Case Nos. 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 OF AMICI CURIAE CHAMBER OF PROGRESS, NETCHOICE, CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, AND ACT | THE APP ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, *Amici Curiae* Chamber of Progress, Civil Justice Association of California, NetChoice, and ACT | The App Association state that they have no parent corporation and that no publicly held company holds 10% or more of their stock.

DATED: June 17, 2025

/s/ William S. Hicks
William S. Hicks

STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

1. No party's counsel authored this brief in whole or in part.

2. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief.

3. No person—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

DATED: June 17, 2025

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I. INTEREST OF AMICI CURIAE

Chamber of Progress is a tech-industry coalition devoted to a progressive society, economy, workforce, and consumer climate. Chamber of Progress backs public policies that will build a fairer, more inclusive country in which the tech industry operates responsibly and fairly, and in which all people benefit from technological leaps. Chamber of Progress seeks to protect Internet freedom and free speech, to promote innovation and economic growth, and to empower technology customers and users.

Chamber of Progress's work is supported by its corporate partners, but its partners do not sit on its board of directors and do not have a vote on or veto power over its positions. Chamber of Progress does not speak for individual partner companies, and it remains true to its stated principles even when its partners disagree.

The Civil Justice Association of California ("CJAC") is a nonprofit organization whose members are businesses from a broad cross section of industries. CJAC's principal purpose is to educate the public about ways to assure that our civil liability laws are fair, efficient, certain, and uniform. Toward this end, CJAC regularly appears as amicus curiae in numerous cases of interest to its members, including those that concern class actions and damages.

NetChoice is a national trade association of online businesses that share the goal of promoting free enterprise and free expression on the Internet. A list of NetChoice's members is available at: https://tinyurl.com/yuwv2eat. NetChoice fights to ensure the internet remains innovative and free. Toward those ends, NetChoice engages in litigation, amicus curiae work and political advocacy.

ACT | The App Association is a not-for-profit global policy trade association for the small business technology developer community. Our members are entrepreneurs, innovators, and independent developers within the app ecosystem that engage with verticals across every industry. The value of the ecosystem the App Association represents—which we call the app economy—is approximately $1.8 trillion and is responsible for 6.1 million American jobs, while serving as a key driver of the $8 trillion internet of things (IoT) revolution.[1]

Here, Amici and their respective members and partner companies share a strong interest in promoting the fair and efficient adjudication of antitrust cases, and in ensuring that antitrust remedies do not inadvertently thwart competition and innovation.

Amici have concurrently filed an unopposed motion for leave to file pursuant to Fed. R. App. P. 29(a)(3).

[1] App Association members lead in developing innovative applications and products across consumer and enterprise use cases.

II. INTRODUCTION

Amici submit this amicus brief because of the importance of reaffirming district courts' critical gatekeeping function in antitrust cases. When performed properly, such gatekeeping reduces the risk of outsized damages awards untethered to reliable evidence and helps to minimize the threats such awards pose to competition, innovation, and economic growth.

In the proceedings below, the District Court properly exercised its gatekeeping responsibility to vacate a ten-figure damages verdict that was not based on relevant, admissible evidence. In a detailed and carefully reasoned opinion,[2] the District Court correctly applied Rule 702 and *Daubert* to exclude trial testimony presented by Plaintiffs' two economic experts concerning what would have happened but for the alleged anticompetitive conduct. Because key assumptions underlying those opinions were unfounded or unexplained, the District Court correctly excluded the testimony as unreliable. And without the excluded testimony, no reasonable jury could have found class-wide injury or damages.

Alternatively, the District Court found that even had the relevant testimony been admitted, the jury's damages award could not stand because it was not supported by relevant evidence. This too was entirely proper. Juries' damages

[2] 1-ER-9-24 (hereinafter, "Order").

awards are generally accorded great deference, but that deference has limits. In antitrust cases, plaintiffs are entitled only to damages caused by the anticompetitive conduct, and those damages must be based on "relevant data," not "speculation or guesswork."[3] This requirement is well established, but courts rarely have occasion to apply it post-verdict because juries typically provide little insight into their decision-making. This case presents a rare exception. As the District Court explained, the basic arithmetic underlying the jury's specific damages award (calculated down to the penny) makes clear that the jury rejected Plaintiffs' models and calculated damages using inputs not tied to the record.

Moreover, a reversal under these circumstances would create a dangerous precedent lowering the reliability threshold for admitting expert testimony in antitrust cases, permitting the enforcement of unsupported damages awards, and discouraging district courts from performing their critical gatekeeping role.

The predictable effects would be profoundly negative:

- more marginal or frivolous antitrust lawsuits;
- reduced innovation and risk-taking;
- less competition in the marketplace; and
- diminished economic growth

[3] *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946).

A competitive marketplace that fosters innovation and economic growth depends on a legal system that awards antitrust damages based only on reliable and admissible evidence. Accordingly, this case provides this Court a critical opportunity to reaffirm the important gatekeeping role that district courts must play in antitrust cases.

III. ARGUMENT[4]

A. Balance in the antitrust system requires courts to ensure that damages verdicts are based on reliable evidence.

"Antitrust's purpose is to promote competition, which it does by encouraging procompetitive structures, and intervening selectively when practices pose a genuine threat to competition."[5] Ideally, the private enforcement of antitrust laws should deter anticompetitive conduct and fairly compensate the injured, while minimizing error costs and overdeterrence.

In practice, however, these goals are difficult to achieve. Antitrust cases are factually complicated, and trials often turn on the jury's evaluation of highly technical testimony offered by dueling experts.[6] In many other systems, the

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[4] Throughout this brief, emphases were added to quotations while internal quotation marks, citations, footnotes, brackets, ellipses, and the like were omitted from them.

[5] Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution*, Cambridge and London: Harvard University Press (2005) at 78 [hereinafter, "Hovenkamp"].

[6] Hovenkamp at 77-79.

adjudication of such disputes is left to specialist tribunals. Here, however, lay juries decide questions of fact, including damages. By its very nature, this adjudicative framework creates a high risk of error in antitrust cases. As Professor Hovenkamp has noted, "jurors remain a very weak link in a system where most of the relevant evidence is economic and technical."[7]

Under the best of circumstances, antitrust juries have a difficult assignment. Reasonable minds often differ about the legality and impact of alleged anticompetitive conduct. And to resolve such issues, juries generally must choose between competing experts whose testimony they struggle to understand.

For antitrust defendants, the news is worse: the antitrust laws provide for treble damages for prevailing plaintiffs, thus creating the risk of a crippling damages award for conduct that is arguably not even anticompetitive.[8] "Treble damages provide a powerful incentive for parties to detect and sue for antitrust violations, and they discourage illegal conduct by increasing the probability of suits and the cost to the violator."[9] But "[w]hen the effects of

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[7] Hovenkamp at 63.

[8] "Treble damages are highly punitive, often running into the hundreds of millions of dollars." Hovenkamp at 65; *see also* Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 Cal. L. Rev. 797, 811 (1987) (noting that treble damages may "encourage[e] baseless or trivial suits" and "discourage[e] legitimate competitive behavior.") [hereinafter, "Turner"].

[9] Turner at 811.

business practices are ambiguous and judicial fact finding imperfect, harsh penalties can deter procompetitive conduct."[10]

These risks are compounded when juries make decisions based on unreliable expert testimony. In such cases, there is an intolerable risk of error and (for defendants) a potentially catastrophic damages award not based on market realities. Such errors can lead to overdeterrence, which may "chill aggressive competition and innovation."[11] As the Supreme Court has explained, "[m]istaken inferences and the resulting false condemnation are especially costly, because they chill the very conduct the antitrust laws are designed to protect."[12]

Overdeterrence costs resulting from such errors take a multitude of forms depending on the type of conspiracy or monopolization theory alleged. For instance, false convictions for predatory pricing provide incentives "to avoid aggressive price competition, which diminishes the welfare of consumers by generating consumer surplus losses."[13] In contrast, "false convictions for capacity

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[10] Hovenkamp at 66; *see also id.* at 59.

[11] *See* Edward D. Cavanagh, *The Private Antitrust Remedy*, 41 Loy. U. Chi. L. J. 629, 641 (2010); Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. Cal. L. Rev. 657, 681 (2001) (error can "lead to overdeterrence costs if it causes actors to go beyond the reasonable level of precaution or forbearance in avoiding harms") [hereinafter, "Cass"]; *see also id*. at 699-700, 703-706.

[12] *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko*, 540 U.S. 398, 414 (2004).

[13] Cass at 704.

expansion deter dominant firms from making aggressive efforts to expand into new markets or to meet increases in demand for their products."[14] But regardless of the antitrust theory, when large damages awards are not supported by competent evidence, the effect is to increase the pressure on innocent defendants to settle before trial, to encourage the filing of marginal or frivolous suits, and to deter some procompetitive practices that might be misconstrued by a jury.

Accordingly, balance in our antitrust system requires trial courts to play an active gatekeeping role to ensure, to the maximum extent possible, that jury verdicts are based on reliable expert testimony and relevant facts. Despite their "longstanding responsibility to screen expert testimony, and to prevent unfounded or unreliable opinions from contaminating a jury trial,"[15] generalist judges sometimes hesitate to scrutinize the reliability of expert testimony in antitrust matters.[16] But the only alternative—transferring to juries the obligation to make reliability determinations—is both unlawful and likely to produce huge error costs.

Moreover, district courts' gatekeeping responsibility does not end when a jury renders its verdict. As discussed below, to ensure that the verdict is based on admissible evidence, courts can and should exclude unreliable expert testimony

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[14] *Id*.

[15] *Elosu v. Middlefork Ranch Inc*., 26 F.4th 1017, 1020 (9th Cir. 2022).

[16] Hovenkamp at 80-81.

post-trial. In resolving post-trial motions under Rule 50, courts should also perform a meaningful analysis to ensure that the jury's verdict is supported by sufficient evidence in the record. Finally, district courts should not hesitate to vacate (or reduce) damages awards that are clearly the product of guesswork or speculation.

1. Judicial gatekeeping of unreliable expert testimony is particularly critical in antitrust actions, including post-trial.

To establish liability for an alleged antitrust violation, plaintiffs must prove (among other things) an injury flowing from that violation and measurable damages.[17] In addition, plaintiffs must provide a factual basis from which the jury can make a "reasonable and just estimate" of damages.[18]

When such evidence takes the form of expert testimony, *Daubert* and "Federal Rule of Evidence 702 require[] trial judges to ensure that any and all scientific testimony . . . is not only relevant, but reliable."[19] In 2023, Rule 702 was amended "to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology"[20] by clarifying the requirement that an "expert's opinion reflects a

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[17] *See Big Bear Lodging Ass'n v. Snow Summit, Inc.,* 182 F.3d 1096, 1101–02 (9th Cir. 1999).

[18] *Bigelow,* 327 U.S. at 264.

[19] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

[20] Fed. R. Evid. 702 advisory committee's note to 2023 amendment.

reliable application of the principles and methods to the facts of the case."[21] The amendment also added the specific requirement that a party seeking to introduce expert testimony demonstrate that it is more likely than not that the Rule's requirements have been satisfied.[22] And it stressed that "[j]udicial gatekeeping is essential because [] jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion . . . [and] determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support."[23]

Such judicial gatekeeping is especially critical to ensure jurors are not asked to assess the reliability of expert testimony. "Just as the district court cannot abdicate its role as gatekeeper, so too must it avoid delegating that role to the jury."[24] Indeed, "[i]t is just because [jurors] are incompetent for such a task that the expert is necessary at all."[25]

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[21] Fed. R. Evid. 702(d).

[22] Fed. R. Evid. 702.

[23] *Id*., advisory committee's note to 2023 amendment.

[24] *Est. of Barabin v. AstenJohnson, Inc*., 740 F.3d 457, 464 (9th Cir. 2014).

[25] Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40, 54 (1901).

Judicial gatekeeping is particularly important in antitrust, which "has had to confront serious problems of quality control."[26] "Antitrust suits are often complex" and commonly present "extraordinarily challenging" contested issues of fact (particularly on issues of causation and damages) that "boil down to matters of expert opinion."[27] Indeed, many antitrust cases turn entirely on expert testimony.[28]

In the antitrust context, judges sometimes hesitate to perform a vigorous gatekeeping role given the inherent "difficulty in understanding whether an expert's testimony is scientifically or technically valid."[29] But the "Supreme Court has obviously deemed [judges as gatekeepers] less objectionable than dumping a barrage of questionable scientific evidence on a jury, who would likely be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert's mystique."[30]

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[26] Hovenkamp at 78.

[27] *Id*. at 77.

[28] *See Dodge v. Cotter Corp*., 328 F.3d 1212, 1226 (10th Cir. 2003) (noting that because "the outcome of this case indisputably hinges on the testimony of experts," the Tenth Circuit had "specifically alerted the district court to the fundamental importance of properly performing the gatekeeper function)").

[29] Hovenkamp at 80.

[30] *Allison v. McGhan Med. Corp*., 184 F.3d 1300, 1310 (11th Cir. 1999).

Under the best of circumstances, "[m]aking juries choose among contending experts is . . . a problem-plagued exercise."[31] But these problems are magnified in antitrust cases when judges offload their gatekeeping responsibility to the jury. "No matter what we may think of a federal judge's qualifications to determine whether an economist's or statistician's testimony is 'good science,' a typical jury of laypersons is far, far less qualified."[32] Thus, "[a] judge's difficulty in understanding whether an expert's testimony is scientifically or technically valid should never be the basis for transferring the decision to a jury. Not only will the jury be less technically competent; it will also be less skilled in listening to experts, and more likely to be persuaded by things that are irrelevant to the issue."[33]

In antitrust cases, judges must therefore embrace their gatekeeping responsibility to evaluate meaningfully whether methodological flaws in damages calculations are issues that go to the admissibility rather than the weight of expert testimony. Although the Ninth Circuit has held that the "correctness" of an expert opinion is a matter of weight,[34] this Court has also stressed that "challenges that go

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[31] Hovenkamp at 61.

[32] *Id*.

[33] *Id*.

[34] *Messick v. Novartis Pharms. Corp*., 747 F.3d 1193, 1199 (9th Cir. 2014).

to the weight of the evidence are within the province of a fact finder" only "***[a]fter*** an expert establishes admissibility to the judge's satisfaction."[35]

Thus, before admitting expert testimony, the trial court must meaningfully assess whether the expert's methodology, and the application of that methodology, is sufficiently reliable. Indeed, the advisory committee's note to the 2023 amendment to Rule 702 makes clear that, while "many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility, such conclusions are an incorrect application of Rules 702 and 104(a)."[36]

Moreover, while trial courts often assess the admissibility of expert testimony before trial, the duty to exclude unreliable expert testimony applies equally during and even after trial.[37] Where, as here, unreliable expert testimony is excluded post-trial, judgment as a matter of law is properly granted if the remaining evidence does not provide a "legally sufficient evidentiary basis for a

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[35] *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co*., 752 F.3d 807, 814 (9th Cir. 2014).

[36] Fed. R. Evid. 702.

[37] *See, e.g., Goebel v. Denver & Rio Grande W. R.R. Co*., 215 F.3d 1083, 1087 (10th Cir. 2000) (the "district court may . . . satisfy its gatekeeper role when asked to rule on a motion *in limine*, on an objection during trial, or on a post-trial motion").

reasonable jury to find for [the opponent of the motion]."[38] "Inadmissible evidence contributes nothing to a legally sufficient evidentiary basis."[39] Accordingly, a jury verdict must be set aside if it is based on unreliable expert testimony properly excluded post-trial.[40]

2. In antitrust cases, the application of an "accepted methodology" is insufficient to satisfy Rule 702 and *Daubert* where it is not applied in a reliable manner.

In antitrust cases, experts commonly apply one or more "accepted methodology" when opining on closely contested issues such as causation and damages. For instance, in opining on what would have happened but for the alleged anticompetitive conduct, experts frequently employ the "yardstick" or "before-and-after" methods.[41] Indeed, some courts have held that these methods are the exclusive means by which antitrust damages can be measured.[42] Thus, in

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[38] Fed. R. Civ. P. 50(a)(1).

[39] *Weisgram v. Marley Co*., 528 U.S. 440, 454 (2000); *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 242 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.").

[40] *See infra* Section III.B; *see also Meister v. Med. Eng'g Corp*., 267 F.3d 1123, 1131-32 (D.C. Cir. 2001) (holding that district court did not abuse its discretion by excluding expert testimony post-trial and granting JMOL to defendants).

[41] *Eleven Line, Inc. v. N. Texas State Soccer Ass'n, Inc*., 213 F.3d 198, 207 (5th Cir. 2000) (noting that "the two most common methods of quantifying antitrust damages are the 'before and after' and 'yardstick' measures").

[42] Herbert Hovenkamp, *A Primer on Antitrust Damages*, Social Science Research

antitrust cases "untested methodologies are less likely to be the problem than assumptions that are unfaithful to the record."[43]

Unfortunately, in evaluating the admissibility of expert testimony in antitrust cases, courts have sometimes abdicated their gatekeeping role by "look[ing] at expert methodologies in a superficial manner, often at too high level of generality to make the determinations that *Daubert* had in mind."[44] As Professor Hovenkamp has explained:

> In too many cases the judge has observed that the expert relied on "statistics" or "regression analysis" and that statistical methodologies are generally accepted in the academic community, subjected to peer review, and have a known error rate. Of course, one could say the same thing about arithmetic and geometry. At a high enough level of generality virtually any methodology seems to pass muster under the *Daubert* criteria.[45]

This is a particular problem in antitrust because the "accepted methodologies" commonly applied by damages experts have inherent limitations that can be exploited to reach highly dubious conclusions.[46]

Network (2011) at 42 [hereinafter, "Hovenkamp Damages Primer"].

[43] Hovenkamp at 83.

[44] *Id*.

[45] *Id*.

[46] Hovenkamp at 86-89; Hovenkamp Damages Primer at 31 ("Obviously, the yardstick method has certain inherent limitations."); *id*. at 32 ("the 'before-and-after' method . . . can involve even more speculation."); Molly L. Zohn, *How Antitrust Damages Measure Up with Respect to the Daubert Factors*, 13 Geo. Mason L. Rev. 697, 718–25 (2005) (describing limitations of "yardstick" approach).

While trial courts who admit questionable expert testimony often encourage the parties to engage in "vigorous cross-examination," "that method is not well calculated to get juries to understand complex issues."[47] "The jury is more likely to be confused, or swayed by the rhetorical skills of either the expert or the cross-examining attorney."[48]

Accordingly, even when a challenged expert has applied an "accepted methodology," courts must perform a rigorous analysis into whether the expert has reliably applied that methodology. In such circumstances, the proposed testimony should be excluded if the expert's assumptions were unfounded or if the expert reached conclusions that "are unsupported by [his or her] basis and methodology."[49] Even when an expert has applied a widely accepted methodology, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."[50]

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[47] Hovenkamp at 84.

[48] *Id*.

[49] Fed. R. Evid. 702, advisory committee note 2 to 2023 amendment; *see also, e.g.*, *Hyland v. HomeServices of Am., Inc*., 2012 WL 12995647, at *8 (W.D. Ky. July 3, 2012) ("Although the yardstick method is a generally accepted method of proving damages in anti-trust cases, . . . that itself is insufficient to be admissible pursuant to Rule 702 and *Daubert*.").

[50] *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

For instance, the "yardstick" method used by Plaintiffs' expert, Dr. Rasher, may vastly overestimate the injuries flowing from alleged anticompetitive conduct if the factual foundations are flawed or unsupported. The "yardstick" method works by comparing the business affected by the anticompetitive conduct at issue to a comparable business that was not affected.[51] Thus, the reliability of testimony applying that method depends on the comparability of the chosen yardstick.[52] "To the extent that either the markets or firms being compared are dissimilar, the yardstick theory will not produce a trustworthy estimate of [damages]."[53] "[T]he business used as a standard must be as nearly identical to the plaintiff's as possible."[54]

Although the comparability determination is sometimes described as a question of fact for the jury,[55] courts have properly excluded expert testimony that did not sufficiently analyze factors impacting the comparability of the chosen yardstick. In *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc*., for instance, the plaintiff owned indoor soccer arenas and the plaintiff's expert used other soccer

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[51] *See Image Tech. Servs., Inc. v. Eastman Kodak Co*., 125 F.3d 1195, 1221 (9th Cir. 1997).

[52] *See Flintkote Co. v. Lysfjord*, 246 F.2d 368, 393 (9th Cir. 1957).

[53] Hovenkamp Damages Primer at 46.

[54] *Lehrman v. Gulf Oil*, 500 F.2d 659, 667 (5th Cir.1974), *cert. denied*, 420 U.S. 929 (1975).

[55] *See Image Tech. Servs*., 125 F.3d at 1221.

arenas owned by the plaintiff as a comparable yardstick.[56] The Fifth Circuit held that the district court should have excluded that testimony because the expert did not analyze various factors relevant to the issue of comparability: no evidence was offered regarding geographical location, the size or attractiveness of those facilities, the size and type of the market that they served, the relative costs of operation, the amounts charged, or the number years the facilities were run.[57] Other courts have likewise excluded "yardstick" testimony where the expert's failure to sufficiently analyze factors relevant to comparability rendered the testimony unreliable.[58]

3. Trial courts must not confirm damages verdicts that are unsupported by relevant evidence.

In antitrust cases, even when the trial court properly screens out unreliable expert testimony, a heightened risk exists that a jury's verdict may be informed by irrelevant considerations. As courts and scholars have noted, "the nature and

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[56] 213 F.3d 198 (5th Cir. 2000).

[57] *Id*. at 208.

[58] *See, e.g., El Aguila Food Prods., Inc. v. Gruma Corp*., 131 F. App'x 450, 453 (5th Cir. 2005) (affirming exclusion where expert "made no effort to demonstrate the reasonable similarity of the plaintiffs' firms and the businesses whose earnings data he relied on as a benchmark"); *Muffett v. City of Yakima*, 2012 WL 12827492, at *3 (E.D. Wash. July 20, 2012); *Loeffel Steel Prods., Inc. v. Delta Brands, Inc*., 387 F. Supp. 2d 794, 812–15 (N.D. Ill. 2005), *amended*, 2005 WL 8178971 (N.D. Ill. Sept. 8, 2005); *Everett Fin., Inc. v. Primary Residential Mortg., Inc*., 2017 WL 90366, at *7–8 (N.D. Tex. Jan. 10, 2017); *Harris Wayside Furniture Co. v. Idearc Media Corp*., 2008 WL 7109357, at *1–3 (D.N.H. Dec. 22, 2008).

complexity of the factual and legal issues raised in most antitrust cases are beyond [the jury's] competence."[59]

In his study of juror performance in five antitrust cases, for instance, Professor Arthur Austin concluded that the jurors were "overwhelmed, frustrated, and confused by testimony well beyond their comprehension."[60] "[A]t no time did any juror grasp—even at the margins—the law, the economics, or any other testimony relating to the allegations or defense."[61]

While the evidence suggests that "laypersons can be taught over long experience to become better at understanding and perceiving the defects of expert testimony . . . for most jurors this is a once-in-a-lifetime situation."[62]

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[59] *See, e.g.,* Turner at 812 (noting that "[j]uries cannot easily absorb and retain all of the evidence presented in the typical antitrust case"); *ILC Leasing Corp. v. IBM Corp* Peripherals., 458 F. Supp. 423, 447-48 (N.D. Cal. 1978) ("Throughout the trial, the court felt that the jury was having trouble grasping the concepts that were being discussed by the expert witnesses . . . . This perception was confirmed when the court questioned the jurors during the course of their deliberations and after they were discharged.").

[60] Arthur Austin, *The Jury System at Risk from Complexity, the New Media and Deviancy*, 73 Denv. U. L. Rev. 51, 54 (1995) [hereinafter, "Austin"].

[61] *Id.*; *see also* Daniel A. Crane, *Antitrust Modesty*, 105 Mich. L. Rev. 1193, 1200 (2007) ("Hovenkamp is quite correct that juries are singularly unqualified to resolve complex disputes over industrial organization matters and that economic experts sometimes take advantage of this.").

[62] Hovenkamp at 62.

"Consequently, there is a high likelihood that jury decisions will be influenced by emotional and other irrational factors . . . ."[63]

For instance, "[w]hen a jury does not understand what is going on it typically bases its decision on such things as rhetorical skills, personalities, or the expert's rate of pay."[64] Moreover, when evidence concerning subjective intent is presented, jurors may "have a difficult time distinguishing aggressive competitive intent from anticompetitive intent," and may be swayed by rhetoric that "is, or should be, irrelevant."[65] And some evidence exists that the size of the defendant's business may influence jurors' decisions in antitrust cases.[66]

Consequently, even under the most favorable conditions, there is a high risk in antitrust that the jury's decision may be based on a misunderstanding of the law or the facts, or its consideration of irrelevant factors. For defendants, this risk is magnified by the mandatory provision of automatic treble damages to the

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[63] Turner at 813; Austin at 56 ("The irony of expert testimony is that while no one can comprehend the message, experts nevertheless play a critical role in the result. Jurors pick over their testimony like buzzards on roadkill, trying to find some word or sentence to support an ideology.").

[64] Hovenkamp at 62; Austin at 54 ("When jurors tune out of substantive testimony, serious consequences follow[;] . . . the irrelevant becomes relevant.").

[65] Hovenkamp at 61.

[66] *See* Austin at 55-56; Barbara S. Swain & Dan R. Gallipeau, *What They Bring to Court: Juror Attitudes in Antitrust Cases*, 8 Antitrust 14 (1994) ("Many jurors walk into antitrust cases with a jaundiced eye toward a large corporate defendant.").

prevailing plaintiff,[67] which further increases the possibility of a large overdeterrent judgment that undermines the goals of antitrust. "Today the United States is virtually the only jurisdiction where competition policy issues are decided by lay juries in this fashion."[68]

Given these challenges, it is crucial that trial courts play an active role post-trial to review and set aside damages awards that are not sufficiently supported by relevant evidence. Rule 50 authorizes courts to direct or set aside a verdict if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the [nonmoving] party on that issue."[69] In antitrust cases, "Rule 50 provides a necessary check on the runaway jury, and courts should not hesitate to invoke this provision where appropriate."[70]

Similarly, Rule 59 authorizes trial courts to grant a new trial if the verdict is against the weight of the evidence. Although "[s]ome courts are reluctant to set aside jury findings under Rule 59 out of fear that any such action might be viewed as interfering with the right to trial by jury[,] [t]hat is clearly not the case."[71] "Rule

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[67] 15 U.S.C. § 15(a).

[68] Hovenkamp at 63.

[69] Fed. R. Civ. P. 50(a), (b).

[70] Edward D. Cavanagh, *The Jury Trial in Antitrust Cases: An Anachronism?*, 40 Am. J. Trial Advoc. 1, 36 (2016).

[71] *Id*.

59 is intended to police verdicts that should not stand, and courts should not hesitate to utilize it properly."[72]

The Supreme Court has also emphasized that damages verdicts in antitrust cases must be supported by relevant evidence. Although private antitrust litigants generally are not required to prove the amount of damages with mathematical certainty, the Court has stressed that "the jury may not render a verdict based on speculation or guesswork," but instead must reach "a just and reasonable estimate of the damage based on relevant data."[73]

Accordingly, in *Murphy Tugboat Co. v. Crowley*, the Ninth Circuit affirmed the district court's order setting aside the jury's damages verdict where that verdict lacked a sufficient evidentiary basis.[74] Because a "key assumption" of the plaintiff's economic expert lacked an evidentiary basis, the court found that "the jury could only have been engaging in unguided speculation" and therefore that

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[72] *Id*.

[73] *Bigelow*, 327 U.S. at 264; *see also Flintkote*, 246 F.2d at 393–94 ("something better is required to sustain a jury [damages] verdict than a mere interested guess"); *Home Placement Serv., Inc. v. Providence J. Co*., 819 F.2d 1199, 1205 (1st Cir. 1987) (explaining that the relaxed standard for proving the amount of damages "does not shift the burden of proof and that it is proper to indulge private antitrust plaintiffs only to the extent that there is evidence on the record from which a trier of fact could make a just and reasonable inference regarding the amount of damages").

[74] 658 F.2d 1256, 1257–63 (9th Cir. 1981).

there was "insufficient relevant data for the jury to make a just and reasonable estimate" of damages.[75]

Similarly, in *Home Placement Svc., Inc. v. The Providence Journal Co.*, the First Circuit affirmed the district court's determination that the evidence presented at trial was insufficient to support more than nominal damages.[76] There, the plaintiff attempted to use the "yardstick" approach to calculate damages but failed to establish that the chosen yardstick firm (its own Nashville franchisee) was sufficiently comparable to its Providence office. The First Circuit noted that the plaintiff had failed to account for various factors relevant to a determination of market comparability—*e.g.*, regional rental patterns, unemployment, colleges, and summer rentals—and had also failed to present evidence supporting an inference that the two firms conducted business in a similar manner.[77] Accordingly, the court concluded that the plaintiff had failed to "introduce[e] evidence sufficient to permit a trier of fact to ascertain the amount of damages by just and reasonable inference."[78]

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[75] *Id.* at 1263-64; *see also Flintkote*, 246 F.2d at 393–94 (explaining that "jury verdict[s] predicated on such [insufficient] evidence cannot stand").

[76] 819 F.2d at 1205.

[77] *Id.* at 1207-08.

[78] *Id.* at 1207.

Courts' insistence upon an evidentiary basis for damages promotes the goals of antitrust and minimizes error costs. "If damages lack an evidentiary basis, the substantive law [is] thwarted by permitting recovery where no demonstrable anticompetitive consequences occurred."[79] The myriad costs include overdeterrence of legitimate conduct, unfair punishment not grounded in actual harm, overcompensation of plaintiffs, and encouragement of frivolous or marginal suits. Accordingly, it is imperative that trial courts meaningfully review antitrust damages verdicts to ensure that they are based on relevant evidence.

B. This Court should affirm the District Court's Order and reaffirm the critical screening role that trial courts must perform in antitrust cases.

The District Court correctly applied the foregoing principles to exclude unreliable expert testimony and to set aside a multi-billion-dollar damages verdict based on guesswork and speculation. "Because of the fluid and contextual nature of the inquiry, district courts are vested with broad latitude to decide *how* to test an expert's reliability and *whether or not [an]* expert's relevant testimony is

[79] Roger D. Blair & William H. Page, *"Speculative" Antitrust Damages*, 70 Wash. L. Rev. 423, 462-63 (1995).

reliable."[80] The District Court's careful analysis shows that it properly exercised that discretion.[81]

1. Dr. Rascher

At trial, Dr. Rascher used the "yardstick" method to opine concerning what would have happened but for the alleged anticompetitive restraints. The District Court correctly excluded that testimony because Dr. Rascher relied on unfounded assumptions without accounting for "significant differences between college football and the outcome in his college football but-for world."[82] This is exactly the sort of judicial gatekeeping that the law demands.

Plaintiffs assert that the District Court erred by requiring Dr. Rascher to provide "definitive" testimony regarding the specifics of his but-for world,[83] but the District Court did no such thing. A key assumption underlying Dr. Rascher's but-for world was that out-of-market NFL telecasts would have been available for free to cable and satellite customers.[84] But Dr. Rascher's only support for that

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[80] *Murray v. S. Route Mar. SA*, 870 F.3d 915, 923 (9th Cir. 2017) (emphasis in original).

[81] This Court "owe[s] the [District Court's] ruling the deference that is the hallmark of abuse-of-discretion review and may not second-guess its sound judgments." *Id*.

[82] Order at 6-9.

[83] Dkt. 41 (hereinafter, "Opening Br.") at 40-41.

[84] Order at 5-6.

assumption was a further assumption that "Defendants would figure it out." As the District Court rightly noted, "FRE 702 certainly does not require a but-for world to perfectly reflect what the real world would have been [but] it certainly requires more than just saying market participants would have figured it out."[85]

Even when applying a generally accepted methodology, an expert's "assumptions and projections must rest on adequate bases, and cannot be the product of mere speculation."[86] Although *Daubert* "does not preclude testimony merely because it may be based upon an assumption, the supporting assumption must be sufficiently grounded in sound methodology[] and reasoning to allow the conclusion it supports to clear the reliability hurdle."[87] "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."[88] But *ipse dixit* testimony is what Dr. Rascher offered.

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[85] *Id*. at 6.

[86] *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1068 (5th Cir. 1985).

[87] *In re TMI Litig.,* 193 F.3d 613, 677 (3d Cir. 1999), *amended*, 199 F.3d 158 (3d Cir. 2000) (affirming the exclusion of expert opinion based on unfounded assumption); *see also, e.g.*, *McGlinchy v. Shell Chem. Co*., 845 F.2d 802, 807 (9th Cir. 1988) (upholding the exclusion of speculative expert testimony that "rests on unsupported assumptions and ignores distinctions crucial to arriving at a valid conclusion"); *Major League Baseball Props., Inc. v. Salvino, Inc*., 542 F.3d 290, 311 (2d Cir. 2008) ("[a]dmission of expert testimony based on speculative assumptions is an abuse of discretion").

[88] *Joiner*, 522 U.S. at 146.

Plaintiffs argue that the District Court erred "in assessing the purported differences between the college and NFL Markets" because "whether the yardstick market properly compares to the relevant market presents a question of fact for the jury."[89] But *ipse dixit* testimony does not raise a jury question. The District Court found that Dr. Rascher's unsupported assumptions could not "substitute for a model of a but-for world grounded in economic analysis,"[90] and went on to explain that "Dr. Rascher's failure to produce a coherent model is *particularly problematic* as there are significant differences between college football and the outcome in his college football but-for world."[91] Because Dr. Rascher accounted for these differences only "by proposing multiple variations of the but-for world, without analysis of how the economically rational actors would have acted,"[92] the result was an *ipse dixit* opinion untethered to an economic analysis of what would have likely occurred in the but-for world.

In any event, contrary to Plaintiff's assertion, it is appropriate and necessary for a court to evaluate an expert's chosen yardstick in evaluating admissibility. As discussed above, the yardstick method is inherently unreliable if the markets or

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[89] Opening Br. at 48.

[90] Order at 8.

[91] *Id*.

[92] *Id*.

firms being compared are dissimilar.[93] Thus, numerous courts have excluded expert testimony that failed to account for potential differences between the chosen yardstick and the business involved in the litigation.[94]

2. Dr. Zona

Nor did the District Court abuse its discretion in excluding Dr. Zona's testimony. As the District Court explained, Dr. Zona's opinion was predicated on an assumption that "the alternative distributor of Sunday Ticket, which Dr. Zona said was 'direct-to-consumer,' could not have required an underlying subscription and must have been able to sell Sunday Ticket as a standalone service—*i.e.*, streaming."[95] But because Dr. Zona never explained what a "direct-to-consumer" product entailed, the District Court was unable determine "whether a viable alternative distributor even existed during the class period," which was necessary to determine "whether [Dr. Zona's] but-for worlds without exclusivity were modeled reliably."[96] Plaintiffs simply failed to "demonstrate[s] to the court that it is more likely than not that [Rule 702's requirements had been satisfied]."[97]

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[93] *See supra*, Section III.A.2.

[94] *See supra*, Section III.A.2.

[95] Order at 10.

[96] *Id*. at 11.

[97] Fed. R. Evid. 702.

Plaintiffs argue that the "reasonableness" of Dr. Zona's assumption was for the jury to decide, but that presupposes that Dr. Zona defined his assumption such that its reasonableness could be assessed. The District Court found that Dr. Zona failed to do so, and its "sound judgment" is entitled to deference.[98]

3. The District Court's alternative order, vacating the jury's unsupported damages verdict, is not an abuse of discretion.

Although "the jury is not bound to accept the bottom line provided by any particular damages expert, [it] is bound to follow the law."[99] In this case, that means that the jury was required to follow the District Court's instructions regarding the proper calculation of damages and its admonition that such calculations must be based on "evidence and reasonable inferences," not "guesswork or speculation."[100]

In most cases, it is difficult to determine whether a jury has followed instructions such as these. This is a rare exception. As the District Court explained, the basic math underlying the jury's specific damages numbers shows that the jury rejected Plaintiffs' models, and that it calculated the awards using inputs that were "not tied to the record."[101] The general rule that juries' damages awards are entitled

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[98] *Murray*, 870 F.3d at 923.

[99] *In re First All. Mortg. Co.*, 471 F.3d 977, 1001–03 (9th Cir. 2006).

[100] Order at 15.

[101] *Id.* at 13-16.

to deference cannot override the Supreme Court's mandate that such awards be based on "relevant data," not "speculation or guesswork."[102]

Plaintiffs fault the District Court for "reverse engineering" the jury's damages award, but it is entirely proper to do so when the jury's arithmetic is obvious from its damages award.[103] Indeed, the Ninth Circuit sanctioned this approach in *In re First Alliance Mortgage Company*.[104]

Plaintiffs protest that its experts' damages models would have supported an even higher award, but the jury rejected those models and performed its calculation using inputs untethered to the record. To be affirmed, a jury verdict must both "find substantial support in the record *and* lie within the range sustainable by the proof."[105] That the jury awarded less than Plaintiffs sought does not allow the District Court to affirm an unsupported award.

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[102] *Bigelow*, 327 U.S. at 264.

[103] *See, e.g., In re First All. Mortg. Co*., 471 F.3d at 1002 ("That [the jury simply averaged the figures provided by the two damages experts] is beyond doubt: their verdict represents the average of the two figures to the dollar."); *Skalka v. Fernald Env't Restoration Mgmt. Corp*., 178 F.3d 414, 424–25 (6th Cir. 1999) ("the jury clearly arrived at Skalka's back-pay figure by adding the stipulated amounts of salary and non-pension benefits to his projected pension without accounting for the amounts Skalka had received in early retirement benefits and in income from other employment"); *Lucent Techs., Inc. v. Gateway, Inc.,* 580 F.3d 1301, 1336–39 (Fed. Cir. 2009) ("it is difficult to understand how the jury could have chosen its lump-sum figure down to the penny unless it used a running royalty calculation").

[104] 471 F.3d at 1002.

[105] *Los Angeles Mem'l Coliseum Comm'n*, 791 F.2d at 1366.

IV. CONCLUSION

In antitrust cases, rigorous judicial gatekeeping is essential to promoting vigorous competition, innovation, and economic growth. The District Court properly performed that function and its well-reasoned decision should be affirmed.

DATED: June 17, 2025 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify as follows:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) and Ninth Cir. Rule 32-1(a). The brief contains 6,729 words according to the word count of the word-processing system used to prepare the brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Ninth Circuit Rule 32-1(c).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a 14-point, proportionally spaced Times New Roman font.

Dated: June 17, 2025

/s/ William S. Hicks
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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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