly impossible for the defendant to justify the restraint. Indeed, “[a] skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements.” Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 1913b (4th ed. 2018).

By requiring the NCAA to show that each element of its amateurism requirements is the least restrictive

means of achieving its concededly procompetitive goal of amateurism, the Ninth Circuit disincentivizes otherwise procompetitive arrangements, including joint ventures and other output-increasing collaborations. *See, e.g.*, U.S. Dep't of Justice & FTC, *Antitrust Guidelines for Collaborations Among Competitors* at 1 (2000) (warning that expressing skepticism “about agreements among actual or potential competitors may deter the development of procompetitive collaborations”). Indeed, the Ninth Circuit’s decision has sweeping implications for antitrust enforcement and potentially calls into question collaborations and joint ventures across a host of areas including healthcare, pharmaceutical development, information technology, consumer electronics, and manufacturing. According to the Ninth Circuit’s approach, any court is empowered to re-write the rules of any industry before it so long as the plaintiff can conjure a slightly less restrictive alternative to the conduct being challenged, including, for example, asserting that a joint venture’s product is priced too high. *But see Texaco Inc. v. Dagher*, 547 U.S. 1, 6-7 (2006) (“As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price.”). Potential exposure to treble damages for such conduct is likely to chill otherwise procompetitive arrangements; such a result would be the antithesis of the goal of the antitrust laws, which promote competition.

Thus, in applying the “least restrictive alternative” test, the Ninth Circuit’s decision discourages a broad swath of beneficial, innovative,

and collaborative conduct by disregarding the Rule of Reason’s requirement that the ultimate burden is on the plaintiff to prove anticompetitive effects and, if necessary, the existence of a reasonable less restrictive alternative—not the defendant to prove its conduct is as procompetitive as possible. *See King Drug Co. of Florence, Inc. v. SmithKline Beecham Corp.*, 791 F.3d 388, 409 (3d Cir. 2015) (antitrust laws do not require “that parties must reach the most procompetitive [arrangement] possible”). Further, as discussed above, joint ventures are generally regarded as lawful, and experience does not support subjecting joint ventures to stricter-than-usual antitrust scrutiny.

Finally, Respondents argue that the Ninth Circuit’s decision here “is the same test that the court applied in *O’Bannon*” and ask this Court to deny review here as it did in *O’Bannon*. Br. in Opp’n to Petition for Certiorari at 25, No. 20-520. But the fact that plaintiffs continue to forum shop when filing suits seeking to invalidate nationwide collaborations, in an effort to benefit from the Ninth Circuit’s *O’Bannon* ruling, only confirms the need for this Court to correct the Ninth Circuit’s erroneous application of the Rule of Reason.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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