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# [***N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=)

United States Court of Appeals for the Second Circuit

December 15, 2017, Argued; February 23, 2018, Decided

Docket No. 17-3585

**Reporter**

883 F.3d 32 \*; 2018 U.S. App. LEXIS 4343 \*\*; 2018-1 Trade Cas. (CCH) P80,285; 2018 WL 1021223

NORTH AMERICAN SOCCER LEAGUE, LLC, Plaintiff-Appellant, v. UNITED STATES SOCCER FEDERATION, INC., Defendant-Appellee.

**Prior History:** **[\*\*1]**Appeal from a November 4, 2017 order of the United States District Court for the Eastern District of New York (Brodie, J.).

North American Soccer League, LLC ("NASL") appeals from the denial of its motion for a preliminary injunction seeking a Division II designation pending the resolution of its ***antitrust*** case against the United States Soccer Foundation, Inc. ("USSF"). We evaluate NASL's motion under the heightened standard applicable to mandatory preliminary injunctions. NASL has not demonstrated a clear likelihood of success on the merits of its ***antitrust*** claim against USSF under *15 U.S.C. § 1*. Accordingly, we AFFIRM the order of the District Court denying NASL's motion for a preliminary injunction, and we REMAND the matter for further proceedings on the merits of NASL's claims.

[*N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc., 296 F. Supp. 3d 442, 2017 U.S. Dist. LEXIS 183202 (E.D.N.Y., Nov. 4, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PWN-GPD1-F04F-03DB-00000-00&context=)

**Core Terms**

league, conspiracy, district court, designation, soccer, preliminary injunction, status quo, procompetitive, anticompetitive, concerted action, direct evidence, requirements, parties, merits, season, ***antitrust***, quotation, courts, benefits, mandatory injunction, adverse effect, promulgation, injunction, stability, annual, argues, likelihood of success, competitive, Athletic, top-tier

**Case Summary**

**Overview**

HOLDINGS: [1]-Where after a men's soccer league was denied an application for a particular division, it sued the soccer federation contending that conspired with its membership and related entities in adopting, amending, and applying its standards in an anticompetitive manner to preclude the league and others from competing in the particular division, in violation of *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*, the league was properly denied a preliminary injunction because it did not sufficiently show its clear likelihood of success of the merits on its *§ 1* ***antitrust*** claim; [2]-In particular, it failed to show a conspiracy from this organizational decision, without more, and in any event, there was no showing of an unreasonable restraint since the federation's standards could be found to have a net pro-competitive effect or no competitive effect at all.

**Outcome**

Decision affirmed.

**LexisNexis® Headnotes**

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[***HN1***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=LNHNREFclscc1)[] **Standards of Review, Abuse of Discretion**



An appellate court reviews a district court's legal rulings de novo and its ultimate denial of a preliminary injunction for abuse of discretion. A district court abuses its discretion when it rests its decision on a clearly erroneous finding of fact or makes an error of law.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > Mandatory Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

[***HN2***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=LNHNREFclscc2)[] **Grounds for Injunctions, Balance of Hardships**



Courts refer to preliminary injunctions as prohibitory or mandatory. Prohibitory injunctions maintain the status quo pending resolution of the case; mandatory injunctions alter it. A party seeking a preliminary injunction must show (1) irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest. Because mandatory injunctions disrupt the status quo, a party seeking one must meet a heightened legal standard by showing a clear or substantial likelihood of success on the merits.

***Antitrust*** & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

***Antitrust*** & Trade Law > Sherman Act > Scope > Monopolization Offenses

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

[***HN3***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=LNHNREFclscc3)[] **Sherman Act, Claims**



*Section 1 of the Sherman Act* prohibits every contract, combination or conspiracy in restraint of trade or commerce. *15 U.S.C.S. § 1*. Thus, to establish a clear likelihood of success under its *§ 1* claim to obtain an injunction, a movant must show there is a contract, combination or conspiracy amongst separate economic actors pursuing separate economic interests such that the agreement deprives the marketplace of actual or potential competition.

***Antitrust*** & Trade Law > Sherman Act > Claims

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

***Antitrust*** & Trade Law > Sherman Act > Scope > Monopolization Offenses

[***HN4***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=LNHNREFclscc4)[] **Sherman Act, Claims**



For an arrangement to be a conspiracy under *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*, it must embody concerted action. Concerted action exists where there is an agreement between separate economic actors pursuing separate economic interests. The fact that the co-conspirators are capable, due to their separateness, of acting in concert is not sufficient. Proof of a conspiracy is required.

***Antitrust*** & Trade Law > Sherman Act > Claims

***Antitrust*** & Trade Law > Sherman Act > Scope > Monopolization Offenses

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

[***HN5***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=LNHNREFclscc5)[] **Sherman Act, Claims**



A plaintiff alleging a conspiracy under *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*, must offer direct or circumstantial evidence that reasonably tends to prove a conscious commitment to a common scheme designed to achieve an unlawful objective. Rarely do co-conspirators plainly state their purpose. As a result, courts often must evaluate circumstantial evidence of a conspiracy by weighing plus factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy. Courts should look for evidence that tends to exclude the possibility that the defendant was acting independently. Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of ***antitrust*** conspiracy.

***Antitrust*** & Trade Law > Sherman Act > Claims

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

***Antitrust*** & Trade Law > Sherman Act > Scope > Monopolization Offenses

[***HN6***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=LNHNREFclscc6)[] **Sherman Act, Claims**



Courts use the Monsanto-Matsushita framework for assessing conspiracies, under *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*, including those conspiracies provable by direct evidence. A plaintiff who can proffer direct evidence of a conspiracy should have no qualms with the Monsanto-Matsushita framework because direct evidence by definition shows the requisite concerted action. Direct' evidence must evince with clarity a concert of illegal action.

***Antitrust*** & Trade Law > Sherman Act > Claims

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

***Antitrust*** & Trade Law > Sherman Act > Scope > Monopolization Offenses

[***HN7***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=LNHNREFclscc7)[] **Sherman Act, Claims**



Organizational decisions do not inherently constitute *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*, concerted action. Not every action by a trade association is concerted action by the association's members. Indeed, even though a trade association by its nature involves collective action by competitors, a trade association is not by its nature a walking conspiracy. Rather, it is when a *§ 1* plaintiff establishes the existence of an illegal contract or combination that the plaintiff can proceed to demonstrate that the agreement constituted an unreasonable restraint of trade. Evidence should tend to show that association members, in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective.

***Antitrust*** & Trade Law > Sherman Act > Scope > Monopolization Offenses

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

[***HN8***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=LNHNREFclscc8)[] **Scope, Monopolization Offenses**



Direct evidence of an illegal contract, combination, or conspiracy satisfies *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*, concerted-action requirement.

***Antitrust*** & Trade Law > Sherman Act > Scope > Monopolization Offenses

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

[***HN9***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=LNHNREFclscc9)[] **Scope, Monopolization Offenses**



Only unreasonable restraints on competition violate *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*. Courts use one of two tests here. A restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be per se unreasonable, or because it violates what has come to be known as the 'Rule of Reason. ***Regulation*** of league sports is a textbook example of when the rule of reason applies. An abbreviated, "quick look" version of the rule of reason applies when no elaborate industry analysis is required to demonstrate the anticompetitive character of the challenged agreement.

***Antitrust*** & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

***Antitrust*** & Trade Law > Sherman Act > Scope > Monopolization Offenses

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

[***HN10***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=LNHNREFclscc10)[] **Exemptions & Immunities, Exempt Cartels & Joint Ventures**



There is a three-step rule-of-reason framework under *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*. First, a plaintiff bears the initial burden of demonstrating that a defendant's challenged behavior can have an adverse effect on competition in the relevant market. Second, if the plaintiff satisfies this initial burden, the burden shifts to the defendant, who must demonstrate the pro-competitive effects of the challenged restraint. Third, if the defendant provides that proof, the burden shifts back to the plaintiff to show that these legitimate competitive benefits could have been achieved through less restrictive means. Ultimately, the true test of legality is whether the restraint imposed is such as merely ***regulates*** and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

***Antitrust*** & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

***Antitrust*** & Trade Law > Sherman Act > Scope > Monopolization Offenses

[***HN11***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=LNHNREFclscc11)[] **Exemptions & Immunities, Exempt Cartels & Joint Ventures**



Under the first step of the rule of reason, a plaintiff must demonstrate that the alleged restraint has an adverse effect on competition. The plaintiff can do this directly, by showing an actual adverse effect on competition as a whole in the relevant market. Or the plaintiff can make her case indirectly, by showing that the defendant has sufficient market power to cause an adverse effect on competition. Plaintiffs seeking to show adverse effect indirectly must demonstrate both the defendant's market power and other grounds for believing the challenged restraint harms competition. These other grounds might include price increases, reduced output or market quality, significantly heightened barriers to entry, or reduced consumer choice.

***Antitrust*** & Trade Law > Sherman Act > Scope > Monopolization Offenses

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

[***HN12***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=LNHNREFclscc12)[] **Scope, Monopolization Offenses**



Although fraught with anticompetitive potential, standards promulgated by standard-setting organizations can be flush with significant procompetitive advantages. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

***Antitrust*** & Trade Law > Sherman Act > Scope > Monopolization Offenses

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

[***HN13***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=LNHNREFclscc13)[] **Scope, Monopolization Offenses**



It is permissible for courts to consider free riding and stability as two potential pro-competitive justifications in the standard-setting context. Eliminating free riders can be a pro-competitive advantage of alleged restraints on competition like vertical price agreements. The same holds true in the standard-setting context.

***Antitrust*** & Trade Law > Sherman Act > Scope > Monopolization Offenses

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

[***HN14***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=LNHNREFclscc14)[] **Scope, Monopolization Offenses**



Courts can consider whether evidence of a defendant's stabilizing behavior constitutes a pro-competitive benefit of standard-setting.

***Antitrust*** & Trade Law > Sherman Act > Scope > Monopolization Offenses

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

[***HN15***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=LNHNREFclscc15)[] **Scope, Monopolization Offenses**



A defendant cannot, of course, justify anticompetitive arrangements by saying an industry's "special characteristics" warrant them.

***Antitrust*** & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

[***HN16***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=LNHNREFclscc16)[] **Conspiracy to Monopolize, Sherman Act**



Unilateral action does not violate *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*.

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GREGORY G. GARRE, Latham & Watkins LLP, Washington, D.C. (Lawrence E. Buterman, New York, NY; Christopher S. Yates, San Francisco, CA, on the brief), for Defendant-Appellee.

**Judges:** Before: PARKER, WESLEY, and CHIN, Circuit Judges.**[\*\*2]**

**Opinion by:** WESLEY

**Opinion**

**[\*34]** Wesley, *Circuit Judge*:

After the denial of its requested Division II designation for the 2018 season of men's professional soccer, the North American Soccer League, LLC ("NASL") filed an ***antitrust*** suit against the United States Soccer Federation, Inc. ("USSF"). NASL also moved for a preliminary injunction, seeking designation as a Division II league pending resolution of the suit. This opinion addresses that motion. We conclude NASL has not demonstrated a clear likelihood of **[\*35]** success on the merits of its ***antitrust*** claim under the heightened standard applicable to mandatory preliminary injunctions. Accordingly, we affirm the judgment of the United States District Court for the Eastern District of New York, [*N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc. ("NASL"), No. 17-CV-05495, 296 F. Supp. 3d 442, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771 (E.D.N.Y. Nov. 4, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PWN-GPD1-F04F-03DB-00000-00&context=) (Brodie, *J.*), denying NASL's motion for a preliminary injunction.

**I**

As the regional governing body for soccer in the United States and Canada, USSF designates leagues as Division I, II, or III according to USSF's Professional League Standards (the "Standards"). The Standards establish requirements that a league must meet to gain a divisional designation—also called a sanction—for a season of play. The more competitive**[\*\*3]** the division, the higher the bar. For example, the 2008 Standards required that a Division I league have a minimum of ten teams distributed in at least three time zones; a Division II league have a minimum of eight teams in at least two time zones; and a Division III league have a minimum of eight teams, with no time-zone requirement.

Soccer leagues apply to USSF to receive annual designations for the upcoming season of play by submitting reports demonstrating their compliance, or plans for compliance, with the Standards. Leagues may submit requests for waivers from compliance with the Standards' requirements. The USSF Board votes on divisional designations after reviewing the recommendations of USSF's Professional League Task Force ("Task Force"). The Board is composed of fifteen directors, two of whom are chosen by the professional leagues.

The same process applies for revising the Standards; the USSF Board works in conjunction with a Professional League Standards Task Force ("Standards Task Force").[[1]](#footnote-0)1 Unchanged from 1996 to 2008, the Standards for all divisions were revised in 2008 and 2014, and for only Division II in 2010.[[2]](#footnote-1)2

The three most prominent men's professional soccer leagues**[\*\*4]** have historically occupied their respective divisions in isolation. Major League Soccer, LLC ("MLS") has been the only Division I men's soccer league since MLS's start in 1995. NASL has existed since 2009 and has operated as a Division II league since 2011. The United Soccer Leagues, LLC ("USL") ordinarily has filled the Division III slot. According to NASL, it long has harbored aspirations to compete against MLS in Division I; in contrast, USL has been content as an MLS feeder league.

It often pays to be at the top, of course, and MLS has enjoyed competitive benefits as the top-tier league since its inception. Indeed, USSF, when establishing men's soccer in the United States, decided "to not sanction any other league as a [Division I] men's professional outdoor league until MLS had finished its second full season in 1997—to give it a 'runway' of sorts." Gulati Decl. ¶ 64. MLS's top-tier status has economic benefit as well. MLS and USSF have a "business relationship" through which Soccer United Market ("SUM"), a marketing company, has the rights to "bundle[d]" MLS and USSF sponsorship **[\*36]** and broadcasting rights. Compl. ¶ 107; Gulati Decl. ¶ 230.[[3]](#footnote-2)3

Like the other leagues, NASL annually applies**[\*\*5]** to USSF for a divisional designation. It operated as a Division II league for the 2011-2017 seasons, receiving compliance waivers for all but one season. Although NASL made a play for a Division I designation for 2016, its application was denied, and NASL operated as a Division II league (with waivers) for that season. For the 2018 season, NASL applied for a Division II designation, requesting waivers for the minimum-team and time-zone requirements. The USSF Board rejected NASL's Division II application but gave NASL additional time to file for Division III status. NASL filed suit instead.

NASL contends that USSF conspired with its membership and related entities in adopting, amending, and applying its Standards in an anticompetitive manner to preclude NASL and other leagues from competing with MLS in the Division I market. *See* *15 U.S.C. §§ 1-2*. NASL requests preliminary injunctive relief in the form of a Division II league designation and permanent relief enjoining USSF from promulgating the Standards to separate leagues into divisions.

NASL's motion for a preliminary injunction is tied to its allegations in the first count of its Complaint—that USSF violated *15 U.S.C. § 1* through a conspiracy to restrain competition.**[\*\*6]** NASL asked the District Court for a preliminary injunction allowing it to operate as a Division II league. In a 49-page decision, the district court made detailed findings of fact and conclusions of law before concluding that NASL had not made a clear showing of entitlement to relief and denying the preliminary injunction. [*NASL, No. 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at \*1, \*21*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PWN-GPD1-F04F-03DB-00000-00&context=). NASL appeals, arguing the District Court abused its discretion in applying the preliminary injunction standard and in finding that NASL had not sufficiently showed its clear likelihood of success on the merits of its *§ 1* ***antitrust*** claim.

**II**

[***HN1***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=clscc1)[] This Court reviews a district court's legal rulings *de novo* and its ultimate denial of a preliminary injunction for abuse of discretion. [*McCreary Cty. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 867, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GGW-F6M0-004C-001C-00000-00&context=); [*Almontaser v. N.Y.C. Dep't of Educ., 519 F.3d 505, 508 (2d Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4S3H-X520-TXFX-429H-00000-00&context=). "A district court abuses its discretion when it rests its decision on a clearly erroneous finding of fact or makes an error of law." [*Almontaser, 519 F.3d at 508*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4S3H-X520-TXFX-429H-00000-00&context=).



**A. Applicable Standard for the Preliminary Injunction**

[***HN2***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=clscc2)[] Courts refer to preliminary injunctions as prohibitory or mandatory. Prohibitory injunctions maintain the status quo pending resolution of the case; mandatory injunctions alter it.[[4]](#footnote-3)4 [*Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 34* ***[\*37]*** *(2d Cir. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-D5J0-001T-D1DX-00000-00&context=) (internal citation omitted). A party seeking a preliminary injunction must show (1)**[\*\*7]** irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest. [*New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 650 (2d Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G38-K6G1-F04K-J0G4-00000-00&context=). Because mandatory injunctions disrupt the status quo, a party seeking one must meet a heightened legal standard by showing "a clear or substantial likelihood of success on the merits." [*N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 294 (2d Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:54MV-X0M1-F04K-J0C2-00000-00&context=) (internal quotation marks omitted). The District Court concluded that NASL was seeking a mandatory injunction and imposed the heightened standard. [*NASL, No. 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at \*7*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PWN-GPD1-F04F-03DB-00000-00&context=). NASL argues that using the heightened standard was error.



Because the proposed injunction's effect on the status quo drives the standard, we must ascertain the status quo—that is, "the last actual, peaceable uncontested status which preceded the pending controversy." [*Mastrio v. Sebelius, 768 F.3d 116, 120 (2d Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D59-YNX1-F04K-J08C-00000-00&context=) (per curiam) (quoting [*LaRouche v. Kezer, 20 F.3d 68, 74 n.7 (2d Cir. 1994))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-76F0-003B-P01K-00000-00&context=).[[5]](#footnote-4)5 Before this litigation, USSF would regularly evaluate NASL's applications and determine NASL's divisional designation. The relationship of annual application, assessment, and sanction determination was the last uncontested status between the parties preceding the present controversy. This is how the parties**[\*\*8]** operated, year after year.

NASL seeks to alter this near-decade-long relationship of annual sanctioning between the parties. Although NASL has never received a designation absent the annual process, it now requests a Division II designation for the duration of this litigation. NASL, looking to upend the federation-league sanctioning framework, seeks a mandatory injunction.

NASL argues that applying a heightened standard here would require applying that standard any time a party seeks an injunction to maintain "critical benefits" they have long received. Appellant's Br. 3. This case is different than the benefits-termination cases, however. In those cases, the status quo is one in which the plaintiff continues receiving previously granted benefits. *See* [*Holt v. Cont'l Grp., 708 F.2d 87, 90 (2d Cir. 1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-05M0-003B-G48P-00000-00&context=) (reinstating benefits restores the status quo ante); *see also* [*Garcia v. Yonkers Sch. Dist., 561 F.3d 97, 99-101, 107 (2d Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VYX-H020-TXFX-41XW-00000-00&context=) (permitting suspended students to continue attending school). Here, USSF decides anew each year which divisional designation applies to NASL, if any. NASL's Division II sanctions never last beyond one season of play. Unlike in the benefits-termination cases, the status quo here involves a periodic sanction of limited life.

"The purpose of a preliminary**[\*\*9]** injunction is . . . to preserve the relative positions of the parties." [*Univ. of Tex. v.* ***[\*38]*** *Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6JD0-003B-S1BN-00000-00&context=). Conflating status with status quo, the parties center their arguments on NASL's status as a Division II league. However, the status quo is not that NASL regularly received a Division II designation, nor is it NASL's lack of a Division II designation for 2018. The status quo is the parties' pre-controversy position vis-à-vis the other.[[6]](#footnote-5)6 Directing USSF to grant NASL a divisional designation for 2018 and beyond would alter that relationship.[[7]](#footnote-6)7 NASL's request for a preliminary injunction was correctly analyzed by the District Court under the heightened standard for a mandatory injunction.[[8]](#footnote-7)8

**B. Clear Likelihood of Success on the Merits**

NASL's claim is anchored in *§ 1* of the Sherman Act.[[9]](#footnote-8)9 [***HN3***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=clscc3)[] *Section 1* prohibits "[e]very contract, combination . . . or conspiracy[] in restraint of trade or commerce." *15 U.S.C. § 1*; [*Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 189, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ2-MVT1-2RHS-K0NF-00000-00&context=). Thus, to establish a clear likelihood of success under its *§ 1* claim, NASL must show "there is a contract, combination . . . or conspiracy amongst separate economic actors pursuing separate economic interests such that the agreement deprives the marketplace . . . of actual or potential competition."**[\*\*10]** [*Am. Needle, 560 U.S. at 195*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ2-MVT1-2RHS-K0NF-00000-00&context=) (internal citations and quotation marks omitted).



NASL alleges that "USSF and co-conspirators MLS, USL and SUM have entered into a continuing agreement, combination, or conspiracy in restraint of trade with the purpose, intent and effect of restraining **[\*39]** horizontal competition among top-tier [and second-tier] men's professional soccer leagues . . . ." Compl. ¶ 200. NASL asserts that the arrangement "enables MLS to be the only men's top-tier professional soccer league . . . by promulgating, revising, manipulating, and selectively granting and denying waivers from anticompetitive Professional League Standards so that MLS, and only MLS, will satisfy the USSF's requirements . . . to qualify for men's top-tier Division I sanctioning." Compl. ¶ 201.

**1. Contract, Combination, or Conspiracy**[[10]](#footnote-9)10

[***HN4***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=clscc4)[] For an arrangement to be a conspiracy under *§ 1*, it "must embody concerted action." [*Am. Needle, 560 U.S. at 191*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ2-MVT1-2RHS-K0NF-00000-00&context=). Concerted action exists where there is an agreement between "separate economic actors pursuing separate economic interests." [*Id. at 195*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ2-MVT1-2RHS-K0NF-00000-00&context=) (internal quotation marks omitted). The fact that the co-conspirators are capable, due to their separateness, of acting in concert is not sufficient. Proof of a conspiracy is required. [*Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 545 (2d Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FV00-003B-P4GG-00000-00&context=).



[***HN5***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=clscc5)[] A plaintiff must**[\*\*11]** offer "direct or circumstantial evidence that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective." [*Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3HS0-003B-S4S6-00000-00&context=). Rarely do co-conspirators plainly state their purpose. As a result, courts often must evaluate circumstantial evidence of a conspiracy by weighing "plus factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *United States v. Apple, Inc., 791 F.3d 290, 315 (2d Cir. 2015)* (citation and internal quotation marks omitted). In *Monsanto*, the Supreme Court noted that courts should look for evidence that "tends to exclude the possibility that the [defendant was] acting independently." [*Monsanto, 465 U.S. at 764*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3HS0-003B-S4S6-00000-00&context=). In *Matsushita*, the Supreme Court elaborated on what this meant: "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of ***antitrust*** conspiracy." [*Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7P90-0039-N51W-00000-00&context=).



The District Court concluded that the USSF Board's promulgation of the Standards was not direct evidence of concerted action among USSF, the leagues, and SUM. According to the court, NASL needed to show there was "an agreement to agree to vote a particular way" before the Standards could satisfy the concerted-action requirement.**[\*\*12]** [*NASL, No. 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at \*10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PWN-GPD1-F04F-03DB-00000-00&context=) (emphasis omitted). The court then evaluated circumstantial evidence of a conspiracy. Regarding the USSF Board's votes to adopt and amend the Standards as parallel conduct, the court examined whether there were plus factors demonstrating an ***antitrust*** conspiracy. [*2017 U.S. Dist. LEXIS 183202, [WL] at \*11*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PWN-GPD1-F04F-03DB-00000-00&context=). Although acknowledging that the SUM agreement **[\*40]** poses "a conflict of interest," and describing as "troubling" USSF's admitted past intent to give MLS a head start in the industry, the District Court concluded that there was insufficient evidence of concerted action because the evidence did not tend to exclude the possibility of independent action. [*2017 U.S. Dist. LEXIS 183202, [WL] at \*11, \*13, \*15*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PWN-GPD1-F04F-03DB-00000-00&context=).

NASL argues that the District Court erred in applying the *Monsanto* standard for inferring a conspiracy because the Standards are direct evidence of a conspiracy. We disagree.

The *Monsanto-Matsushita* framework works here. *See* [*Monsanto, 465 U.S. at 764, 768*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3HS0-003B-S4S6-00000-00&context=); [*Matsushita, 475 U.S. at 588*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7P90-0039-N51W-00000-00&context=). [***HN6***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=clscc6)[] Courts use this framework for assessing conspiracies, including those conspiracies provable by direct evidence. *See, e.g.,* [*Monsanto, 465 U.S. at 765*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3HS0-003B-S4S6-00000-00&context=) (finding substantial direct evidence of vertical price-fixing agreement). A plaintiff who can proffer direct evidence of a conspiracy should have no qualms with the *Monsanto-Matsushita* framework because direct evidence by definition**[\*\*13]** shows the requisite concerted action. *See* [*Cosmetic Gallery, Inc. v. Schoeneman Corp., 495 F.3d 46, 52 (3d Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P79-6XC0-TXFX-53D1-00000-00&context=) ("'Direct' evidence must evince with clarity a concert of illegal action.").



Moreover, [***HN7***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=clscc7)[] organizational decisions do not inherently constitute *§ 1* concerted action. NASL's argument misinterprets the meaning of concerted action in ***antitrust*** law. "[Not] every action by a trade association is . . . concerted action by the association's members." [*AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 234 (2d Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WST-K660-0038-X2XF-00000-00&context=) (per curiam). Indeed, even though a "trade association by its nature involves collective action by competitors[,] . . . a trade association is not by its nature a 'walking conspiracy.'" [*Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 293-94 (5th Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0RJ0-001B-K2Y5-00000-00&context=). Rather, it is when "a *§ 1* plaintiff establishes the existence of *an illegal* contract or combination" that the plaintiff can "proceed to demonstrate that the agreement constituted an unreasonable restraint of trade.'" [*Capital Imaging, 996 F.2d at 542*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FV00-003B-P4GG-00000-00&context=) (emphasis added). Evidence should "tend[] to show that association members, in their individual capacities, consciously committed themselves to a common scheme *designed to achieve an unlawful objective*." [*AD/SAT, 181 F.3d at 234*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WST-K660-0038-X2XF-00000-00&context=) (emphasis added).



In fairness to NASL, organizational decisions sometimes are *§ 1* concerted action. For example, when there is direct evidence of an alleged conspiracy via an association's express ***regulation*** of its**[\*\*14]** members' market. In *Associated Press*, the government challenged as illegal a cooperative news association's by-laws that restricted membership and prohibited members from distributing news to nonmembers. [*Associated Press v. United States, 326 U.S. 1, 5, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JYW0-003B-S44D-00000-00&context=). In ruling for the government, the Supreme Court endorsed the district court's conclusion that "[t]he bylaws of AP are in effect agreements between the members . . . . [They are] contracts in restraint of commerce." [*Id. at 11 n.6*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JYW0-003B-S44D-00000-00&context=). Similarly, in *Indiana Federation of Dentists*, the Supreme Court found that a federation's policy constituted a collective refusal to deal with insurers and was an illegal agreement. [*FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 457-58, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6V80-0039-N3PM-00000-00&context=). These cases corroborate the obvious—that [***HN8***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=clscc8)[] direct evidence of an illegal "contract, combination, or conspiracy" satisfies *§ 1*'s concerted-action requirement. *See* [*Allied Tube & Conduit Corp. v. Indian* ***[\*41]*** *Head, Inc., 486 U.S. 492, 500, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F1W0-003B-43GD-00000-00&context=) (finding agreement, in violation of *§ 1*, to subvert standard-setting process by packing vote); *see also* [*United States v. Topco Assocs., Inc., 405 U.S. 596, 601-02, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-D970-003B-S3X4-00000-00&context=) (by-laws allocating market territory among chain members found anticompetitive); [*Fashion Originators' Guild, Inc. v. FTC, 312 U.S. 457, 462-64, 61 S. Ct. 703, 85 L. Ed. 949, 32 F.T.C. 1856 (1941)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6G40-003B-715X-00000-00&context=) (Guild's rules and policies found anticompetitive where purpose was to prevent sales and create a monopoly).



If NASL were challenging the Standards themselves—in totality—as violative of the ***antitrust*** laws, then the USSF Board's promulgation of them would**[\*\*15]** constitute direct evidence of *§ 1* concerted action in that undertaking.[[11]](#footnote-10)11 As for the clearly alleged overarching conspiracy to restrain competition in markets for top-and second-tier men's professional soccer leagues in North America, the promulgation of the Standards is circumstantial evidence of that conspiracy. The District Court properly evaluated the Standards along with other circumstantial evidence of NASL's conspiracy allegations, concluding that NASL had not sufficiently shown the presence of concerted action. *See* [*NASL, 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at \*11-15*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PWN-GPD1-F04F-03DB-00000-00&context=). But even assuming NASL's allegations show a conspiracy, NASL has failed to show that the agreement was an unreasonable restraint on competition under *§ 1*.

**2. Unreasonable Restraint**

[***HN9***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=clscc9)[] Only unreasonable restraints on competition violate *§ 1* of the Sherman Act. Courts use one of two tests here. "[A] restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be '*per se*' unreasonable, or because it violates what has come to be known as the 'Rule of Reason.'" [*Ind. Fed'n of Dentists, 476 U.S. at 457-58*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6V80-0039-N3PM-00000-00&context=). ***Regulation*** of league sports is a textbook example of when the rule of reason applies. *See* [*Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3BC0-003B-S304-00000-00&context=).



NASL argues for an**[\*\*16]** abbreviated, "quick look" version of the rule of reason,[[12]](#footnote-11)12 which applies when "no elaborate industry analysis is required to demonstrate the anticompetitive character of [the challenged] agreement." [*Ind. Fed'n of Dentists, 476* ***[\*42]*** *U.S. at 459*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6V80-0039-N3PM-00000-00&context=) (internal quotation mark omitted). Here, however, far from being obviously anticompetitive, the Standards could be found to have a net procompetitive effect, or no competitive effect at all. *See* [*Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WJ6-7N70-004C-100F-00000-00&context=). Indeed, the Standards are seemingly designed to avoid a flaw in the relevant market: implosion of leagues due to minimal consumer demand and teams' financial instability. Because the alleged restraints might avoid a flaw in the market, the full rule-of-reason analysis applies. *See id.* (using three-step rule of reason when reviewing restrictions designed to address deceptive advertising in market prone to information gaps).

The District Court properly applied [***HN10***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=clscc10)[] the three-step rule-of-reason framework. First, a plaintiff bears the initial burden of demonstrating that a defendant's challenged behavior can have an adverse effect on competition in the relevant market. [*United States v. Am. Express Co., 838 F.3d 179, 194 (2d Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KT5-1XM1-F04K-J4DP-00000-00&context=), *cert. granted,* *Ohio v. Am. Express Co., 138 S. Ct. 355, 199 L. Ed. 2d 261 (Oct. 16, 2017)* (mem.). Second, if the plaintiff satisfies this initial burden, the burden shifts to the defendant, who must demonstrate**[\*\*17]** the procompetitive effects of the challenged restraint. [*Id. at 195*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KT5-1XM1-F04K-J4DP-00000-00&context=). Third, if the defendant provides that proof, the burden shifts back to the plaintiff to show that these "legitimate competitive benefits . . . could have been achieved through less restrictive means." [*Id.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KT5-1XM1-F04K-J4DP-00000-00&context=) (internal quotation marks omitted). Ultimately, "[t]he true test of legality is whether the restraint imposed is such as merely ***regulates*** and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." [*Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8YC0-003B-S2D5-00000-00&context=) (quoting [*Chi. Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5YH0-003B-H0VW-00000-00&context=).



[***HN11***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=clscc11)[] Under the first step of the rule of reason, a plaintiff must demonstrate that the alleged restraint has an adverse effect on competition. [*Am. Express, 838 F.3d at 194*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KT5-1XM1-F04K-J4DP-00000-00&context=). The plaintiff can do this directly, by showing an "actual adverse effect on competition as a whole in the relevant market." *Id.* (emphasis omitted) (internal quotation mark omitted) (giving examples of higher prices or reduced output).[[13]](#footnote-12)13 Or the plaintiff can make her case indirectly, "by showing that the defendant has sufficient market power to cause an adverse effect on competition." *Id.* (internal quotation marks omitted). Plaintiffs seeking to show adverse effect indirectly must demonstrate both the defendant's market power and "other**[\*\*18]** grounds" for believing the challenged restraint harms competition. [*MacDermid Printing Sols. LLC v. Cortron Corp., 833 F.3d 172, 183-84 (2d Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KF3-RXP1-F04K-J431-00000-00&context=). These other grounds might include price increases, reduced output or market quality, significantly heightened barriers to entry, or reduced consumer choice. [*Id. at 183 & n.42, 184, 186 n.56*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KF3-RXP1-F04K-J431-00000-00&context=).



The District Court did not err in finding that NASL indirectly established an adverse effect on competition in "the market for (1) top-tier and (2) second-tier men's professional soccer leagues located in the United States and Canada." [*NASL, 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017* ***[\*43]*** *WL 5125771, at \*17 & n.40*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PWN-GPD1-F04F-03DB-00000-00&context=).[[14]](#footnote-13)14 USSF's market power is evident in its "power to . . . exclude competition" through the Standards. [*United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-J8H0-003B-S4P3-00000-00&context=). And the ratcheting up of the Standards over the last two decades imposes increasingly "significant barriers to entry" in the relevant soccer market. [*CDC Techs., Inc. v. IDEXX Labs., Inc., 186 F.3d 74, 80 (2d Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3X0S-S4Y0-0038-X1H5-00000-00&context=); *see also* [*MacDermid, 833 F.3d at 183-84, 186 n.56*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KF3-RXP1-F04K-J431-00000-00&context=).

The burden then shifts to USSF to offer evidence of the Standards' procompetitive effects. *See* [*Am. Express, 838 F.3d at 195*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KT5-1XM1-F04K-J4DP-00000-00&context=). [***HN12***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=clscc12)[] Although fraught with anticompetitive potential, standards promulgated by standard-setting organizations can be flush with "significant procompetitive advantages." *See* [*Allied Tube, 486 U.S. at 501*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F1W0-003B-43GD-00000-00&context=). "The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all**[\*\*19]** relevant facts." [*Capital Imaging, 996 F.2d at 543*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FV00-003B-P4GG-00000-00&context=) (quoting [*Chi. Bd. of Trade, 246 U.S. at 238*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5YH0-003B-H0VW-00000-00&context=)).



The District Court also did not err in finding that USSF offered sufficient evidence of the Standards' procompetitive virtues. *See* [*NASL 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at \*18-19*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PWN-GPD1-F04F-03DB-00000-00&context=) (considering minimum-team count, time zones, market size, stadium capacity, and financial viability). The court found that the minimum-team requirement increases output through sustained fan interest and provides stability because larger leagues are less likely to collapse. [*2017 U.S. Dist. LEXIS 183202, [WL] at \*19*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PWN-GPD1-F04F-03DB-00000-00&context=). The court further found that the time-zone and market-size requirements generate fan and media interest, and, along with the stadium-capacity requirement, promote league quality. *Id.* The court lastly determined that the financial-viability requirements keep fans interested, stabilize the leagues financially, and prevent free riding. *Id.* These findings by the District Court are not clearly erroneous. *See* [*Almontaser, 519 F.3d at 508*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4S3H-X520-TXFX-429H-00000-00&context=).

The Standards further benefit the market by coordinating necessary competition. As the Supreme Court recognized when addressing the National Collegiate Athletic Association's ("NCAA") role in ***regulating*** intercollegiate athletics, "this case involves an industry in which horizontal restraints on competition are essential if the product**[\*\*20]** is to be available at all." [*Bd. of Regents, 468 U.S. at 101*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3BC0-003B-S304-00000-00&context=); *see also* [*id. at 102*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3BC0-003B-S304-00000-00&context=) ("[The NCAA's] actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.").

NASL argues that the District Court erred in finding some of the Standards' requirements justified in part by their procompetitive effects of eliminating free riding and stabilizing the market. However,[***HN13***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=clscc13)[] it is permissible for courts to consider free riding and stability as two potential procompetitive justifications in the standard-setting context.



Eliminating free riders can be a procompetitive advantage of alleged restraints on competition like vertical price agreements. *See* [*Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889-92, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P2S-4S20-004C-002X-00000-00&context=) (discussing free riding and other procompetitive justifications). The same holds true in the standard-setting context. Here, the District **[\*44]** Court did not err in finding that the Standards reduce leagues' incentive to free ride on USSF's efforts and expenditures without making similar investments to generate fan interest in the sport. [*NASL, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at \*19*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PWN-GPD1-F04F-03DB-00000-00&context=).

[***HN14***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=clscc14)[] Courts can also consider whether evidence of a defendant's stabilizing behavior constitutes a procompetitive benefit of standard-setting. NASL argues that anticompetitive**[\*\*21]** behavior cannot be justified as preventing "[r]uinous competition, financial disaster, [or the] evils of price cutting." [*United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7110-003B-72F4-00000-00&context=). However, that logic is tied to cases where courts were confronted with per se illegal practices. Per se illegal practices, like horizontal price-fixing, are those that "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." [*N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-J470-003B-S0WT-00000-00&context=). Though courts might reject the stability rationale where conduct is so anticompetitive as to be beyond redemption, *see* [*Socony-Vacuum, 310 U.S. at 228*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7110-003B-72F4-00000-00&context=), that and other procompetitive justifications still can be relevant elsewhere—as in the sports standards context.



[***HN15***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=clscc15)[] A defendant cannot, of course, justify anticompetitive arrangements by saying an industry's "special characteristics" warrant them. [*Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 689*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8YC0-003B-S2D5-00000-00&context=). But in the context of a soccer industry historically prone to collapse, the free-rider and stability justifications do not rationalize anticompetitive effects—they evince procompetitive ones. Specifically, as USSF urges, the Standards avoid free riders on, and lock in consumer interest**[\*\*22]** for, the relevant competitive market. *See* [*Bd. of Regents, 468 U.S. at 117*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3BC0-003B-S304-00000-00&context=) ("[M]ost 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*.") (emphasis added).



NASL separately argues that the District Court should have concluded NASL was clearly likely to succeed on the merits once the court found problems with the SUM agreement and USSF's early use of the Standards to favor MLS. [*NASL, No. 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at \*11, \*13*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PWN-GPD1-F04F-03DB-00000-00&context=). As the District Court noted, however, USSF's voting procedures and early history are a far cry from the collusive activity that would warrant per se ***antitrust*** analysis. *See* [*Allied Tube, 486 U.S. at 501*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F1W0-003B-43GD-00000-00&context=) (excluding product by packing the annual meeting vote); [*Gelboim v. Bank of Am. Corp., 823 F.3d 759, 775 (2d Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JV8-2DW1-F04K-J033-00000-00&context=) (acting collusively by circumventing LIBOR-setting rules). NASL has not shown a meaningful financial conflict of interest stemming from the SUM agreement; Board members with ties to professional leagues do not participate in the Task Forces and must abstain from votes regarding the Standards. As for USSF sheltering MLS from competition in the mid-1990s, USSF's alleged co-conspirator leagues did not yet exist. Any anticompetitive promulgation or misuse of the**[\*\*23]** Standards would be attributable to USSF alone. And [***HN16***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RPY-HSR1-JWBS-63SK-00000-00&context=&link=clscc16)[] unilateral action does not violate *§ 1* of the Sherman Act. [*Am. Needle, 560 U.S. at 190-91*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ2-MVT1-2RHS-K0NF-00000-00&context=); *see also* [*United States* ***[\*45]*** *Football League v. Nat'l Football League, 842 F.2d 1335, 1372 (2d Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2610-001B-K36J-00000-00&context=) (saying prior judgments against defendant, "admitted as evidence of a longstanding conspiracy," were "at best marginally probative of an ongoing intent to exclude competitors").



Because USSF has demonstrated procompetitive effects of the Standards, the burden shifts to NASL to prove that "any legitimate competitive benefits offered by [USSF] could have been achieved through less restrictive means." [*Am. Express, 838 F.3d at 195*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KT5-1XM1-F04K-J4DP-00000-00&context=) (internal quotation mark omitted). Less restrictive alternatives are "those that would be less prejudicial to competition as a whole." [*Capital Imaging, 996 F.2d at 543*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FV00-003B-P4GG-00000-00&context=). The District Court did not err in concluding that NASL failed to demonstrate viable less restrictive alternatives to the current Standards.

NASL points to the earlier renditions of the Standards as less restrictive alternatives to the current version of the Standards.[[15]](#footnote-14)15 NASL notes, for example, that the Standards' eight-team requirement for Division II is less restrictive than its current twelve-team requirement. Having fewer requirements generally is less restrictive than having more. But NASL fails to show how reverting to earlier versions**[\*\*24]** of the Standards would achieve the same legitimate procompetitive objectives as the Standards' current form. The Standards' evolution could show simply that its earlier renditions were no longer viable. Growing industries have developing standards; ***antitrust*** plaintiffs cannot just point to earlier standards as less restrictive alternatives without additionally showing the equivalent viability of the alternatives proffered.

NASL also urges that eliminating the Standards—using league rules instead of federation rules—is a less restrictive alternative. Again, we fail to see that leagues-based rules would accomplish the same ends as those issued by a federation. As the Supreme Court said of the NCAA's ***regulating*** function in intercollegiate sports, "[w]hat the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed." [*Bd. of Regents, 468 U.S. at 102*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3BC0-003B-S304-00000-00&context=). The same holds true here.

**III**

NASL has a case left to make. But we cannot say at this point that NASL has shown a clear likelihood of its success on the merits under**[\*\*25]** *15 U.S.C. § 1*. Accordingly, the order of the District Court denying NASL's motion for a preliminary injunction is **AFFIRMED**, and the matter is **REMANDED** for further adjudication of this case on the merits.

**End of Document**

1. 1Individuals with current ties to any professional league cannot be on the Task Forces and must abstain from USSF Board votes on matters relating to the professional leagues. [↑](#footnote-ref-0)
2. 2Amendments proposed in 2015 for Division I, to which NASL objected, never were adopted. [↑](#footnote-ref-1)
3. 3Under the agreement, which was extended for an eight-year term in 2015, SUM guarantees an annual amount of marketing revenue, plus additional revenue if SUM hits monetary targets. The bundling financially benefits both USSF and MLS. [↑](#footnote-ref-2)
4. 4We focus on the status quo rather than the "mandatory" and "prohibitory" terminology because "in borderline cases injunctive provisions containing essentially the same command can be phrased either in mandatory or prohibitory terms." [*Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 835, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-JTM0-003B-R4R4-00000-00&context=) ("'Do not strike,'" would appear to be prohibitory . . . [but] 'Continue working,' would be mandatory."); [*Abdul Wali v. Coughlin, 754 F.2d 1015, 1025 (2d Cir. 1985)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JK30-0039-P4X8-00000-00&context=), *overruled on other grounds by* [*O'Lone v. Estate of Shabaze, 482 U.S. 342, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H6X0-003B-4503-00000-00&context=) ("In many instances, this distinction is more semantic[] than substantive."). [↑](#footnote-ref-3)
5. 5The "status quo" in preliminary-injunction parlance is really a "status quo ante." *See* [*Holt v. Cont'l Grp., Inc., 708 F.2d 87, 90 (2d Cir. 1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-05M0-003B-G48P-00000-00&context=) (referring to reinstatement of benefits as "restoration of the *status quo ante*"); *accord* [*O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 1013 (10th Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DSJ-0T40-0038-X07G-00000-00&context=) (en banc) (per curiam) ("requir[ing] a party who has recently disturbed the status quo to reverse its actions . . . restores, rather than disturbs, the status quo ante, and is thus not an exception" to the ordinary standard for preliminary injunctions). This special "ante" formulation of the status quo in the realm of equities shuts out defendants seeking shelter under a current "status quo" precipitated by their wrongdoing. [↑](#footnote-ref-4)
6. 6Some of our sister circuits have explicitly incorporated this principle into their formulations of the status quo. *See, e.g.,* [*SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1100 (10th Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-C4R0-008H-V4S1-00000-00&context=), *overruled on other grounds by* [*O Centro Espirita, 389 F.3d at 975*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DSJ-0T40-0038-X07G-00000-00&context=) ("The status quo . . . is defined by the reality of the existing status and relationships between the parties.") (emphasis omitted); [*Stemple v. Bd. of Ed. of Prince George's Cty., 623 F.2d 893, 898 (4th Cir. 1980)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DFN0-0039-W0M5-00000-00&context=) ("[C]ourts . . . will frame any equitable relief to preserve the last uncontested status between the parties."); [*Wash. Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 475 (9th Cir. 1969)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-SPC0-0039-Y1FJ-00000-00&context=) ("maintain[ing] the status quo between the litigants") (citing [*Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YCD0-003B-01G2-00000-00&context=). [↑](#footnote-ref-5)
7. 7The case might be different if USSF designated NASL a Division II league and revoked that designation mid-season. There, the status quo between the parties arguably would be NASL's Division II designation for that season, in which case we would evaluate NASL's challenge to USSF's revocation under the ordinary standard for a preliminary injunction. [↑](#footnote-ref-6)
8. 8NASL contends that, as an alternative to a showing of a clear or substantial likelihood of success, it can satisfy the higher standard by showing that failure to issue the injunction would result in extreme or very serious damage. It relies on our earlier statement "that a mandatory injunction should issue 'only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief.'" [*Tom Doherty, 60 F.3d at 34*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-D5J0-001T-D1DX-00000-00&context=) (quoting [*Abdul Wali, 754 F.2d at 1025*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JK30-0039-P4X8-00000-00&context=)). Irreparable harm, however, is "indistinguishable" from extreme damage. [*Jacobson & Co., Inc. v. Armstrong Cork Co., 548 F.2d 438, 441 n.3 (2d Cir. 1977)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1740-0039-M54H-00000-00&context=). Therefore, as we have previously noted, the extreme-damage language in our jurisprudence remains "merely a reaffirmation of the traditional reluctance to issue mandatory injunctions . . . ." [*Id.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1740-0039-M54H-00000-00&context=) [↑](#footnote-ref-7)
9. 9The District Court found that NASL had established irreparable harm and that the injunction would not harm the public interest. [*NASL, No. 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at \*8-9, \*21*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PWN-GPD1-F04F-03DB-00000-00&context=). USSF does not focus on a failure by NASL in either area. Thus, we start and finish with the lower court's determination that NASL had not demonstrated its clear likelihood of success on the merits. [↑](#footnote-ref-8)
10. 10Because "[t]he question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade," [*Am. Needle, 560 U.S. at 186*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ2-MVT1-2RHS-K0NF-00000-00&context=), we first examine, pursuant to NASL's allegations, whether USSF, MLS, USL, and SUM conspired within the meaning of ***§ 1*** of the Sherman Act. Although we ultimately assume the existence of a conspiracy, we address this antecedent question to clarify the framework the lower court must use on remand. [↑](#footnote-ref-9)
11. 11How NASL is challenging the Standards is unclear. *See* A-135 (the District Court, with NASL's later agreement, summarized NASL's position as: "You're saying standards are okay, Division I, Division II is okay; the manner in which [USSF] set[s] the requirements for each is wrong"); *see also* A-137 (NASL stating "I'm challenging the requirements here . . . that a standard setting body should set [the minimum-team requirement] . . . [challenging] [t]hat particular rule"). There is room for disagreement as to whether NASL's reference to the Standards, as "effectuat[ing] the USSF's anticompetitive conspiracy," wages war on the Standards or just fires shots at their role in the larger alleged conspiracy. Compl. ¶ 122. *See* [*Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 339-40, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KSN0-003B-R16B-00000-00&context=) (Scalia, *J.*, dissenting) (describing an alleged agreement to boycott as "not the totality of the conspiracy, but merely the means used to enforce it"). *Compare* [*Wilk v. Am. Med. Ass'n, 895 F.2d 352, 374 n.9 (7th Cir. 1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-70B0-003B-5248-00000-00&context=) (saying plaintiffs did not directly challenge standards alleged to "*perpetuate[]* the boycott"), *with* [*Robertson v. Sea Pines Real Estate Cos., Inc., 679 F.3d 278, 283, 288, 289 (4th Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55MT-FSB1-F04K-M4PS-00000-00&context=) (finding direct evidence of conspiracy where defendants used joint venture as an "instrumentality" and "conduit," saying that "board members conspired in the form of [their] rules, the very passage of which establishes that the defendants convened and came to an agreement"). [↑](#footnote-ref-10)
12. 12The parties did not, and do not, dispute the rule of reason's applicability. [↑](#footnote-ref-11)
13. 13The District Court found that NASL had not directly shown an actual adverse effect on competition in the market. [*NASL, 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at \*18 & n.41*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PWN-GPD1-F04F-03DB-00000-00&context=) (no customer confusion and no reduced output beyond NASL's own exclusion from Division II). [↑](#footnote-ref-12)
14. 14The District Court defined the market as proposed by NASL, and the parties do not contest this definition. In light of that consensus, we regard the relevant market to be the same. [↑](#footnote-ref-13)
15. 15By making this argument, NASL apparently concedes that the earlier Standards had procompetitive justifications. [↑](#footnote-ref-14)