No. 97-2004

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, INDIVIDUALLY 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

BRIEF *AMICUS CURIAE* OF THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF *AMICUS CURIAE* OF THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The American Council on Education ("ACE") submits this brief *amicus curiae* in support of the petition for a writ of certiorari filed by the National Collegiate Athletic Association ("NCAA"). This brief is filed with the written consent of all parties, and their letters of consent have been filed with the Court.[1/]

INTEREST OF THE *AMICUS CURIAE*

ACE is a nonprofit national educational association whose members include more than 1,800 public and private colleges, universities, and educational organizations throughout the United States. Since its founding in 1918, ACE has sought to promote the highest standards in all aspects of post-secondary education. As a leading participant in higher education affairs, ACE seeks to advance the interests of all members of the academic community — students, faculty, staff and educational institutions themselves. ACE is dedicated to the principle that a strong higher education system is a cornerstone of a democratic society.

ACE participates as an *amicus curiae* only on rare occasions when a case presents an issue of importance to our nation's system of higher education. This is such a case.

The court below in *Law v. National Collegiate Athletic Association*, 134 F.3d 1010 (10th Cir. 1998) (Pet. App. at 1a-26a), misapplied the federal antitrust laws. In the absence of any evidence of restraints on prices or output affecting

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1/ Only counsel for the *amicus curiae* wrote this brief. No person or entity, other than the *amicus curiae* and its members, made a monetary contribution to the preparation or submission of this brief.

consumers, the Tenth Circuit forbade more than 300 colleges and universities from implementing a rule that is designed to foster amateurism in Division I basketball competition, to encourage creation of new entry-level coaching positions, and to control the rising costs of men's intercollegiate basketball programs. After the Tenth Circuit refused to consider these justifications for the challenged rule and issued its opinion, the district court imposed trebled damages of some $67 million that will heavily burden nonprofit colleges and universities. Beyond the monetary burden, the Tenth Circuit's decision affects the nation's colleges and universities in three important respects:

First, the decision has the perverse effect of requiring nonprofit institutions pursuing noncommercial goals to justify challenged actions that have not harmed consumers solely by reference to the kind of competitive economic objectives that motivate for-profit entities.

Second, by treating college amateur athletics purely as a for-profit business that may be "restrained" only by those agreements that promote the business aspects of intercollegiate athletics, the decision makes NCAA Division I sports a commercial enterprise that is beyond the control of the schools that created it. The decision below curtails the schools' ability to resist the constant pressures toward professionalism and win-at-any-cost spending that subordinates educational objectives to commercial values.

Third, the decision's requirement that the NCAA "prove" each "restraint" is "necessary" to the survival of college athletics will encourage adversely affected teams or athletes to contest heretofore accepted rules regarding academic standards, scholarship limitations, and other eligibility matters.

SUMMARY OF *AMICUS'S* POSITION

The "restricted earnings coach" rule ("REC Rule") at issue in this case limits the coaching staff of Division I men's basketball teams to a head coach, two assistants, and a "restricted earnings coach" with a capped compensation level of $16,000. It is the latest in a long series of coaching and other regulations by which colleges and universities have sought, through the NCAA, to harmonize the rules of intercollegiate sports competition with the goals of amateurism, competitive balance among teams, and the larger educational mission of higher education. The REC Rule was adopted after a careful study recommended a package of regulations designed to promote competitive balance on the basketball court, preserve opportunities for entry-level student coaches, and curb overspending on athletic programs at the expense of academic and other activities.

The court of appeals summarily rejected all justifications offered for the REC Rule on the view that it was so "obviously anticompetitive" that it should be condemned under a "quick-look" rule-of-reason analysis. In so ruling, the Tenth Circuit departed from previously applied antitrust principles in two key respects:

1. Most broadly, the court of appeals did not follow the accepted precept that, because higher education institutions are not for-profit businesses acting with commercial motives, the NCAA deserved an opportunity to defend the challenged restrictions in a full-fledged trial under the rule-of-reason standard. The Tenth Circuit's refusal to consider any non-economic justification for the REC Rule departed from many decisions in which courts have weighed such factors where there is no evidence of any price or output restraint harming consumers. In these circumstances, the decision below

conflicts with *United States v. Brown University*, 5 F.3d 658, 678 (3d Cir. 1993):

> "[A] full rule of reason analysis is in order here. It may be that institutions of higher education 'require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.' *Goldfarb v. Virginia*, 421 U.S. 773, 778 n.17 (1975). *See also Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959) ('[t]he 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')."

2. More narrowly, the court of appeals' "quick-look" analysis condemned rules that do not materially differ from coaching and similar regulations that have been upheld under a plenary rule-of-reason analysis. *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977); *Board of Regents of the University of Oklahoma v. NCAA*, 561 P.2d 499 (Okla. 1977) ("*Board of Regents*").

ACE accordingly urges this Court to grant certiorari and address the Tenth Circuit's departure from previously accepted principles. These questions deserve review because, where there is no evidence of any output or price restraint affecting consumers, the nation's nonprofit colleges and universities (1) must be able to present a full rule-of-reason defense against antitrust claims by offering evidence bearing on the special characteristics and objectives that set them apart from purely commercial enterprises, and (2) should not be punished by large treble damages awards under an unprecedented antitrust analysis that rejects earlier decisions upholding rules that are not materially different from those challenged here.

STATEMENT

ACE adopts the statement of the case presented in NCAA's petition filed on June 11, 1998. Here we focus on matters showing why the Tenth Circuit's decision, if allowed to stand, would unduly restrict the ability of the nation's colleges and universities to accomplish their broad educational mission, of which athletic programs are only a part.

The NCAA is an unincorporated, nonprofit association of more than 1,100 colleges and universities engaged in intercollegiate athletic competition. It was established "to maintain intercollegiate athletics as an integral part of the educational program," the essential attribute that differentiates intercollegiate athletics from professional sports. *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988) (internal quotation marks omitted). To preserve the special character of amateur athletics, and to subordinate intercollegiate athletic programs to the broader educational goals of colleges and universities, NCAA rules impose standards of academic eligibility and amateurism (including strict limits on student-athlete compensation), regulate recruiting, limit coaching staffs and team rosters, and prescribe many other guidelines.

The NCAA schools have long regulated expenditures on athletic programs in order to preserve competitive equity and "to reorient the athletic programs into their more traditional role as amateur sports operating as a part of the educational process." *See Board of Regents*, 561 P.2d at 507. Such limitations — including restrictions on the number of coaches an intercollegiate team may employ — have previously survived antitrust challenge. *See Hennessey v. NCAA*, 564 F.2d at 1154; *Board of Regents*, 561 P.2d 499.

During the 1980s, colleges and universities began to address the sharply rising costs of intercollegiate athletic

programs, a problem that was compounded by the need to reallocate financial support between men's and women's athletic programs in order to comply with Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a). (Pet. App. at 2a-3a.) About 42% of Division I NCAA member schools were incurring deficits in their athletic programs, averaging more than $800,000 per school. (*Id.* at 3a.) The focus on athletic competition and professionalism was overshadowing educational objectives and activities: some schools "had to close academic departments, fire tenured faculty, and reduce the number of sports offered to students." (*Id.*)

Accordingly, the NCAA established a Cost Reduction Committee ("CRC") to study ways of containing athletic program costs in a manner that would maintain competitive balance among Division I college teams and preserve student-athletes' access to higher education. (*Id.* at 4a.) The CRC included financial aid personnel, athletic administrators, college presidents, university faculty, and a university chancellor. (*Id.*)

The CRC recommended a number of economies and other measures that were adopted by the schools and that are not challenged here.[2/] The CRC also suggested reducing Division I basketball coaching positions to three, which was opposed by the National Association of Basketball Coaches on the ground that it would discourage the hiring of apprentice-level coaches, particularly students seeking graduate degrees

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[2/] Measures that were adopted regulated the number of coaches who could recruit off campus, off-campus contacts with prospective student-athletes, printed recruiting materials, the number of practices before scheduled games, the number of games and duration of seasons, team travel and training table meals, and financial aid grants to student athletes. (Pet. App. at 7a n.5.)

in physical education. (Pet. at 4.) To address this problem, the CRC proposed and the NCAA Division I schools adopted a modified proposal that became the REC Rule. It limited basketball coaching positions to three, while allowing schools to employ a fourth restricted earnings coach ("REC") whose coaching compensation was limited to $16,000 per year (although REC's could take other *bona fide* paying jobs at their colleges or elsewhere). (Pet. at 4-5.) The compensation cap was patterned on the average grant-in-aid for graduate student teaching assistants. (*Id.*)

Soon after the REC Rule took effect, five basketball coaches filed a class action alleging that the REC Rule limited their compensation in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Tenth Circuit affirmed the district court's grant of summary judgment to the plaintiffs based on a "quick-look" rule-of-reason analysis of the REC Rule.

REASONS FOR GRANTING THE WRIT

THE TENTH CIRCUIT DEPARTED FROM ESTABLISHED PRACTICE IN CASES INVOLVING NONPROFIT ACADEMIC OR PROFESSIONAL ASSOCIATIONS BY REFUSING TO CONSIDER JUSTIFICATIONS FOR THE REC RULE UNDER A FULL RULE OF REASON ANALYSIS.

The Tenth Circuit held that the NCAA was not entitled to a trial on the merits because, in that court's view, the REC Rule was a "naked horizontal agreement among competitive purchasers to fix prices." (Pet. App. at 11a.) It found that the practice was "so obviously anticompetitive" that it was unnecessary even to identify a relevant market, determine whether NCAA exercised any market power, or evaluate resulting anticompetitive effects. (*Id.* at 18a.) The court said that the only legitimate justifications for the REC Rule would

be those proved to be "necessary to produce competitive intercollegiate sports" (*id.* at 20a), and that the schools' noneconomic values or goals could not be considered in judging the reasonableness of the rule.

Such a truncated review of practices challenged under the Sherman Act is the exception, rather than the rule. *State Oil Co. v. Kahn*, 118 S. Ct. 275, 279 (1997). NCAA's petition shows that, even under antitrust law standards applied to for-profit businesses pursuing purely commercial objectives, the Tenth Circuit's application of the "quick-look" standard fails to appreciate the important distinctions between improper *output* restrictions and permissible cooperation in a joint enterprise. (Pet. at 12-17.) Here, ACE addresses an equally important defect: the Tenth Circuit's failure to recognize and apply the standards customarily employed where challenged restraints are imposed by nonprofit entities pursuing noncommercial objectives.

A. The Tenth Circuit Departed From Established Practice By Condemning The Practices Of Nonprofit Educational Institutions Without Engaging In A Full Rule Of Reason Analysis.

By refusing to engage in a full rule-of-reason analysis, the Tenth Circuit departed from a long line of decisions that are discussed and applied in the Third Circuit's decision in *United States v. Brown University*, 5 F.3d 658. In *Brown University*, the district court applied a truncated "quick-look" rule of reason analysis to condemn "what it believed was a plainly anticompetitive agreement" among a group of universities that had imposed need-based restrictions on financial assistance that could be awarded to matriculating students. 5 F.3d at 664. The district court rejected as impermissible "social welfare justifications" the schools' defense that the financial assistance rules preserved their financial ability to offer "need-

blind admissions" to prospective students, which fostered educational diversity by admitting students from all walks of life without regard to their ability to pay steep private college tuitions. *Id.*

The Third Circuit reversed, finding that "a full rule of reason analysis is in order here." *Id.* at 678. It remanded the case with instructions that the district court should "more fully investigate the procompetitive and noneconomic justifications proffered by [the University] than it did when it performed the truncated rule of reason analysis." *Id.* The Third Circuit ruled as it did for three reasons that are equally applicable in this case.

First, on the broadest level, the Third Circuit in *Brown University* drew from this Court's decisions the principle that antitrust challenges to nonprofit entities pursuing noncommercial goals warrant careful consideration under a plenary rule-of-reason review, because "it may be that institutions of higher education 'require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.'" *Id.* (quoting *Goldfarb v. Virginia*, 421 U.S. at 788 n.17). This reflects the principle that the Sherman Act should be "applied only to a very limited extent to organizations . . . which normally have [noncommercial] objectives." *Klor's Inc.*, 359 U.S. at 213 n.7. Other courts of appeals have applied the same principle in antitrust cases challenging the conduct of colleges and universities.[3/] The Tenth Circuit ignored this

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[3/] *See, e.g., Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges & Secondary Schools, Inc.*, 432 F.2d 650, 654 (D.C. Cir.) ("[T]he proscriptions of the Sherman Act were 'tailored* * *for the business world,' not for the noncommercial aspects of the liberal arts and the learned professions") (footnote omitted), *cert. denied*, 400

(continued...)

principle and gave inadequate consideration to the nonprofit status and noncommercial goals of the NCAA members.

Second, the Third Circuit in *Brown University* stressed that, unlike the situation posed by the NCAA television broadcast restrictions in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 113 (1984), there was no showing that the challenged financial assistance rules were harming consumers by restricting output or raising prices.[4/] The Third Circuit observed that "the absence of any finding of adverse effects such as higher price or lower output is relevant" in considering the justifications for the financial assistance rules. *Id.* Here there was no evidence that the REC Rule had harmed consumers by affecting the output or price of intercollegiate basketball. Instead, the Tenth Circuit seized on a single ancillary effect of the REC Rule: the complaints of *coaches* who contended that the compensation restrictions reduced their pay. (Pet. App. at 17a-18a.) Instead of condemning the REC Rule based entirely on its supposed effect on the compensation levels of affected coaches, the Tenth Circuit should at least have remanded the case — as the Third Circuit did in *Brown University* — for careful weighing of the schools' goals and objectives against any ancillary impact on plaintiffs. A proper analysis would

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[3/](...continued)
U.S. 965 (1970). *See also Donnelly v. Boston College*, 558 F.2d 634, 635 (1st Cir.), *cert denied*, 434 U.S. 987 (1977); *Selman v. Harvard Medical School*, 494 F. Supp. 603, 621 (S.D.N.Y.), *aff'd*, 636 F.2d 1204 (2d Cir. 1980).

[4/] Specifically, the Third Circuit found no evidence suggesting that the financial assistance rule "caused or is even likely to cause any reduction of output," and observed that the district court had "assumed without deciding that the cooperation among the schools had no aggregate effect on the price of [higher] education." 5 F.3d at 674.

also have considered the evidence showing that the affected coaching positions account for a *de minimis* proportion of the coaching positions for which plaintiffs might qualify. (*See* Pet. at 21-22.) As NCAA's petition correctly observes, the Tenth Circuit likewise disregarded the principle in rule-of-reason cases that joint input restrictions often benefit consumers and must accordingly be judged under standards different from those applied to output restrictions. (Pet. at 12-17.)

Third, the Third Circuit in *Brown University* properly recognized that nonprofit academic institutions pursuing noncommercial goals should not be required to justify challenged actions solely by reference to the kind of competitive, economic objectives that motivate for-profit businesses. Nonprofit charitable and eleemosynary institutions exist to provide services and achieve social goals that are largely unavailable from for-profit businesses; it is perverse to require nonprofits to defend their conduct by reference to the motives of the commercial marketplace. From this perspective, the Third Circuit in *Brown University* held that "alleged social welfare values" inherent in encouraging a diverse student body should be considered in determining the reasonableness of the financial assistance rules. 5 F.3d at 676. Here, by contrast, the Tenth Circuit rejected all justifications save those economic and competitive "rationales . . . necessary to produce competitive intercollegiate sports." (Pet. App. at 20a.) This ignores the noncommercial educational goals of intercollegiate athletic programs that are entirely distinct from the desire to create a commercial product. Amateur athletics also exist to encourage the development of scholar athletes within the larger academic community.

In reaching their conflicting conclusions, both the Third Circuit and Tenth Circuit relied on three of this Court's

decisions holding that the Sherman Act redresses consumer injury caused by commercially-motivated professionals acting through associations to impose price or output restrictions. The Third Circuit's analysis correctly reads the three decisions as applying to such particular circumstances; the Tenth Circuit misreads them as establishing a broad ban on considering any noneconomic justification in the context of any rule-of-reason analysis.[5/] In the absence of any price or output restraints harming consumers, the new rule announced by the Tenth Circuit cannot be justified by precedent or logic.

B. The Tenth Circuit's Decision Effectively Requires That Intercollegiate Athletic Programs Be Operated As For-Profit Businesses.

The Third Circuit in *Brown University* held that a full rule-of-reason analysis should be conducted upon a showing that the challenged restrictions were "reasonably necessary to [a university's] institutional purpose." 5 F.3d at 674. *See*

[5/] The Third Circuit in *Brown University* distinguished this Court's decisions in *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); and *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). In each case, this Court was expressly mindful of the fact that the defendants were organizations of for-profit businesses or professionals who pursued their commercial advantage through competitive price or output restrictions that they tried to defend with high-sounding justifications of dubious sincerity. 5 F.3d at 677-78.

Oblivious to the three cases' real import, the Tenth Circuit erroneously reads them as declaring that "we may not consider such [noneconomic goals and] values unless they impact upon [*i.e.*, promote] competition." (Pet. App. at 20a.) This Court has never adopted the broad principle applied by the Tenth Circuit: namely, that the noneconomic goals and institutional mission of nonprofit entities may not be considered in a rule of reason analysis.

also Chicago Prof. Sports Partnership v. National Basketball Association., 961 F.2d 667, 674 (7th Cir.), *cert. denied*, 506 U.S. 954 (1992). But the Tenth Circuit upheld summary judgment against NCAA because it had failed to *prove* that the REC Rule succeeded in "increasing output, creating operational efficiencies, making a new product available, enhancing product or service quality, and widening customer choice." (Pet. App. at 22a.) This approach not only denies NCAA the plenary rule-of-reason review conducted in *Brown University* and other cases, but it also treats all aspects of intercollegiate sports purely as a for-profit business that may be "restrained" only by those agreements designed to promote the business success of athletics. Such a rule might make sense in a case involving restraints on output or price affecting consumers, such as this Court's decision striking down price fixing/output restrictions on for-profit television broadcasting of college football games in *NCAA v. Board of Regents*, 468 U.S. 85. But it is a perverse and unprecedented principle when applied in the context of restraints such as the REC Rule, which does not restrain any product market.

Thus, the Tenth Circuit's sweeping and indiscriminate standard — and the heavy burden of proof imposed on schools — casts doubt on many NCAA rules, including rules that have been upheld by other courts. Although it attempts to distinguish its holding here, the Tenth Circuit's reasoning logically would condemn a rule limiting the number of coaches on a team, which is precisely the "restraint" that was upheld after a full rule-of-reason analysis in *Hennessey v. NCAA*, 564 F.2d 1136, and *Board of Regents*, 561 P.2d 499. And if coaches can use the new Tenth Circuit standard to challenge the REC Rule on the ground that it is not absolutely necessary to the success of intercollegiate sports, there is no principled reason why adversely affected teams or athletes should not be able to contest whether heretofore accepted academic standards, scholarship limitations, and other

eligibility rules meet that stringent standard.[6/] The Tenth Circuit's decision, in sum, puts the NCAA and its member schools at grave risk because rules adopted in good faith to promote amateurism and competitive balance, and which do not hurt consumers by restricting output or fixing prices, may nevertheless be the source of litigation and large treble damage awards.

In addition to promoting competitive balance and amateurism, the REC Rule sought to advance the educational goal of preserving coaching positions for physical education graduate students and other neophytes at compensation levels established by reference to graduate teaching fellowships. The Tenth Circuit granted that "opening up coaching positions for younger people may have social value apart from its effect on competition," but rejected the justification as an appeal to illegitimate noneconomic factors. (Pet. App. at 20a.) Having focused exclusively on free market economic principles, the Tenth Circuit scorned the REC Rule as violating the social Darwinism precept against "sav[ing] inefficient or unsuccessful competitors from failure." (*Id.* at 24a.) It should be clear from this and the many similar observations in the decision below that the Tenth Circuit equated intercollegiate basketball teams with for-profit business

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[6/] *See, e.g., Smith v. NCAA,* 139 F.3d 180 (3d Cir. 1998) (upholding NCAA bylaw prohibiting a student-athlete from participating in intercollegiate athletics at a postgraduate institution other than the institution from which she received her undergraduate degree) (*petition for cert. filed* July 16, 1998); *Banks v. NCAA,* 977 F.2d 1081 (7th Cir. 1992) (upholding NCAA eligibility requirements including the no-agent and no-draft rules), *cert. denied* 508 U.S. 908 (1993); *McCormack v. NCAA,* 845 F.2d 1338 (5th Cir. 1988) (upholding limits on compensation to student athletes); *College Athletic Placement Service v. NCAA,* 1975-1 Trade Cas. (CCH) ¶ 60,117 (D.N.J.), *aff'd* 506 F.2d 1050 (3d Cir. 1974) (upholding NCAA rule prohibiting student-athletes from hiring professional business agents).

competitors, rather than treating them as amateur participants in a joint enterprise among nonprofit educational institutions. While the NCAA member schools surely have certain commercial goals for their sports programs — to earn revenues covering their costs and perhaps more — they also have noncommercial, educational goals that differentiate them from for-profit sports leagues. Although this case did not involve any effort to impose price and output restraints harmful to consumers of college basketball, the Tenth Circuit rejected noneconomic justifications as if they were offered in support of such restraints.

The Tenth Circuit also missed the broader point that should also have been considered under a full rule-of-reason analysis: namely, intercollegiate athletics is only one narrow aspect of the larger product that is actually created by the NCAA members — a college education. Through the joint cooperation required to create intercollegiate athletics, schools must impose restraints designed to preserve the goals of amateurism, foster scholar-athletes, and curb the constant pressures toward professionalism, commercialization and win-at-any-cost spending that threatens to undermine academic values. *See Board of Regents*, 561 P.2d at 507 (NCAA rules legitimately seek to "reorient the athletic programs into their more traditional role as amateur sports operating as a part of the educational process"); *Hennessey*, 564 F.2d at 1153 (same); *College Athletic Placement Service v. NCAA*, 1975-1 Trade Cas. (CCH) ¶ 60,117 at 65,267. It is not easy to resist the commercial pressures of big-time athletics, but fighting to preserve a balance is essential to the institutional mission of colleges and universities. Moreover, exercising control over the costs of men's intercollegiate basketball enables schools to husband their resources for other athletic and academic programs demanded by the actual consumers for whose welfare the REC Rule was adopted — the students who attend the NCAA Division I colleges and universities. A proper rule

of reason analysis would have considered the welfare of student consumers in evaluating the reasonableness of the REC Rule.

In sum, the Tenth Circuit lost sight of the fundamental point: the Sherman Act aims at "prevention of restraints to free competition in business and commercial transactions which ten[d] to restrict production, raise prices, or otherwise control the market." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940). That is not this case. Nothing in the antitrust laws or decisions construing them supports the Tenth Circuit's misconception that, once college and universities create intercollegiate sports, they must be compelled forever to take only those actions that will promote and expand the commercial scale and success of the endeavor. The decision below turns the Sherman Act upside down by transforming it from a regulation of restraints on trade or commerce into a rule that nonprofit institutions must behave as if they are commercial businesses wherever their collective noncommercial activities may have incidental economic effects.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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