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Brief of Amici Curiae Antitrust Law Professors in O'Bannon v. NCAA

Thomas C. Arthur

Amitai Aviram

Edward D. Cavanagh

Jorge L. Contreras

Daniel A. Crane

See next page for additional authors

Authors

Thomas C. Arthur, Amitai Aviram, Edward D. Cavanagh, Jorge L. Contreras, Daniel A. Crane, Susan Beth Farmer, Herbert Hovenkamp, Keith N. Hylton, Michael S. Jacobs, Alan J. Meese, Salil K. Mehra, William H. Page, Gary R. Roberts, D. Daniel Sokol, and Alexander Volokh

Nos. 14-16601, 14-17068

In the
United States Court of Appeals
for the Ninth Circuit

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

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant-Appellant,

and

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

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

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

JONATHAN M. JACOBSON
DANIEL P. WEICK
WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION
1301 AVENUE OF THE AMERICAS
40TH FLOOR
NEW YORK, NEW YORK 10019
(212) 497-7700

Counsel for Amici Curiae

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are 15 professors of antitrust law at leading U.S. universities whose names, titles, and academic affiliations are listed in Appendix A. They have an interest in the proper development of antitrust jurisprudence, and they agree that the court below misapplied the "less restrictive alternative" prong of the rule of reason inquiry for assessing the legality of restraints of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1. They are concerned that the district court's approach to the antitrust rule of reason, if affirmed, would grant undue authority to antitrust courts to regulate the details of organizational rules, and would also undermine the NCAA's goal of amateurism in collegiate athletics, a goal that courts have recognized universally as valid and important—and in which the undersigned, as academics themselves, are deeply interested.

INTRODUCTION & SUMMARY OF ARGUMENT

The judgment below, if affirmed, would substantially expand the power of the federal courts to alter organizational rules that serve important social and academic interests. The court below found that

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

the NCAA student-athlete compensation restrictions at issue here furthered two important goals of the organization. But rather than uphold the restrictions, it announced that the NCAA violated the Sherman Act because the Court believed modestly higher payment caps were appropriate. This approach expands the "less restrictive alternative" prong of the antitrust rule of reason well beyond any appropriate boundaries and would install the judiciary as a regulatory agency for collegiate athletics. This Court should accordingly reject it.

Amici take as their point of departure the district court's findings that restrictions on payments to players bear a reasonable relationship to 1) increasing consumer demand for amateur sports—here, Football Bowl Subdivision (FBS) football and Division I basketball—and 2) integration of student-athletes into their campuses' academic communities. *See* ER98. Because the district court accepted that the NCAA met its burden of establishing a link between the restrictions on player compensation at issue here and the proffered procompetitive justifications, the core issue in this appeal from the perspective of antitrust law is how to analyze the plaintiff class's proffered less restrictive alternatives.

The court below took an excessively broad view of its authority under the Sherman Act to invalidate a restraint based on the possibility that a less restrictive approach could be taken. Once the court found that restricting payments to students was reasonably necessary to the

amateurism/integration justifications, it should not have condemned the restraints solely because it thought a different level of athlete compensation was preferable to the level chosen by the NCAA.

But that is just what it did. The injunction below simply elevates the compensation caps from existing athletic scholarship levels (full grant-in-aid) to cost of attendance plus a deferred $5,000 per year payment. In other words, the court below rested a finding of antitrust liability on the court's disagreement with the details of the restraint's implementation rather than a finding that the restraint itself was unreasonable. Absent a showing by the plaintiff class that an approach other than restriction of student-athlete compensation would have achieved the valid justifications with equal efficacy, the restraints should have been upheld.

The district court's decision to read what amounts to a "least restrictive alternative" inquiry into the rule of reason, if accepted, would authorize courts to substitute their judgments regarding the details of a restraint for the judgments made by the actual market participants seeking to achieve admittedly procompetitive goals. This goes well beyond judicial enforcement of Section 1 of the Sherman Act and instead imbues courts with rate-setting and other powers analogous to those of regulatory agencies, but without the benefit of detailed statutory guidance and without the institutional expertise of

such bodies. This Court should clarify that courts do not possess such regulatory authority and reverse the judgment below.

ARGUMENT

I. ONCE A DEFENDANT ESTABLISHES THAT A CHALLENGED RESTRAINT FURTHERS A VALID PROCOMPETITIVE OBJECTIVE, COURTS SHOULD GRANT SUBSTANTIAL DEFERENCE TO THE DEFENDANT'S IMPLEMENTATION OF THE RESTRAINT

A. THE NCAA'S COMPENSATION RESTRICTIONS ARE PROPERLY ASSESSED UNDER THE RULE OF REASON

Sherman Act Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. It is hornbook antitrust law that, in enacting this provision, "'Congress intended to outlaw only *unreasonable* restraints.'" *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)). *See also* 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1500, at 379-80 (3d ed. 2010) (hereinafter, "Areeda & Hovenkamp"). While some restraints like horizontal price-fixing or market allocation are subject to condemnation under a *per se* rule or other truncated analysis due to their overwhelming tendency to harm competition, the Supreme Court's recent jurisprudence has made clear that those approaches are disfavored in other contexts. *See F.T.C. v. Actavis, Inc.*, 133 S. Ct. 2223, 2237 (2013) (rejecting "quick look" approach to "reverse payment" patent settlements); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 885-87 (2007) (describing strict limits on

applicability of *per se* rules). "The rule of reason is the presumptive or default standard, and it requires the antitrust plaintiff to 'demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive.'" *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011) (en banc) (quoting *Dagher*, 547 U.S. at 5).

The court below properly held that the NCAA's limitations on student-athlete compensation at issue in this case could not be condemned under a *per se* rule or "quick look" analysis. *See* ER57. As the Supreme Court has held, "[w]hen 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable and instead the restraint must be judged according to the flexible Rule of Reason." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010) (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 101 (1984)). *See also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20-24 (1979); Areeda & Hovenkamp ¶¶ 1504c, at 404 & 1511d, at 473-74. Offering amateur sports as a distinct product plainly requires some agreement between the competing teams on standards for amateurism and other eligibility requirements, so the rule of reason necessarily applies to decide the lawfulness of the restrictions needed to make the product available at all. *See Dagher*, 547 U.S. at 8.[2]

[2] *Amici* recognize that the NCAA has argued that its rules are procompetitive as a matter of law. *See* NCAA Br. at 21-31. *See also Bd. of Regents*, 468 U.S. at 120. *Amici* do not opine on that argument.

B. Under the Rule of Reason, the Plaintiff Class Bore the Burden of Identifying a Less Restrictive Alternative to the Challenged Student-Athlete Compensation Restrictions

The basic analytical approach where a restraint is subject to full rule of reason review is well-settled in this Circuit:

> Under the rule of reason, the fact-finder examines the restraint at issue and determines whether the restraint's harm to competition outweighs the restraint's procompetitive effects. . . . The plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within the relevant product and geographic markets. If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's procompetitive effects. The plaintiff must then show that "any legitimate objectives can be achieved in a substantially less restrictive manner."

Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1319 (9th Cir. 1996) (quoting *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991)). This burden-shifting approach has been repeatedly reaffirmed in the courts of appeals. *See Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1156 (9th Cir. 2003); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003); *United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (en banc).

In its assessment of the factual record, the district court found that the plaintiff class had sufficiently established a relevant market consisting of the provision of educational services to FBS football and Division I basketball student athletes, that the NCAA rules at issue restrain competition in the market, and that student athletes received

less compensation than they otherwise would have as a result of the restraints. ER15-20, 27-31, & 59-74. Whatever the merits of those findings, *amici* assume their correctness for purposes of this brief, and so assume that the plaintiff class met its burden of proof on the first part of the rule of reason inquiry, establishing anticompetitive effects in a relevant market. *See Hairston*, 101 F.3d at 1319.

The district judge recognized that the restraints at issue in fact promoted two procompetitive goals of the NCAA: preservation of amateurism to promote consumer demand for FBS football and Division I basketball, as well as integration of student-athletes into their campus communities. *See* ER32-42, 45-48, 86-91, 94-96, & 97-98. While the court couched its findings in skeptical language, it ultimately held that "the NCAA has produced sufficient evidence to support an inference that some circumscribed restrictions on student-athlete compensation may yield procompetitive benefits," including "increase[d] consumer demand for [the NCAA's] product" and facilitation of "[NCAA] member schools' efforts to integrate student-athletes into the academic communities on their campuses." ER97-98.[3]

[3] The district court would have been hard pressed to rule otherwise. NCAA restrictions on compensation to athletes have been routinely upheld as reasonably necessary to promote amateurism and student-athlete integration with their academic communities. *See McCormack v. NCAA*, 845 F.2d 1338, 1344-45 (5th Cir. 1988); *In re NCAA IA Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1148-49 (W.D. Wash. 2005) ("The law is clear that athletes may not be 'paid to play.'").

The key antitrust question in this case is therefore how to implement the next prong of the rule of reason inquiry—the plaintiff's burden of establishing a "substantially less restrictive" alternative to the challenged limitations on student-athlete compensation. *See Hairston*, 101 F.3d at 1319. The scope of the less restrictive alternative inquiry is a question on which there is limited appellate authority since most cases are decided by either 1) a plaintiff's failure to establish harm to competition or 2) a defendant's failure to proffer and support a valid justification after competitive harm has been shown. *See, e.g.*, *Bd. of Regents*, 468 U.S. at 113-20 (NCAA failed to establish procompetitive justifications for restraints); *Law v. NCAA*, 134 F.3d 1010, 1021-24 (10th Cir. 1998) (same). *See also Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp.*, 592 F.3d 991, 997-98 (9th Cir. 2010) (plaintiffs failed to make initial showing of competitive harm); *Visa*, 344 F.3d at 243 (card networks failed to prove procompetitive justifications); *Microsoft*, 253 F.3d at 58-78 (each claim decided by either failure by government to prove anticompetitive effects or failure by Microsoft to prove valid justification). But the precedents that do bear on the subject, as well as the policies and principals underlying the antitrust laws, make it clear that the district court overstepped its bounds.

C. THE LESS RESTRICTIVE ALTERNATIVE STANDARD REQUIRES IDENTIFICATION OF AN ALTERNATIVE THAT IS SUBSTANTIALLY LESS RESTRICTIVE, EFFECTIVE AT ACHIEVING THE SAME VALID BUSINESS GOAL, AND NO COSTLIER THAN THE EXISTING RESTRAINT

The importance of the less restrictive alternative inquiry as part of the rule of reason is well-established. *See* Areeda & Hovenkamp ¶ 1505b, at 417-19. Merely approving a restraint with some connection to a valid business purpose without asking whether alternative approaches could achieve the same result would improperly truncate the reasonableness inquiry. *See id.* at 419.

But the inquiry must also respect the institutional limitations of the courts. As the Third Circuit has observed:

> In a rule of reason case, the test is not whether the defendant deployed the least restrictive alternative. Rather the issue is whether the restriction actually implemented is "fairly necessary" in the circumstances of the particular case, or whether the restriction "exceed[s] the outer limits of restraint reasonably necessary to protect the defendant." . . . Application of the rigid "no less restrictive alternative" test in cases such as this one would place an undue burden on the ordinary conduct of business. Entrepreneurs . . . would then be made guarantors that the imaginations of lawyers could not conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade. And courts would be placed in the position of second-guessing business judgments as to what arrangements would or would not provide "adequate" protection for legitimate commercial interests.

Am. Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1248-50 (3d Cir. 1975) (citations omitted). *See also United States v. Brown Univ.*, 5 F.3d 658, 678-79 (3d Cir. 1993). *Accord* Areeda & Hovenkamp ¶ 1913b,

at 375 ("A skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements.").[4]

In assessing a proffered less restrictive alternative, a court should therefore ask whether the plaintiff has truly identified a "substantially less restrictive manner" of achieving the valid goals of the restraint as effectively as the chosen provision; simply identifying alternatives that could somewhat reduce the identified anticompetitive effects or that essentially amount to tweaking the restraint should not suffice to expose a defendant to antitrust liability for a restraint that is reasonably necessary to achieving a valid business purpose. *See Hairston*, 101 F.3d at 1319. *Accord* Areeda & Hovenkamp ¶ 1505b, at 419 ("[T]o require the very least restrictive choice might interfere with the legitimate objectives at issue without, at the margin, adding that much to competition.").[5] A less restrictive alternative should also

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[4] Notably, moreover, some recent scholarship has argued that the uncabined use of the less restrictive alternative inquiry does more harm than good in rule of reason analysis. *See, e.g.*, Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 563 (2009) ("Rather than add clarity to the rule of reason, however, this additional prong adds a new level of confusion and opacity to Section 1 analysis and changes the role of antitrust law from an ex ante deterrent of net anticompetitive behavior to an ex post regulator of net procompetitive business decisions.").

[5] *See also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.2 (2000) (proffered alternative must be a "practical, significantly less restrictive means" of achieving the procompetitive aim).

achieve the valid business purpose with comparable efficacy and without adding costs, complexity, or enforcement difficulties. *See Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159-60 (9th Cir. 2001). *Accord* Areeda & Hovenkamp ¶ 1760d, at 387 ("[T]he rule of reason plaintiff bears the burden of persuading the tribunal that an alternative is substantially less restrictive and virtually as effective in serving the legitimate objective without significantly increased cost."). [6]

Courts should therefore search for alternatives that would truly result in substantially less restraint of the market while preserving the efficiencies of the existing restraint and avoiding imposition of additional costs. If the proffered alternative is simply to refine existing restraints (by, for example, changing the level of a price cap), that strongly suggests that the court is being asked to second-guess the reasoned judgment of industry participants rather than to enforce the Sherman Act's prohibition on unreasonable restraints of trade. *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227-28 (D.C. Cir. 1986) ("We do not believe, however, that . . . the Supreme Court intended that lower courts should calibrate degrees of reasonable necessity. That would make the lawfulness of conduct turn upon

[6] Although paragraph 1760 of the Areeda & Hovenkamp treatise is specifically concerned with tying practices, paragraph 1760d pertains to the less restrictive alternative inquiry under the rule of reason more broadly. *See* Areeda & Hovenkamp ¶ 1760d, at 385 ("[W]e recall briefly how claims of justification fare under the reasonableness test.").

judgments of degrees of efficiency. There is no reason in logic why the question of degree should be important.").

D. THE DISTRICT COURT MISAPPLIED THE LESS RESTRICTIVE ALTERNATIVE STANDARD

The approach taken by the district court does not fit the principles described above. The court did not identify a different *method* for achieving the procompetitive justifications it accepted. Rather, the court simply chose a different cap for student-athlete compensation out of revenues generated by the use of athlete images and likenesses (namely, the cost of attendance plus a deferred $5,000 per year payment). *See* ER104-05. While increasing allowable payments to students from full grant-in-aid to cost of attendance plus a deferred $5,000 per year may be a fairer policy, that is not a judgment the antitrust laws authorize courts to make.

The district court's rule is essentially the same basic approach taken by the current NCAA rules (capping payments to student athletes) and simply adds additional costs. This Court should therefore reverse the district court's liability finding and hold that a defendant may not be held liable under Section 1 of the Sherman Act simply by virtue of the fact that a federal district court can conceive of a better way to implement a restraint that has been found reasonably necessary to a valid business purpose.

E. BALANCING OF HARMS AND BENEFITS SHOULD NOT CHANGE THE RESULT

There is authority for rejecting a rule of reason claim based on the plaintiff's failure to establish a valid less restrictive alternative without proceeding to a balancing inquiry. *See Hairston*, 101 F.3d at 1319 (affirming summary judgment where the plaintiff athletes failed "to show that the Pac-10's procompetitive objectives could be achieved in a substantially less restrictive manner."). *See also Virgin Atl. Airways v. British Airways Plc*, 257 F.3d 256, 265 (2d Cir. 2001) ("Virgin's failure to address this point leaves intact the evidence that British Airways' incentive agreements are good for competition."). But some articulations of the rule of reason in this Circuit and others state that a court, as the final step in a rule of reason analysis, "must balance the harms and benefits of the [restraints at issue] to determine whether they are reasonable." *See Sonora*, 236 F.3d at 1160; *Bahn*, 929 F.2d at 1413. *See also Major League Baseball Props. v. Salvino, Inc.*, 542 F.3d 290, 317 (2d Cir. 2008); *Microsoft*, 253 F.3d at 59; Areeda & Hovenkamp ¶ 1507d, at 430-31.

The court below did not attempt to balance procompetitive benefits and anticompetitive effects, and such a balancing should not alter the outcome of this case. Given that preserving amateurism in college sports and promoting integration of student athletes with their academic communities are at the core of the NCAA's mission, and that the plaintiff class has failed to identify a substantially less restrictive

alternative to capping payments to players for promoting those aims, the Court should be able to conclude that the procompetitive benefits outweigh any alleged competitive harms without elaborate analysis. *See Sonora*, 236 F.3d at 1160 (summarily determining that "any anticompetitive harm is offset by the procompetitive effects of SCH's effort to maintain the quality of patient care that it provides."). *See generally McCormack*, 845 F.2d at 1344-45 ("The NCAA markets college football as a product distinct from professional football. The eligibility rules create the product and allow its survival in the face of commercializing pressures. The goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal.").

II. THE DISTRICT COURT'S ANALYTICAL APPROACH, IF ACCEPTED, WOULD IMPROPERLY PERMIT FEDERAL COURTS TO MICROMANAGE ORGANIZATIONAL RULES

Allowing antitrust courts to impose their own views as to optimal organizational policy for business operations has profound and sweeping implications for antitrust enforcement. Any number of amateur sports leagues, amateur arts or performance organizations, or other organizations could be open to suit.

For example, a court could easily follow the reasoning below to require compensation for Little League baseball players at a level deemed "fair" by a district judge. Similarly, a kennel club could be required to alter its breed standard if a breeder claims to have been

excluded because their dogs are an inch or two shorter than the adopted standard. *Cf. Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1038 n.5 (9th Cir. 2005) (noting height requirements in Jack Russell Terrier standards). Courts would have free rein to rewrite any rule adopted by an organization plausibly found to have restrained a relevant market if they can identify modest changes that may (or may not) be fairer.

And the district court's approach raises the broader concern noted by *American Motor Inns* that restraints reasonably necessary to achieving valid business objectives could be subject to antitrust condemnation—including exposure to treble damages—based solely on the creativity of antitrust lawyers imagining marginally less restrictive approaches. With only a modest extrapolation from the reasoning of the decision below, a court could have decided that obstetricians really only need 30 months of residency training to perform C-sections rather than 36, and therefore condemned the credentialing requirements upheld in *Sonora*. *Cf.* 236 F.3d at 1152. A court likewise could have decided that the five-year transportation assignments upheld in *Paladin* should instead have been four years. *Cf.* 328 F. 3d at 1157. A court could even determine that the price for a joint-venture's products set by the parties to the venture should be set at a different level. *Cf. Dagher*, 547 U.S. at 6-7. The possibilities are only limited by the imagination of the antitrust bar and the willingness of the bench to indulge it.

The Supreme Court has cautioned that antitrust courts are "ill-suited" to "act as central planners, identifying the proper price, quantity, and other terms of dealing" in place of the judgments of industry participants. *See Verizon Comm'cns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). *See also Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 597 (7th Cir. 1996) ("[T]he antitrust laws do not deputize district judges as one-man regulatory agencies."). This Court should heed that counsel and hold that a defendant cannot be subject to antitrust liability merely because a court can identify potential improvements to a restraint that is conceded to be reasonably necessary to a valid business purpose.

CONCLUSION

The judgment of the district court should be reversed.

Dated: November 21, 2014

Respectfully submitted,

s/ Jonathan M. Jacobson

JONATHAN M. JACOBSON
DANIEL P. WEICK
WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION
1301 AVENUE OF THE AMERICAS
40TH FLOOR
NEW YORK, NEW YORK 10019
(212) 497-7700

COUNSEL FOR *AMICI CURIAE* ANTITRUST SCHOLARS:

THOMAS C. ARTHUR
AMITAI AVIRAM
EDWARD D. CAVANAGH
JORGE L. CONTRERAS
DANIEL CRANE
SUSAN BETH FARMER
HERBERT HOVENKAMP
KEITH N. HYLTON
MICHAEL S. JACOBS
ALAN J. MEESE
SALIL K. MEHRA
GARY R. ROBERTS
WILLIAM H. PAGE
D. DANIEL SOKOL
ALEXANDER VOLOKH

APPENDIX A*

Thomas C. Arthur, L. Q. C. Lamar Professor of Law, Emory University School of Law

Amitai Aviram, Professor of Law, University of Illinois College of Law

Edward D. Cavanagh, Professor of Law, St. John's University School of Law

Jorge L. Contreras, Associate Professor of Law, University of Utah, S.J. Quinney College of Law

Daniel Crane, Associate Dean for Faculty and Research and Frederick Paul Furth, Sr. Professor of Law, University of Michigan Law School

Susan Beth Farmer, McQuaide Blasko Faculty Scholar & Professor of Law and International Affairs, Pennsylvania State University, Dickinson School of Law

Herbert Hovenkamp, Ben and Dorothy Willie Chair, University of Iowa College of Law

Keith N. Hylton, William Fairfield Warren Distinguished & Professor of Law, Boston University School of Law

Michael S. Jacobs, Distinguished Research Professor of Law, DePaul University College of Law

Alan J. Meese, Ball Professor of Law and Cabell Research Professor, College of William & Mary Law School

Salil K. Mehra, Professor of Law, Temple University Beasley School of Law

Gary R. Roberts, Dean Emeritus and Gerald L. Bepko Professor of Law, Indiana University Robert H. McKinney School of Law

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

William H. Page, Professor & Marshall M. Criser Eminent Scholar in Electronic Communications and Adminstative Law, University of Florida Levin College of Law

D. Daniel Sokol, Professor of Law, University of Florida Levin College of Law

Alexander Volokh, Associate Professor of Law, Emory University School of Law

CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 3,805 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it was prepared in Microsoft Office Word in 14-point, proportionally spaced Century Schoolbook font.

s/ Jonathan M. Jacobson
Jonathan M. Jacobson

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief for Antitrust Scholars as *Amici Curiae* in Support of Appellant to be served on all counsel of record via the appellate CM/ECF system on this 21st day of November 2014.

s/ Jonathan M. Jacobson
Jonathan M. Jacobson