Nos. 14-16601, 14-17068

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD O'BANNON, JR.,
ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant-Appellant,

and

ELECTRONIC ARTS, INC.; COLLEGIATE LICENSING COMPANY,
Defendants.

Appeals from the United States District Court for the Northern District of California
Case No. 09-cv-03329 (Hon. Claudia Wilken, C.J.)

BRIEF FOR LAW AND ECONOMICS AND ANTITRUST SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law and economics professors and antitrust professors at leading U.S. universities, whose biographies are attached as Appendix A. They have an interest in the proper development of antitrust jurisprudence. They agree that the court below misapplied the rule of reason analysis for assessing the legality of restraints of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1. They are concerned that the District Court's analytical approach, if affirmed, would subject many collective restraints imposed by universities, high schools, and other nonprofit entities to antitrust scrutiny and liability, thereby fueling a race to the bottom that likely would leave students, universities, and public collectively worse off. They are also concerned that the District Court's reasoning would undermine the NCAA and its members' goal of integrating academics and

[1] In accordance with Federal Rule of Appellate Procedure 29(a) & (c)(5), amici state that all parties to this appeal have consented to the filing of this brief, that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money to fund the preparation or submission of this brief, and that no person other than amici and their counsel contributed money to fund the preparation or submission of this brief.

amateur athletics, whereby student-athletes can obtain all of the educational benefits that their schools provide and remain fully committed in their schools' academic communities.

SUMMARY OF ARGUMENT

Federal antitrust cases are poor vehicles to create new property rights. That is especially true here. No sound economic basis exists for a district court creating a property right in a student-athlete's name, image, or likeness in these live team sports telecasts or game re-broadcasts, when no such right has been recognized before. Students—without any such purported property right—are participating in high school and college team sports at record levels. The District Court never explained how recognizing a property right for the use of the athlete's likeness in a televised broadcast would increase the students' incentives, would improve the "product," or was needed for the product at issue (educational services) or amateur sports to exist in the first place.

Creating a property right here is especially problematic when doing so exposes high school and college athletic

associations across the country—even in states that expressly disclaim any such property right—to federal antitrust claims. With many amateur athletic contests photographed, streamed over the Internet and televised every week, the potential antitrust liability is indeterminate and widespread. Moreover, the District Court failed to account for other potential risks in creating a property right, such as higher transaction costs, the likelihood of holdouts, and potential deleterious effect on the students' educational and athletic experience if extrinsic financial incentives crowd out intrinsic motivation and non-market norms.

Antitrust cases are also poor vehicles for courts and agencies to socially reengineer products and services to their liking. It is far beyond the function of antitrust law and federal courts to substitute the product at issue with a different, unique product. The District Court fundamentally erred when it ignored a key antitrust principle: If the joint venture's restraint is necessary to create the product, and the product increases output, consumer choice, and consumers' ability to satisfy their preferences, then the product presumptively increases consumer welfare and is

presumptively lawful under antitrust's rule of reason. The District Court instead compared the joint venture's conduct to what would happen in an "unrestrained market," when the unique product would not be available in an "unrestrained market."

Both economic theory and Supreme Court precedent recognize that joint activity and ventures, at times, must impose restraints in order for the product or service to exist at all. Amateur athletics is a well-recognized example. As the Supreme Court recognized, the NCAA needs ample latitude to maintain the revered tradition of amateurism in college sports. This is precisely because in an "unrestrained" market, each university would seek a relative advantage, fueling a race to the bottom that leaves the universities, students and public collectively worse off.

While recognizing the ample evidence of universities' attempts to halt this race to the bottom and drift toward professionalism, the District Court failed to appreciate how its remedy will fuel the race by allowing universities to pay for athletes. Attempts by the NCAA and its member universities to limit college athletics in order to prevent further commercial

exploitation will now be subject to antitrust scrutiny, liability, and treble damages.

ARGUMENT

I. AN ANTITRUST CLAIM CANNOT BE PREMISED ON A RESTRAINT OF AN ALLEGED PROPERTY RIGHT THAT NEVER HAS BEEN LEGALLY RECOGNIZED; THERE IS NO ECONOMIC BASIS TO DO SO HERE.

A. The District Court Never Reconciled How an Antitrust Claim Can Be Premised on a Purported Property Right That Has Never Been Legally Recognized in This Context.

Plaintiffs are challenging a set of NCAA rules that, according to the District Court, "bar student-athletes from receiving a share of the revenue that the NCAA and its member schools earn from the sale of licenses to use the student-athletes' names, images, and likenesses in videogames, live game telecasts, and other footage." *O'Bannon v. National Collegiate Athletic Association*, 7 F. Supp. 3d 955, 963 (2014). Plaintiffs' antitrust claim assumes that Plaintiffs have a legally cognizable property right (namely a right to publicity in the use of their names, images, and likenesses in live game broadcasts and archival game footage). If Plaintiffs had no cognizable property interest, they suffered no

antitrust injury to their business or property under Section 4 of the Clayton Act, 15 U.S.C. § 15.

No federal or state court has recognized such a property right and it is doubtful whether any such right exists under any state law. Despite those facts, the District Court found that "professional athletes often sell group licenses to use their names, images, and likenesses in live game telecasts, videogames, game re-broadcasts, advertisements, and other archival footage." 7 F. Supp. 3d at 968. The Court went on to analogize that absent the NCAA's challenged rules, "FBS football and Division I basketball players would also be able to sell group licenses for the use of their names, images, and likenesses." *Id.*

Every week many amateur athletic contests are televised or streamed over the Internet. Those broadcasts may have commercials, and schools may receive money from the broadcasts. To date, however, the high school and college players in those broadcasts have not received money for the use of their likeness. Nor do such students currently negotiate or sell licenses for the use of their names, images, and likenesses in these live game

telecasts or game re-broadcasts. Few such students likely know of this purported right; even fewer would likely believe that this purported right could serve as the basis for a federal antitrust claim, with treble damages. But that may become the reality after the District Court's decision. Colleges, high schools, and amateur athletic leagues could become liable under the federal antitrust laws to students for broadcasting or streaming athletic contests, even in states that expressly disavow any such right of publicity in this context, and even if the schools collectively seek to maintain the sport's amateur status.

B. The District Court Never Provided Any Economic Basis to Justify Recognizing a Property Right in the Use of an Amateur Student's Likeness in a Televised Athletic Contest; Nor Does There Appear to be an Economic Justification in Creating Such a Right Here.

The economic rationale for granting a limited right of publicity is probably best captured by Hugo Zacchini, the human cannonball. As the Supreme Court found, Zacchini was shot from a cannon into a net some 200 feet away, a performance that lasted about 15 seconds. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563 (1977). Only Zacchini performed this human

cannonball act, which represented his livelihood. His concern was that fewer people would pay to see him shot from a cannon if they could watch his entire act on television. Thus the live broadcast substantially threated Zacchini's ability to profit from his performance. Zacchini was a professional performer. He wanted to capture whatever profits that came from people seeing him shot from a cannon. If Zacchini could not profit from his time, effort, and expense, he would cease performing. Simply put, the broadcast of the human cannonball's entire performance went "to the heart of [his] ability to earn a living as an entertainer." *Id*. at 576.

So for a property right in one's name, image, or likeness used in a live broadcast to exist, several economic conditions, as both the economics literature and the *Zacchini* Court recognized, must also exist. First, providing the financial incentive must encourage the individual to undertake the effort to invest in creating the product. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 22 (2003). That inducement effect is typically the case where the performer

earns his or her living from the performance. Second, the economic value of the performance must be capable of being misappropriated (such as the television crew filming Zacchini's performance), which as a result impairs the performer's ability to earn a living as an entertainer. *Id.* at 23. Third, absent the economic incentive, the performer would not perform. And, finally, granting a limited property right must represent the best way to advance the public interest. *Zacchini*, 433 U.S. at 575-76 (noting that the state's "decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court."). The public interest favors reproduction as a free economic good in the absence of incremental distribution costs unless doing so will reduce output of the product. The concern is that absent the property right, others will appropriate or free ride on the actor's performance, which deprives the

performer of the economic incentive necessary for the performance, and society thereby loses out with fewer creative performances. But "in areas of intellectual property where fixed costs were low or other incentives besides the prospect of royalty income were present in force, intellectual property protection would be slight or would even be withheld altogether." Landes & Posner, *supra*, at 24.

The District Court never considered whether these economic conditions for granting a property right in one's publicity were present here. Indeed, they are not. First, high school and college students do not earn a living from participating in their team sports. The students' participation in the team sport is not contingent on their receiving an immediate financial incentive. In fact for the vast majority of students without pro aspirations or capabilities, participation in high school and college sports can represent an opportunity cost, where they forgo working or pursuing other profitable activities, undertaken for purely amateur motives.

Despite the absence of economic compensation for the use of their likeness in televised broadcasts, students are participating

in high school and college sports at increasing and record levels. As the National Federation of State High School Associations observed, "[p]articipation in high school sports increased for the 24th consecutive year in 2012-13 and passed the 7.7 million mark for the first time, according to the annual High School Athletics Participation Survey conducted by the NFHS. Participation reached an all-time high of 7,713,577 participants – an increase of 21,057 from the previous year."[2] Likewise, many more students are participating in NCAA sports without financial compensation for their likeness. As the NCAA reported, "[t]he participation rates in NCAA sports continued to rise during the 2013-14 academic year, with the number of teams competing in NCAA championship sponsored sports reaching an all-time high of 19,086" and "[t]he total number of student-athletes participating in the 23 sports that the NCAA sponsors also reached an all-time high at 472,625."[3]

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[2] National Federation of State High School Associations, Annual Report 2013, at 9, http://www.nfhs.org/media/885658/2013-nfhs-annual-report.pdf.

[3] Greg Johnson, *Athletics Participation Rates Continue to Rise: More Than 19,000 Teams Competed in NCAA Sports in 2013-14*,

Likewise, the number of regionally and nationally televised broadcasts of televised sports has grown.[4] Moreover, athletic contests such as the traditional football rivalry between Phillips Academy Andover and Phillips Exeter Academy are streamed live over the Internet.[5] Every August, the Little League Baseball tournament is telecast from South Williamsport, Pennsylvania to a global audience of millions.[6]

NCAA, Oct. 15, 2014, http://www.ncaa.org/about/resources/media-center/news/athletics-participation-rates-continue-rise.

[4] *See, e.g.*, Sporting News, *2014 NCAA College Football Schedule, Game Times, Scores, TV*, http://www.sportingnews.com/ncaa-football/schedule?iadid=Nav_Sport_NCAAF_SCHEDULE (listing many televised college football games each week); NFHS Annual Report, *supra* note 2, at 5 (noting how "the NFHS and PlayOn! Sports officially launched the NFHS Network, an all-digital network that expands coverage of high school sports and performing arts through the Internet at www.NFHSnetwork.com" and how 28 states at the onset joined the NFHS Network, "making it the largest aggregated destination for coverage of high school sports in the country").

[5] http://edgestreaming.com/andover/.

[6] Amanda Kondolojy, *Most-watched Little League World Series Ever on ESPN Networks*, TV BY THE NUMBERS, Aug. 28, 2014, http://tvbythenumbers.zap2it.com/2014/08/28/most-watched-little-league-world-series-ever-on-espn-networks/297682/ (noting that the 2014 Little League World Series "was the most-watched ever on ESPN networks (ABC, ESPN and ESPN2 combined) according to Nielsen," with the Little League World Series Championship weekend averaging "4,163,000 viewers and a 2.7 U.S. rating, the best in both categories since 2002").

The District Court failed to account for why a record number of high school and college students are playing team sports and why output has increased (both in terms of students' participation in high school and college sports and the airing of such amateur games) without high schools and colleges offering students the financial incentive for the use of their likeness in these televised games. For Zacchini, it was straightforward. If the television station could air his entire performance without compensating him, he would no longer fly out of the cannon. That is not the case here.

C. There Are Several Economic Reasons Why This Court Should Hesitate to Recognize a Property Right in the Use of an Amateur High School or College Student's Likeness in a Televised Broadcast.

Using a federal antitrust case to create a new property right invariably creates more issues than it resolves. Creating a property right here would increase transaction costs and reduce allocative efficiency. Suppose a student now has a property right in the use of his or her likeness in televised athletic games. Students can now compete by offering to license their likeness at a higher or lower rate. More popular student-athletes (or position

players) may demand more for the use of their likeness. Other students, schools, and television stations collectively face the "holdout" problem, whereby the last essential football or basketball player to license his right demands a premium for the use of his likeness.[7] Students who wanted to game the system could refuse to license their likeness early in the process; each would want to be the last holdout. Or the students could demand that if any other player gets a higher amount, then they would automatically get that (or an even higher) amount. The potential holdout problem increases the licensees' transaction costs (as they need to negotiate individually with the students and potentially

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[7] U.S. Government Accountability Office, *Report to Congressional Committees: Statutory Copyright Licensing: Implications of a Phaseout on Access to Television Programming and Consumer Prices Are Unclear* (Nov. 2011), http://www.gao.gov/assets/590/586471.html (noting industry concern of the holdout problem, "a well-recognized phenomenon in economic literature" arising if "Congress phased out the statutory licenses for broadcast programming, FCC's must carry and carry-one carry-all rules—which require cable and satellite operators, respectively, to carry the signals of qualified television broadcast stations upon request—could become impractical" as "industry stakeholders identified transaction costs and holdouts—which occur when certain copyright owners delay negotiations by demanding high compensation—as key factors that would make acquiring such rights impractical for operators absent the licenses.").

pay higher fees to the holdouts). This holdout problem can play out on the team or conference level. With the prospect of higher transaction costs and protracted negotiations, some prospective licensees may decide against broadcasting or streaming the game to the detriment of students, universities and public.

While newly recognizing an individual property right for each student in the use of his or her likeness, the District Court assumed without basis that the football and basketball athletes would have to agree to license their likenesses collectively through a group license that the universities (or conferences) in turn would negotiate with the television stations. As the District Court recognized, Plaintiffs never presented any evidence to show that, in the absence of the challenged restraint, teams of student-athletes would actually compete against one another to sell their group licenses. In fact, the evidence in the record strongly suggests that such competition would not occur. This is because any network that seeks to telecast a particular athletic event would have to obtain a group license from every team that could potentially participate in that event. 7 F. Supp. 3d at 995.

The District Court also acknowledged that "limited restrictions" on student-athlete compensation might be needed to help "integrate student-athletes into the academic communities of their schools, which may in turn improve the schools' college education product." *Id*. at 980.

It is unusual for a court to create, on the one hand, an individual property right in a federal antitrust case and then, on the other hand, to require its holders to agree to a group license, which raises its own antitrust issues. There is no legal authority or compelling economic theory requiring individuals, who have an individual property right, to abide by a group license. In *BMI*, for example, the blanket license was offered *in addition* to the individual license. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 24 (1979) (noting there was "no legal, practical, or conspiratorial impediment to CBS's obtaining individual licenses; CBS, in short, had a real choice"). Nor is there any sound economic or obvious legal basis for the Court, consistent with the antitrust laws, to allow the NCAA to require that every student, regardless of the value of his or her property right, to get the same

amount. *O'Bannon*, 7 F. Supp. 3d at 1008 (allowing the NCAA to "enact and enforce rules ensuring that no school may offer a recruit a greater share of licensing revenue than it offers any other recruit in the same class on the same team"). Returning to our human cannonball example, if the assumption is that money is necessary to incentivize performance, then it makes no economic sense to require every player, regardless of the economic value of his or her likeness, to be paid the same amount. If anything, that should, under the District Court's theory, diminish the athletes' incentives. If a financial incentive is needed for the star quarterback to play for his team, why should the university pay him the same amount as the third-string punter who sits mostly on the bench?

The District Court's ruling raises many other complex issues that potentially would increase both transaction costs and antitrust risks: Do students who play more football and basketball games get more money? Does the payment vary based on the value of the likeness or popularity of the player? Do players on more popular teams get more money? To what extent

is the value of the student's likeness distinguishable from the value of the university logo? If students do not know beforehand how much they will receive, to what extent would a financial payment incentivize them or improve the products at issue? Would payment be limited to those whose likenesses had pre-existing value since playing for their school increases their recognition?

Finally, the District Court failed to account for the potential harm that occurs when extrinsic, economic market incentives crowd out intrinsic incentives and social, moral, and ethical norms. This again goes to the fundamental question: Why is participation in high school and college sports increasing even though the students are not being paid for the use of their likeness in televised games? The District Court assumed that the students are self-interested, profit-maximizers who will perform the same or better when given financial incentives.

As the economic literature reflects, financial incentives at times motivate, and financial penalties deter, behavior. At times, financial incentives and social, moral, and ethical norms are

complements.[8] But at other times, extrinsic financial incentives will displace (or "crowd out") behavior motivated by intrinsic or non-market norms; the net effect is that individual motivation and the likelihood of achieving the desired results *decrease*, rather than increase. [9] Moreover, "external intervention through monetary means," economist Bruno Frey observed, "can transform the nature of the good or relationship fundamentally" and at times destroy it completely.[10]

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[8] Samuel Bowles, *Policies Designed for Self-Interested Citizens May Undermine "The Moral Sentiments": Evidence from Economic Experiments*, 320 SCIENCE 1605, 1606 ("In a few cases, explicit incentives and ethical motives are complements, the former enhancing the salience of the latter. In most cases, though, separability fails in the opposite way: Incentives undermine ethical motives. As is standard in behavioral economics, most of the experiments were played anonymously for real (and often substantial) money stakes.").

[9] For an overview see MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 93–130 (2012); LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE 190-92, 250-51 (2011); *see also* Yochai Benkler, *The Unselfish Gene*, HARV. BUS. REV., July-Aug. 2011, at 79, 83-84; Uri Gneezy & Aldo Rustichini, *Incentives, Punishment, and Behavior*, *in* ADVANCES IN BEHAVIORAL ECONOMICS 574-76 (Colin F. Camerer et al. eds., 2004).

[10] Bruno Frey, *Crowding Out and Crowding In of Intrinsic Preferences*, *in* REFLEXIVE GOVERNANCE FOR GLOBAL PUBLIC GOODS 81 (Eric Brousseau et al. eds., 2012).

Professor Dan Ariely, for example, did several experiments when social and market norms clashed.[11] Similarly, more lawyers volunteered to donate their services for free to needy retirees than when they were offered a relatively small amount—thirty dollars per hour.[12] Voluntary blood donations in Britain declined sharply when a policy of paying donors was instituted alongside the voluntary sector.[13] Uri Gneezy and Aldo Rustichini reached a similar conclusion in their experiment with high school students

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[11] DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 69-74 (2008). Participants were divided into three groups. Each group performed the same mundane task. One group, the social-norm group, was not compensated, but asked to undertake the task as a favor. In the first study, the social-norm group outperformed the group whose members received five dollars of compensation for the task, which outperformed the group whose members received fifty cents for the task. In the second study, the two groups did not receive cash, but a gift of comparable value—a Snickers bar for the fifty-cent group and a box of Godiva chocolate for the five-dollar group. The two groups performed as well as the social-norm group. When in the third study the gifts were monetized to the two groups—a "[fifty]-cent Snickers bar" or a "[five dollar]-box of Godiva chocolates"—these two groups again devoted less effort than the social-norm group.

[12] *Id.* at 71.

[13] Herbert Gintis et al., *Moral Sentiments and Material Interests: Origins, Evidence, and Consequences*, *in* MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE 119 (2005).

who collected donations for a public purpose in Israel's annually publicized "donation days."[14]

Here, the District Court never considered or explained how recognizing a property right for the use of a student's likeness in a televised broadcast would increase the student-athlete's incentives, would improve the "product," or was needed for the product at issue (educational services) or amateur sports to exist in the first place. Moreover, the District Court failed to account for the potential risks in creating a property right, such as higher transaction costs, the likelihood of holdouts, and potential deleterious effect on the students' educational and athletic experience if extrinsic financial incentives crowd out intrinsic motivation and non-market norms.

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[14] Gneezy & Rustichini, *supra* note 9, at 573-80. One group was given a pep talk of the importance of these donations. A second group, in addition to the pep talk, was promised one percent of the amount collected to be paid from an independent source. A third group was promised an even greater financial incentive—ten percent of the amount collected. If each group was primarily motivated by financial incentives, then the third group should collect the most donations. Instead, the groups promised the one percent and ten percent shares collected a lower average amount—$153.67 and $219.33, respectively—than the group not financially compensated but given only the pep talk—$238.60.

II. THE DISTRICT COURT ERRED IN BASING ITS HOLDING ON WHAT WOULD HAVE HAPPENED IN AN "UNRESTRAINED" MARKET WHEN THE RESTRAINT WAS INTEGRAL TO CREATING THE UNIQUE PRODUCT.

A. The District Court's Reasoning

Plaintiffs argued that the economic interests in this case were determined by the value of what their athletic performance would have been in an "unrestrained market." Plaintiffs alleged "that student-athletes are harmed by this restraint because it prevents them from receiving compensation -- specifically, for the use of their names, images, and likenesses -- that they would receive in an *unrestrained* market." (Order Resolving Cross-Motions for Summary Judgment, dated April 11, 2014, at 11.) (Emphasis added.)

The District Court agreed: "Plaintiffs' evidence supports an inference that this restraint has an anticompetitive effect on the college education market," and was thus "sufficient to satisfy their initial summary judgment burden." *Id.* at 11. The District Court noted that the "student-athletes' economic interests in this case are determined by the value their athletic performances would

have in an *unrestrained* market – not by their value in a market from which they have been allegedly excluded." *Id.* at 17-18. (Emphasis added.)

B. The District Court Erred in Comparing the Joint Venture's Conduct to What Would Happen in a Purely "Unrestrained Market," When the Unique Product Would Not Be Available in an "Unrestrained Market."

It is bad economic policy to compare a joint venture's conduct to what would have happened in a purely "unrestrained market," when the unique product would not be available in an "unrestrained market." As the Supreme Court intuitively grasped, joint ventures at times need restraints in order for the product to become available at all and to avoid a race to the bottom that leaves the participants collectively and society worse off. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 101-02 (1984) (noting "the integrity of the 'product' cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed").

College and high school athletics are susceptible to this race to the bottom. The economist Irving Fisher over a century ago

examined two assumptions of any "unrestrained" laissez-faire doctrine:

> first, each individual is the best judge of what subserves his own interest, and the motive of self-interest leads him to secure the maximum of well-being for himself; and, secondly, since society is merely the sum of individuals, the effort of each to secure the maximum of well-being for himself has as its necessary effect to secure thereby also the maximum of well-being for society as a whole.[15]

Unrestrained competition benefits society when individual and group interests and incentives are aligned (or at least do not conflict). But "unrestrained" competition for a relative advantage can leave the competitors collectively and society worse off. Recognizing this race to the bottom, joint ventures often will require certain restraints to enable the product or service to be offered in the first place.

Indeed economist Robert Frank recently predicted that in 100 years, most economists will identify as their discipline's intellectual father, Charles Darwin:

> As Darwin saw clearly, the fact that unfettered competition in nature often fails to promote the

[15] Irving Fisher, *Why Has the Doctrine of Laissez Faire Been Abandoned?*, SCIENCE, Jan. 4, 1907, at 19.

> common good has nothing to do with monopoly exploitation. Rather, it's a simple consequence of an often sharp divergence between individual and group interests.[16]

One area of this suboptimal competition is where advantages and disadvantages are relative.[17]

Frank used the bull elk as an example. It is in each elk's interest to have relatively larger antlers to defeat other bull elks. But the larger antlers compromise the elks' mobility, handicapping the group overall.

Hockey players are another example. Hockey players prefer wearing helmets. But to secure a relative competitive advantage, one player may choose to play without a helmet. The other players follow. None enjoy a competitive advantage from playing helmetless. Collectively the hockey players are worse off.[18]

Fisher gave the example of patrons competing to exit a

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[16] ROBERT H. FRANK, THE DARWIN ECONOMY: LIBERTY, COMPETITION, AND THE COMMON GOOD 16, 138 (2011).
[17] *See* Fisher, *supra* note 15, at 24 ("A general increase in relative advantage is a contradiction in terms, so that in the end the racers as a whole have only their labor for their pains.").
[18] Frank, *supra* note 16, at 8–9, citing THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR (1978).

theater on fire; it is in each individual's interest to get ahead of others, but "the very intensity of such efforts in the aggregate defeat their own ends."[19]

Thus economic theory recognizes that joint activity and ventures, at times, must impose restraints in order for the product or service to exist at all. Amateur athletics is one well-recognized example. In an unrestrained market of athletic contests, each university would seek a relative advantage that would leave the universities and students collectively worse off.

The Supreme Court recognized this basic economic principle:

> We need no empirical data to credit [the high school athletic association's] commonsense conclusion that hard-sell tactics directed at middle school students could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics. [The athletic association's] rule discourages precisely the sort of conduct that might lead to those harms, any one of which would detract from a high school sports league's ability to operate "efficiently and effectively." For that reason, the First Amendment does not excuse [the private high school Brentwood Academy] from abiding by the same antirecruiting rule that governs the conduct of its sister schools. To hold otherwise would undermine the principle, succinctly articulated

[19] Fisher, *supra* note 15, at 22.

> by the dissenting judge at the Court of Appeals, that "[h]igh school football is a game. Games have rules." It is only fair that Brentwood follow them.

Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad., 551 U.S. 291, 300 (2007) (internal citations omitted).

No one can seriously deny that in an unrestrained market, some colleges and private high schools would freely compete for students by paying them to compete for their team. Universities, in an unrestrained market, might seek to extend the time that students could practice and limit the amount of time each student would have to prepare for, or attend, class. Each university might seek a relative advantage (such as paying talented athletes to attend their schools without requiring them to attend class). Universities might outbid one another for talented athletes, while other parts of their university, which face resource constraints, would suffer. So if universities spend millions of dollars to obtain talented athletes, others would either exit the activity or do the same. None of the universities would gain a sustained competitive advantage. The overall educational experience would diminish, leaving the universities, students, and student-athletes

collectively worse off.

The NCAA and high school rules seek to prevent that race-to-the-bottom, namely to prevent amateur athletics, which are part of the unique offering of educational services, into becoming a professional sport. The evidence before the District Court was replete with evidence that the NCAA was seeking to curb the "arms race" and creeping professionalism that would occur in an "unrestrained market."

As the antitrust economic literature has long recognized, in these markets, the product itself (amateur sports) requires the restraint. To prevent this "race to the bottom" or "arms race" from occurring, and to preserve the unique product that students desire, the universities must agree to bind themselves collectively.

Thus, the District Court ignored a basic antitrust principle: If the restraint is necessary to create the product and if the product is socially beneficial (for example, if the product increases output and consumer choice), then the restraint is presumptively lawful. As the Supreme Court repeated, in "such instances, the agreement is likely to survive the Rule of Reason." *Am. Needle,*

Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010) ("Joint ventures and other cooperative arrangements are also not usually unlawful . . . where the agreement . . . is necessary to market the product at all") (citing *BMI*, 441 U.S. at 23); *see also Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006). As the Court in *NCAA*, 468 U.S. at 101-02, stated,

> In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.

The Court also stated,

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. *There can be no question but that it needs ample latitude to play that role*, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.

468 U.S. at 120 (emphasis added).

The District Court's approach (i.e., what might happen in an unrestrained market) would potentially subject legitimate joint ventures to widespread and indeterminate antitrust liability. Under the lower court's approach, an antitrust plaintiff can single out a particular restraint integral to creating the product itself, compare the joint venture product to an altogether different product, and argue that the restraint is unnecessary and illegal. Since joint ventures change and develop over time, it would be bad economic and legal policy to allow every change to be tested by an antitrust case, which could easily defeat the procompetitive benefits of the venture through repeated litigation at every rule change. This in turn can chill innovation as future joint ventures hesitate in offering new products that require a restraint.

Thus antitrust law and economic theory support an important legal presumption: If the restraint is reasonably necessary to create a new product and that product increases consumer choice, and the ability to satisfy consumer preferences, then the product presumably increases consumer welfare, and the restraint is presumptively legal. When the joint venture increases

consumer choice and output by offering a unique product, it is not the court's function, under the antitrust laws, to determine whether another, distinct product in a market without the restraint (namely professional football or basketball) would be just as good.

III. IN CHARACTERIZING THE NCAA'S RULES AS A "PRICE FIXING AGREEMENT," AND FAILING TO RECOGNIZE RESTRAINTS THAT ARE INTEGRAL TO CREATING THE PRODUCT, THE DISTRICT COURT'S REASONING WILL EXPOSE HIGH SCHOOLS AND UNIVERSITIES TO POTENTIALLY WIDESPREAD ANTITRUST LIABILITY AND THEREBY CHILL PROCOMPETITIVE ACTIVITY TO SOCIETY'S DETRIMENT.

The District Court does not provide any significant economic or legal principle to limit liability to Division I basketball and Football Bowl Subdivision football. The lower court's analytical framework would cover other televised university and high school sports. Agreements among universities to limit the number of (or not offer any) athletic scholarships would also be subject to antitrust attack.

Cheerleading is one example. Universities today do not pay cheerleaders for the use of their likeness on televised athletic contests. Although courts have not recognized university

cheerleaders to have a property right in the use of their likeness in televised games, the District Court noted that an agreement between the FBS conferences, the University of Notre Dame, and Fox Broadcasting Company for the rights to telecast certain 2007, 2008, and 2009 bowl games provided "that the event organizer will be solely responsible for ensuring that Fox has 'the rights to use the name and likeness, photographs and biographies of all participants, game officials, *cheerleaders*' and other individuals connected to the game." *O'Bannon*, 7 F. Supp. 3d at 969 (emphasis added). Because the parties' contract specifically mentions the right to use the cheerleaders' likeness, the cheerleaders, under the District Court's logic, would have a property right in these licensing rights. They too would presumably be alleged victims of an alleged price-fixing restraint, if the universities, through their conferences, agree not to pay cheerleaders for their licensing rights (beyond any scholarship).[20]

[20] http://www.topcheers.com/cheerleadingscholarships ("More and more colleges are beginning to offer cheerleading scholarships. Cheerleading scholarships come in many different forms, some offering only a couple hundred dollars a semester, and some paying full tuition.").

Attorneys, using the District Court's faulty analysis, could satisfy their class members' initial burden under the rule of reason, and require the universities to justify their agreement to not pay cheerleaders more.

Compensation restraints on high school athletes would also be subject to antitrust attack. High school football and basketball contests are now televised around the country. Private high schools today recruit players, including some post-graduate students to play one year at their preparatory school. In an "unrestrained market," some private high schools would pay the parents for gifted teenage students to play, especially if doing so increases the private school's reputation and revenues. Thus the private high schools in agreeing through their athletic association to restrain trade in depriving students the value of using their likeness in televised games would be embroiled in antitrust litigation. Future antitrust plaintiffs could show that this restraint designed to prevent the professionalization of high school sports is a "price-fixing restraint," and thereby shift the burden on

private high schools across the country to offer procompetitive justifications in the plaintiffs' narrowly-defined product market.

The district court in *Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) aptly summarized the issue:

> The overriding purpose of the eligibility Rules, thus, is not to provide the NCAA with commercial advantage, but rather the opposite extreme–to prevent commercializing influences from destroying the unique "product" of NCAA college football. Even in the increasingly commercial modern world, this Court believes there is still validity to the Athenian concept of a complete education derived from fostering full growth of both mind and body. The overriding purpose behind the NCAA Rules at issue in this case is to preserve the unique atmosphere of competition between "student-athletes." This Court, therefore, rejects the notion that such Rules may be judged or struck down by federal antitrust law.

One can scoff at the concept of the student-athlete and universities' attempts to hold the line against further inroads from professionalism. Plaintiffs assume that the NCAA and its university members are self-interested, profit-maximizing entities that only make economically rational decisions. But as Plaintiffs' expert recognized, the NCAA and universities were leaving "a lot money on the table." The reality, after the District Court's ruling,

is that the arms race will only quicken. More universities will outbid one another for a relative advantage. A few students may benefit; most students and universities won't. And the Athenian concept of a complete education will indeed become a historical artifact.

CONCLUSION

The district court's judgment should be reversed.

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Respectfully submitted,

/s/ Allen P. Grunes

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APPENDIX A*

BIOGRAPHIES OF *AMICI CURIAE*

John B. Kirkwood, Professor of Law
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Professor Kirkwood is a Senior Fellow of the American Antitrust Institute. His article "Powerful Buyers and Merger Enforcement" won the Jerry S. Cohen Award for the best antitrust scholarship published in 2012. An earlier article on buyer power, "Buyer Power and Exclusionary Conduct," was quoted by the Supreme Court. His work has appeared in numerous law reviews, and he has edited two books, spoken frequently at antitrust conferences, and consulted on many antitrust matters. He has also testified before Congress and at the hearings on predatory pricing held by the Justice Department and the Federal Trade Commission.

After graduating from Yale *magna cum laude* and with Honors of Exceptional Distinction in Economics, he received a masters degree in public policy and a law degree from Harvard, both with honors. He directed the Planning Office, the Evaluation Office, and the Premerger Notification Program at the FTC's Bureau of Competition and later managed cases and investigations at the FTC's Northwest Regional Office. At Seattle University, he has received the Outstanding Faculty Award and the Dean's Medal and was an Associate Dean for five years.

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* Institutional affiliations are given for identification purposes. The views expressed in this brief are those of *amici curiae* only and may not reflect the views of their universities, which are not signatories to this brief.

Justin McCrary, Professor of Law
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Professor McCrary joined the Berkeley faculty in 2008. He is also a Faculty Research Fellow at the National Bureau of Economic Research (Cambridge), and a Fellow of the Criminal Justice Research Program, Institute for Legal Studies (Berkeley). His research has been supported by the National Science Foundation, the Robert Wood Johnson Foundation, and the National Institute of Health.

Before coming to Berkeley, Professor McCrary was an assistant professor of public policy and assistant professor of economics at the University of Michigan.

Barak Orbach, Professor of Law
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Professor Orbach teaches and writes in the areas of business law, antitrust, and regulation. He is a member of the American Law Institute and recognized nationally and internationally as a leading scholar of antitrust and regulation. Professor Orbach holds undergraduate degrees in law and economics from Tel Aviv University and masters and doctorate degrees in law from Harvard Law School. Before joining the academia, Professor Orbach served as an Advisor for Law & Economics to the Israeli Antitrust Commissioner and as an associate with Cleary, Gottlieb, Steen & Hamilton, New York. Professor Orbach is the author of a leading casebook on regulation, REGULATION: WHY AND HOW THE STATE REGULATES (Foundation Press 2012). Additionally, he published over 30 articles, essays, and book chapters. Professor Orbach's teaching and writing integrate the study of real-world

problems and law. His study of the motion-picture industry is credited for contributing to a change in movie pricing in the United States.

Gary R. Roberts
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Gary R. Roberts was Dean and Gerald L. Bepko Professor of Law at Indiana University Robert H. McKinney School of Law in Indianapolis from July 2007 through June 2013. Since 2013 he has been Dean Emeritus, Bepko Professor and Of Counsel to the law firm of Bose McKinney & Evans in Indianapolis. Prior to moving to Indianapolis in 2007, he was the Deputy Dean, Sumter Davis Marks Prof. of Law & Director of the Sports Law Program at Tulane Law School. He graduated from Bradley University *magna cum laude* ('70) and Stanford Law School, Order of the Coif ('75). In 1975-76 he clerked for Judge Ben C. Duniway of the U.S. 9th Circuit Court of Appeals in San Francisco. From 1976-83 he was an attorney with the Washington, D.C. law firm of Covington & Burling, where his primary clients were the National Football League and National Hockey League. In 1983 Dean Roberts joined the Tulane Law School faculty, where he established and directed the first sports law certification program in the U.S. He has written several major law review articles and book chapters and has co-authored the leading text on sports law used in U.S. law schools. He is a frequent speaker at sports law conferences and programs throughout the world and has testified before Congressional committees on nine different occasions relating to sports issues. Dean Roberts was Tulane University's Faculty Athletics Representative (FAR) from 1992-2007, and was the chair of the Tulane University Senate Athletic Committee for five years before that. From 2008-11 he served as the FAR for IUPUI. Over

the years he has served on several NCAA and Conference USA committees, and from 2003-07 was a member of the NCAA Division I Academics, Eligibility & Compliance Cabinet.

Dean Roberts is also a sports arbitrator, having served as an AAA certified commercial and sports arbitrator since 2006. He was appointed a member arbitrator of the Court of Arbitration for Sport (CAS) in 2011, and served as one of the nine members of the CAS Ad Hoc Division at the Sochi Winter Olympic Games in 2014. He has since 1987 been an officer and a member of the board of directors of the Sports Lawyers Association, for which he served as president from 1995- 97. From 1987 to 2010 he edited the SLA's newsletter, The Sports Lawyer, and created the SLA's annual academic law review, The Sports Lawyers Journal. He has also done extensive consulting work for a wide variety of sports clients.

CERTIFICATE OF COMPLIANCE

I certify that:

a. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6,661 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

b. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it was prepared in Microsoft Office Word in 14-point, proportionally spaced Century Schoolbook font.

/s/ Allen P. Grunes
ALLEN P. GRUNES

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief for Law and Economics and Antitrust Scholars as *Amici Curiae* in Support of Appellant to be served on all counsel of

record via the appellate CM/ECF system on this 21st day of November 2014.

/s/ Allen P. Grunes
ALLEN P. GRUNES