No. 10-

IN THE
Supreme Court of the United States

DEUTSCHER TENNIS BUND, ROTHENBAUM SPORTS GMBH AND QATAR TENNIS FEDERATION,

Petitioners,

v.

ATP TOUR, INC., ETIENNE DE VILLIERS, CHARLES PASARELL, GRAHAM PEARCE, JACCO ELTINGH, PERRY ROGERS, IGGY JOVANOVIC AND JOHN DOES 7-9,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Court's "quick look" antitrust law jurisprudence, which applies when challenged conduct is not illegal *per se* but nonetheless has self-evident anticompetitive impact, a Sherman Act § 1 plaintiff need not prove a relevant market in which defendant has market power, and defendant bears the burden of proving procompetitive justifications for the facially anticompetitive practice. The questions presented are:

1. May defendants justify conduct that has self-evident anticompetitive impact in one market (*e.g.*, a horizontal restraint in the market for player services, in which members of a professional sports organization compete with each other) by claiming the practice has procompetitive effects in different markets (*e.g.,* the spectator sports and entertainment markets).

2. When defendants proffer procompetitive justifications for a horizontal restraint or other facially anticompetitive practice, does the quick look presumption of anticompetitive impact "disappear," thereby requiring that a § 1 plaintiff must now prevail on the "relevant market" and "market power" inquiries the quick look doctrine is intended to obviate, and shifting to plaintiff the burden of proving that the net impact of the challenged conduct is anticompetitive.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceeding below.

Petitioners Deutscher Tennis Bund and Rothenbaum Sports GmbH are non-governmental entities with no parent corporations. Petitioner Qatar Tennis Federation is a governmental organization. No publicly held company holds 10% or more of the stock of Deutscher Tennis Bund or Qatar Tennis Federa-tion. Duetscher Tennis Bund and Qatarian Tennis Federation Germany GmbH each hold 10% or more of the stock of Rothenbaum Sports GmbH. Non-party Qatarian Tennis Federation Germany GmbH, as a stockholder in Rothenbaum Sports GmbH, has a financial interest in the outcome of this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Deutscher Tennis Bund, Rothenbaum Sports GmbH and Qatar Tennis Federation (Federations) seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

On June 25, 2010, the United States Court of Appeals for the Third Circuit issued an opinion and judgment reported at 610 F.3d 820 (3rd Cir. 2010) and reproduced in the appendix to this Petition ("App.") 1a-41a. The judgment of the United States District Court for the District of Delaware, entered on October 3, 2008, is not reported and is reproduced at App. 42a. Bench rulings of the district court pertinent to the issues presented are not reported and are reproduced at App. 43a-50a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337 based on claims under 15 U.S.C. §§ 1, 2 and 26, and under 28 U.S.C. § 1367 for supplemental claims. The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

The statutory provision at issue (Sherman Act § 1, 15 U.S.C. § 1) is reproduced at App. 51a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Last Term, the Court resolved misunderstanding and conflict in applying its "single entity" antitrust jurisprudence, holding that while members of a professional sports league may be a single entity incapable of conspiring for Sherman Act § 1 purposes when collaborating on certain activities in one market, this did not justify treating them as a single entity in a different market in which they competed with each other. *Am. Needle, Inc. v. NFL*, 560 U.S. ___, 130 S. Ct. 2201 (2010).

The instant case, also involving § 1 claims against members of a professional sports organization, shows that the Court needs to resolve misunderstanding and conflict among the courts of appeals in applying its "quick look" antitrust jurisprudence.

The challenged conduct is a horizontal agreement among tournament members of the ATP professional tennis organization, under which they eliminated competition with each other for participation of top players on which tournament success depends, and severely impeded other tournaments' ability to compete for such player services. The Third Circuit recognized that the agreement (called the "Brave New World" plan) has anticompetitive impact in the player-services market, but held it could be justified by claimed procompetitive effects in the "sports and entertainment markets." The court also held that if a defendant offers claimed procompetitive justifications for facially anticompetitive conduct, the "quick look" presumption

of anticompetitive impact "disappears," requiring the market proof by plaintiff that the quick look doctrine obviates when anticompetitive impact of challenged conduct is self-evident.

This contravenes this Court's "quick look" precedent, and conflicts with application of that law by other courts of appeals, in multiple critical respects.

"Quick look" doctrine applies when challenged conduct, while not illegal *per se*, has readily apparent anticompetitive impact, obviating need to prove a relevant market in which defendant has power. "As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output." *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109 (1984). When "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anti-competitive effect on customers and markets," *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999), defendant has "a heavy burden of establishing an affirmative defense which competitively justifies [the] apparent deviation from the operations of a free market," *NCAA*, 468 U.S. at 113.

The Third Circuit recognized respondents' horizontal agreement had anticompetitive impact in the player-services market in which ATP tournaments competed. App. 32a ("the Brave New World Plan might have deprived the marketplace of potential competition"); *id.* ("Professional sports teams or tournaments always have an interest in obtaining the best players possible"); App. 32a-33a ("The record in

this case indicates that the individual tennis tournaments traditionally compete for player talent"). But it held respondents presented valid justifications by claiming their anticompetitive agreement had procompetitive impact in different markets – "the sports and entertainment markets." App. 8a, 22a.

This itself contravenes this Court's authority, and conflicts with decisions of other courts of appeals, under which anticompetitive impact in one market may not be justified by claimed procompetitive effects in another. *E.g.*, *United States v. Topco Assocs.*, 405 U.S. 596, 610-12 (1972); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 370-71 (1963); *Smith v. Pro Football, Inc.*, 593 F.2d 1183, 1196 (D.C. Cir. 1978).

The Third Circuit also held that even under "quick look" analysis, the Federations' § 1 claims failed because they had not proved a "relevant market." In the panel's view, if defendant offers procompetitive justifications for facially anticompetitive conduct, "the 'quick look' presumption [of anticompetitive impact] disappears" and the case reverts to what the court called "full-scale rule of reason analysis." App. 23a.

This fundamentally distorts and misapplies this Court's quick look jurisprudence, and again conflicts with decisions of other courts of appeals. It also strips the quick look doctrine of practical import.

Proof of a relevant market in which defendant has power has no independent significance in § 1 analysis. "[T]he purpose of the inquiries into market definition and market power is to determine whether an

arrangement has the potential for genuine adverse effects on competition." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460 (1986). If anticompetitive impact is facially evident (the premise of quick look doctrine), there is no need for market and market power proof.

Hence, defendant's procompetitive justifications for facially anticompetitive conduct do not mean plaintiff must now "prove" a market under a court's view of "full-scale" rule of reason analysis. Defendant's justifications do not alter that the challenged practice (*e.g.*, the horizontal restraint here) has facial anticompetitive impact. Since showing such impact is "the purpose of the inquiries into market definition and market power," *Indiana Dentists*, 476 U.S. at 460, there is no basis to revert to those market inquiries when anticompetitive impact is apparent, as it is by definition in cases warranting quick look review. The contrary analysis below also conflicts with decisions of other courts of appeals, holding that market inquiries have no role in such cases. See *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005); *Cal. ex rel. Brown v. Safeway, Inc.*, ___ F.3d ___, 2010 WL 3222187, at *15 (9th Cir. 2010); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019-20 (10th Cir. 1998).

Shifting the burden of proving anticompetitive impact to plaintiff when defendant proffers claimed procompetitive justifications also contravenes this Court's authority, and highlights circuit conflict on another key "quick look" issue. This Court holds that when anticompetitive impact is apparent, defendant has "a heavy burden of establishing an affirmative defense which competitively justifies" the conduct. *NCAA*, 468

U.S. at 113. Despite this instruction, courts of appeals are split on this issue. *Compare N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 352 (5th Cir. 2008) ("burden remains on the challenger" to show conduct does not have net procompetitive impact); App 21a-22a (citing *Specialty Physicians*), *with Safeway*, 2010 WL 3222187, at *17 (9th Cir.) ("burden of proof is shifted to the defendant"); *Law*, 134 F.3d at 1021 (10th Cir.) ("disagree[ing] with the Fifth Circuit's allocation of the burden of proof"; "burden shifts to the defendant to justify the restraint").

The reasoning below also renders this Court's quick look jurisprudence a practical nullity. Antitrust defendants will always be able to proffer some procompetitive justification for challenged conduct (particularly if, as wrongly allowed below, defendants may point to supposed positive impact in different markets). Under the Third Circuit's reasoning, quick look becomes a meaningless exercise: After plaintiff shows a facially anticompetitive practice warrants application of quick look, whose premise is that market proof is unnecessary when anticompetitive impact is apparent, quick look "disappears" when defendant advances procompetitive rationales – making plaintiff's case fail absent the "market" evidence quick look doctrine obviates.

Finally, the Third Circuit mistakenly viewed application of "quick look" and what it called "full-scale rule of reason analysis" as an "either-or" choice, with quick look being exclusively for the court with no role for the factfinder. App. 23a.

"Rule of reason" balancing is not an "alternative" to quick look. Rather, it involves a different aspect of antitrust analysis, which may apply in quick look cases as in any antitrust action not involving *per se* violations. Quick look addresses whether "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect," *California Dental*, 526 U.S. at 770, "even in the absence of a detailed market analysis," *NCAA*, 468 U.S. at 110. If so, the consequence is that plaintiff need not "prove" a relevant market or market power, whose sole purpose is showing anticompetitive impact, which by definition is not needed in quick look cases.

The only aspect of antitrust analysis "abbreviated" in quick look cases involves eliminating need for such market proof. A factfinder's "rule of reason" balancing still occurs if defendant proffers procompetitive justifications. Under rule of reason analysis, "the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). Nothing about quick look doctrine, which addresses only whether evidence of relevant market and market power is unnecessary, alters that elemental proposition.

STATEMENT OF THE CASE

1. Petitioners Deutscher Tennis Bund or German Tennis Federation (GTF) and Qatar Tennis Federation (QTF) are nonprofit organizations that promote tennis in their respective countries, including by owning and operating men's professional tennis tournaments.[1]

Respondent ATP Tour, Inc. is a nonprofit corporation whose membership comprises the vast majority of top men's professional tennis players and tournaments. Petitioner Federations are ATP tournament members.

2. This action involves adoption by ATP and certain directors and officers (individual respondents) of a plan restructuring men's professional tennis called the "Brave New World," which went into effect January 1, 2009. The Federations' suit claimed the plan violated Sherman Act §§ 1 and 2, and fiduciary duties to the Federations. The § 1 claim, at issue before the Third Circuit and on this Petition, charged that respondents (including ATP tournament members favored by the Brave New World plan) conspired and combined to control the supply of top men's professional tennis players' services, creating a favored class of tournaments in which top-player participation was mandated. This eliminated need for those tournaments to compete for such player services, and severely impeded the ability of other tournaments (such as those owned by the Federations) to do so.

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1. Petitioner Rothenbaum Sports GmbH, an entity owned by GTF and QTF, owns the professional tennis tournament GTF has long operated in Hamburg.

As the Third Circuit recognized, "[p]rofessional sports teams or tournaments always have an interest in obtaining the best players possible" (citing *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996)), and "[t]he record in this case indicates that the individual tennis tournaments traditionally compete for player talent." App. 32a-33a. But in adopting their Brave New World plan, respondents decided to "channel" top players to favored ATP tournament members: "The Brave New World plan's objective was to increase the value and appeal of top-tier tournaments by channeling top players to compete in them." App. 6a.

This was achieved *via* "carrots" and "sticks" that would cause top players to participate in plan-favored events. The "sticks" punished players who chose not to participate in such events and/or to play in competing tournaments:

> Notably, the Brave New World plan also amended ATP rules so that qualifying players were required, under threat of sanctions – suspension, loss of ranking, and loss of ability to earn ranking points – to play all [ATP] Tier I events, at least four Tier II events, and at least two Tier III events. Further, all qualifying players were also required to play in the year-end [ATP-owned] Tennis Masters Cup championship. In addition, the Brave New World plan imposed a "Special Events" rule on the top 50 players, prohibiting them from participating in any non-ATP, non-Grand Slam events during the weeks of and surrounding ATP events.

App. 7a. On the "carrots" side, the plan "monetized" top-player participation in plan-favored events *via* increased financial rewards: "In turn, ATP increased the tournaments' minimum prize money levels to benefit the players." *Id.*

Respondents justified the Brave New World not by claiming it had procompetitive benefits in the player-services market in which tournaments compete with each other, but rather by arguing it improved ATP's position *vis-à-vis* other spectator sports and other entertainment generally. See App. 5a ("According to ATP, this restructuring was necessitated [because] ATP was losing ground in the sports and entertainment markets"); *id.* ("By strengthening its top-tier events and simplifying its tournament structure, ATP believed it could better compete with other sports events and other forms of entertainment"); App. 8a ("ATP designed the Brave New World plan as a comprehensive plan to address the perceived decline of ATP in the sports and entertainment markets").

3. In the jury trial below, the district court ruled for respondents and against the Federations on two legal issues critical to the § 1 claim.

First, the court instructed the jury over the Federations' objection that it could decide if ATP and tournament members favored by the Brave New World were a "single entity" incapable of conspiring for § 1 purposes. Respondents said that as a sports league and its members, they were a "single entity" under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The court rejected the Federations' claim

that respondents were not a "single entity" in creating their Brave New World, which eliminated player-services competition among economically independent tournaments. App. 46a-49a.

After the court gave respondents' instruction on this issue, the jury returned a special verdict form finding that ATP and its plan-favored member tournaments were a "single entity" incapable of conspiring in violation of § 1. Based on this, the Federations' § 1 claim failed without need for the jury to decide any other question. App. 11a.

Second, the district court refused to hold that respondents' facially anticompetitive conduct merited "quick look" analysis. The Federations argued that, because the Brave New World plan was a horizontal restraint in the player-services market among plan-favored ATP tournaments that competed for such services, "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect." *California Dental*, 526 U.S. at 770. As the anticompetitive impact of the plan was facially apparent, the Federations asked that the jury be instructed that its task on the § 1 claim was to weigh that anticompetitive impact against any legitimate procompetitive justifications proved by respondents. The court refused the Federations' tendered instruction. App. 49a-50a.

The jury finding that respondents were a "single entity" made it unnecessary for it to determine if the Federations had proved a relevant market on their § 1 claim (proof the Federations contended was not needed

under this Court's "quick look" doctrine). However, in finding against petitioners on the § 2 monopolization claim (not at issue on appeal), the jury found a relevant market had not been shown. App. 11a.

The district court entered judgment for respondents on the Federations' § 1 and other claims. App. 42a.

4. The Third Circuit affirmed. It acknowledged that "the agreement among the ATP's tournament members in the Brave New World Plan might have deprived the marketplace of potential competition," because "[p]rofessional sports teams or tournaments always have an interest in obtaining the best players possible" and "[t]he record in this case indicates that the individual tennis tournaments traditionally compete for player talent." App. 32a-33a. But despite this anticompetitive impact on the player-services market, the panel held "quick look" analysis was inappropriate because "the definition of the relevant market was one of the most contested issues at trial," and "'the contours of the market' here are not 'sufficiently well known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition.'" App. 20a-21a (citation omitted).

The Third Circuit also held that, even under "quick look" analysis, the § 1 claim would fail. In the panel's view, if defendant proffers procompetitive rationales for facially anticompetitive conduct, "the 'quick look' presumption [of anticompetitive impact] disappears" and the case reverts to what the court called "full-scale rule of reason analysis." App. 23a. Here, the Third

Circuit treated respondents' claims of procompetitive effects in the sports and entertainment markets as legally cognizable justifications for their horizontal restraint in the market for player services among competing ATP tournaments:

> ATP proffered evidence of procompetitive justifications for the Brave New World plan. The plan was developed to make the ATP Tour more competitive with other spectator sports and entertainment products by improving the quality and consistency of its top-tier events.

App. 22a.

Believing procompetitive justifications made quick look analysis "disappear[ ]" and required "full-scale rule of reason analysis," the Third Circuit reasoned that the Federations' § 1 claims failed because they had "failed to prove the relevant market." App. 23a. In other words, the panel believed that (a) what it called "full-scale rule of reason analysis" was the "either-or" alternative to "quick look" analysis; (b) even in a quick look case, this "full-scale analysis" alternative became obligatory if defendant proffered procompetitive justifications for facially anticompetitive conduct; and (c) under full-scale analysis, plaintiff was then required to prove the "relevant market" that the quick look presumption had obviated. Applying this chain of reasoning, the panel held the jury's finding that a relevant market was not proved on the § 2 claim also established that no relevant market was proven for purposes of the Federations' § 1 claim. App. 23a.

The Third Circuit also rejected the possibility of a factfinder role in quick look cases. The Federations contended the factfinder "balance[s] the proffered procompetitive justification against the presumed anticompetitive harm" – *i.e.*, that "under 'quick look,' the jury's inquiry 'starts from the premise – already determined by the court as a matter of law – that the restraint's anticompetitive effect is evident without need for detailed market analysis, requiring no proof by plaintiff of market definition or power.'" App. 22a-23a (quoting Federations' brief). The panel said this "misapprehend[s] the reasonableness analysis": "'The application of the quick look analysis is a question of law to be determined by the court,' and therefore the concept of 'quick look' has no application to jury inquiry." App. 23a (citation omitted).

Finally, the Third Circuit concluded that any error in allowing the jury to find respondents acted as a "single entity" in adopting the Brave New World plan was harmless. The panel recognized that under this Court's *American Needle* decision (rendered after oral argument below) it was dubious that ATP and plan-favored tournament members acted as a single entity in creating their Brave New World:

> The record in this case indicates that the individual tennis tournaments traditionally compete for player talent. An agreement restricting this competition should not necessarily be immune from § 1 scrutiny merely because the tournaments cooperate in various aspects of producing the ATP Tour. "The justification for cooperation is not relevant to whether that cooperation is

> concerted or independent action." *Am. Needle*, [130 S. Ct.] at 2214. The necessity of cooperation does not "transform[ ] concerted action into independent action." *Id.* "The mere fact that the teams operate jointly in some sense does not mean that they are immune." *Id.*

App. 32a-33a. Nonetheless, the panel believed the jury's relevant market finding on the § 2 claim mooted any single entity error on the § 1 claim:

> [W]e need not decide whether the single enterprise instruction was given in error. As noted, even if the jury had found concerted action, the Federations' antitrust claims still fail because they did not satisfy their burden of proving a relevant market.

App. 33a.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit Allowed Anticompetitive Impact In One Market To Be Justified By Claimed Benefits In Another, Contravening This Court's Authority And Conflicting With Decisions Of Other Circuits.

As shown in Part II, the Third Circuit misperceived and misapplied this Court's cases on quick look review of facially anticompetitive conduct, rendering that doctrine a practical nullity and yielding confusion and circuit conflict in an important antitrust arena. But the decision's analysis also contravened and created circuit

conflict on an elemental principle of this Court's antitrust jurisprudence long predating quick look doctrine – namely, that anticompetitive conduct in one market may not be justified by claimed benefits in a different market.

United States v. Topco Associates, 405 U.S. 596 (1972), is instructive. There, members of a cooperative association comprising economically independent small and regional supermarket chains established "exclusive territorial areas," with all members agreeing not to compete in sale of association-brand products within another member's territory. 405 U.S. at 598-603. The Court held "the restraint in this case is a horizontal one, and, therefore a per se violation of § 1." *Id.* at 608. It then rejected the argument that this anticompetitive conduct could be justified by its claimed procompetitive effects in a different market:

> [T]he Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition. [collecting cases] . . .
>
> The District Court determined that by limiting the freedom of its individual members to compete with each other, Topco was doing a greater good by fostering competition between members and other large supermarket chains. But the fallacy in this is that Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the

> economy. On the contrary, the Sherman Act gives to each Topco member and to each prospective member the right to ascertain for itself whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products.

Id. at 610-11.

Likewise, the Court has rejected the theory that an anticompetitive bank merger could be justified by arguing "that the increased lending limit of the resulting bank will enable it to compete with the large out-of-state bank, particularly the New York banks, for very large loans:"

> If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader.

United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963).

The law that anticompetitive conduct in one market cannot be justified by alleged procompetitive effects in another also rests on the Court's recognition that the judiciary lacks the authority and competence to "weigh" competitive benefits and detriments across different economic sectors:

> If a decision is to be make to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by the Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and the courts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.

Topco, 405 U.S. at 611-12.

Philadelphia National Bank is identical:

> [An anticompetitive merger] is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us by Congress when it enacted the amended § 7.

374 U.S. at 371.

The decision below overlooked *Topco* and *Philadelphia National Bank*, holding instead that claimed competitive benefits in the "sports and entertainment markets" constituted procompetitive justifications for respondents' horizontal restraint on competition among ATP tournaments in the player-services market. This is elemental error.

Competition for player services is a self-evident feature of professional sports endeavors, recognized by this Court and others – including the Third Circuit here. See Part II, *infra* at 25-26; App. 32a ("Professional sports teams or tournaments always have an interest in obtaining the best players possible"); App. 32a-33a ("The record in this case indicates that the individual tennis tournaments traditionally compete for player talent"). Respondents' Brave New World plan is a classic horizontal restraint – an agreement among horizontal competitors (plan-favored tournaments) that eliminates their need to compete for top-player services, and severely impedes other tournaments' ability to do so. See Part II, *infra* at 27-28. The decision acknowledged the anticompetitive impact in that market. App. 32a ("the agreement among the ATP's tournament members in the Brave New World Plan might have deprived the marketplace of potential competition"); App. 33a ("An agreement restricting this competition [among tournaments for player talent] should not necessarily be immune from § 1 scrutiny merely because the tournaments cooperate in various aspects of producing the ATP Tour").

Despite this acknowledged anticompetitive impact, the Third Circuit held that claimed competitive benefits

in "the sports and entertainment markets" were procompetitive justifications for respondents' horizontal restraint in the player-services market. As the decision accurately reflects, respondents' justifying rationales for the Brave New World related exclusively to its claimed impact in those other markets. See App. 5a ("According to ATP, this restructuring was necessitated [because] ATP was losing ground in the sports and entertainment markets"); *id.* ("By strengthening its top-tier events and simplifying its tournament structure, ATP believed it could better compete with other sports events and other forms of entertainment"); App. 8a ("In sum, ATP designed the Brave New World plan as a comprehensive plan to address the perceived decline of ATP in the sports and entertainment markets").

Claimed benefits in "sports and entertainment markets" were also the sole bases for holding respondents had proffered procompetitive justifications that (in the decision's view of "quick look" doctrine) made the presumption of anticompetitive impact in the player-services market "disappear[ ]:"

> ATP proffered evidence of procompetitive justifications for the Brave New World plan. The plan was developed to make the ATP Tour more competitive with other spectator sports and entertainment products by improving the quality and consistency of its top-tier events. The modifications to the tour calendar, increase of investment, higher payments to players, and expanded geographic reach were all designed to improve the Tour. Such rules and regulations can be procompetitive where

> they enhance the "character and quality of the 'product.'"

App. 22a (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 102 (1984)).

As shown in Part II, this is incorrect under *NCAA* and the Court's other "quick look" cases. But it also directly contravenes *Topco* and *Philadelphia National Bank*. Respondents have "no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy." *Topco*, 405 U.S. at 610-11. A decision "to sacrifice competition" in the player-services market "for greater competition" in the sports and entertainment markets "must be made by the Congress and not by private forces or by the courts." *Id.* at 611. Respondents are private actors who "are too keenly aware of their own interests in making such decisions." *Id.* The court below was "ill-equipped and ill-situated for such decisionmaking," *id.*, which was "beyond the ordinary limits of judicial competence," *Philadelphia National Bank*, 374 U.S. at 371.

The Third Circuit view also conflicts with decisions of other courts of appeals that anticompetitive impact in one market may not be justified by claimed benefits in another. See, *e.g.*, *Smith v. Pro Football, Inc.*, 593 F.2d 1183, 1196 (D.C. Cir. 1978); see also *Sullivan v. NFL*, 34 F.3d 1091, 1111-13 & n.9 (1st Cir. 1994) (noting "it seems improper to validate a practice that is decidedly in restraint of trade simply because the practice produces some unrelated benefits to competition in another market;" but saying "waters are muddied" by *NCAA*, in which *Sullivan* believed "it is

impossible to tell whether the Court was consciously applying the rule of reason to include a broad area of procompetitive benefits in a variety of markets, or whether the Court was simply not being very careful and inadvertently extended the rule of reason past its proper scope"). This underscores the need for renewed guidance from this Court.

II. The Third Circuit Fundamentally Misunderstood And Misapplied This Court's "Quick Look" Jurisprudence, Creating And Highlighting Conflicts Among The Courts of Appeals.

The Court's "quick look" doctrine – which applies when challenged conduct, while not illegal *per se,* has self-evident anticompetitive impact – developed in three decisions over an eight-year period: *Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978); *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984); and *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986):

> In [*NCAA*], we held that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." [468 U.S.], at 110. Elsewhere, we held that "no elaborate industry analysis is required to demonstrate the anticompetitive character of" horizontal agreements among competitors to refuse to discuss prices, [*Professional Engineers*], 435 U.S.[, at 692], or to withhold a particular desired service, [*Indiana Dentists*], 476 U.S.[, at 459] (quoting [*Professional Engineers*], *supra* at 692). In each of these

> cases, which have formed the basis for what has come to be called abbreviated or "quick-look" analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.

Cal. Dental Ass'n v. FTC, 526 U.S. 756, 769-70 (1999).

The key features of quick look analysis are straightforward. First, if challenged conduct has obvious anticompetitive impact, plaintiff need not prove a relevant market in which defendant has power: "As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output." *NCAA*, 468 U.S. at 109. Examples include a "league's television plan [that] expressly limited output" and "fixed a minimum price," *California Dental*, 526 U.S. at 770 (describing *NCAA*, 468 U.S. at 99-100); an association's imposing on its members "'an absolute ban on competitive bidding,'" *id.* (quoting *Professional Engineers*, 435 U.S. at 692): and "'a horizontal agreement among the participating dentists to withhold from their customers'" a desired service, *id.* (quoting *Indiana Dentists*, 476 U.S. at 459).

Second, defendant must produce evidence of the conduct's procompetitive impact. The "hallmarks of anticompetitive behavior" that trigger quick look analysis "place upon [defendant] a heavy burden of establishing an affirmative defense which competitively justifies [the] apparent deviation from the operations

of a free market." *NCAA*, 468 U.S. at 113. "[U]nless the defendant comes forward with some plausible (and legally cognizable) competitive justification for the restraint, [it is] summarily condemned." *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005); *accord Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992) (absent "sound justification, the court condemns the practice without ado"). If defendant offers evidence of procompetitive impact, the factfinder weighs anticompetitive and procompetitive effects under the rule of reason.

The Third Circuit held quick look analysis was inappropriate because "the definition of the relevant market was one of the most contested issues at trial," and "'the contours of the market' here are not 'sufficiently well known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition.'" App. 20a-21a (citation omitted). It then held that even under quick look analysis, respondents' offer of procompetitve justifications made "the 'quick look' presumption disappear[ ]," thereby triggering what the court called "full-scale rule of reason analysis" – under which the Federations' claim failed because they "failed to prove the relevant market." App. 23a. Consistent with its view that "quick look" and "full-scale rule of reason analysis" were either-or choices, the decision also held quick look analysis was a legal exercise exclusively for the court, in which the factfinder has no role: "'The application of the quick look analysis is a question of law to be determined by the court,' and therefore the concept of 'quick look' has no application to jury inquiry." *Id.* (citation omitted).

Each holding misunderstands and misapplies this Court's quick look jurisprudence, and creates or highlights conflicts among the courts of appeals.

A. The Decision's View That "Relevant Market" Disputes Preclude Quick Look Analysis Ignored The Player-Services Market In Professional Sports, Recognized By This Court And Others, And The Self-Evident Anticompetitive Impact Of ATP's Horizontal Restraint In That Market.

"[A]n observer with even a rudimentary understanding of economics," *California Dental*, 526 U.S. at 770 – or, as accurately if more colloquially, any high school graduate who watches ESPN – knows that competition for top-player services is an inherent, critical aspect of professional sports endeavors. This is true in league sports (Major League Baseball, the NFL, the NBA, the NHL) where each team competes for services of star players with other teams, with which it also competes on the field or in the arena. It is equally true in professional tennis, where economically independent tournaments compete to secure participation of top players.

This is why antitrust cases involving restrictions on player-services markets (*e.g.*, NFL or NBA drafts) routinely hold such conduct is anticompetitive. See *Smith v. Pro Football*, 593 F.2d at 1183-86 (NFL draft was "unreasonable restraint of trade" and "undeniably anticompetitive both in its purpose and in its effect," which "was to 'suppress and even destroy competition' in the market for player services") (*quoting Chi. Bd. of*

Trade v. United States, 246 U.S. 231, 238 (1918)); *Drysdale v. Florida Team Tennis, Inc.*, 410 F. Supp. 843, 848 (W.D. Pa. 1976) (World Team Tennis draft "would simply stifle any competition between [league] franchisees for obtaining players' services"); *Kapp v. NFL*, 390 F. Supp. 73, 82 (N.D. Cal. 1974) (NFL draft was "patently unreasonable"), *appeal on issue dismissed as moot*, 586 F.2d 644 (9th Cir. 1978); *Robertson v. NBA*, 389 F. Supp. 867, 893 (S.D.N.Y. 1975) (NBA "draft system and perpetual reserve system" binding player to specific team "are readily susceptible to [antitrust] condemnation").

The competitive player-services market is also the self-evident predicate for applicability to professional sports endeavors of statutory and nonstatutory labor exemptions from antitrust liability. See *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (league's imposing fixed salary on developmental players fell within scope of nonstatutory labor exemption from antitrust liability); *Mackey v. NFL*, 543 F.2d 606, 615 (8th Cir. 1976) ("labor exemption pre-supposes a violation of the antitrust laws").

Elsewhere in its opinion the Third Circuit acknowledged existence of the player-services market here. App. 32a ("Professional sports teams or tournaments always have an interest in obtaining the best players possible" (citing *Brown v. Pro Football*)). The court acknowledged as well that this was documented by the evidence. App. 32a-33a ("The record in this case indicates that the individual tennis tournaments traditionally compete for player talent").

The decision also did not dispute the Brave New World plan's anticompetitive impact. App. 32a ("[T]he agreement among the ATPs tournament members in the Brave New World Plan might have deprived the marketplace of potential competition"). The plan's explicit purpose is to channel top players to favored tournaments, thereby eliminating need for these economically independent entities to compete with each other for player services, and severely limiting ability of nonfavored tournaments to engage in that competition. The decision repeatedly stated this obvious point. App. 2a ("The redesigned format channeled more top-tier players to the top-tier ATP tournaments"); App. 6a ("The Brave New World plan's objective was to increase the value and appeal of top-tier tournaments by channeling top players to compete in them").

The decision also detailed the "sticks" and "carrots" used by the plan to accomplish this objective:

> Notably, the Brave New World plan also amended ATP rules so that qualifying players were required, under threat of sanctions – suspension, loss of ranking, and loss of ability to earn ranking points – to play all Tier I events, at least four Tier II events, and at least two Tier III events. Further, all qualifying players were also required to play in the year-end [ATP-owned] Tennis Masters Cup championship. In addition, the Brave New World plan imposed a "Special Events" rule on the top 50 players, prohibiting them from participating in any non-ATP, non-Grand Slam events during the weeks of and

> surrounding ATP events. . . . In turn, ATP increased the tournaments' minimum prize money levels to benefit the players.

App. 7a.

This is classic horizontal market division – an agreement among some competitors to divvy-up services of leading players among favored tournaments to the exclusion of other competitors. Such conduct is typically illegal *per se*. *E.g.*, *Topco,* 405 U.S. at 602-03, 607-08 (agreement among cooperative association members "dividing markets" into "exclusive territorial areas" where members would not compete with each other was "horizontal [restraint], and, therefore a per se violation of § 1"). Even assuming any circumstances rescue respondents' plan from *per se* condemnation, the anticompetitive impact of horizontal market division remains self-evident. "[N]o elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Professional Engineers*, 435 U.S. at 692. "[A]n observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect," *California Dental*, 526 U.S. at 770, "even in the absence of a detailed market analysis," *NCAA*, 468 U.S. at 110.

In addition to overlooking the self-evident anticompetitive impact of respondents' horizontal restraint, the Third Circuit view that disputes about "definition of the relevant market" obviate quick look review (App. 20a) misperceived the "market dispute." The panel thereby misperceived as well the pertinent market that triggers quick look analysis.

Any claim that no "player-services market" exists is untenable, given recognition of that obvious market in professional sports enterprises by this Court and others (including the Third Circuit in acknowledging that market and its record documentation). See *supra* at 25-26. The market dispute here centered instead on respondents' theory that the "relevant" markets were "really" the spectator sports and entertainment markets, rather than the player-services market in which tournaments compete with one another. In respondents' view, claimed procompetitive impact in these entertainment markets justified their horizontal restraint of competition in the player-services market (or rendered that market not the "relevant" one).

As shown in Part I, a defendant may not justify anticompetitive practices in one market by pointing to supposed procompetitive impact in another. But the Third Circuit's "relevant market" reasoning sanctions precisely such impermissible "justification" in the quick look context: It allows defendant to evade quick look review of facially anticompetitive conduct in one market (here, horizontal allocation of the player-services market) by arguing that different markets (here, sports and entertainment markets) are really the "relevant" ones. This overlooks and undermines *Topco* and *Philadelphia National Bank*.

The panel reasoning is also at odds with this Court's recent explication of "single entity" doctrine. As *American Needle, Inc. v. NFL* shows, the fact that members of a professional sports league may be a single entity for § 1 purposes when engaged in some activities in some markets (*e.g.*, "production and scheduling of

games" in the spectator sports and entertainment markets) does not make members a single entity when engaged in different activities in other markets (*e.g.*, "when it comes to the marketing of the team's individually owned intellectual property"). 560 U.S. ___, 130 S. Ct. 2201, 2216-17 (2010). But the "relevant market" reasoning below sanctions precisely such impermissible conflating of different markets in quick look cases: It allows defendant to evade quick look review of facially anticompetitive conduct in a market where members of a sports organization do *not* act as single entity (here, horizontal allocation of the player-services market in which tournaments compete with each other) by arguing that ATP members supposedly do need to act as a single entity in different markets (here, sports and entertainment markets). This overlooks and undermines *American Needle*.

The Third Circuit made the identical errors, including misperceiving the "relevant market" dispute, in holding that the Federations' not "proving a relevant market" made it unnecessary to decide if the district court erred in allowing the jury to view ATP tournaments as a single entity. See App. 33a. Yet this holding came immediately after the panel explicitly noted that "the individual [ATP] tennis tournaments traditionally compete for player talent," and "[a]n agreement restricting this competition should not necessarily be immune from § 1 scrutiny merely because the tournaments cooperate in various aspects of producing the ATP Tour." *Id.* This shows that the Third Circuit's "relevant market" rationale for allowing respondents' horizontal restraint to escape quick look scrutiny is at odds not only with *American Needle*, but

also with the decision's own recognition of the realities of the player-services market and the anticompetitive impact of the Brave New World plan.

B. The Decision's View That Quick Look "Disappears" If Defendant Offers Justifications For Facially Anticompetitive Conduct, Shifting the Burden To Plaintiff To Prove Anticompetitive Impact In A Relevant Market, Contravenes This Court's Quick Look Jurisprudence And Conflicts With Decisions Of Other Courts Of Appeals.

The Third Circuit also held that once defendant proffers procompetitive rationales for facially anticompetitive conduct, "the 'quick look' presumption disappears" and the case reverts to "full-scale rule of reason" analysis – including requiring plaintiff to start at square one and prove a relevant market in which defendant's conduct has anticompetitive impact. App. 23a. This fundamentally distorts and misapplies this Court's jurisprudence, stripping it of practical import, and conflicts with decisions of other courts of appeals.

First, the Third Circuit misperceived the reason for market analysis. The questions "What is the market?" and "Does defendant have market power" have no independent significance. Rather, "the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition." *Indiana Dentists*, 476 U.S. at 460. The "inquiry into market power . . . is but a 'surrogate for detrimental effects'" on competition. *Id.* at 461 (citation omitted). If

anticompetitive impact is evident, there is no need to "prove" a market in which defendant has power.

This, of course, is the core premise of quick look doctrine. As shown, quick look analysis is triggered by anticompetitive impact that is evident to "an observer with even a rudimentary understanding of economics." *California Dental*, 526 U.S. at 770. That is why "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output." *NCAA*, 468 U.S. at 109. That is why such a restriction requires defendant to prove "some competitive justification even in the absence of a detailed market analysis." *Id.* at 110.

That is also why defendant's proffer of such justifications does not mean plaintiff must now go back and "prove," under a court's view of "full-scale" rule of reason analysis, a market in which defendant's conduct has anticompetitive impact. Defendant's justifications do not alter that the challenged practice (*e.g.*, the horizontal restraint here) is facially anticompetitive. Since demonstrating anticompetitive impact is "the purpose of the inquiries into market definition and market power," *Indiana Dentists*, 476 U.S. at 460, there is no legal or logical basis to revive those market inquiries when anticompetitive impact is evident – which it is by definition in a case that warrants quick look review.

If defendant proffers procompetitive justifications for facially anticompetitive conduct, the factfinder moves to rule of reason balancing of anticompetitive and procompetitive effects. Nothing in *Professional*

Engineers, *NCAA*, *Indiana Dentists* or *California Dental* supports the novel proposition, irreconcilable with the premise of "quick look" doctrine, that instead the burden now shifts to plaintiff to prove anticompetitive impact in a relevant market in which defendant possesses market power.

The Third Circuit's mistaken contrary view also creates and highlights conflicts among the courts of appeals in two critical respects. First, other circuits correctly hold, consistent with this Court's cases, that relevant market and market power inquiries have no role in quick look cases. See *Polygram*, 416 F.3d at 36 (D.C. Cir.) (rejecting argument that FTC's quick look analysis erred because "'proof of actual anticompetitive effect (or market power as its surrogate) is required in *any* Rule of Reason case'" (quoting brief; original emphasis); *Cal. ex rel. Brown v. Safeway, Inc.*, ___ F.3d ___, 2010 WL 3222187, at *15 (9th Cir. 2010) (rejecting argument in quick look case that State "lack[ed] empirical evidence to demonstrate that the effects of [defendants'] agreement were anticompetitive in practice;" when "anticompetitive nature of the likely effects of an agreement is, as a theoretical matter, 'obvious,' it is not necessary for a plaintiff to provide empirical evidence demonstrating anti-competitive consequences"); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019-20 (10th Cir. 1998) (rejecting argument in quick look case that "district court erred by failing to define the relevant market and by failing to find that the NCAA possesses power in that market"; this "misapprehends the purpose in antitrust law of market definition, which is not an end unto itself but rather exists to illuminate a practice's effect on

competition"); see also *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1448 (9th Cir. 1988) (rejecting claim, in case where jury found challenged conduct "had actual detrimental effects on competition," that proper relevant market had not been proven; "[d]efining the market is not the aim of antitrust law; it merely aids the search for competitive injury"; "market definition and market power are merely tools designed to uncover competitive harm").

Second, the Third Circuit's shifting the burden of proving anticompetitive impact to plaintiff when defendant proffers procompetitive justifications highlights direct circuit conflict on another key "quick look" issue. This Court holds that when anticompetitive impact is apparent, defendant has "a heavy burden of establishing an affirmative defense which competitively justifies" the conduct. *NCAA*, 468 U.S. at 113. Despite this clear instruction, courts of appeals are split on this issue. *Compare N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 352 (5th Cir. 2008) ("burden remains on the challenger" to show conduct does not have net procompetitive impact); App 21a-22a (citing *Specialty Physicians*), *with Safeway*, 2010 WL 3222187, at *17 (9th Cir.) ("burden of proof is shifted to the defendant"); *Law*, 134 F.3d at 1021 (10th Cir.) ("disagree[ing] with the Fifth Circuit's allocation of the burden of proof"; "burden shifts to the defendant to justify the restraint").

The decision below also renders quick look doctrine a practical nullity. It will be a rare antitrust defendant who cannot advance some procompetitive rationale (likely supported by an expert) for a challenged practice.

This is particularly so if, as the decision mistakenly allows, defendant may point to supposed positive impact in different markets, which the defendant argues (again with expert support) are really "relevant." Under the reasoning below, quick look becomes a meaningless exercise: After plaintiff shows facially anticompetitive conduct warrants application of quick look – whose premise is that market proof is not required when anticompetitive impact is apparent – quick look then "disappears" if defendant proffers procompetitive rationales; and plaintiff's case then fails absent "market" evidence that quick look doctrine was supposed to render unnecessary.

The Third Circuit's own precedent recognizes that such reasoning vitiates the quick look doctrine. See *United States v. Brown Univ.*, 5 F.3d 658, 673 (3rd Cir. 1993) (rejecting argument that quick look analysis is appropriate "only when evidence establishes that 'the challenged practice . . . manifestly has an adverse effect on price, output, or quality'" (quoting brief); demanding "proof of actual adverse effects generally will require the elaborate, threshold industry analysis that an abbreviated inquiry is designed to obviate"). The decision below threatens precisely that result.

C. The Decision Below Also Misperceives And Creates Confusion On Other Critical Features Of This Court's Quick Look Doctrine.

The Third Circuit reasoning also misapprehends and misapplies this Court's jurisprudence in other critical respects.

First, holding that procompetitive justifications make quick look "disappear," thereby triggering the decision's view of "full-scale rule of reason analysis," mistakenly treats these as categorically separate forms of analysis between which an "either-or" choice must be made. This Court instructs otherwise. *E.g.*, *California Dental*, 526 U.S. at 781 ("What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint"); see *American Needle*, 130 S. Ct. at 2216-17.

Further, the decision's "either-or" view reflects a fundamental conceptual misunderstanding of quick look doctrine. "Rule of reason" balancing is not an "alternative" to quick look review; it involves instead a *different aspect* of antitrust analysis – and one that may apply in quick look cases just as in any other antitrust action not involving *per se* illegality. Again: Quick look doctrine addresses whether "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect," *California Dental*, 526 U.S. at 770, "even in the absence of a detailed market analysis," *NCAA*, 468 U.S. at 110. If so, the consequence is that plaintiff need not "prove" a relevant market in which defendant has market power – because such evidence has no purpose other than as a *means to show* anticompetitive impact. By definition, that demonstration is not needed in quick look cases, because the doctrine applies only if anticompetitive impact is facially apparent.

Hence, the sole aspect of antitrust analysis that is necessarily "abbreviated" in quick look cases involves

eliminating need for evidence of defendant's power in a relevant market. Rule of reason balancing by the factfinder will still occur if defendant proffers legally cognizable procompetitive justifications.

To be sure, analysis may be *further* "abbreviated" if a defendant advances no justification (in which case the conduct is "summarily condemned," *Polygram,* 416 F.3d at 36), or the court determines the justification is insufficient as a matter of law (*e.g.*, "is inconsistent with the basic policy of the Sherman Act," *NCAA*, 468 U.S. at 117, as when it is "based on the assumption that competition itself is unreasonable," *Professional Engineers*, 435 U.S. at 696). But if legally cognizable procompetitive justifications *are* advanced, rule of reason balancing occurs; and, depending on the justification evidence, it may be just as "full-scale" as in any other antitrust case. Again, analysis in quick look cases is "abbreviated" only by eliminating the preliminary inquiries about the market and market power – *i.e.*, what earlier Third Circuit case law correctly calls "the elaborate, threshold industry analysis that an abbreviated [quick look] inquiry is designed to obviate," *Brown University*, 5 F.3d at 673.

Finally, the decision confuses quick look law by mistakenly saying there is no jury role. The factfinder "balance[s] the proffered procompetitive justification against the presumed anticompetitive harm. . . . [U]nder 'quick look,' the jury's inquiry 'starts from the premise – already determined by the court as a matter of law – that the restraint's anticompetitive effect is evident without need for detailed market analysis.'" App. 22a-23a (quoting Federations' brief).

In rejecting this, the panel, not the Federations, "misapprehend[ed] the reasonableness analysis" (*id.*). Under the rule of reason, "the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). Nothing about quick look doctrine, which addresses whether need for market evidence is obviated, alters that elemental proposition.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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