ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-271

TITLE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Petitioners v. BOARD OF REGENTS OF THE UNIVERSITY OF OHLAHOMA AND UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION

PLACE Washington, D. C.

DATE March 20, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL COLLEGIATE ATHLETIC :

ASSOCIATION, :

Petitioners :

v. : No. 83-271

BOARD OF REGENTS OF THE UNIVERSITY :

OF OKLAHOMA AND UNIVERSITY OF :

GEORGIA ATHLETIC ASSOCIATION :

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Washington, D.C.

Tuesday, March 20, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 a.m.

APPEARANCES:

FRANK H. EASTERBROOK, ESQ., Chicago, Illinois; on behalf of Petitioners

ANDY COATS, ESQ., Oklahoma City, Oklahoma; on behalf of Respondents.

REX E. LEE, ESQ., Washington, D.C.; on behalf of the United States as amicus curiae

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in National Collegiate Athletic Association against the Board of Regents of the University of Oklahoma. Mr. Easterbrook, you may proceed whenever you're ready.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

ON BEHALF OF PETITIONERS

MR. EASTERBROOK: TMr. Chief Justice, and may it please the Court:

The questions in this case concern the application of the Sherman Act to the NCAA's arrangements for the telecasting of college football. Two agreements are at issue. One is the TV plan adopted by the NCAA's members and the other is a series of contracts signed between the NCAA and the ABC, CBS and Turner television networks.

These agreements collectively govern the TV appearances of college football teams. They give ABC and CBS the right to broadcast football in 14 time slots each fall, or roughly one slot per network per Saturday. They require each network to broadcast a total of 35 different games each fall, and they require each network to broadcast the games of at least 82 different teams, different colleges, over a period of

any two years.

Colleges may telecast games outside the network contracts only in compliance with a series of rules called the exceptions rules. Although the exceptions rules have permitted the telecast of more than 100 games a year in recent years, they reduce the number of stations that can carry each game and they restrict the ability of colleges to broadcast their games when other nearby schools have not sold out their stadiums.

The decisions of the lower courts rest on two principal bases. First they held these agreements are unlawful per se because they are horizontal arrangements among competitors, the colleges, to reduce the output, that is the number of different games shown on TV.

Second, the courts held they're unlawful under the rule of reason. The Tenth Circuit thought that the plan violated the rule of reason because only large networks would be able to bid for these contracts and that created objectionable foreclosure of broadcasting by competing TV stations.

As the case comes here there are seven issues before the Court. Our petition presents four questions: questions concerning the scope of the per se rule, the allocation of the burden of persuasion, the

existence of market power, and the application of the rule of reason if the Court funds market power.

Respondents have invoked two different grounds in support of their judgment. They have argued that the arrangements are unlawful per se as boycotts and as monopolization.

And the Solicitor General has added still a seventh issue to this case. The Solicitor General argues that the Court should replace the traditional dichotomy between per se analysis and rule of reason analysis with a new three-tier analysis.

Seven issues is obviously too many to handle in this oral argument, and I therefore want to address the third question presented in our petition, market power, and to discuss the other questions only as time permits.

I want to focus on market power because it's the centerpiece of this case. We have argued that the rule of reason rather than the per se rule applies because the agreements are useful in helping the NCAA and its members compete against other forms of entertainment.

What you think of that argument will depend on what you think of our market power argument. If you agree with us about the nature of competition in this

market, it follows not only that the NCAA has no market power, but that the arrangements are pro-competitive tools that help to compete against other forms of entertainment.

QUESTION: Mr. Easterbrook, is the NCAA a for-profit association or a non-profit?

MR. EASTERBROOK: It is a non-profit association, Your Honor.

QUESTION: And are the universities that are members of it non-profit?

MR. EASTERBROOK: They are.

If the Court doesn't agree with our contentions on market power, though, we have I think an uphill fight on the per se issues, because most of our arguments about how these arrangements help the NCAA's members to compete depend on our characterization of what the market is.

Market power is also the principal thing separating us from the Solicitor General in this case. The Solicitor General joins us in arguing that the per se rule is inapplicable here because the NCAA's arrangements are potentially pro-competitive. The Solicitor General then calls for a novel intermediate tier of scrutiny under which the Court takes a quick look at the practices in context. We are perfectly

willing to agree with the Solicitor General's approach, but only if the quick look starts with a look at market power.

Market power is essential in our view because otherwise the courts end up condemning whatever they do not fully understand. Here the lower courts didn't reject our justifications for this conduct so much as to say that they were not persuaded, that the NCAA's contentions were too speculative, too open-ended, too uncertain to show the necessity of this plan.

Now, we think it's natural for a judge who's a novice in both economics and the football business to be hesitant about embracing a novel explanation for why the NCAA has done what it's done. But antitrust is not opposed to all complicated practices just because it's hard to understand them or hard to articulate why those practices are carried out. After all, if they're banned that kind of proof will never be available.

The market power test for which we argue is we think an absolutely essential filter. If there's no market power the practices can't be anticompetitive, and indeed it's precisely the case when there is no market power that cooperative practices are likely to be most useful as instruments of competition.

We think that when a court says that it

doesn't really know why a business practice was undertaken, the court should be very slow to hold that business practice unlawful if there is no market power, and that it's appropriate to put the plaintiff to one of two burdens. On the one hand, the plaintiff could show that the practices are never beneficial, and in that event the per se rule applies and market power is irrelevant. But if the practices have potentially pro-competitive effects, the rule of reason should apply and market power should be the initial test before a court can hold those practices unlawful.

Let me then summarize our argument on market power. It's this: Market power under this Court's cases is the ability to raise price by reducing output. That is, we want to know if the defendant has the ability to charge a monopoly price. If it can't, there's no antitrust reason to be concerned about its practices. And there is no way the NCAA can charge a monopoly price by reducing the number of different games that appear on TV.

The television industry sells viewers to advertisers. That is the central commercial transaction. The only people who put money into this system are the advertisers, and the only people who can be held up for more money are therefore the

advertisers.

It is undisputed on this record that advertisers pay only for viewers actually delivered. They are buying audience. The TV networks pay the suppliers of programs only to the extent the programs summon viewers to their sets.

QUESTION: Well, but the contracts between the TV networks and the colleges are not dependent on receipt of revenue by the TV stations. They're outright flat commitments.

MR. EASTERBROOK: They are flat commitments, Your Honor. But the amount of money the network will be willing to pay as a flat commitment or a contingent commitment depends on how many viewers it thinks it can get, and in fact the networks are very sensitive to that, going into quite complicated calculations before making bids based on the number of viewers.

We think the right way to look at the transaction in this case is that the NCAA and its members supply programs to television stations and to networks. If a program supplier makes its programs scarcer or less attractive, fewer people watch. If fewer people watch, the network gets less money and it therefore is willing to bid less for the programs.

And therefore, a program supplier cannot make

itself better off by reducing its quality or the number of programs it supplies. It can't get a higher price per viewer because advertisers take the viewers as essentially fungible, and it therefore has no market power.

Now, that in a word is our whole argument.

Respondents say that we are quibbling with the lower court's facts and inferences. But we think a lot more is at issue. The question, wholly a question of law, is what the lower courts should address their findings to. We say that as a matter of law a lower court can't find market power without finding that the defendant has the ability to raise the price, to make itself better off by reducing output. The court must address and answer the question whether there is an ability to enrich the defendant's pockets by harming consumers.

Neither lower court even addressed that question. In fact, neither lower court thought that was the legally relevant question to address. The lower courts took different, but in our view equally erroneous, approaches to the market power question.

The district court said that it would decide whether there was market power power by defining a market and that it would define the market by looking at

what it is that plaintiffs sell. What plaintiffs sell is football games. The University of Oklahoma and the University of Georgia sell football, not ads.

QUESTION: Mr. Easterbrook, as a judge who is an expert neither in antitrust nor football, I get the impression occasionally that this market definition thing is a game that many people can play at. One person says A plus B equals C is the equation we ought to have to decide it, and somebody else says, oh, no, it's E plus F equals G.

I get the impression perhaps that the first person to have a bite at the apple, that is the district court, frequently can say what the rules on which the game is played.

MR. EASTERBROOK: I think that's right, Your Honor. There is an enormous amount of elasticity in defining the market, and that is one reason why I have not been talking about the definition of a market. In a sense, you can define the market in this business as football games that appear on TV, or as college football games that appear on TV in the fall, or as some other market.

Our principal argument is that, since the market definition game is so easy to play and so easily manipulable, that it is in cases of this sort the wrong

game to play; that what you want to determine is not a formal definition of the market. It is not a game of lexicographic legerdemain in which you want to see who can get the upper definitional hand.

But instead, the objective is to set out to find out whether the defendants really have the ability to raise prices by reducing the amount of their output.

QUESTION: Could you spell out just what you mean by manipulate in the sense you used it there, Mr. Easterbrook?

MR. EASTERBROOK: Well, by manipulate, Mr. Chief Justice, I mean that the market definition, the definitional exercise, is as inevitably arbitrary as any exercise in definition. In a sense, it has to be right that there is a market in college football games, because a lot of people specialize in selling college football games and don't sell much else.

QUESTION: Are you using that in the same sense that the networks can manipulate the soap opera market, for example?

MR. EASTERBROOK: No, no. I don't mean that the participants in the market can manipulate it to their benefit or to detriment. I was just suggesting that market definition, like any other definitional exercise, really is subject to the Humpty-Dumpty

problem. That is, when I use a word, says Humpty-Dumpty, it means exactly what I say it means, neither more nor less.

And it is possible to define almost an infinitely large number of markets in any antitrust case. The legal question that we're presenting is not which is the formally correct definition, because there is no formally correct definition, but has the lower court tried to put its finger, or to draw a circle around a set of activities that gives people who engage in those activities the power to drive up price by reducing how much they sell?

And that's where we say the lower courts have failed, because they haven't even attempted to do that.

QUESTION: Mr. Easterbrook, may I ask you a question. Does your argument depend -- I think you said earlier that viewers or advertising dollars are essentially fungible, viewing time. I thought the district court at page 75A of the opinion said something quite different, that they pay a much higher rate for Saturday football than they do for baseball or soap operas.

MR. EASTERBROOK: That's correct, they pay a much higher rate per thousand viewers per 30-minute spot than they do for pro baseball. The question is what one

makes of that. As it turns out, the data which we collect in a footnote in our brief shows that they pay a much lower rate than for pro football, they pay about 51 percent less than for horse racing, and 131 percent less than for Dynasty.

Now, as it turns out, it is undisputed on this record that the source of the differential payment per thousand viewers per 30-second spots is that people of different demographic characteristics watch. The plaintiffs' principal expert witness, Dr. Horowitz, testified at pages 602 to 604 of the appendix that the reason why the NCAA gets a higher price per viewer is that the people who watch have a higher amount of education than the people who watch baseball. Advertisers are always willing to pay more for more educated, higher income viewers, on the theory that they go out and buy more.

What you then have to answer in order to figure out whether the NCAA has market power, given the difference in these viewers, is whether there is something special about the NCAA's audience. If they get a uniquely high demographic group, then maybe there is some ability to exploit the advertisers.

QUESTION: You're saying that the networks want a higher intelligence group of people?

MR. EASTERBROOK: I don't know whether they want a higher intelligence person --

QUESTION: If they do they ought to change their commercials.

(Laughter.)

MR. EASTERBROOK: Justice Marshall, I'm not sure whether intelligence is the criterion at all, rather than say income.

If you try to ask the question from Justice Stevens' point of view, ask whether there is something special about these viewers, you would want to ask the kind of thing that I just gave in response. That is, see whether there is a uniquely high price for NCAA football. It turns out that the answer is no, that most of --

QUESTION: I think maybe more precisely, Mr. Easterbrook, what I'm asking is, if the district court took the view that I just indicated, do you have to convince us that it was clearly erroneous in doing so? The Solicitor General argues rather heavily that maybe you're right in theory, but you've got to contend with a lot of district court findings, and we don't start from scratch.

MR. EASTERBROOK: Well, Your Honor, I agree that we can't start from scratch in this case, and in

fact we're not asking you to declare the district court's findings clearly erroneous.

We asked the Court of Appeals to declare many of the findings clearly erroneous. The Court of Appeals by and large declined to reach our attacks on the district court's findings, because it had still another legal theory about market power which it invoked and then stopped.

The theory that the Court of Appeals invoked on market power is principally that you tell whether the NCAA has market power by seeing whether it gets a higher total price per ad, per 30-second ad. It turns out the NCAA does get a higher total price per 30-second ad than other Saturday afternoon programming, because the NCAA attracts more viewers. And the Court of Appeals said that shows market power.

Well, our argument is that that is a legally erroneous basis for inferring things. It's the equivalent of a court saying, if someone makes a better mousetrap and sells more of the mousetraps, that that demonstrates that he must have market power because he's getting higher gross revenues. But that is as unsupported a basis for inferring market power as one can come up with.

In the advertising business it is conceded all

around that you get a higher price per ad the more people who watch. But the more people who watch is an increase in output.

If the NCAA has figured out some method to get the number of viewers up from 10 million to 20 million, it certainly gets more viewers. But I think it stands antitrust law on its head to say that that's proof of market power. The appropriate inference to draw from that is that that's proof of success in competition and increasing one's output.

But let me come back to the method that we have tried to use for inferring market power. As I said earlier, what we have suggested is the legal standard that the court should try to employ is whether the defendant has the power to raise the price it charges by reducing its output, and that if the findings of the lower courts are not addressed to --

QUESTION: Well, what if it just has power to raise the price?

MR. EASTERBROOK: I'm sorry, Justice White, I didn't hear the full question.

QUESTION: Well, what if it just has power to raise the price?

MR. EASTERBROOK: Then it seems to me that there is no demonstration of market power. If I have a

widget that I could sell for a dollar in the market, but being some fool I sell it for 90 cents, I then have the power to raise the price, if everyone else is selling his widget for a dollar.

But that doesn't show market power. There is on my example a competitive market in dollar widgets, and it shows that I am sacrificing profit. Now, it may be that I'm the fool, but the difference between the dollar and 90 cents doesn't show much.

And I think that there is some of that flavor in what both the district court and the Court of Appeals did. They said, look, the NCAA --

QUESTION: So what if the NCAA says to the television, when they put it out for bids, they say, just remember, this year if the bids are only so and so -- or you're going to have to do better than a certain price this year, which is considerably more than last year. Certainly it's been going up every year, hasn't it?

MR. EASTERBROOK: Every time the NCAA has renegotiated a contract, the price per exposure has indeed gone up, although --

QUESTION: And you say that's part of the market, that's some evidence of market power, I suppose.

MR. EASTERBROOK: No.

QUESTION: But not enough?

MR. EASTERBROOK: In fact, Justice White, we think, quite the contrary, we think it's evidence of lack of market power. The market power story is the story that the defendant has the ability to cut back its output and drive up the price, and the reverse of that is that if a defendant, exercising market power, increases his output you'd expect the price to fall.

QUESTION: Well, they've been raising the price and increasing output, so-called, every year, too.

MR. EASTERBROOK: That's right. They've been increasing the number of exposures on TV and they've been getting more money. Now, that is almost the reverse of the market power story. If they're really a monopolist -- if a monopolist doubles its output, the price per widget falls.

QUESTION: Mr. Easterbrook, am I not correct in believing that these contracts limit the number of games that can be televised?

MR. EASTERBROOK: Yes, Your Honor, they do.

QUESTION: Isn't it true that in consequence of that you get a total greater aggregate revenue than if you had unrestricted individual televising of games?

Isn't that a classic example of limiting output and raising price?

MR. EASTERBROOK: No, Your Honor, and it is not a classic example of doing that for essentially two reasons. One thing that is happening is that these contracts, by specifying that the national games appear on ABC-CBS networks, has concentrated the viewers on those networks, and therefore obviously the network price is up, but without any evidence that the price paid per viewer is up relative to what it would be. The price is up because the viewers end up on the network program, rather than scattered.

The second thing that is --

QUESTION: Price of what? Now, we're talking about a particular game being televised. If you had unrestricted television, wouldn't you agree that the individual school could not get the revenue for that one game that is now obtainable for one broadcast?

MR. EASTERBROOK: No, Your Honor, we would not agree to that. I keep coming back to drawing the distinction, which I think is very important to this case, between the price per game and the price per viewer, since it is, after all, that networks are delivering viewers to advertisers.

Suppose that the difference in this case is

that football viewers, when turned out, will fetch $4.81 per 30-second spot. That's what the Nielson data suggests that football viewers fetch. If you have just one national game on TV, the price paid for that game may be $2 million, because all the viewers show up and watch the same game.

If instead you had ten different games, the price per game may be $200,000. But the fact that you end up with a higher price for the national network broadcast than for the local broadcast just tells you where the viewers are concentrated, rather than that there's any market power over the viewers.

I can change the example just a little to other things that go on in the entertainment industry. When any packager or program producer produces his programs, he will enter into some kind of exclusivity clause. In fact, exclusivity is the order of the day in this business.

When the producer of Dallas sells his package to the network, there will be exclusivity clauses of at least two sorts. One will be, say, that only CBS can show Dallas. The other will be that reruns will be held out of syndication for some period of time, five years perhaps.

And it turns out that as a result of that each

episode of Dallas collects more viewers and therefore a higher price than it would if CBS had a Dallas and ABC had a Dallas and they were shown head to head. That would fracture the audience.

The question is whether you would infer from that that Dallas has market power, and we think not. I don't think there's any doubt in this record, I don't think that Mr. Coats or the Solicitor General will say, that the TV programming market is anything other than cutthroat competition, with hundreds, maybe thousands of program suppliers bidding for these time slots on the network in order to supply their programming. Dallas is in head to head competition with everything that Mary Tyler Moore Productions makes.

One of the things we learn from that arrangement is that exclusivity, limiting the head to head, Dallas versus Dallas competition, proves to be a wonderful competitive tool in the market. It has a lot to do with your ability to advertise Dallas, get people to watch Dallas. If it's on one network exclusively you can advertise it.

The failure to split the audience, that is not having multiple series competing against one another, enables you to spend more producing and increasing the quality of the particular series.

One of the things, one of the inferences that I think is a very important inference in the market power question is that when all the producers of television, essentially all the sports leagues, the producers of drama, the producers of movies, the producers of comedies, all engage in exactly the same kind of exclusivity arrangements that the NCAA has engaged in, there is a very weak basis for inferring that these arrangements are an exercise of or a means of exploiting market power and very good reason for thinking that that's the way in which people compete in this market.

There are really two competing hypotheses here about what the NCAA is doing. The one hypothesis which Justice Stevens has brought up is that the NCAA has market power and it's reducing the number of games. But if we persuade you that there is no evidence in this record -- and indeed, the lower courts didn't even address their findings to the question of whether the NCAA can increase the payments per viewer by reducing the number of games. If the lower courts just didn't address their findings to that, then it seems to me one has to say that there's no market power.

And then the two different ways of looking at this case change quite substantially. If the NCAA has

no market power, then the plaintiff's argument that the NCAA is holding games off TV has to be viewed in one of two ways.

Either the NCAA is cutting its own throat just by reducing the number of games and therefore getting its product shown to fewer viewers and therefore getting less total revenue, or there is something pro-competitive about these arrangements.

QUESTION: But you're suggestion, Mr. Easterbrook, suggests that the NCAA is in the business of manufacturing widgets and that its only motive is to maximize profits. But if it's a nonprofit association, might it not have other, non-economic goals?

MR. EASTERBROOK: It might well, Your Honor. As you know, we have not argued that any educational or amateurism goals of the NCAA are a good reason for the NCAA to engage in monopolistic practices, practices that increase the price paid by viewers.

QUESTION: Why haven't you argued that?

MR. EASTERBROOK: We haven't argued that because as we read this Court's cases, including Engineers and others, the goals other than economic are not reasons for monopolistic practices.

QUESTION: Well, Engineers was an association that represented people who were in business for profit

only.

MR. EASTERBROOK: Indeed, Your Honor. But let me say the way in which we think amateurism is relevant in this market. We think it is very relevant in this market in the following sense: A group of amateur and educational nonprofit schools and the NCAA may well undertake certain practices which deliberately fail to maximize its profit.

When the NCAA says, we are running programs of amateur football, it is probably reducing its net profits. It might be able to get more viewers and so on if it had semi-professional clubs rather than amateur clubs. The NCAA might be able to increase its intake if it abolished or reduced the academic standards that its players must meet.

But we don't think the intentional sacrifice of profit is any objection to this plan. Nowhere is it written in the antitrust laws that everybody has to maximize profit. What the antitrust laws do is provide that someone can't maximize his profit by monopolizing. They don't require someone to maximize his profit.

So we think that the amateur and educational status of the NCAA may be very important in understanding why the NCAA would intentionally do something other than maximize its profits.

QUESTION: You've been talking about now, almost exclusively about the contracts between the NCAA and the networks. Do you have to talk at all about the agreement, the other agreement that you mentioned at the outset?

MR. EASTERBROOK: The TV plan among the members of the NCAA?

QUESTION: Yes.

MR. EASTERBROOK: As we view it, the TV plan establishes the contents of what the network contracts will be. The network contracts are largely embodiments of the rules in the TV plan for who can --

QUESTION: Well, it is an agreement among the schools --

MR. EASTERBROOK: Oh, yes.

QUESTION: -- not to compete with each other.

MR. EASTERBROOK: It is an agreement among the schools to engage in competition in a particular way, as we've said.

QUESTION: Well, the way it operates on a particular Saturday, everybody except the school who's on television in a certain area has agreed to stay off the air.

MR. EASTERBROOK: Yes, Your Honor.

QUESTION: Do you have to talk about that at

all?

MR. EASTERBROOK: Well, we talk about it at great length in our brief, and the Solicitor General also talks about it.

QUESTION: I notice it's quite long in your brief.

MR. EASTERBROOK: Pardon?

QUESTION: It is quite long in your brief.

MR. EASTERBROOK: Indeed. Our argument there is essentially that this form of cooperative behavior is a form of behavior which influences the success of football by enabling it to increase its output. That is, it apportions viewers, viewership opportunities --

QUESTION: It increases its output of what?

MR. EASTERBROOK: Its output of games and viewers. The spreading of TV appearances makes it --

QUESTION: Well, you really are -- if there weren't this system there might be more games, but there might not be --

MR. EASTERBROOK: There might be fewer viewers, Your Honor.

QUESTION: There might be fewer viewers.

MR. EASTERBROOK: And therefore reduced output.

QUESTION: That's what we're really talking

about.

MR. EASTERBROOK: That's what we're really talking about, that an increase, short-term increase in the number of games --

QUESTION: Well, an agreement among potential competitors is always valid if the result is to increase their gross?

MR. EASTERBROOK: No.

QUESTION: That doesn't sound quite right.

MR. EASTERBROOK: No.

(Laughter.)

MR. EASTERBROOK: And we contend nothing of the sort, Your Honor. An agreement among competitors that just increases their gross by reducing their output is monopolistic.

QUESTION: Well, that's all you've told me yet is the justification for this agreement.

MR. EASTERBROOK: I'm sorry. Let me try to be a little more precise. One of the things that this agreement does, Your Honor, is to require each of the networks to show 82 different teams over a period of two years. In an amateur football market where the colleges cannot bid for players by offering them higher salaries, where players go depends substantially on a combination of the scholastic program, the exposure on TV, the

recruiting opportunities, and so on.

The ability of the NCAA to produce quality football that people want to watch depends on having high quality rivalry on the field. One of the things this arrangement does is to increase the number of different schools who will attract students, attract high quality players, increase the rivalry on the field, and therefore make each game a more exciting thing to watch.

That's what ends up increasing the number of people who watch and increasing output in this market. It is cooperation, but not monopolistic cooperation.

QUESTION: You always arrive at the same bottom line, that this arrangement will increase the gross. And I'm not sure --

MR. EASTERBROOK: The distinction we're trying to draw is between increasing the gross by cutting back your output and monopolizing, and increasing the gross by improving the quality of your product and getting more people to watch. The former is a violation of the antitrust laws. The latter we think is pro-competitive and beneficial.

QUESTION: Well, would you -- there are findings, I suppose, in the record that, except for this arrangement, there would be more games on television.

Do you disagree with that finding?

MR. EASTERBROOK: We do not disagree with that finding.

QUESTION: So let's say there were twice as many games on television, but there was only half the take. Nevertheless, how do you say that therefore, in order to double the take, it's defensible to cut the number of games in half?

MR. EASTERBROOK: The monopoly question is whether the NCAA can increase --

QUESTION: Well, it isn't only -- you talk as though this were 100 percent a monopoly case.

MR. EASTERBROOK: Well, I don't think so, Your Honor. It's been argued as a cartel case and a monopolization case and a variety of other ways.

QUESTION: Well, how about just an agreement among competitors?

MR. EASTERBROOK: I view that as stating a claim under Section 1 of Sherman for cartel behavior. But as you well know from the Broadcast Music case, not all agreements among competitors are cartel behavior. Whether this is a cartel is a legal conclusion and not a fact.

One has to figure out, as in Broadcast Music, whether this is --

QUESTION: I don't know why you keep putting this word "cartel" in it. Here are a bunch of colleges that come together, and suppose they just say, we all agree that we will only put 80 games on and we will never take less than a certain amount for any of those games. And both lower courts thought this was a per se violation of the antitrust laws.

MR. EASTERBROOK: I understand that. But if there is no market power that can't be a per se violation, we think, because suppose all that happens is that I produce wheat. If I stand up and say, I'm going to produce half as much wheat as before and charge a higher price, I'm not going to get away with it.

QUESTION: Well, here are two -- here are two supermarkets in a large city, two chains. They agree not to compete. The only thing is that neither one of them has got five percent of the market. I had thought that that is a per se violation of the antitrust laws. Is that right or not?

They just agree not to compete, or they have a price. They say, here's what we're going to sell the following goods at, no higher, no less. Is that a violation of the antitrust laws?

MR. EASTERBROOK: If all they do is agree not --

QUESTION: It isn't monopolization, is it?

MR. EASTERBROOK: It's clearly a violation of the antitrust laws. We have never had any doubt about that.

But the NCAA is doing a great deal more than just agreeing not to compete.

QUESTION: But it's doing that much, isn't it?

MR. EASTERBROOK: The NCAA --

QUESTION: Maybe it's doing more, but it's doing that much. And you have to say that it's doing so much more that the arrangement has pro-competitive --

MR. EASTERBROOK: Exactly, as we've been trying to say, as in Broadcast Music.

QUESTION: Well, I know. But if you don't get to that -- you aren't talking very much about that if all you want to talk about is market power.

MR. EASTERBROOK: No, no. Justice White, we have not abandoned in any way the first two arguments we made in the brief. I just thought that this --

QUESTION: All right, all right. I'll read the briefs.

MR. EASTERBROOK: Thank you.

(Laughter.)

CHIEF JUSTICE BURGER: Mr. Coats.

ORAL ARGUMENT OF ANDY COATS, ESQ.,

ON BEHALF OF RESPONDENTS

MR. COATS: Mr. Chief Justice and may it please the Court:

The NCAA bylaws which control the televising of college football games and the exclusive network contracts which govern the sale of these rights are classic violations of the Sherman Act. It is really doubtful if anyone would seriously contend they were even defensible in any other context.

We have two lower courts that have found as a matter of fact that the purpose and the effect of the NCAA TV plan and contracts has been to fix prices in the sense of fixing the price for all the games, fixing the price of the individual games, limiting the availability of the product, limiting output, for the purpose of driving up the price.

Now, at trial this was not really contested. This was proclaimed, that indeed the network witnesses for NCAA, the Executive Director of NCAA, Mr. Byers, all said that if we didn't have this, the limitations, if we didn't have the plan all together, that the networks would grind down the prices. And he said that, if we didn't have the limitations and we weren't the exclusive bargaining agent, there would be lots and lots more

games on television.

And that's what the lower courts found. They found that indeed, if this limitation of output, this limitation on the number of games was not in place, that there would be so many more games, mostly on the basis of local and regional circumstances.

QUESTION: So long as Oklahoma's on every Saturday.

MR. COATS: Well, it would be hoped, Your Honor, that the networks would want us. If we don't do better than we did last year, they may not.

(Laughter.)

MR. COATS: But that would certainly be the hope. But not only Oklahoma. The schools, Oklahoma and Georgia are in a situation, for example, where we share revenues with our conference. So we think the national package would actually decrease --

QUESTION: How do you get away with that?

MR. COATS: I beg your pardon?

QUESTION: How do you get away with that?

MR. COATS: Well, we think that that's perfectly legitimate, Your Honor, for us to --

QUESTION: Under your theory of this case it is?

MR. COATS: Yes, sir, for us to --

QUESTION: Well, we'll probably see if you win this case.

MR. COATS: Right.

(Laughter.)

MR. COATS: It has been, both in the Southeast Conference, the University of Georgia and the University of Oklahoma both share, and we believe that additional revenues would be raised, revenues which are primarily to be used to support the other kind of sports --

QUESTION: You also have a conference basketball game of the week, don't you?

MR. COATS: Yes, sir, but it's not exclusive in the sense that the other teams can still be on. In fact, the basketball is probably the best analogy and it's one of the few times --

QUESTION: But the conference -- but you negotiate with the TV people together for a game of the week?

MR. COATS: There is a game of the week.

QUESTION: And it's an agreed upon price, right?

MR. COATS: Yes, sir. And we are still -- which is very much like Your Honor's, the Court's, decision in BMI, because we have the safety valve of being able to sell individually on a horizontal basis to

anybody else that wants the games that are not selected by the conference, or by the NCAA, for that matter.

Basketball has been unregulated since the beginning. Basketball, NCAA sells --

QUESTION: I understand that. I'm talking about your conference arrangement.

MR. COATS: Yes, sir. We have a conference arrangement in which they can select certain games to be on.

QUESTION: Well, we'll probably see about that, too.

MR. COATS: I'm sorry, I missed that.

QUESTION: I would suppose we would probably see about that, too, one of these days.

(Laughter.)

MR. COATS: Well, quite honestly, Your Honor, if this case was allowed, if football was allowed to be governed in the way that basketball has been, I think everybody would leave here with a good deal of satisfaction, because the truth is that basketball has been unregulated.

QUESTION: Well, if you had a conference football game of the week in the big eight, I'd almost guarantee you that Oklahoma would not be on every week.

MR. COATS: I don't expect it would be, Your

Honor.

QUESTION: No. You probably wouldn't be on any more often than you are now.

MR. COATS: But the saving grace would be that we would be able and all the schools would be able to market that game through other regional and local television stations. They wouldn't be foreclosed from being able to televise the game just because there was a big eight game on.

QUESTION: Do you have to make the case that Justice White postulated to you to prevail here?

MR. COATS: No, I think not, Your Honor. We think that the main problem with the NCAA plan is the fact that it has exclusivity at both ends. It does not allow us or any schools to market individually outside the program at the lower end, and it does not allow other networks and other broadcasters to be able to sell their games at the top end, if you will, of the way it works.

We suggest that the Court's decision in Broadcast Music is a good way to display what's happening here. We do not believe the Court would have decided Broadcast Music as it had if all the composers had come together and agreed that they would sell only -- not sell outside of a blanket license which they gave

to CBS and that they would -- I mean, that they gave to Broadcast Music, and they would ask Broadcast Music to go out and only sell to one or two networks.

It's the exclusivity at the top and at the bottom. The reason the Broadcast Music exception to the per se rule came around was because there was indeed countervailing forces in the market, the ability of the composers to sell outside of that package.

QUESTION: Mr. Coats, if you prevail what would happen to the revenues that the colleges might receive thereafter from the television broadcasting?

MR. COATS: In two respects, Your Honor: We think that, first of all, the amount of revenues would be substantially greater for lots of schools.

QUESTION: Well, who gets the revenues?

MR. COATS: The revenues would go to the colleges that were on television, except in those cases where there's a conference situation, where they go into the conferences and then are redistributed.

QUESTION: What would prevent NCAA from saying, fine, you sell to whoever you want to, but we get the revenues if you're going to belong?

MR. COATS: I think that there's nothing in an antitrust sense, there's nothing wrong with them doing that, as long as we still have the right to market our

product and decide. That seems to me one of those internal rules that is more political than antitrust. They may have trouble getting that passed.

QUESTION: So they might well do that if you prevail --

MR. COATS: They might, Your Honor, exactly.

QUESTION: -- and say, fine, you win, but we'll take the money?

MR. COATS: They might indeed do that. But we think that is not something that they can or will do. They take a percentage of it now, and schools who do not even participate in football obviously benefit to some degree from the revenues from football.

QUESTION: Well, I take it you don't want to just opt out of NCAA because you think that it offers other benefits for other sports, is that right?

MR. COATS: Exactly, Your Honor. The integration of rulemaking as far as the rules of play and as far as the other sports are concerned is very important. We think this is an area where they have moved into the commercial area, and it's really the only area in regular season athletics that they have moved into commerce. These other areas are really, as we see them, strictly a rulemaking integration on the side, and of the same order of the decisions of this Court in the

Society of Professional Engineers, in Goldfarb versus Virginia Bar Association, and Maricopa; that there are functions of that kind which are necessary.

But we understood the rules of this Court to be that that's fine, but once you move into commerce you really have to play by the same rules that everybody else does, and that is you can't fix prices and you can't limit output for the purpose of enhancing prices.

QUESTION: Well, if you win in this case is there some chance that you 60 or 80 so-called first class schools will sort of have your own arrangements, one among the other, something like the NCAA, or what?

MR. COATS: Your Honor, there is a possibility, I suppose, that there will be some additional national packages, but they would be on a voluntary basis. You could opt in or opt out of them. There would not be the exclusivity that was involved.

The NCAA major problem has been the fact that it prevents the schools from being able to market those games that are not selected.

QUESTION: Do you think the networks would -- if there are 60 of you, you had your own organization and were trying to negotiate with the television people, do you think the television people are going to pay you the price you would want if some other school 200 miles

away says, sorry, but we're going to go on television, too?

MR. COATS: We think that the prices, that the total dollars will be increased, but the national package would probably be decreased to some extent. That's the testimony from the NCAA expert, that what they really wanted was exclusivity. And that's what kept the national package up.

And the reason basketball has worked so well is that exact situation, that lots of teams were on, they were on in local and regional areas. The national package has --

QUESTION: Of course, they're on at 12:00 o'clock at night, too, with basketball.

MR. COATS: Yes, sir, they're on just nearly any time of day.

QUESTION: You don't find nearly as much prime time coverage of basketball, I think, as you do of football.

MR. COATS: Well, we do in our part of the country, Your Honor. I haven't watched it up here, but we do have lots of early evening prime time basketball, even from the East Coast, on our various stations over the air, which we think certainly indicates again what has happened in basketball; and the factors that live

attendance has doubled and tripled and increased during the time that it was unregulated; that revenues have doubled and tripled and been more spread around among more schools. The competitive balance has never been better. Basketball it seems to me is very important, and I don't want to belabor that point, but it has worked very well along side of football.

And the trial court found -- two courts, really, have found that what the national package did was build sort of a power elite, to answer Justice White's question a minute ago, that the regionalization is a very wholesome thing and indeed creates competitive balance; and that this plan has had the effect of creating the power elite because they're the only teams that get to be on television.

And they said, and I thought it was very interesting, the television was, that indeed that Notre Dame and Southern California or Michigan and Ohio State don't play well in Kansas against Kansas and Kansas State; that the national packages indeed lose a lot of their glamor because the local folks want to watch the local teams.

And that of course has all kinds of effects for the recruiting, because the kids that are playing out there, they want to be on television in their home

town. They're much more interested in being on the local and regional games, because that's, for most of them, that's where they'll be seen.

And that regionalization should have a very wholesome effect upon college football in the future.

Now, to get back to the idea that these are indeed per se violations, and we think they are and we think the point was made earlier that market power is really unnecessary for this, that horizontal competitors and colleges compete in all kinds of areas.

QUESTION: Well, Mr. Coats, did the district court make any findings about NCAA market power?

MR. COATS: Yes, they did. They found that the relevant market was indeed the sale of the rights to televise college football games; that there was indeed a very special market for that; and that the NCAA controlled 100 percent of it.

Roughly, they have virtually all of the people who put on football on television. There are some NAIA games that are on occasionally, but for the commercial television portion of it they had 100 percent of that market.

QUESTION: But you don't think those findings are necessary to support you?

MR. COATS: No, Your Honor, we think they are

necessary. The court did find a Section 2 violation. They found --

QUESTION: You say you do think they are necessary?

MR. COATS: Yes, sir.

QUESTION: For your position?

MR. COATS: Yes, sir, we do.

That there was indeed a Section 2 violation, the trial court found it.

QUESTION: It isn't necessary for your Section 1 case?

MR. COATS: No, sir, it is not. It is not necessary for Section 1.

We do not agree, on these per se violations, that you have to have market power. We think cases of this Court, in Tofco and in Sealy Mattress and in McKesson-Robbins and others say that you don't, that market control is not necessary, market power.

QUESTION: What if we reject your per se case, though? Then where are you?

MR. COATS: All right. Then we have, I think, Your Honor, to go to what both lower courts did, was find not only per se violations, but go right on into rule of reason and analyze the balance of restraints.

QUESTION: How about then? You have to have

some market power, don't you?

MR. COATS: We think that the -- well, if you take the traditional look under rule of reason, it seems to us that you probably would have to have market power in a relevant market.

QUESTION: Wouldn't you go to Broadcast Music?

MR. COATS: I beg your pardon, sir.

QUESTION: Wouldn't you go to Broadcast Music?

MR. COATS: Yes, and we certainly can in this case go to Broadcast Music, because Broadcast Music we think supports our view.

And the balancing of the various kinds of anti-competitive and pro-competitive effects here is really quite remarkable. The idea that the NCAA can do all the things they do and really offer only two or three justifications -- I mean, they have fixed prices, they have limited output, they have increased concentration in the marketplace, all of these things that two courts have found.

QUESTION: Limited output of what?

MR. COATS: The games, the games that are on television.

QUESTION: The number of games on television?

MR. COATS: Yes, Your Honor.

QUESTION: You disagree with your opponent's view that output is to be measured by number of viewers who look at the games?

MR. COATS: We absolutely do. Viewers is -- and his idea of viewership is a little to us like ridership on buses. What they're saying is that if you foreclose the sale of buses and you fix the prices on buses and you limited the output, as long as the number of riders of buses stayed the same there wouldn't be any problems in the market.

QUESTION: Well, he says the number of riders goes up and that's the best test of a competitive market.

MR. COATS: Well, viewership has gone up. Demand for the product has gone up over the years, which is why his ideas about the fact that -- he says that if you're a monopolist, if you have market power and you release more of the product, the price should go down, but it has indeed gone up. And they postulate, therefore, we're not a monopolist.

We say that's because the demand -- we've stayed behind the demand curve.

QUESTION: Well, he says the price has gone down per viewer, as I understand it. You don't look at

just the aggregate amount of money. It's the amount of dollars divided by the number of people who are looking at the program.

MR. COATS: We think, Your Honor, that the evidence in court showed that it was the contrary, that the cost per viewer is higher, two and a half times as high as it has been. And I think what he's talking about is some information that was furnished perhaps later and not available at trial.

But we think the cost per minute has gone up, and that all of the aspects of the demographics as far as the market is concerned are expanding.

QUESTION: Well, the cost per minute, but is it also the cost per minute per viewer gone up?

MR. COATS: Well, they generally figure --

QUESTION: The reason the cost per minute's gone up I assume is because so many more people are watching the programs.

MR. COATS: That's right. And it's a special kind of viewer, too. There's a specific kind of audience that they want to reach, which is why the advertisers may pay more.

But the questions about the market -- really, we see ourselves in a situation of furnishing a raw product. We play football games and we play them

whether they're on television or not on television. We sell that right to the networks. They come in and they add announcers and people to bring color and instant replay and music, and they take a program and sell that to the advertisers.

Now, we don't say that there may not be a market up there for advertisers, although they were very reluctant to do that. At trial the NCAA witness would not say there was any market at all, and finally he said, maybe subscription -- I mean, maybe advertiser subscribed television is the market, that may be a market.

But there's also a market in the sale of these football games, and it's earmarked, I think, by the fact that a good part of what we really want to do and what's involved in this case is a sale where there are no advertisers involved. That is, a sale to subscription television, a sale to pay per view television, a sale to cable television, which is really where the NCAA really first said they controlled in 1981, is the ability to extend the stadium --

QUESTION: In other words, you say the relevant market is the market for the raw materials, and he says the relevant market is the market for the finished product.

MR. COATS: Yes, sir, he does.

QUESTION: And you say that they have monopolized the market for the raw material.

MR. COATS: Yes, sir, exactly. And we say that there are purchasers of that raw material that don't have anything to do with the advertisers he talks about. Those indeed make a market which is substantially different than what we have.

And then I think the fact that the decisions of this Court in International Boxing, that found that championship boxing was a separate market apart from all boxing, that first run movies were indeed a separate market from all movies, that there certainly is and two courts have found, a very solid, clearly defined, clearly delineated relevant market for the sale of the games.

And as he indicated in his reply brief in here, if that's the market NCAA can't prevail here, and we think that that certainly is the market. We think that there are differences. There are integrations, rulemaking integrations that they make, that control athletics and control the plays of the games and that sort of thing, and they ought to be there.

Where they get into commerce as directly in commerce as they are here, they really ought to play by

the same rules that everybody else does. We think that would cause regionalization. We think that would increase, as the courts found, competitive balance.

We think their attempt to justify this on the basis that it somehow increases live attendance is really not so; that the courts found that it wasn't so. But more importantly, look what's happened in the other sports.

Professional football has come along and they have allowed themselves to regionalize. The people have developed a following for the game and you can't buy a ticket in live attendance to a professional game. And that's what happens. The people in the local area will identify with the product, they'll identify with the school, they'll identify with the players. They will then want to go and see the games in person, and indeed it will enhance, as the court found --

QUESTION: You don't think the broadcasting helps that attendance?

MR. COATS: I think it helps it, yes, sir. We think that the broadcasting enhances attendance, live attendance at the games. They have said as a justification that it does not, that the reason they're doing this is to protect live attendance.

We think the courts found the contrary and we

think as a matter of fact and logic and intuition that that's not so, that the ability to market the product, and again we point to basketball, that live attendance has increased substantially while television has been totally unlimited. And we really believe that the decision by this Court affirming the lower courts would be very healthy for football, will indeed cause a lot of teams that are never on these days to be able to be on, to display their wares, their products, and their teams, and indeed return us to the free market, which is where we think this matter should rest.

CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF REX E. LEE, ESQ., ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. LEE: Mr. Chief Justice, may it please the Court:

I submit that the one thing that should be apparent by now is that, regardless of the path by which the result is reached, whether it's per se violation, full-blown rule of reason analysis, or a more carefully tailored rule of reason middle ground, it should be apparent that the Sherman Act has been violated. Two federal courts have determined as a matter of fact that the NCAA TV plan restricts output.

Now, there is this debate over whether

viewership is really restricted or enhanced. It all ties back to a citation, a reference in the reply brief back to our brief. The reply brief quotes our brief as saying: "The exclusivity factor of the package allows the chosen few networks to deliver larger audiences." That occurs at the top of page 19 of our brief.

The larger audiences to which we are referring, consistent with the findings of two lower courts, is the larger audience, the larger audiences for those few games that are subject to the exclusive package, and that of course is larger. That is the very purpose of price-fixing and restriction of output.

But there is no finding in the record concerning total viewership.

I'd like to concentrate on the narrow difference between the NCAA's position and the Government's position, because I believe it will be helpful to the Court. The area of agreement, in the NCAA's words, is that it accepts our framework for analysis. Let me say just a word about what that accepted framework is.

Our experience as the principal enforcers of the antitrust laws is that the identification of unlawful restraints of trade under Section 1 of the Sherman Act requires more than just two polar extremes.

The per se rule on the one hand, which is simply a special case of application of the rule of reason, is too limiting. And on the other hand, the Petitioner agrees with us that the full-blown rule of reason analysis often opens the door to virtually unlimited discovery and introduction of evidence of every conceivable effect the defendant's practice might have on competition.

We believe that what is needed is not a novel rule, but is rather what is already reflected not only in this Court's Broadcast Music and Professional Engineers decisions, but also in the common sense underpinnings of the rule of reason itself, that the rule occupies the entire spectrum of inquiry into effect on competition and not just the two end points of that spectrum.

And this is the framework for analysis which the NCAA accepts. The narrow point of disagreement is that in the NCAA's view the tailored rule of reason approach always requires a showing of market power and in this particular case it specifically requires a showing that the NCAA has market power over advertisers.

That point of disagreement is squarely controlled by the factual findings of two federal

courts. First, in this case the lower courts did address the issue of market power. They did find a relevant market. It is the television market for college football.

They also found that the restriction at issue in this case restricts output, that the restriction of output drives up the price, as classical economics would teach that it will, and that the justifications asserted by the NCAA are factually inadequate.

QUESTION: Mr. Solicitor General, do you have to disavow any so-called findings of the lower courts to say that the per se rule does not apply here?

MR. LEE: Do I have to disavow any findings to say? No. All I am saying is --

QUESTION: Well, you differ with both lower courts on the framework in which you analyze this case.

MR. LEE: Yes.

QUESTION: And why do you? Why do you differ with them?

MR. LEE: Because of our interest in enforcing the antitrust laws..

QUESTION: Well, that's a nice thought.

MR. LEE: Because our experience has taught that the application of the per se rules in an area where there are legitimate areas of cooperative endeavor

has the effect of -- has the opposite, precisely the opposite of the effect that was intended by the per se rule, which is that the courts shy away from using shortcuts and presumptions in those areas where shortcuts and presumptions are in order.

QUESTION: If the product is called football and the effect of the agreement is to limit output and drive up prices, I don't understand why you then say the lower courts were wrong in just stopping there.

MR. LEE: We say the lower courts were not wrong in stopping there. We say that what the lower courts --

QUESTION: Well, they could have -- they apparently independently thought the NCAA plan was illegal because it was a per se violation of the antitrust laws. They might have stopped. They didn't.

MR. LEE: We say that the point at which they should have stopped -- this is simply a demonstration of our view that it does occupy the entire spectrum. The point at which they should have stopped was the point at which they determined that it does restrict output and drives up the price, and that there were no justifications. That is the point at which they should have stopped.

Now, if you want to call that per se, so be

it. The problem is that many of the lower courts are identifying those two extremes as simply located too far away from each other, without sufficient flexibility in the middle. But that is precisely our point, that the stopping point in this case should have been the point at which the lower courts determined that output was restricted and that the price was driven up.

Now, the market can be a helpful guide in determining that ultimate issue, whether there has been a restriction of output. But the market is not the ultimate inquiry. The ultimate inquiry is whether there has been a restriction of output. The market --

QUESTION: Well, do you think there was an agreement on prices at which to sell this product that you say was involved?

MR. LEE: There is no evidence to that in the record and I think there probably was not. But there was an agreement8 --

QUESTION: Well, there was a finding that this is a price fix.

MR. LEE: That is correct.

QUESTION: Do you disagree with that?

MR. LEE: I don't agree with it or disagree with it. What I do agree with is Mr. Easterbrook's proposition that the Sherman Act is violated when output

has been restricted, and that is price-fixing for Section 1 Sherman Act purposes, when you restrict output with the effect of driving up the price. And that is what they agreed to do, was to restrict output and as a result of that restriction of output the price was driven up, and that is exactly what two lower courts have held.

I find it anomalous, to say the least, that the NCAA would argue on the one hand, as I think they really have to, that there is a certain sleight of hand problem with market definition and that it is capable of being applied either microscopically or virtually throughout the galaxies, and yet at the same time to argue that market power is the sina quo none for the application of what they agree with us should be a more flexible, a more tailored approach to rule of reason analysis.

The dispositive fact is that in this particular case the NCAA takes one view of what the market is and one view of whether there has or has not been restriction of output. The colleges take another view of what the market is and whether or not there has been a restriction of output.

Both of those views have been submitted to two lower courts with all of the supporting evidence and

those courts have made their decisions, and the decisions have been, yes, there was a restriction of output, it had the effect of driving up the price, and in both instances they agreed that that analysis was supported by a relevant market.

In any event --

QUESTION: Well, do you think the Court of Appeals followed the same analysis in its opinion that the district court did?

MR. LEE: Not precisely. I think the Court of Appeals' analysis is closer to ours.

In any event, even if you could ignore the two court rule, which of course it should not be ignored, the market --

QUESTION: Except we ignore their conclusions about per se.

MR. LEE: No, Justice White, you -- well --

QUESTION: Well, I read your brief. it says --

MR. LEE: Well, the conclusions, yes. But I'm talking about findings. I'm talking about findings. We disagree with their conclusion --

QUESTION: I thought they found there was a price fix, illegal price fix.

MR. LEE: That is correct, that is correct.

And at that point they should have stopped. That makes it per se. And if that's what you want to clarify as being the per se trigger, then fine.

But the problem is, I reiterate once again, when we talk of it only in terms of per se at one extreme end and rule of reason at the other extreme end, we leave out the concept that there is a broad middle ground.

QUESTION: Mr. Solicitor General, do I correctly understand your view to be that there's one broad rule of reason, one might say, at one end of which and a species of a rule of reason violation is what we've often called per se; at the other end is a very thorough market analysis; and there are a lot of cases where you don't get there in ten minutes, but you don't have to go all the way; and they're still all one variety of the rule of reason?

MR. LEE: Precisely, precisely. And at any point along that spectrum you can identify points at which you say, at this point we have a shortcut, at this point we have a presumption. And at the point where you reach a determination that output has been restricted with the effect of driving up the price, that's the stopping point. And I don't care what label you put on it.

But the other concept that will be helpful to us as antitrust enforcers is to make very clear that the rule that you just articulated very well really is what the Sherman Act Section 1 really means.

Mr. Chief Justice, I have nothing further unless there are other questions.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:16 a.m., argument in the above-entitled case was submitted.)

* * *

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#83-271 - NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Petitioners
v. BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA AND UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION

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