No. 24-5493 & 24-5691

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE NATIONAL FOOTBALL LEAGUE'S SUNDAY TICKET ANTITRUST LITIGATION,

NINTH INNING, INC., *ET AL.*,

Plaintiffs-Appellants,

v.

NATIONAL FOOTBALL LEAGUE, INC., *ET AL.*,

Defendants-Appellees

On Appeal from the United States District Court
for the Central District of California
No. 2:15-ml-02668-PSG-SK
Hon. Philip S. Gutierrez

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Appellate Rule 26.1(a), the American Antitrust Institute states that it is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT....................................i

TABLE OF AUTHORITIES...iii

INTEREST OF AMICI CURIAE...1

INTRODUCTION AND SUMMARY OF ARUGMENT.......................1

ARGUMENT...7

I. The District Court Misapplied this Circuit's Standard for Proof of Damages in Jury Awards...7

II. The District Court's Approach to Jury Damage Awards Impinges on the Constitutional Right to a Jury Trial 16

III. The Overly Interventionist Review of Jury Awards Frustrates the Goals of the Antitrust Laws..20

A. The Integrity of Jury Trials Is Inseparable from the Antitrust Laws' Democratic Goals...20

B. An Overly Demanding Review of Jury Awards Compromises, and in Some Instances Reverses, the Deterrent Effect of the Antitrust Laws...24

CONCLUSION..29

.

CERTIFICATE OF SERVICE..30

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

CASES

Beacon Theatres v. Westover,
359 U.S. 500 (1959) ---------- 17

Bernstein v. Universal Pictures, Inc.,
79 F.R.D. 59 (S.D.N.Y. 1978) ---------- 23

Bigelow v. RKO Radio Pictures,
327 U.S. 251 (1946) ---------- 2, 8, 27

Dimick v. Schiedt,
293 US 474 (1935). ---------- 18

Image Tech. Servs., Inc. v. Eastman Kodak Co.,
125 F.3d 1195 (9th Cir. 1997) ---------- 9

In re First All. Mortg. Co.,
471 F.3d 977 (9th Cir. 2006) ---------- *passim*

In re Multidistrict Vehicle Air Pollution,
591 F.2d 68 (9th Cir. 1979) ---------- 9

In re U.S. Fin. Sec. Litig.,
609 F.2d 411 (9th Cir. 1979) ---------- 17

J. Truett Payne Co. v. Chrysler Motors Corp.,
451 U.S. 557 (1981) ---------- 8

Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League,
791 F.2d 1356 (9th Cir. 1986) ---------- *passim*

Lucent Techs., Inc. v. Gateway, Inc.,
580 F.3d 1301 (Fed. Cir. 2009) ---------- *passim*

Northern Pacific Railway Co. v. United States,
356 U.S. 1 (1958) ---------- 20

Story Parchment Co. v. Paterson Parchment Paper Co.,
282 U.S. 555 (1931) ---------- 8, 9, 29

Zenith Radio Corp. v. Matsushita Elec. Indus. Co.
478 F. Supp. 889 (E.D. Pa. 1979). ---------- 18

OTHER AUTHORITIES

Daniel Crane, *Private Enforcement of U.S. Antitrust Law—A Comment on the Data,* CPI Antitrust Chronicle (February 2019) ---------- 22

Edward D. Cavanagh, *The Jury Trial in Antitrust Cases: An Anachronism?*, Am. Journal of Trial Advocacy, Vol 40: 1 (2016). ---------- *passim*

Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit,* 81 Fordham L. Rev. 2543 (2013) ---------- *passim*

John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays,* 34 Cardozo L. R. 427 (2012) ---------- 25

INTEREST OF AMICUS CURIAE[1]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. See http://www.antitrustinstitute.org/.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Almost eighty years ago, the Supreme Court described the importance of a relaxed standard for proof of damages in antitrust cases. It explained that "[t]he most elementary conceptions of justice

[1] All parties have consented to the filing of this amicus. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amicus curiae or its counsel—has contributed money that was intended to fund preparing or submitting this brief.

[2] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. Certain members of AAI's Board of Directors or Advisory Board, or their law firms, represent Plaintiffs-Appellants, but they played no role in AAI's deliberations with respect to the filing of the brief.

and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 266 (1946) (cleaned up). "That principle is an ancient one," it continued, "and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application." *Id.*

That principle remains as applicable today. The Defendants here have engaged in an illegal conspiracy to increase prices for live U.S. sports broadcasts for millions of everyday Americans. They ask this Court to hold that they should pay nothing for their conduct. The Court should refuse this request. Granting it would abandon the core principle that wrongdoers should not benefit from circumstances they themselves create.

Among the justifications for escaping liability, and the district court's basis for vacating the jury award, is Defendants' after-the-fact speculation about the jury's damages calculation. The controlling caselaw does not permit this. On the contrary, the Ninth Circuit, following the Supreme Court's mandate, has adopted a "liberal" standard for proof of damages that considers the reasonableness of the

jury's "aggregated verdict in light of the totality of the circumstances." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League,* 791 F.2d 1356, 1360, 1366 (9th Cir. 1986). Even the cases cited by the district court in support of vacating emphasize how rare interfering with a jury finding of damages should be. The narrow exceptions courts have found to justify overturning a damages award do not apply here, especially when the jury awarded an amount lower than the amount plaintiffs' expert modeled and presented. *See infra* Section I.

The concern about judicial intervention in damage awards is not just a matter of fairness and good public policy. Protecting the integrity of the jury's decision-making, particularly on damages, is a constitutional issue. The right to jury trial in private antitrust damage actions is unquestionably protected by the Seventh Amendment. Any argument to the contrary has been routinely and firmly rejected. And as this Court has recognized, those constitutional protections require that jury damage awards be treated with great deference. *See infra* Section II.

The right to a jury trial also ensures that antitrust enforcement fulfills its goal of protecting the consumer. The involvement of the jury

and the cross-section of society it represents helps to keep the antitrust laws democratic. It protects the integrity of the judicial process as well as bolstering fundamental equity. And since nearly all government civil antitrust actions are decided by a judge, the jury trial in the private antitrust damages action is a uniquely democratic check on the system and the most direct way for consumers to participate in antitrust enforcement. *See infra* Section III.A.

Statistically, the odds are heavily against a private antitrust action making it to trial. Only 1% of private antitrust cases are ultimately heard by a jury. Plaintiffs here ran a gauntlet of challenges before they presented the case to the jurors. The validity of the claims here has been repeatedly tested over the almost decade-long litigation, and the case passed all the tests. The jury was properly instructed, and even the district court agreed that it was reasonable for a jury to find Defendants engaged in an illegal conspiracy. *See* Order Granting Def.'s J.M.L. 12 ("There was evidence in the record […] to support a reasonable jury's finding of an unreasonable restraint of trade at each step of the rule of reason."). This history is evidence of the strength of

the Plaintiffs' claims, and it illustrates why it is so important to protect the jury's decision-making at the damages award stage.

Decades of defendant-friendly decisions have made it easier to end an antitrust damages case on a motion to dismiss or summary judgment and more difficult for plaintiffs to certify a class. Even at trial, *Daubert* motions and other evidentiary challenges often drastically limit the evidence the jury sees and the questions it can answer. *See* Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit,* 81 Fordham L. Rev. 2543, 2554 (2013); Edward D. Cavanagh, *The Jury Trial in Antitrust Cases: An Anachronism?*, Am. Journal of Trial Advocacy, Vol 40: 1, 17-26 (2016) (cataloging the obstacles court decisions have created to jury trials). When plaintiffs have cleared all the hurdles to trial and presented a case that has convinced a jury to hold defendants liable, as Plaintiffs here have done, its rarity makes it especially important for vindicating the right to a jury trial and for realizing its democratizing benefits.

For the same reasons, the district court's overly exacting standard for proof of damages threatens to undermine deterrence, a key goal of antitrust enforcement. Because more antitrust conspiracies are

undetected than are found and punished, the potential to profit illegally without consequence is a strong incentive for companies to engage in anticompetitive conduct. The award of treble damages under the Sherman and the Clayton Acts recognizes that skewed incentive. To impose an unduly demanding standard for proof of damages on top of the already significant challenges to success in a private antitrust damages action has a particularly dampening effect on deterrence.

A stringent damages standard means that some illegal conduct, even though proven, will not be punished. That alone is an equity problem. But more concerning, it can perversely incentivize defendants to be more thorough in their anticompetitive conduct so as to more completely obscure the "but-for world" absent their conduct. When antitrust violators erase all evidence of a competitive status quo, plaintiffs have a harder time modeling damages and more difficulty reaching a precise damages figure. *See infra* Section III.B. This case is an example. The longstanding violations and the thoroughness of the output restrictions make it difficult to know with exactitude what kind of unbundled game broadcasts would have been available in a competitive environment. Plaintiffs must be creative—turning, for

example, to analogous markets for evidence of what competition would have meant. Defendants, in turn, take advantage of the circumstances they created to challenge that approach, although well-accepted as an economic method, as too uncertain. *See, e.g.,* Order Granting Def.'s Mot. for J.M.L. 5-12.

As this Court has stated, effective antitrust enforcement demands that "any just and reasonable estimate" of damages be sufficient. *L.A. Mem'l Coliseum Comm'n,* 791 F.2d at 1360. Reverse engineering the jury award to scrutinize the details of the inputs the jury may have used imposes a standard of precision made impossible by Defendants' scorched earth elimination of competitive market conditions. By focusing on exactitude rather than general reasonableness, the district court's approach rewards the thoroughness of Defendants' anticompetitive conduct. The Court should correct this wrong and clarify that the district court's analysis of the jury award is mistaken.

ARGUMENT

I. The District Court Misapplied this Circuit's Standard for Proof of Damages in Jury Awards

The Supreme Court has held that "there is a clear distinction between the measure of proof necessary to establish the fact that

petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). The latter is governed by a far more relaxed standard. The jury may not award a damages amount based on "mere speculation or guess," but it may do so "as a matter of just and reasonable inference" even though "the result be only approximate." *Id. See also Bigelow*, 327 U.S. at 264 ("[T]he jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.").

A jury's damages award may be a just and reasonable approximation, without precision, for two reasons, both rooted in basic principles of equity and justice. First, "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566–67 (1981). In that situation, "[t]he wrongdoer is not entitled to complain that [the amount of damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is

responsible for making, were otherwise." *Story Parchment*, 282 U.S. at 562.

Second, "a wrongdoer should not profit from uncertainty caused by his own wrong." *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 73 (9th Cir. 1979). To deny any recovery to victims and allow the defendant to keep its ill-gotten gains would "enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite depredation. Such is not, and cannot be the law . . . ." *Story Parchment,* 282 U.S. at 565.

Consistent with Supreme Court precedent and its emphasis on justice and equity, the Ninth Circuit has adopted a "relaxed" standard for proving damages in private antitrust actions. *Image Tech. Servs., Inc. v. Eastman Kodak Co.,* 125 F.3d 1195, 1221 (9th Cir. 1997). In *Los Angeles Mem'l Coliseum Comm'n v. National Football League*, the Court clarified that a "jury's finding of the amount of damages must be upheld unless the amount is 'grossly excessive or monstruous,' clearly not supported by the evidence, or 'only based on speculation or guesswork.'" 791 F.2d at 1360. In antitrust cases specifically, the Court noted, "a

lesser level of proof is needed to support the amount of damages than to support the fact of antitrust injury." *Id.*

In that case, some of these same Defendants asked the court to re-visit the jury's damage award for sufficient proof of causal links between the "NFL's antitrust violation and certain elements of the alleged damages." *Id.* at 1366. This Court refused. While it acknowledged that some elements of the damage estimate, like lost profits from unbuilt luxury boxes, may have been unfounded, the Court explained that such a piece-by-piece examination of the damages finding was neither necessary nor appropriate. "Even a total inadequacy of proof on isolated elements of the damage claims submitted to a jury," this Court wrote, "will not undermine a resulting aggregated verdict which is nevertheless reasonable in light of the totality of the circumstances." *Id.* Instead, evidence "including attendance and seat price estimates" offered by plaintiffs was sufficient to determine that the verdicts "were in the range sustainable by the proof." *Id.* Indeed, the only situation this Court offered as grounds for intervention was if the jury's damages award were to "exceed[] the maximum amount sustainable by the probative evidence." *Id.*

The district court's alternative judgement as a matter of law relied on exactly the kind of piece-by-piece, input-by-input analysis that this Court rejected in *L.A. Mem'l Coliseum Comm'n*. Rather than looking at the damages award as a whole, as this Circuit instructed, it delved into the individual elements of the calculation. The district court hypothesized what figure the jury used for the price actually paid by subscribers and the figure it used for subscription prices in the "but-for world." The district court set aside the damages finding because it did not agree with those hypothetical numbers. But the jury never disclosed what figures it actually used, and it was never required to do so. And critically, the district court never examined the total amount of the damage award to determine whether it would exceed the amount justified by the evidence presented, as this Circuit requires.

None of the cases cited by the district court support deviating from the *L.A. Mem'l Coliseum Comm'n* standard. Most obviously, the circuit-level cases invoked, *In re First All. Mortg. Co.*, 471 F.3d 977 (9th Cir. 2006), and *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301 (Fed. Cir. 2009), were not antitrust cases. Those decisions, involving a breach of contract and a reasonable royalty in a patent case, respectively, arose in

a quite different set of circumstances than the antitrust damages analysis in *L.A Mem'l Coliseum Comm'n.*

That context matters. The antitrust cases more directly implicate the principle, endorsed by the Supreme Court, that wrongdoers should not benefit from the uncertainty they created. The damage assessments here and in *L.A. Mem'l Coliseum Comm'n* were made more difficult by the broad, market-wide effects of the defendants' efforts to thwart competition. That is not true of either of the other cases. But even assuming the nature of the misconduct did not matter to the standard of review, the situations are not comparable.

In *In re First All. Mortg. Co.*, the jury was presented with two expert damage calculations—each based on a different legal theory of recuperable damages: "benefit of the bargain" and "out of pocket" expense. As a matter of law, only one of those theories was correct to apply in the case. So even though the jury's award split the difference between the two estimates, that averaging was not the problem. The issue instead was that the higher expert estimate was based on an incorrect legal theory and could therefore play no justifiable role in the damages assessment. Aside from the faulty higher estimate, the only

evidence the jury heard to support the damages amount was the other, lower estimate, which the award significantly exceeded. *See* 471 F.3d at 1001.

Notably, the *First Alliance* court's focus on the apparent precision of the award amount was not the invitation to reverse engineer a jury's work that the district court here took it to be. What mattered to the court's analysis was that the award exceeded the amount of the only viable damages estimate the jury had before it. The re-tracing of how the jury reached the excessive number was simply a means to understand why the jury award went above the only legally justified estimate it was offered. *Id.*

In *Lucent Techs.*, the Federal Circuit rejected a lump-sum award that exceeded any lump-sum estimates the jury was presented. Tellingly, before analyzing the award, the court was careful to distinguish the case by noting it was "not an instance in which the jury chose a damages award somewhere between maximum and minimum lump-sum amounts advocated by the opposing parties." 580 F.3d at 1332. If that had been the case, the Federal Circuit explained, the jury

would be free to reject both estimates and instead choose an intermediate sum without inviting further scrutiny. *Id.*

Instead, the jury in *Lucent Techs.* was presented with two estimates based on entirely different methods of calculating a reasonable royalty—a lower one based on a lump-sum payment and a higher one based on a running royalty. The jury, instructed to indicate which methodology it was applying, had checked the box for lump-sum payment. *Id.* at 1325. After explaining why a lump-sum payment cannot be equated to a running royalty, the court examined whether there was any evidence other than the inapplicable running royalty estimate that the jury could have used to support a lump-sum award higher than the estimate presented at trial. It set aside the award only when it concluded there was not. *Id.*

What all three of these cases emphasize, and the lesson the district court here missed, is how infrequent second guessing a jury's damage award should be. In *Lucent Techs.,* the court was careful to note that "most jury damage awards reviewed on appeal have been held to be supported by substantial evidence." 580 F.3d at 1336. In *In re First All. Mortg. Co*, this Court was even more emphatic, noting that a "jury's

award of damages is entitled to great deference" and explaining that its decision reflects a "rare" case based on improperly considered evidence. 471 F.3d at 1001. In *L.A. Mem'l Coliseum Comm'n,* the Court reiterated that there can be 'only limited review of jury damages awards, in order to avoid encroaching upon the jury's proper function under the Constitution." 791 F.2d at 1365.

This case was only unusual because Defendants presented the district court with a reverse engineering of the award that the court found "compelling." Order Granting Def.'s Mot. for J.M.L. 14. The danger with the district court's rule here is that there is no way to know how often defendants will attempt such a calculation or when it might be compelling enough to sway the court. Certainly, with the resources of the typical antitrust defendant, one can imagine that it could become standard practice for defendants to try to do the same.

The three cited circuit cases are careful to draw a bright line between what is reviewable and what is not. In each case, the courts confined their inquiry to whether the damage award as a whole was reasonable. Scrutiny of the award's component parts was limited to the rare instances in which the proffered evidence that could have justified

the level of the total award is a high-end estimate that was improperly considered as a matter of law. In one case, it was based on the wrong theory of damages and in the other it was excluded by the method the jury clearly indicated that it was using. Careful jury instructions can ensure that such instances truly are rare.

In contrast, the approach taken by the district court here has no limiting principle. Any damages award is subject to heightened scrutiny by a judge provided it can be reverse engineered into hypothetical component parts, even if it otherwise falls within a reasonable range. If defendants can find a formula to apply, the district court analysis suggests, it is a license to look beyond whether the award is "generally supported," and question each of the particular steps the jury took to get there. In that case, nearly every jury award could be challenged, not just those that arguably exceed the justified amounts. This cannot be the rule in a Circuit that has repeatedly emphasized restraint in interfering with jury damage awards.

II. The District Court's Approach to Jury Damage Awards Impinges on the Constitutional Right to a Jury Trial

To vacate the jury award here supplants the jury's work in evaluating the case: it throws out the jury's finding of damages and

absolves plaintiffs of liability for antitrust wrongs the jury reasonably found they committed. In so doing, the district court's review of the jury's award not only defies precedent; it also impinges dangerously on the constitutional right to a jury trial.

The Seventh Amendment of the United States Constitution provides that "[i]n suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. Actions for private treble damages under the Sherman Act fall squarely under these core protections. *See Beacon Theatres v. Westover*, 359 U.S. 500, 508-09 (1959). *See also* Cavanagh at 7–8 (describing the legal history affirming Constitutional protections for jury trial in private antitrust damage actions). Indeed, attempts to limit the scope of the jury trial in cases like this one have routinely been denied. See, e.g., *In re U.S. Fin. Sec. Litig.,* 609 F.2d 411, 432 (9th Cir. 1979) (declining to recognize a complexity exception to the Seventh Amendment's right to jury trial).

Courts must therefore be exceptionally careful making decisions that impinge upon that right. As the Supreme Court has noted, "maintenance of the jury as a fact-finding body is of such importance

and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 US 474, 486 (1935).

Setting a just damages amount is a core part of the jury role that the Seventh Amendment protects. As one court put it, the centrality of the jury trial in our legal system comes out of values "deeply rooted in our notions of democracy—which require that factual decisions affecting the life, liberty and property of litigants would, at least at [the individual's] option, be made by a cross section of the community." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.* 478 F. Supp. 889, 938 (E.D. Pa. 1979). Damage awards are the criteria that bring a case under the protections of the Seventh Amendment. They are exactly the kind of property-affecting actions the Constitution entrusts the jury, as a body representative of the community, to decide.

This Court has already drawn a direct connection between judicial interference in jury damage awards and the right to a jury trial. The strict constraints on judicial review of jury awards, it has explained, are necessary "to avoid encroaching on the jury's proper function under the Constitution." *L.A. Mem'l Coliseum Comm'n.,* 791 F.2d at 1365. Failing

to respect those limits is, in effect, "to supplant the jury's evaluation of the complex and conflicting evidence with [the court's] own." *Id.* at 1366. The constitutional right to a jury trial does not allow a court that freedom.

The district court here did not exercise the requisite care the Seventh Amendment demands. It undid the remedy fashioned unanimously by the jurors after they sat through three weeks of trial, heard the testimony of dozens of witnesses, and deliberated for five hours over two days. And the court vacated the award—and also dismissed, without explanation, the possibility of injunctive relief, see Pls.' Br. at 7—despite acknowledging the jury reasonably found an illegal conspiracy occurred. As a result, it substitutes in its entirety an individual judge's view of justice for the collective views of the eight jury members tasked by the Constitution with assessing the facts. This Circuit has made clear that such preemption is not consistent with the right to a jury trial nor with the related standards of proof, so long as the award is "within the range sustainable by the proof." As a result, the district court's analysis of the jury award cannot stand.

III. An Overly Interventionist Review of Jury Awards Frustrates the Goals of the Antitrust Laws

The district court's interventionist review of the jury's damage award implicates more than the basic right to a jury trial. It also compromises the goals of the antitrust laws in at least two ways. Supplanting the jury as fact-finder undermines the democratic purposes of the antitrust laws, and imposing an overly stringent standard of proof subverts their deterrent effect.

A. The Integrity of Jury Trials Is Inseparable from the Antitrust Laws' Democratic Goals

The Seventh Amendment right to a jury trial takes on special importance in antitrust cases. To be sure, the right is a core foundational value of our legal system, and the use of juries as fact-finders always "promotes democratic values and lends legitimacy to the judiciary's function of resolving legal disputes among citizens." Cavanagh at 6. But in Sherman Act cases, the right touches our very "charter of economic liberty." *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 4 (1958).

The Sherman Act was designed to create an "environment conducive to the preservation of our democratic political and social

institutions." *Id.* Indeed, "[p]ublic and private antitrust enforcement were set up to enforce the law in a way that would advance democratic goals—to deal with concentrations of economic power and to police business behavior that exploited consumers and excluded competitors." First & Waller at 2573.

In part to serve those goals, the Sherman Act created a right of private action alongside the government power to prosecute anticompetitive conduct. As Professors Harry First and Spencer Weber Waller explain, that dual enforcement power is a democratic check built into the antitrust enforcement scheme: "together, these two affirmative rights placed decisional power in antitrust cases squarely in the hands of judges and juries, the former often viewed as the least democratic branch of government and the latter often viewed as representing the populace from which it was drawn." *Id.* at 2546.

The balance of power envisioned in the statute has not always matched reality. First and Waller find that modern antitrust enforcement strays from its statutory origins by putting "too much control in the hands of technical experts, moving antitrust enforcement too far away from its democratic roots." *Id.* at 2544. One aspect of that

technocratization is the tendency to favor judicial decision-making over jury trial outcomes. *Id.*

The available statistics on antitrust damages trials support the academic concerns about waning jury influence. For example, "of the more than 200 private cases filed against Microsoft in the aftermath of the governments' monopolization case, only two ever went to trial before a jury, and only one to a conclusion." *Id.* at 2553. Recent federal court workload statistics tell a similar story on a broader scale. An academic analysis of the data from 2002-2017 estimates that, on average, a shockingly tiny 1% of antitrust cases brought annually are ever tried in court. *See* Daniel Crane, *Private Enforcement of U.S. Antitrust Law—A Comment on the Data,* CPI Antitrust Chronicle (February 2019).

The retreat of the jury's sway comes at the price of antitrust's democratic values. As First and Waller explain, juries have a democratizing influence because they are composed of non-experts, forcing lawyers to explain claims and defenses in ways that lay people understand, using comprehensible language that is "not cloaked in professional jargon." First & Waller at 2552. And it is closely linked to the democratizing effects of private antitrust damages litigation

generally. "Private litigation is not in the control of government enforcers nor antitrust experts […] Private citizens [and private businesses] do not care so much for antitrust theory as they care about getting damages for anticompetitive conduct that has harmed them[…]" *Id.* at 2555.

At risk in the declining influence of the jury is not just a version of the "antitrust enterprise" that average lay people can understand, but also the version of antitrust enforcement that best serves them. First and Waller observe that technocracy, by making antitrust less "politically responsive," tends to promote a "laissez-faire" approach to enforcement that suits big business better than small businesses and consumers. *Id.* at 2568. Protecting the jury's role as fact-finder "rebalances" that tendency. *See Bernstein v. Universal Pictures, Inc.,* 79 F.R.D. 59, 65 n.4 (S.D.N.Y. 1978) ("The jury is like rock music. Classical theory frowns; the masses applaud. And in a democracy the felt need of the masses has a claim upon the law."). It encourages decision-making that is truer to the statute while also boosting the legitimacy and the effectiveness of the antitrust laws. *Id.* at 2572-3.

On the other hand, standards that make it easier to set aside the role of the jury as fact-finder, particularly with respect to the damage awards that drive private litigation, increase the gap between antitrust enforcement and the general public. This matters because that public is made up of the same people—the consumers, the small business owners, and the employees—the antitrust laws were designed to protect. An important perspective on the facts presented at trial is lost if we discount the collective judgement of a jury representing a cross-section of experiences. In this case, for example, the jury necessarily brings a variety of experiences as sports fans and as consumers of in-home entertainment. To disregard their perspectives on the facts is to lose, as Professor Cavanagh describes it, "a window into community values." Cavanagh at 39. The less democratic, less representative enforcement of the antitrust laws that results is, by its own standards, less effective enforcement.

B. An Overly Demanding Review of Jury Awards Compromises, and in Some Instances Reverses, the Deterrent Effect of the Antitrust Laws.

Antitrust enforcement aims to compensate the consumers harmed by anti-competitive conduct and to restore competitive conditions. But it

is equally targeted at deterring future violations, either by those found guilty of anticompetitive conduct or by others who may be contemplating it. Damage awards are the primary tool for deterring civil antitrust violations.

As the drafters of the Sherman Act acknowledged when they provided for treble damages, many antitrust violations will go undetected and unpunished. Current studies suggest the problem is even worse than the initial drafters imagined. While it is impossible to know exactly how many conspiracies, for example, operate undiscovered every year, a wide range of different studies have all estimated that significantly less than a third of those antitrust violations are detected. *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays,* 34 Cardozo L. R. 427, 462–66 (2012) (cataloguing studies estimating probabilities of cartel detection ranging from 13%-30%).

Meanwhile, violating the antitrust laws can be very profitable. Here, for example, the Defendants received more than $15 billion from DirecTV for its anticompetitive package deal. Basic game theory tells us that if the expected profit from the violation is greater than the

potential for damages, risk-adjusted for the (un)likelihood of detection, a company will be highly incentivized, perhaps irresistibly so, to engage in anticompetitive conduct.

Too demanding a standard for proving damages, and judicial hesitancy to accept high jury damages awards, reduces the likelihood that even acknowledged antitrust violators will have to pay in full for their conduct. This unavoidably undoes the deterrent effect. This case, where the district court decision means the defendants would pay nothing, offers an extreme example.

Academics and enforcers sometimes debate whether high damage awards risk over-deterring potentially legal conduct. Studies attempting to measure the levels of deterrence against consumer harm in cartel prosecutions suggest that under-deterrence is far more of a problem than over-deterrence. *See* Connor & Lande at 478. But the general debate on over-deterrence, whether justified or not, is irrelevant when it comes to the standard of proof for damages. Rejecting damage awards, especially in cases where juries have reasonably found illegal conduct occurred, does nothing to prevent over-deterrence of legal

conduct and is particularly likely to blunt antitrust enforcement's deterrent effect against illegal conduct.

But the more pernicious issue affecting deterrence was identified by the Supreme Court as early as its 1946 decision in *Bigelow*. There, the plaintiffs sought damages for a conspiracy that excluded them from access to movie distribution. The lost profits they sought were based on conditions of purchase in effect before they were illegally denied access. The defendants argued that plaintiffs could not show that the conditions of purchase after the restraint would have been the same as before and the damages were thus too speculative and uncertain. The Court observed that what the conditions of purchase would have been "but for" the illegal restraint was only uncertain because of the defendants' misconduct. The Court concluded that the standard of proof for damages should not allow defendants to benefit from the uncertainty they themselves created. Not only would this "enable the wrongdoer to profit by his wrongdoing at the expense of his victim" but it also "would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain." 327 U.S. at 265.

In other words, a demanding standard may perversely incentivize antitrust violators to be more thorough in their anticompetitive conduct so as to destroy the competitive benchmarks on which to model a world "but for" the illegal actions. For example, price-fixing conspirators might have an incentive to expand the conspiracy to include all competitors in a market so the collusive price cannot be compared to a non-collusive one. Similarly, a monopolist may be motivated to drive all competitors out of a market to eliminate any evidence of what competitive pricing or output or quality would look like.

Indeed, there is some indication that such an incentive is already at work in this case. The breadth and comprehensiveness of the illegal agreements to suppress out-of-market Sunday football telecasts so thoroughly eliminated competition that plaintiffs' experts had to model the "but for" world by comparison to other analogous markets. And ironically, Defendants have succeeded at the district court level in attacking these yardstick approaches taken by plaintiffs' experts as too speculative. That "perversion of fundamental principles of justice" should not have worked. *Story Parchment*, 282 U.S. at 563.

CONCLUSION

For all the reasons outlined above, the Court should clarify that the district court's review of the jury award verdict does not comply with the Ninth Circuit's standard for proof of damages or with the constitutional right to a jury trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate ACMS system. Counsel for all parties to the case are registered ACMS users and will be served by the appellate ACMS system.

s/ *Kathleen W. Bradish*

Dated: January 17, 2025

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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