DISAPPROVAL OF QUICK-LOOK APPROVAL: ANTITRUST AFTER *NCAA v. ALSTON*

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ABSTRACT

In its most recent antitrust opinion, National Collegiate Athletic Association v. Alston *(2021), the Supreme Court condemned the NCAA's policy against compensating student athletes as a violation of the Sherman Act. Although perceived as a pro-plaintiff antitrust decision, the Court's opinion is anything but. While granting a victory to the plaintiffs at hand, the* Alston *opinion surreptitiously created a powerful new weapon for future antitrust defendants to evade liability and even trials: "quick-look approval."*

Alston *birthed quick-look approval as the evil doppelganger of the quick-look rule, a mode of antitrust analysis that the Supreme Court created over forty years ago to make it easier to condemn obviously anticompetitive agreements. Without acknowledging the rationale for antitrust law's quick-look rule, the* Alston *Court turned the rule on its head and asserted that the quick-look approach is also a method for quickly exonerating challenged restraints of trade.*

The Alston *opinion inappropriately and unnecessarily upends decades of antitrust jurisprudence, while pretending to do nothing of the sort. This Article explains the dangers of quick-look approval, especially in light of the abundance of other pro-defendant tools that courts have created and misapplied against antitrust plaintiffs. Unfortunately, federal judges have routinely failed to appreciate the anticompetitive effects of challenged agreements, and this problem will be exacerbated if quick-look approval gains acceptance. This Article calls for coordinated rejection of quick-look approval before it takes root and inflicts great damage on America's antitrust regime.*

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TABLE OF CONTENTS

I. QUICK-LOOK CONDEMNATION OF ANTICOMPETITIVE RESTRAINTS 5
A. *The Birth of the Quick-Look Rule* 7
B. *Quick Look as a Mode of Condemnation* 11
C. *Quick Look as Presumption and Burden Shifting* 14
II. *ALSTON*'S CONVERSION OF CONDEMNATION INTO APPROVAL.....19
III. THE DANGERS AHEAD: REASONS TO DISAPPROVE OF QUICK-LOOK APPROVAL.....22
A. *The Competing Quick-Look Approaches Are Divergent*.....22
B. *Quick-Look Approval is Unnecessary to Reduce False Positives*..23
C. *The Risks Posed by Quick-Look Approval* 26
1. *Intellectual Property Settlements* 29
2. *Deference to Proffered Justifications*.....32
3. *False Indicia of Harmlessness* 35
4. *Long-Term Effects*.....42
5. *Non-Obvious Anticompetitive Effects* 44
D. *Summary*.....46
IV. QUICK-LOOK APPROVAL BY A DIFFERENT NAME?.....46
A. *Antitrust Deference Toward the NCAA* 48
B. *Safe Harbors and Pro-Defendant Factors* 53
V. RESISTANCE IS FERTILE: RESPONDING TO *ALSTON*.....55
CONCLUSION.....57

INTRODUCTION

A short-term loss can presage long-term victories. In some professional sports leagues, the team with the worst win-loss record in a season receives the first draft pick for the following season. This reward for losing can generate a race to the bottom. In 2011, when the Indianapolis Colts were at risk of having the worst record in the NFL, many Colts fans urged their team to lose on purpose to secure the first draft pick, which could be used to select Andrew Luck, a quarterback phenom at Stanford University.[1] Colts fans launched a "Suck for Luck" campaign, encouraging the Colts to lose their remaining games of the season.[2] Although perhaps not in deference to these

1. Steve Politi, *'Suck For Luck' Could Be Best Hope For NFL's Worst*, CNN, (Oct. 21, 2011), https://www.cnn.com/2011/10/21/us/suck-for-luck-could-be-best-hope-for-nfls-worst/index.html [https://perma.cc/JL8k-GOKJ].

2. *Id.* Colts fans were not the only ones rooting on their team to lose to have a shot at acquiring Luck. *Id.* ("From Miami to Indianapolis, from Minnesota to St. Louis, some fans want their team to lose as many games as possible to get the No. 1 pick in the next NFL draft, which would give them an

fans, the Colts lost their final games, received the first draft pick, and selected Luck, who led the team to two consecutive division titles and a championship game.[3] The Colts' losses laid the groundwork for long-term winning.

Shrewd attorneys are also adept at converting short-term losses into longer-term victories. Social movement leaders use litigation losses to frame their organizational identity, to rally their current constituents, and to build their membership rolls.[4] Civil rights attorneys can translate early judicial losses into calls for legislative action or into revised litigation strategies.[5] In retrospect, some litigation losses are actually victories in disguise. And, conversely, for the apparently winning litigants, their victories are pyrrhic.

This phenomenon of winning by losing observed in both sports and law may describe the Supreme Court's most recent foray into the intersection of sports and antitrust law. On its face, the Supreme Court's 2021 decision in *National Collegiate Athletic Association v. Alston*[6] ("*Alston*")—which affirmed the Ninth Circuit's invalidation of the NCAA's rules against compensating student athletes—seems like a pro-plaintiff antitrust opinion. It is not. While granting a victory to the plaintiffs at hand, the *Alston* opinion surreptitiously created a powerful new weapon for future antitrust defendants (not just athletic leagues) to evade liability and even trials: quick-look approval. *Alston* birthed quick-look approval as the evil doppelganger of quick-look condemnation, a mode of antitrust analysis that the Supreme Court created over forty years ago to make it easier to condemn obviously anticompetitive agreements. Without acknowledging the rationale for antitrust's quick-look rule for *condemning* anticompetitive restraints, the *Alston* Court turned the rule on its head and asserted that the quick-look approach is also a method for quickly *exonerating* challenged restraints of trade.

In *Alston*, a group of current and former college athletes sued the NCAA for violating antitrust laws by strictly limiting the amount and forms of compensation available to student-athletes.[7] After winning a bench trial, the

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opportunity to draft the player [Andrew Luck] who is widely regarded as the most polished prospect at quarterback in years to enter the league.").

3. Danny Webster, *Andrew Luck Comments on Staying Healthy, Adjusting Playing Style*, BLEACHER REP., (May 17, 2016), https://bleacherreport.com/articles/2640806-andrew-luck-comments-on-staying-healthy-adjusting-playing-style [https://perma.cc/WA4M-8D7N].

4. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 941–42 (2011).

5. *Id.*

6. 141 S. Ct. 2141 (2021).

7. *Id.* at 2147. The NCAA "is a voluntary, non-profit standard-setting association. . . . Its membership includes over 1,200 educational institutions, athletics conferences, and related organizations. It promulgates rules of play, recruiting, length of season, amateurism, and equipment

plaintiffs secured an injunction against those NCAA rules that restricted the education-related benefits that member schools could give student-athletes but not against corollary rules limiting athletic scholarships and other compensation pegged to athletic performance.[8] Both parties appealed, the NCAA as to liability and the athletes as to remedy.[9] And the Ninth Circuit affirmed liability without altering the remedy.[10] The Supreme Court, in turn, affirmed, but not without creating some pro-defendant mischief along the way.[11]

Like a basketball team dominating March Madness, the athletes won every round of their antitrust litigation on the issue of liability.[12] But this string of victories does not bode well for future antitrust plaintiffs. The athletes' triumph at the Supreme Court has little meaning for future antitrust plaintiffs writ large because the *Alston* holding is narrow and exceptionally fact specific. And *Alston*'s fact pattern is unique and non-analogous to the more conventional antitrust cases that plaintiffs are likely to bring. The most significant impact of the *Alston* opinion will be its sly maneuver to create a new mode of pro-defendant antitrust analysis—its spin on the quick-look rule.

This Article presents the origins and purposes of antitrust law's quick-look rule. It then explores how *Alston* inappropriately and unnecessarily upends decades of antitrust jurisprudence, while pretending to do nothing of the sort. The Article then explains the dangers of quick-look approval, especially in light of the abundance of other pro-defendant tools that courts have created and misapplied against antitrust plaintiffs. Federal judges routinely fail to appreciate the anticompetitive effects of challenged agreements, a problem that will be exacerbated if quick-look approval gains acceptance. Finally, this Article calls for coordinated rejection of quick-look approval before it takes root and inflicts great damage on America's antitrust regime.

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regulations, operates championships and maintains intercollegiate athletics records." *In re* NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1146 (W.D. Wash. 2005).

8. 141 S. Ct. at 2151–54.

9. *Id.* at 2154.

10. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1265–66 (9th Cir. 2020), *aff'd sub nom.* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

11. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

12. Some of these victories were not absolute, as some NCAA rules survived. *Id.*

I. QUICK-LOOK CONDEMNATION OF ANTICOMPETITIVE RESTRAINTS

Although Section One of the Sherman Act condemns "[e]very contract, combination . . . or conspiracy, in restraint of trade,"[13] the Supreme Court in its 1911 *Standard Oil Co. v. United States* opinion held that Section One condemns only those restraints that *unreasonably* restrain trade.[14] Antitrust liability thus turns on whether the plaintiff can prove that the defendants' agreement constitutes an unreasonable restraint on trade. For three quarters of a century, courts applied one of two modes of analysis to determine whether an agreement constituted an unreasonable restraint of trade in violation of Section One of the Sherman Act: the per se rule or the rule of reason.[15]

Under the per se rule, certain restraints are deemed unreasonably anticompetitive as a matter of law. The Supreme Court has proscribed as per se illegal "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[16] Examples of per se illegal restraints include horizontal agreements[17] to fix prices, to reduce output, to divide markets, or to allocate customers.[18] When the per se rule applies, the plaintiff does not

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13. 15 U.S.C. § 1.

14. Standard Oil Co. v. United States, 221 U.S. 1, 58–60 (1911).

15. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978) (explaining the "two complementary categories of antitrust analysis").

16. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958). *See also* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133 (1998) (some agreements are per se illegal because they "will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances").

17. Horizontal restraints are agreements between competitors, while vertical restraints are agreements between businesses at different levels of the distribution chain, such as a contract between a wholesaler and a retailer. *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730 (1988) ("Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints."). Although vertical price-fixing agreements were deemed per se illegal for almost a century, courts now evaluate vertical price restraints under the rule of reason. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 907 (2007) ("*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), is now overruled. Vertical price restraints are to be judged according to the rule of reason.").

18. *See e.g.*, United States v. Joyce, 895 F.3d 673, 677 (9th Cir. 2018) (condemning horizontal price fixing as per se illegal); United States v. Andreas, 216 F.3d 645, 667 (7th Cir. 2000) ("Functionally, an agreement to restrict output works in most cases to raises [sic] prices above a competitive level, and for this reason, output restrictions have long been treated as *per se* violations.") (citations omitted); United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) ("One of the classic examples of a per se violation of §1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition."); Hammes v. AAMCO Transmissions, Inc., 33

have to prove the agreement had, or is likely to have, anticompetitive effects because such effects are presumed.[19] Thus, the plaintiff is spared the burden of defining the relevant market, and the defendants cannot argue that their low collective market share negates antitrust liability.[20] Finally, the defendants cannot argue that they had a procompetitive justification for their agreement.[21] The agreement is illegal, full stop.

For decades, courts subjected all agreements that did not fall in a per se category to rule-of-reason analysis, the default mode of antitrust analysis.[22] Under the rule of reason, the plaintiff must prove that the challenged restraint unreasonably injures competition.[23] This generally requires the plaintiffs to define the relevant market, to show the defendants' market power,[24] and to demonstrate actual or likely anticompetitive effects.[25] The latter inquiry means that "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as

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F.3d 774, 782 (7th Cir. 1994) (noting that "an out-and-out scheme of customer allocation would be a per se violation of section 1").

19. Pace Elecs., Inc. v. Canon Comput. Sys., Inc., 213 F.3d 118, 123 (3d Cir. 2000) (noting that the per se rule "allows a court to presume that certain limited classes of conduct have an anticompetitive effect without engaging in the type of involved, market-specific analysis ordinarily necessary to reach such a conclusion."); United States v. Fischbach & Moore, Inc., 750 F.2d 1183, 1195–96 (3d Cir. 1984) ("The Supreme Court repeatedly has held that *per se* violations require no proof of anticompetitive effect to constitute a violation of the Sherman Act.").

20. *See* Christopher R. Leslie, *Tying Conspiracies*, 48 WM. & MARY L. REV. 2247, 2301 (2007).

21. Polygram Holding, Inc. v. FTC, 416 F.3d 29, 34 (D.C. Cir. 2005) (noting that a per se unlawful restraint is "not susceptible to a procompetitive justification"); United States v. Microsoft Corp., 253 F.3d 34, 95 (D.C. Cir. 2001).

22. Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) ("Since the early years of this century a judicial gloss on this statutory language has established the 'rule of reason' as the prevailing standard of analysis.") (citing Standard Oil Co. v. United States, 221 U.S. 1 (1911)); California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1133 (9th Cir. 2011) ("The rule of reason is the presumptive or default standard . . . .").

23. Robert's Waikiki U-Drive, Inc. v. Budget Rent-a-Car Sys., Inc., 732 F.2d 1403, 1408 (9th Cir. 1984) ("To succeed on a rule of reason claim, an antitrust plaintiff must prove that the restraint in question injures competition in the relevant market."); Orchard Supply Hardware LLC v. Home Depot USA, Inc., 967 F. Supp. 2d 1347, 1357 (N.D. Cal. 2013) ("To establish a rule of reason violation a plaintiff must plead '(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition.'") (quoting Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012)).

24. Menasha Corp. v. News Am. Mktg. In-Store, Inc., 354 F.3d 661, 663 (7th Cir. 2004) ("The first requirement in every suit based on the Rule of Reason is market power, without which the practice cannot cause those injuries (lower output and the associated welfare losses) that matter under the federal antitrust laws.").

25. Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 403 (3d Cir. 2016) (evaluating exclusive dealing arrangement under the rule of reason requires the court to "analyze the likely or actual anticompetitive effects of the exclusive dealing arrangement, including whether there was reduced output, increased price, or reduced quality in goods or services"); Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1552 (11th Cir. 1996) ("The rule of reason analysis is concerned with the actual or likely effects of defendants' behavior . . . .").

imposing an unreasonable restraint on competition."[26] The Supreme Court has instructed courts to take "into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect."[27] Generally, under the rule of reason, antitrust plaintiffs must define the relevant market and prove that the defendants possess market power.[28] The rule of reason is often cumbersome.[29]

The binary scheme, in which restraints were condemned as per se illegal or evaluated under the rule of reason, prevailed for several decades. But this dichotomous approach to adjudicating challenged agreements began to break down in the mid-1980s, as the following section describes.

A. The Birth of the Quick-Look Rule

Coincidentally, the origins of the quick-look rule are found in the Supreme Court's only other antitrust decision involving the NCAA.[30] In *NCAA v. Board of Regents*,[31] two universities challenged the NCAA's policy of limiting the number of televised football games for each NCAA member school. Although a horizontal output agreement would normally constitute a per se illegal restraint of trade,[32] the Court declined to apply the

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26. *Cont'l T. V., Inc.*, 433 U.S. at 49.

27. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

28. *Levine*, 72 F.3d at 1551; Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1334 (7th Cir. 1986) ("Market power is a necessary ingredient in every case under the Rule of Reason."). *See also* Assam Drug Co. v. Miller Brewing Co., 798 F.2d 311, 315–16 (8th Cir. 1986) ("Some courts have narrowed the unlimited inquiry necessary under the rule of reason by requiring at the threshold that the plaintiff attacking a vertical nonprice restraint prove the defendant's substantial market power in a relevant market.").

29. *See, e.g.*, *In re* Detroit Auto Dealers Ass'n, 955 F.2d 457, 475 (6th Cir. 1992) (Ryan, J., concurring in part and dissenting in part) (describing rule of reason analysis as "often unnecessary, cumbersome and complicated"); Consol. Farmers Mut. Ins. Co. v. Anchor Sav. Ass'n, 480 F. Supp. 640, 651 (D. Kan. 1979), *aff'd*, No. 79-2260, 1980 WL 4691 (10th Cir. July 24, 1980) (noting that "application of the 'rule of reason' test can be an arduous task"); Daniel E. Lazaroff, *An Antitrust Exemption for the NCAA: Sound Policy or Letting the Fox Loose in the Henhouse?*, 41 PEPP. L. REV. 229, 237 (2014) ("The rule-of-reason journey is an arduous one, and it can generate considerable expense and substantial investment of time and money."); Val D. Ricks & R. Chet Loftis, *Seeing the Diagonal Clearly: Telling Vertical from Horizontal in Antitrust Law*, 28 U. TOL. L. REV. 151, 155 n.9 (1996) ("Because a rule of reason case can be such an arduous and expensive task, few potential litigants bring them.").

30. In *California Dental Association v. FTC*, 526 U.S. 756, 769–70 (1999), the Court cited three cases as providing the basis for the quick-look rule: *National Collegiate Athletic Ass'n. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); *National Soc. of Professional Engineers v. United States*, 435 U.S. 679 (1978); and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

31. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 88 (1984).

32. United States v. Andreas, 216 F.3d 645, 667 (7th Cir. 2000) ("Functionally, an agreement to restrict output works in most cases to raises [sic] prices above a competitive level, and for this reason, output restrictions have long been treated as *per se* violations.") (citations omitted); *In re* Sulfuric Acid Antitrust Litig., 743 F. Supp. 2d 827, 867 (N.D. Ill. 2010) ("Horizontal price-fixing is one of the

per se rule because the NCAA needed to operate jointly, including imposing some horizontal restraints, in order to create the product of college football.[33] Making a classic defense under the rule of reason, the NCAA argued that its television plan could not have an anticompetitive effect because the group lacked market power.[34] The Court, however, blocked the NCAA's argument, holding that "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output."[35] By describing the restraint as "naked," the court employed the language of per se illegality, as courts have long held that "the *per se* rule is designed for 'naked' restraints."[36] The Court further explained that "when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'"[37] Yet such "elaborate industry analysis" is a hallmark of the rule of reason,[38] which the court claimed to be applying. Eschewing such traditional analysis, the Court quoted Harvard antitrust professor Philip Areeda for the proposition that "[t]he essential point is that the rule of reason can sometimes be applied in the twinkling of an eye."[39] This metaphor would prove particularly powerful, eventually taking on a life of its own.[40]

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clearest *per se* violations of the Sherman Act. . . . An agreement among competitors to restrict the production of a certain good equates to a price-fixing agreement, because conspiracies to limit output are designed to raise, stabilize, or otherwise fix the price of goods.") (citation omitted).

33. 468 U.S. at 100–01.

34. *Id.* at 109 ("Petitioner argues, however, that its television plan can have no significant anticompetitive effect since the record indicates that it has no market power—no ability to alter the interaction of supply and demand in the market.").

35. *Id.*

36. Polk Bros. v. Forest City Enters., Inc., 776 F.2d 185, 188 (7th Cir. 1985); *Andreas*, 216 F.3d at 666 ("*Per se* violations are 'naked restraints of trade with no purpose except stifling of competition . . . .'") (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963)); *In re* Sulfuric Acid Antitrust Litig., 743 F. Supp. 2d at 871–72 (noting that "naked restraints remain subject to *per se* treatment because they have no other purpose than to stifle competition"); *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 682, 693 (E.D. Mich. 2000) (noting that "[c]ourts often say that a 'naked' horizontal restraint is illegal 'per se'") (quoting 11 H. HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 1910a at 252 (1998 ed.)); Rozema v. Marshfield Clinic, 977 F. Supp. 1362, 1374 (W.D. Wis. 1997) ("[*P*]*er se* illegality is limited to 'naked' restraints on trade . . . ."). *See also* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1221 (2008) ("Naked restraints are essentially per se illegal.").

37. *NCAA*, 468 U.S. at 109 (quoting Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

38. *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 317 (3d Cir. 2010) (noting the "'elaborate industry analysis' required by the traditional rule-of-reason standard"); United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1037 (N.D. Cal. 2013) (noting that per se illegal restraints "do not require any 'elaborate industry analysis' otherwise required under the rule of reason.").

39. *NCAA*, 468 U.S. at 110 n.39.

40. *See infra* notes 127–142 and accompanying text.

The *NCAA v. Board of Regents* ("*NCAA*") opinion seems internally contradictory. After laying out the rationale for the per se rule, the Court then claimed that it was using the rule-of-reason analysis but immediately forbade the defense from arguing that the NCAA has no market power, even though that is a standard rule-of-reason inquiry. The Court essentially said: *This isn't naked, so we will apply the rule of reason, but the defendant cannot make standard rule-of-reason arguments because this is naked.* This seems like the per se rule. But after denying any defense based on market power, the Justices asserted that the NCAA's "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."[41] By entertaining a "competitive justification," the Court was not treating the NCAA's plan as per se illegal, because the per se rule precludes the defendants from presenting a procompetitive justification.[42] Thus, the Court's approach was neither rule of reason nor per se, but rather a muddle. Ultimately, the Court rejected the NCAA's proffered justifications and condemned the output restraint for violating Section One of the Sherman Act.[43]

Two years after *NCAA*, the Court again straddled the line between per se and rule of reason, this time in a challenge to a dental federation's policy against providing x-rays to insurers. In *FTC v. Indiana Federation of Dentists*,[44] a group of dentists had agreed to withhold x-rays from insurance companies, which wanted to use the x-rays to make reimbursement decisions.[45] The Court reasoned that the Federation's policy amounted to a group boycott, which would ordinarily trigger the per se rule, but the Justices noted they had been "slow to condemn rules adopted by professional associations as unreasonable *per se*, and, in general, to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not

41. *NCAA*, 468 U.S. at 110.

42. Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761, 773 (8th Cir. 2004) ("Unlike the rule of reason analysis, *per se* analysis does not allow inquiry into the intent behind the restraint, its pro-competitive justifications, or its actual effect on competition."); United States v. Microsoft Corp., 253 F.3d 34, 94–95 (D.C. Cir. 2001) (citing Supreme Court precedent to note that the "per se rule does not broadly permit consideration of procompetitive justifications") (interpreting Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 25 nn.41–42 (1984), *superseded by statute*, 35 U.S.C. § 271, *as recognized in* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006)); Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1016 (10th Cir. 1998) ("Once a practice is identified as illegal *per se*, a court need not examine the practice's impact on the market or the procompetitive justifications for the practice advanced by a defendant before finding a violation of antitrust law.").

43. *NCAA*, 468 U.S. at 120.

44. 476 U.S. 447 (1986).

45. *Id.* at 451–52.

immediately obvious."[46] So, the Court did not apply the per se rule because the case involved dentists, not manufacturers.[47]

Proceeding under a rule-of-reason approach, the Federation argued that the FTC could not prevail because the agency had failed to define the relevant market.[48] The Court rejected this argument, however, holding that "the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason."[49] This was unusual because federal courts generally require plaintiffs to define markets under rule-of-reason analysis.[50] Thus, as in *NCAA v. Board of Regents*, the Court eschewed the per se rule but prevented the defendants from making traditional market definition arguments, which are common in rule-of-reason defenses. Also, as in *NCAA*, the Court entertained the defendants' justifications but rejected them.[51] The Justices unanimously upheld the FTC's findings of antitrust liability.[52]

Because the Supreme Court applied neither a clean per se rule nor a traditional rule-of-reason analysis in *NCAA* and *Indiana Federation of Dentists*, lower federal courts were forced to divine a third mode of analysis from the high Court's opinions. The internal contradictions within these opinions blurred the line between per se and rule of reason and gave rise to the development of quick-look analysis, which represented a hybrid between the two established modes of analysis.[53] As several circuits were doing this in parallel fashion, courts attached various labels to this new mode of antitrust analysis, including quick-look, abbreviated rule of reason, and truncated rule of reason.[54] As of now, the "quick look" jargon has won the nomenclature battle.

Quick look is "an intermediate standard"[55] for those anticompetitive restraints that "fall between the types of conduct typically

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46. *Id.* at 458–59 (citing Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679 (1978) *and* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979)).

47. *Ind. Fed'n of Dentists*, 476 U.S. at 458 ("Although this Court has in the past stated that group boycotts are unlawful *per se*, we decline to resolve this case by forcing the Federation's policy into the 'boycott' pigeonhole and invoking the *per se* rule.") (citations omitted).

48. *Id.* at 460.

49. *Id.*

50. *See supra* note 28.

51. *See* 476 U.S. at 460–64.

52. *See id.* at 448, 465–66.

53. *See, e.g.*, *In re* Se. Milk Antitrust Litig., 739 F.3d 262, 274–75 (6th Cir. 2014) ("This Court has characterized 'quick look' analysis as a third type of category arising from the blurring of the line between *per se* and rule of reason cases.").

54. *See, e.g.*, United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993) ("In addition to the traditional rule of reason and the *per se* rule, courts sometimes apply what amounts to an abbreviated or 'quick look' rule of reason analysis.").

55. Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 830–31 (3d Cir. 2010).

labeled *per se* anticompetitive and that which is analyzed under a 'full-blown' rule of reason analysis."[56] In 1999's *California Dental Association v. FTC*,[57] the Supreme Court used the phrase "quick look" for the first time and held that this abbreviated approach was appropriate when "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."[58] The Court stated that "quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained."[59] With its *California Dental* opinion, the Court officially endorsed the quick-look rule as a middle mode of antitrust analysis used to condemn anticompetitive restraints. The following section describes how the quick-look rule operates.

B. Quick Look as a Mode of Condemnation

Quick-look analysis begins with the antitrust plaintiff showing that the defendants' restraint has a "great likelihood of anticompetitive effects."[60] A defendant can avoid quick-look condemnation by (quickly) showing that their restraint has no "obvious anticompetitive effect."[61] Failing that, the defendant is also afforded the opportunity to present procompetitive justifications that outweigh the anticompetitive effects.[62] But the proffered procompetitive justification must be examined and determined credible, or else the restraint will be condemned on a quick look.[63] The Fifth Circuit in *North Texas Specialty Physicians v. FTC*[64] explained that "[i]f, after examining the competing claims of anti- and procompetitive effects, it remains plausible that the net effect is procompetitive or that there is no effect on competition, then '[t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown.'"[65] Thus, if the defendants show a procompetitive justification for the challenged restraint, then "the court must proceed to weigh the overall reasonableness of the restraint using

56. 1-800 Contacts, Inc. v. FTC, 1 F.4th 102, 115 (2d Cir. 2021) (quoting Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 317 (2d Cir. 2008)).

57. 526 U.S. 756 (1999).

58. *Id.* at 770. The restraint may not be per se illegal, but it is illegal nonetheless. *See id.*

59. *Id.*

60. *Deutscher Tennis Bund*, 610 F.3d at 831 (citation omitted).

61. *Cal. Dental*, 526 U.S. at 778 (1999).

62. *Deutscher Tennis Bund*, 610 F.3d at 832 ("[E]ven where anticompetitive effects are obvious, 'quick look' condemnation is proper only after assessing and rejecting the logic of proffered procompetitive justifications.") (citation omitted).

63. *Id.* ("Where procompetitive justifications are proffered, their logic must be assessed and rejected in order to avoid reverting to full-scale rule of reason analysis.").

64. 528 F.3d 346 (5th Cir. 2008).

65. *Id.* at 362 (quoting *Cal. Dental*, 526 U.S. at 778).

a full-scale rule of reason analysis."[66] Even if an antitrust plaintiff's request for quick-look condemnation is denied, a full-blown rule-of-reason analysis is warranted because, as then-Judge Sotomayor explained in *Major League Baseball Properties, Inc. v. Salvino, Inc.*,[67] "[e]mpirical analysis could ultimately show that the anticompetitive harms from the challenged provisions outweigh any procompetitive benefits."[68] Thus, antitrust plaintiffs can argue in the alternative in three steps: (1) the defendants' agreement falls in a per se category and is unreasonable as a matter of law; (2) even if the restraint is not per se illegal, it warrants quick-look condemnation because the anticompetitive effects are obvious and procompetitive justifications are lacking; and, finally, (3) even if the restraint is not subject to quick-look condemnation, it fails under the traditional rule of reason because it has demonstrable anticompetitive effects that are not outweighed by any procompetitive effects.

Courts generally use quick-look condemnation for anticompetitive conduct that for some reason falls just short of per se illegality.[69] Some opinions have explained that "the 'quick look' analysis applies to a certain class of restraints that is 'not unambiguously in the per se category' but 'may require no more than cursory examination to establish that their principle or only effect is anticompetitive.'"[70] Scholars have argued that "at a visceral level a quick look analysis may be little more than an elegant substitute for per se labeling."[71] Courts generally hold that quick look "applies in cases

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66. United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993); *see also* Bogan v. Hodgkins, 166 F.3d 509, 514 n.6 (2d Cir. 1999) (quoting *Brown Univ.*, 5 F.3d at 669) ("Under quick look, once the defendant has shown a procompetitive justification for the conduct, 'the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis.'") (citation omitted); 11 PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 1911c, at 305 (2d ed. 2005) (noting if defendant presents plausible procompetitive justification, then case proceeds to "general rule of reason analysis requiring full consideration of power and anticompetitive effects").

67. 542 F.3d 290, 334 (2d Cir. 2008).

68. *Id.* at 340 n.10 (Sotomayor, J., concurring).

69. *See* United States v. eBay, Inc., 968 F. Supp. 2d 1030, 1040 (N.D. Cal. 2013) ("Courts use the quick look rule when (1) the plaintiff shows that the challenged restraint falls into one of the general per se categorizations, but (2) the agreement or the nature of the market in which the agreement is made is sufficiently unfamiliar to refrain from applying the per se rule, and (3) the defendant offers preliminary evidence suggesting that the challenged restraint is reasonably necessary to some precompetitive activity."); *see also* Craftsmen Limousine, Inc. v. Ford Motor Co., 491 F.3d 380, 387 (8th Cir. 2007) (noting quick-look analysis is "reserved for the most patently anticompetitive restraints"); Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1312 (10th Cir. 2017) (quoting *Craftsmen*).

70. PBTM LLC v. Football Nw., LLC, 511 F. Supp. 3d 1158, 1179 (W.D. Wash. 2021) (quoting California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1133 (9th Cir. 2011)).

71. Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493, 499 (2009); *see also* Garry A. Gabison, *Juries Can* Quick Look *Too*, 10 SETON HALL CIR. REV. 271, 283 (2014) ("[C]ourts reserve quick look for cases that involve anticompetitive behaviors that have the same *effects* as *per se*, but are not *per se* on their face."); Thomas A. Piraino, Jr., *The Antitrust*

where *per se* condemnation is inappropriate, but where 'no elaborate industry analysis is required to demonstrate the anticompetitive character' of an inherently suspect restraint."[72] Per se illegality is, of course, not a prerequisite for triggering quick-look condemnation.[73] If a challenged restraint is per se illegal, the plaintiff prevails without needing to travel the quick-look route. But the quick-look rule is often conceptually coupled with per se illegality. For example, in her *Salvino* concurrence,[74] then-judge Sotomayor reasoned that either per se or quick-look condemnation may be appropriate when a joint venture is a sham or "a particular challenged restraint is not reasonably necessary to achieve any of the efficiency-enhancing benefits of a joint venture and serves only as naked restraint against competition."[75] The quick-look rule is often the per se rule with a pause button.

Most cases invoking quick-look condemnation involve horizontal restraints regarding price that judges are nonetheless reluctant to condemn as per se illegal. For example, in *Polygram Holding, Inc. v. FTC*,[76] the FTC challenged an arrangement between two record companies to form a joint venture to distribute an album of a 1998 concert by the Three Tenors—José Carreras, Placido Domingo, and Luciano Pavarotti—which included an agreement to temporarily suspend advertising and discounting of the trio's previous concert albums.[77] The D.C. Circuit used the quick-look framework to condemn the arrangement because the FTC had shown that the agreement "in all likelihood had a deleterious effect upon consumers"[78] and the defendants "failed to identify any competitive justification for [their] agreement . . . to refrain from advertising or discounting their competitive Three Tenors products."[79] Because the defendants entered a horizontal agreement affecting prices without any procompetitive justification, the arrangement violated the quick-look rule.[80]

Analysis of Joint Ventures After the Supreme Court's Dagher *Decision*, 57 EMORY L.J. 735, 747 n.88 (2008) ("The quick look is an abbreviated form of analysis similar to the per se rule.").

72. United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993) (quoting Nat'l Soc'y of Pro. Eng'rs. v. United States, 435 U.S. 679, 692 (1978)).

73. *See In re* Se. Milk Antitrust Litig., 739 F.3d 262, 275 (6th Cir. 2014) ("Even though [the defendant's] alleged conduct is not illegal *per se*, the evidence in the record and the allegations in Plaintiffs' complaint are sufficient to shift the burden to [the defendant] to present some procompetitive benefits of the alleged conduct.").

74. Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 334 (2d Cir. 2008).

75. *Id.* at 338 (Sotomayor, J., concurring).

76. 416 F.3d 29 (D.C. Cir. 2005).

77. *See id.* at 31–32.

78. *Id.* at 37.

79. *Id.* at 38.

80. *Id.*

Addressing a different form of quasi-price restraint, the Fifth Circuit in *North Texas Specialty Physicians v. FTC*[81] employed the quick-look approach to condemn an agreement among an association of independent physicians.[82] The association polled its members about the minimum rate they would accept for their services and then "calculate[d] the mean, median, and mode of the minimum acceptable fees identified by its physicians," which the association used to "determine[] a minimum contract fee that it utilizes when negotiating managed care contracts on behalf of its participants."[83] The appellate panel affirmed the FTC's decision against the association because its "practices [bore] a very close resemblance to horizontal price-fixing, generally deemed a *per se* violation."[84] As in *Polygram*, the restraint was not naked price fixing as that would be per se illegal, but it would obviously have similar effects and, therefore, could be condemned after a quick look.

Courts have also applied quick-look condemnation to non-price horizontal restraints. Some courts have suggested the quick-look rule applies to group boycotts that are obviously anticompetitive.[85] The Fourth Circuit, for example, employed quick-look condemnation against an agreement among North Carolina dentists to block non-dentists from providing teeth-whitening services.[86] The court reasoned that "[i]t is not difficult to understand that forcing low-cost teeth-whitening providers from the market has a tendency to increase a consumer's price for that service."[87] Consequently, although the dentists' restraint was not per se illegal, the court condemned it without a full-blown rule-of-reason analysis.[88]

C. Quick Look as Presumption and Burden Shifting

In operation, the quick-look rule combines both the use of presumptions and burden shifting. Quick-look analysis starts with a presumption that the challenged restraint is anticompetitive. The Tenth Circuit in *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*[89] explained that "under an abbreviated, 'quick look' rule-of-reason analysis, courts sometimes simply assume the existence of anticompetitive effect where the conduct at issue

81. 528 F.3d 346 (5th Cir. 2008).
82. *See id.* at 353, 362.
83. *Id.* at 353.
84. *Id.* at 362.
85. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359, 373–74 (4th Cir. 2013).
86. *Id.*
87. *Id.* at 374.
88. *Id.*
89. 846 F.3d 1297 (10th Cir. 2017).

amounts to a 'naked' and effective restraint on price or output that carries 'obvious' anticompetitive consequences."[90] This creates a rebuttable presumption of illegality, in contrast to the per se rule's irrebuttable presumption.[91] The Third Circuit in *Deutscher Tennis Bund v. ATP Tour, Inc.*[92] observed that "[u]nder 'quick look' analysis, the competitive harm is *presumed*, and 'the defendant must promulgate "some competitive justification" for the restraint.'"[93] If the defendant does not advance a procompetitive justification, then "the presumption of adverse competitive impact prevails and 'the court condemns the practice without ado.'"[94] Thus, an unrebutted presumption results in condemnation. But, again, this presumption is rebuttable.[95]

After the presumption of anticompetitive effects is in place, the quick-look approach operates as a burden-shifting rule. The Ninth Circuit in *California ex rel. Harris v. Safeway, Inc.*[96] held that after the antitrust plaintiff "establishe[s] that the restraint is inherently suspect and the anticompetitive effects are easily ascertained, then the *burden shifts* to the [defendants] to produce evidence of procompetitive justification or effects and thus demonstrate the need for more extensive market inquiry."[97] If the

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90. *Id.* at 1311 (citing Cal. Dental Ass'n v. FTC, 526 U.S. 756, 769–70 (1999)).

91. *See* Apex Oil Co. v. DiMauro, 713 F. Supp. 587, 596 (S.D.N.Y. 1989) ("The primary distinction between the Rule of Reason and the *per se* approach is that no showing of anticompetitive effect is required under the latter—the proscribed types of conduct are irrebuttably presumed to be violations of the Sherman Act."); Fisher v. City of Berkeley, 693 P.2d 261, 280 (Cal. 1984), *aff'd* 475 U.S. 260 (1986) ("The per se rule reflects an irrebuttable presumption that, if the court were to subject the conduct in question to a full-blown inquiry, a violation would be found under the traditional rule of reason.").

92. 610 F.3d 820 (3d Cir. 2010).

93. *Id.* at 831 (emphasis added) (quoting United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993)).

94. *Brown Univ.*, 5 F.3d at 669 (quoting Chi. Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 674 (7th Cir. 1992); *see also Chi. Pro. Sports*, 961 F.2d at 674 ("Unless there are sound justifications, the court condemns the practice without ado, using the 'quick look' version of the Rule of Reason . . . .").

95. *See Brown Univ.* 5 F.3d at 669 ("If no legitimate justifications are set forth, the presumption of adverse competitive impact prevails . . . ."). *See also* Polygram Holding, Inc. v. FTC, 416 F.3d 29, 31 (D.C. Cir. 2005) ("[A]lthough not a *per se* violation of antitrust law, the agreement was presumptively unlawful and PolyGram failed to rebut that presumption."); Andrew I. Gavil & Steven C. Salop, *Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct*, 168 U. PA. L. REV. 2107, 2117 (2020) (noting that "what has been labelled the 'quick look' can be understood as courts utilizing a rebuttable presumption when the probability of competitive harm is relatively high, albeit not as high as with per se unreasonableness").

96. 651 F.3d 1118 (9th Cir. 2011).

97. *Id.* at 1138 (emphasis added) (citation omitted); *see also* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 775 n.12 (1999) (stating "quick-look analysis in effect" shifts to "a defendant the burden to show empirical evidence of procompetitive effects"); 1-800 Contacts, Inc. v. FTC, 1 F.4th 102, 115 (2d Cir. 2021) (with quick-look approach, "once the government has identified a 'suspect' agreement, the burden shifts directly to the defendant to show any procompetitive justifications it might have for the restraint"); Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1311 (10th Cir.

defendant meets that burden, the plaintiff can still argue that "the proffered procompetitive effect does not plausibly result in 'a net procompetitive effect, or possibly no effect at all on competition.'"[98] If the defendant fails to prove the plausibility of its procompetitive justification, the restraint is condemned under the quick-look rule. If, however, the defendant satisfies its burden, it does not win the case; it is entitled to neither dismissal nor summary judgment. Instead, the case proceeds to full-blown rule-of-reason consideration.[99]

The Supreme Court intended the quick-look rule's presumptions and burden-shifting mechanisms to make it easier for courts to hold that defendants have violated antitrust laws.[100] All prior Supreme Court references to the quick-look rule describe it exclusively as a way to condemn "plainly anticompetitive" arrangements.[101] The Sixth Circuit, for example, has explained that the quick-look "test is useful when the anticompetitive nature of an agreement is so blatant that a detailed review of the surrounding marketplace would be unnecessary."[102] In the most recent federal appellate opinion discussing the quick-look rule, *1-800 Contacts, Inc. v. Federal Trade Commission*,[103] the Second Circuit described the Supreme Court's opinion in *Texaco Inc. v. Dagher* as declining to apply the quick-look rule to the case at hand "because it applies *only* 'to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust

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2017) ("Under quick-look analysis, the burden in effect immediately shifts to the defendant to demonstrate countervailing procompetitive effects."); *In re* Se. Milk Antitrust Litig., 739 F.3d 262, 275 (6th Cir. 2014) ("Once anticompetitive behavior is shown to a court's satisfaction, even without detailed market analysis, the burden shifts to the defendant who must justify the agreement at issue on procompetitive grounds by providing some 'competitive justification' for the restraint at issue.") (quoting Realcomp II Ltd. v. FTC, 635 F.3d 815, 825 (6th Cir. 2011)).

98. N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 362 (5th Cir. 2008) (quoting *Cal. Dental*, 526 U.S. at 771).

99. *See* Madison Square Garden, L.P. v. Nat'l Hockey League, 270 F. App'x 56, 58 (2d Cir. 2008) ("A court must abandon 'quick look' and proceed to a full-blown rule of reasons analysis, however, 'once the defendant has shown a procompetitive justification for the conduct.'") (quoting Bogan v. Hodgkins, 166 F.3d 509, 514 n.6 (2d Cir. 1999)); *see also* Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 514, 517 (4th Cir. 2002) (finding that district court had too quickly condemned the defendants' restraint and remanding for the district court to perform a more detailed inquiry).

100. *See* Robert A. Skitol & Kenneth M. Vorrasi, *Justice Stevens' Antitrust Legacy*, ANTITRUST, Summer 2010, at 32, 37 (Justice Stevens' "opinions on horizontal restraints paved the way for today's 'quick look' methodology that has made it easier for courts to find antitrust violations in circumstances where the per se rule does not quite fit but where the facts of the case do not require or justify a lengthy rule of reason analysis.").

101. Texaco Inc. v. Dagher, 547 U.S. 1, 7 n.3 (2006).

102. *In re* Se. Milk Antitrust Litig., 739 F.3d 262, 274–75 (6th Cir. 2014).

103. 1 F.4th 102 (2d Cir. 2021).

liability.'"[104] For decades, federal courts have treated the quick-look approach as *only* a mechanism for condemning anticompetitive arrangements.[105]

The quick-look rule is inherently pro-plaintiff because it relieves antitrust plaintiffs of unnecessary burdens when the anticompetitive effects of a particular restraint are obvious. For example, the Tenth Circuit in *Law v. National Collegiate Athletic Association*[106] held that "where a practice has obvious anticompetitive effects . . . there is no need to prove that the defendant possesses market power."[107] Because the plaintiff does not have to prove the defendants' market power, neither does the plaintiff have to define the relevant product and geographic markets.[108] As the Second Circuit noted in *1-800 Contacts*[109]—a mere ten days before the Supreme Court announced *Alston*,—with the quick-look approach, "'elaborate market analysis' is unnecessary."[110] All of this inures to the benefit of plaintiffs because market definition is the most complicated and expensive part of antitrust litigation.[111]

In sum, the quick-look approach's abbreviated rule of reason is a pro-plaintiff tool to more quickly and efficiently condemn restraints with

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104. *Id.* at 115 (emphasis added) (quoting *Dagher*, 547 U.S. at 7 n.3).

105. *See* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 317 (2d Cir. 2008) ("The Court has applied quick-look analysis *only* 'to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability.'") (emphasis added) (quoting *Dagher*, 547 U.S. at 7 n.3); Krause Marine Towing Corp. v. Ass'n of Md. Pilots, 44 A.3d 1043, 1053 (Md. Ct. Spec. App. 2012) ("Courts apply a 'quick-look' analysis only 'to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability.'") (quoting *Dagher*, 547 U.S. at 7 n.3). *See infra* notes 307–345 and accompanying text (discussing cases in which courts may have used quick-look approach to favor antitrust defendants).

106. 134 F.3d 1010 (10th Cir. 1998).

107. *Id.* at 1020.

108. *In re* Se. Milk Antitrust Litig., 739 F.3d 262, 275–76 (6th Cir. 2014) (footnote omitted) ("Under a quick-look analysis, the Plaintiffs do not necessarily need to establish either product or geographic market evidence in order to defeat summary judgment.").

109. 1-800 Contacts, Inc. v. FTC, 1 F.4th 102 (2d Cir. 2021).

110. *Id.* at 115 (quoting Polygram Holding, Inc. v. FTC, 416 F.3d 29, 35 (D.C. Cir. 2005)). *See also In re* Se. Milk Antitrust Litig., 739 F.3d at 274–75 (6th Cir. 2014) ("Applying this test is useful when the anticompetitive nature of an agreement is so blatant that a detailed review of the surrounding marketplace would be unnecessary.").

111. David Glasner & Sean P. Sullivan, *The Logic of Market Definition*, 83 ANTITRUST L.J. 293, 344 (2020) ("Market definition is challenging."); Sean P. Sullivan, *Anticompetitive Entrenchment*, 68 U. KAN. L. REV. 1133, 1148–49 (2020) (noting that market definition entails "complicated fact questions"); Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 143 (2007) (noting extreme difficulties involved in market definitions). *See also* Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 502 (2010) (arguing that "market definition really is unnecessary as a matter of policy").

obvious anticompetitive effects.[112] Because the quick-look rule relieves antitrust plaintiffs of certain burdens, a plaintiff may plead a quick-look violation without having to plead or prove market definition or the defendants' market power.[113] Because market definition, in some cases, is costly (or even impossible) to define, this burden can prevent plaintiffs from pursuing valid antitrust claims.[114] By reducing these unnecessary burdens, the quick-look rule facilitates challenges to obviously anticompetitive agreements.

These benefits for antitrust plaintiffs are also advantages for the judicial system. Because it eliminates the need for precise market definition, the quick-look rule conserves judicial resources.[115] The quick-look approach relieves courts of having to "examin[e] the relevant market, market power, and anticompetitive effect."[116] Quick-look condemnation reduces litigation costs while still affording defendants an opportunity to defend their conduct as procompetitive (which the per se rule would not allow them to do).[117] By eliminating costly and unnecessary burdens on antitrust plaintiffs, the quick-look rule arguably "fosters deterrence by encouraging lawsuits that might otherwise be intimidated by the burdens of a traditional Rule of Reason case."[118] This serves both judicial economy and the overall antitrust enforcement system because it "allows courts to make categorization decisions without a full-blown economic analysis that would eliminate the benefits of the per se rule."[119] When applied properly,

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112. Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 832 (3d Cir. 2010) ("Under 'quick look,' the rationale for presuming competitive harm without detailed market analysis is that the anticompetitive effects on markets and consumers are obvious.") (citation omitted).

113. *See supra* notes 102–110 and accompanying text.

114. *See* Kaplow, *supra* note 111, at 517 (noting that "if legal authorities are to insist on market definition, they are in a sense commanding something impossible and, as generally conducted, needlessly misleading or, if the process is properly corrected, devoid of content and thus merely vacuous."); Louis Kaplow, *Market Definition: Impossible and Counterproductive*, 79 ANTITRUST L.J. 361, 361 (2013) ("Market definition is impossible."). *See* Christine P. Bartholomew, *Death by* Daubert*: The Continued Attack on Private Antitrust*, 35 CARDOZO L. REV. 2147, 2196 (2014) ("If the market definition or damages are complicated, plaintiffs' attorneys will feel great pressure to decline the case because this complexity increases the chance an expert's testimony will be excluded under an early *Daubert* motion.").

115. Brunet, *supra* note 71, at 502 ("Several quick look decisions conserve resources by omitting rule of reason style proof of market power.").

116. Bogan v. Hodgkins, 166 F.3d 509, 514 n.6 (2d Cir. 1999).

117. Edward D. Cavanagh, *Whatever Happened to Quick Look?*, 26 U. MIA. BUS. L. REV. 39, 55 (2017) (citing Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 GEO. L.J. 835, 838 (2016)).

118. Cavanagh, *supra* note 117, at 55 (citing Meese, *supra* note 117, at 838) (noting the argument without necessarily endorsing it).

119. Lemley & Leslie, *supra* note 36, at 1215.

the quick-look process facilitates accurate judicial decision-making while minimizing costs.

Although judges and attorneys seeking greater clarity may wish the quick-look rule had clearer boundaries, the Supreme Court in *California Dental Association v. FTC*[120] admitted that "there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment."[121] Furthermore, the Court confessed "[t]he truth is that our categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear."[122] The three labels describe spaces on a continuum.[123] That continuum presents three ways of condemning anticompetitive agreements: the per se rule, the quick-look rule, and the rule of reason.

II. *ALSTON*'S CONVERSION OF CONDEMNATION INTO APPROVAL

Before *Alston*,[124] a consensus prevailed that the quick-look approach existed exclusively to condemn restraints, not exonerate them.[125] The *Alston* opinion, however, distorts the quick-look apparatus. In the Supreme Court, the NCAA argued that the lower "courts should have given its restrictions at most an 'abbreviated deferential review,' or a 'quick look,' before approving them."[126] The NCAA attempted to convert the pro-plaintiff quick-look rule into a pro-defendant device even though "quick look" is a method for courts to *condemn* anticompetitive restraints without having to undergo a full-blown rule-of-reason analysis. When the NCAA requested "abbreviated deferential review," the Supreme Court Justices should have quickly explained that no such beast exists.

Instead, the Supreme Court spoke as though the quick-look rule had always operated as both slayer and liberator. The *Alston* Court began by

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120. 526 U.S. 756 (1999).

121. *Id.* at 780–81; Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 509 (4th Cir. 2002) (quoting *Cal. Dental*, 526 U.S. at 780–81).

122. *Cal. Dental*, 526 U.S. at 779.

123. Lemley & Leslie, *supra* note 36, at 1217 (noting *Cal. Dental*'s "language reinforces the notion that a continuum is in operation."); HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 116 (2005) ("In its *California Dental Association* (*CDA*) decision the Supreme Court observed that there is no bright line between per se and rule of reason analysis, but rather a continuum.").

The D.C. Circuit in *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005), for example, observed that the *Cal. Dental* Court had not so much shifted from a dichotomy to a trichotomy, but rather "backed away from any reliance upon fixed categories and toward a continuum." *Id.* at 35.

124. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

125. *See supra* notes 100–112 and accompanying text.

126. *Alston*, 141 S. Ct. at 2155 (citations omitted).

stating that the 1984 *NCAA* opinion "suggested that sometimes we can determine the competitive effects of a challenged restraint in the 'twinkling of an eye.'"[127] But that's not exactly what *NCAA* said. The *NCAA* opinion held only that *anti*competitive effects can be determined with eyes aflutter.[128] Nonetheless, the *Alston* Court asserted that for "restraints at opposite ends of the competitive spectrum . . . a quick look is sufficient for approval or condemnation."[129] This was a sea change that the Court did not register as a ripple.

In its application, the *Alston* Court ruled that the NCAA was not entitled to deference. The Justices reasoned that "[e]ven if the NCAA is a joint venture, then, it is hardly of the sort that would warrant *quick-look approval* for all its myriad rules and restrictions."[130] But, in so ruling, the Court created a new pro-defense tool for future Section One defendants. Before *Alston*, no federal court had used the phrase "quick-look approval." Yet, by uttering this phrase—and without explicitly acknowledging the radical change in doctrine it undertook—the *Alston* Court converted a pro-plaintiff tool (quick-look condemnation) into a pro-defendant weapon (quick-look approval).

The *Alston* opinion represents a significant reimagination of the quick-look rule. All the Court's prior explicit references to "quick look" treated it as a method for more expeditiously condemning anticompetitive arrangements. In *Cal. Dental*—the first Supreme Court case to explicitly repeat the phrase "quick look"—the Supreme Court noted that its prior cases, "which have formed the basis for what has come to be called abbreviated or 'quick-look' analysis under the rule of reason," stood for the proposition that "quick-look analysis carries the day when the great likelihood of *anti*competitive effects can easily be ascertained."[131] In *Texaco Inc. v. Dagher*,[132] the Court stated that "we have applied the quick look doctrine to business activities that are *so plainly anticompetitive* that courts need undertake only a cursory examination before imposing antitrust liability."[133] And in *Federal Trade Commission v. Actavis, Inc.*,[134] the Court declined to apply the quick look to condemn a reverse settlement payment

127. *Id.* (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 110 n.39 (1984)).

128. *See supra* notes 31–43 and accompanying text (describing the *NCAA* opinion). *See also infra* notes 131–137 and accompanying text (describing how the Supreme Court interpreted *NCAA* as using the quick-look approach only to condemn restraints).

129. *Alston*, 141 S. Ct. at 2155.

130. *Id.* at 2156 (emphasis added).

131. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999) (emphasis added).

132. 547 U.S. 1 (2006).

133. *Id.* at 7 n.3 (emphasis added) (citing *Cal. Dental*, 526 U.S. at 770).

134. 570 U.S. 136 (2013).

—in which pharmaceutical patentholders pay their alleged infringers to stay out of the market[135]—because "abandonment of the 'rule of reason' in favor of presumptive rules (or a 'quick-look' approach) is appropriate *only* where '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.'"[136] *Cal. Dental*, *Dagher*, and *Actavis* were the only pre-*Alston* Supreme Court cases that referred to "quick look" explicitly, and all three cases treated quick look as solely a method of condemning agreements, not exonerating them.[137]

Instead of following its precedent discussing quick-look analysis, the *Alston* opinion invoked "the twinkling of an eye" idiom used by *NCAA* to flip the quick-look rule on its head.[138] The Supreme Court's *NCAA* opinion lifted the "twinkling of an eye" rhetoric from late Harvard law professor Philip Areeda, whom the majority quoted extensively. In a lengthy block quote recited in the *NCAA* opinion, Professor Areeda explained that some practices may be obviously anticompetitive yet not per se illegal. In his 1980s monograph, he hypothesized an agreement between "Ford and General Motors [to] distribute[] their automobiles nationally through a single selling agent."[139] No judge would need a trial to appreciate that such an arrangement between two major players in their industry "would eliminate important price competition between them" and would not be justified by any procompetitive rationale.[140] In situations like this, Professor

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135. HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY, CHRISTOPHER R. LESLIE & MICHAEL A. CARRIER, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY § 16 (3d ed. 2016) (explaining why reverse settlement payments are anticompetitive and they violate the Sherman Act).

136. 570 U.S. at 159 (emphasis added) (quoting *Cal. Dental*, 526 U.S. at 770).

137. *Alston* cited *Cal. Dental* and *Dagher* for the proposition that "some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful *per se* or rejected after only a quick look." Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2156 (2021) (citing *Dagher*, 547 U. S. at 7 n.3; *Cal. Dental*, 526 U.S. at 770).

138. *Alston* also noted that the Supreme Court's opinion in *American Needle v. NFL* repeated the twinkling metaphor. *Alston*, 141 S. Ct. at 2155 (citing Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010)). In one line of dicta in *American Needle*, Justice Stevens made the passing comment that "depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye.'" *American Needle*, 560 U.S. at 203–04 (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 110 n.39 (1984)). This throwaway sentence is clearly dicta because the sole issue in *American Needle* was whether the teams of the NFL comprised a single entity for antitrust purposes and, therefore, were incapable of conspiring in violation of Section One. *American Needle*, 560 U.S. at 189 ("As the case comes to us, we have *only a narrow issue to decide*: whether the NFL respondents are capable of engaging in a 'contract, combination . . ., or conspiracy' as defined by § 1 of the Sherman Act. . . .") (emphasis added). The issue of what standard applies to joint ventures was not before the Court.

139. *NCAA*, 468 U.S. at 109 n.39 (quoting PHILLIP AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 37–38 (1981)).

140. *Id.*

Areeda concluded, "the rule of reason can . . . be applied in the twinkling of an eye."[141] In other words, Professor Areeda—and by extension the *NCAA* Court in quoting his explanation, example, and conclusion—argued solely that certain restraints could be *condemned* "in the twinkling of an eye,"[142] not that any restraints could be exonerated with similar alacrity. Consequently, the *Alston* Court misinterpreted the idiom and misapplied its precedent. This is not a harmless error, as Part Three explains.

III. THE DANGERS AHEAD: REASONS TO DISAPPROVE OF QUICK-LOOK APPROVAL

The *Alston* Court's ill-conceived invention of quick-look approval risks wreaking havoc on antitrust doctrine and enforcement. The potential harms are significant, yet no corresponding benefits exist. This Part first explains why quick-look approval and quick-look condemnation are incomparable in ways that make the former nonsensical given the structure of antitrust analysis. It then explains why quick-look approval is unnecessary, and it explores several ways in which judges are susceptible to misusing quick-look approval. Finally, it discusses pre-*Alston* cases in which courts short-circuited the rule of reason in order to rule quickly for antitrust defendants, showing how quick-look approval could lead to false negatives.

A. The Competing Quick-Look Approaches Are Divergent

Quick-look approval does not track the reasoning or structure of the traditional quick-look rule. As explained in Part One, the quick-look rule operates by creating presumptions and burden shifting when a challenged restraint is obviously anticompetitive.[143] These evidentiary devices make no sense as a pro-defendant doctrine. First, while the pre-*Alston* quick-look rule recognized a presumption of anticompetitiveness for certain restraints, any corresponding or countervailing "presumption" of non-anticompetitiveness is pointless. Under the traditional rule of reason, the plaintiff must prove likely or actual anticompetitive effects by a preponderance of the evidence.[144] In other words, the antitrust defendant already enjoys a

141. *Id.*

142. *Id.*

143. *See supra* notes 89–111 and accompanying text.

144. United States v. Visa U.S.A. Inc., 163 F. Supp. 2d 322, 345 (S.D.N.Y.), *modified*, 183 F. Supp. 2d 613 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003) ("Under the rule of reason, the Government bears the initial burden (by a preponderance of the evidence) of demonstrating that each restraint has substantial adverse effects on competition such as an increase in price or a decrease in quality."). *See* Gavil & Salop, *supra* note 95, at 2132 ("The rule of reason benchmark standard requires

presumption of nonliability. Second, there is no need for burden shifting because the antitrust plaintiff already bears the burden of proof under the traditional rule of reason.[145]

Consequently, the structure of the established quick-look rule does not map to quick-look approval. The latter bears none of the characteristics of the quick-look rule as it has existed for almost four decades. Quick-look approval is not the mirror image of quick-look condemnation, but a distorted funhouse mirror reflection of proper antitrust analysis.[146]

Moreover, the *Alston* opinion gave no guidance for when quick-look approval would be appropriate.[147] The Court assumed that the rule operates similarly at both ends of the competition spectrum, regardless of whether the judge has determined that an agreement's effects are obviously anticompetitive or obviously not anticompetitive. This, however, is a false symmetry. Obvious anticompetitive effects—like price increases and output restrictions—are easily observed. In contrast, an arrangement might seem "obviously not anticompetitive" yet be rife with anticompetitive potential and actual harms. Anticompetitive effects can be non-obvious or obscured.[148] When they are obscured, these anticompetitive effects are less likely to be appreciated by federal judges.[149] Quick-look approval invites courts to fall for the mirage of benignancy. If courts exonerate challenged restraints whenever the judge cannot readily appreciate the anticompetitive effects, judicial errors will cause false negatives, as Section III.C explores, after Section III.B explains why this new pro-defendant weapon is unneeded.

B. Quick-Look Approval is Unnecessary to Reduce False Positives

Antitrust rules should be designed to ensure that anticompetitive restraints are condemned, and procompetitive (or benign) arrangements are not. Much antitrust doctrine is driven by the fear of false positives[150]—the

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the plaintiff to prove that anticompetitive effects are 'more likely than not,' or, as it applies to all civil antitrust cases, 'by a preponderance of the evidence.'").

145. Planetarium Travel, Inc. v. Altour Int'l Inc., 622 F. App'x 40, 41 (2d Cir. 2015).

146. *See infra* notes 307–347 and accompanying text (discussing pre-*Alston* cases that arguably applied a version of quick-look approval).

147. This is in contrast to the pre-*Alston* decisions that instructed judges to apply quick-look condemnation when the anticompetitive effects are obvious.

148. *See infra* notes 293–301 and accompanying text (discussing circumstances in which courts may fail to appreciate anticompetitive effects).

149. *See id.*

150. Gavil & Salop, *supra* note 95, at 2112 ("Continued reliance on what are now exaggerated fears of "false positives," and failure adequately to consider the harm from "false negatives," have led courts to impose excessive demands of proof on plaintiffs that belie both established procedural norms and sound economic analysis.").

risk that innocent defendants will be found liable for antitrust violations or will be deterred from engaging in procompetitive conduct. In order to establish a true positive, an antitrust plaintiff must generally clear five hurdles: survive a motion to dismiss, survive a motion for summary judgment, obtain a jury (or bench) verdict, survive a motion for judgment notwithstanding the jury verdict, and survive any appeals. Additionally, antitrust class actions must survive class certification.[151] It is extremely rare for antitrust plaintiffs to clear all these hurdles.[152] The first two hurdles—motions to dismiss and motions for summary judgment—are the most onerous and eliminate the vast majority of antitrust claims filed in federal court.

For antitrust law's first century, dismissals were not a major problem. Antitrust complaints were subject to notice pleading, which was relatively easy to satisfy.[153] But then in 2007, the Supreme Court in *Twombly* dramatically increased the burdens on antitrust plaintiffs seeking to survive a motion to dismiss.[154] Now, federal judges dismiss even when plaintiffs plead per se violations supported by abundant circumstantial evidence of illegal collusion.[155] Federal judges have dismissed antitrust claims in ways that undermine antitrust enforcement.[156]

Even if an antitrust claim can survive the motion to dismiss, the plaintiffs still face an even higher hurdle at the summary judgment stage. For decades, federal courts described summary judgment as disfavored on antitrust claims. The Supreme Court in *Poller v. Columbia Broadcasting System, Inc.*[157] held that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses

151. *See* Bartholomew, *supra* note 114, at 2152 (explaining how courts have made class certification more difficult by improperly excluding expert evidence and how "[a]dding *Daubert* to class certification in antitrust class actions imports the present confusion over its application into an already complicated, nuanced area of law.").

152. *See* Christine P. Bartholomew, *Redefining Prey and Predator in Class Actions*, 80 BROOK. L. REV. 743, 781 (2015) (noting that "courts have yet to fully consider the cumulative effect" of the various hurdles that plaintiffs must clear).

153. Conley v. Gibson, 355 U.S. 41, 47–48 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

154. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

155. Christopher R. Leslie, *The Probative Synergy of Plus Factors in Price-Fixing Litigation*, 115 NW. U. L. REV. 1581, 1644 (2021) (discussing Ninth Circuit's improper dismissal in *In re Musical Instruments and Equip. Antitrust Litig.*, 798 F.3d 1186 (9th Cir. 2015)).

156. Edward D. Cavanagh, *The Rule of Reason Re-Examined*, 67 BUS. LAW. 435, 464–65 (2012) ("Lower courts have clearly heeded *Twombly's* admonitions and have not hesitated to dismiss antitrust complaints at the pleadings stage. . . . [These dismissals] increase[] under-enforcement and hence underdeterrence of anticompetitive behavior.").

157. 368 U.S. 464 (1962).

thicken the plot."[158] But, concerned about the risk of false positives, scholars associated with the Chicago School strongly advocated making it more difficult for antitrust claims to even receive trials.[159] The Supreme Court answered the Chicago School's call in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[160] which made it significantly harder for antitrust plaintiffs to survive summary judgment.[161] Federal judges began granting antitrust defendants summary judgment in droves.[162]

Rule-of-reason cases struggle to survive the phalanx of motions to dismiss and for summary judgment.[163] Courts reject over 99.5% of rule-of-reason claims, primarily because judges do not see anticompetitive effects.[164] Plaintiffs pursuing Section Two claims[165] are similarly unsuccessful, with one study showing defendants winning 335 of the 344 cases (a 97% success rate), and 313 of these wins coming at the dismissal

158. *Id.* at 473. *See also* C.E. Servs., Inc. v. Control Data Corp., 759 F.2d 1241, 1245 (5th Cir. 1985) (noting that "summary judgment is especially disfavored in 'complex, fact-sensitive antitrust cases'") (quoting Fortner Enters., Inc. v. U.S. Steel Corp., 394 U.S. 495, 505 (1969)).

159. *See* Edward D. Cavanagh, *The Jury Trial in Antitrust Cases: An Anachronism?*, 40 AM. J. TRIAL ADVOC. 1, 2–3 (2016) ("The attack on the use of juries in antitrust cases has proceeded in two distinct phases. Phase one took place in the 1970s, a time that roughly coincides with the federal judiciary's embrace of the Chicago School revolution in antitrust thinking. Phase one featured a full-frontal assault on the right to a jury trial.").

160. 475 U.S. 574 (1986).

161. Leslie, *supra* note 155, at 1628–32. *See also* Christopher R. Leslie, *The Decline and Fall of Circumstantial Evidence in Antitrust Law*, 69 AM. U. L. REV. 1713, 1761–62 (2020) ("Many courts interpret *Matsushita* to require plaintiffs to proffer evidence to support as many plus factors as possible in order to survive the price-fixing defendants' inevitable motion for summary judgment."); Marina Lao, *Ideology Matters in the Antitrust Debate*, 79 ANTITRUST L.J. 649, 665 (2014) ("[C]hanges in substantive and procedural legal rules in antitrust law since the mid-1970s have made it progressively more difficult for plaintiffs even to survive motions to dismiss or for summary judgment, let alone win at trial."); Brunet, *supra* note 71 at 509 (The Court in *Matsushita* "completely ignored its earlier *Poller* decision . . . [and thereby] exorcized the homily that antitrust conspiracy claims were questionable candidates for summary judgment.").

162. Edward D. Cavanagh, Matsushita *at Thirty: Has the Pendulum Swung Too Far in Favor of Summary Judgment?*, 82 ANTITRUST L.J. 81, 82 (2018) (noting that "*Matsushita* rekindled interest in summary judgment among lower courts and emboldened courts to grant summary judgment in antitrust cases where they had once hesitated to do so").

163. Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1423 (2009) ("The empirical evidence reflects that most rule-of-reason claims never reach juries; rather, most are decided on motions to dismiss or summary judgment, and most (and in some surveys nearly all) antitrust plaintiffs lose.").

164. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009) ("These findings lead to two important conclusions. First, plaintiffs almost never win under the rule of reason. In 221 of 222 cases . . . , the defendant won. Second, courts decide almost all rule of reason cases by finding that the plaintiff failed to show an anticompetitive effect."). *See also* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1268 [hereinafter Carrier, *Bridging the Disconnect*] (empirical study showing that courts reject 84% of rule of reason cases for the plaintiff's failure to prove actual anticompetitive effects or likely effects using defendants' significant market share).

165. Section Two of the Sherman Act condemns illegal monopolization and attempts to monopolize. 15 U.S.C. § 2.

and summary judgment stages.[166] As a result, antitrust plaintiffs usually cannot even get valid and colorable claims in front of juries.[167]

Quick-look approval is unnecessary to reduce the risk of false positives because most antitrust plaintiffs already have little to no realistic chance of winning a rule-of-reason case.[168] The *Alston* Court acknowledged that the rule of reason is already very pro-defendant, noting that "courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect."[169] This is particularly true regarding challenges to vertical restraints, which are especially hard for plaintiffs to win.[170] But even cases challenging naked horizontal restraints are generally blocked from reaching juries.[171] Consequently, a more pro-defendant quick-look rule is superfluous. Treating "quick look" as a defendant's weapon upends antitrust doctrine, which is already exceedingly pro-defendant.[172]

C. The Risks Posed by Quick-Look Approval

Not only is there no pressing need for yet another pro-defendant gatekeeping device, quick-look approval will further tilt an already sloped playing field. This section explains why any notion of quick-look approval

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166. Stucke, *supra* note 163, at 1423–24:

> For example, in one recent survey of judicial resolutions of private section 2 Sherman Act claims, all of which are governed by the rule of reason, defendants prevailed ninety-seven percent of the time (335 of the 344 cases). Nearly all of the defendants' wins (313) came on motions to dismiss or summary judgment.

167. Cavanagh, *supra* note 162, at 82–83 (noting that "fewer and fewer antitrust cases ever come to trial" and the "criticism among judges, scholars, and lawyers, who question both the (largely assumed) efficiencies of summary disposition as well as the fairness of the process in antitrust cases and whether that process comports with an overall goal of the Federal Rules of Civil Procedure that meritorious litigants have their day in court.").

168. Jesse W. Markham, Jr., *Sailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. 591, 627 (2012) ("The elephant in the room is the fact that plaintiffs rarely pursue, and even more rarely win, rule of reason cases.").

169. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2161 (2021) (quoting the Brief of *Amici Curiae* 65 Professors of Law, Business, Economics, and Sports Management in Support of Respondents, Nos. 20-512, 20-520, 2021 WL 943556, at 21, n.9 for the proposition that "[s]ince 1977, courts decided 90% (809 of 897) on this ground").

170. Lemley & Leslie, *supra* note 36, at 1260–61 ("[C]onventional wisdom is that vertical restraints evaluated under the rule of reason are essentially de facto per se legal since rule of reason cases are notoriously difficult for plaintiffs to win."). *See also* Douglas H. Ginsburg, *Bork's "Legislative Intent" and the Courts*, 79 ANTITRUST L.J. 941, 950–51 (2014) ("Business people now know nonprice vertical restraints are in effect per se lawful").

171. Christine P. Bartholomew, *Antitrust Class Actions in the Wake of Procedural Reform*, 97 IND. L.J. 1315 (2022).

172. While motions to dismiss are inherently pro-defendant, in theory either an antitrust plaintiff or defendant can win at summary judgment. Nonetheless, judges have largely converted summary judgment into exclusively pro-defendant devices, in that antitrust plaintiffs do not receive summary judgment even when they proffer irrefutable evidence of a per se violation.

is ripe for abuse or mishandling. In the name of avoiding false positives, courts already seize any pro-defendant hook they can to dismiss antitrust claims, grant summary judgment to antitrust defendants, or reverse pro-plaintiff antitrust verdicts.

Courts and commentators have been so focused on the risk of false positives that they improperly ignore the cost of false negatives. When antitrust violators are not held accountable for the antitrust injuries they inflict, antitrust violations will increase. With competition stifled, consumers will suffer from higher prices, reduced output, as well as reduction in quality and innovation. The likelihood and cost of false negatives should inform any discussion on the wisdom of quick-look approval. This Part explains how quick-look approval substantially increases the risk of false negatives in antitrust litigation.

Quick-look approval has significant potential to fuel false negatives because anticompetitive effects are often not "obvious," and judges can miss or ignore these anticompetitive harms. Even before the *Alston* Court's creation of quick-look approval, federal judges have demonstrated an inability to appreciate the anticompetitive consequences of challenged restraints of trade.

The Supreme Court's recent opinion in *American Express* highlights the problem. In *Ohio v. American Express Co.*,[173] the DOJ and several state attorneys general brought a Section One lawsuit against American Express ("Amex") for imposing anti-steering requirements that prevented Amex-accepting merchants from encouraging their customers to use credit cards with lower merchant fees.[174] In a 5-to-4 decision, the Supreme Court upheld the Amex anti-steering policy even though its immediate effect was to raise prices for merchants.[175] The majority reasoned that the policy did not have anticompetitive effects that antitrust law cares about because credit card transactions involve a two-sided market between merchants and customers, and the merchants' losses were offset by the rewards Amex gave its card users.[176] Focusing solely on the reward that Amex cardholders receive, the majority failed to appreciate that the anti-steering policy harmed *all* consumers because merchants had to raise prices to pay the higher merchant fees that they could not escape due to the anti-steering policy.[177]

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173. 138 S. Ct. 2274 (2018).

174. Herbert Hovenkamp, *Platforms and the Rule of Reason: The* American Express *Case*, 2019 COLUM. BUS. L. REV. 35, 36.

175. 138 S. Ct. at 2290.

176. *Id.* at 2287–88.

177. Andrew I. Gavil & Jordan L. Ludwig, *The Many Sides of* Ohio v. American Express Co., ANTITRUST, Fall 2018, at 8, 9 (noting that the district court "also identified what it viewed as evidence of actual anticompetitive effects, including that the anti-steering rules . . . caused higher prices to

Despite the fact that Amex's restraints increased fees for merchants and prices for consumers, the *Amex* majority incorrectly concluded that "there is nothing inherently anticompetitive about Amex's antisteering provisions" and that the policy "promote[s] interbrand competition."[178] The opinion is wrong.[179] The policy had direct anticompetitive effects by preventing steering—an important form of competition in itself[180]—and raising prices;[181] yet the *Amex* opinion "never considered head-on, let alone disturbed, the district court's factual finding that the [anti-steering] terms had 'no offsetting pro-competitive benefit to shoppers.'"[182] The majority either ignored or failed to understand the restraint's clear anticompetitive effects.[183] This is the type of juridical error that could lead federal judges to "quickly approve" anticompetitive restraints that should not survive rule-of-reason scrutiny. Troublingly, antitrust defendants have already tried to take advantage of the *Amex* opinion by characterizing their business models as a two-sided market, inviting lower courts to replicate the *Amex* error.[184]

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consumers, as merchants passed the higher merchant discount fees on to consumers"); Hovenkamp, *supra* note 174, at 44 ("The government alleged that the antisteering rule effectively forced customers to stay with the higher priced card, thus increasing not only merchant fees, but also product prices indirectly.").

178. 138 S. Ct. at 2289.

179. *See* John B. Kirkwood, *Antitrust and Two-Sided Platforms: The Failure of* American Express, 41 CARDOZO L. REV. 1805, 1815 (2020) (describing *Amex* as "deeply flawed"); Chris Sagers, *Platforms,* American Express, *and the Problem of Complexity in Antitrust*, 98 NEB. L. REV. 389, 389 (2019) ("Everything about *Ohio v. American Express* was wrong and the adoption of 'two-sided platform' reasoning into American antitrust law might be one of its worst, most regrettable wrong turns in decades.").

180. Hovenkamp, *supra* note 174, at 44 ("'Steering' is fundamental to competition of any kind, including competition among platforms. It offers market participants an incentive to seek out lower cost alternatives.").

181. John M. Newman, *The Output–Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563, 586 (2022):

> Credit cards are costly for merchants to accept, and rewards cards are often the most costly of all. Many merchants would naturally prefer to pass those costs on to the relatively wealthy customers who trigger them. But contractual restraints imposed by card networks prevent merchants from doing so. As a result, merchants must pass on their increased costs via higher across-the-board retail prices.

182. Adam Gitlin & Brendan Glackin, *The Antitrust of Dominant Hospital Systems:* United States v. CMHA *and* UFCW v. Sutter Health, ANTITRUST, Summer 2020, at 79 (quoting *Amex*, 138 S. Ct. at 2294 (Breyer, J., dissenting)).

183. *See* Newman, *supra* note 181, at 580 ("The opinion admitted that AmEx's restraints had caused higher prices without yielding equivalent offsetting benefits.").

184. *See, e.g.*, US Airways, Inc. v. Sabre Holdings Corp., 938 F.3d 43, 52–53 (2d Cir. 2019) (arguing that airline booking system is a two-sided market); *In re* Delta Dental Antitrust Litig., 484 F. Supp. 3d 627, 634 (N.D. Ill. 2020) ("[D]efendants argue that plaintiffs' theory of per se liability fails to appreciate that the dental insurance market is a 'two-sided transaction platform' requiring analysis under *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2283 (2018), and their allegations fail to state a claim under that framework.").

The remainder of this section details various scenarios in which federal judges sometimes fail to appreciate anticompetitive effects. Such failures lead courts to dismiss antitrust claims or grant summary judgment to antitrust defendants even though the plaintiffs have presented valid antitrust claims. Quick-look approval increases the probability of mistakes occurring at a greater rate in the future. Each scenario presents an additional justification for resisting quick-look approval.

1. Intellectual Property Settlements

Antitrust cases involving intellectual property owners will be particularly prone to misuse of quick-look approval. Courts are already far too quick to absolve anticompetitive agreements embedded within intellectual property settlements. Before the Supreme Court's opinion in *Federal Trade Commission v. Actavis, Inc.*,[185] pharmaceutical firms with suspect patents manipulated regulations designed to increase competition in pharmaceutical markets.[186] Essentially, the holder of a (potentially or likely invalid) patent would pay rival generic drug manufacturers to not challenge its patent and to stay out of the market for a prescribed period of time.[187] These exclusion payments were disguised as IP settlements, albeit ones in which the putative plaintiff (the patentholder) paid the defendant (the alleged infringer) to settle the litigation and to stay out of the market for a set period. Thus, courts referred to these as reverse settlement payments.[188] Although some courts recognized that these agreements were anticompetitive and violated Section One of the Sherman Act,[189] most courts held that exclusion payments were not anticompetitive because they were negotiated as part of a patent settlement.[190] The Supreme Court in *Actavis* eventually corrected this error, holding that reverse settlement payments by patentholders can violate Section One when the "anticompetitive consequences" of exclusion payment settlements "prove unjustified."[191] In the years after *Actavis*, federal courts have condemned reverse settlement payments for violating antitrust law.[192]

185. 570 U.S. 136 (2013).

186. HOVENKAMP ET AL., *supra* note 135, at § 16.

187. *Id.*

188. *See, e.g.*, *Actavis*, 570 U.S. at 147.

189. *See, e.g.*, *In re* Cardizem CD Antitrust Litig., 332 F.3d 896, 908 (6th Cir. 2003).

190. *See, e.g.*, *In re* Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 204–05 (2d Cir. 2006), *abrogated by Actavis*, 570 U.S. 136; Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1066 (11th Cir. 2005).

191. 570 U.S. at 156.

192. HOVENKAMP ET AL., *supra* note 135, at § 16.01[D] (collecting cases).

Yet even after the *Actavis* opinion explained that IP settlements can be anticompetitive in ways that violate Section One of the Sherman Act, federal courts continue to incorrectly believe that IP settlements are somehow inherently procompetitive. For example, the Second Circuit in *1-800 Contacts, Inc. v. Federal Trade Commission*[193] upheld a series of trademark settlements despite their evident anticompetitive effects. The largest online seller of contact lenses, 1-800 Contacts, Inc. ("1-800 Contacts"), dominated the market despite charging higher prices.[194] Online sellers of contact lenses reach consumers through advertising and being displayed in the "organic results" generated by a search engine's algorithms.[195] Online sellers can improve their ad placements in response to searches by paying a search engine to have their ads displayed when a consumer types in certain "keywords," which may include another company's brand name or trademark.[196] Online advertisers can also purchase "negative keywords" from a search engine.[197] This precludes an advertiser's ad from being displayed when the consumer searches on that particular word.

1-800 Contacts sued—or threatened suit against—several rivals for trademark infringement based on their use of keywords related to 1-800 Contacts. The competitors settled their disputes by agreeing not to "us[e] each other's trademarks, URLs, and variations of trademarks as search advertising keywords. The agreements also require the parties to employ negative keywords so that a search including one party's trademarks will not trigger a display of the other party's ads."[198] The FTC in turn sued 1-800 Contacts because these settlement agreements "prevented [1-800 Contacts's] competitors from disseminating ads that would have informed consumers that the same contact lenses were available at a cheaper price from other online retailers, thereby reducing competition and making it more difficult for consumers to compare online retail prices."[199] The FTC "found 'direct evidence' of anticompetitive effects on consumers and search engines," and it held that 1-800 Contacts's purported desire to protect its trademarks did not constitute a procompetitive justification for an otherwise

193. 1 F.4th 102 (2d Cir. 2021).
194. *Id.* at 110.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 111.
199. *Id.*

illegal agreement to restrain trade.[200] The FTC used a quick-look framework to condemn the settlements.[201]

On appeal, the Second Circuit reversed.[202] The appellate panel began by discounting—but not disproving—the FTC's evidence of anticompetitive effects, including higher prices for consumers.[203] While diminishing the settlements' anticompetitive effects, the panel asserted that they were necessarily outweighed by "two procompetitive effects: reduced litigation costs and protecting [1-800 Contacts's] trademark rights."[204] But the reduced litigation costs are a red herring given that 1-800 Contacts could have eliminated these costs altogether by not bringing litigation in pursuit of an anticompetitive settlement. Moreover, these cost savings are not procompetitive unless they trickle down to consumers,[205] which the FTC had already found did not occur.[206]

Furthermore, the FTC had already found that 1-800 Contacts's trademark claims being settled were "likely meritless."[207] The Second Circuit missed the significance of this finding, asserting that "[e]ven if the Commission's analysis of the underlying trademark claims were correct, trademark agreements that 'only marginally advance[] trademark policies' can be procompetitive."[208] This is misguided because settling a worthless lawsuit with an anticompetitive agreement among competitors that increases consumer prices can never be procompetitive.[209] Yet, the Second Circuit failed to understand this fact because it treated trademark settlement agreements as inherently procompetitive, despite this particular settlement agreement containing anticompetitive terms and causing anticompetitive effects.[210]

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200. *Id.* at 112.

201. *Id.* at 115 ("Under the Commission's 'inherently suspect' framework, neither direct evidence of harm nor proof of market power is needed to show the anticompetitive effect of the restraint because the 'likely tendency to suppress competition' posed by the challenged conduct makes it 'inherently suspect.'") (citation omitted).

202. *Id.* at 122.

203. *Id.* at 118–19.

204. *Id.* at 119.

205. HOVENKAMP ET AL., *supra* note 135 at 33.08[B] ("Although reducing litigation costs may save the parties money, it is not procompetitive unless the settlement results in lower prices, greater output, or some other pro-consumer effect. The FTC, however, had found these settlements increased prices and reduced output (of advertising at least).").

206. *1-800 Contacts*, 1 F.4th at 112.

207. *Id.* at 120.

208. *Id.* at 120 (quoting Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 57 (2d Cir. 1997)).

209. HOVENKAMP ET AL., *supra* note 135 at 33.08[B] ("An agreement among competitors that 'settles' meritless trademark claims by restricting legal advertising does not protect a party's trademark rights and is not therefore procompetitive.").

210. *1-800 Contacts*, 1 F.4th at 122.

The advent of quick-look approval will likely worsen this problem. Some judges may quickly approve any IP settlements with anticompetitive terms based on the false premise that IP settlements are inherently procompetitive and, thus, should be ratified rapidly.[211] Such alacrity would prevent juries from ultimately determining that the proffered—often ill-defined—procompetitive effects do not outweigh the proven anticompetitive effects. In such cases, deference to IP settlements results in false negatives.

2. *Deference to Proffered Justifications*

Quick-look approval magnifies the risk of courts mistakenly rejecting antitrust claims based on defendants' proffered procompetitive justifications. Courts have made three types of mistakes when considering defendants' procompetitive justifications for their anticompetitive restraints: crediting justifications that are not procompetitive; deferring to an asserted procompetitive justification that is unsupported by evidence; and using the assertion of a procompetitive justification to prevent application of a full-blown rule-of-reason analysis. This section provides an example of each type of error.

First, courts are sometimes prone to crediting irrelevant or inappropriate justifications. For example, in the recent case of *Epic Games, Inc. v. Apple Inc.*,[212] an online game developer challenged the provisions in Apple's license agreements that required developers to distribute their applications ("apps") solely through Apple's app store and to conduct all in-app purchases through Apple's in-app purchasing system. In a bench trial, the district court found that Apple's policy had significant anticompetitive effects by raising price and suppressing innovation.[213] Discussing the combined effects of Apple's policies, the court observed that "common threads run through Apple's practices which unreasonably restrain[] competition and harm consumers, namely the lack of information and

211. *1-800 Contacts* is merely the most recent example of federal courts mistakenly assuming that IP settlements are presumptively or inherently procompetitive and, thus, legal under antitrust law. *See, e.g.*, *Clorox*, 117 F.3d at 60 (presuming trademark settlement agreements to be procompetitive); *In re* Wellbutrin XL Antitrust Litig., 133 F. Supp. 3d 734, 738 (E.D. Pa. 2015), *aff'd sub nom. In re* Wellbutrin XL Antitrust Litig. Indirect Purchaser Class, 868 F.3d 132 (3d Cir. 2017) ("Even if the plaintiffs had shown that the Wellbutrin Settlement had anticompetitive effects, the Court finds that a reasonable jury could not find that any anticompetitive effects outweigh the procompetitive benefits of the settlement."). *See also* Michael A. Carrier, *Three Challenges for Pharmaceutical Antitrust*, 59 SANTA CLARA L. REV. 615, 631–32 (2020) (discussing patent case).

212. 559 F. Supp. 3d 898 (N.D. Cal. 2021).

213. *Id.* at 998 ("Apple's restrictions on iOS game distribution have increased prices for developers."). *See also id.* at 1037 (prices are "artificially high given Apple's growing market power and growing demand"); *Id.* at 999–1001 (finding Apple had "[d]ecreased innovation" in "core" game distribution services).

transparency about policies which effect consumers' ability to find cheaper prices, increased customer service, and options regarding their purchases."[214] In short, the plaintiff proved harm to competition.

Despite finding these anticompetitive effects, the court deferred to Apple's asserted justifications of increased security and privacy, as well as protecting consumers from unreliable apps that could crash.[215] But these are not necessarily procompetitive justifications;[216] rather, they are the reasons why Apple is suppressing competition. These are distinct concepts in antitrust law. The Supreme Court in *National Society of Professional Engineers v. United States*[217] rejected the defendants' argument that they could prohibit competitive bidding because "the practice of awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare."[218] The Court disallowed this defense, holding that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."[219] Apple's argument was essentially that competition would reduce security, privacy, and reliability. But the only legitimate business justifications are those that *increase* competition.[220] Apple's stated goals are not antitrust defenses.[221] *National Society of Professional Engineers* stands for the proposition that goals like improved reliability and privacy are best achieved through competition, not suppression of competition.[222]

Second, even when the asserted justification is procompetitive, courts often improperly accept a defense that is unsupported by evidence. In *SCFC ILC, Inc. v. Visa USA, Inc.*,[223] for example, the Tenth Circuit held that

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214. *Id.* at 1013–14.

215. *Id.* at 1038–39.

216. *See* Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, 130 YALE L.J. F. 647, 667 (2021) (discussing the relationship between antitrust and data privacy).

217. 435 U.S. 679 (1978).

218. *Id.* at 685, 696.

219. *Id.* at 696.

220. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2159 (2021) ("This Court has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.").

221. *See* Erika M. Douglas, *Data Privacy Protection as a Procompetitive Justification*, ANTITRUST MAG. ONLINE, Dec. 2021, at 12 (noting that "greater app security and privacy" is not a procompetitive justification because even if "normatively 'good' for consumers, . . . [they] require[] the absence or reduction of competition"); *see also id.* ("It is true that a reliable, secure source for app downloads benefits consumers in the broader sense of social welfare achieved through privacy and security protection," but "this type of normative privacy claim is not cognizable as a justification under current antitrust case law.").

222. *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 695 ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.").

223. 36 F.3d 958 (10th Cir. 1994).

Visa—a horizontal consortium of credit-card-issuing banks[224]—did not violate antitrust laws when it excluded Sears from membership (and, thus, prevented Sears from issuing Visa credit cards) because Visa had a procompetitive justification: it was trying to prevent Sears from "free riding."[225] But the court misused the concept of free riding because "it was entirely unclear how the restraint could have [prevented free riding]—or even upon what, exactly, Sears could have taken a free ride."[226] As the S.D.N.Y. court explained in subsequent antitrust litigation, the "member bank executives have repeatedly testified that Visa and MasterCard have *no* interest in the banks' relationships with their customers; so there is no asset on which free-riding could occur."[227] But the Tenth Circuit accepted a free-riding defense that was factually unsupported.[228] Unfortunately, firms routinely try to justify their anticompetitive restraints by invoking the concept of free riding.[229] The concept of quick-look approval increases the risk of judges hurriedly (and improperly) rejecting Section One claims when the defendants assert a free-riding defense.

Third, courts sometimes treat the defendants' proffer of a justification as entitling them to summary judgment. The *1-800 Contacts* decision provides a cautionary tale where a court overreached when it should have remanded. The Second Circuit in *1-800 Contacts* rejected the FTC's argument that the defendants' agreements were illegal under the quick-look rule.[230] The panel should have remanded the case at that point for a full rule-of-reason analysis.[231] In *Cal. Dental*, for example, the Supreme Court held that quick look did not apply and remanded the case for ordinary rule-of-reason analysis.[232] That is the correct approach: if the defendant presents a viable procompetitive justification, then it is entitled to a full-blown rule-of-reason examination, instead of being condemned under the quick-look rule of reason.[233] In contrast, the Second Circuit in *1-800 Contacts* held that quick

224. Visa has since restructured. Herbert Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. 813, 867–72 (2011) (explaining how Visa had a cartel-like structure).

225. *SCFC*, 36 F.3d at 970–72.

226. John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 536 (2019) (explaining how *SCFC* erred).

227. United States v. Visa U.S.A. Inc., 163 F. Supp. 2d 322, 404 (S.D.N.Y.), *modified*, 183 F. Supp. 2d 613 (S.D.N.Y. 2001), *and aff'd*, 344 F.3d 229 (2d Cir. 2003).

228. Newman, *supra* note 226, at 536.

229. Oliver E. Williamson, *Why Law, Economics, and Organization?*, 1 ANN. REV. L. & SOC. SCI. 369, 383 (2005) (noting that "unspecific free-rider claims are too often used as a shibboleth").

230. 1-800 Contacts, Inc. v. FTC, 1 F.4th 102, 117 (2d Cir. 2021).

231. *See supra* note 66 (explaining how courts apply full rule of reason if the quick-look rule is not applicable).

232. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999).

233. *See* Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 832 (3d Cir. 2010); Bogan v. Hodgkins, 166 F.3d 509, 514 n.6 (2d Cir. 1999) ("Under quick look, once the defendant has shown a

look did not apply because the defendant had proffered a justification (i.e., settling IP litigation), but then it transformed that shield into a sword.[234] The assertion of a justification led the court to quickly exonerate a restraint with demonstrable anticompetitive effects.[235] This was a mistake.[236]

The *Alston* opinion invites future courts to make these same three mistakes even more quickly. Accelerating the problem of judges improperly accepting defendants' claims of procompetitive justifications, courts may recreate the *1-800 Contacts* whiplash in which failure to prove quick-look condemnation will lead to quick-look approval. Even before *Alston*, several federal courts had already improperly deferred to Section One defendants' explanations for their anticompetitive restraints in order to grant or affirm summary judgment for defendants.[237] These opinions, however, were clearly contrary to long-established law of summary judgment that requires judges to read the evidence in the light most favorable to the non-moving party: the plaintiff.[238] The new quick-look approval moniker, unfortunately, could provide a legal hook for overreaching judges to insinuate themselves into antitrust litigation and exculpate anticompetitive restraints that a reasonable jury would have condemned as unreasonably anticompetitive.

3. *False Indicia of Harmlessness*

Some federal judges are prone to assert that challenged restraints do not pose anticompetitive risks if a particular variable is present. This section discusses four markers that courts have improperly relied on to assert a lack of anticompetitive effects: low market share; stable or declining prices; stable or increasing output; and the pervasiveness of the restraint. Judicial reliance on these characteristics is, unfortunately, mistaken because an

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procompetitive justification for the conduct, . . . 'the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis.'") (citations omitted); 11 PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 1911c, at 305 (2d ed. 2005) (noting if defendant presents plausible procompetitive justification, then case proceeds to "general rule of reason analysis requiring full consideration of power and anticompetitive effects").

234. *1-800 Contacts*, 1 F.4th at 116.

235. *Id.* at 122.

236. *See supra* note 209 and accompanying text.

237. *See, e.g.*, Valspar Corp. v. E.I. Du Pont De Nemours & Co., 873 F.3d 185, 201 (3d Cir. 2017); Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1574 (11th Cir. 1991) ("[W]hen the defendant puts forth a plausible, procompetitive explanation for his actions, we will not be quick to infer, from circumstantial evidence, that a violation of the antitrust laws has occurred."). *See also* Mark R. Patterson, *Standardization of Standard-Form Contracts: Competition and Contract Implications*, 52 WM. & MARY L. REV. 327, 414 (2010) ("Antitrust defers to efficiency justifications for standardization with little effort to determine whether individual terms are desirable.").

238. *In re* Baby Food Antitrust Litig., 166 F.3d 112, 124 (3d Cir. 1999). A judge's belief in the defendants' explanation over the plaintiffs' does not warrant summary judgment for the defendant so long as a reasonable jury could find antitrust liability. *Id.*

agreement can violate Section One of the Sherman Act and inflict antitrust injury despite the presence of one or more of these alleged markers of benignity.

a. Low Market Share

Courts sometimes assume that if the defendants' collective market share is low, then there must not be anticompetitive effects from their activity. Federal courts have observed that "in most cases the prima facie case under the rule of reason requires proof 'that the defendant has sufficient market power to restrain competition substantially.'"[239] Judges often equate high market share and market power, sometimes requiring proof of the former in order to establish the latter.[240] Courts reason that "[u]nder the rule of reason, plaintiffs must plausibly allege that defendants have sufficient market power to restrain competition substantially in a relevant market. . . . The starting point for finding market power in the relevant market is market share."[241] A plaintiff's failure to prove the defendants' shared market power can prevent Section One claims from proceeding to trial.[242]

The *Alston* dicta introducing the phrase "quick-look approval" raises the distinct possibility of courts more quickly approving restraints whenever the judge believes the defendants have low market shares. This would be a mistake because firms with seemingly insignificant market shares can injure

239. *In re* Sulfuric Acid Antitrust Litig., 703 F.3d 1004, 1007 (7th Cir. 2012) (quoting Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 596 (7th Cir. 1984)); L.A.P.D., Inc. v. Gen. Elec. Corp., 132 F.3d 402, 405 (7th Cir. 1997) ("[P]roof of market power is essential; without it, any case under the Rule of Reason collapses."); Lucas v. Citizens Commc'ns Co., 409 F. Supp. 2d 1206, 1220 (D. Haw. 2005), *aff'd*, 244 F. App'x 774 (9th Cir. 2007) ("Under the Rule of Reason, Plaintiff must prove that the Defendants have market power in the relevant market."). *See also* Newcal Indus., Inc. v. Ikon Off. Sol., 513 F.3d 1038, 1044 (9th Cir. 2008) ("In order to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a 'relevant market.' That is, the plaintiff must allege both that a 'relevant market' exists and that the defendant has power within that market."); Gunawardana v. Am. Veterinary Med. Ass'n, 515 F. Supp. 3d 892, 909 (S.D. Ill. 2021), *aff'd*, No. 21-1330, 2021 WL 4951697 (7th Cir. Oct. 25, 2021) ("Substantial market power is an essential ingredient of every antitrust case under the Rule of Reason.") (quoting Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994)).

240. *See* James M. King & Assocs., Inc. v. G.D. Van Wagenen Co., 717 F. Supp. 667, 675 (D. Minn. 1989) (granting summary judgment on Section One claim because plaintiff did not prove defendant possessed "dominant market share"). *Cf.* Union Carbide Corp. v. Montell N.V., 27 F. Supp. 2d 414, 417 (S.D.N.Y. 1998) ("In the Second Circuit, the first step in a rule of reason analysis is an examination of a defendant's market power, . . . the presence of which is often, though not always, determined with reference to its market share.") (citation omitted).

241. *In re* Pool Prods. Distrib. Mkt. Antitrust Litig., 940 F. Supp. 2d 367, 397 (E.D. La. 2013).

242. *See* Retina Assocs., P.A. v. S. Baptist Hosp. of Fla., Inc., 105 F.3d 1376, 1384 (11th Cir. 1997) (concluding that "fifteen percent of the retina referral market is insufficient, as a matter of law, to establish market power" and granting defendant summary judgment on rule-of-reason case).

competition and harm consumers.[243] If non-members of the conspiracy lack the ability to expand production or if they independently decide to mimic the conspirators' conduct in order to maximize their profits, an anticompetitive conspiracy can inflict antitrust injury even though the actual conspirators have a deceptively low combined market share. Even if non-conspirators have the capacity to increase their sales and undercut the cartel price, a rational firm may decide to use the cartel's fixed price as an umbrella price.[244] When this happens, a cartel can raise price and maintain a stable conspiracy despite its members not controlling a dominant share of the market. Yet, if a court interpreted the defendants' low market share as entitling them to quick-look approval, a false negative would result.

b. Stable or Declining Prices

Price stability or downward movements in price can also create the illusion that the defendants' agreement has caused no anticompetitive effects. Too often, courts prevent valid antitrust conspiracy claims from reaching juries because judges believe that horizontal coordination—such as price verification schemes—does not violate Section One if market prices are declining.[245] If market prices fall, then some judges assume that vibrant competition must be protecting consumers from the anticompetitive effects of any alleged conspiracy.[246] This assumption is false.[247]

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243. *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 461 (2012) (opining that "effective cartels with low market shares for long periods are not common."). *Cf.* Oxbow Carbon & Mins. LLC v. Union Pac. R.R., 926 F. Supp. 2d 36, 44–45 n.5 (D.D.C. 2013) ("A low market share does not preclude a conspiracy to monopolize claim . . . .").

244. JOHN M. CONNOR, GLOBAL PRICE FIXING 89 (2008) ("If a cartel does not enroll all the producers in an industry, it may happen that nonconspirators ('fringe' firms) raise their prices toward the monopoly price P_m (the 'umbrella' effect)."). *See also* U.S. Gypsum Co. v. Ind. Gas Co., 350 F.3d 623, 627 (7th Cir. 2003) ("A cartel cuts output, which elevates price throughout the market; customers of fringe firms (sellers that have not joined the cartel) pay this higher price, and thus suffer antitrust injury, just like customers of the cartel's members.").

245. *See* Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1032, 1038 (8th Cir. 2000) (affirming summary judgment for price-fixing defendants, in part, because prices had been "slowly but steadily declin[ing] for the most part since . . . 1988"); *In re* Baby Food Antitrust Litig., 166 F.3d 112, 133 (3d Cir. 1999).

246. *See* United States v. Nippon Paper Indus. Co., 62 F. Supp. 2d 173, 185 n.22 (D. Mass. 1999) (treating falling prices "as evidence of competition in what was a buyers' market").

247. In some cases, the rivals may be conspiring to reduce prices in order to hurt other competitors. USA Petrol. Co. v. Atl. Richfield Co., 859 F.2d 687, 696 (9th Cir. 1988), *rev'd on other grounds*, 495 U.S. 328 (1990) (noting that "when firms conspire to fix low prices in order to drive out competition, the long-term consequences may be higher prices and reduced service to consumers").

Anticompetitive conspiracies are sometimes designed not to increase prices but to prevent prices from decreasing or to dampen their decline.[248] For example, when prices are decreasing in a market, rivals may conspire to forestall prices from freefalling.[249] Such conspiracies can succeed even though prices do not rise. And they harm consumers by artificially keeping prices higher than they would otherwise have been.[250] Courts may fail to appreciate that but for the collusion, prices would have fallen even further. If courts do not understand that prices can be decreasing despite an underlying price-fixing conspiracy,[251] then quick-look approval could exacerbate this problem of courts misinterpreting falling or stable prices as proof that defendants have not violated Section One.

Furthermore, courts cannot appreciate anticompetitive effects in markets where the product or service is nominally free, such as the market for social media platforms. In so-called zero-price markets, dominant firms may seemingly provide their services for free, but they are selling advertisers access to these consumers. In other words, the consumer is the product. Consumers pay by forgoing their privacy and personal data. Even if some consumers do not understand how they are paying for the product and service, antitrust law should. Anticompetitive agreements can reduce consumer privacy in ways that antitrust law cares about.[252] Free products and services can create barriers to entry in complementary markets.[253] And firms may engage in anticompetitive conduct to maintain their base of users,

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248. Christopher R. Leslie, *Hindsight Bias in Antitrust Law*, 71 VAND. L. REV. 1527, 1581 (2018) ("In some cases, the conspirators do not intend to raise the price but rather intend to stabilize the pre-conspiracy market price and prevent it from falling."). *See, e.g.*, United States v. Container Corp. of Am., 393 U.S. 333, 336 (1969) (condemning "reciprocal exchange of prices [that] . . . stabilize[d] prices though at a downward level").

249. Indeed, the reduction in market price may spur the formation of a price-fixing cartel. *See* John M. Connor & Darren Bush, *How to Block Cartel Formation and Price Fixing: Using Extraterritorial Application of the Antitrust Laws as a Deterrence Mechanism*, 112 PENN ST. L. REV. 813, 850 n.261 (2008) ("Cartel formation is frequently, perhaps usually preceded by an actual or impending 'crisis' (as perceived by cartel members): markedly slowing growth, falling prices, rising inventories, low rates of capacity utilization or similar conditions that have caused or are about to cause profits to decline to what are by the standards of the industry historically low rates.").

Prices can fall during the operation of a price-fixing cartel because of declining seasonal demand. *See* CONNOR, *supra* note 244, at 223 (discussing "weakening seasonal demand" causing declining prices during lysine price-fixing conspiracy).

250. CONNOR, *supra* note 244, at 1580 ("Price-fixing conspiracies can inflict injuries even when the market price does not increase following the rivals' agreement.").

251. *Id.*

252. Salil K. Mehra, *Data Privacy and Antitrust in Comparative Perspective*, 53 CORNELL INT'L L.J. 133, 139 (2020); Frank Pasquale, *Privacy, Antitrust, and Power*, 20 GEO. MASON L. REV. 1009, 1011 (2013).

253. Michal S. Gal & Daniel L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 ANTITRUST L.J. 521, 539–47 (2016); John M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 WASH. U. L. REV. 49, 77–78 (2016).

as well as exploit them. Price effects are not necessary to prove an antitrust violation.[254] When judges focus exclusively on price theory and price effects, they may fail to see or appreciate the anticompetitive effects of some restraints.[255] Quick-look approval increases the risk of courts summarily clearing these restraints.

c. Stable or Increasing Output

Some judges treat reduced output as a prerequisite to antitrust liability. For example, the Supreme Court in *Ohio v. American Express Co.*[256] upheld the reversal of a bench verdict condemning American Express' anti-steering policy, which prevented merchants from encouraging customers to use lower-fee credit cards, because the majority asserted that there was no decrease in market output measured in credit-card transactions.[257] Professor John Newman has observed how federal courts have improperly made output reductions the *sine qua non* of anticompetitive effects.[258]

Quick-look approval could encourage judges to rely more heavily on output as a perfect proxy for anticompetitive effects and to dismiss or reject antitrust claims without obvious output-reducing effects. This would be a mistake. In his scholarship, Professor John Newman has explained how "various types of marketplace activity can increase output while decreasing welfare."[259] A restraint can be anticompetitive and injure consumers by increasing price above the competitive level without reducing output if the demand for the product is inelastic. For example, a conspiracy to increase the price of insulin harms consumers who are forced to pay more for life-saving medication, but that harm is not necessarily reflected in reduced consumption.[260] Similarly, a restraint can reduce allocative efficiency despite increasing output if the production or consumption of the product

254. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 461–62 (1986) ("A concerted and effective effort to withhold (or make more costly) information desired by consumers . . . is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices . . . .").

255. John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 197 (2015) ("Antitrust law, however, has failed to evolve to account for the disappearance of prices. The antitrust enterprise remains firmly grounded in price theory, yet this dependence has inevitably led to an exclusive focus on price competition that is often inappropriate in the face of zero prices.").

256. 138 S. Ct. 2274 (2018).

257. *Id.* at 2288 (noting that "output of credit-card transactions grew dramatically from 2008 to 2013"). *See also* Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 848 (9th Cir. 1996) (affirming summary judgment for antitrust defendant because plaintiff "has produced no evidence of reduced output or increased prices").

258. Newman, *supra* note 181, at 574.

259. *Id.* at 567.

260. Christopher R. Leslie, *Achieving Efficiency Through Collusion: A Market Failure Defense to Horizontal Price-Fixing*, 81 CALIF. L. REV. 243, 279 (1993).

entails significant negative externalities—costs imposed on society but not borne by the manufacturer or consumer.[261] Ultimately, "[a] variety of strategies—including some that are quite well-recognized by antitrust law—can have the effect of increasing output while simultaneously reducing welfare."[262] Quickly rejecting antitrust claims based on the steadiness of output risks creating significant false negatives.

d. Deference to Prevalence

Finally, courts sometimes assume that if multiple firms engage in a particular practice, then it must be efficient, competitive, or, on balance, beneficial such that the practice must not violate antitrust law.[263] For example, some judges and commentators have argued that if several sellers in the market are using exclusive dealing arrangements, that indicates the practice must be efficient, not anticompetitive.[264] Not only is this inference incorrect, but the popularity of such exclusive deals can increase their anticompetitive effects.[265]

In tying arrangement cases, courts also sometimes confuse popularity and innocence. A tying arrangement exists when a seller refuses to sell one product (the "tying product") unless the buyer also agrees to purchase another separate product (the "tied product").[266] Tying arrangements can distort competition in the market for the tied product,[267] as well as create a

261. *Id.* at 275–76.

262. Newman, *supra* note 181, at 582 (emphasis omitted) ("These include creating or maintaining information asymmetries, deception and misleading, predatory pricing, coercive practices like tying, intrabrand vertical restraints, externalizing costs, and exploiting cognitive limits.").

263. *See, e.g.*, Princo Corp. v. Int'l Trade Comm'n, 563 F.3d 1301, 1311 (Fed. Cir.), *reh'g en banc granted, opinion vacated*, 583 F.3d 1380 (Fed. Cir. 2009), *and on reh'g en banc*, 616 F.3d 1318 (Fed. Cir. 2010) ("Our understanding of the likely procompetitive benefits of package licensing patents which reasonably might be necessary to practice a given technology is further informed by industry practice in the analogous area of standards-setting organizations."); Advo, Inc. v. Phila. Newspapers, Inc., 51 F.3d 1191, 1204 (3d Cir. 1995) (affirming grant of summary judgment for defendants on Section Two claim, noting that defendant's typical "contract length, two years, did not depart from standard industry practice").

264. *See* Wis. Interscholastic Athletic Ass'n v. Gannett Co., 658 F.3d 614, 627 (7th Cir. 2011) (discussing exclusive dealing in context of intellectual property, equating commonality with efficiency).

265. William B. Lockhart & Howard R. Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 924 (1952) (noting that the anticompetitive effects of an exclusive dealing arrangement are a function, in part, of "[t]he extent to which other suppliers are also using the device").

266. *See* Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14–15 (1984), *abrogated by* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); Christopher R. Leslie, *Cutting Through Tying Theory with Occam's Razor: A Simple Explanation of Tying Arrangements*, 78 TUL. L. REV. 727 (2004).

267. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 11 (1958) ("[T]he vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another.").

barrier to entry into the tying product market.[268] In the 1940s, the Supreme Court considered tying arrangements so anticompetitive that the Justices condemned tying as per se illegal[269] and asserted that "[t]ying agreements serve hardly any purpose beyond the suppression of competition."[270] Such sweeping condemnation is now considered overwrought, as scholars and courts have recognized some benign uses of tying arrangements in certain circumstances.[271] Nonetheless, anticompetitive tying arrangements still violate antitrust law.[272]

Some tying opinions, however, inappropriately equate ubiquity with efficiency, asserting that when all of the firms in a market employ tying arrangements, this "implies strong net efficiencies."[273] This is overly simplistic. Multiple firms in a market may simultaneously adopt tying policies precisely because it effectively raises consumer prices.[274] Moreover, pervasiveness may indicate collusion among the sellers, not efficiency.[275] Tying conspiracies entail rival firms agreeing to impose similar tying arrangements, which prevents consumers from being able to evade a tying requirement imposed by a lone seller.[276] Tying conspiracies are more anticompetitive than unilateral tying arrangements. Yet, courts generally fail to appreciate that tying conspiracies are legally and economically distinguishable from unilaterally imposed tying arrangements.[277] Indeed, some antitrust opinions read as though tying

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268. *See* Christopher R. Leslie, *Patent Tying, Price Discrimination, and Innovation*, 77 ANTITRUST L.J. 811 (2011).

269. Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947), *abrogated by* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006).

270. Standard Oil Co. v. United States, 337 U.S. 293, 305–06 (1949).

271. Data Gen. Corp. v. Digidyne Corp., 473 U.S. 908, 908 (1985) (White, J., dissenting) ("As we have consistently explained, a particular tying arrangement may have procompetitive justifications, and it is thus inappropriate to condemn such an arrangement without considerable market analysis."). *See* Christopher R. Leslie, *The Commerce Requirement in Tying Law*, 100 IOWA L. REV. 2135, 2137 (2015) ("Other scholars and judges have reasoned that some sellers have imposed tying requirements to protect an infant industry, to protect goodwill by [ensuring] that only high-quality complementary goods are used with the seller's tying product, or simply to increase their sales of the tied product at competitive prices.").

272. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 462 (1992).

273. United States v. Microsoft Corp., 253 F.3d 34, 88 (D.C. Cir. 2001) ("[B]undling by all competitive firms implies strong net efficiencies.").

274. Leslie, *supra* note 20, at 2266 ("Tying conspiracies raise the prices that consumers pay for a number of interrelated reasons.").

275. *Id.* at 2281–82 ("The presence of multiple tie-ins in a market may be evidence of concerted action in the same way that uniform price hikes are ubiquitous in cartelized markets."). *See also* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 41 (2013) ("One way in which boilerplate could possibly become uniform in an industry or trade is by old-fashioned collusion, the kind that antitrust law is designed to target.").

276. Leslie, *supra* note 20, at 2291.

277. *See, e.g.*, *In re* Visa Check/Mastermoney Antitrust Litig., 2003 WL 1712568, at *2 (E.D.N.Y. 2003) (applying traditional tying test for unilaterally imposed tie-ins to alleged tying conspiracy);

conspiracies do not exist.[278] This increases the likelihood of courts exonerating anticompetitive tie-ins, whether the product of collusion or independent decisions. Armed with the possibility of quick-look approval, some judges may be likely to quickly approve tying arrangements despite their anticompetitive effects.

Overall, the assumption that pervasiveness necessarily equates to harmlessness is false. Many firms will pursue policies in parallel whenever profitability predictions so dictate, regardless of negative consequences for consumers. Indeed, firms often collude to fix prices, but the pervasiveness of price-fixing conspiracies demonstrates their ability to generate illegal profits, not efficiency. Unfortunately, quick-look approval could operationalize the false connection between ubiquity and legality.

4. *Long-Term Effects*

When evaluating antitrust claims, federal courts should be looking at long-term effects.[279] Many anticompetitive schemes may create short-term benefits for consumers but impose long-term costs. For example, a small group of rival firms may conspire to charge a predatorily low price in order to drive their other rivals from the market, allowing the conspirators to operate as a well-disciplined cartel. Conspirators have successfully employed this tactic for centuries, from the nineteenth-century midwestern

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Marian Bank v. Elec. Payment Servs., Inc., 1997 WL 811552, at *21 (D. Del. 1997) (same); Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n, 629 F.Supp. 1002, 1008 (D. Kan. 1986), *aff'd in part, rev'd in part sub nom.*, 891 F.2d 1473 (10th Cir. 1989) (dismissing tying claims); Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n, 891 F.2d 1473, 1482–83 (10th Cir. 1989). Rental Car of N.H., Inc. v. Westinghouse Elec. Corp., 496 F. Supp. 373, 380 (D. Mass. 1980) ("Proof of conspiracy in a tying arrangement case would not relieve plaintiff of the burden of proving the illegality of the tie."). *See also* Leslie, *supra* note 20, at 2280–81 (discussing the "judiciary's failure to appreciate the anticompetitive effects wrought by concerted tying arrangements").

278. *See, e.g.*, Will v. Comprehensive Acct. Corp., 776 F.2d 665, 669 (7th Cir. 1985) ("Tying is not cooperation among competitors, the focus of § 1, it is aggressive conduct akin to monopolization under § 2 of the Sherman Act."). *See also* Abercrombie v. Lum's Inc., 345 F. Supp. 387, 391 (S.D. Fla. 1972) ("Whether or not such a conspiracy existed, the restraint of trade which must be proven in a tying case is an agreement, express or implied, between *buyer and seller* . . . ."). Leslie, *supra* note 20, at 2280 (critiquing these cases for failing to recognize that "collusion among competitors is worse than an agreement between buyer and seller").

279. JetAway Aviation, LLC v. Bd. of Cnty. Comm'rs, 754 F.3d 824, 842 (10th Cir. 2014) (Holmes, J., concurring) ("[I]n discerning the presence of unlawful anticompetitive conduct, courts have focused on the *long-term* impact of firm conduct on prices, even when the short-term effects might appear (at first blush) to be beneficial to consumers.").

salt cartel[280] to the late twentieth-century international vitamins cartel.[281] Although price decreases are generally good and legal, predatory pricing conspiracies violate Section One of the Sherman Act because the short-term price decreases presage long-term price increases.[282] Although predatory pricing conspiracies are atypical because they begin with the short-term benefit of a price reduction, many restraints may lack short-term harms but injure competition in the long run.[283]

Unfortunately, federal judges often seem incapable of perceiving and appreciating the durable anticompetitive effects of challenged restraints.[284] The Supreme Court has acknowledged that "[i]t is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects."[285] Judges frequently have particular trouble discerning long-term anticompetitive effects of vertical restraints,[286] such as tying arrangements.[287] Similarly, courts do not believe that predatory pricing conspiracies happen,[288] because judges cannot appreciate the lasting

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280. JOHN E. STEALEY III, THE ANTEBELLUM KANAWHA SALT BUSINESS AND WESTERN MARKETS 84 (1993) (explaining "the strategy of large companies was to reduce salt prices for an extended period to ruin those who had refused to cooperate in any arrangement").

281. MICHAEL A. UTTON, CARTELS AND ECONOMIC COLLUSION: THE PERSISTENCE OF CORPORATE CONSPIRACIES 47–48 (2011).

282. Multistate Legal Stud., Inc. v. Harcourt Brace Jovanovich Legal & Pro. Publ'ns, Inc., 63 F.3d 1540, 1548 (10th Cir. 1995) ("To establish a section 1 violation, [the plaintiff] must show a conspiracy to engage in short-term price cutting to secure long-term monopoly profits."); Malcolm v. Marathon Oil Co., 642 F.2d 845, 854 n.18 (5th Cir. 1981) ("A drop in prices is perfectly legal, but a drop in prices instigated by a conspiracy to rid the market of price-cutters would be unlawful.").

283. Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 661 (2004) ("Simply because a venture does not have obvious short-term anti-competitive effects does not mean the venture does not pose a long-term threat to competition."). *See also* Diva Limousine, Ltd. v. Uber Techs., Inc., 392 F. Supp. 3d 1074, 1090 (N.D. Cal. 2019) (noting that "economic behavior does not pass[] muster simply because it might result in lower prices. . . . Predatory pricing can harm competition in the long run.").

284. Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261, 352 (2010).

285. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458–59 (1993).

286. Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 610–11 (2009) ("Courts have long had trouble discerning the anticompetitive effects, procompetitive benefits, and net competitive effects of vertical restraints such as resale price maintenance schemes, exclusive territories, area of primary responsibility clauses, long-term contracts, tie-ins, and other related restrictions.").

287. Leslie, *supra* note 266, at 745–46 ("The Chicago School's reliance on static models is particularly troubling in the tying context because the School's adherents are attacking an opposing school that explicitly posits a dynamic model of long-term anticompetitive effects."); Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 530 (1985) ("It is hard to understand why so much of the criticism of leverage theory operates primarily in a static framework when even some of the earliest and most unsophisticated statements of the leverage theory were explicitly grounded in a dynamic model.").

288. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589-90 (1986). *In re* Flat Glass Antitrust Litig., 385 F.3d 350, 358 (3d Cir. 2004) ("Courts and commentators alike have come to regard predatory pricing as a relatively speculative phenomenon, particularly when its success requires collusion among multiple firms.").

consequences.[289] Moreover, courts have rejected antitrust claims—such as certain group boycotts and IP licensing restrictions—that seem to involve irrational behavior even though "much conduct that appears irrational may be rational precisely because of its long-term anticompetitive effects."[290] Professor Nicolas Petit has explained how "[a]ttention to price or output effects narrows antitrust decisionmakers' line of sight, leading them to neglect hard to measure, long-term, and broad harms from competitor exclusion like loss of quality competition, slowing of innovation, and weakening of entrepreneurial dynamism."[291] The focus on short-term price effects can blind judges to a plethora of enduring anticompetitive harms.

Courts applying the quick-look approval approach may fail to appreciate the long-term anticompetitive effects of a challenged restraint. Too often, even when staring intently, judges fail to see the enduring harm from anticompetitive restraints. By shortening the observation period, the process of quick-look approval risks exacerbating the problem of overlooked long-term effects.

5. *Non-Obvious Anticompetitive Effects*

Courts are prone to overlooking anticompetitive effects that are not immediately apparent, which magnifies the dangers of quick-look approval run amok. The risk of false negatives is significant because, in theory, most rule-of-reason litigation should involve restraints with non-obvious anticompetitive effects because if such effects were obvious, quick-look condemnation should apply.[292] Once a restraint falls within the rule of reason, the antitrust plaintiff must prove that the defendants' arrangement has (or will likely have) anticompetitive effects. Unfortunately, the anticompetitive effects of some conspiracies are not obviously reflected in price or output, but the conspirators still unreasonably restrain trade in violation of the Sherman Act.[293]

Even in absence of price effects, a conspiracy can have anticompetitive non-price effects. For example, reductions in quality constitute

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289. In the context of predatory pricing, judges focus on the short-term price decrease and do not realize that predators are purchasing a reputation for aggression that will allow them to charge monopoly prices in the long run, undisciplined by would-be rivals who do not wish to be the target of predatory pricing in the future. Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695 (2013).

290. Leslie, *supra* note 284 at 352.

291. Nicolas Petit, *A Theory of Antitrust Limits*, 28 GEO. MASON L. REV. 1399, 1403–04 (2021).

292. *See supra* notes 56–88 and accompanying text.

293. Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 576 (2012) ("Courts cannot simply assume that, because prices did not increase and output did not decrease as a result of the restraint, consumer welfare was not diminished.").

anticompetitive effects,[294] and some conspiracies are designed to diminish product quality in ways that increase profits while reducing consumer welfare.[295] Famously, before the formation of the lightbulb cartel in the 1920s, manufacturers produced lightbulbs that lasted between 1,500 and 2,500 hours.[296] The international lightbulb cartel conspired to reduce lightbulbs' duration to 1,000 hours, forcing consumers to purchase lightbulbs more frequently.[297] Ironically, this anticompetitive harm increased unit sales of lightbulbs, which some courts could mistakenly interpret as beneficial for consumers.[298] Plaintiffs already bear the burden of proving a reduction in quality.[299] When overeager to dismiss an antitrust complaint or grant summary judgment to antitrust defendants, judges will sometimes discount quality-based antitrust injuries.[300] If judges use quick-look approval to reject conspiracy claims lacking obvious price or output effects, antitrust harms related to quality will go unremedied.

Some anticompetitive conspiracies are designed to conceal another underlying antitrust violation or to insulate the defendants from antitrust liability and/or damages. For example, an agreement among rival banks to impose similar arbitration clauses on their customers may seem like a legitimate way to reduce anticipated litigation costs, but such an agreement can facilitate price-fixing conspiracies and prevent consumers from

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294. Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1339 (11th Cir. 2010) ("Actual anticompetitive effects include, but are not limited to, reduction of output, increase in price, or deterioration in quality."); Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 276 (3d Cir. 1999) (stating that a deterioration in quality constitutes an anticompetitive effect); Inline Packaging, LLC v. Graphic Packaging Int'l, LLC, 351 F. Supp. 3d 1187, 1213 (D. Minn. 2018), *aff'd*, 962 F.3d 1015 (8th Cir. 2020) ("Harm to competition is measured by increased price, reduced output, or decreased quality."). *See also* Standard Oil Co. v. United States, 221 U.S. 1, 52 (1911) ("The evils which led to the public outcry against monopolies and to the final denial of the power to make them [include] [t]he danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale.").

295. *See, e.g.*, Christopher R. Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381, 410–11 (2018) (explaining how conspiracies among sellers to impose arbitration clauses with class action waivers harm consumers).

296. Shmuel I. Becher & Anne-Lise Sibony, *Confronting Product Obsolescence*, 27 COLUM. J. EUR. L. 97, 101–02 (2021).

297. *Id.* at 102.

298. *See supra* notes 256–262 and accompanying text.

299. Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (3d Cir. 1996).

300. Adaptive Power Sols., LLC v. Hughes Missile Sys. Co., 141 F.3d 947, 952 (9th Cir. 1998) ("[Plaintiff] argues that it can establish antitrust injury by showing other anticompetitive effects, such as a reduction in output and quality. . . . Just as a temporary decline in the number of competitors is not a significant restraint of trade, neither is a related temporary decline in quantity, quality, or efficiency."). *See* Leslie, *supra* note 284, at 334–36 (critiquing the Ninth Circuit's opinion in *APS v. Hughes*). *See also* Peter J. Hammer & William M. Sage, *Antitrust, Health Care Quality, and the Courts*, 102 COLUM. L. REV. 545, 548 (2002) (noting "while courts deal assertively with health antitrust cases and employ standard economic tools in their analyses, they seldom address quality as a specific competitive dimension, rather than as a regulatory matter.").

bringing valid antitrust claims in federal court.[301] Similarly, agreements among antitrust defendants to allocate any damage awards evenly among the alleged co-conspirators may seem like a reasonable way to spread risk, but such agreements help stabilize and conceal an underlying price-fixing conspiracy by giving co-conspirators a strong incentive not to settle antitrust claims.[302] Consequently, these agreements should be condemned by antitrust law.[303]

It is only upon close inspection that the anticompetitive effects of many arrangements become apparent. But quick-look approval may prevent this meaningful examination. By focusing on short-term price and output effects because they are easiest to observe, courts overlook harder-to-quantify-but-no-less-important anticompetitive effects such as reduced quality, diminished innovation, and other long-term consequences of the defendants' concerted activity.[304]

D. Summary

Quick-look approval does not have the same advantages or purposes as quick-look condemnation. Swiftly rejecting colorable antitrust claims undermines the deterrence that is one of the key advantages of the quick-look rule.[305] If implemented by courts, quick-look approval could amplify and accelerate judicial errors. It could effectively hamper the ability of plaintiffs to educate judges about why certain agreements are anticompetitive.

IV. QUICK-LOOK APPROVAL BY A DIFFERENT NAME?

Some observers may argue that this Article's warnings are overwrought because lower federal courts have already employed a version of quick-look approval, long before the *Alston* opinion introduced that particular

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301. Leslie, *supra* note 295, at 412–23.

302. Christopher R. Leslie, *Judgment-Sharing Agreements*, 58 DUKE L.J. 747, 774–79 (2009).

303. *Id.* at 813–18.

304. Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, ANTITRUST, Summer 2021, at 33, 39 (noting that some courts "focus excessively on short-term price effects and discount longer-term effects on prices, product quality, or innovation that are harder to quantify."). *See also* Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 672 (2017) ("Given the hazards of predicting the future, long-term anticompetitive effects are difficult, if not impossible, to prove in court.").

305. *See* Cavanagh, *supra* note 117, at 55 ("Proponents of quick look view it as an improvement over traditional Rule of Reason analysis for several reasons: . . . [including] it fosters deterrence by encouraging lawsuits that might otherwise be intimidated by the burdens of a traditional Rule of Reason case . . . .").

nomenclature.[306] This Part considers some candidates for the title of "pre-*Alston* quick-look approval case." Far from suggesting that the *Alston* Court's implicit endorsement of quick-look approval is harmless, these cases demonstrate how this approach can lead courts to give short shrift to valid antitrust claims.

Before *Alston*, only one circuit opinion had applied the "quick-look" label to find for a defendant, and the court had to misuse precedent to do so. In *Wallace v. International Business Machines Corp.*,[307] Judge Easterbrook invoked quick-look rhetoric to absolve a defendant, Linux, of antitrust liability. The Seventh Circuit affirmed dismissal of an antitrust complaint challenging licensing agreements for open-source software as akin to horizontal price fixing because the plaintiff did not "contend that Linux has such a large market share, or poses such a threat to consumers' welfare in the long run, that evaluation under the Rule of Reason could lead to condemnation. A 'quick look' is all that's needed to reject [the plaintiff's] claim."[308] Easterbrook cited three cases to support his position that the quick-look rule could be used to dismiss antitrust claims: *California Dental Association v. FTC*;[309] *NCAA v. Board of Regents*;[310] and *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*[311] Easterbrook provided no pincites, and with good reason; none of these cases held that antitrust complaints could be *rejected* on a quick look. *Cal. Dental* acknowledged that quick look is a way to *condemn* challenged agreements; *NCAA* initiated the quick-look approach to *condemn* restraints;[312] and *Ball Memorial* did not mention or apply the quick-look approach at all. This misuse of the "quick look" language is unsurprising given Easterbrook's infamous desire to dismantle antitrust law, working toward repealing the Sherman Act one judicial opinion at a time.[313]

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306. *See supra* note 130 and accompanying text.

307. 467 F.3d 1104 (7th Cir. 2006).

308. *Id.* at 1108.

309. 526 U.S. 756 (1999).

310. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984).

311. 784 F.2d 1325 (7th Cir. 1986).

312. *See supra* notes 31–43 and accompanying text (discussing *NCAA* opinion).

313. *See* Shapiro, *supra* note 304, at 37 ("Frank Easterbrook undermined antitrust enforcement under cover of purportedly neutral 'error cost' analysis.") (citing Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984)); Leslie, *supra* note 289, at 1703, 1740 (explaining how Judge Easterbrook misinterpreted antitrust precedent to create a recoupment requirement for predatory pricing claims, which made such claims almost impossible to prove); Daniel R. Shulman, *Comment: "Anticompetitive Effect"*, 95 MINN. L. REV. HEADNOTES 92, 100–01 (2011) (noting that "the Chicago school advocates that have successfully revolutionized—one is tempted to say undermined—antitrust law in the past four decades, such as Bork and Easterbrook, have done so largely on the basis of a misrepresentation of original legislative intent").

To the extent that *Wallace* represents a pre-*Alston* instance of quick-look approval, the case illustrates the dangers of this approach. In rejecting the plaintiff's claims that defendants were fixing a predatorily low price, Judge Easterbrook asserted that the plaintiffs raised no antitrust issues because low prices reflect "efficient production and enduring benefits to consumers."[314] Yet antitrust scholars Michal Gal and Daniel Rubinfeld have demonstrated *Wallace*'s "intuitive result does not always hold true [because] . . . when path dependence is created, which eventually leads to lower quality than is optimal even if goods are free, welfare can be harmed."[315] Furthermore, Easterbrook failed to appreciate how the licenses being challenged in *Wallace* created "a plausible threat" of "deliberate cartelization."[316] Although Easterbrook could not understand the long-term, anti-consumer effects, a jury—especially one with some technically sophisticated members—might have understood these harms and condemned the arrangement. But quick-look approval might preclude this possibility in future cases, thus replicating Easterbrook's mistake.

A. Antitrust Deference Toward the NCAA

Although *Wallace* is the only pre-*Alston* case to employ the phrase "quick look" to rule for an antitrust defendant, other opinions arguably use a quick-look approach without using that terminology. Ironically, a decades-spanning line of cases challenging NCAA rules illustrates the folly of using pro-defendant presumptions to exonerate challenged restraints. In the years following the Supreme Court's opinion in *NCAA v. Board of Regents*, the NCAA has been a frequent antitrust defendant, as both schools and student-athletes have challenged the organization's anticompetitive eligibility rules as antitrust violations. Lower federal courts have generally applied a highly deferential "procompetitive presumption" to insulate NCAA rules about eligibility and amateurism from full rule-of-reason inquiry.[317]

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314. Wallace v. Int'l Bus. Machs. Corp., 467 F.3d 1104, 1106 (7th Cir. 2006).

315. Michal S. Gal & Daniel L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 ANTITRUST L.J. 521, 558 (2016). *But see* Newman, *supra* note 253, at 92 (describing *Wallace* as "provid[ing] an instructive example of benign (and, indeed, beneficial) horizontal zero-price fixing agreements among suppliers"). Regardless of who is correct, given the competing perspectives among respected antitrust scholars, the restraint warranted more than a mere quick look before judicial approval that blocked a jury trial.

316. Stephen M. Maurer, *The Penguin and the Cartel: Rethinking Antitrust and Innovation Policy for the Age of Commercial Open Source*, 2012 UTAH L. REV. 269, 309 ("This provides yet another reason for courts and policymakers to scrutinize GPL-style licenses.").

317. Thomas A. Baker III, Marc Edelman & Nicholas M. Watanabe, *Debunking the NCAA's Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661,

In some ways, this judicial deference has been akin to quick-look approval. Courts deemed NCAA eligibility rules to be presumptively procompetitive and blocked athletes injured by specific anticompetitive rules from receiving the benefit of a full rule-of-reason inquiry.[318] This presumption has blocked all meaningful antitrust analysis of NCAA eligibility rules.[319] In 1990, one federal district judge alluded to "substantial support in the caselaw for this Court's conclusion that the NCAA eligibility Rules are not subject to antitrust scrutiny."[320] This form of putative "quick-look approval" essentially grants the NCAA a judicial exemption from antitrust liability.

In the dozens of separate antitrust challenges to anticompetitive NCAA rules, most federal courts have misinterpreted the Supreme Court's 1984 *NCAA* opinion as mandating deference to NCAA rules. For example, soon after its loss before the Supreme Court, the NCAA suspended Southern Methodist University's football program for exceeding NCAA's restrictions on compensation for student-athletes.[321] In response to SMU football players' antitrust lawsuit challenging the NCAA's rules as illegal price fixing,[322] the Fifth Circuit invoked the Supreme Court's *NCAA* opinion to affirm dismissal of the litigation, asserting that "we have little difficulty in concluding that the challenged restrictions are reasonable."[323] The court essentially treated the NCAA's compensation restrictions as immune to antitrust scrutiny, let alone liability.[324]

Similarly, in *Agnew v. NCAA*,[325] college football players challenged the NCAA rules that capped the number of scholarships given per team and prohibited multi-year scholarships.[326] The plaintiffs explained how the rules

670 (2018) ("[S]ince the Supreme Court's ruling in *Board of Regents*, four federal circuits have jumped on these dicta to presume the Supreme Court intended to create, at a minimum, a 'procompetitive presumption' about amateurism . . . .").

318. Evan Kanz, *Changing the NCAA's "Year-in-Residency" Rule: Narrowing Supreme Court Precedent from Below*, 52 UIC J. MARSHALL L. REV. 1085, 1102 (2019) ("In turn, student-athletes like Peter Deppe are forced to abide by the 'cartel-like' regulations set by the NCAA without ever having the opportunity to force the NCAA to defend its unlawful restraints of trade under a full rule of reason analysis.").

319. *Id.* at 1103 ("After the decision in *Bd. of Regents*, federal courts have consistently held that any NCAA regulation relating to eligibility is considered presumptively procompetitive, and therefore no antitrust analysis is necessary.").

320. Gaines v. Nat'l Collegiate Athletic Ass'n, 746 F. Supp. 738, 748 (M.D. Tenn. 1990).

321. McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1340 (5th Cir. 1988).

322. The court dismissed SMU cheerleaders as plaintiffs for lack of standing. *Id.* at 1341–42.

323. *Id.* at 1344.

324. *Id.* at 1345 ("That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable. . . . [T]he plaintiffs cannot prove any set of facts that would carry their antitrust claim and that the motion to dismiss was properly granted.").

325. Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328 (7th Cir. 2012).

326. *Id.* at 332.

prevented them from receiving full scholarships and, hence, raised the price of their college education. In dicta, the Seventh Circuit interpreted the Supreme Court's *NCAA* opinion as holding that NCAA rules could be held "procompetitive 'in the twinkling of an eye.'"[327] The *Agnew* court ultimately dismissed the antitrust complaint for failure to identify a relevant market,[328] but its dicta created a procompetitive presumption for NCAA eligibility rules.[329]

Although seemingly limited to eligibility rules, judicial deference extended to allowing the NCAA to decide what constituted an eligibility rule.[330] Far beyond traditional concepts of eligibility—e.g., athletes must be enrolled students—"the procompetitive presumption [for eligibility rules] has been applied to caps on the number of scholarships available, transfer regulations, and compensation for student-athlete name and likeness."[331] The NCAA never had to justify its anticompetitive policies with actual evidence; judicial deference sufficed.[332]

The Seventh Circuit soon elevated the *Agnew* dicta to doctrine. In *Deppe v. NCAA*,[333] a punter challenged the NCAA year-in-residence rule that prevented him from transferring with eligibility to play football the following season. The student-athlete argued that the restriction violated Section One of the Sherman Act because absent the bylaw, "student-athletes would receive more generous athletic scholarships if they could transfer more freely."[334] The NCAA moved to dismiss, "arguing that the year-in-residence bylaw is an eligibility rule and thus is presumptively procompetitive under *NCAA* and *Agnew* and need not be

327. *Id.* at 341 (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 110 n.39 (1984)).

328. The court did not actually apply quick-look approval, but it created a "procompetitive presumption." *Id.* at 342.

329. Joseph W. Schafer, Comment, *NCAA Division I Transfers "Are Now Basically Screwed": The Battle Against the NCAA's Year in Residence Rule in the Seventh Circuit*, 66 BUFF. L. REV. 481, 515 (2018) (criticizing *Agnew* because it "set an improper procedural standard that permitted courts to dismiss any portion of a complaint that dealt with an eligibility bylaw at the motion to dismiss stage.").

330. Kanz, *supra* note 318, at 1104 (noting how *Agnew*'s precedent becomes "troublesome" when "federal courts will determine a given NCAA regulation is an eligibility rule merely because it is featured in the eligibility section of the NCAA Manual. This creates the notion that any given NCAA regulation will be considered an eligibility regulation simply because the NCAA says it is."); *id.* at 1106 ("[F]ederal courts have given extreme deference to the NCAA's definition of eligibility which has led to seemingly unfair and inadequate results.").

331. *Id.* at 1105.

332. *Id.* at 1104 ("While the procompetitive presumption may have increased the efficiency of the courts in deciding NCAA antitrust challenges quickly, it has also denied many complainants the right to force the NCAA to justify its anticompetitive actions under a full rule of reason antitrust analysis.").

333. Deppe v. Nat'l Collegiate Athletic Ass'n, 893 F.3d 498, 500 (7th Cir. 2018).

334. *Id.*

tested for anticompetitive effect under a full rule-of-reason analysis."[335] The district court obliged and the Seventh Circuit affirmed dismissal, holding that this was "a presumptively procompetitive eligibility rule under *Agnew* and *NCAA* [and a]ccordingly, a full rule-of-reason analysis is unnecessary."[336] In other words, the Seventh Circuit dismissed the claim quickly without meaningfully looking for anticompetitive effects.[337]

This approach provides short shrift to colorable antitrust claims and creates a significant risk of false negatives. The *Deppe* decision, for example, was deeply flawed because "[f]or the student-athlete, sitting out a year at a new school inhibits her incentive to switch schools, even when an opportunity arises that could help her career. Altogether, the NCAA's transfer rule impairs competition."[338] The *Deppe* court's hasty approach led to the wrong result because "the NCAA would not prevail if its transfer rules and no-poaching rules were subject to a rule of reason analysis."[339] Whether or not the *Deppe* court's approach is considered a form of quick-look approval, the opinion represents another false negative.[340]

Although exceptions exist,[341] by treating almost all NCAA restrictions as presumptively procompetitive, the vast majority of antitrust cases against the NCAA are dismissed without meaningful review of anticompetitive effects.[342] This line of authority flows from one passing observation by

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335. *Id.*

336. *Id.* at 503–04.

337. *Id.* at 502 (reasoning that "most NCAA eligibility rules are entitled to the procompetitive presumption announced in *Board of Regents* because they define what it means to be a student-athlete and thus preserve the tradition and amateur character of college athletics").

338. Roger D. Blair & Wenche Wang, *The NCAA's Transfer Rules: An Antitrust Analysis*, 11 HARV. J. SPORTS & ENT. L. 1, 5–6 (2020).

339. *Id.* at 2; *id.* at 1 (analyzing "NCAA-imposed restraints and find[ing] them inconsistent with current antitrust policy"). *See also* Schafer, *supra* note 329, at 532 (noting that, unless overturned, the district court opinions in "*Pugh* and *Deppe* will set harmful precedents regarding the rights of student-athletes to challenge the NCAA under antitrust law when the organization's model is justifiably in its most vulnerable state").

340. Blair & Wang, *supra* note 338, at 14 ("In its *Deppe* opinion, the Seventh Circuit has blessed anticompetitive conduct by the NCAA and its members. Neither the transfer rules nor the non-solicitation rules should be considered *presumptively procompetitive*. Both are plainly anticompetitive, and neither would pass muster under a rule of reason analysis.").

341. *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015); *see* Baker et. al., *supra* note 317, at 678 ("*O'Bannon* makes clear that the procompetitive presumption will not serve as an automatic exemption to antitrust liability for the NCAA when its rules that implicate amateurism are challenged in antitrust actions.").

342. Kanz, *supra* note 318, at 1102 ("Because of the procompetitive presumption established in *Bd. of Regents*, the majority of NCAA antitrust challenges have been dismissed at the pleadings stage."). *See id.* at 1102 n.120 ("From 1973-2015 there were thirty-seven antitrust cases brought against the NCAA, only six cases made it past the motion to dismiss stage and only one case, *O'Bannon*, succeeded on part of its merits.") (citing Babette Boliek, *Is the NCAA Dam About to Burst?*, AM. ENTER. INST. (Apr. 5, 2018), www.aei.org/publication/is-the-ncaa-dam-about-to-burst/) [https://perma.cc/3NAK-M8A6].

Justice Stevens in his 1984 *NCAA* opinion: "It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."[343] This statement is noncontroversial; it merely acknowledges that to have a sports competition—whether a tournament or a league—the teams must agree on the rules. Stevens' dicta did not entitle NCAA rules to overwhelming deference. Moreover, the nature of the NCAA's anticompetitive restrictions has evolved in meaningful ways that make Justice Stevens' loose dicta outdated.[344]

Courts and commentators have misconstrued Justice Stevens' simple observation as "crucial precedent that NCAA regulations aimed at preserving the tradition of amateurism in college sports would be deemed *inherently procompetitive*, and not in violation of the Sherman Act."[345] These interpretations misrepresent Justice Stevens' nonbinding prediction that most NCAA eligibility rules would survive rule-of-reason analysis. Stevens' dicta is a vague prediction, not a valid precedent.

Ultimately, most post-1984 NCAA federal opinions illustrate the warning from the beginning of this Article: A Supreme Court antitrust decision *against* the NCAA can transform into a pro-defendant opinion. As one commentator explained almost thirty years after the 1984 *NCAA* opinion, "[a]lthough the University of Oklahoma emerged from the case victorious, the case has actually benefited the NCAA in the long run, as positive language in the Court's reasoning would prove invaluable in future antitrust litigation."[346] Federal courts excessively deferred to the NCAA's rules and restrictions.[347] The line of NCAA cases highlights the danger of quick-look analysis—courts may stop even looking for anticompetitive effects. The *Alston* opinion risks improperly emboldening federal judges to rule for defendants in ways that create false negatives. Just as courts fixated on—and distorted—the Court's 1984 *NCAA* opinion, federal judges in the future could do the same with the *Alston* dicta's reference to quick-look approval.

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343. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 117 (1984).

344. Kanz, *supra* note 318, at 1102 ("While this dicta may have been well-reasoned at the time of the Supreme Court's decision in *Bd. of Regents*, the current state of the NCAA is far different than it was in 1984, and thus courts should take this into consideration.").

345. *Id.* at 1101–02 (emphasis added).

346. Kemper C. Powell, *A Façade of Amateurism: An Examination of the NCAA Grant-in-Aid System Under the Sherman Act*, 20 SPORTS LAWS. J. 241, 251 (2013).

347. Katherine Kargl, Note, *Is Amateurism Really Necessary or Is It an Illusion Supporting the NCAA's Anticompetitive Behaviors?: The Need for Preserving Amateurism in College Athletics*, 2017 U. ILL. L. REV. 379, 392 ("[E]arlier courts gave more deference to the NCAA amateurism defense.").

B. Safe Harbors and Pro-Defendant Factors

Some commentators may argue that quick-look approval already exists in the form of judicially created safe harbors and legal presumptions.[348] For example, in *Jefferson Parish Hospital v. Hyde*,[349] the Supreme Court created a safe harbor of sorts for tying arrangements by holding that a tying defendant that controlled 30% of the tying product market does not commit a per se violation.[350] Although the challenged tying arrangement could theoretically still be condemned under the traditional rule of reason, lower courts have generally treated this 30% threshold as necessary to establish any antitrust liability on a tying claim.[351]

Although these cases provide a measure of protection for firms accused of illegal tying, this kind of safe harbor is distinct from quick-look approval. The judicial creation of a safe harbor for a specific factual scenario differs from the sweeping pro-defendant mode of analysis proposed by the NCAA. This new quick-look approval excuses judges from looking thoroughly for anticompetitive effects before blocking antitrust claims from reaching a jury. In contrast, in tying cases that invoke the 30% safe harbor, lower courts are following precedent for determining that in a specific factual scenario, anticompetitive effects are unlikely. Judges are using the ordinary common law process to address particular conduct that resembles the conduct and fact patterns of previous judicial opinions; judges are not embracing a mode of analysis that eschews careful investigation of a defendant's conduct more broadly.

Similar to safe harbors, in some areas of antitrust law, courts have held that restraints are presumptively lawful when certain conditions are met. For example, some courts have applied such a presumption to short-duration

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348. In addition to safe harbors created by case law, there are many statutory exemptions from antitrust liability. Conn. Ironworkers Emps. Ass'n, v. New Eng. Reg'l Council of Carpenters, 869 F.3d 92, 95 n.2 (2d Cir. 2017) ("There are dozens of . . . immunities to antitrust scrutiny . . . . Some are express, such as statutory carve-outs for sports broadcasting, 15 U.S.C. § 1291, or the business of insurance, 15 U.S.C. §§ 1011–15; others are implied . . . .").

349. Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), *abrogated by* Ill. Tool Works, Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006).

350. *Id.* at 26–27 ("Seventy per cent of the patients residing in Jefferson Parish enter hospitals other than East Jefferson. . . . [T]he geographic data does not establish the kind of dominant market position that obviates the need for further inquiry into actual competitive conditions.").

351. *See* BookLocker.com, Inc. v. Amazon.com, Inc., 650 F. Supp. 2d 89, 103–04 (D. Me. 2009) ("The Supreme Court has not defined how much market share constitutes a predominant share. . . . Nevertheless, post-*Jefferson Parish*, there seems to be a consensus building that thirty percent is a threshold."). *See also* AngioDynamics, Inc. v. C.R. Bard, Inc., 537 F. Supp. 3d 273, 313 (N.D.N.Y. 2021) (quoting Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc., 920 F. Supp. 455, 473 (S.D.N.Y. 1996), *as corrected* (Mar. 15, 1996) for the proposition "that 'a market share above 30 percent is necessary to establish the requisite [market] power' for purposes of a tying claim under Sherman Act § 1.") (brackets in original).

exclusive dealing arrangements. The Seventh Circuit has held that "[e]xclusive-dealing contracts terminable in less than a year are presumptively lawful . . . ."[352] Similarly, antitrust opinions note that "courts increasingly view at-will exclusive arrangements as presumptively valid."[353] The Supreme Court has not endorsed these presumptions and circuits are split.[354]

Although observers could interpret these pro-defendant cases as a form of quick-look approval, the Seventh Circuit's approach does not resemble what the *Alston* Court was discussing. In *Alston*, the NCAA asked the Justices to mandate that lower courts review "its restrictions" with "abbreviated deferential review,"[355] thus treating "quick look" as a mode of defendant-deferential analysis. In contrast, the Seventh Circuit's presumption in short-term exclusive dealing cases does not create a different mode of analysis. Instead, it assigns significant weight to a particular factor under the rule of reason.[356]

One can argue that the Seventh Circuit's decision to weigh this one factor so heavily in favor of antitrust defendants is flawed because, depending on the surrounding facts, even shorter-term exclusive dealing arrangements can injure competition and should be thoroughly examined when properly challenged.[357] But regardless of whether the Seventh Circuit's presumptions are wise or imprudent, they are not equivalent to the quick-look approval requested by the NCAA in *Alston*. As envisioned by the NCAA, quick-look

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352. Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir. 1984).

353. Minn. Mining & Mfg. Co. v. Appleton Papers Inc., 35 F. Supp. 2d 1138, 1143 (D. Minn. 1999).

354. McWane, Inc. v. FTC, 783 F.3d 814, 833–34 (11th Cir. 2015) ("No binding precedent from the Supreme Court or this Court speaks specifically to this issue, but [the defendant] hangs its hat on caselaw from other circuits. . . . But not all courts agree.").

355. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2155 (2021).

356. Plaintiffs could (presumably) overcome the Seventh Circuit's presumption, but quick-look approval is more likely to be dispositive.

357. FTC v. Surescripts, LLC, 424 F. Supp. 3d 92, 104 (D.D.C. 2020) ("Even if the contracts were short term and easily terminable, the FTC argues that their exclusive terms, when combined with the nature of the two relevant markets and Surescripts's dominant monopoly position, had the effect of foreclosing large parts of both markets and harming competition.").

After all, contract duration is but one factor to be considered during rule-of-reason analysis, and other factors should be analyzed as well. *See* Thompson Everett, Inc. v. Nat'l Cable Advert., L.P., 57 F.3d 1317, 1326 (4th Cir. 1995) (noting "the exclusive contracts in this case are typically of short duration, usually terminable after a year," but also noting the "evidence shows that these contracts are negotiated in a competitive context"). Antitrust justice would be better served by examining all of the facts holistically in context. As the Supreme Court opined in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992): "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" *Id.* at 466–67 (quoting Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563, 579 (1925)). The Seventh Circuit's presumptions violate this principle, especially if they blunt the hunt for anticompetitive effects.

approval is far more dangerous because it asks judges to assume that challenged restraints are procompetitive and—as in *Deppe*—to decline even "test[ing] for anticompetitive effect[s] under a full rule-of-reason analysis."[358] This new version of quick-look approval is not merely following precedent on the significance of individual factors in a rule-of-reason analysis. Instead, it invites judges to block antitrust claims from proceeding to trial whenever the judge cannot immediately perceive the anticompetitive potential or reality of the challenged restraint. That would uniquely increase the risk of costly false negatives.

Ultimately, even if one believes that the NCAA line of antitrust cases (and/or the legal presumptions of other cases) represent a form of quick-look approval, the *Alston* opinion is still a potential game changer. The Court's adoption of the quick-look approval label legitimates, reinforces, and perpetuates improper judicial deference to antitrust defendants. While increasing the risk of future mistakes, the *Alston* opinion provides a lens and an opportunity for analyzing past judicial missteps.

V. RESISTANCE IS FERTILE: RESPONDING TO *ALSTON*

Quick-look approval could do great damage to antitrust enforcement. Fortunately, the train has not yet left the station. Although the phrase has been uttered, legitimate antitrust claims have not yet been summarily rejected by judges too willing to employ pro-defendant tools in antitrust litigation. Now is the time to prevent the misuse of the quick-look rule in a manner that undermines antitrust law.

The proper judicial response to *Alston* entails several steps. First, courts should neither embrace nor apply the concept of quick-look approval. Quick-look approval is a Pandora's Box of potential judicial error. The easiest solution is for judges to not open the box. Lower courts should treat the "quick-look approval" phrase as the dictum that it is. The *Alston* opinion's reference to "quick-look approval" as though this concept existed was both deceptive and unnecessary to the Court's decision.

Second, courts must be wary of asserted justifications for trade restraints. Section One defendants—particularly the NCAA—often allege procompetitive justifications for which they have no evidence at all.[359] Yet courts are far too deferential to defendants' assertions.[360] One of the worst

358. Deppe v. Nat'l Collegiate Athletic Ass'n, 893 F.3d 498, 500 (7th Cir. 2018).

359. *See, e.g.*, *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., No. 14-CV-02758-CW, 2018 WL 1524005, at *10 (N.D. Cal. Mar. 28, 2018) ("For six of their asserted procompetitive justifications, Defendants have not attempted to meet [their] burden at all . . . .").

360. *See supra* notes 230–236 and accompanying text.

paths that courts could take post-*Alston* is to use quick-look approval to replicate the deference that many federal judges afforded to the NCAA's anticompetitive policies.

Third, even if judges perceive a challenged restraint to be "presumptively procompetitive" or somehow eligible for quick-look approval, antitrust plaintiffs should always be afforded the opportunity to show that the restraint causes (or will likely cause) anticompetitive effects. The inquiry into anticompetitive effects is important because even if a restraint has procompetitive effects or potential, these effects can be outweighed by countervailing anticompetitive effects. Plaintiffs must be afforded the opportunity to demonstrate that the anticompetitive effects predominate because, if they do, then the restraint unreasonably restrains trade and violates the Sherman Act. This weighing should be performed by the factfinder at trial, not by a judge at summary judgment—let alone at the motion to dismiss stage.[361]

Fourth, even if a challenged restraint has a demonstrable procompetitive justification, antitrust plaintiffs should be allowed to argue—if defendants try to invoke quick-look approval—that any procompetitive goals can be achieved by a less anticompetitive alternative. Even procompetitive restraints violate antitrust law if they unnecessarily cause anticompetitive effects that could have been avoided had the defendants pursued their goals through a less restrictive alternative.[362] Under the rule of reason, the plaintiffs can still show that a restraint violates antitrust law because any legitimate objectives could be achieved in a less restrictive manner.[363]

Finally, courts should not treat so-called "presumptively procompetitive" restraints as warranting—let alone requiring—the dismissal of antitrust claims where the plaintiffs have presented plausible claims of anticompetitive effects. Quick-look approval is most dangerous at the dismissal stage. Without a record, judges are most susceptible to incorrectly believing that an agreement warrants absolution without full scrutiny. Discovery from defendants' documents and employees can reveal

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361. Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991) ("Under this [rule of reason] test, the factfinder must analyze the anti-competitive effects along with any pro-competitive effects to determine whether the practice is unreasonable on balance.").

362. Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993) ("Assuming defendant comes forward with such proof [of a procompetitive justification], the burden shifts back to plaintiff for it to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole."); Carrier, *Bridging the Disconnect*, *supra* note 164, at 1268–69 ("If the defendant meets this burden, the burden then returns to the plaintiff to show either that the restraint is not reasonably necessary to achieve the objectives of the restraint or that the objectives could be achieved by alternatives 'less restrictive' of competition . . . .").

363. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1074 (9th Cir. 2015).

heightened prices, depressed output, and other anticompetitive effects. Judges already dismiss antitrust claims too quickly, for example by finding insufficient evidence of agreement even when plaintiffs have presented abundant evidence of collusion.[364] Widespread adoption of quick-look approval would encourage courts to replicate their mistakes regarding the first element of Section One claims (proof of agreement) with the second element (proof of unreasonable anticompetitive effects).[365] Because lack of discovery magnifies these mistakes at the dismissal stage, the use of quick-look approval could effectively conceal the precise harms that antitrust law is designed to remedy. Consequently, while courts should not employ quick-look approval—full stop—they should definitely not dismiss claims on a quick look.

In sum, courts should not grant either a motion for summary judgment or dismissal until after the plaintiff has been afforded appropriate discovery and the opportunity to argue that the alleged procompetitive effects are illusory, are outweighed by anticompetitive effects, or could have been achieved through a less restrictive alternative.[366] If the plaintiffs create a genuine issue of material fact about any of these issues, they are entitled to present their arguments to a jury.

CONCLUSION

"Quick look" is a method of condemning conduct, not exonerating it. Antitrust law has fleetingly few doctrines to assist plaintiffs seeking to rid the economy of anticompetitive restraints and to compensate those injured by illegal restraints of trade. With the reach of the per se rule dwindling,[367] the quick-look rule remains one of the few tools that plaintiffs can use to efficiently challenge anticompetitive agreements. Yet *Alston* essentially converts a theory of liability into a defense.

Quick-look approval could prove disastrous for antitrust plaintiffs with valid claims. If antitrust's past is prologue, then federal courts are likely to

364. *See* Leslie, *supra* note 155, at 1644–45 (discussing *In re* Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186 (9th Cir. 2015), in which the Ninth Circuit improperly affirmed dismissal of colorable antitrust claim).

365. *See generally* Leslie, *supra* note 161 (describing how courts improperly require plaintiffs to present direct evidence of collusion to prove the first element of a Section One claim); Leslie, *supra* note 155 (describing how courts improperly disaggregate plaintiffs' evidence of collusion among defendants).

366. *Cap. Imaging Assocs.*, 996 F.2d at 543 ("Ultimately, it remains for the factfinder to weigh the harms and benefits of the challenged behavior.").

367. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 907 (2007) (removing vertical price fixing from per se category); Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57 (1977) (removing non-price vertical restraints from per se category).

use quick-look approval to blunt the inquiry into the actual anticompetitive effects of a challenged restraint. Antitrust history is a trail of decisions where judges have taken every potentially pro-defendant legal doctrine—whether procedural or substantive—and weaponized it against antitrust plaintiffs.[368] Antitrust law currently favors antitrust defendants to the point where it is almost impossible for most antitrust plaintiffs with colorable rule-of-reason claims to get their case in front of a jury.[369] The last thing that antitrust doctrine needs is yet another tool to block antitrust plaintiffs from being able to present claims to juries.

Decades of antitrust jurisprudence demonstrate that judges are far more likely to fail to appreciate how defendants' conduct is anticompetitive than to condemn benign conduct. False negatives are far more likely today than false positives. Unfortunately, when anticompetitive effects are neither obvious nor common, judges are prone to overlook them or fail to appreciate them. Many agreements among business executives may seem innocent or even beneficial, but closer inspection can reveal that they unreasonably restrain competition in ways that antitrust law should condemn. Quick-look approval may represent another mechanism for courts to diminish, ignore, or preempt any evidence of actual anticompetitive effects.

Ultimately, the plaintiff's victory in *Alston* is exceedingly narrow, but the pro-defendant dicta is dangerously susceptible to expansion. The *Alston* opinion's nonchalant—yet revolutionary—reference to quick-look approval is ill-conceived and unnecessary dicta that misrepresents long-standing precedent. Unless federal courts reject this dicta, firms engaging in anticompetitive conduct will use *Alston* as the vehicle to further undermine antitrust doctrine writ large. Federal courts are already too prone to imagine efficiencies and ignore actual anti-competitive effects. The advent of quick-look approval will worsen an already dire legal landscape.

368. *See* Stephen Calkins, *Reflections on* Matsushita *and "Equilibrating Tendencies": Lessons for Competition Authorities*, 82 ANTITRUST L.J. 15, 19 (2018).

369. *See supra* notes 163–172 and accompanying text.