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Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BROCK WISNE; AIDAN SHAW; AISLIN MALCOLM; CADE TYSON; ABIGAIL JEFFERIES; ANTHONY JOHNSON; LOUIE JORDAN; JEFFERSON DE LA CRUZ MONEGRO; ISAIAH JONES; DIMOND LOOLSI; BRETT GRIFFITHS; JAKE MORELL, on behalf of themselves and all others similarly situated,

Plaintiffs - Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendant - Appellant.

No. 26-1309

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:26-CV-03063-CNS-KAS)

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Robert K. Shelquist of Cuneo Gilbert Flannery & LaDuca LLP, St. Louis Park, Minnesota (Christian Hudson and Alexandra Klein of Cuneo Gilbert Flannery & LaDuca LLP, Brooklyn, New York, Michael J. Flannery of Cuneo Gilbert Flannery & LaDuca LLP, St. Louis, Missouri, Alexandra Warren of Cuneo Gilbert Flannery & LaDuca LLP, Washington, D.C., Diana J. Florence and Robert A. Boland of Shumaker, Loop &

Kendrick, LLP, Toledo, Ohio, and Elliot S. Abrams of Cheshire Parker Schneider & Abrams, PLLC, Raleigh, North Carolina, with him on the brief) for Plaintiffs-Appellees.

Before **McHUGH**, **KELLY**, and **MORITZ**, Circuit Judges.

McHUGH, Circuit Judge.

Plaintiffs-Appellees are a group of student-athletes who have completed four seasons of Division I competition at member schools of the Defendant-Appellant National Collegiate Athletic Association ("NCAA").[1] Prior to a rule change agreed upon in June 2026, the NCAA limited Division I student-athletes to four seasons of competition within a five-year period. The NCAA subsequently adopted a new rule allowing eligible athletes to compete for up to five years during a five-year period. The NCAA chose not to apply this rule retroactively to student-athletes like Plaintiffs, who had already competed in the maximum number of seasons permitted under the old rule. Plaintiffs sued the NCAA, arguing its decision not to apply the new rule retroactively is an illegal restraint of trade in the labor market for NCAA Division I athletes, in violation of § 1 of the Sherman Act, *see* 15 U.S.C. § 1. The district court granted Plaintiffs a preliminary injunction, ordering the NCAA to allow Plaintiffs to compete for a fifth season. The NCAA appeals that order.

[1] These member schools are segregated into three divisions, known as Division I, II, and II. Division I is considered the most prestigious. This lawsuit relates solely to the rule governing participation in Division I athletics.

Exercising jurisdiction under 28 U.S.C. § 1292(a)(1), we conclude that Plaintiffs' proposed labor market—all of NCAA Division I athletics in the United States—lacks evidentiary support. Therefore, we reverse.

I. BACKGROUND

A. Factual Background

The NCAA was created in 1905, to reduce violence in college football. *NCAA v. Alston*, 594 U.S. 69, 75–76 (2021). In the many decades since then, the NCAA has grown into a "sprawling enterprise" that adopts rules governing its 1,100 member schools on the conduct of the games themselves, as well as compensation and eligibility of athletes. *Id.* at 79.

1. Growing Use of Antitrust Laws to Challenge NCAA Rules

In *Alston*, the Supreme Court examined a seemingly narrow issue about the limits on the NCAA's ability to restrict "education-related benefits [NCAA member] schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships." *Id.* at 74. In examining the issue, the Supreme Court clarified that the NCAA has no special immunity from antitrust laws based on its professed mission of "maintain[ing] amateurism in college sports." *Id.* at 94 (internal quotation marks omitted); *see also id.* ("To the extent [the NCAA] means to propose a sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade—that we should overlook its restrictions because they happen to fall at the intersection of higher education, sports, and money—we cannot agree.").

At the same time *Alston* was working its way through the courts, the NCAA was considering a major change to its amateurism rules: whether and how much to allow student-athletes to accept money in exchange for allowing their name, image, or likeness (NIL) to be used to promote a product or service. The NCAA formally permitted NIL deals on June 30, 2021. Michelle Brutlag Hosick, *NCAA adopts interim name, image and likeness policy* (June 30, 2021), https://www.ncaa.com/news/ncaa/article/2021-06-30/ncaa-adopts-interim-name-image-and-likeness-policy [https://perma.cc/E22X-57R5]. Also, beginning with the 2025–26 academic year, NCAA Division I schools were allowed to make revenue-sharing payments to their student-athletes.

Now that NCAA student-athletes may accept NIL money and revenue-sharing payments, NCAA recruiting has taken on attributes of a free-agency system, with schools luring athletes in part based on the amount of money the athlete could earn. *See, e.g.*, *Elad v. NCAA*, 160 F.4th 407, 412 (3d Cir. 2025) (describing an instance of a college football team recruiting a player by "help[ing] him secure an approximately $500,000 [NIL deal]"). With that development, NCAA recruiting in some sports now more closely resembles a traditional labor market, i.e., workers willing to provide their services in exchange for money. In turn, this has prompted numerous lawsuits against the NCAA alleging that its various eligibility rules violate the Sherman Act. This is such a case.

2. Plaintiffs' Challenge to the NCAA's New Seasons-of-Eligibility Rule[2]

Until recently, the NCAA limited Division I athletes to four seasons of competition over the span of five years. In June 2026, however, the NCAA approved a new rule allowing Division I athletes, in most cases, to compete for up to five seasons in five years. The NCAA also chose not to apply the new rule retroactively to those who had already competed for four seasons under the old four-in-five rule. The NCAA explained that those students had already "received the full period of eligibility permitted" under the old rule and giving them "another season would destabilize rosters just ahead of the coming season by disrupting settled expectations of countless student-athletes regarding their expected roster spots and playing time next year." App. vol. 1 at 263.

Plaintiffs entered college in 2022 and competed in four straight seasons of intercollegiate athletics. All of them played their fourth and final season (under the old rule) at a Division I school during the 2025–26 academic year. Had the NCAA made the new rule retroactive, they would seek to play a fifth year at a Division I school. In addition, all but one of the Plaintiffs allege they earned NIL money last season and claim they could earn even more if granted an extra season.[3]

[2] We derive this background largely from the uncontested findings in the district court's preliminary injunction order.

[3] All Plaintiffs except Abigail Jefferies allege they have received NIL compensation.

B. Procedural Background

Plaintiffs sued the NCAA on behalf of themselves and a class of similarly situated athletes, arguing the NCAA's decision to exclude them from the new rule illegally restrains trade in violation of § 1 of the Sherman Act.[4] More specifically, they argued that "[e]very rule put forth by the NCAA indicates an agreement among the NCAA and its member institution[s] to restrict the market for Division I athletic labor, having direct implications for the ability of hundreds of thousands of athletes to receive compensation for the skill and effort they put in." App. vol. 1 at 50, ¶ 42. This amounts to "a group boycott," they claim, allowing the NCAA "to dictate just who can and cannot access the market for college athletic opportunities." *Id.* at 32, ¶ 8. But Plaintiffs emphasized they were not "challeng[ing] the [new] rule as a whole in this action"; instead, they challenge only "the application of the rule by the NCAA," or in other words, the decision not to apply the rule retroactively to Plaintiffs. *Id.* at 33, ¶ 10.

Not long after filing their complaint, Plaintiffs also moved for a preliminary injunction requiring the NCAA to grant them a fifth season of Division I eligibility. The motion included a declaration from Dr. David Berri, a professor who specializes in the economics of sports. Dr. Berri opined that "Division I college sports are a unique labor market . . . distinct from other college divisions, minor league professional sports, and the major league professional sports." App. vol. 1 at 109,

[4] Plaintiffs also pleaded claims for breach of contract and declaratory judgment. Neither is at issue in this appeal.

¶ 12. Moreover, "[b]ecause the NCAA has monopsonistic power, it has complete control over which workers are allowed to participate in the Division I labor market."[5] *Id.* at 111, ¶ 19.

The NCAA responded with a declaration from Dr. Matthew Backus, also an economist. Dr. Backus contended that Division I college sports, collectively, was a "patently implausible" market definition because it "assumes all student-athletes are interchangeable within the relevant market." *Id.* at 284, ¶ 32. "All sports, all genders, all skill levels are corralled into one relevant market that is not supported by economic theory, standard antitrust analysis, or reliable data analysis." *Id.* at 285, ¶ 34.

The district court accepted Dr. Berri's reasoning and concluded that the relevant market was "Division I athletics in the United States." *Id.* at 462. Using this market definition, the district court examined the other elements of Plaintiffs' Sherman Act claim and concluded Plaintiffs were likely to succeed on the merits. The district court further found that Plaintiffs had satisfied the other requirements for a preliminary injunction (irreparable harm, balance of harms, and public interest). The

[5] A monopsony is "[a] market situation in which one buyer controls the market." Black's Law Dictionary 1204 (12th ed. 2024). "Monopsony is often thought of as the flip side of monopoly. A monopolist is a seller with no rivals; a monopsonist is a buyer with no rivals." *Id.* (quotation marks omitted).

court therefore granted Plaintiffs' motion and ordered the NCAA to permit Plaintiffs to compete for a fifth season.[6]

The NCAA appealed the district court's decision to this court and moved for a stay of the injunction pending appeal, which we granted. Because the 2026–27 season is already underway for some sports, we expedited the merits phase of this appeal.

II. DISCUSSION

The Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with any foreign nations, is declared to be illegal." 15 U.S.C. § 1. By its terms, the Sherman Act outlaws "[e]very . . . restraint of trade." *Id.* Courts interpret it, however, to outlaw "only *unreasonable* restraints." *Ohio v. Am. Express Co.*, 585 U.S. 529, 540 (2018) (quotation marks omitted). "Restraints that are not unreasonable *per se* are judged under the 'rule of reason.'" *Id.* at 541. In the district court, the parties agreed that Plaintiffs' challenge to the NCAA's actions should be judged according to the rule of reason. No party disputes that here and we proceed accordingly.

The rule-of-reason analysis first requires the court to define the market in question. *See id.* at 542–43. "Without a definition of the market there is no way to

[6] Shortly before issuing its preliminary injunction order, the district court certified a class of all Division I athletes similar to Plaintiffs, i.e., those who began their collegiate athletic careers in the 2022–23 academic year and competed for four straight seasons. Thus, the district court's preliminary injunction benefitted both Plaintiffs and the class. The class-certification order is not before us in this appeal.

measure the defendant's ability to lessen or destroy competition." *Id.* at 543 (brackets and quotation marks omitted). "Typically [the relevant market] is the arena within which significant substitution in consumption or production occurs." *Id.* (internal quotation marks omitted). When that market has been identified, the court can then analyze whether the alleged restraint of trade has a substantial anticompetitive effect in that market, whether it also has a procompetitive rationale, and whether less anticompetitive means exist to achieve those same procompetitive efficiencies. *Id.* at 541–42.

In this appeal, the question of market definition is dispositive. We therefore do not address other matters the district court ruled on, such as anticompetitive effect, procompetitive rationale, and less anticompetitive alternatives.[7]

A. District Court Proceedings Regarding Market Definition

In the context of an alleged monopsony, "the market is not the market of competing sellers but of competing buyers. This market is comprised of buyers who are seen by sellers as being reasonably good substitutes." *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001) (quotation marks omitted). *See also Fourqurean v. NCAA*, 143 F.4th 859, 869 (7th Cir. 2025) ("In the labor market context, as here, the market is comprised of those employers [buyers of labor] seen by workers [sellers of labor] as reasonably good substitutes.").

[7] We also do not address the NCAA's argument that antitrust laws do not apply to its eligibility rules at all because the outcome in this appeal would be the same either way.

1. Plaintiffs' Evidentiary Burden

In the district court, Plaintiffs argued for a market defined as "the labor market for Division I college athletes," App. vol. 1 at 89, without distinguishing between different sports or genders. The NCAA challenged that market definition, claiming that Plaintiffs failed to provide any data supporting the notion that all Division I athletes see all Division I programs as reasonably good substitutes.

Recent circuit-level decisions reversing or vacating pro-athlete preliminary injunctions for lack of evidence supporting the athletes' market definition are instructive. In *Fourqurean*, a football player challenged the NCAA's old four-in-five eligibility rule as "an illegal restraint of trade or commerce under § 1 of the Sherman Act because it prevents student-athletes like [him] from competing in NCAA Division I football." 143 F.4th at 865. The Seventh Circuit reversed the district court's preliminary injunction because, among other reasons, the plaintiff's only effort to define the relevant market was to claim the Supreme Court's *Alston* decision "established that men's NCAA Division I FBS[8] football is a relevant market." *Id.* at 870. The Seventh Circuit disagreed and further noted that antitrust liability requires "'a careful analysis of market realities.'" *Id.* (quoting *Alston*, 594 U.S. at 93). The court stated that market realities had changed since *Alston* due to the

[8] FBS stands for "football bowl subdivision," referring to football teams that play for the chance of bowl games and the College Football Playoff at the end of the season—in contrast to FCS (football championship subdivision), where teams play for a chance to be in an end-of-season tournament separate from the College Football Playoff. FBS football is the form of college football that garners the most media and fan attention and thus, the most revenue.

advent of NIL payments. *Id.* Accordingly, the plaintiffs could not simply rely on the market definition set forth in *Alston.*

In *Elad*, a football player challenged the NCAA's practice of counting seasons played at a junior college toward the old four-in-five rule. 160 F.4th at 411. The plaintiff defined the market as "the labor market for college football athletes in general and NCAA Division I football specifically." *Id.* at 416 (quotation marks omitted). The Third Circuit vacated the district court's preliminary injunction because the district court had not "engage[d] in a fact-specific analysis of the relevant market despite the parties' differing opinions on the topic." *Id.* Rather, the district court had simply accepted the plaintiff's expert's definition of the market without question, even though the expert "cite[d] no market evidence or economic data." *Id.*

In *Robinson v. NCAA*, 172 F.4th 271 (4th Cir. 2026), four football players brought the same challenge as in *Elad*, *see id.* at 279. They defined the relevant market as "the nationwide market for the labor of NCAA Division I college football players." *Id.* at 293 (internal quotation marks omitted). The Fourth Circuit vacated the district court's preliminary injunction for the same reasons as in *Elad*, namely, failure to make fact-specific findings about the relevant market. *See id.* at 294.

2. Dr. Berri's Declaration

Seeking to avoid the same outcome as in these decisions, Plaintiffs proffered Dr. Berri's declaration in support of their theory that "Division I college sports are a unique labor market, and . . . the NCAA has clear monopsonistic control over this market." App. vol. 1 at 90 (internal quotation marks omitted). Dr. Berri focused on

proving two points: (1) "Division I college sports is unique relative to other college sports divisions"; and (2) "Division I college sports is unique relative to professional minor [league] and major [league] sports." *Id.* at 109, ¶ 13. In the district court and on appeal, the NCAA has challenged Dr. Berri's second point. In addition, the NCAA challenged Dr. Berri's inclusion of all Division I sports in a single market.

First, Dr. Berri concluded that men's basketball players do not view the National Basketball Association's (NBA) developmental league, known as the G-League, as a reasonable substitute for Division I basketball because the G-League receives significantly less media attention and fan interest, so it cannot generate nearly as much NIL money. Dr. Berri also presented statistics suggesting basketball players who have graduated from high school but are too young to be eligible for the NBA draft mostly choose to play college basketball instead of joining the G-League or an international professional league.

Second, Dr. Berri presented data about the number of men's basketball underclassmen (i.e., college players who have not exhausted their years of eligibility) selected in the NBA draft before and after NIL payments became available in 2021. In Dr. Berri's interpretation, the data show that, after the advent of NIL deals, more underclassmen are choosing to enter the NBA draft than pre-NIL. This, he says, is the opposite of what one would expect if men's basketball players now view Division I as a reasonable substitute for the NBA.

Third, Dr. Berri presented data about men's college baseball players. Dr. Berri interpreted the data as showing that, post-NIL, the number of players taken in the

Major League Baseball draft who chose to sign a professional contract went up, or, in certain instances, declined only slightly. Thus, in Dr. Berri's view, NIL money was not keeping baseball players in college, thereby showing they did not look at staying in college as a reasonable substitute for signing a professional contract.

Fourth, Dr. Berri noted that the WNBA does not admit players younger than twenty-two. Thus, women's college basketball players could not view the WNBA as a reasonable substitute for Division I play until late in their college careers.

Fifth, Dr. Berri stated that professional leagues for other college sports are very small or nonexistent. Thus, "the college sports labor market is generally the only place where [athletes in these sports] can be employed." *Id.* at 125, ¶ 65.

3. Dr. Backus's Rebuttal

To counter Dr. Berri's opinion, the NCAA submitted a declaration from its expert, Dr. Backus. As noted above, Dr. Backus declared Dr. Berri's market definition—all of Division I sports—as implausible because it assumes employers are interchangeable between sports and across genders. Dr. Backus also disputed Dr. Berri's interpretation of the available data attempting to distinguish some men's Division I markets from the professional leagues in those sports. Dr. Backus's most significant criticisms of Dr. Berri's attempt to distinguish the Division I markets for men's basketball and baseball from the professional market are as follows.

First, Dr. Backus challenged Dr. Berri's lack of hard data about how much college athletes are actually earning through NIL deals. According to Dr. Backus, "we know that individuals receive vastly different amounts—some zero to some in

the millions," App. vol. 2 at 301, ¶ 57, and that large difference fundamentally undermines Dr. Berri's mathematical calculations.

Second, Dr. Backus identified a mathematical error in Dr. Berri's calculations regarding whether college basketball underclassmen were seeing Division I and the NBA as reasonable substitutes. In Dr. Backus's opinion, the corrected calculation shows that, per Dr. Berri's own criteria, this class of athletes has begun to see the two leagues as reasonable substitutes.

Third, Dr. Backus presented data showing that the average annual contract value for NBA draftees noticeably jumped in 2022 (the first draft after NIL deals became available) as compared to the smaller increases in preceding years. The NBA's minimum rookie salary likewise jumped in 2022 and has continued to increase at a far greater rate than during the pre-NIL years. Dr. Backus's data suggest that the NBA's higher salary figures reflect a response to increasing competition from Division I universities under the new compensation rules.

Fourth, Dr. Backus offered data showing underclassmen drafted by the NBA has steadily declined since 2022, from 91% of all draftees in that year down to 46% of all draftees in 2026. Again, this could support the view that Division I men's basketball is a reasonable substitute for employment with the NBA.

Fifth, Dr. Backus presented data showing a similar downward trend among college football underclassmen declaring for the National Football League (NFL) draft since the advent of NIL payments. Like the NBA data, the downward trend in

underclassmen declaring for the NFL draft could reflect competition between the Division I and NFL employers.

In sum, from Dr. Backus's perspective, Dr. Berri's data showed, "at best," the possibility of "sport-by-sport, conference-level analysis of competition." App. vol. 1 at 284, ¶ 33. Dr. Backus referred to these as "submarket[s]." App. vol. 2 at 314, ¶ 70. But according to Dr. Backus the data did not support a market definition that assumes all Division I athletes, regardless of sport or gender, see all Division I programs as reasonable substitutes.

4. Dr. Berri's Reply

In a reply declaration, Dr. Berri conceded that "college athletes in different sports are different." *Id.* at 395, ¶ 21. But he insisted his unitary market definition was appropriate because, "[f]or purposes of this case, the submarkets (i.e. individual sports) [Dr.] Backus identifies are also 100% controlled by the NCAA as a monopsonist." *Id.*

5. The District Court's Resolution

The district court concluded that Dr. Berri provided precisely the kind of data that the plaintiffs lacked in *Fourqurean*, *Elad*, and *Robinson*. The court also found Dr. Berri more persuasive than Dr. Backus. Specifically, as to the criticism that Plaintiffs' market definition suggests "all Division I sports are interchangeable," the district court accepted Dr. Berri's explanation that "the NCAA is the sole 'buyer' for all athletes in the 'submarkets' of individual sports." *Id.* at 458. Thus, the court found the relevant market was "Division I athletics in the United States." *Id.* at 462.

B. Analysis

We review the district court's market definition for clear error. *See Colo. Motor Carriers Ass'n v. Town of Vail*, 153 F.4th 1052, 1058 (10th Cir. 2025) (stating that we review factual findings at the preliminary-injunction phase "for clear error"); *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 975 (10th Cir. 1990) ("Market definition is a question of fact."). Because a market defined as all Division I athletics in the United States is not plausible, the district court clearly erred in accepting Plaintiffs' market definition.

1. Implausibility of the Alleged Market

As discussed, "[i]n the labor market context . . . the market is comprised of those employers *seen by workers* as reasonably good substitutes." *Fourqurean*, 143 F.4th at 869 (emphasis added). The NCAA itself (i.e., the central administrative organization) is not one of "those employers" because it does not hire athletes to compete on its behalf. Indeed, Plaintiffs' allegations show that they understand it must be at least the individual Division I universities, rather than the NCAA as a whole, that are the employers. They allege, for instance, that the *universities* engage in "what is in essence a group boycott." App. vol. 1 at 32, ¶ 8. The district court similarly acknowledged that the NCAA is "a monopsony of colluding employers," App. vol. 2 at 407, thereby recognizing that the "employers" for purposes of our analysis are the universities and not the NCAA. Thus, to the extent the district court's decision hinges on a finding that the NCAA is the relevant employer for purposes of defining the market, that finding is clearly erroneous.

Even treating the universities as the employers and discounting any competition from professional sports organizations, however, we are not convinced the market can be defined as all Division I athletics in the United States. As discussed, the question is whether the laborers (student-athletes) see all employers (Division I universities) "as reasonably good substitutes," *Fourqurean*, 143 F.4th at 869. We have no trouble answering no to that question. Plaintiffs allege, for example, that Division I comprises 366 universities, with 265 of them fielding a football team. Obviously, a football player looking for a Division I roster spot would not view the 101 schools *without* a football program as reasonably good substitutes. Dr. Berri's data also show there are 63 Division I universities with a women's gymnastics program. We can easily conclude that a female gymnast would not view the 303 schools without a women's gymnastics program as reasonably good substitutes.

These examples illustrate why individual athletic programs within a Division I university, not all NCAA university members, are ultimately the employers for purposes of market-definition analysis. Student-athletes do not seek to be "hired" by any Division I university, but by a particular athletic program within a member university. In turn, those employers—Division I teams in the athlete's sport—compete for the same pool of employees (athletes who play that sport). Plaintiffs' position that "the relevant market is the labor market for Division I college athletics," is simply not plausible. A men's basketball player looking for a Division I roster spot, for example, does not explore what he might earn by selling his labor to a men's

hockey team. He looks for a position on a men's basketball team and he does not view a position on some other type of team as a reasonably good substitute. Likewise, a women's volleyball player does not explore what she might earn by selling her labor to a women's lacrosse team because it is not a reasonably good substitute.[9] Thus, while the relevant market likely would include multiple universities with a Division I program in the athlete's sport, it would not include all Division I athletics in the United States.

In sum, as Dr. Backus observed, Plaintiffs' market definition is "patently implausible." App. vol. 1 at 284, ¶ 32. *Cf. Blythe v. NCAA*, ___ F.4th. ___, 2026 WL 2653349, at *6 (9th Cir. Sept. 9, 2026) (holding that a district court abused its discretion when it accepted the plaintiff's market definition of "the Division I collegiate baseball labor market" based on pronouncements from other courts about the labor market for college football or basketball, because "[t]hese markets are not interchangeable" (emphasis and internal quotation marks omitted)). If a market for men's Division I baseball players is implausible when supported by data related to Division I men's basketball and football, we have little trouble concluding that the all-inclusive market definition here is unsupported by the data relating to a few men's sports provided by Plaintiffs.

[9] Plaintiffs point out that some athletes excel in multiple sports. But no one contends there is an athlete who excels in *all* Division I men's and women's sports. Or, even less likely, that all Plaintiffs excel in all Division I athletics.

In the absence of a plausible market definition, the antitrust challenge to the NCAA's failure to apply the new rule retroactively cannot proceed to the next analytical steps of the rule of reason. A properly defined market is a prerequisite to the assessment of the anti-competitive effects and pro-competitive justifications of the prospective application of the new rule in that market. *See Am. Express Co.*, 585 U.S. at 543. We therefore cannot proceed in this appeal beyond our rejection of a market defined as all Division I athletics in the United States.

2. Submarkets

The district court's reliance on Dr. Berri's explanation that individual sports within Division I are merely submarkets, each one dominated by the NCAA, does not rescue the analysis. "Submarket" is merely a label for the circumstance in which an alleged monopolist (or monopsonist) participates in a broad market, but, for antitrust purposes, the relevant focus is a well-defined subset of that broader market. Importantly, like any other market definition, a submarket must be supported by appropriate economic data.

The Supreme Court made this point in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). There, the government sued to stop a merger between two shoe manufacturers, alleging the merger would likely create a monopoly in violation of the Sherman Act. *See id.* at 296–97. At the market-definition phase, the district court rejected the government's argument that the relevant market was all "footwear," but it accepted the alternative argument that there were three relevant markets: "men's, women's and children's shoes, separately considered." *Id.* at 297–99 (internal

quotation marks omitted). Evaluating that decision, the Supreme Court stated that "within [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Id.* at 325. The Court continued, "[I]t is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition." *Id.* The Court upheld the district court's identification of men's, women's, and children's shoes as separate analytical units: "These product lines are recognized by the public; each line is manufactured in separate plants; each has characteristics peculiar to itself rendering it generally noncompetitive with the others; and each is, of course, directed toward a distinct class of customers." *Id.* at 326.

Brown Shoe demonstrates that a submarket is not a dependent subset of a broader market, as if it inherits all the analysis of the broader market. If a submarket is the relevant focus, it is an antitrust market unto itself, requiring its own analysis of anticompetitive effects, procompetitive rationale, and other relevant considerations. *Cf. Black v. Occidental Petroleum Corp.*, 69 F.4th 1161, 1177 (10th Cir. 2023) (in an antitrust dispute regarding mineral rights, upholding the district court's finding that "competitive conditions" created "two distinct groups [i.e., submarkets]" defined by the type of royalty to which the parcels of land were subject (quotation marks omitted)).

Plaintiffs disagree, pointing us to *United States v. Phillipsburg National Bank & Trust Co.*, 399 U.S. 350, 360 (1970). There, the Supreme Court instructed that

"submarkets are not a basis for the disregard of a broader line of commerce that has economic significance." Contrary to Plaintiffs' reading, however, the Court's point in *Phillipsburg* was *not* that there were two or more markets to analyze—a broader market and one or more submarkets. Rather, the Court held that the district court improperly focused on a submarket, when it should have focused on the broader market. *Id.* at 359–61. Thus, *Phillipsburg* is merely the other side of *Brown Shoe*'s coin: sometimes the proper focus of the antitrust inquiry is a smaller piece of a larger market in which the defendant participates (as in *Brown Shoe*), and sometimes the proper focus is the larger market (as in *Phillipsburg*). And in every antitrust case, the relevant market must be properly identified before Sherman Act liability can be determined.

Here, Plaintiffs did not allege any submarkets in their complaint, nor did they assert their existence or define them when they moved for a preliminary injunction. It was Dr. Backus, the NCAA's rebuttal expert, who first raised the concept in the context of explaining why Dr. Berri's data could not plausibly treat Division I sports as an undifferentiated mass. In reply, Dr. Berri did not attempt to define relevant submarkets. Instead, he defended the collective treatment of all Division I sports, by asserting that all are entirely controlled by the NCAA through its monopsony power. As discussed, however, the NCAA is not the employer here and the actual employers (Division I teams) are not all viewed as reasonable substitutes by the employees

(Division I athletes). Further, Dr. Berri failed to provide any data for most of the sports offered at Division I universities.[10]

In sum, "[b]ecause market power is contextualized by the relevant market, inquiry into an antitrust defendant's market power necessarily begins with defining the relevant market." *Black*, 69 F.4th at 1177. Previous Sherman Act lawsuits against the NCAA, such as *Fourqurean*, *Elad*, *Robinson*, and *Blythe*, have emphasized the importance of data to support any such submarket definition. In this lawsuit, Plaintiffs attempted to avoid the same fate as those earlier suits by providing hard numbers on various aspects of some Division I sports. In that sense, they have perhaps done more than the plaintiffs in those predecessor suits. But whereas the earlier lawsuits focused on the submarket for individual sports, Plaintiffs insist the relevant market is all Division I sports in the United States, taken together. With this we cannot agree. As explained, the employers are not interchangeable because the athletes competing in different sports are not fungible. Accordingly, the district court clearly erred in defining the relevant market as all Division I athletics in the United States.

[10] If such markets are properly defined, it is likely that data will show that, for example, men's basketball players face significantly different market considerations than women's volleyball players. In turn, those distinctions would be relevant to the assessment of the pro- and anti-competitive effects of the NCAA's decision not to apply the new rule retroactively.

III. CONCLUSION

The district court clearly erred at the first step of the rule-of-reason analysis—defining the relevant market. In turn, the district court clearly erred when it concluded Plaintiffs had shown a likelihood of success on the merits based on that market. We therefore REVERSE the district court's order granting Plaintiffs a preliminary injunction, and we VACATE the injunction.[11]

[11] The parties dispute whether Plaintiffs' requested preliminary injunction altered the status quo, meaning Plaintiffs needed to make a heightened showing of likelihood of success. *Cf. Fish v. Kobach*, 840 F.3d 710, 723–24 (10th Cir. 2016) (explaining that if a preliminary injunction would alter the status quo, it "require[s] a stronger showing by the movant" as to likelihood of success). We do not address this question because Plaintiffs have not shown a likelihood of success even under a non-heightened analysis.