No. 83-271

# In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

*v.*

BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA AND UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE**


REX E. LEE
*Solicitor General*

J. PAUL MCGRATH
*Assistant Attorney General*

LAWRENCE G. WALLACE
*Deputy Solicitor General*

DOUGLAS H. GINSBURG
*Deputy Assistant Attorney General*

JERROLD J. GANZFRIED
*Assistant to the Solicitor General*

BARRY GROSSMAN
ANDREA LIMMER
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

JOHN H. CARLEY
*General Counsel*

DAVID A. GIACALONE
*Attorney*
*Federal Trade Commission*
*Washington, D.C. 20580*

## QUESTIONS PRESENTED

The National Collegiate Athletic Association (NCAA) is a joint venture of colleges that establishes rules and regulations governing a variety of intercollegiate athletic events. Membership in the NCAA is a prerequisite for participation in a broad intercollegiate athletic program, and membership is conditioned on adherence to the organization's rules. The particular rules at issue in this case provide that the NCAA will act as the selling agent for the television rights to in-season intercollegiate football games in a manner that prevents the individual schools from selling telecasts outside of the NCAA package. The questions presented are:

1. Whether these television restrictions constitute per se illegal price fixing.

2. Whether the television restrictions violate the Sherman Act when judged under the rule of reason. This issue involves the following subsidiary questions:

a. Whether the lower courts applied the proper legal standards in requiring petitioner to show that legitimate justifications exist to outweigh the anticompetitive effects of the television restraints.

b. Whether the district court committed clear error in defining the relevant product market in which to assess the anticompetitive restraint.

c. Whether the fact that the three television networks compete for the NCAA television package negates the anticompetitive effects of the television restrictions.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

**Cases—Continued:** Page

Miscellaneous—Continued: Page

# In the Supreme Court of the United States

OCTOBER TERM, 1983

---

No. 83-271

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

*v.*

BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA AND UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE**

---

## INTEREST OF THE UNITED STATES

The United States and the Federal Trade Commission, which have primary responsibility for the preservation and promotion of competition through enforcement of the federal antitrust laws, have a substantial interest in ensuring that those laws are interpreted and applied in a manner that promotes competition and consumer welfare. Because of the importance of the issues raised by this case, the United States filed an amicus brief before the Tenth Circuit. Subsequently, at Justice White's invitation, the United States filed a memorandum in this Court concerning the application for a stay (Resp. App. 1A-5A).

## INTRODUCTION AND SUMMARY OF ARGUMENT

1. The National Collegiate Athletic Association (NCAA) has developed a Television Plan and Principles of Negotiation and has entered into contracts with three television networks (CBS, ABC, and Turner Broadcasting) as the sole seller of televised in-season collegiate football games (Pet. App. 44a-45a, 47a). The contracts

limit the number of times a member institution may have its games televised and effectively establish the price that each nationally and regionally televised team will receive (Pet. App. 56a, 58a, 64a; Tr. 826, 842-885, 877-878). Except for differences in payment between national and regional telecasts, the amount that a team receives does not vary with the size of the viewing audience, the number of markets in which the game is broadcast, or the popularity or caliber of the teams (Pet. App. 7a & n.5, 60a; Tr. 86-96, 100, 104, 106). In addition, the NCAA prohibits its members from independently negotiating for broadcast of individual games; violations of this rule subject member institutions to sanctions such as expulsion from the organization and bans against appearing on television in a game against another NCAA member (Pet. App. 28a-29a; Tr. 15-16, 54, 115).[1]

Both the district court and the court of appeals held that this television plan is a per se violation of the Sherman Act. Alternatively, both courts also found that the conduct is unlawful under the rule of reason.

2. In order properly to assess the conduct at issue, it is necessary to understand the role of the per se standard in antitrust analysis. The ultimate question in any case of concerted action is whether the conduct unreasonably restrains competition. And the usual mode of evaluation is the rule of reason. The Court has, however, recognized that certain forms of behavior are so inherently anticompetitive that, after the courts have sufficient experience with them, they are deemed unreasonable per se and subject to condemnation without extended inquiry into their purpose or competitive effect. Other forms of conduct, while facially suspect, may in fact promote competition and thus require additional scrutiny to see if their purported economic justifications outweigh the potential for competitive harm.

---

[1] While agreements covering the telecasting of some professional sports are exempt from the antitrust laws (15 U.S.C. 1291 *et seq.*), Congress has created no such immunity for college football.

The conduct at issue in this case is not of a type with which the courts have had substantial experience and does not involve a naked restraint imposed by competitors who have no legitimate cooperative relationship with one another. Accordingly, per se condemnation is not warranted.

3. The conclusion that the NCAA's conduct is not unreasonable per se does not end the case. Rather, the televison arrangements must be evaluated to determine whether the asserted justifications may excuse the facially suspect impact on price and output their restrictions entail. This inquiry need not, however, involve "full-blown" scrutiny of all aspects of the conduct. The rule of reason is a flexible standard that can be fitted to the conduct and defense justifications in particular cases. Just as the Court has established an abbreviated analysis of reasonableness under the per se standard, a similar, but less truncated, version of the rule of reason may suffice where the justifications presented, although plausible, are rejected after further scrutiny.

4. Both lower courts addressed petitioner's proffered defenses and concluded that the conduct constituted an unreasonable restraint of trade. The factual findings upon which this conclusion is based are not clearly erroneous and, in our view, provide a sufficient foundation for holding that Section 1 of the Sherman Act, 15 U.S.C. 1, has been violated. Petitioner's defenses include claims that (1) the television restrictions are necessary to maintain competitive balance between teams; (2) uncontrolled telecasting would reduce live attendance at football games; and (3) competition is preserved because networks bid for the rights to televise an NCAA football "package." As we discuss, however, these arguments are unsupported by the record.

Based on the lower courts' findings of fact, there was ample basis for concluding that any benefits flowing from the television arrangements did not outweigh their anticompetitive effects. Accordingly, it was correct to hold that the NCAA's conduct unreasonably restrained trade, and the court of appeals' judgment should be affirmed on that basis.

## ARGUMENT

### I. THE NCAA TV RULES DO NOT CONSTITUTE PER SE ILLEGAL PRICE FIXING

#### A. The Role of the Per Se Standard in Antitrust Analysis

1. Although Section 1 of the Sherman Act, 15 U.S.C. 1, literally prohibits every agreement in restraint of trade, from the earliest cases this Court recognized that Congress could not have intended that the fullest scope be given to this language, for every business contract or agreement, to some extent, restrains trade. See, *e.g.*, *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911); *United States* v. *Joint Traffic Ass'n*, 171 U.S. 505, 568 (1898). Accordingly, this Court has long held that the Sherman Act precludes only those restraints that are "unreasonably restrictive of competitive conditions." *Standard Oil Co.* v. *United States*, 221 U.S. at 58; accord, *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690 (1978). The unreasonableness of a restraint of trade must be established by either (1) evidence that the restraint is anticompetitive in the circumstances of the case (the rule of reason), or (2) a conclusive presumption of unreasonableness based on the general character of the challenged conduct (the per se rule). See *Professional Engineers*, 435 U.S. at 687-692; *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977); *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958). The rule of reason is the usual test of the legality of a restraint; the per se rule is employed only in those limited circumstances where courts, on the basis of considerable experience with the type of conduct challenged, have concluded that such conduct has a "pernicious effect on competition and * * * lack[s] * * * any redeeming virtue." *Northern Pacific Ry.*, 356 U.S. at 5; see *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 8 (1979).[2]

[2] The per se rule has been described as, in effect, "a special case of the rule of reason analysis." L. Sullivan, *Antitrust* 196 (1977); see *Professional Engineers*, 435 U.S. at 692; R. Bork, *The Antitrust Paradox* 18 (1978). The ultimate question—whether a restraint is unreasonable—remains the same whether it is answered

In either event, "the purpose of the analysis is to form a judgment about the competitive significance" of the alleged restraint. *Professional Engineers*, 435 U.S. at 692.

Certain types of conduct, such as horizontal price-fixing or group boycotts,[3] are deemed to be naked restraints on competition that are inherently likely to enhance price or restrict output, while offering no competitive benefits. These restraints are, accordingly, regarded as illegal per se. But the availability of this label does not obviate the task of determining whether particular practices that may affect price or exclude competitors should be viewed as conduct of the type subject to automatic condemnation. For example, not all concerted conduct that may affect price has been deemed price fixing. See, *e.g.*, *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588 (1925); *Joint Traffic*, 171 U.S. at 567-568.[4] Indeed, this Court has held that the mere fact that two parties have "literally" fixed the price of goods they sell does not neces-

---

by a conclusive presumption or by particularized evidence of effect on competition. Thus, the labels "per se" and "rule of reason" refer to the extent of scrutiny required to decide particular cases based on judicial experience with the conduct at issue and its potential for anticompetitive results. See, *e.g.*, *United States* v. *American Tobacco Co.*, 221 U.S. 106, 179 (1911).

[3] On several occasions this Court has stated that group boycotts are per se illegal (see *e.g.*, *Northern Pacific Ry.*, 356 U.S. at 5, and cases cited therein). Nevertheless, not all cases that could be characterized as group boycotts have been struck down on this basis. Rather, the per se rule has been applied only to narrower classes of concerted exclusionary activities whose clearly pernicious market effects warrant automatic condemnation (see L. Sullivan, *supra*, § 90). The classic boycott to which the courts have applied the per se rule "constitute[s] efforts by a firm or firms at one level to drive out competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle" (*id.* § 92, at 261-262).

[4] Thus, the legality of information exchanges and product standardization practices has been examined under the rule of reason because of judicial recognition that such practices have significant procompetitive potential in certain circumstances. See *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563 (1925); *cf. United States* v. *Container Corp. of America*, 393 U.S. 333 (1969).

sarily result in a finding of per se illegality. *Broadcast Music,* 441 U.S. at 9. To determine whether the challenged conduct is properly characterized as "per se price fixing" (*id.* at 19-20 (footnote omitted; citation omitted)):

> [the] inquiry must focus on whether the effect and * * * the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output * * *, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive."

Accordingly, when defendants proffer plausible justification for a horizontal combination, claiming that the arrangement as a whole " 'increase[s] * * * efficiency and render[s] markets more, rather than less, competitive' " (*id.* at 20 (citation omitted)), the mere fact that prices are in some sense "fixed" or that competitors may be excluded[5] does not automatically resolve the question of legality under the Sherman Act.

2. The terminology of "per se" and "rule of reason" analysis has led to a common misconception: that conduct necessarily falls either into the category subject to automatic condemnation or into the category where all aspects of the conduct and its context (*e.g.*, market definition, market power, intent, and competitive effect) must be exhaustively scrutinized before its legality can be determined. The polarity of this approach has led to un-

---

[5] Many membership organizations attempt to regulate certain aspects of the behavior of their members through the sanction of expulsion. The courts, however, have never held that a group's authority to expel its members renders the group structure tantamount to a group boycott and thus per se unlawful. The expulsion sanction is merely an enforcement vehicle for the underlying rules and policies of the group. Thus, the important issue is the competitive reasonableness of the underlying rules (here, the NCAA's television controls), not the existence of sanctions for their violation. See, *e.g., Molinas* v. *NBA,* 190 F. Supp. 241, 243-244 (S.D.N.Y. 1961); See also R. Posner, *Antitrust Law: An Economic Perspective* (1976).

fortunate consequences. Rule of reason cases have tended to become mired in laborious and time-consuming efforts to quantify and evaluate conduct. As a result, such cases have become needlessly protracted. The drain on judicial resources this entails creates a countervailing pressure in the lower courts to avoid that analysis by fitting into the narrow per se category all conduct that could conceivably be characterized as such. The danger in those instances is that conduct that is, or may be, procompetitive will categorically be barred, to the detriment of consumers and the economy.

It is our submission that antitrust analysis is not restricted to these two extremes, a per se category that precludes an examination of actual effects, and an elaborate, "full-blown" category that requires precise measurement of markets and market power. Rather, as this Court's decisions in *Broadcast Music* and *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982), suggest, there is some middle ground in the continuum of antitrust analysis. Often a restraint can escape per se condemnation and yet be judged unreasonable without a full evaluation of its precise effects in the marketplace. For example, the market power of a combination may be so obvious that no elaborate evaluation is needed and rule of reason analysis may therefore be "truncated."[6]

Similarly, where conduct is facially suspect because it tends to restrict the output of collaborators by its very nature, and a limited examination of the proffered justifi-

---

[6] L. Sullivan, *supra*, at 192; see P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center June 1981) (*Areeda Monograph*); see generally *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980); *American Medical Ass'n*, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982).

The abbreviated rule of reason inquiry we describe in this brief is merely an application of this Court's own recognition that certain conduct may be held to be unreasonable in the absence of minute scrutiny. By carving out a "per se" category for restraints conclusively presumed to be unreasonable, the Court has approved an inquiry far more truncated than what we propose here. See note 2, *supra*.

cation indicates that it will produce little or no procompetitive effect, there is no need for a searching inquiry into likely or actual competitive effects. The "weighing" of competitive effects is simplified greatly—with no expected procompetitive effect to balance against the inherent anticompetitive effects, the restraint can be held to be unreasonable without precise measurement of its probable harm to competition.[7] In such a situation, it would be an unnecessary waste of judicial and private resources to require the plaintiff to prove the precise nature and amount of competitive injury.

As Professor Areeda has aptly noted (*Areeda Monograph* 37):

> That something is not unlawful per se does not always require refined fact finding or balancing; indeed, a particular defense may be rejected categorically or presumptively within the general ambit of a rule of reason.

The rule of reason does not, then, always require an elaborate and precise measurement of harm; in fact, it "can sometimes be applied in the twinkling of an eye" (*id.* at 38).[8]

---

[7] Judge Bork has explained why inherently suspect conduct should be summarily condemned once it is clear that no efficiency will result from the challenged restraint (R. Bork, *supra,* at 369):

> There being no possibility of efficiency, nothing is lost to society by outlawing the agreement. If these parties were allowed to prove lack of market power, * * * [a] cartel in the steel industry could not be declared unlawful without a trial on the cross-elasticities of demand between steel, aluminum, copper, cement, wood, and so on. There would be no net gain from such trials. In fact, the only result would be to make the prosecution of output-restricting cartels much more difficult, rendering the law less effective.

Once a proffered efficiency justification is rejected, Judge Bork would call the restraint "naked" and therefore per se illegal. Although we believe it is more precise to say that a truncated form of rule of reason analysis is being applied, the economic and policy analysis is identical whatever label is used.

[8] The Federal Trade Commission has also recognized that "the contours of the analysis required under the rule of reason will vary somewhat depending upon the nature of the restraint." *Ameri-*

In *Broadcast Music*, this Court provided an analytical framework for evaluating concerted activity. The Court posed two central questions in attempting to characterize the blanket copyright licenses challenged there: first, is the practice "'plainly anticompetitive'" (441 U.S. at 8 (citation omitted)) in that it "facially appears to be one that would always or almost always tend to restrict competition and decrease output?" (*id.* at 19-20). And, second, is the practice "designed to 'increase economic efficiency and render markets more rather than less competitive'?" (*id.* at 20 (citation omitted)).

With those two questions, *Broadcast Music* sharply focused the characterization process: courts should first ask whether challenged conduct is likely, absent an efficiency justification,[9] to lead to the restriction of output, for such conduct is inherently suspect. Where output restriction does appear likely, we must ask whether there is a plausible efficiency justification for the practice, *i.e.*, is there reason to believe that the restraint may nonetheless have significant efficiency benefits and therefore enhance competition and output. In the event that there is no plausible efficiency justification, the suspect practice is per se illegal because there are no possible procompetitive effects to offset its inherent tendency to reduce output and thereby injure competition and consumer welfare. See *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980).

But, in cases where the participants raise a plausible efficiency justification for conduct that is facially sus-

*can Medical Ass'n*, 94 F.T.C. 701, 1004 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982). "Where horizontal arrangements * * * closely relate to prices * * *, a less elaborate analysis of competitive effects is required." *Michigan State Medical Society*, [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 21,991, at 22,461 (Feb. 17, 1983).

[9] An efficiency justification exists if the challenged restraint increases the quantity or quality, or reduces the cost, of overall output—*e.g.* by creating a new product, improving the operation of a market, or reducing production or marketing costs—*and* is reasonably necessary to achieve such efficiencies.

pect, per se characterization is inappropriate, because more scrutiny is needed to evaluate the restraint's overall competitive effect. It may be that further examination will show that the proffered efficiency justification should be rejected; in that event, the conduct can still be condemned as unreasonable without completing a "full" rule of reason analysis that includes market definition and market power determinations. On the other hand, if efficiency benefits are shown to be likely, a more elaborate rule of reason inquiry is called for, with a thorough analysis of market power, in order to determine whether the practice is, on balance, harmful or beneficial.

It will, of course, be easier in some instances than in others to determine whether there is merit to a proffered efficiency justification for suspect conduct. Some agreements will clearly be "naked restraints" with no purpose except stifling competition, and will have no efficiency justification, or the justification offered may be clearly untrue, frivolous or de minimis. Similarly, an "efficiency" argument can be summarily rejected if it is not based on an enhancement of competition, but instead argues that the particular characteristics of an industry require a lessening of competition in order to promote trade or some other public value. Even if such a claim is couched in terms of "efficiency," it is not a cognizable antitrust defense. *Professional Engineers*, 435 U.S. at 689.

The assessment of an efficiency explanation will often be more difficult when, as in this case, the collaborators are engaged in a form of productive economic integration. Nevertheless, it is not enough that a restraint *accompanies* an otherwise legitimate cooperative activity (such as the creation of a new product, or operation of a market exchange). A restraint that appears inherently likely to restrict output or enhance price can be justified as an efficiency only if it is also "capable of increasing the effectiveness of that co-operation and no broader than *necessary* for that purpose." R. Bork, *supra*, at 279 (emphasis added).[10]

---

[10] Accordingly, the analysis in *Broadcast Music* did not end when this Court noted that the blanket license and fixed prices "accom-

Thus, even if the challenged conduct is that of a cooperative joint venture that legitimately integrates certain production or marketing functions, this does not mean that the conduct can never be condemned as unlawful without extensive inquiry into its actual competitive effects. The nature of the joint venture's conduct—and not merely its designation as a joint venture—is determinative.[11] See, generally, Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1523 (1982). If a limited examination reveals that its principal purpose or effect is to stabilize prices or restrict output of products previously sold by the venturers independently, or that the procompetitive integrative functions of the joint venture are not dependent on the challenged restrictions, its restrictive conduct should be struck down as unlawful under a truncated rule of reason analysis without further scrutiny.[12]

pan[y] the integration of sales, monitoring, and enforcement against unauthorized copyright use" (441 U.S. at 20). Instead, the Court went on to emphasize that a "middleman with a blanket license was an obvious necessity" in the industry (*ibid.*), and that "a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established" (*id.* at 21).

[11] It is well-established that anticompetitive rules or practices of a voluntary membership association are subject to the antitrust laws where a "valuable service germane to petitioners' business and important to their effective competition with others [is] withheld from them by collective action." *Silver* v. *New York Exchange*, 373 U.S. 341, 348-349 n.5 (1963). See *Associated Press* v. *United States*, 326 U.S. 1 (1945); *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1373-1374 (5th Cir. 1980); Bodner, *Antitrust Restrictions on Trade Association Membership and Participation*, 54 A.B.A. J. 27, 28 (1968); Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 Colum. L. Rev. 1325, 1345-1346 (1970). Although membership in the NCAA is "voluntary" in that a member can withdraw at any time, membership is essential for any school that wishes to engage in intercollegiate athletics, *i.e.*, to have a well-rounded sports program, to recruit quality athletes, and to compete in national championships. Pet. App. 53a-54a, 101a-102a; Tr. 125, 294-297, 335-336.

[12] See *Maricopa*, 457 U.S. at 352. Although *Maricopa* does not explicitly adopt the analytical framework outlined above, the de-

This does not mean, of course, that plaintiffs and courts can merely second-guess those participating in an otherwise legitimate enterprise, and invalidate any restraint that is not the "least restrictive" imaginable or practicable. Like many antitrust questions, whether a restraint is "reasonably related" or "reasonably necessary" to procompetitive collaboration requires a court to exercise its judgment, but, as was true here, courts have proven to be quite capable of making those judgments. See *Areeda Monograph* 8-10; pages 20-30, *infra*.[13]

Where the practice at issue is shown to pose high anticompetitive risks because, on its face, it restricts output or restrains price competition, a court can and should address the above efficiency questions without conducting

---

cision is fully consistent with this framework and with the similar approach employed in *Broadcast Music*. The Court in *Maricopa* sought to analyze whether the challenged agreement might enhance competition significantly (457 U.S. at 351-354). In concluding it would not, the Court stressed that the insurance carriers, not the physicians, underwrote the health care plans and that it was not necessary for physicians to establish the fee schedules in order for the plans to function effectively (*id.* at 352); moreover, the Court clearly indicated that competitors who act jointly could avoid the per se price-fixing rule when they form "partnerships or other joint arrangements in which [they] * * * pool their capital and share the risks of loss" (*id.* at 356). Thus, given the facts of record, the outcome in *Maricopa* can be understood as reflecting a judgment that the joint setting of prices, a facially suspect practice, was not shown to be ancillary to any operational integration or other efficiency-enhancing arrangement that could justify avoidance of the per se rule. The joint fee schedule was not reasonably related to the doctors' peer review activities. Nor was it reasonably related to the "approved" health care coverage offered and underwritten by independent insurance carriers (rather than by the physicians, who were not joint venturers with the insurers and bore no financial risk). It was also clear that the insurers could have offered such plans without using fee schedules established by a physician group. Therefore, the respondents had not shown any efficiency justification for a facially suspect practice, and the Court declared it unreasonable per se.

[13] See, *e.g.*, *American Medical Ass'n* (medical society's ban on all advertising by physicians found to be overbroad, since goal of protecting patients from deception could be achieved directly by banning false and deceptive advertising).

a "full" rule of reason analysis of market definition and market power. *Broadcast Music,* 441 U.S. at 19 n.33. If at any point it becomes clear that the collaborators have no viable, significant efficiency justification, a facially suspect restraint can be condemned without further inquiry.

### B. The Court of Appeals Should Not Have Condemned the NCAA's Conduct as Per Se Unlawful

Applying this analysis to the present case, the NCAA's televison controls should not be invalidated under the per se rule. Even though the conduct facially appears to restrict output, NCAA has offered plausible efficiency justifications that must be weighed. The court of appeals found that petitioner's conduct constituted price fixing and was illegal per se because it restricted output and manipulated price (Pet. App. 6a-7a).[14] It rejected NCAA defenses to the per se rule, finding that the restraints did not promote efficiencies in legitimate rulemaking functions, and were unnecessary to achieve the joint marketing of a more competitive product (Pet. App. 13a).[15]

[14] The court noted two aspects of "price-fixing": First, a single price is set for the entire football television package. Second, every national and regional game in the package commands the identical price: more prominent, better quality teams and more widely viewed games cannot garner higher prices; less popular teams cannot offer lower prices to make their games attractive to broadcasters. The court of appeals found that, while this latter distribution of revenues "distort[s] * * * free market forces" it does not in the aggregate constitute price enhancement, *i.e.*, "price-fixing" (Pet. App. 7a n.5).

[15] The court rejected the contention (Pet. App. 10a) that the plan increases output by promoting live attendance at the stadium. It specifically noted the district court's rejection of the claim that the plan enhances live viewership (Pet. App. 10a n.8), and did not quarrel with that finding. It noted that total viewership—including television and live audiences—was not necessarily increased, and that the reduced availability of desirable options for football viewers suggested ineffeciencies rather than competitive benefits. The court also rejected the argument that the restraint promotes competitive balance. As a noneconomic justification, the court deemed it irrelevant. In any event, it concluded that balance could be achieved by less restrictive means (Pet. App. 11a; see *id.* at 10a n.7).

In our view, however, this case does not warrant per se treatment. It does not involve conduct of a type with which the courts have substantial experience, such as straightforward price fixing by competitors (see *Broadcast Music*, 441 U.S. at 9-10, 19 & n.33). Nor does it involve a naked restraint imposed by competitors who have no legitimate cooperative relationship with one another. See Blecher & Daniels, *Professional Sports and the "Single Entity" Defense Under Section One of the Sherman Act*, 4 Whittier L. Rev. 217, 237 (1982). The NCAA has shown (and respondents do not deny) that a certain amount of cooperation between the colleges is necessary and that some form of regulation is desirable, and probably necessary, for the organization and preservation of amateur intercollegiate athletics (Pet. App. 6a, 9a).

In essence, the NCAA argues that its challenged conduct enables the joint venture to offer a new product—ordinarily a procompetitive activity (Pet. 15-17). It describes itself as a rulemaking and promotional association, like a trade association engaging in permissible regulatory behavior (Pet. 2). It also describes itself as a joint selling agency for its member institutions who have agreed to transfer to it the sole authority to negotiate the sale of their output, *i.e.*, the right to broadcast the games in which they compete (Pet. 3, 8). Generally, such joint selling agencies are not subject to per se condemnation; rather, at least a limited scrutiny of the effect of the restrictions is appropriate. See, *e.g.*, *Broadcast Music*, *supra*. Indeed, while the court of appeals held the current "exclusive control" of television rights unlawful, it reserved decision on whether television "rights may be [otherwise] commonly regulated" (Pet. App. 27a). Such reservations "tend to impeach the *per se* basis for the holding of liability." *Broadcast Music*, 441 U.S. at 17 & n.27.[16] Where an agreement's "competitive effect can only

[16] Because the success of a sports league requires some sort of economic joint venture—no team can engage in a competitive sport by itself—the courts and commentators generally deem it advisable to eschew per se condemnation and evaluate regulations

be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed" it is properly evaluated under a rule of reason rather than treated as unreasonable per se. *Professional Engineers*, 435 U.S. at 692; see *White Motor Co.* v. *United States*, 372 U.S. 253 (1963).

## II. THE COURT OF APPEALS CORRECTLY HELD THAT THE NCAA TELEVISION PLAN IS UNLAWFUL UNDER THE RULE OF REASON

Although petitioner's conduct is not unreasonable per se, it is facially suspect for the reasons stated by the lower courts. Both courts below made alternative findings that the challenged conduct was unduly restrictive under a rule of reason analysis. We believe that their factual findings support, under the analytical framework discussed above, the conclusion that the challenged conduct unreasonably restrained competition. Accordingly, the judgment below should be affirmed.

After a full trial, the district court concluded, and the court of appeals agreed, that the NCAA's controls appear on their face to be the type of restraints that would tend to reduce output and limit the choices available to buyers. It is clear, and both courts below found, that absent these controls the amount of such broadcasting would be much greater, the televised games would better coincide with consumer preferences, and payments received would vary considerably to reflect anticipated viewer interest in each particular football match-up.

---

of such leagues under the rule of reason. See, *e.g., Smith* v. *Pro Football, Inc.*, 593 F.2d 1173, 1180-1181 (D.C. Cir. 1978); *Mackey* v. *NFL*, 543 F.2d 606, 618-620 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977); *Los Angeles Memorial Coliseum Commission* v. *NFL*, 484 F. Supp. 1274, 1276 (C.D. Cal. 1980), rev'd on other grounds, 634 F.2d 1197 (9th Cir. 1980); *Kapp* v. *NFL*, 390 F. Supp. 73, 80-81 (N.D. Cal. 1974), aff'd, 586 F.2d 644 (9th Cir. 1978), cert. denied, 441 U.S. 907 (1979); Blecher & Daniels, *supra*, at 238; Closius, *Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry*, 24 B.C.L. Rev. 341, 345 (1983); Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws:* Los Angeles Memorial Coliseum v. National Football League, 15 Conn. L. Rev. 183, 192 (1983).

Once the plaintiffs established the high anticompetitive potential of the challenged conduct, the burden of coming forward with countervailing evidence of an efficiency justification was placed on the defendant. The district court made a series of factual findings, which were not clearly erroneous, that the restraints were unlikely to enhance the efficiency of NCAA's legitimate rulemaking and promotional activities because: (1) petitioner's defense amounted to a claim that competition had to be restricted in this way for the market to operate properly, an argument not cognizable under the antitrust laws (see *Professional Engineers*, 435 U.S. at 689); and (2) there was little or no evidence to support a conclusion that efficiency would be enhanced by the controls, while there was persuasive evidence to the contrary.[17]

[17] This conclusion is clearly correct. For example, in arguing that its broadcast rules contribute to legitimate NCAA promotional efforts, petitioner asserts that the rules are necessary to overcome free-riding problems and thereby motivate networks to promote NCAA football broadcasts. There appears to be no merit to this free-rider argument. First, there is no reason to believe that a network would not adequately promote its own NCAA football broadcasts either because other games might also be televised on other networks or because it is not guaranteed an entire series of games. Networks vigorously promote particular situation comedies, soap operas, adventure series, movies, college basketball games, and major sports events, even though other networks have similar programming. There appears to be no lack of promotion and resultant decrease in output because networks fear free-riding by their competitors. Indeed, since the NCAA now contracts with more than one network, as well as with a cable firm, for the broadcasting of college football games, it apparently no longer believes that exclusivity is needed to achieve adequate promotion.

Second, many viewers are not interested in seeing just *any* NCAA football game—they want to know which game is being presented. When a network announces that it will show a particular, desirable game, other networks cannot free-ride in any significant way, because they will not be showing the same game. Free-riding succeeds only for products with identical characteristics. See R. Posner, *supra*, at 149-150. Similarly, there has been no showing and there is no reason to believe that the NCAA "brand" is what attracts viewers to a particular game. The common sense of the matter is that viewers are more attracted by the reputation of the particular teams, by local interest, or by conference rivalries, than

On these findings, the lower courts could have determined, without an elaborate inquiry into market power or actual anticompetitive effects, that the NCAA's exclusionary policies violated the Sherman Act under the rule of reason. We develop the application of this analysis to this case more fully below.

### A. The District Court Correctly Held That Plaintiffs Satisfied Their Burden of Showing the Significantly Anticompetitive Potential of the NCAA's Conduct

In the present case, the NCAA's member colleges have agreed not to compete in the sale of television rights. Independent decisionmaking by the colleges has been replaced by a joint venture, which acts as exclusive selling agent. The record contains evidence supporting the district court's finding that "many more games would be televised in a free market than are televised under NCAA controls" (Pet. App. 91a; Tr. 252-253, 537-539, 859-860, 1003-1007, 1305), and the court of appeals specifically endorsed this finding (Pet. App. 14a). Indeed, the district court found that the very purpose of the NCAA's policy was to limit individual members' sales (Pet. App. 66a-67a). The NCAA's football television policy also artificially suppressed product diversity by restricting the opportunity for regional or local broadcasts of individual college games of local interest, and deprived consumers (viewers) of their choice of games by limiting the number of television appearances by individual

by the NCAA label—especially since virtually all televised college football games involve NCAA schools.

Finally, while it may indeed be true that a network is more motivated to promote the NCAA when it has rights to a series of games over the entire season (as opposed to sporadic rights to individual games), no one is challenging here the right to offer a series contract. As with other arguments made by petitioner, a justification that warrants the offering of a season-long contract does not explain or justify the need for exclusivity. Even if free-riding somehow made it desirable to offer networks an entire series of games, the NCAA has suggested no basis for concluding that free-riding justifies exclusive contracting rights and the prohibition of individual negotiations by member schools or conferences.

teams. The evidence showed that these restrictions reduced the opportunity for many smaller schools to appear on television (either locally or regionally) (Tr. 252-253, 537-539), and reduced the opportunities for the major football schools to appear (either on national or regional broadcasts) as frequently as consumer demand would dictate (Tr. 370-371, 856-857).[18]

In an attempt to minimize the significance of the competitive distortions resulting from its television policy, the NCAA contends that it lacks market power in the market for television programming because advertisers can use other programming to reach their desired audiences (Pet. Br. 30-46).

As indicated, pages 7-10, *supra*, where the challenged conduct would, on its face, appear directly to restrict output or fix prices, courts may, without undertaking precise market power analysis of the type required in monopolization and merger cases, require the defendant to justify the challenged conduct in terms of its procompetitive potential. See *Professional Engineers*, 435 U.S. at 692; *American Medical Ass'n* v. *FTC*, 638 F.2d 443, 449-450 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982). Here, however, the lower courts did not rely solely on the inherent anticompetitive potential of the challenged conduct. Instead, they concluded, on the basis of findings that are not clearly erroneous, that the NCAA had substantial power in the collegiate football television market. The NCAA seeks to refute that market power finding by claiming that "[t]here is simply no way in which the NCAA, by cutting back the output of games, can induce advertisers to part with an extra nickel." Pet. Br. 38; see also Pet. Br. 40. But the networks and, derivatively, the advertisers

[18] This type of collective suppression of product diversity can be as anticompetitive as collusive reductions in output. Such behavior interferes with consumer choice and can give rise to the same types of inefficiencies that are the ultimate concern of all antitrust prohibitions, *i.e.*, reduced output of desired products and increased consumption of less desired substitute products. See, *e.g.*, R. Dorfman, *Prices and Markets* 155-156 (3d ed. 1978); R. Bork, *supra*, at 98-101.

(see Pet. Br. 38) in fact do pay more for the exclusive NCAA contracts than they would pay if schools could sell rights outside the package as well. The exclusionary feature of the package allows the chosen few networks to deliver larger audiences to advertisers than would be the case if there were competing local or regional telecasts arranged by those schools that would sell their television rights to broadcasters but for the NCAA restraints (Pet. App. 67a; Tr. 1248).

Moreover, if college football telecasts actually were only an undifferentiated part of a large entertainment television market, there would be no need for the networks to seek an exclusive right to telecast the games. Such games would be subject to intense competition from other equally attractive forms of television entertainment. The fact that the networks seek, and obviously pay, to limit the amount of competition from other college football telecasts even though they face other forms of television competition, reflects their recognition that college football is indeed a distinct product in the eyes of a significant number of viewers. See also Tr. 256-257, 357-361. For this group of consumers, the NCAA's restraints on the variety and output of college football telecasts have significant anticompetitive effects. As NCAA's own expert testified, advertisers often want to reach different audiences with their advertising packages, and college football reaches an audience on Saturday afternoons that is not necessarily available at other times through other programming (Tr. 1234-1236, 1238, 1251, 1292). NCAA concedes that advertisers are willing to pay more for this audience (Pet. Br. 33).

There was no need for the respondents to establish monopoly power in any precisely defined market for television programming in order to prove the restraint unreasonable. Both lower courts found not only that NCAA has power over the market for intercollegiate sports, but also that in the market for television programming—no matter how broadly or narrowly the market is defined—the NCAA television restrictions have reduced output, subverted viewer choice, and distorted pricing. Consequently, unless the controls have some countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power over advertising dollars. While the "reasonableness" of a particular alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed, market power is only one test of "reasonableness" (2 P. Areeda & D. Turner, *Antitrust Law* ¶ 500, at 321 (1978)). And where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.[19]

### B. The Court of Appeals Properly Rejected Petitioner's Defenses

The NCAA has argued that in the creation of the college football television rights, it functions as a joint venture, similar to the performing rights societies in *Broadcast Music* (Pet. 15). But the fact that the NCAA performs some legitimate joint venture activities serves only to begin the rule of reason inquiry, not to end it. In view of the suspect nature of its television restrictions, the NCAA had the burden of demonstrating a sufficiently strong relationship between the restraints and its productive activities.

The NCAA did in fact proffer several justifications, and the district court heard the evidence presented as to their validity. It then concluded not only that the NCAA had failed to carry its burden of proof, but also that plaintiffs' evidence was more convincing. The court of appeals was therefore correct in holding that there was sufficient record evidence to sustain the conclusion reached

---

[19] See R. Posner & F. Easterbrook, *Antitrust* 347 (2d ed. 1981) (noting in their chapter dealing with market definition and market power as an "Introduction to the 'Power Offenses'" that an analysis of market power is generally not required for practices, such as per se offenses under Section 1, which evidence no redeeming virtue).

by the district court, and there is no reason for this Court to overturn the factual findings on which the two lower courts agree. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[20]

1. The NCAA claims that its television controls are necessary to maintain a competitive balance among the teams that play against one another on television (see, *e.g.*, Pet. Br. 20-22). It argues that the television package puts competing teams on a more equal footing and results in more evenly matched, hence more exciting, games; this, it is said, better enables college football to compete with other forms of television programming. There is little, if any, evidentiary support for this position, however.

We do not gainsay that the success of college football requires sufficient parity among competing teams to create some unpredictability as to the outcome of individual games. In fact, the NCAA has a number of rules that seek directly to promote competitive parity in college football. These rules limit the sizes of squads, the number of scholarships that may be offered, the number of practices that may be held, the sizes of coaching staffs, the numbers of years of eligibility, and minimum scholastic performance levels for obtaining and maintaining eligibility (Pet. App. 9a)—all without direct restrictions on output.

---

[20] In particular, we believe that the NCAA has failed to explain the necessity of its assuming the role of exclusive selling agent for the colleges, *i.e.*, how the product would be damaged if colleges were granted the right to contract independently with local stations for the broadcasting of individual games (see Pet. App. 70a). Indeed, the courts below noted this as a major distinction between the present case and *Broadcast Music*, in which, although the performing rights societies organized umbrella sales agreements, individual authors retained the power to sell the performing rights to their compositions on an individual basis (Pet. App. 14a, 93a). Even if it were found to be procompetitive for there to be a weekly NCAA "game of the week" on network television, that would not require that all schools whose games are not selected to be shown in any given week be prevented from selling their television rights to local, regional or national broadcasters.

The telecasting restrictions are, at best, an indirect means of promoting the parity that are the direct objective of other NCAA rules, and there is little support for the NCAA's contention that the television restrictions play a significant role in promoting competitive parity.[21] First, the restraints have not prevented the emergence of a "power elite" among the major football schools (Pet. App. 98a; cf. Pet. Br. 22 n.11), and yet that elite has not dominated the sport to the detriment of competition. Second, the NCAA has not imposed exclusivity restrictions on the telecasting of college basketball games, although competitive parity is presumably as important in basketball as it is in football (Pet. App. 47a-48a). The absence of such telecasting restrictions has not led to competitive imbalance in college basketball (Pet. App. 76a; Tr. 240-242). With this background, it is not surprising that witnesses testified, and the courts found, that a loosening of the NCAA's restrictions would result in the proliferation of televised football on the local and regional levels (Pet. App. 14a, 21a; Tr. 252-253, 537), with a concomitant increase of television income to those whose games are rarely broadcast under the current system.[22]

[21] There is no evidence that competitive parity throughout the entire NCAA Division I membership is necessary to provide football that consumers want. The NCAA itself recognizes the different caliber of football played by its members by dividing them into different classes, *e.g.*, I-A, I-AA, II and III. It is well known that there exist significant disparities among the qualitative levels of football played in different conferences, *e.g.*, compare the "Big Eight" to the "Ivy League." Nonetheless, there are many fans of "Ivy League" football. At best, there appears to be a need for some semblance of competitive parity within a conference, but the NCAA made no attempt to justify its national restrictions on television marketing on the basis of such intra-conference parity needs—needs that extend to non-televised as well as televised games.

[22] The apparent anomaly of the NCAA member schools' supporting a restrictive football telecasting policy that lessens the total income received for football telecast rights may be attributable to the fact that the current policy benefits financially those member schools that do not play football (approximately 300 schools, see Tr. 769), or football schools in Divisions II and III that are unaffected by the current restrictions (300 additional schools, Tr.

The NCAA, of course, offered conflicting testimony. But as the district court noted, although various witnesses for the NCAA argued that the restrictions were necessary, none was able to articulate any credible reason why that was so (Pet. App. 70a).

2. The courts below also correctly rejected the NCAA's claim that uncontrolled telecasting would result in the reduction of live attendance at football games (cf. Pet. Br. 25-27). This argument stems from the notion that abridgement of competition in the telecasting of college football is necessary to maintain live attendance at games, which in turn is necessary to the success of college football. There is little evidentiary support for this two-tiered speculative claim. First, the predictions of harm caused by telecasting were not borne out by the evidence (Pet. App. 68a-70a, 10a n.8); moreover, the NCAA's own witnesses testified that, at best, television's impact on live attendance was "slight" or "small" (Tr. 954, 1049). Other witnesses testified to studies that showed no negative impact by television on live attendance (Tr. 320-321, 326-327; see also Tr. 817).[23] Indeed, the NCAA has steadily increased the number of games in its football package every time it has negotiated a new network package.

The most compelling reason to reject the NCAA's position is that it fails to present a valid efficiency argument. Even if we adopt petitioner's assumptions, there is no reason to believe the rules enhance efficiency; they merely prevent competition. Thus, the NCAA argues that the restrictions "increase live attendance at games by reducing the conflict between telecasting and live games" (Pet. Br. 25) and that the rules are needed to protect or raise revenues from live attendance (*ibid.*). All output restrictions are meant to enhance revenues or prices; anti-

770). Although not directly affected by the rules, these members can control the voting.

[23] Although the court of appeals found "some evidence that supports the conclusion the plan enhances live viewership," it noted the district court's rejection of the argument and did not find it to be clearly erroneous (Pet. App. 10a & n.8).

trust law, however, allows collaborators in a productive joint venture to limit competition in order to protect each other's revenues only when a significant efficiency results. The NCAA has not demonstrated any such efficiency and none is apparent.

It appears, therefore, that the sole purpose of the rules imposed to protect the live gate is to prevent the price of tickets from falling due to competition from televised games. Without televised college football, schools are virtual monopolists or oligopolists in their localities in selling live college football. Televised games, however, turn schools that never competed for live audiences into potential or actual competitors for viewers. The NCAA wishes to prevent that "conflict" or competition from developing—because competition drives down the price of tickets at stadiums; to get the same number of people to the stadium, a school may have to lower its ticket prices when college football is also being shown on television. Preventing competition in order to preserve a monopoly position is hardly an efficiency goal.

The NCAA also argues, however, that it creates two products—attendance at stadiums and broadcast rights to college football games—and that efficiency or output is enhanced by preserving live gate attendance. An analogy may be useful to show that the underlying purpose is to restrict competition rather than enhance efficiency. Motion picture producers also produce a product that can be seen in two locations—in a theater and at home on a television set. If all major movie companies agreed, however, to limit the number of films they permit on television in order to preserve theater revenues (or if they agreed to allow none to be aired on weekend nights), we would scarcely say that they were increasing output or efficiency. Like the NCAA, the movie makers would be limiting output and competition in order to protect prices and revenues. The live gate argument, therefore, was properly rejected.[24]

---

[24] To the extent that the NCAA contends that its television restrictions are necessary to achieve laudable goals unrelated to promoting competition, *i.e.*, a sharing of the wealth provided by

3. The NCAA also suggests that its restrictions on the telecasting of football games makes possible various production cost savings and the creation of a "series" (Pet. Br. 22-24). Petitioner argues that fewer production crews are needed for the games telecast by the networks under the present exclusive contract than would be needed absent the exclusivity provisions (*id.* at 24). A plausible showing of such joint venture savings, if significant in terms of total expenses, might, as petitioner suggests, take the case out of the per se category. But, if further examination reveals the justification to be insubstantial, it must be rejected and the restraint deemed unreasonable.

We have found no evidence in the record to support the claimed existence or significance of such production cost savings, and the NCAA points to none. The claim is economically illogical, moreover. If broadcasters, free of the NCAA restraints, contract with schools to televise additional football games, and incur the expenses of doing so, it is because they believe that the gain to viewers, as reflected in the willingness of advertisers to support the additional program, more than outweighs its production costs. Under the NCAA's approach, in contrast, it alone decides what number of football games are "enough" for the viewing public, and, like a classic monopolist, reduces output to that level. Insofar as any "savings" could be realized by NCAA's reducing the joint output of its members, however, a court can only conclude that such savings are attributable directly to the restriction of output (and the market power that makes it possible) and can hardly justify the competitive restraint that produces them.[25]

television, the defense is not cognizable under the antitrust laws (see Pet. App. 10a n.7). Indeed, it is precisely the type of defense rejected by this Court in *Professional Engineers,* 435 U.S. at 689-692.

[25] Every price-fixing agreement could be said to enhance efficiency, by reducing the transaction costs of sellers in determining their prices and the search costs of consumers in deciding which product to purchase. This type of "efficiency" claim is attributable solely to the elimination of competition, however, and the Court has rejected it. See *Catalano, Inc.* v. *Target Sales, Inc.,* 446 U.S. at 649;

The argument (Pet. Br. 23) that no single broadcaster would "promote" NCAA football if the benefits of that promotion would inure to other broadcasters also invites skepticism, since there are now three networks that carry NCAA football, and presumably each of them is promoting it. See note 17, *supra*. Similarly, there is no reason to believe, as the NCAA contends (Pet. Br. 23), that in a competitive market games would have to be sold in advance of the football season, preventing networks from having flexibility in choosing the most interesting games for their "game of week" series. Schools are eager for the exposure of national television. There is every reason to believe, therefore, that schools, in entering into local or regional television sale contracts, would reserve the right to appear on a national network, if chosen. In sum, the NCAA's argument about cost efficiencies is merely an unpersuasive attempt to relitigate the facts.[26]

4. The NCAA contends that the fact that the television networks engage in competitive bidding for the NCAA package saves it from condemnation (Pet. Br. 46-49). But the product offered for that competitive bidding is an exclusive contract that the lower courts found reduces output and consumer choice. In any event, petitioner's argument rests on asserted benefits flowing from the NCAA package—*e.g.*, "promot[ing] competitive balance," "increas[ing] viewership on TV," and enabling "TV stations to deliver football at a lower cost per viewer" (Pet. Br. 48)—that find no support in the record, or that

*Maricopa*, 457 U.S. at 353-354; accord, R. Bork, *supra*, at 268; *Areeda Monograph* 43-44.

[26] Petitioner's attempt to analogize the NCAA football package to television programs such as "Dynasty" (Pet. Br. 23) also fails. Unlike the producers of a series like "Dynasty," the NCAA does not produce or create the football games at issue. The individual schools produce the teams and schedule their games, often many years in advance. They did so prior to the advent of television and they continue to do so now. Moreover, such an entertainment series, unlike college football, does not constitute a distinct programming market, and the packaging of such a series does not prevent the broadcast of similar, competing programs.

are contradicted by the lower courts' findings. The courts below found that the NCAA package does not directly contribute to competitive parity, nor does it increase TV viewership.[27] To the contrary, the two courts below found that the "exclusivity" of the football television package in this market is contrived in the sense that it is not attributable to demonstrable efficiencies; and that, absent the NCAA controls, more televised games would be offered and sold. Petitioner simply has not offered a satisfactory justification for that market distortion.

5. The NCAA complains that the court of appeals improperly placed the burden on it to "prove not only the existence and extent of procompetitive benefits but also the 'necessity' of the contractual arrangements" (Pet. Br. i). While this argument is framed as a defense to the per se holding only (*ibid.*), petitioner seeks to overturn

[27] In this context, petitioner's claim that it creates competition by offering a series contract through an exclusive sales agent should be rejected. Petitioner incorrectly equates the competition created when a single *buyer* asks all potential sellers to bid on an exclusive contract with its own situation in which all competitors create a single *seller* and ask buyers to bid for the exclusive contract. The NCAA joint sales situation is far more likely to create market power and output restriction than is one in which each seller is competing for the exclusive right to provide a product to an individual buyer over the term of a contract.

Petitioner's attempt to equate its football plan with the anesthesiology contract in *Hyde* v. *Jefferson Parish Hospital District No. 2*, 686 F.2d 286 (5th Cir. 1982), cert. granted, No. 82-1031 (Mar. 7, 1983), should be rejected. In *Hyde*, a single hospital located in a metropolitan area with numerous other hospitals entered into an exclusive supply contract with one group of anesthesiologists. This caused rival groups of anesthesiologists to compete to obtain the exclusive contract if they wanted to utilize the hospital's facilities. The instant case is not at all analogous. The *Hyde* facts would be similar to the NCAA's football plan only if they were turned on their head—if all anesthesiologists in the geographic market joined together in a group and told all the hospitals that anesthesiology services would be provided only as a package and under particular contract terms that specified a minimum amount of services, that limited the use of particular anesthesiologists who were held in high esteem, and that forced all hospitals to deal through the group rather than directly with any individual member.

the lower courts' rule of reason analysis on this basis as well (Pet. Br. 32-33). Petitioner's position on both of these issues, however, is contrary to established law.

Once the plaintiffs demonstrated the high anticompetitive risk inherent in the defendant's conduct (Pet. App. 6a-7a, 64a-66a), it was entirely proper to place the burden on the NCAA to establish its defense of countervailing benefits.[28] Although petitioner failed even to demonstrate that the football television restrictions were reasonably related to procompetitive aspects of its joint venture (see pages 20-26, *supra*), it claims that the lower courts erred in requiring it to prove that its restraints were absolutely necessary, in the sense that they were the least restrictive alternative for attaining competitive parity (Pet. Br. 29). This argument takes the word "necessary"

---

[28] In an antitrust suit, as in other civil suits, the burden of proof is on the party seeking relief. *Chrysler Corp.* v. *United States*, 316 U.S. 556 (1942); *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981). Once the plaintiff proves the existence of an unreasonable restraint, however, as respondents did here, the burden of proof shifts to the defendant to prove the existence of a defense to that statutory violation. "[T]he burden of proving justification * * * to the prohibitions of a statute generally rests on one who claims its benefits." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) (footnote omitted) (cost justification defense under the Robinson-Patman Act); accord, *United States* v. *First City National Bank*, 386 U.S. 361, 366 (1967) (defense under 12 U.S.C. 1828(c)(5)(B) to anticompetitive merger); see *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 138-139 (1969) ("failing company" defense under Section 7 of the Clayton Act, 15 U.S.C. 18); *Rosebrough Monument Co.* v. *Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1139 n.5, 1146 (8th Cir. 1981); *Phonetele, Inc.* v. *AT&T*, 664 F.2d 716, 739 (9th Cir. 1981), cert. denied, No. 81-2359 (Jan. 17, 1983); *Switzer Bros. v. Locklin*, 297 F.2d 39, 46 (7th Cir. 1961); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 560 (E.D. Pa. 1960), aff'd per cuiram, 365 U.S. 567 (1961); see also *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 8 (1958). This requirement that the defendant come forward with a satisfactory justification for an agreement after the plaintiff has proven its inherently anticompetitive nature or effect does not amount to an improper shifting of the burden of proof. *FMC* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244-246, 251, 253 (1968); *Areeda Monograph* 34.

out of the legal context in which it was used by the lower courts, *i.e.*, to mean "reasonably related to," and ascribes to it a meaning—"absolutely necessary," *i.e.*, there being no less restrictive alternative—not fairly attributable to those courts.

The requirement that a defendant show that an anticompetitive restraint is "necessary" to foster (*i.e.*, "reasonably related to") a legitimate business or statutory purpose is entirely consistent with an unbroken line of precedent. The rule was set out more than 85 years ago in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899) ("no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and *necessary* to protect the covenantee in the enjoyment of the legitimate fruits of the contract * * *. [I]f the restraint exceeds the necessity presented by the main purpose of the contract it is void").

This Court and the lower courts apply the rule routinely in examining the reasonableness of anticompetitive restraints.[29] While the clear availability of less restrictive alternatives is not dispositive, it is a relevant factor in determining whether a restraint is reasonably necessary.[30]

---

[29] *Silver*, 373 U.S. at 361; *NFL* v. *North American Soccer League*, No. 81-2296 (Dec. 6, 1982), slip op. 6 (Rehnquist, J., dissenting from denial of cert.) (anticompetitive practices "must be narrowly drawn to vindicate the legitimate interest"); *Roberts* v. *Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1482 (9th Cir. 1983); *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1372, 1376 (5th Cir. 1980); cf. Pet. Br. 17 & n.7.

[30] *White Motor Co.* v. *United States*, 372 U.S. 253, 270-272 & n.13 (1963) (Brennan, J., concurring); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1249-1250 (3d Cir. 1975); *Betaseed, Inc.* v. *U and I, Inc.*, 681 F.2d 1203, 1215, 1230 (9th Cir. 1982); *North American Soccer League* v. *NFL*, 670 F.2d 1249, 1259 (2d Cir. 1982), cert. denied, No. 81-2296 (Dec. 6, 1982) (Rehnquist, J., dissenting); *Rosebrough Monument Co.* v. *Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1145 (8th Cir. 1981).

The "reasonably necessary" standard is precisely the standard the district court applied here (Pet. App. 95a). There is no indication that either the district court or the court of appeals adopted any more rigid standard (cf. Pet. Br. 31-32 n.17). Neither court spoke of a "least" restrictive alternative. Indeed, neither court rejected petitioner's justifications solely because they were not necessary to effect the legitimate objectives of the NCAA. The justifications were rejected because they were found to be ineffective as well as unnecessary in advancing the objectives sought (see pages 20-26, *supra*). Thus, the "reasonably" necessary standard was not met. See *Bravman* v. *Bassett Furniture Industries, Inc.*, 552 F.2d 90, 102 (3d Cir. 1977).

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
*Solicitor General*

J. PAUL MCGRATH
*Assistant Attorney General*

LAWRENCE G. WALLACE
*Deputy Solicitor General*

DOUGLAS H. GINSBURG
*Deputy Assistant Attorney General*

JERROLD J. GANZFRIED
*Assistant to the Solicitor General*

BARRY GROSSMAN
ANDREA LIMMER
*Attorneys*

JOHN H. CARLEY
*General Counsel*
DAVID A. GIACALONE
*Attorney*
*Federal Trade Commission*

JANUARY 1984

☆ U. S. GOVERNMENT PRINTING OFFICE; 1984 430680 236