Nos. 19-15566, 19-15662

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IN RE: NATIONAL COLLEGE ATHLETIC ASSOCIATION GRANT-IN-AID CAP ANTITRUST LITIGATION

SHAWNE ALSTON, ET AL.,

Plaintiffs-Appellees-Cross-Appellants,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,

Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court for the Northern District of California, No. 14-md-2541 (Wilken, J.)

Brief *Amici Curiae* of the Open Markets Institute, Change to Win, the National Employment Law Project, and Economics and Law Professors in Support of Plaintiffs-Appellees-Cross-Appellants

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Open Markets Institute, Change to Win, and the National Employment Law Project state that they are non-profit corporations and, as such, no entity has any ownership interest in them.

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INTEREST OF *AMICI CURIAE*[1]

The Open Markets Institute (OMI) is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

Change to Win (CTW) is a democratic federation of labor unions representing millions of working people. The organization strives to ensure that every worker has a living wage, benefits to support their family and dignity in retirement. CTW advocates not just for jobs, but for good jobs: safe, equitable workplaces where all employees meaningfully participate in the decisions affecting their employment. CTW believes that robust antitrust enforcement and regulation can bring more equity to the balance of power between working people and those who profit from their labor.

[1] No parties oppose the filing of this brief, and no counsel for any party authored this brief in whole or part. Apart from *amici curiae*, no person contributed money intended to fund the brief's preparation and submission.

The National Employment Law Project (NELP) is a non-profit organization with 50 years of experience advocating for the employment and labor rights of workers. NELP seeks to ensure that all workers receive the full protection of labor and employment laws. NELP prioritizes workplace equity and opposes interpretations of the labor laws that privilege corporate profits over the rights of workers. NELP has litigated and participated as *amicus curiae* in numerous cases in circuit and state courts and the U.S. Supreme Court addressing the importance of equal access to labor law protections for all workers.

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Contemporary Problems, and *The Cambridge Handbook of U.S. Labor Law for the Twenty-First Century*, and has been recognized with the Jerry S. Cohen Award for Antitrust Scholarship (category prize, 2016). She earned her JD from Yale Law School and completed a judicial clerkship on the Ninth Circuit Court of Appeals.

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The *amici curiae* have moved for leave to file this brief in support of the plaintiffs.

SUMMARY OF ARGUMENT

The Sherman Act protects sellers of goods and services (including workers, who sell their labor) from powerful purchasers. Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 Antitrust L.J. 707, 714 (2007). Senator Sherman stated that trusts and monopolies "regulate prices at their will, depress the price of what they buy and increase the price of what they sell." 21 Cong. Rec. 2461 (1890). *See also Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to

sellers."). Moreover, antitrust analysis under the rule of reason is carefully circumscribed. It "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978).

The district court undercut the Sherman Act's protection of sellers and contradicted Supreme Court guidance on analyzing restraints of trade. The plaintiffs—current and former college basketball and football players—are sellers of athletic services to the member colleges of the National Collegiate Athletic Association (NCAA). They allege that the NCAA and its member colleges collusively restrained intercollegiate competition for their athletic services and deprived them of the right to earn competitive compensation for their hard work and talent.[2] Once the plaintiffs established a *prima facie* case under the rule of reason,[3] the court allowed the NCAA to rebut this presumption by showing benefits to others groups, such as viewers of college sports, and credited one of

[2] The players generate billions in annual revenues for the NCAA and its member colleges. A fair market for their athletic services ultimately requires both competition among colleges and collective organizations for players. In general, labor markets serve workers best when both employers compete for their skills and workers exercise collective power through labor unions.

[3] The Supreme Court and this Court have held that the NCAA's horizontal restraints should be evaluated under the rule of reason and are not subject to per se invalidation. *National Collegiate Athletic Ass'n v. Bd. Of Regents of Univ. of Okla.*, 468 U.S. 85, 86 (1984); *O'Bannon v. National Collegiate Athletic Ass'n*, 802 F.3d 1049, 1063-64 (9th Cir. 2015).

these justifications (purported viewer interest in college sports on account of limited player compensation). While it correctly found the NCAA liable, the district court, in balancing harms to one class (college athletes) against benefits to another group (viewers of college sports), undermined the Sherman Act's protection of sellers and ignored Supreme Court guidance on how to analyze restraints of trade.

In accordance with congressional intent, the Supreme Court, since the early years of the Sherman Act, consistently has held that the law protects sellers from restraints of trade and monopolistic practices. In *Swift & Co. v. United States*, 196 U.S. 375 (1905), the Supreme Court affirmed a district court's finding of liability against stockyard owners that had collusively suppressed the price of cattle paid to ranchers. The Court in a subsequent buyer-side price-fixing case made clear that the Sherman Act protects both purchasers and sellers. *Mandeville Island Farms*, 334 U.S. at 236. It stated, "The Act is comprehensive in its terms and coverage, protecting *all who are made victims* of the forbidden practices by whomever they may be perpetrated." *Id.* (emphasis added). Just earlier this year, the Supreme Court held that a monopolistic intermediary inflicts *distinct* injuries on purchasers and sellers and that both classes have the right to recover antitrust damages from the monopolist. *See Apple Inc. v. Pepper*, 139 S.Ct. 1514, 1525 (2019).

In effectuating the Sherman Act's protection of multiple classes of economic actors, the courts should look only at a restraint's effects on the plaintiffs and should *not* "sacrifice competition in one portion of the economy for greater competition in another portion[.]" *United States v. Topco Associates, Inc.*, 405 U.S. 596, 611 (1972). Accordingly, the rule of reason is restricted only to a challenged restraint's costs and benefits for only the injured class. *See National Society of Professional Engineers*, 435 U.S. at 688 ("Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.").

> The Court made this clear in *National Society of Professional Engineers*:
>
> [T]he purpose of [antitrust] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress. *Id.* at 692.

In the wake of *National Society of Professional Engineers*, a court of appeals, in applying the rule of reason to a labor-market facing restraint in professional sports, rejected an unbounded rule of reason. *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1186 (D.C. Cir. 1978).

From an institutional perspective, the courts are ill-equipped to engage in a broad cost-benefit analysis through the rule of reason. The Supreme Court recognized that such balancing requires the evaluation of numerous considerations—a task more appropriate for legislators than judges. *Topco*, 405 U.S. at 611-12. At a fundamental level, this type of balancing calls for judgments that the courts should not make and should instead leave to democratically accountable legislatures. *See id.* at 612 ("[T]o make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required."); *Smith*, 593 F.2d at 1186 ("The draft's 'anticompetitive evils,' in other words, cannot be balanced against its 'procompetitive virtues,' and the draft be upheld if the latter outweigh the former.").

Under the district court's articulation of the rule of reason, firms with market power can inflict harms on sellers through restraints of trade and monopolization and defend themselves by showing benefits to another group—consumers, for example. This type of balancing sacrifices sellers' right to a fair marketplace in order to serve buyers. The court gave powerful purchasers significant freedom to disempower workers and other sellers through restraints of trade so long as they show offsetting gains to consumers or another group. As such, firms are permitted to maintain their buy-side restraints in partial or full measure.

In this case, the results are especially perverse. Under the district court's ruling, colleges are given broad latitude to deprive athletes of the right to earn a competitive wage to satisfy the purported peculiar preferences of the viewing public. The expansive rule of reason "leads to the abhorrent result of allowing purchasers of labor to unlawfully exploit one class of people (in this case, predominantly African American college athletes) for the purpose of benefiting another, presumably a more important class of people (the consumers of college athletics, in particular the viewers of televised men's football and basketball games)." Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 Marq. Sports L. Rev. 331, 366-67 (2005).

In evaluating the challenged restraint, the district court should have confined its rule of reason analysis to the effects on college athletes—and not considered effects on other groups. Once the plaintiffs established their *prima facie* case, the district court should have considered only the presumptively illegal restraint's offsetting benefits to the college athletes themselves. The restraint's supposed benefits to other groups, such as viewers of college sports, should have been disregarded. This bounded approach ensures that the Sherman Act fully protects sellers, such as the plaintiffs, from purchasers' restraints of trade.

ARGUMENT

1. The Sherman Act Protects Workers and Other Sellers from Purchasers' Restraints of Trade and Monopolistic Practices

The Sherman Act protects sellers of goods and services from powerful purchasers. In enacting the Sherman Act, Congress aimed to safeguard the freedom of workers, farmers, and other sellers from monopolies and trusts. *See* Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 Antitrust L.J. 707, 714 (2007) ("The legislative history leaves no doubt that Congress intended to protect sellers victimized by trusts and other conduct within the scope of the Sherman Act's prohibitions."). Indeed, Americans in the late nineteenth century principally opposed the trusts and monopolies (and supported antitrust legislation at the federal and state levels) because these powerful corporations threatened their interests as producers—business proprietors, farmers, and workers. David Millon, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219, 1226 (1988). Given this clear congressional intent, the Supreme Court and this Court have long held that sellers are protected from buyers' restraints of trade and monopolization.

A sample of floor remarks from the debate concerning the Sherman Act illustrates Congress's intent to protect sellers. Senator Sherman condemned the trusts for their power over both buyers and sellers. He declared, "They regulate

prices at their will, depress the price of what they buy and increase the price of what they sell." 21 Cong. Rec. 2461 (1890). *See also* 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman) (A trust can "command[] the price of labor without fear of strikes, for in its field it allows no competitors."). Senator George, a lead drafter of the bill, expressed almost identical sentiments and attacked the trusts' power as purchasers and sellers. *See* 21 Cong. Rec. 1768 (1890) ("They operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business and they decrease the cost of raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell.").

Exemplifying this legislative interest in the autonomy and wellbeing of sellers, members of Congress repeatedly cited the beef trust for its dominance over both ranchers and consumers. The Senate even established a special committee to investigate it. John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 Fordham L. Rev. 2425, 2435 (2013). In addressing the power of the beef trust, Representative Taylor asserted, "This monster robs the farmer on the one hand and the consumer on the other." 21 Cong. Rec. 4098 (1890). In a similar spirit, Senator Allison observed that "there is a combination in the city of Chicago which not only keeps down the

price of cattle upon the hoof, but also . . . make[s] the consumers of beef pay a high price for that article." 21 Cong. Rec. 2470 (1890).

In accordance with congressional intent, the Supreme Court, since the early years of the Sherman Act, has held that the law protects sellers from restraints of trade and monopolistic practices. In *Swift & Co. v. United States*, 196 U.S. 375 (1905), the Supreme Court affirmed a district court's finding of liability against stockyard owners that had collusively suppressed the price of cattle paid to ranchers.

The Court in a subsequent buyer-side price-fixing case made clear that the Sherman Act protects both purchasers and sellers. *See Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers."). It stated, "The Act is comprehensive in its terms and coverage, *protecting all who are made victims* of the forbidden practices by whomever they may be perpetrated." *Id.* (emphasis added). Applying this principle of protecting all victims of antitrust violations including sellers, the Court held that a football player-coach who alleged a group boycott of his services had the right to take his claim to trial. *Radovich v. National Football League*, 352 U.S. 445, 453-54 (1957).

The Sherman Act's protection of sellers has not diminished over time, as seen in decisions in recent years. The Court in a case concerning predatory bidding treated buyer-side power as symmetric with seller-side power. *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007) ("Monopsony power is market power on the buy side of the market. As such, a monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a 'buyer's monopoly.'") (citations omitted).

In a decision from earlier this year, the Supreme Court affirmed the antitrust protection of sellers and held that a monopolistic intermediary inflicts *distinct* injuries on purchasers and sellers. It ruled that both classes have the right to recover antitrust damages from the monopolist. *See Apple Inc. v. Pepper*, 139 S.Ct. 1514, 1525 (2019) ("[S]ome downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a 'common fund[.]'").

This Court, in accordance with congressional intent and Supreme Court precedent, has held that the Sherman Act protects sellers. For example, it affirmed a district court verdict against two pulp processors for, among other conduct, collusively suppressing the price paid for logs. *Reid Bros. Logging Co. v.*

Ketchikan Pulp Co., 699 F.2d 1292, 1303 (9th Cir. 1983). In a different case interpreting California and federal antitrust laws, it wrote that buyer-side collusion, just as much as seller-side collusion, is actionable:

> When horizontal price fixing causes buyers to pay more, or sellers to receive less, than the prices that would prevail in a market free of the unlawful trade restraint, antitrust injury occurs. This is seen most often in claims by overcharged buyers; as to underpaid sellers it is less common in the reported cases, but is equally true. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000).

In a 2011 decision, this Court again stressed the antitrust protection for sellers. The Court stated, "Congress sought to ensure that competitors not cut deals aimed at stifling competition and at permitting higher prices to be charged to consumers than would be expected in a competitive environment, or *permitting lower prices to be paid to those from whom competitors bought materials than a fair market rate*." *California ex rel. Harris v. Safeway, Inc.* 651 F.3d 1118, 1132 (9th Cir. 2011) (en banc) (emphasis added).

II. The District Court's Application of the Rule of Reason Subverts the Sherman Act's Protection of Workers and Other Sellers

The district court's application of the rule of reason undermines the Sherman Act's protection of sellers and is inconsistent with Supreme Court guidance on

applying the rule of reason. The court compared the established harms of the challenged restraints to the plaintiffs (sellers of their athletic services) against the purported benefits to viewers of college sporting events (consumers in this case). By engaging in this cross-market balancing, the district court undercut the Sherman Act's protection of sellers. This type of balancing is also contrary to the Supreme Court's directive that the rule of reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978).

A. The District Court's Application of the Rule of Reason Subordinates Sellers' Interests to Consumers' Interests

While it found that the NCAA's restraints inflicted harm on college athletes, the district court allowed this injury to the plaintiffs to be weighed against benefits to viewers of college sports. To be sure, the court did not credit most of the NCAA's proffered benefits to consumers (or plaintiffs). It, however, did conclude that the NCAA established that consumers value college sports, in part, because of the restrictions on player compensation (in contrast to professional sports in which caps on player compensation are limited or non-existent). In other words, the district court balanced the benefit to consumers against the demonstrated injury to college athletes.

Under the district court's rule of reason, firms with market power can inflict harms on sellers through restraints of trade and monopolization and defend themselves by showing offsetting benefits to another group, such as downstream purchasers. They can be found liable but subject to only a modest remedy, as the NCAA was here. Even more troublingly, under this formulation of the rule of reason, defendants can potentially escape liability entirely if they can demonstrate that their restraint's benefits to consumers exceed the harm to workers or other sellers. In other words, powerful purchasers have significant freedom to disempower workers and other sellers and deprive them of a competitive income through restraints of trade so long as they show offsetting gains to consumers.

Instead of protecting sellers in full measure, the district court subordinates their interests to consumer interests. The Supreme Court and this Court have made clear that the Sherman Act protects workers and other sellers of services just as much as it protects consumers and other purchasers. *See supra* Part I. The district court's decision, however, grants significant latitude to firms to injure sellers through restraints of trade provided that they can establish offsetting benefits to consumers.

This type of balancing sacrifices sellers' right to a fair marketplace in order to serve buyers' purported preferences. In this case, the results are especially indefensible. Under the district court's ruling, colleges are given broad latitude to

deprive athletes of the right to earn a competitive wage to satisfy the supposed preferences of the viewing public. The expansive rule of reason "leads to the abhorrent result of allowing purchasers of labor to unlawfully exploit one class of people (in this case, predominantly African American college athletes) for the purpose of benefiting another, presumably a more important class of people (the consumers of college athletics, in particular the viewers of televised men's football and basketball games)." Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 Marq. Sports L. Rev. 331, 366-67 (2005).

B. The Supreme Court Has Directed the Lower Courts Not to Engage in Open-Ended Cost-Benefit Analysis Under the Rule of Reason

The district court's antitrust analysis also is contrary to the Supreme Court's directive against broad cost-benefit analysis under the rule of reason. Rejecting judicial measuring of social debits and credits through the Sherman Act, the Supreme Court wrote, "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 611 (1972).

In effectuating the Sherman Act's protection of multiple classes, the rule of reason is restricted to a challenged restraint's costs and benefits for only the

affected class in the relevant market. The rule of reason's lens is circumscribed, not unbounded. *See National Society of Professional Engineers*, 435 U.S. at 688 ("Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."). The Court made this clear:

> [T]he purpose of [antitrust] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress. *Id.* at 692.[4]

In the wake of *National Society of Professional Engineers*, a court of appeals, in applying the rule of reason to a labor-market facing restraint in professional sports, rejected an unbounded rule of reason. *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1186 (D.C. Cir. 1978). *See also Safeway*, 651 F.3d at 1161 (Reinhardt, J.,

[4] Consider the Supreme Court's adoption of the rule of reason for vertical restraints governing retail markets. These decisions have *not* broadened the scope of the rule of reason. Instead, the Court considers the relevant costs and benefits borne by or accruing to the directly affected group—consumers affected by the vertical restraints. *See, e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-59 (1977) (holding vertical non-price restraints are subject to rule of reason and, in effect, requiring gains in interbrand competition to be weighed against reduction in intrabrand competition); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 897-99 (2007) (same with respect to minimum vertical price restraints).

dissenting) ("[D]riving down compensation to workers [through an agreement among rivals] is not a benefit to consumers cognizable under our laws as a 'procompetitive' benefit."); *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building & Construction Trades Council*, 670 F.2d 421, 439 (3d Cir. 1982) (Sloviter, J., dissenting) ("[A]ntitrust cases have always rejected the premise that a procompetitive effect in one market will excuse an anticompetitive effect in another.").[5]

Furthermore, from an institutional perspective, the courts are ill-equipped to engage in a broad cost-benefit analysis through the rule of reason. The Supreme Court recognized that such balancing requires a weighing of values and the evaluation of numerous considerations—a task more appropriate for legislators than judges. *Topco*, 405 U.S. at 611-12. This type of cost-benefit analysis introduces significant administrative difficulties and risks severely weakening antitrust law. Daniel A. Crane, *Balancing Effects Across Markets*, 80 Antitrust L.J. 397, 409-10 (2015). *See also* Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 Vand. L. Rev. 21-22 (2016) (observing the difficulties of balancing costs and benefits to different classes of consumers).

[5] In evaluating the legality of mergers under the Clayton Act, the Supreme Court held that "a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963).

At a fundamental level, this type of balancing calls for judgments that the judiciary should generally avoid. The Supreme Court recognized the comparative weakness of courts vis-à-vis legislative bodies in making broad economic, political, and social judgments:

> If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required. *Topco*, 405 U.S. at 611-12.

Applying this principle, a court of appeals rejected open-ended cost-benefit analysis in an antitrust challenge to a professional sports league's restraints of trade. *See Smith*, 593 F.2d at 1186 ("The draft's 'anticompetitive evils,' in other words, cannot be balanced against its 'procompetitive virtues,' and the draft be upheld if the latter outweigh the former.").

Through an unbounded rule of reason, the district court made policy choices appropriately reserved for democratic institutions. The court, in balancing the restraint's harms to college athletes against its benefits to viewers of college sports, improperly chose "to sacrifice competition in one portion of the economy for greater competition in another portion[,]" *Topco*, 405 U.S. at 611, and usurped legislative prerogatives.

III. The District Court Should Have Considered Only the Restraint's Harms and Benefits in the Market for College Athletes' Services

The district court should have limited its rule of reason analysis of the challenged restraint to the effects on college athletes. This cabined approach ensures that the Sherman Act fully protects sellers, as Supreme Court precedent makes clear it does, and does not become a vehicle for open-ended judgments more appropriate for legislatures than for courts.

Once the plaintiffs established a *prima facie* case, the district court should have only evaluated offsetting benefits of the restraint to the plaintiffs. The district court should have confined its analysis to credible benefits in the affected market—the market for college athletes' services. It should not have considered the NCAA's arguments that the challenged restraints benefit other groups. For instance, the question of whether restraints on college athletes' compensation

increase the value of college sports to viewers falls outside of a proper rule of reason analysis.

A bounded rule of reason ensures that the Sherman Act protects "*all* who are made victims" of antitrust violations, *Mandeville Island Farms*, 334 U.S. at 236 (emphasis added), including sellers of services such as the plaintiffs here. As such, it would prevent the NCAA and other powerful buyers from inflicting harm on college athletes and other sellers through restraints of trade and overcoming presumptive illegality by showing benefits to another class. In considering only harms and benefits to sellers, this rule of reason places sellers on an equal footing with buyers under the Sherman Act, as they should be in light of congressional intent and Supreme Court precedent. A circumscribed rule of reason "protect[s] the economic freedom of participants in the relevant market[,]" *Knevelbaard Dairies*, 232 F.3d at 988 (citation omitted), and ensures that the judiciary reserves broader economic, social, and political judgments to Congress and state legislatures.

CONCLUSION

The Sherman Act protects sellers of goods and services, including workers, from buyers' restraints of trade. In applying the rule of reason, the district court subverted the Sherman Act's protection of sellers of goods and services and disregarded Supreme Court guidance against turning the rule of reason into a general social cost-benefit analysis. While the district court correctly found the

NCAA liable under the Sherman Act, it should have only evaluated the challenged restraint's harms and benefits to the plaintiffs—and not considered its effects on other groups. Because it found that the challenged restraints had no benefit to college athletes, the court should have enjoined all NCAA compensation restraints and not looked to find a less restrictive alternative under the rule of reason.

DATED: OCTOBER 30, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 19-15566, 19-25661

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Signature s/ Sandeep Vaheesan **Date** October 30, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing to be served on counsel of record for all parties via ECF.

/s/ Sandeep Vaheesan
Sandeep Vaheesan

Counsel for Amici Curiae

Dated: October 30, 2019