

No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

v.

NORMAN LAW, ANDREW GREER, PETER HERRMANN,
MICHAEL JARVIS, JR., CHARLES M. RIEB, DOUG SCHREIBER,
LAZARO COLLAZO, ROBIN DREIZLER, AND FRANK CRUZ, INDI-
VIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
RESPONDENTS

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1992, the National Collegiate Athletic Association adopted a bylaw that reduced the number of men's basketball coaches each Division I school was allowed to employ without salary limitations to three. To preserve entry-level opportunities in Division I, the NCAA rule also allowed each school to hire an additional "restricted earnings" coach, who could be paid no more than \$16,000 per year. Based on a "quick look" analysis and without even defining any relevant market, the Tenth Circuit affirmed a grant of summary judgment in favor of restricted earnings coaches, holding that no trial was necessary to determine that this salary restriction violated Section 1 of the Sherman Act.

The following question is presented:

Whether the NCAA rule limiting the compensation of a fourth basketball coach is so "obviously anticompetitive" as to warrant summary condemnation under the antitrust laws, where market power and anticompetitive effects in a properly defined market were not demonstrated, and where the factfinder was precluded from weighing alleged anticompetitive effects against procompetitive benefits because the evidence did not show that the rule was absolutely necessary to serve a compelling procompetitive need.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

All parties to the proceeding are listed in the caption. The district court certified a class of persons who had served as restricted earnings men's basketball coaches in Division I of the National Collegiate Athletic Association after August 1, 1992, for the purpose of the injunction under review. See App., *infra*, 44a-56a. The parties in two actions encompassing Division I restricted earnings baseball coaches (*Schreiber v. NCAA*, No. 94-2053-KHV (D. Kan.)) and restricted earnings coaches in all other NCAA men's and women's Division I sports (*Hall v. NCAA*, No. 94-2392-KHV (D. Kan.)) stipulated to be bound on the merits by the principal decision under review. The damages phase of the three cases was tried together, and all three classes were awarded damages based on the decision under review.

The National Collegiate Athletic Association is a voluntary, unincorporated association of colleges, universities, and inter-collegiate athletic conferences. The NCAA has no parent corporations or non-wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

The National Collegiate Athletic Association (NCAA) respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit in this case.¹

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-26a, 27a-36a) are reported at 134 F.3d 1010 and 134 F.3d 1025. The opinion of the district court certifying a class for the purpose of injunctive relief (App., *infra*, 40a-51a) is reported at 167 F.R.D. 178. The order of the district court entering an injunction (App., *infra*, 66a-73a) is unreported. The opinion of the district court granting summary judgment on liability (App., *infra*, 74a-100a) is reported at 902 F. Supp. 1394. The orders of the district court awarding interim attorneys' fees (App., *infra*, 52a-53a and 54a-65a) are unreported.

JURISDICTION

The judgments of the court of appeals were entered on January 23, 1998. Timely petitions for rehearing were denied on March 13, 1998. App., *infra*, 101a-102a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

Every contract, combination * * *, or conspiracy, in restraint of trade or commerce among the several States * * * is hereby declared to be illegal * * *.

STATEMENT

In a judgment that has since resulted in a staggering treble-damage award of \$67 million, whose impact would be borne by the nation's universities, the Tenth Circuit held that the antitrust laws prohibit the NCAA from limiting to three the number of basketball coaches who may be paid unlimited salaries. The court invalidated

¹ Pursuant to S. Ct. Rule 12.4, the NCAA seeks review of the Tenth Circuit's judgments in three separate dockets (10th Cir. Nos. 96-3034, 96-3150, and 96-3186) disposed of in two separate opinions. In all three dockets — one involving an injunction and two involving awards of attorneys' fees — the court's judgment depends on the correctness of its antitrust analysis.

a rule that attempted to balance the size and quality of coaching staffs while preserving a fourth coaching position for graduate assistant or entry-level coaches by imposing a salary cap on that one position. Although purportedly applying the rule of reason, the court of appeals, reasoning from price-fixing cases, found the rule so “obviously anticompetitive” that it affirmed summary judgment for respondents. The court thus denied the NCAA an opportunity to show at trial that the rule enhanced competitive balance in athletic competition. But “easy labels do not always supply ready answers” (*BMI v. CBS*, 441 U.S. 1, 8 (1979)), particularly in “an industry in which horizontal restraints on competition are essential if the product is to be available at all” (*NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 101 (1984)).

A. Factual Background

1. *The NCAA*

The NCAA, which was founded in 1906 at the request of President Theodore Roosevelt, is an unincorporated, nonprofit association of more than 1100 colleges, universities, and athletic conferences engaged in intercollegiate athletic competition. One of its purposes is “promot[ing] opportunity for equity in competition” among student-athletes and their schools. App., *infra*, 2a. Another “fundamental polic[y] 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).

In economic terms, “[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. *Board of Regents*, 468 U.S. at 101. “The identification of” NCAA sports “with an academic tradition differentiates” them from minor league professional contests and increases their popularity. *Id.* at 101-102.

The NCAA coordinates its members’ athletic programs to preserve competitive equity. The NCAA classifies college basketball programs into Divisions I, II, and III. The 300 schools in Division I generally have the strongest and most prestigious teams. App.,

infra, 2a. The NCAA also legislates uniform playing rules; conducts national championship tournaments in basketball and more than 20 other sports; imposes standards of amateurism and academic eligibility, including strict limits on compensation for student-athletes; limits colleges' conduct in recruiting student-athletes; and sets maximum sizes for coaching staffs and team rosters. *Id.* at 2a; *Board of Regents*, 468 U.S. at 88.

2. *NCAA Coaching Restrictions Before 1992*

By the 1970s, some colleges were expanding their coaching staffs, giving them a substantial advantage over less wealthy rivals. See *Board of Regents of the University of Oklahoma v. NCAA*, 561 P.2d 499, 506-507 (Okla. 1977) (*Oklahoma Regents*). The NCAA responded by limiting Division I basketball programs to no more than five coaches. App., *infra*, 80a n.6. It did so “to make everyone begin on equal footing by curtailing potentially monopolistic practices by the more powerful schools and to reorient the athletic programs into their more traditional role as amateur sports operating as a part of the educational process.” *Oklahoma Regents*, 561 P.2d at 507. These limits survived two antitrust challenges. See *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977); *Oklahoma Regents*, *supra*.

The NCAA rules allowing no more than five coaches imposed no limits on the compensation of the head coach and two full-time assistant coaches, but restricted the compensation of the remaining two assistants in one of three ways. Volunteer coaches could receive no compensation; graduate assistants could receive only a grant-in-aid for their tuition; and part-time assistants' compensation could not exceed the value of a grant-in-aid.

Because out-of-state tuition was the limit for compensating part-time coaches, a private school might be able to pay a part-time assistant \$20,000, while its public cross-town rival could pay only \$8000. NCAA C.A. App. 349. In addition, some colleges evaded the compensation restrictions by arranging for part-time coaches to earn substantial sums — as much as \$70,000 at a school with a celebrity head coach — at summer camps affiliated with head coaches. *Id.* at 127, 143, 313-314. By designating a high-paid senior assistant as a “part-time” coach with only a small on-budget salary, schools with leading basketball programs could recruit “part-

time” assistants who were qualified to serve as full-time head or assistant coaches for other schools, and compensate them for full-time work. *Id.* at 127, 143, 313-314.

The schools with four or five *de facto* full-time coaches had a powerful advantage in recruiting athletes. *Id.* at 127. To field competitive teams, other schools were under severe pressure to increase their own spending on coaches and recruiting. App., *infra*, 3a. Colleges that faced greater financial pressures and could not offer lucrative summer employment to their “part-time” coaches complained that the situation was not fair and was harming “competitive equity.” NCAA C.A. App. 127.

3. *The 1992 Restricted Earnings Coach Bylaw*

The NCAA in 1989 established a Cost Reduction Committee (CRC) of school administrators and faculty members to recommend ways to contain costs in a manner that would preserve competitive balance among college teams. App., *infra*, 4a; see also NCAA C.A. App. 345, 414. The CRC concluded that attempts at unilateral cost containment would fail because such actions “invariably make[] you less competitive” with other institutions. *Id.* at 342. As one CRC member testified, “if I’m allowed to keep ten coaches and you unilaterally restrict the number of coaches on your football team to two, then the school with ten coaches is going to [use] that as a recruiting tool.” *Ibid.*

The CRC recommended reducing the number of coaching positions for all Division I sports “by at least one full-time equivalent position.” App., *infra*, 6a. The CRC originally intended to reduce basketball coaching positions to three without restricting compensation. NCAA C.A. App. 127, 142-143, 176. The National Association of Basketball Coaches opposed that plan, however, on the ground that it left no position available to apprentice-level coaches. *Id.* at 142, 147, 176.

As a result, the CRC proposed and the NCAA adopted the “REC Rule,” which reduced Division I basketball coaching staffs from five to four — a head coach, two assistant coaches, and one entry-level coach called a “restricted earnings coach,” or “REC.” App., *infra*, 4a. The REC Rule was adopted in January 1991 and took effect on August 1, 1992. *Id.* at 7a.

The CRC intended the REC position to “encourage the development of new coaches while more effectively limiting compensation

to such coaches.” App., *infra*, 7a. The CRC wanted to ensure that there would be “balance, [a] level playing field with [the fourth] position,” rather than the prior abuses involving “part-time” coaches earning top incomes. NCAA C.A. App. 143.

To preserve some opportunity for entry-level coaches, the REC Rule capped the compensation for restricted-earnings coaches at \$12,000 per academic year and an additional \$4000 during the summer — including summer-camp earnings related in any way to a Division I school or coach. App., *infra*, 5a; see also NCAA C.A. App. 144, 174, 520. The inclusion of summer camp pay in the earnings cap was the principal change from the earlier policy; the \$16,000 total approximated the average grant-in-aid for graduate assistants — and, thus, the salaries previously permitted part-time assistant coaches — but it put all institutions on an equal footing. App., *infra*, 6a; see also NCAA C.A. App. 141, 144. Restricted earnings coaches (many of whom really were part-timers) could take other *bona fide* paying jobs at their colleges or elsewhere. See App., *infra*, 6a.

4. Mobility in the Basketball Coaching Profession

Men’s basketball coaches seek and find part-time or full-time positions at high schools, junior colleges, NCAA institutions in all three divisions, minor professional leagues, and the National Basketball Association. Of all these positions, only one-quarter of the positions at NCAA Division I schools were affected by the REC Rule, and coaches in REC positions could use them as stepping stones to jobs without salary restrictions.

The record in this case illustrates basketball coaches’ mobility within the coaching market. Respondent Jarvis rejected two offers of assistant positions (one at Yale) that paid in the “mid-twenties”; instead he chose to serve as the REC on his father’s staff. NCAA C.A. App. 242-246. Respondent Herrmann began as a high school head coach; he then became a Division III full-time assistant, a Division I full-time assistant, and a Division I head coach. *Id.* at 223-227. When he lost the last job, he sought employment in all three NCAA divisions, and with professional teams, before accepting a REC position. *Id.* at 216-218, 224. Respondent Law had been a head coach for a high school and a Division III college before becoming a part-time assistant (and then REC) in Division I.

Id. at 280-285, 295-297. Respondent Rieb was a graduate assistant in Division II, and a volunteer assistant, part-time assistant, REC, and full-time assistant in Division I. *Id.* at 483-492. Before becoming a graduate assistant (and then REC) at a Division I school, respondent Greer had been an assistant at a junior college, a graduate assistant in Division II, a full-time assistant in Division III, and a part-time assistant at another Division I school. *Id.* at 181-189. Greer left his REC position to become a Division III head coach. *Id.* at 191.

B. Proceedings Below

1. Five men's basketball REC coaches filed a class action alleging that the REC Rule violated Section 1 of the Sherman Act, 15 U.S.C. § 1. The United States District Court for the District of Kansas granted summary judgment to the plaintiffs, concluding that the REC Rule violated the antitrust laws under a "quick look" rule-of-reason analysis. App., *infra*, 87a-100a.

The plaintiffs did not define any relevant market. The district court nevertheless reasoned that, because some unidentified part-time coaches had earned \$60,000 to \$70,000 before the REC Rule by participating in lucrative summer camps (NCAA C.A. App. 127, 143), and because the REC Rule was intended to curtail such evasions, the rule had an indisputable anticompetitive effect that made market analysis unnecessary. See App., *infra*, 89a-90a. The district court also brushed aside the NCAA's justifications for the REC Rule. App., *infra*, 90a-100a.

After granting summary judgment, the district court permanently enjoined the NCAA from enforcing the REC Rule compensation limits, effectively increasing to four the number of full-time, unrestricted-compensation coaches in Division I basketball programs. App., *infra*, 66a-73a. The court later awarded attorneys' fees (*id.* at 52a-53a, 54a-65a) and certified a class of present and former REC coaches (*id.* at 40a-51a).

2. The NCAA appealed the injunction and fees, and the Tenth Circuit affirmed. App., *infra*, 1a-26a, 27a-36a.² Like the district court, the court of appeals purported to apply a "quick look" analysis under the rule of reason. The Tenth Circuit concluded that

² In this Court, as below, the NCAA challenges the fee awards solely on the ground that plaintiffs should not have prevailed on the antitrust merits.

the REC Rule “fixe[d] the cost of one of the component items used by NCAA members to produce the product of Division I basketball”; in the Tenth Circuit’s view, the Rule thus “constitute[d] [a] naked horizontal agreement among competitive purchasers to fix price.” *Id.* at 11a. Although the court of appeals recognized that in *Board of Regents* the plaintiffs had proven market power in a defined market, the court held that the REC Rule was “so obviously anticompetitive” that there was no need for plaintiffs to identify a relevant market or to prove any marketwide anticompetitive effects. *Id.* at 18a. At no point did the court pause to consider whether *capping* the price of an *input* has the same kind of pernicious effect on consumers as seller price fixing; rather, the court assumed that any adverse effect on the coaches themselves was “obviously anticompetitive.”

The court of appeals relied on two factors in holding that the REC Rule had “obvious anticompetitive effects.” App., *infra*, 17a. First, the court found that the NCAA “adopted the REC Rule to reduce the high cost of part-time coaches’ salaries.” *Id.* at 18a. Second, although there was no evidence about the market price for coaching services, the court found that, in “some cases,” “the cost-reduction has effectively reduced restricted earnings coaches’ salaries.” *Ibid.* Based on that fact alone, the court concluded that “the REC Rule was successful in artificially lowering the price of coaching services,” and that “no further evidence or analysis is required to find market power to set prices.” *Ibid.*

The Tenth Circuit refused to follow *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977), which held that no anticompetitive effects resulted from the NCAA’s original rule limiting the number of full-time coaches. After attempting to distinguish *Hennessey*, the court of appeals acknowledged the conflict but observed that “*Hennessey* is not Tenth Circuit precedent, and accordingly, is not binding authority on us.” App., *infra*, 19a.

The Tenth Circuit limited its consideration of procompetitive justifications for the REC Rule to “those necessary to produce competitive intercollegiate sports” (App., *infra*, 20a) and rejected all of the reasons for the Rule. The court found that the NCAA had not “*prove[d]* that the salary restrictions enhance competition, level an uneven playing field, or reduce coaching inequities” (*id.* at 25a (emphasis added)) and that “it is not *clear* that the REC Rule *will*

equalize the experience level of such coaches” (*ibid.* (emphasis added)). The court rejected cost containment as a justification because there was “no evidence that limits on restricted-earnings coaches salaries *would be successful* in reducing deficits, let alone that such reductions were *necessary to save college basketball.*” *Id.* at 24a (emphasis added). Because “the nexus between the rule and a *compelling need* to maintain competitive balance” was not “sufficiently *clear on this record,*” the court upheld summary judgment and denied the NCAA a trial on the merits. *Id.* at 25a (emphasis added).

3. The district court did not stay the damages phase of the case. The court tried the damages in this case together with two class actions challenging the REC Rule on behalf of coaches in other sports. See p. ii, *supra*. A jury awarded 1900 coaches a total of \$22.3 million in damages, trebled to almost \$67 million.

REASONS FOR GRANTING THE PETITION

In a case with drastic fiscal consequences for the nation’s institutions of higher learning, the court below held that a rule setting an upper limit on the compensation available to the fourth-ranking coach on Division I basketball teams had such “obvious anticompetitive effects” that it could be condemned on summary judgment without any analysis of those effects within a market. That wholly inappropriate application of the “quick look” rule of reason to a sports federation’s restriction on one input creates intercircuit conflicts and raises issues of antitrust theory sufficiently important to warrant this Court’s attention.

But the importance of this case transcends the legal issues. One of respondents’ counsel called this “the most important legal case in the history of intercollegiate athletics.” *A Matter of Dollars and Nonsense*, ORANGE COUNTY REGISTER, Feb. 26, 1995, at C10 (quoting Gerald Roth). National media have recognized the case’s importance, particularly in light of the massive damages award. See, e.g., *Assistant Coaches Win N.C.A.A. Suit; \$66 Million Award*, N.Y. TIMES, May 5, 1998, at A1; see also *A \$67 Million Blunder?*, SPORTS ILLUSTRATED, May 18, 1998, at 26 (suggesting that, as a consequence of the decision, “the NCAA might not survive in its current form.”).

The Tenth Circuit visited those drastic consequences on the NCAA because it totally misunderstood *NCAA v. Board of Re-*

gents, 468 U.S. 85 (1984), the “quick look” rule of reason, and the proper application of antitrust law to joint *buying* activity in the context of an amateur sports organization. This Court should grant certiorari, endorse the far sounder analysis of such cases as *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977), and reaffirm that it meant what it said in *Board of Regents* when it observed that the NCAA must be accorded “ample latitude” to “play[] [its] critical role in the maintenance of a revered tradition of amateurism in college sports.” 468 U.S. at 120.

I. THE TENTH CIRCUIT’S CONDEMNATION OF THE NCAA’S INPUT RESTRICTION CREATES CONFLICTS WITH SEVERAL OTHER CIRCUITS

In *Board of Regents*, this Court rejected as unreasonable an NCAA rule restricting the *sale* to television broadcasters of the final product — intercollegiate athletic contests. This Court distinguished the *production* of those contests, for which “horizontal restraints on competition are essential” (468 U.S. at 101), from restraints on *the terms of sale for the output*. The broadcasting rule was a “*naked* restraint on price and *output*” and required “*some* competitive justification even in the absence of a detailed market analysis.” *Id.* at 110 (emphasis added).

This case, by contrast, concerns an *input* — coaching services — to the product of intercollegiate athletic contests. As this Court has recognized, it is the very essence of the NCAA (like any sports league) to bring together teams and define the terms on which they will *jointly* produce the “product” of athletic competition. *Athletic* competition, not *economic* competition, is the primary goal. Joint activity on the production side is therefore not inherently suspect. Rather, this Court in *Board of Regents* had only positive things to say about such cooperation:

“Some activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams.” R. Bork, *The Antitrust Paradox* 278 (1978). What the NCAA and its member institutions market * * * is competition itself — contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create

and define the competition to be marketed. A myriad of rules * * * must be agreed upon, and all restrain the manner in which institutions compete. * * * [T]he integrity of the “product” cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. 468 U.S. at 101-102; see *id.* at 88 (citing with approval “rules governing the size of * * * coaching staffs”).

This Court in *Board of Regents* parsed with considerable care the NCAA’s various activities and condemned *only* one output-restricting activity, while describing input-restricting activities with approval. Largely because of its failure to heed the distinctions this Court drew, the Tenth Circuit misconceived the law, and created conflicts with other circuits, at all major stages of its analysis — its characterization of the REC Rule as “obviously anticompetitive,” its condemnation of the rule without determining whether it had actual anticompetitive effects in a properly defined market, and its imposition of an insuperable *post hoc* burden of justification on the NCAA.

A. The Tenth Circuit’s Decision Conflicts With Decisions Upholding The Legality Of NCAA Coaching Limitations Under The Rule Of Reason

1. The Tenth Circuit’s decision is in square conflict with two decisions that upheld the NCAA’s earlier, functionally indistinguishable rule that capped the number of full-time coaches whose salaries were unlimited and restricted part-time coaches to the equivalent of grants-in-aid. Both the Fifth Circuit and the Oklahoma Supreme Court applied a full rule-of-reason analysis in holding that these agreements to limit purchases of coaching services did *not* violate the antitrust laws. See *Hennessey v. NCAA*, *supra*; *Oklahoma Regents*, *supra*. Indeed, the Tenth Circuit is the first court ever to invalidate an NCAA restraint on an input into the “product” of college athletic competitions. NCAA rules restricting athlete compensation have been held *valid* with “little difficulty” despite the horizontal restraint on price. *McCormack v. NCAA*, 845 F.2d 1338, 1344 (5th Cir. 1988). Courts have upheld a variety of other NCAA input restrictions.³

³ See, e.g., *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998); *Hairston v. Pacific 10 Conf.*, 101 F.3d 1315, 1320 (9th Cir. 1996); *Banks v. NCAA*, 977 F.2d 1081, 1087-

The Tenth Circuit ultimately acknowledged the conflict with *Hennessey* by resting its contrary ruling on the fact that “*Hennessey* is not Tenth Circuit precedent, and accordingly is not binding authority.” App., *infra*, 19a. The court’s half-hearted efforts elsewhere to distinguish *Hennessey* fell far short. To begin with, the flat input restriction challenged in *Hennessey* is economically identical to the salary cap at issue here. In both cases, the question is whether the NCAA can cut off unrestricted price competition for coaches after a certain number have been hired.

A flat three-coach limit, barring the fourth coach altogether, would have been *more* restrictive of competition for coaches than the REC Rule, which permitted a fourth coach to be paid up to \$16,000. In fact, one plaintiff in *Hennessey* complained of his consignment to a part-time position that paid only \$2100 at the public college where he coached, after having earned \$20,000 as a full-time assistant. 564 F.2d at 1141 n.3. The plaintiffs in *Hennessey* **proposed** a salary cap as a less restrictive alternative to limiting the number of coaches. See *id.* at 1154. The lesser economic restraint of a salary cap and the greater restraint of an absolute refusal to hire either must stand together under the rule of reason, as in *Hennessey*, or fall together, as the Tenth Circuit saw it. App., *infra*, 19a; see Yancey, Comment, *Is the Quick Look Too Quick?: Potential Problems with the Quick Look Analysis of Antitrust Litigation*, 44 U. KAN. L. REV. 671, 705-706 (1996); see also *Chicago Prof. Sports Ltd. Partnership v. National Basketball Ass’n*, 961 F.2d 667, 676 (7th Cir. 1992) (*Bulls I*).

In a most misguided attempt to justify creating a conflict, the Tenth Circuit speculated that the *Hennessey* court might “have reached a different result” if it had “had the benefit” of this Court’s later decision in *Board of Regents*. App., *infra*, 19a. In *Board of Regents*, however, this Court cited *Hennessey* with approval as an example of a case in which the NCAA had ensured the “the integrity of a ‘product’” — athletic contests “identifi[ed] * * * with

1094 (7th Cir. 1992); *Shelton v. NCAA*, 539 F.2d 1197, 1198 (9th Cir. 1976); *Gaines v. NCAA*, 746 F. Supp. 738, 744-746 (M.D. Tenn. 1990); *United States v. Walters*, 711 F. Supp. 1435, 1441-1442 (N.D. Ill. 1989); *Justice v. NCAA*, 577 F. Supp. 356, 379 (D. Ariz. 1983); *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975); *Kupec v. Atlantic Coast Conf.*, 399 F. Supp. 1377, 1380 (M.D.N.C. 1975).

an academic tradition” — that “cannot be preserved except by mutual agreement,” and thus “had play[ed] a vital role in enabling college football to preserve its character”; such actions “widen consumer choice” and “hence can be viewed as procompetitive.” 468 U.S. at 101-102 & n.24. The Court’s favorable view of *Hennessey* was unanimous: the dissent cited *Hennessey* in specifically approving NCAA limitations on “the number of coaches a school may hire for its football and basketball programs.” *Id.* at 123 (White, J., dissenting).

In the end, the Tenth Circuit rested not on distinctions but on the ground that *Hennessey* was “not Tenth Circuit precedent.” App., *infra*, 19a. This Court’s *Board of Regents* opinion demonstrates that it is the Tenth Circuit that is out of step, not *Hennessey* or *Oklahoma Regents*. The conflict warrants review.⁴

2. The Tenth Circuit’s decision rests on its assessment that the REC Rule is a “naked price restraint” that is “obviously anti-competitive” and “nearly identical” to the *output* restraint condemned in *Board of Regents*. App., *infra*, 17a-18a. The court could not have been more wrong.

Input and output restraints are not economically identical and do not receive the same legal treatment. See Jacobson & Dorman, *supra*, 36 ANTITRUST BULL. at 45. Sellers violate the most settled prohibition in antitrust law when they enter into naked agreements not to sell except at a particular price. By contrast, most joint

⁴ *Hennessey* and *Oklahoma Regents* reflect sound economic principles. As one analysis of buyer-side restraints concludes:

The courts’ failure to develop a consistent general theory or methodology * * * has not caused them to reach incorrect results. The courts have seemed to grasp, intuitively, the point that ***purchasing restraints should not be treated harshly***. Faced with specific fact situations, the cases usually reach results consistent with sound economic analysis.

Jacobson & Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1, 26 (1991) (emphasis added). The same authors decry judicial decisions — such as the one below — that “leave[] the inaccurate impression that the antitrust treatment of buyer conduct should be ‘symmetric’ to the treatment of seller behavior” (*id.* at 3), or are “inconsistent[] with” this “Court’s recognition in *NCAA v. Board of Regents* that enhancement of the quality of the sport is a legitimate procompetitive justification that must be considered under the rule of reason” (*id.* at 34-35 (footnotes omitted)).

purchasing arrangements “do not raise antitrust concerns” at all. U.S. Dep’t of Justice & FTC, *Statements of Antitrust Enforcement Policy in Health Care* (1996) (*DOJ/FTC Health Care Statements*), reprinted in 4 Trade Reg. Rep. ¶ 13,153, at 20,812. Indeed, the joint purchase of *inputs* by a cooperative of horizontal competitors in an *output* market is not an “activity characteristically likely to result in predominantly anticompetitive effects.” *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985).⁵

Furthermore, whatever the proper antitrust treatment of *naked* price agreements among buyers may be, it is flatly wrong to apply the price-fixing paradigm to restrictions on competition among buyers that further their joint production of a product. As this Court recognized in *Board of Regents*, 468 U.S. at 101, such restraints are classic examples of restraints ancillary to a legitimate joint venture. See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 416 & n.131 (4th ed. 1997); see also *Chicago Prof. Sports Ltd. Partnership v. National Basketball Ass’n*, 95 F.3d 593, 598-599 (7th Cir. 1996) (*Bulls II*).

The Tenth Circuit’s conclusions that the buyer restraint at issue is “naked” and “obviously anticompetitive” cannot be squared with *Board of Regents*. This Court recognized the general principle permitting buying-side cooperation by joint venturers, and cited as an example of the NCAA’s “important role” its adoption of “rules * * * governing the size of * * * coaching staffs.” 468 U.S. at 88. The Court specifically identified *Hennessey* and *Oklahoma Regents* as cases that involved NCAA actions that “can be viewed as procompetitive.” *Id.* at 102 & n.24.

The input limitation at issue here is not at all a “naked restrain[t] of trade with no purpose except stifling of competition.” *BMI*, 441 U.S. at 20. Rather, the REC Rule was one of myriad input-restricting rules appropriately designed for the “product” of athletic contests within the framework of higher education. See pp. 2-3, *supra*; *Board of Regents*, 468 U.S. at 101-102. To condemn such

⁵ Senator Sherman believed that his bill contained “nothing * * * to prevent a refusal by anybody to buy anything. All that it says is that the people producing or selling a particular article shall not make combinations to advance the price of the necessaries of life.” 20 CONG. REC. 1458 (1889).

a rule on the basis of *Board of Regents* — which involved an unjustified restraint on the *output* of the legitimate joint venture — reflects a fundamental misunderstanding of that decision, which this Court should correct.

Moreover, the REC Rule is a “restraint in a *limited* aspect of a market” that “may actually enhance marketwide competition.” *Board of Regents*, 468 U.S. at 103 (emphasis added).⁶ This Court approved a closely analogous pricing limitation in *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918) (Brandeis, J.). In *Chicago Board*, the members of a commodities exchange agreed that they would not purchase exchange-traded commodities while the exchange was closed except at the exchange closing price on the last trading day. Viewed through a microscope, that agreement was pure price fixing, but this Court held that the limited restraint served the greater good of the exchange, and so was permissible. *Id.* at 238-239. So too here, the limitation of full-time coaches to three and the REC Rule limitations on the fourth coach leave NCAA members free to bid up the price of coaching services for most of their positions, but reserve a single position for an apprentice coach. The rest of the coaching market — 900 unlimited-compensation coaching positions in Division I and thousands more in Divisions II and III, professional leagues, junior colleges, and high schools — remains unchanged.

3. Although the court of appeals thought it “obviously anticompetitive” for the NCAA to place *any* limit on the salaries paid *any* coaches, it is far from obvious that labor-market restraints in the sports league context are anticompetitive. There is considerable

⁶ The Tenth Circuit was skeptical that the REC Rule could actually enhance competitive balance among basketball teams. App., *infra*, 25a. The court’s skepticism was no reason to deny the NCAA a trial to show otherwise, but in any event the court’s framework for analysis was wrong. If the REC Rule truly has a trivial impact on the game, that is because it affects so little of one input, coaching. It makes no sense to treat such a limited restraint as “obviously anticompetitive” (and sufficient justification for a \$67 million judgment), yet so limited in its impact that its procompetitive effects can be disregarded. Ordinarily, under the rule of reason, the limited nature of a restraint is a ground to uphold it, not to strike it down. Cf. *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 957 F.2d 1318, 1330 (6th Cir.), vacated, 506 U.S. 910 (1992), reinstated in pertinent part, 11 F.3d 660, 663-664 (6th Cir. 1993); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 519-520 (3d Cir. 1998).

academic debate on this subject.⁷ Some courts and academics go so far as to contend that the antitrust laws do not forbid concerted restraints on competition for any purchase of labor unless competition in an output market also is restrained.⁸

One reason why it is far from clear that collectively imposed labor restraints are anticompetitive is that they tend to lower rather than raise prices. As this Court recently reiterated, “[l]ow prices benefit consumers regardless of how those prices are set.” *State Oil Co. v. Khan*, 118 S. Ct. 275, 282 (1997). For that reason, Justice Breyer observed as a Circuit Judge, “the relevant economic considerations may be very different when low prices, rather than high prices, are at issue,” and “courts * * * should be * * * reluctant to condemn too speedily * * * an arrangement that on its face, appears to bring low price benefits to the consumer.” *Kartell v. Blue Shield*, 749 F.2d 922, 931 (1st Cir. 1984).

It is not anticompetitive simply to eliminate a narrow degree of rivalry among a limited group of horizontal competitors unless that elimination also harms consumer welfare. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986) (Bork, J., joined by R.B. Ginsburg, J.). What makes some “input sellers unhappy” may help rather than harm consumers. Jacobson & Dorman, *supra*, 36 ANTITRUST BULL. at 3-4. And the interests of consumers, not those of input sellers, must govern antitrust analysis because “Congress designed the Sherman Act as a consumer welfare prescription.” *Reiter v. Sonotone Corp.*, 442

⁷ Compare Jacobson & Dorman, *supra*, 36 ANTITRUST BULL. at 33-35; Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 2-6 (1971); and Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 34-58 (1986), with Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 527.

⁸ Compare the decision below with *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 534 (5th Cir. 1982) (concerted employer “restraint at the level of the labor market itself does not state a claim of violation of the antitrust laws”), and *Carroll v. Protection Maritime Ins. Co.*, 512 F.2d 4, 9-10 (1st Cir. 1975) (same). Compare Altman, *Antitrust: A New Tool for Organized Labor?*, 131 U. PA. L. REV. 127 (1982), with Jerry & Knebel, *Antitrust and Employer Restraints in Labor Markets*, 6 INDUS. REL. L.J. 173 (1984).

U.S. 330, 343 (1979); see *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940) (Act prohibits restraints that operate “to the detriment of purchasers or consumers of goods and services”). Just such considerations — the recognition that under the antitrust laws the “fundamental test of the reasonableness of [a] restraint is its effect on the *public*” — led the Oklahoma Supreme Court to hold that the NCAA’s earlier limitations on the number of full-time professional coaches did not violate the antitrust laws. *Oklahoma Regents*, 561 P.2d at 506 (emphasis added).

Because “buyer agreements are rarely likely to have significant anticompetitive effects” on consumers, “the antitrust treatment of joint buyer activity should not be symmetrical to the treatment of joint seller activity.” Jacobson & Dorman, *supra*, 36 ANTITRUST BULL. at 4. In general, the antitrust laws have little concern with buyers’ ability to pay *lower* prices unless an intermediate buyer may reduce *output* by paying its suppliers less than a competitive price, and then take advantage of the shortage to turn around and charge supracompetitive prices to consumers. 2A P. AREEDA ET AL., ANTITRUST LAW ¶ 574, at 300 & n.2 (1995). But there are no such dangers here.

This Court in *Board of Regents* understood — yet the Tenth Circuit completely failed to grasp — that an output-reducing effect is the *sine qua non* of an antitrust violation. This Court declared in *Apex Hosiery* that it “never applied the Sherman Act in any case, whether or not involving labor * * * unless * * * there was some form of restraint upon commercial competition in the marketing of goods or services” — *i.e.*, output markets. 310 U.S. at 493. And as Judge Easterbrook, speaking for a panel, put it, “The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem.” *Bulls II*, 95 F.3d at 597.⁹ The limited antitrust concern that

⁹ See also *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988) (to be “manifestly anticompetitive,” a practice must “always or almost always tend to restrict competition *and decrease output*”) (emphasis added and internal quotation marks omitted); *Association for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 583 n.7 (D.C. Cir. 1984) (Tamm, Wald & R.B. Ginsburg, JJ.) (“If the practice allows an entity to supply more goods for less cost, it has procompetitive effects. If the practice excludes competitors or *restricts output*

does exist with buyer-side restraints stems from the possibility that some such restraints will reduce output and thereby harm allocative efficiency. See Jacobson & Dorman, *supra*, 36 ANTITRUST BULL. at 17. This Court was acutely aware of the need for an output-limiting effect in *Board of Regents*. See 468 U.S. at 104, 106-107, 110, 114, 116-117, 120. Yet the court of appeals branded the REC Rule “obviously anticompetitive” without *one word* about its effect on output.

Courts should be especially reluctant to condemn cost-cutting measures in sports contexts, where those who agree with each other to limit buying-side competition compete with each other not in the marketplace, but on a court or playing field. See *Board of Regents*, 468 U.S. at 102; Jacobson & Dorman, *supra*, 36 ANTITRUST BULL. at 28 & n.49, 34-35, 64, 77-78. “The essence of successful league competition is maintaining a balance of power among the competitors — a goal antithetic to the goals of competition in a conventional economic market.” *General Leaseways, Inc. v. National Truck Leasing Ass’n*, 744 F.2d 588, 595 (7th Cir. 1984) (Posner, J.). Limiting individual teams’ ability to engage in unlimited spending to attain sporting advantages is a way to *enhance* — not degrade — the product consumers want, *i.e.*, competitive leagues and tournaments.

By deeming “obviously anticompetitive” the NCAA’s attempt to limit the cost of one coaching position, however, the Tenth Circuit collapsed a complex economic analysis into the conclusory label “price-fixing.” That “easy label[]” led to the wrong answer, *BMI*, 441 U.S. at 8, so that, in Justice Breyer’s words, the court of appeals “condemned too speedily” a procompetitive restraint. *Kartell*, 749 F.2d at 934.

B. The Tenth Circuit’s Decision Conflicts With Decisions Of Other Circuits Because It Condemned The Restraint Based On A “Quick Look” Without Proof Of Market Power Or Anticompetitive Effects In A Discernible Market

Most business practices challenged under the antitrust laws “are analyzed under a ‘rule of reason’” that requires “the finder of fact”

without decreasing the cost of production, [it] generally will *increase the price of consumption* and thus have anticompetitive effects.”) (emphasis added and citation omitted).

to “decide whether the questioned practice imposes an unreasonable restraint on competition.” *State Oil*, 118 S. Ct. at 279. The plaintiff must prove that the defendant has market power or that the practice has actual anticompetitive effects in a properly defined market. See *Board of Regents*, 468 U.S. at 104-113. If such a showing is made, the factfinder compares any evidence of procompetitive benefits of the practice with its adverse effect on competition. *Id.* at 104.

A few extraordinarily pernicious practices, including naked price fixing among competing sellers, are condemned *per se*. *State Oil*, 118 S. Ct. at 279. And in limited circumstances involving restraints that appear anticompetitive but may not warrant categorical prohibition, the Court has applied a “quick look” analysis that requires the defendant to advance plausible procompetitive benefits without first requiring a detailed inquiry into anticompetitive effects. *Board of Regents*, 468 U.S. at 100-117; *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 457-464 (1986).

The Tenth Circuit applied the “quick look” rule of reason in this case in a way that conflicts with decisions in other circuits.

1. The Tenth Circuit held that any horizontal agreement not to compete on price could be condemned under the rule of reason without assessing the relevant market or the existence of *market-wide* anticompetitive effects. App., *infra*, 16a-19a. By contrast, several courts of appeals have held that a practice may not be condemned under the rule of reason, even in a “quick look” analysis, unless the defendant has market power (or causes actual anticompetitive effects) in a relevant market.

This Court observed in *Board of Regents* 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 (emphasis added)), but the Court did not dispense with market analysis altogether in the way the Tenth Circuit did here. To the contrary, before requiring the NCAA to justify its output-limiting television restrictions, this Court determined that the NCAA *did* “possess market power” in a properly defined “separate market for telecasts of college football.” *Id.* at 112; see also *Indiana Dentists*, 476 U.S. at 460.

Other courts of appeals interpret *Board of Regents* in this way.¹⁰ In applying the “quick look,” the Ninth Circuit requires “some analysis of market power,” although that analysis need not amount to “the full economic analysis of market power often required under the full rule of reason” if the restraint is “facially anti-competitive.” *California Dental Ass’n v. FTC*, 128 F.3d 720, 729, 730 (9th Cir. 1997), petition for cert. pending, No. 97-1625.¹¹ Similarly, the Sixth Circuit has held that “evidence of the power of [defendants] in the relevant market” is necessary for an agreement to be condemned under a “quick look.” *Detroit Auto Dealers Ass’n v. FTC*, 955 F.2d 457, 470 (1992) (applying *Indiana Dentists*). And the Eleventh Circuit found “tortured” an argument that *Board of Regents* obviated any “showing of market power and diminution of competition.” *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1507 n.10 (1989). In that court’s view, this Court in *Board of Regents* held only that “a lengthy economic analysis of market power is unnecessary” if market power is “evident” from the record. *Ibid.*¹²

The decision below also conflicts with the Second Circuit’s holding that, in every rule-of-reason case, “quick look” or not, the plaintiff must either “establish that defendants possess the requisite

¹⁰ Leading commentators also agree. *Board of Regents* “did not denigrate any and all proof of power and industry circumstances. Rather, it dispensed with ‘elaborate,’ ‘de-ailed,’ ‘extensive,’ and ‘lengthy analysis’ of the industry, market, or power.” 7 AREEDA, *supra*, ¶ 1511, at 433 (1986); see also Kauper, *The Sullivan Approach to Horizontal Restraints*, 75 CAL. L. REV. 893, 914 (1987) (under quick look, “the issue of market power must be addressed directly” before conduct is condemned). Some market power screen is necessary if the rule of reason is to have any meaning because entities “that lack [market] power cannot injure competition no matter how hard they try.” Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 20 (1984).

¹¹ Thus, in *California Dental*, although the FTC had not proved “what the market shares are in particular localities,” the Ninth Circuit noted that the FTC had proved that the association accounted for “75 percent of licensed dentists in California,” which was “fairly strong evidence.” 128 F.3d at 730. Even so, the Ninth Circuit still required evidence of “significant barriers to entry” that might “convert this market share into market power.” *Ibid.*

¹² See also *Bulls II*, 95 F.3d at 600 (in *Board of Regents* “the Court satisfied itself that the NCAA possesses market power” before “cast[ing] any burden of justification on the NCAA”).

market power so that their arrangement has the potential for genuine adverse effects on competition” or “demonstrate actual detrimental effects, such as a reduction of output,” in a relevant market. *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 545 (2d Cir. 1993). The Seventh Circuit likewise requires a plaintiff to show “anti-competitive effects on a discernible market” in any rule-of-reason case. *Banks v. NCAA*, 977 F.2d 1081, 1088 (7th Cir. 1992). The Court should grant review to resolve this conflict as well.

2. The Tenth Circuit purported to find that the REC Rule had actual anticompetitive effects (App., *infra*, 19a), but that bald conclusion is meaningless because the court of appeals did not delineate a proper market within which such effects could be gauged. In *Board of Regents*, the dispositive effect was a reduction in *output*. *Board of Regents*, 468 U.S. at 120. In this case, by contrast, there was no suggestion that any output had been reduced; moreover, had there been evidence of a reduction in an *input*, that could not have advanced plaintiffs’ case because improved *efficiencies* always result in reduced input.

The Tenth Circuit believed, however, that it could find an anti-competitive effect by inferring that NCAA members would not have prescribed the REC Rule unless the coaches’ salaries would have been higher in a competitive marketplace. App., *infra*, 22a. But that conclusion does not follow: the NCAA intended that the lower salary would operate, not to reduce the compensation of existing coaches, but to substitute entry-level coaches for more experienced coaches who would seek higher-paying opportunities elsewhere. The evidence at the damages trial showed that exactly that phenomenon occurred. More than 75% of the coaches in REC positions were new. Out of the class of 3000 REC coaches, fewer than 100 previously received more than the cap amount and took pay cuts when the REC Rule took effect.

Respondents did not advance any definition of the relevant market, much less introduce evidence that the REC Rule had actual detrimental effects in a relevant market. The only evidence the Tenth Circuit cited to show the supposed effects of the REC Rule was deposition testimony that “some” unspecified part-time coaches formerly had earned \$60,000 to \$70,000 annually because they

were employed at basketball summer camps operated by their head coaches. NCAA C.A. App. 127, 143. But evidence of episodic effects on “some” unnamed individuals does not show a marketwide anticompetitive effect. *Lie v. St. Joseph Hosp.*, 964 F.2d 567, 570 (6th Cir. 1992). “Rather, a practice is ‘anticompetitive’ only if it harms the competitive process.” *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, J.). Yet the Tenth Circuit entirely disregarded the competitive *process* for the sale of coaching services.¹³

In the end, the Tenth Circuit reasoned by tautology: because NCAA members did not pay REC coaches more than \$16,000, the “price of coaching services” was restrained. See App., *infra*, 18a. Lacking any evidence that the “price of coaching services” in general was affected, the Tenth Circuit simply labeled the restraint an “effect” in itself.

3. Because respondents presented no evidence of anticompetitive effects, the question of market power should have been dispositive. The relevant market here consists of competing *buyers* for the coaches’ services, and is measured by all positions that would provide reasonable substitutes for REC positions. See *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 392-399 (1956). As the record in this case demonstrates (see pp. 5-6, *supra*), the market for coaching services embraces at a minimum *all* positions at *all* levels of the NCAA, as well as paid positions in junior colleges, high schools, Amateur Athletic Union leagues, and professional leagues such as the National Basketball Association, the Continental Basketball Association, and the United States Basketball League. The question of market definition in this case is not at all like that in *Board of Regents*, where only the NCAA and its members could sell major college football telecast rights; rather, the NCAA and its member institutions have many competitors for the purchase of coaching talent. The Fifth Circuit in *Hennessey* recognized the breadth of this market. 564 F.2d at 1154.

The *only* evidence on this issue showed that the positions covered by the REC rule accounted for no more than 8% of the

¹³ By contrast, the Third Circuit has expressly distinguished between the marketwide anticompetitive effect of an agreement and the self-evident effect of an agreed-upon price on particular transactions made at that price. *United States v. Brown Univ.*, 5 F.3d 658, 674 (3d Cir. 1993).

basketball coaching market. App., *infra*, 16a. As a matter of law, such a limited restraint could not have anticompetitive effects. See, e.g., *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991) (defendant with only 5.2% market share unlikely to “significantly restrain trade”); *Rothery Storage*, 792 F.2d at 220 n.7 (defendant with 6% market share could not injure competition); *DOJ/FTC Health Care Statements*, 4 Trade Reg. Rep. at 20,812 (joint purchasing agreements involving less than 35% of a market raise no antitrust concerns).

A proper market analysis should have resulted in summary judgment for the NCAA. See Yancey, *supra*, 44 U. KAN. L. REV. at 703-706. At the least, given the restraint and market at issue here, the evidence created a triable issue of fact, precluding summary judgment, on the question whether the REC Rule had anti-competitive effects in any relevant market at all.¹⁴

C. The Tenth Circuit, In Conflict With Other Circuits, Unduly Narrowed The Justifications Available To Invoke A Full Rule-of-Reason Analysis

1. Under a “quick look” analysis, a court is supposed to determine whether the defendant has advanced a plausible competitive justification sufficient to warrant a full rule-of-reason inquiry into the actual effects of the practice. Only if anticompetitive effects exist need the court determine whether the procompetitive benefits outweigh the adverse effects. The Tenth Circuit assessed the justifications for the REC Rule with its thumb firmly on the scale, holding that the restraint must be condemned summarily unless the defendant could prove to the court’s satisfaction that the challenged restraint invariably achieved the asserted procompetitive benefit, and that the restraint was “necessary” to achieve a procompetitive

¹⁴ That conclusion is bolstered by the difficulty that *buyers* have in exerting market power. Buyers of an input can exert monopsony power only when the input is uniquely valuable in its current use, so that, even if the price is depressed by a group of buyers acting collectively, *sellers* of the input cannot find alternative *buyers*. See R. POSNER & F. EASTERBROOK, ANTITRUST LAW 150 (2d ed. 1982). Thus, in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 240-242 (1948), the refiners’ monopsonistic price-fixing scheme succeeded because sugar-beet growers could not easily find other buyers or profitably switch to other crops. See Jacobson & Dorman, *supra*, 36 ANTITRUST BULL. at 29-30. By contrast, basketball coaches can sell their services to a wide variety of buyers.

end for which there was a “*compelling need*.” App., *infra*, 20a, 25a (emphasis added).

That restrictive approach conflicts with the holding of the Seventh Circuit that, in a “quick look” analysis, a defendant need only articulate “some explanation connecting the [challenged] practice to consumers’ benefits” to shift the inquiry to the “analysis of market power” that stands at the threshold of the full rule-of-reason analysis. *Bulls I*, 961 F.2d at 674. In addition, the Third Circuit has held that the burden of a defendant undergoing a “quick look” is merely to “justify” the restraint “with some procompetitive virtue.” *United States v. Brown Univ.*, 5 F.3d 658, 674 (1993). That court refused to require defendants to produce a “persuasive procompetitive justification, or a showing of necessity,” simply to trigger full rule-of-reason review (*id.* at 676); rather, “the *asserted* procompetitive and pro-consumer features” of the challenged agreement sufficed to require “a full rule of reason analysis.” *Id.* at 678 (emphasis added).

Professor Areeda agreed with this conception of “quick look” review: 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 shifts to the plaintiff the burden to demonstrate market power or anticompetitive effects in a market. *Id.* at 429. Only after such a showing does a defendant “have the burden of coming forward with allegations and evidence that the justifications claimed are legitimate in principle and are actually promoted significantly by the restraint.” *Ibid.*; see also Schmalensee, *Agreements Between Competitors*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 98, 110-111 (Jorde et al., eds., 1992).

This conflict among the circuits on the proper structure of the “quick look” rule-of-reason analysis warrants further review.

2. In *Board of Regents*, this Court found it “reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.” 468 U.S. at 117. The Court identified

the promulgation of “rules governing the size of * * * coaching staffs” as part of the NCAA’s “important role in the regulation of amateur collegiate sports.” *Id.* at 88. And the Court cited *Hennessey* in illustrating “procompetitive” NCAA actions that help college sports “preserve [their] character.” *Id.* at 102 & n.24. That precedent should have been sufficient for the Tenth Circuit at least to allow a factfinder to balance the supposed anticompetitive effects of the REC Rule against the procompetitive benefits shown by the evidence: maintaining competitive balance, controlling athletic department costs, and providing an opportunity for entry-level coaches to work in Division I programs.

Instead, the court of appeals measured the REC Rule’s benefits against an impossible standard. The Rule had to serve a “compelling need” (App., *infra*, 25a) — a function that was absolutely “necessary to produce competitive intercollegiate sports” (*id.* at 20a) — and the Rule had to be invariably “successful” in achieving the stated benefit. *Id.* at 24a. That approach wholly misconceives proper rule-of-reason analysis, which assesses whether a “restraint, viewed at the time it was adopted, may promote the success of * * * more extensive cooperation” toward a joint undertaking like intercollegiate sports. *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (Easterbrook, J.) (emphasis added).¹⁵

The Tenth Circuit declared that the REC Rule “was nothing but a cost-cutting measure.” App., *infra*, 25a. In so stating, the court disregarded extensive testimony about the Rule’s relation to the competitive balance between colleges that stockpiled experienced coaches as their fourth and fifth coach and schools that had graduate students or *bona fide* part-time coaches in those positions. See pp. 3-4, *supra*.

¹⁵ The Tenth Circuit disregarded the traditional meaning of “necessary” in rule-of-reason analysis — *i.e.*, “reasonably related” or “reasonably necessary” — to impose its standard of absolute necessity. See, *e.g.*, *Brown Univ.*, 5 F.3d at 669, 678-679; U.S. Dep’t of Justice & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* (1995), reprinted in 4 Trade Reg. Rep. ¶ 13,132 at 20,743. “The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity.” *National Football League v. North Am. Soccer League*, 459 U.S. 1074, 1079 (1982) (Rehnquist, J., dissenting from denial of certiorari).

Just as the NCAA lawfully may restrict roster sizes, player compensation (in such forms as scholarships), practice hours, and season lengths, it may restrict the coaching resources that members may use in NCAA-sanctioned contests. The number and quality of coaches affect the ultimate product of athletic competition in many ways. These include the availability of training for each athlete based on the ratio of athletes to coaches, the attractiveness of a college's athletic program to prospective recruits based on the availability of individual coaching, and the availability of experienced assistants to conduct team drills to free more senior coaches for other duties such as recruiting. See NCAA C.A. App. 342. As a commentator sympathetic to respondents has acknowledged, "schools that would invest more to hire more coaches would clearly perform on the field or court at a higher level." Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2654 (1996).

3. The Tenth Circuit denigrated the stated aim of the REC Rule to preserve some positions for entry-level coaches, on the ground that some experienced coaches would fill REC positions despite the low pay. App., *infra*, 20a-21a. But, before the REC Rule was proposed, the NCAA proposed to limit colleges to three basketball coaches without salary limits. See p. 4, *supra*. The REC Rule arose only after basketball coaches asked that the NCAA preserve some avenue of entry into Division I for coaches who could not successfully compete for higher salaried positions. The NCAA legitimately could do so without being second-guessed on the ground that not every single REC coach would be new to the profession. The development of coaches, no less than the development of athletes, is part of the NCAA's mission to provide the "product" of intercollegiate athletics.

Of course, a salary cap will not prevent some coaches, like respondent Jarvis, from selling their services for less money than they could command elsewhere for a while. But the tailoring between a restraint and a procompetitive benefit need not be perfect, and economic considerations eventually prevail. Over time, coaches who can earn more than \$16,000 will move out of REC positions, and restricted earnings coaches will be less experienced than the others on a staff.

4. The court of appeals likewise rejected the cost containment rationale because the NCAA did not prove that reducing the

number and compensation of restricted earnings coaches unquestionably would reduce costs if schools chose to spend the money they saved on other aspects of the basketball program. App., *infra*, 24a. But reducing the cost of a personnel *position* that a school must fill to remain competitive cuts costs; doing so will *permit* some schools to funnel the savings into academic programs or other sports, even if not all schools *choose* to do so.

The Tenth Circuit did not believe that cost containment could legitimately justify the REC Rule at all (App., *infra*, 24a), but that view disregards the entire context of NCAA members' joint undertaking to provide competitive intercollegiate athletics for the benefit of spectators and students alike. Many colleges face opposing pressures to field well-coached competitive teams, to provide opportunities for a broad range of students to participate in intercollegiate sports, and to accomplish both of these goals on a tight budget. See *id.* at 79a (42% of Division I athletic programs operated at a deficit in 1985).

Several procompetitive benefits flow from controlling the costs necessary to maintain a competitive Division I basketball program. As the Oklahoma Supreme Court recognized in approving the original restrictions on coaches, "the rising costs of amateur athletics * * * and the ever increasing competitive imbalance [in] Division I" are closely connected. *Oklahoma Regents*, 561 P.2d at 507. Containing those costs fosters competitive balance by better enabling less affluent schools to provide the same athlete-coach ratio and to compete effectively for recruits.

Moreover, the NCAA "seeks to maintain * * * intercollegiate athletics, including coaching activities, as an integral part of th[e] educational program." *Oklahoma Regents*, 561 P.2d at 502. Controlling athletic department costs, in particular limiting the number of full-time salaried coaches, helps keep athletics from overshadowing the other functions of member schools and preserves the distinctive collegiate character of the product.

Finally, cost containment directed at individual sports allows colleges to devote funds to additional sports. Concern about "sports being dropped" underlay the cost-reduction inquiry that produced the REC Rule and other measures. See NCAA C.A. App. 162, 519. Cost containment helps to foster the diversity of competitive events that fans, students, and athletes demand.

* * * * *

Once the NCAA had advanced justifications for the REC Rule that were tied to the aims that this Court held were legitimately procompetitive, respondents should have had the burden to prove actual anticompetitive effects under a full rule-of-reason analysis. Because respondents could not meet that burden, the NCAA was entitled to summary judgment. At the very least, the case should have been set for trial.

The Tenth Circuit's requirement that a defendant *prove* that a restraint was "necessary" to serve — and *succeeded* in serving — a "compelling need" in order to put the plaintiffs to their proof of anticompetitive effects transforms the "quick look" into a rule of *per se* condemnation. This important question of burden allocation warrants review by this Court.

II. THIS CASE PRESENTS QUESTIONS OF EXCEPTIONAL IMPORTANCE TO ANTITRUST LAW AND INTERCOLLEGIATE ATHLETICS

The decision below deserves review by this Court because it creates multiple conflicts with other circuits and is, in many respects, flatly wrong. It also deserves review because it is exceptionally important, in terms both practical and doctrinal.

1. The decision "deserves careful scrutiny" because its "application threatens the entire structure of intercollegiate sports." Roberts, *supra*, 70 TUL. L. REV. at 2632. The decision undermines "[o]ne of the NCAA's primary reasons for existence — providing member schools with a way to make rules designed to keep any school from gaining a competitive advantage." *NCAA Reassesses Future After \$67 Million Judgment*, WASH. POST, May 12, 1998, at E1. According to Professor Roberts, the case "opens the door for challenges to all NCAA rules. . . . Once you start down that path, the NCAA is at some risk of having any rule they have challenged." *Court Orders NCAA to Pay \$67 Million*, WASH. POST., May 5, 1998, at E1, E2.¹⁶

¹⁶ Reflecting its importance, the decision of the district court, which the Tenth Circuit affirmed, has attracted substantial academic commentary. See, e.g., Roberts, *supra*, 70 TUL. L. REV. 2631 (1996); Sacks, *The Restricted Earnings Coach Under Sherman Act Review*, 4 SPORTSLAW. J. 13, 31 (1997); Yancey, *supra*; Dowd, Note, *Oligopsony Power: Antitrust Injury and Collusive Buyer Practices in Input Markets*, 76 B.U. L. REV. 1075, 1107-1110 (1996).

The NCAA cannot perform its “important role in the regulation of amateur intercollegiate sports” (*Board of Regents*, 468 U.S. at 88) under such a cloud. Rather, this Court has already recognized the “ample latitude” the NCAA needs to perform that role (*id.* at 120), latitude conspicuously absent from the Tenth Circuit’s analysis. That court’s sweeping decision threatens the survival of all rules limiting expenditures on inputs to an intercollegiate athletic program. One of respondents’ lawyers already threatened a lawsuit if the NCAA attempts to reduce the number of paid coaches by replacing one position with a graduate assistant who could only be compensated with a grant-in-aid. *NCAA Loses Court Battle*, WASH. TIMES, July 29, 1995, at D1. Indeed, respondents have maintained (C.A. Br. 36 & n.15) that “the district court * * * issue[d] the injunction under appeal” precisely to *prevent* the NCAA from replacing the fourth paid coach with a graduate student. That is, in the view of plaintiffs and, apparently, the district court, any attempt by the NCAA to limit the number of paid professional coaches in any sport — even to replace them with *students* — would risk contempt sanctions.

Moreover, under the Tenth Circuit’s flawed analysis, it can be seriously argued that “virtually all NCAA rules will have significant anticompetitive effects,” and “virtually no substantive rule can survive” antitrust review. Roberts, *supra*, 70 TUL. L. REV. at 2671-2672. If the decision below stands, disgruntled athletes who would like more or larger athletic scholarships may even file lawsuits in the hope that other courts will extend the Tenth Circuit’s mistaken notion that the NCAA cannot defend rules that affect “price” unless they are absolutely “necessary to create the product of competitive college sports.” App., *infra*, 20a; see Goplerud, *Pay for Play for College Athletes: Now, More Than Ever*, 38 S. TEX. L. REV. 1081, 1091-1092 (1997) (decision affirmed in this case supports the “notion that the limit on [athletic] scholarships and even a dollar-specific stipend would violate the antitrust laws”); *A \$67 Million Blunder?*, SPORTS ILLUSTRATED, May 18, 1998, at 26 (“limits on the number of games a school can play” also at risk). In such a world, “maybe the only thing the NCAA will be able to do is set the width of the field and the height of the goal posts.” *NCAA Re-assesses Future*, *supra*, WASH. POST, May 12, 1998, at E8

(quoting general counsel of American Council on Education). The NCAA will vigorously defend its existing rules — which courts have upheld in the past — yet the Tenth Circuit’s broad reasoning encourages renewed, vexatious litigation against this non-profit organization.¹⁷

The decision below places in grave doubt the future of competitive intercollegiate athletics that are “identifi[ed] with an academic tradition” and thus are “differentiate[d]” from minor league professional sports. *Board of Regents*, 468 U.S. at 101-102. And it hamstring[s] the ability of the NCAA to implement any economic restrictions on *inputs* to intercollegiate athletic competition, substantially nullifying “the NCAA’s historic role in the preservation and encouragement of intercollegiate amateur athletics.” *Id.* at 101. Further review is warranted in light of this Court’s solicitude for that “important role.” *Id.* at 88.

2. In addition, the unsettled questions presented here arise in the context of a legal doctrine — “quick look” analysis under the rule of reason — that has become exceptionally important to the administration of the antitrust laws. Since this Court last used a “quick look” analysis in *Indiana Dentists*, that method of review has brought the circuits into the conflicts set forth above.

The federal antitrust agencies have made clear their intent to rely extensively on “quick look” analysis. “An antitrust practitioner today can hardly pick up a new set of government guidelines or an agency enforcement speech without some reference to the so-called ‘quick look’ or ‘truncated’ rule of reason * * *.” Keyte, *What It Is and How It Is Being Applied: The “Quick-Look” Rule of Reason*, ANTITRUST, Summer 1997, at 21. The Antitrust Division’s Assistant Attorney General has advocated expanding the use of “quick look” analysis,¹⁸ and the Director of the Federal Trade

¹⁷ Indeed, the district court in this case, despite being the first court ever to invalidate an NCAA input restriction and despite the NCAA’s long history of successful defenses, castigated the NCAA for its failure to show “repentance.” *Law v. NCAA*, ___ F. Supp. ___, 1998 WL 230878 at *13 (D. Kan. Apr. 20, 1998).

¹⁸ See, e.g., Klein, *Point: A “Stepwise” Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, ANTITRUST, Summer 1998, at 41.

Commission's Bureau of Economics identified the "quick look" as one of the "hot topics" at that agency.¹⁹

Assistant Attorney General Klein has noted that disagreements among courts and commentators as to the proper scope and application of the "quick look" ensure that the current "debate will go forward" until it is resolved by this Court. See Klein, *A Stepwise Approach to Antitrust Review of Horizontal Agreements*, Remarks at the ABA Antitrust Section's Semi-annual Fall Policy Program, text at n.17 (Nov. 7, 1996). The Court should review this case to bring greater clarity and certainty to this increasingly important mode of analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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¹⁹ Jonathan Baker, Director, Bureau of Economics, FTC, "*Hot Topics*" at the *Federal Trade Commission*, Remarks before the ABA Section of Antitrust Law (Mar. 28, 1996); see also Cohen, *Per Se Illegality and Truncated Rule of Reason: The Search for a Foreshortened Antitrust Analysis*, FTC Staff Discussion Draft (Nov. 1997).

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