No. 97-1625

In the Supreme Court of the United States

OCTOBER TERM, 1998

CALIFORNIA DENTAL ASSOCIATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF REVERSAL

STEPHEN M. SHAPIRO
ALAN N. SALPETER
MICHAEL W. MCCONNELL
MICHELE L. ODORIZZI
Mayer, Brown & Platt
190 S. LaSalle St.
Chicago, IL 60603
(312) 782-0600

ROY T. ENGLERT, JR.*
DONALD M. FALK
DAVID A. J. GOLDFINE
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 463-2000

* *Counsel of Record*

ELSA KIRCHER COLE
General Counsel
The National Collegiate Athletic Association
6201 College Boulevard
Overland Park, KS 66211

GREGORY L. CURTNER
Miller, Canfield, Paddock and Stone, P.L.C.
1450 Broadway
41st Floor
New York, NY 10018

QUESTION PRESENTED

This brief addresses the second question presented:

Whether a court may enter judgment that a challenged practice violates that antitrust laws under the rule of reason after an abbreviated "quick look" analysis, without a showing (i) that the practice reflects an exercise of market power or produces actual anticompetitive effects, and (ii) that the proffered procompetitive justifications are so facially implausible that the challenged restraint may be regarded as naked rather than ancillary.

TABLE OF CONTENTS

Page

QUESTION PRESENTED I

INTEREST OF THE AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT . 4

ARGUMENT 6

I. A RESTRAINT SUBJECT TO THE RULE OF REASON CANNOT BE CONDEMNED AFTER A "QUICK LOOK" WITHOUT A SHOWING OF MARKET POWER OR ANTICOMPETITIVE EFFECTS IN A RELEVANT MARKET 8

II. THE "QUICK LOOK" MUST GIVE WAY TO FULL RULE-OF-REASON ANALYSIS ONCE A DEFENDANT HAS OFFERED A FACIALLY PLAUSIBLE PROCOMPETITIVE JUSTIFICATION 16

CONCLUSION 25

TABLE OF AUTHORITIES

Pages

44 Liquormart, Inc. v. *Rhode Island*,
517 U.S. 484 (1996) 15

Arizona v. *Maricopa County Medical Society*,
457 U.S. 332 (1982) 7, 23

Association for Intercollegiate Athletics for Women v. *NCAA*, 735 F.2d 577 (D.C. Cir. 1984) . . . 20

Banks v. *NCAA*, 977 F.2d 1081 (7th Cir.),
cert. denied, 508 U.S. 908 (1992) 3

BMI v. *CBS*, 441 U.S. 1 (1979) 8, 13

Cha-Car, Inc. v. *Calder Race Course, Inc.*,
752 F.2d 609 (11th Cir. 1985) 20

Chicago Professional Sports Ltd. Partnership v. *NBA*,
95 F.3d 593 (7th Cir. 1996) 10

Continental T.V., Inc. v. *GTE Sylvania, Inc.*,
433 U.S. 36 (1977) 23

Dedication and Everlasting Love to Animals v. *Humane Society*, 50 F.3d 710 (9th Cir. 1995) 23

FTC v. *Indiana Federation of Dentists*,
476 U.S. 447 (1986) . . . . *passim*

FTC v. *Superior Court Trial Lawyers Ass'n*,
493 U.S. 411 (1990) 7

Gaines v. *NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990) . . . 3

General Leaseways v. *National Truck Leasing Ass'n*,
744 F.2d 588 (7th Cir. 1984) 17

Goldfarb v. *Virginia State Bar*,
421 U.S. 773 (1975) 22, 23

Hairston v. *Pacific 10 Conference*,
101 F.3d 1315 (9th Cir. 1996) 3, 20

TABLE OF AUTHORITIES — Continued

Pages

Hertz Corp. v. *City of New York*, 1 F.3d 121 (2d Cir. 1993), cert. denied, 510 U.S. 1111 (1994) . . 20

Jefferson Parish Hospital District No. 2 v. *Hyde*, 466 U.S. 2 (1984) 13

Jones v. *NCAA*, 392 F. Supp. 295 (D. Mass. 1975) 3

Justice v. *NCAA*, 577 F. Supp. 356 (D. Ariz. 1983) 3

Klor's, Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) 23

Kupec v. *Atlantic Coast Conference*, 399 F. Supp. 1377 (M.D.N.C. 1975) 3

Law v. *NCAA*, 134 F.3d 1019 (10th Cir. 1998), cert. denied, 67 U.S.L.W. 3230 (Oct. 5, 1998) (No. 97-2004) . . . . *passim*

Lie v. *St. Joseph Hospital*, 964 F.2d 567 (6th Cir. 1992) 8

NCAA v. *Board of Regents*, 468 U.S. 85 (1984) . . . . . *passim*

NCAA v. *Tarkanian*, 488 U.S. 179 (1988) 1

National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978) . . . . *passim*

Northwest Wholesale Stationers, Inc. v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) . . 8, 13

Shelton v. *NCAA*, 539 F.2d 1197 (9th Cir. 1976) 3

Smith v. *NCAA*, 139 F.3d 180 (3d Cir. 1998), cert. granted, 67 U.S.L.W. 3187 (Sept. 29, 1998) (No. 98-84), and cert. denied, 67 U.S.L.W. 3234 (Oct. 5, 1998) (No. 98-107) 3

TABLE OF AUTHORITIES — Continued

Pages

State Oil Co. v. *Khan*, 118 S. Ct. 275 (1997) 6, 7

Times-Picayune Publishing Co. v. *United States*, 345 U.S. 594 (1953) 7

United States v. *Brown University*, 5 F.3d 658 (1993) 17, 20

United States v. *Columbia Steel Co.*, 334 U.S. 495 (1948) 14

United States v. *General Dynamics Corp.*, 415 U.S. 486 (1974) 14

Miscellaneous

7 PHILLIP E. AREEDA, ANTITRUST LAW (1986) . . . . *passim*

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Edward Correia, *Joint Ventures: Issues in Enforcement Policy*, 66 ANTITRUST L.J. 737 (1998) 7, 12, 14

Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) 7, 13, 18

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Joseph Kattan, *The Role of Efficiency Considerations in the Federal Trade Commission's Antitrust Analysis*, 64 ANTITRUST L.J. 613 (1996) 18, 19

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TABLE OF AUTHORITIES — Continued

Pages

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Joel I. Klein, Assistant Attorney General, Antitrust Division, A Stepwise Approach to Antitrust Review of Horizontal Agreements, Address to the ABA Section Semi-Annual Fall Program (Nov. 7, 1996), *reprinted in* [Current Comment] Trade Reg. Rep. (CCH) ¶ 50,157 . . . . 11-12, 18

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Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701 (1998) 8

BRIEF FOR THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF REVERSAL

INTEREST OF THE AMICUS CURIAE

The National Collegiate Athletic Association (NCAA) is an unincorporated, nonprofit association of more than 1100 colleges, universities, and athletic conferences engaged in intercollegiate athletic competition.[1] The NCAA was founded in 1906 to regulate intercollegiate athletic programs and contests to assure safer and fairer competition between schools. "One of the NCAA's fundamental policies is to maintain intercollegiate athletics as an integral part of the educational program * * * and by so doing, retain a clear line of demarcation between college athletics and professional sports." *NCAA* v. *Tarkanian*, 488 U.S. 179, 183 (1988) (internal quotation marks omitted). To that end, the NCAA exercises limited authority over its members' athletic programs to preserve equity in competition among student-athletes and their schools.

To produce and market the "product" of college sports, the NCAA must function as a joint venture among colleges and universities. No academic institution acting unilaterally could maintain an organized series of competitive athletic contests between colleges. And no single college could keep its athletic programs appropriately situated within a broader context of academic experience, unless it was willing to renounce all hope of athletic success against schools less devoted to that goal.

The NCAA is concerned with the second question on which this Court granted certiorari. That question calls on the Court to decide how antitrust courts should apply "quick look" analysis under the rule of reason.

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[1]Pursuant to Sup. Ct. R. 37, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded entirely by the NCAA and was written entirely by its counsel.

The proper application of the antitrust laws to collaborative undertakings is acutely important to the NCAA. In numerous antitrust lawsuits, including one that has reached this Court, plaintiffs have attacked cooperation among NCAA member institutions. It is settled that such cooperation is generally not to be judged under *per se* rules, because substantial cooperation is necessary for amateur college sports to exist at all: "[w]hat the NCAA and its member institutions" produce and market "is competition itself — contests between competing institutions" that constitute a "particular brand" of sports. *NCAA* v. *Board of Regents*, 468 U.S. 85, 101 (1984). Nevertheless, this Court concluded that the restraint at issue in *Board of Regents* could be condemned under what has come to be known as a "quick look" rule of reason, and antitrust plaintiffs have attacked other NCAA rules under the same approach. Proper understanding of the limits of the "quick look" is therefore important to the NCAA.

The NCAA also has an interest in this case because in many respects it acts, like the California Dental Association, as a joint standard-setting organization. The NCAA sets standards for the conduct of college athletic competition both on and off the field. In that role, and because its membership consists of academic institutions led by professional educators, the NCAA also resembles nonprofit professional associations like petitioner in this case.

This Court and the lower federal courts have come to understand that snap judgments do not do justice to the complex competitive issues presented by joint ventures, standard-setting organizations, and professional associations. As a result, antitrust analysis of these types of collaborations has become increasingly sophisticated.

A "quick look" analysis that lacked principled underpinnings could reverse this salutary trend. Courts generally have applied some form of the rule of reason, and often have applied a "quick look," to

NCAA rules and policies.[2] The most significant recent use of a "quick look" produced a broad injunction in *Law* v. *NCAA*, 134 F.3d 1019 (10th Cir. 1998), cert. denied, 67 U.S.L.W. 3230 (Oct. 5, 1998) (No. 97-2004), pet. for rehearing pending. The finding of liability that underlay the injunction has produced a $67 million award of damages that will be reviewed by the Tenth Circuit on appeal.

If this Court reaches the second question presented and thus addresses the antitrust analysis undertaken by the court of appeals, the Court will have to reassess the rule of reason in general and the "quick look" in particular. The Court's rulings may determine whether the NCAA can operate effectively and efficiently in the future, or whether instead it must relinquish its role in regulating not just the rules of play, but also the economic inputs to intercollegiate sports. Unprincipled application of the antitrust laws threatens not only the NCAA's ability to place limits on the conduct and compensation of athletes and coaches, but also its specifications for uniforms, equipment, season length, and hours of practice. All such specifications are potential targets for antitrust attack — in the absence of clear antitrust rules — because they may reduce the income of one input provider or another, and several such providers have shown a propensity to threaten or bring antitrust lawsuits.

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[2]See *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984); *Smith* v. *NCAA*, 139 F.3d 180 (3d Cir. 1998), cert. granted on other grounds, 67 U.S.L.W. 3187 (Sept. 29, 1998) (No. 98-84), and cert. denied, 67 U.S.L.W. 3234 (Oct. 5, 1998) (No. 98-107) (antitrust issue); *Hairston* v. *Pacific 10 Conference*, 101 F.3d 1315 (9th Cir. 1996); *Banks* v. *NCAA*, 977 F.2d 1081 (7th Cir.), cert. denied, 508 U.S. 908 (1992); *Shelton* v. *NCAA*, 539 F.2d 1197 (9th Cir. 1976); *Gaines* v. *NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990); *Justice* v. *NCAA*, 577 F. Supp. 356 (D. Ariz. 1983); *Jones* v. *NCAA*, 392 F. Supp. 295 (D. Mass. 1975); *Kupec* v. *Atlantic Coast Conference*, 399 F. Supp. 1377 (M.D.N.C. 1975).

In this brief, the NCAA suggests the proper scope of "quick look" analysis under the rule of reason. To assess the correct outcome of this case under the proper analysis would require thorough familiarity with the record before the Federal Trade Commission and the court of appeals. Lacking that familiarity, the NCAA submits this brief as amicus curiae in support of neither party. Because our position requires application of legal rules inconsistent with those applied by the Ninth Circuit below, however, we respectfully suggest that an appropriate disposition of this case would be to remand for review of the facts under the correct legal standards.

INTRODUCTION AND SUMMARY OF ARGUMENT

The second question presented in this case calls on the Court to clarify an important aspect of the rule of reason in antitrust law. Since this Court first applied an explicitly truncated rule-of-reason analysis in *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984), courts have struggled to formulate principles that would determine when to apply a full rule-of-reason analysis and when to afford a challenged practice only a "quick look" before condemning it.

There are two principal ways of regarding the "quick look." Under one view, the "quick look" is no more than *per se* condemnation accompanied by a cursory and dismissive glance at possible justifications. But there is another conception of the "quick look," which in our view is the correct one: If a challenged restraint does not come within the narrow categories receiving *per se* condemnation, full analysis of its anticompetitive effects may be postponed or pretermitted *only* if (a) the restraint is of a type that appears likely to raise prices or restrict output to consumers *and* (b) that likelihood is supported by evident market power or anticompetitive market effects. In such circumstances no full rule-of-reason analysis may be necessary *if* a "quick look" shows that the proffered procompetitive justifications for the restraint are implausible.

But a court should not jump ahead to a "quick look" at procompetitive justifications *unless* there is clear evidence that the restraint exploits the defendant's market power in a relevant market or that the challenged practice actually has had market-wide anticompetitive effects. And full rule-of-reason analysis must supersede the "quick look" review if the defendant presents a plausible procompetitive justification for the restraint.

1. Before departing from a full rule-of-reason analysis of the competitive effects of a challenged practice, a court must have a compelling basis for concluding that the practice likely will produce anticompetitive effects within a properly defined market. If a restraint does not fall within the narrow categories subject to *per se* condemnation, an intuitive appraisal of the restraint cannot by itself justify assuming anticompetitive effects. Rather, a court must find a sufficient evidentiary basis for concluding that the restraint is likely to inflict the kind of market-wide harm to competition and consumers that is the concern of the antitrust laws. Only if that conclusion can be drawn without a full, detailed market analysis may a court proceed directly to consider the asserted procompetitive justifications.

To begin with, the challenged conduct must appear likely to raise prices or restrict output *to consumers*. But characterizing the type of conduct is not enough in itself to justify omitting a thorough analysis of anticompetitive effects. Rather, that analysis may be truncated in the first instance only if there is clear evidence that the defendant exercises market power in a properly defined market, or that the restraint *actually* has increased prices or restricted the output available to consumers throughout a market.

Without a strong showing of market power or anticompetitive effects, courts should not condemn business conduct after only a "quick look" at its justifications. To do so is effectively the same as *per se* condemnation of a practice. But this Court's "quick look" cases have rejected arguments that the *per se* rule should be expanded, concluding that the challenged conduct had sufficient potential

for neutral or procompetitive effects to warrant at least some analysis under the rule of reason.

2. When a practice is subject to rule-of-reason analysis, it may be condemned after a "quick look" — and thus without full proof of anticompetitive effects — only if the practice is *not* reasonably ancillary to some larger procompetitive arrangement. If a defendant can state a facially plausible procompetitive justification for the challenged restraint, the "quick look" should be over and the restraint examined in full. A defendant should not have to produce factual support sufficient to *prevail* after a full rule-of-reason analysis before the plaintiff is put to *its* proof of actual anticompetitive effects. To rush to condemn a business practice in that way would make "quick look" analysis into a sham that clothes *per se* condemnation in rule-of-reason language.

Moreover, in considering whether the justifications for a restraint suffice to invoke a full rule-of-reason analysis, courts should not dismiss out of hand justifications that might not seem "procompetitive" in the narrowest sense — particularly when the defendant is a nonprofit organization or association. In concluding that judicial familiarity with certain restraints was not sufficient to support *per se* condemnation, this Court has relied on characteristics of particular defendants that did not directly relate to competition. In addition, a variety of consumer benefits may distinguish a joint product from competing products, and thus ultimately may affect the competitive implications of a restraint undertaken by a joint venture. That certainly is the case with the NCAA, see *Board of Regents*, 468 U.S. at 101-102, and may be the case with petitioner in this case as well.

ARGUMENT

Most practices challenged under the antitrust laws "are analyzed under a 'rule of reason'" that requires "the finder of fact" to "decide whether the questioned practice imposes an unreasonable restraint on competition." *State Oil Co.* v. *Khan*, 118 S. Ct. 275, 279 (1997). Under normal rule-of-reason analysis, the plaintiff first must prove that the challenged practice has, or likely will have, a substan-

tial anticompetitive effect. That proof usually entails at least a showing that the defendant has market power and exercises it in a way that tends to restrain competition, or that the practice has actual anticompetitive effects in a properly defined market. See, *e.g.*, *Times-Picayune Publishing Co*. v. *United States*, 345 U.S. 594, 611-13 (1953); see also, *e.g.*, *Board of Regents*, 468 U.S. at 104-113. Upon such a showing, the factfinder weighs any procompetitive benefits of the practice against its demonstrated adverse effect on competition. See *Board of Regents*, 468 U.S. at 104.

Only a very few restraints, generally involving naked restraints on price or output, "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*." *State Oil*, 118 S. Ct. at 279. The *per se* rule applies "a conclusive presumption that the restraint is unreasonable." *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 344 (1982). Such a conclusion must be based on longstanding "experience with a particular kind of restraint" that "enables the Court to predict with confidence that the rule of reason will condemn it." *State Oil*, 118 S. Ct. at 279 (quoting *Maricopa*, 457 U.S. at 344); see also *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990).

As judicial understanding of business economics has deepened, however, the set of practices condemned *per se* has shrunk rather than grown. This Court has recognized that practices formerly presumed to be anticompetitive in fact are neutral or even procompetitive in many cases. See *State Oil*, 118 S. Ct. at 279-285; see also Edward Correia, *Joint Ventures: Issues in Enforcement Policy*, 66 ANTITRUST L.J. 737, 753 n.70 (1998) (identifying other *per se* rules that have been narrowed in the past 25 years). See generally Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984). The Court has been particularly vigilant to correct overzealous efforts by lower courts to condemn *per se* horizontal arrangements that "restrain" trade in some sense but are undertaken as part of a joint venture that permits efficient standardization or inte-

gration of productive efforts. *E.g.*, *BMI* v. *CBS*, 441 U.S. 1, 17-24 (1979); *Board of Regents, supra*; *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 296 (1985).

In some cases, judicial experience with a restraint may not justify *per se* condemnation, yet the character of the restraint at issue may permit its condemnation after a truncated application of the rule of reason. See *Board of Regents*, 468 U.S. at 100-117; *FTC* v. *Indiana Federation of Dentists,* 476 U.S. 447, 457-464 (1986). Under this "quick look," a defendant must advance plausible pro-competitive justifications, or else the court may dispense with any *detailed* inquiry into market structure and actual anticompetitive effects. That variant of the rule of reason is at issue here.

I. A RESTRAINT SUBJECT TO THE RULE OF REASON CANNOT BE CONDEMNED AFTER A "QUICK LOOK" WITHOUT A SHOWING OF MARKET POWER OR ANTICOMPETITIVE EFFECTS IN A RELEVANT MARKET

1. Only limited types of business conduct may be subject to "quick look" review. Analysis under the rule of reason legitimately may proceed at a quicker pace when the conduct in question appears likely to raise prices or reduce output available to consumers. As the Sixth Circuit put it, the "quick look" generally is reserved for conduct that is "very similar to *per se* violations and might, but for prudential constraints, be analyzed under the *per se* presumption." *Lie* v. *St. Joseph Hospital*, 964 F.2d 567, 569 (6th Cir. 1992); see also Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 717 (1998) ("quick look" may be applied only to "a practice [that] is much like one condemned as per se illegal even if it is not properly assigned to a per se category").

This Court's decisions in *Board of Regents* and *Indiana Dentists* provide prime examples of the type of conduct that qualifies for "quick look" review. In *Board of Regents*, colleges

pooled their sales of televised football games in a way that inevitably restricted nationwide output and, by setting a single price scale for that restricted output, effectively fixed prices as well.[3] The restraint in *Indiana Dentists* completely deprived consumers (acting through their fee-payment proxies, insurance companies) of X-rays, critical information about decisions about the adequacy and necessity of dental care. Constraining information, the Court recognized, is a type of output restriction.

The restraints at issue in this case resemble those in *Indiana Dentists*, but the differences may be significant. Petitioner here did not cut off *all* of a uniquely valuable source of information like X-rays. Rather, the advertising restrictions at issue here simply nibbled around the edges, and did not appear to cut patients and their insurers off from the information needed to compare prices among various dentists. It thus is not clear that a "quick look" analysis was appropriate at all.

2. Somewhat contradictory language in *Board of Regents* and *Indiana Dentists* has made it unclear whether a restraint can be condemned based on a "quick look" without any analysis of market power or anticompetitive effects. In *Board of Regents*, this Court observed that no "detailed market analysis" was necessary to show the anticompetitive effect of a seller's "naked restraint on price and output." 468 U.S. at 109-110. And the Court also stated that "a lengthy analysis of market power is not necessary" so long as "the anticompetitive effects of conduct can be ascertained though means short of extensive market analysis." *Id.* at 110 n.42 (quoting U.S. Br., *Board of Regents*, at 19-20).

From these statements, some courts (though not the court below) have concluded that *no* market analysis is necessary in a

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[3]The NCAA accepts the judgment and reasoning of this Court in *Board of Regents* under principles of *stare decisis*, although the NCAA believes that the dissent in that case had considerable persuasive force.

"quick look" case. But, as Professor Areeda has explained, this Court's actual *decision* in *Board of Regents* did not dispense in the per se manner with *all* proof of power or effects. * * * It did not denigrate *any and all* proof of power and industry circumstances. Rather, it dispensed with "elaborate," "detailed," "extensive," and "lengthy analysis," of the industry, market, or power.

7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1511, at 433 (1986) (emphasis added). A brief but *convincing* market analysis made a *detailed* one unnecessary.

In *Board of Regents*, however, the Court made clear that labeling conduct as probably anticompetitive is not enough to require the defendant to advance a procompetitive justification. Rather, this Court determined that the NCAA *did* "possess market power" in a properly defined "separate market for telecasts of college football." *Id.* at 111; see *Chicago Professional Sports Ltd. Partnership* v. *NBA*, 95 F.3d 593, 600 (7th Cir. 1996) (Easterbrook, J.) (in *Board of Regents* "the Court satisfied itself that the NCAA possesses market power" before "cast[ing] any burden of justification on the NCAA"). And the Court did not rely on the finding of market power alone to infer the anticompetitive effects of the output limitation. Rather, the Court relied on the district court's factual findings, after a full trial, that the broadcast limitations actually reduced the number of broadcasts and increased the price paid for that limited output. *Board of Regents*, 468 U.S. at 111-114, 119-120.

Similarly, in *Indiana Dentists*, the Court did not substitute labels for market analysis. The Court again observed that the lack of an "elaborate" or "detailed market analysis" was "not *fatal*" under "quick look" review. *Indiana Dentists*, 476 U.S. at 460-461 (emphasis added). But the Court did not simply assume that the horizontal restriction on information output was inherently anticompetitive. Rather, as in *Board of Regents*, the Court identified evidence of both market power and anticompetitive effects. Before proceeding to assess the proffered procompetitive justifications, the

Court relied on specific FTC findings that "Federation dentists constituted heavy majorities of the practicing dentists" in two localities and that the challenged restraint actually reduced the output of X-rays provided for purchaser review. *Id.* at 460.

As the Court observed, "the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition." 476 U.S. at 460. Accordingly, the Court reached the unremarkable conclusion that "'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.' 7 P. Areeda, Antitrust Law ¶1511, p. 429 (1986)." *Id.* at 460-461.

3. Recent assertions by antitrust enforcement agencies (and the ruling of one court of appeals) demonstrate the need for this Court to ensure that "quick look" analysis remains appropriately circumscribed. This Court has applied "quick look" analysis only in cases where there were showings of both market power and actual output restriction. In its brief in opposition to certiorari, the FTC recognizes that the decision below in fact relied on evidence of market power in order to justify condemning the challenged restraint after only a "quick look." And in the decision reviewed by the Ninth Circuit, the FTC held that petitioner "possesses the necessary market power to impose the costs of its anticompetitive restrictions on * * * consumers." Pet. App. 84a.

The FTC did try to extend the *per se* rule in this case, however, and its brief in opposition hints that it may try to defend the result below by applying the more interventionist quick-look analysis that the Antitrust Division has recently advanced, and that the Tenth Circuit adopted in *Law* v. *NCAA*. The FTC asserts (Br. in Opp. 19-20) that the Ninth Circuit's analysis is "similar" to the "stepwise approach" endorsed by the Assistant Attorney General for the Antitrust Division. But that "stepwise approach" would permit business practices to be condemned, paradoxically, "without considering anticompetitive effects." Joel I. Klein, Assistant Attorney

General, Antitrust Division, A Stepwise Approach to Antitrust Review of Horizontal Agreements, Address to the ABA Section Semi-Annual Fall Program (Nov. 7, 1996) ("*Stepwise Speech*"), *reprinted in* [Current Comment] Trade Reg. Rep. (CCH) ¶ 50,157, at 49,194. That question-begging approach dispenses with *all* proof of market power *or* anticompetitive effects so long as a restraint has been characterized at the outset as warranting "quick look" analysis, and the defendant's proof of procompetitive benefits does not outweigh whatever value the factfinder assigns to *presumed* anticompetitive effects. See *ibid*.; accord Joel I. Klein, *A 'Stepwise' Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, ANTITRUST, Spring 1998, at 41, 42.

Similarly, the Tenth Circuit has adopted an approach to "quick look" review that removes the calculus of anticompetitive effects from the rule of reason. The Tenth Circuit in *Law* condemned an NCAA bylaw without requiring *any* proof of market power or anticompetitive effects in a relevant market. See 134 F.3d at 1021-1024. As one commentator recently noted, under such a formulation, enforcement "agencies could demand proof of procompetitive justifications simply because agency staff do not understand the transaction." Correia, *supra*, 66 ANTITRUST L.J. at 753. And, as the NCAA is acutely aware, "[a]n even more troubling possibility is that private plaintiffs could shift the burden to the defendants without a showing of market power." *Ibid*. That is exactly what happened in *Law*.

In light of these developments, this Court should remove all doubt that the "quick look" should not be imprudently hasty: once conduct has been determined to require analysis under the rule of reason, that analysis may be reduced to a "quick look" only if the conduct has demonstrated anticompetitive effects or the restraint is shown to be an exercise of market power. The distinction between *per se* condemnation and analysis under the rule of reason makes little difference if characterization alone will carry a plaintiff's most difficult burden under the rule of reason: proving that business conduct hurts competition. This Court aptly observed in *BMI*, 441

U.S. at 8, that "easy labels do not always supply ready answers." Attaching an epithet to conduct generally tells us little about anti-competitive effects, unless the conduct falls within the narrow (and shrinking) class of *per se* offenses.

Indeed, although "tying" and "group boycotts" remain classified as *per se* offenses, this Court requires proof of market power before tying or group boycotts may be condemned "*per se*." See *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2, 26-27 (1984); *Northwest Stationers*, 472 U.S. at 296. The Court has insisted on a market-power screen because of the growing awareness that such conduct, while formerly condemned out of hand, can harm competition only in limited circumstances.[4] Surely "the issue of market power must be addressed directly" in the evaluation of conduct that can *not* be condemned *per se*. See Thomas Kauper, *The Sullivan Approach to Horizontal Restraints*, 75 CAL. L. REV. 893, 914 (1987). If a business practice could be condemned after a "quick look" but without a showing of market power or actual anticompetitive effects, the practical result would be to extend the *per se* rule beyond its carefully limited boundaries.

A market power screen is particularly appropriate in the context of joint ventures, which generally involve a combined effort by entities that are horizontal competitors in some way. Lower courts have too readily attached erroneous "price-fixing" or "output restriction" labels to a variety of joint marketing, joint production, and standard-setting agreements. Without a market power screen, a wide variety of joint ventures could be condemned after a "quick look" even though they did not harm competition. Some market

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[4] Because "the point of antitrust is promoting consumer welfare," the antitrust laws should not condemn any business conduct "[i]f the structure of the market" allows "little potential for consumers to be harmed, * * * because the presence of effective competition will provide a powerful antidote to any effort to exploit consumers." George Hay, *Market Power in Antitrust*, 60 ANTITRUST L.J. 807, 808 (1992). As Judge Easterbrook put it, entities without market power "cannot injure competition no matter how hard they try." Easterbrook, *supra,* 63 TEX. L. REV. at 20.

analysis (or showing of actual anticompetitive effects) is necessary at the threshold to "minimize the risk of enforcement mistakes" in this context. See Correia, *supra*, 66 ANTITRUST L.J. at 755.

4. In the decision below, the Ninth Circuit took a "quick look" at procompetitive justifications only after finding that petitioner possessed "enough market power to harm competition" (Pet. App. 24a). The Ninth Circuit based its conclusion on what it perceived as "significant barriers to entry" and a "high" — 75% — market share, under the assumption that the relevant market consisted of dentists in California or within localities in California (in some of which petitioner's members accounted for 90% of all dentists). *Id.* at 23a.

On the surface, the Ninth Circuit's analysis of market power might appear to coincide with this Court's analysis (and its market definition) in *Indiana Dentists*. Petitioner, however, has raised serious questions about the significance the Ninth Circuit attributed to market share in determining market power in this case. This Court has cautioned against affording too much significance to market share in finding market power, emphasizing that "statistics concerning market share and concentration * * * [are] not conclusive indicators of anticompetitive effects." *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 498 (1974). Rather, "[t]he relative effect of percentage command of a market varies with the setting in which that factor is placed." *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527-528 (1948). "Market share alone is misleading." William Landes & Richard Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 947 (1981).

The Ninth Circuit appears to have paid little heed to those cautions. As petitioner has pointed out, 25% of California dentists were *not* covered by petitioner's rules, and thus could advertise and exert downward competitive pressure on the prices charged by petitioner's members. See, *e.g.*, Pet. 24-25; see also Pet. App. 110a (Az-

cuenaga, Comm'r, dissenting) (characterizing evidence of market power as "sparse"). In light of the type of restraint at issue in this case, the Ninth Circuit's analysis of market power was too cursory.

The court of appeals also found a restriction of output based on the FTC's showing that some truthful advertising had been curtailed as a result of the challenged restraint. Although precedent and commentary support casting a skeptical eye on *blanket* advertising bans,[5] petitioner's restrictions were not so broad. And unlike the X-rays at issue in *Indiana Dentists*, which contained information that purchasers could not obtain in any other way, the price and quality information at issue here was available from other sources — including the word-of-mouth communications among consumers that are the bedrock of most successful professional practices.

Whether or not it was ultimately accurate, the Ninth Circuit's consideration of market facts was excessively sparse and reflected a far more cursory analysis than those in *Board of Regents* and *Indiana Dentists*. The Ninth Circuit's haste to condemn the challenged advertising restrictions led to similar analytical shortcomings in its peremptory rejection of the justifications that petitioner offered.

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[5] Professor Areeda predicted that, "[i]f large scale professional organizations like the American Medical Association promulgate rules against advertising, a court will see a significant restraint that needs to be analyzed without careful market definition." 7 AREEDA, *supra*, ¶ 1503, at 377, quoted in Pet. App. 24a. And this Court has held that *blanket* restrictions on price advertising "will tend to mitigate competition and maintain prices at a higher level than [otherwise] would prevail." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 505 (1996).

II. THE "QUICK LOOK" MUST GIVE WAY TO FULL RULE-OF-REASON ANALYSIS ONCE A DEFENDANT HAS OFFERED A FACIALLY PLAUSIBLE PROCOMPETITIVE JUSTIFICATION

1. In *Board of Regents*, this Court held that under the "quick look" rule of reason the NCAA need only provide "some competitive justification" for a challenged restraint. 468 U.S. at 110. The Court stopped short of full rule-of-reason analysis only because the output limitation at issue in *Board of Regents* was "not even arguably tailored" to the asserted procompetitive interests. *Id*. at 119. Similarly, in *Indiana Dentists*, this Court explained that a "quick look" under the rule of reason must expand into a full rule-of-reason analysis if the defendant identified "some countervailing procompetitive virtue" or "'some competitive justification'" for a challenged restraint. 476 U.S. at 459-460 (quoting *Board of Regents*). The only reason why the Court did not undertake a full rule-of-reason analysis was that "[n]o *credible argument* has been advanced" that the restraint served procompetitive interests. *Id*. at 459 (emphasis added).

Thus, a defendant can terminate the "quick look" and return to the full rule of reason by advancing a plausible procompetitive justification for the challenged restraint. A defendant may "avoid summary condemnation if [it] claims justification of the kind which a 'quick look' — *usually at the arguments alone* — shows to be legitimate in principle and capable of being proved satisfactorily." 7 AREEDA, *supra*, ¶ 1511, at 428-429 (emphasis added). That modest showing by the defendant triggers full rule-of-reason scrutiny and thereby shifts to the plaintiff the burden to demonstrate market power or anticompetitive effects in a market. *Id*. at 429.[6]

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[6]The defendant's burden under "quick look" review is similar to that of a defendant in the initial stages of the burden-shifting framework used

Only after such a showing by the plaintiff does a defendant "have the burden of coming forward" with "evidence that the justifications claimed are legitimate in principle and are actually promoted significantly by the restraint." 7 AREEDA, *supra*, ¶ 1511, at 429; see also Schmalensee, *Agreements Between Competitors*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 98, 110-111 (T. Jorde *et al*., eds., 1992); William Kolasky, *Counterpoint: The Department of Justice's 'Stepwise' Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements,* ANTITRUST, Spring 1998, at 41, 45 (under the quick-look approach, a defendant must "come forward" with a "plausible" or "legitimate" reason for the restraint). As the Third Circuit has explained, defendants need not produce a "*persuasive* procompetitive justification, or a showing of *necessity*," simply to return antitrust analysis of their activities to its presumptive starting point: full rule-of-reason review. *United States* v. *Brown University*, 5 F.3d 658, 676 (1993) (emphasis added). Judge Posner, writing for the Seventh Circuit, saw it the same way: a defendant causes the analysis to revert to the full rule of reason merely by asserting "a plausible connection between the specific restriction and the essential character of the product." *General Leaseways* v. *National Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984).

In the decision below, however, the Ninth Circuit held that the assertion of an admittedly "legitimate" and "indeed procompetitive goal" of "preventing false and misleading" advertising was insufficient for the defendant to meet its burden under "quick look" review. Pet. App. 19a. The Ninth Circuit instead required petitioner to prove that the restraint had "in fact" achieved the asserted procompetitive end. Pet. App. 20a. The Tenth Circuit in *Law* followed the same approach. See 134 F.3d at 1021-1024.

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in employment discrimination cases. See Mark Chang, David Evans & Richard Schmalensee, *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*, 1998 COLUM. BUS. L. REV. 223, 280 & n.116. Once the plaintiff has established a prima facie case that the challenged restraint at issue may have an anticompetitive effect, the defendant need only articulate a legitimate justification for the restraint in order to shift the burden of proving anticompetitive effects back to the plaintiff.

The Antitrust Division appears to side with the Ninth and Tenth Circuits. The "stepwise approach" now favored by the Antitrust Division also would permit a summary finding of liability unless the defendant proves "with real world evidence — factual evidence, expert economic evidence, or preferably both" — that the restraint *actually* serves a procompetitive purpose. Klein, *Stepwise Speech*, *supra*, at 49,192.

This is too much. Requiring defendants to prove the benefits of their conduct *before* plaintiffs show that the conduct actually harms competition stands the procompetitive principles of the antitrust laws on their head. This burden-shifting standard presents a particularly acute risk of deterring innovative, pro-consumer collaboration. See Easterbrook, *supra*, 63 TEX. L. REV. at 5 ("The inhospitality tradition of antitrust has proven very costly. The costs were inevitable. Wisdom lags far behind the market."). That is especially so in joint-venture and standard-setting contexts, in light of "the enormous difficulties that can be associated with *proving* valid efficiencies." Joseph Kattan, *The Role of Efficiency Considerations in the Federal Trade Commission's Antitrust Analysis*, 64 ANTITRUST L.J. 613, 615 (1996) (emphasis added).

Indeed, the procompetitive efficiencies of many business practices are often "difficult to quantify" without close economic examination. Mark Chang, David Evans & Richard Schmalensee, *Some Economic Principles For Guiding Antitrust Policy Towards Joint Ventures*, 1998 COLUM. BUS. L. REV. 223, 309. For that reason, economists have criticized the heavy burden placed on defendants by versions of the "quick look" that prematurely shift burdens of proof, and thus may "condemn conduct that may or may not have been efficient but had not been shown to have anticompetitive effects, solely because the respondent had failed to overcome the complex problems (or cost) of proving that the conduct

was positively procompetitive." Kattan, *supra*, at 615; see also Chang *et al.*, *supra*, at 309.[7]

It is difficult to quantify many procompetitive benefits. For example, there is no reliable way to measure the intensification of intercollegiate athletic competition resulting from rules that equalize the coaching resources that schools can use for their teams, as in *Law*. Nor can one measure the consumer benefits of channeling professional advertising away from the sort of claims that may risk misleading or disappointing consumers, as in this case. Such claimed benefits invite judicial skepticism and demands for "better" — and often unavailable — proof. To avoid erroneously condemning a broad range of benign or beneficial activity — and to avoid making "quick look" analysis the instrument of a greatly expanded *per se* rule, see Kolasky, *supra*, at 43 — the assertion of a logically plausible justification for a challenged restraint should be enough to invoke full rule-of-reason analysis. The plaintiff then should be put to its burden of proving actual anticompetitive effects.

2. Justifications for a challenged restriction raise another question under rule-of-reason analysis generally and quick-look analysis in particular. That is whether the rule of reason may take account of

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[7]Federal antitrust enforcement agencies are well aware that efficiencies, even if genuine and important, are often hard to prove, and that legal rules that require proving efficiency may result in overdeterrence of socially beneficial activity. In replacing the 1968 Merger Guidelines, which overdeterred beneficial mergers, with the more lenient 1982 Guidelines, for example, the agencies were motivated in large measure by recognition that a case-by-case approach to evaluating merger-caused efficiencies would likely "creat[e] an administrative and judicial morass" and involve "extensive, perhaps fruitless, efforts to assess potential efficiency gains in individual cases." John J. McGowan, *Mergers for Power or Progress?*, in ANTITRUST AND REGULATION 1, 10, 11 (F. Fisher ed. 1985) (Professor McGowan's essay reflects the views of a task force that advised the government on redrafting the Merger Guidelines).

social benefits that are not directly related to competition, or are not ordinarily expressed in economic terms.

Some courts, including the Tenth Circuit in *Law*, see 134 F.3d at 1021-1022, refuse to consider *any* justifications for challenged restraints unless the asserted benefits fit directly within a particular court's paradigm of commercial competition. Other courts take a much broader view of the considerations relevant to the rule-of-reason inquiry.[8] Some of those courts explicitly recognize non-commercial justifications as proper. Others recast apparently "social" justifications in economic terms.

In reviewing the reasoning of the Ninth Circuit in the present case, the Court should explicitly approve that court's conclusion that justifications based on fostering professionalism may have procompetitive aspects, and thus warrant consideration under the rule of

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[8]See, *e.g.*, *Board of Regents*, 468 U.S. at 117; *Hairston* v. *Pacific 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996) (acknowledging that the non-commercial justification of promoting amateurism in intercollegiate athletics warranted consideration in a rule-of-reason analysis); *Brown University*, 5 F.3d at 677-678 (holding that socio-economic diversity on campus and high-quality education are cognizable justifications under the rule of reason); *Hertz Corp.* v. *City of New York*, 1 F.3d 121, 131 (2d Cir. 1993) (holding that a municipality's role in barring certain rental car surcharges warranted consideration of "non-commercial federal values embodied in the thirteenth and fourteenth amendments" in the "economic scale of traditional antitrust analysis"), cert. denied, 510 U.S. 1111 (1994); *Cha-Car, Inc.* v. *Calder Race Course, Inc.*, 752 F.2d 609, 614 n.9 (11th Cir. 1985) (stating that rules by cooperative groups such as trade associations and sports organizations may be justified under the rule of reason based on non-commercial objectives that are, *e.g.*, "essential to the existence of or survival of a sport"); *Association for Intercollegiate Athletics for Women* v. *NCAA*, 735 F.2d 577, 584 n.8 (D.C. Cir. 1984) (recognizing that certain non-commercial justifications which "are essential to the [nonprofit] organization's achieving its legitimate noncommercial objectives" are cognizable under traditional antitrust analysis).

reason. See Pet. App. 19a-20a. The Ninth Circuit went astray when — in a "quick look" case — it rejected as *unproven* petitioner's plausible assertion that the conduct promoted the asserted ends, but at least it recognized the legitimacy of ends that were not purely linked to commercial competition. This Court should make clear that the antitrust laws do not categorically forbid consideration of such factors to justify a limited restraint on some aspect of competition.

Petitioner in this case is a nonprofit standard-setting organization of professionals; its advertising restrictions are motivated at least in part by concerns over quality, professional stature, and consumer trust. See generally Michael Goldenberg, *Standards, Public Welfare Defenses, and the Antitrust Laws*, 42 BUS. LAW. 629, 642-653 (1987). As this Court has recognized, *e.g.*, *Board of Regents*, 468 U.S. at 101-102, 120, many of the valuable functions of the NCAA also have little to do with unfettered economic competition; indeed, the NCAA's amateur sports "product" is differentiated by, and thus is marketable because, it is *less* characterized by pure economic competition between teams than major professional sports. *Ibid.*

This Court's decisions give somewhat conflicting signals about the validity of justifications that are not strictly related to promoting competition. In a widely repeated statement, the Court wrote that the rule of reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint," but rather "focuses directly on the challenged restraint's impact on competitive conditions." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688 (1978). And the Court rejected the defendant professional association's public interest justification for its ban on all competitive bidding by saying that "the inquiry mandated by the Rule of Reason is [limited to evaluating] whether the challenged agreement is one that promotes competition or one that suppresses competition." *Id.* at 691. But that statement must be viewed in context: the Court was laying a foundation for its rejection of the proposition that non-commercial concerns could justify a

horizontal restraint that flatly precluded *all* price competition for sales of the final *output* of the defendant association's members. *Id.* at 695-696.

The Court later made clear in *Board of Regents*, however, that it did not mean to foreclose *all* consideration of benefits that do not directly promote competition. The Court's analysis under the rule of reason weighed the NCAA's "critical role in the maintenance of a revered tradition of amateurism in college sports"and in "the preservation of the student-athlete in higher education." 468 U.S. at 120. By depriving schools of the ability to compete for athletes by paying them, amateurism in some sense may restrict the scope of competition, but it fosters other values. The Court also recognized that benefits that do not *directly* promote competition in fact may stimulate competition indirectly, whether by increasing consumer confidence in a profession and its services, or by further differentiating a joint product from competing products by "preserv[ing] [its] character and quality." *Id.* at 102. As this Court recognized, such conduct "can be viewed as procompetitive" under a rule-of-reason analysis. *Ibid.*

There is no basis for turning a blind eye toward considerations of public benefits not directly tied to competition in the marketplace. That is especially so when the defendant is a nonprofit entity, and still more when both the defendant and its members are nonprofit institutions, as is the case with the NCAA. "[N]either *Professional Engineers* nor any other decision of this Court suggests that * * * nonprofit [organizations] must defend their self-regulatory restraints solely in terms of their competitive impact, without regard for the legitimate non-commercial values they promote." *Board of Regents*, 468 U.S. at 135 (White, J., dissenting); see also 7 AREEDA, *supra*, ¶ 1504, at 380-383. Excluding all consideration of non-commercial values would be inconsistent with the Court's pronouncement that it is "unrealistic to view the practice of professions as interchangeable with other business activities, and automatically [to] apply to the professions antitrust concepts which originated in other areas," *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788 n.17 (1975),

a view to which the Court expressly "adhere[d]" in *Professional Engineers*, 435 U.S. at 696.

This Court certainly has not foreclosed the possibility that some practices by nonprofit organizations may be justified under the rule of reason when they are important to achievement of the organization's legitimate noncommercial objectives. See, *e.g.*, *Professional Engineers*, 435 U.S. at 696 & n.22; *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 55 n.23 (1977). To the contrary, the Court has recognized the importance to antitrust analysis of the "public service aspect" of some challenged restraints. *Maricopa*, 457 U.S. at 348 (quoting *Goldfarb*, 421 U.S. at 788 n.17). An assessment of the activities of nonprofit organizations "may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Id.* at 348-349 (quoting *Goldfarb*, 421 U.S. at 788 n.17).

The Sherman Act declares competition to be the overarching and vitally important national economic policy, but Congress did not intend the Sherman Act to require *all* concerted human activity to justify itself solely in terms of allocative efficiency. "Not every aspect of life in the United States is to be reduced to such a single-minded vision of the ubiquity of commerce." *Dedication and Everlasting Love to Animals* v. *Humane Society*, 50 F.3d 710, 714 (9th Cir. 1995).

Regulations such as those challenged in *Board of Regents* do not arise in a purely commercial context. Special consideration must be accorded to the necessarily and properly integrated nature of various noncommercial and educational activities at issue in those settings. As Justice White observed, "the Sherman Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives." *Board of Regents*, 468 U.S. at 133 (dissenting opinion) (quoting *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959)).

The core vice of excluding noneconomic "public interest" considerations from the rule-of-reason balance is the same as the core vice of overzealously invoking the "quick look": it makes a court's job seem too easy and allows a court to condemn conduct that is socially beneficial without adequately evaluating the real-world effects of its decision. Professor Areeda's treatise and the *Law* case illustrate that vice.

Professor Areeda hypothesizes an agreement among television networks "that each would devote two hours weekly, not overlapping with the others, to quality programming." 7 AREEDA, *supra*, ¶ 1504, at 383. Professor Areeda makes clear that such an agreement should be sustained under a rule-of-reason inquiry even though it "may seem an illegitimate appeal to those broader claims of 'public interest' that *Engineers* rejected." *Ibid.* Without directly challenging the *Engineers* dictum, however, Professor Areeda then imaginatively recasts the restraint as one that "offset[s] a 'market failure'" and thereby "promotes competitive results." *Ibid.*

But district courts and courts of appeals do not generally accept such recharacterizations — especially when they are advanced by self-interested litigants and not by an eminent law professor discussing hypothetical facts. Instead, the response of the *Law* court is unfortunately typical. That court reflexively dismissed the NCAA's demonstration that unbridled economic competition by universities for coaching talent had led to market failures that impaired equity among colleges and injured younger coaches: "While opening up coaching positions for younger people may have social value apart from its effect on competition, we may not consider such values unless they impact upon competition." *Law*, 134 F.3d at 1021-1022.

When nonprofit organizations pursue socially beneficial goals in a reasonable manner, they should not be mulcted with treble damages just because a court excludes from consideration the legitimate goals being pursued. Congress could not possibly have intended the antitrust laws to penalize nonprofit organizations for pursuing non-commercial goals. The antitrust laws, and particularly

the rule of *reason*, were never meant to require courts to wear blinders and thereby condemn socially beneficial conduct.

This Court should dispel the confusion created by out-of-context quotations from *Professional Engineers* and explicitly hold that non-commercial justifications may be considered in a rule-of-reason analysis. Recognizing the legitimacy of such justifications is particularly important when the defendant is a nonprofit regulatory association whose justifications for standards and other restraints often must rest on non-commercial and social welfare concerns. Such considerations will not *prevail* where the restraint is too broad, as in *Professional Engineers*. But categorical exclusion of non-commercial concerns exposes nonprofit regulatory associations to inappropriate risks of antitrust litigation and liability.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

STEPHEN M. SHAPIRO
ALAN N. SALPETER
MICHAEL W. MCCONNELL
MICHELE L. ODORIZZI
Mayer, Brown & Platt
190 S. LaSalle St.
Chicago, IL 60603
(312) 782-0600

ROY T. ENGLERT, JR.*
DONALD M. FALK
DAVID A. J. GOLDFINE
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 463-2000

* *Counsel of Record*

ELSA KIRCHER COLE
General Counsel
The National Collegiate Athletic Association
6201 College Boulevard
Overland Park, KS 66211

GREGORY L. CURTNER
Miller, Canfield, Paddock and Stone, P.L.C.
1450 Broadway
41st Floor
New York, NY 10018

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