Nos. 20-512, -520

In The Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Petitioner,

v.

SHAWNE ALSTON, et al.,

Respondents.

AMERICAN ATHLETIC CONFERENCE, et al.,

Petitioners,

v.

SHAWNE ALSTON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PROFESSOR SAM C. EHRLICH AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*[1]

Sam C. Ehrlich is an assistant professor of legal studies in the Department of Management at Boise State University[2] with a research focus on the legal aspects of athlete labor and employment. He has published several academic articles in connection with such issues. Professor Ehrlich has a strong interest in seeking clarification on the applicability of antitrust laws to NCAA activities and restrictions based on preserving amateurism in intercollegiate athletics.

SUMMARY OF ARGUMENT

Based on the Ninth Circuit Court of Appeals' definitive opinion in the presently-appealed *Alston v. NCAA*, 958 F.3d 1239 (9th Cir. 2020), a reader unfamiliar with the intricacies and history of the treatment of college sports by the antitrust courts would be justified in thinking that courts were unanimous in their belief that the treatment of college athletes by the National Collegiate Athletic Association ("NCAA") is violative of

[1] Pursuant to Rule 37, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Counsel for all parties were timely notified more than ten days before the filing of this brief, and all parties gave consent to this filing.

[2] Professor Ehrlich's institutional affiliation is provided for identification purposes only. This brief does not purport to represent the view of the affiliated institution.

§1 of the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. § 1. *Alston*'s almost absolute reliance on *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015)—a 2015 antitrust case decided by the Ninth Circuit that had also found NCAA restrictions on college athlete compensation to be anticompetitive—continues *O'Bannon*'s legacy of spearheading a history of tough antitrust treatment by the Ninth Circuit of the NCAA's activities to preserve their brand of amateurism in intercollegiate sports.

However, as Petitioners have argued in their petition for a writ of certiorari, the Ninth Circuit's unforgiving treatment of the NCAA in *Alston* and *O'Bannon* has created inconsistency in how the various circuits apply antitrust law to NCAA amateurism rules. As Petitioners have noted, this difference is primarily centered around interpretation of this Court's language in *NCAA v. Board of Regents*, 468 U.S. 85 (1984)—language that has been noted by others, including the Ninth Circuit in *O'Bannon*, 802 F.3d at 1063, as dicta.

But while Petitioners focus their discussion on what they frame as a strictly bilateral circuit split—between the Ninth Circuit, which held them liable on antitrust grounds, and the Third, Fifth, and Seventh Circuits, which the NCAA Petitioners claim "properly read this Court's precedent to mean that NCAA rules designed to prevent student-athletes from being paid to play receive deference under the rule of reason"—the reality is actually more complex than they admit. Pet. for Writ of Certiorari at 19, *NCAA v. Alston*, No. 20-512 (Oct. 15, 2020).

The application of antitrust law by the courts to NCAA amateurism restrictions is even more fractured than a simple circuit split. The differences of opinion existing in the courts' application of antitrust law to NCAA amateurism restrictions exists as a *three-tiered* circuit split between three jurisdictional silos: (i) the Third and Sixth Circuits; (ii) the Seventh Circuit; and (iii) the Ninth Circuit.[3] This circuit split is visualized in Figure 1, which shows clear disagreement between the courts by virtue of the multitude of negative citations (i.e. red lines, compared to green lines for positive citations) between NCAA amateurism case law.[4]

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[3] While the NCAA Petitioners point to *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988), as another example of differing judicial treatment, they fail to note that *McCormack* was actually decided based on full Rule of Reason analysis, even if that analysis was still fairly surface-level in its approach. *See id*. at 1344-45. By contrast, *amicus curiae* argues that what all Petitioners call for—and what the Seventh Circuit has granted through their 'procompetitive presumption,' *see Agnew*, 683 F.3d at 341-42—is actually a judicially-made threshold exemption from antitrust law.

[4] "Positive" and "negative" citations to *Board of Regents* are coded to whether *Board of Regents*' call for "ample latitude" reflects antitrust immunity in any form.

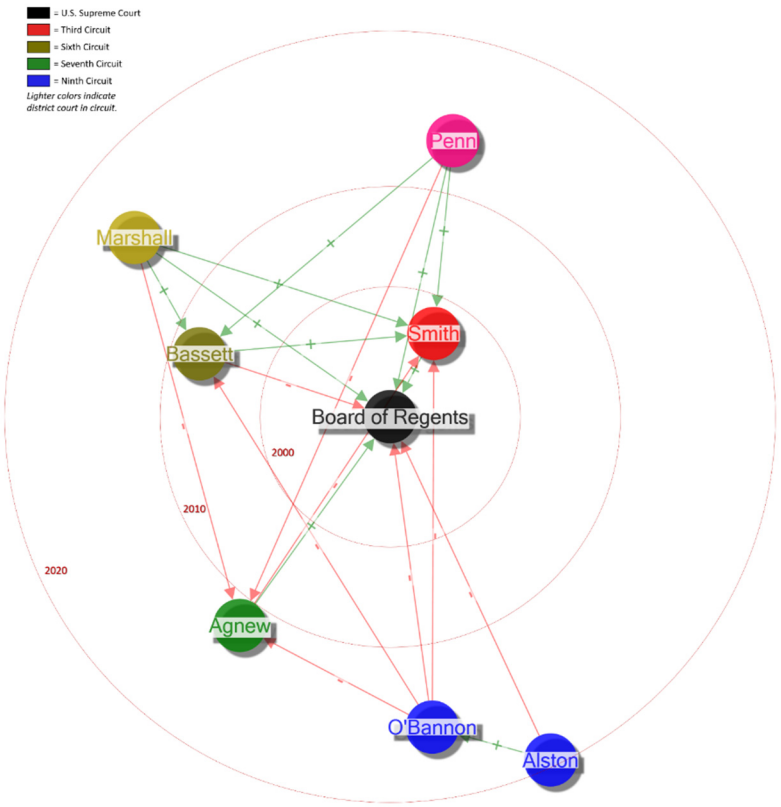

Figure 1: NCAA Amateurism Signed Network Graph Visualization[5]

This three-tiered circuit split involves three radically different approaches to applying antitrust law to NCAA amateurism rules, leading to three wildly divergent legal rules by three different precedential silos as

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[5] *See* Sam C. Ehrlich, *A Three-Tiered Circuit Split: Why the Supreme Court Needs to Hear Alston v. NCAA* (2020 working paper). For an explanation of the methodology employed to create this visualization, *see* Sam C. Ehrlich & Ryan M. Rodenberg, *Tracking the Evolution of Stare Decisis* (2020 working paper).

to the interpretation of *Board of Regents* and whether, how, and when NCAA rules should be subject to scrutiny under the Sherman Act. Whereas the guiding precedent within the Third, Sixth, and Seventh Circuits grants varying levels of implied antitrust immunity to NCAA activities in furtherance of amateurism, the guiding precedent within the Ninth Circuit seemingly does not.

As such, *amicus curiae* argues that there exists a need for correction by this Court. Whereas Petitioners argue that this case must be reviewed to overturn the Ninth Circuit's opinion, which they claim "erred in holding that NCAA amateurism rules receive fact-intensive rule of reason scrutiny," Pet. for Writ of Certiorari at 24, *NCAA v. Alston*, No. 20-512 (Oct. 15, 2020), this Court has repeatedly expressed a "heavy presumption against implicit exemptions" to the Sherman Act. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 777 (1975). Therefore—counter to Petitioner's arguments—*amicus curiae* argues that the decision below should be reviewed and affirmed to revoke the antitrust exemption that has been implicitly granted to the NCAA by other appellate circuits, who have improperly read into *Board of Regents* dicta a "tremendous weight" that it simply cannot support. *O'Bannon*, 802 F.3d at 1063.

For these reasons, the Court should grant the petition for a writ of certiorari.

ARGUMENT

In their petition for certiorari, Petitioners have noted a conflict between the circuits as to the application of antitrust laws to NCAA amateurism rules, including the grant-in-aid compensation rules at issue in the present case. Pet. for Certiorari at *passim*, *NCAA v. Alston*, No. 20-512 (Oct. 15, 2020); Pet. for Certiorari at *passim*, *Am. Athletic Conf., et al. v. Alston*, No. 20-520 (Oct. 15, 2020). However, the circuit split is even deeper than the NCAA admits. In fact, there is a *three-tiered* circuit split where the Ninth Circuit stands alone against two other sets of circuits. These other two circuits have improperly granted various degrees of implied antitrust immunity to the NCAA to enforce amateurism regulations. The presently appealed case should be heard by this Court to correct that circuit split and reaffirm this Court's longstanding "heavy presumption against implicit exemptions" to the antitrust laws. *Goldfarb*, 421 U.S. at 777.

I. A Three-Tiered Circuit Split Exists Where Petitioners Have Been Erroneously Granted an Implied Antitrust Exemption in Several Circuits

On May 18, 2020, the Ninth Circuit Court of Appeals released its opinion in *Alston v. NCAA*, 958 F.3d 1239 (9th Cir. 2020), affirming the district court's ruling finding Petitioners liable to the college athlete plaintiffs for antitrust injury concerning the fixing of grant-in-aid compensation to college athletes as a portion of their athletic scholarships. In its opinion, the

Ninth Circuit relied heavily on its previous ruling in *O'Bannon v. NCAA*, 802 F.3d 1049 (2015). In *O'Bannon*, the Ninth Circuit rejected Petitioners' contention "that any Section 1 challenge to its amateurism rules must fail as a matter of law" based on *NCAA v. Board of Regents*, 468 U.S. 85 (1984), where this Court prescribed "ample latitude" for the NCAA to play its "critical role in the maintenance of a revered tradition of amateurism in college sports." *Id*. at 120A.

As Petitioners have themselves argued, the repeated holding by the Ninth Circuit that Petitioners are subject to full Rule of Reason analysis has exacerbated an existing split between the circuits as to whether NCAA rules—specifically those rules implicating the amateur status of college athletes—are subject to antitrust review as a threshold matter.

In *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998), *rev'd on other grounds*, *NCAA v. Smith*, 525 U.S. 459 (1999), the Third Circuit Court of Appeals held that only the NCAA's commercial activities could be subject to antitrust scrutiny while holding that NCAA "eligibility rules" designed "to ensure fair competition in intercollegiate athletics" did not constitute such commercial activity. *Id*. at 185-86. The Sixth Circuit would later use that analysis to distill a similar division between NCAA activity, finding that "[s]imilar to the eligibility rules in *Smith*, NCAA's rules on recruiting student athletes, specifically those rules prohibiting improper inducements and academic fraud, are all explicitly non-commercial," as "providing remuneration to athletes in exchange for their commitments to play"

college sports "violates the spirit of amateur athletics." *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008).

Four years later, the Seventh Circuit addressed the commercial/non-commercial distinction in *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012), a case involving a challenge to NCAA limitations on the number and length of the athletic scholarships afforded to college athletes by member institutions. The Seventh Circuit clearly distanced itself from the Third and Sixth Circuits' reasoning, holding that the transaction between athletes and NCAA member institutions of "full scholarships in exchange for athletic services" is "not non-commercial, since schools can make millions of dollars as a result of these transactions." *Id*. at 340. While the Seventh Circuit found that the plaintiffs did not adequately plead a commercial market in that case, they wrote that "[t]he proper identification of a labor market for student-athletes . . . would meet plaintiffs' burden of describing a cognizable market under the Sherman Act." *Id*. at 346.

At the same time, however, the Seventh Circuit cited *Board of Regents*—specifically its statement that "most of the regulatory controls of the NCAA . . . are procompetitive because they enhance public interest in intercollegiate athletics," *Board of Regents*, 468 U.S. at 117—to find that certain NCAA bylaws "have been blessed by the Supreme Court, making them presumptively procompetitive." *Agnew*, 683 F.3d at 341. As such, the Seventh Circuit found that:

> [W]hen an NCAA bylaw is clearly meant to maintain the "revered tradition of amateurism in college sports" or the "preservation of the student-athlete in higher education," the bylaw will be presumed to be procompetitive, since we must give the NCAA "ample latitude" to play that role. *Id*. at 342-43.

When the Ninth Circuit released its decision in *O'Bannon v. NCAA*, it turned away from its sister circuits in explicit language. According to the Ninth Circuit, the Sixth Circuit's holding that NCAA recruiting rules are noncommercial was "simply wrong," as the exchange that NCAA compensation rules regulate "is a quintessentially commercial transaction." *O'Bannon*, 802 F.3d at 1065-66. The Ninth Circuit similarly rejected *Agnew*, writing that the Seventh Circuit's analysis "rested on the dubious proposition that in *Board of Regents*, the Supreme Court 'blessed' NCAA rules that were not before it, and did so to a sufficient degree to virtually exempt those rules from antitrust scrutiny," a proposition that the Ninth Circuit "doubt[ed]" was this Court's intent. *Id*. at 1064. In fact, the Ninth Circuit found that the *Board of Regents* language relied upon by the Seventh Circuit did not bind them "to conclude that every NCAA rule that somehow relates to amateurism is automatically valid," as the language was merely dicta since *Board of Regents* was a case about television rights, not amateurism rules. *Id*. at 1063.

As shown by the wide variety of differing opinions as to how to interpret and apply the *Board of Regents*

language calling for "ample latitude" for NCAA activity, the state of antitrust law as applied to amateurism is in complete disarray. As such, *amicus curiae* agrees with Petitioners that this case requires review by this Court. Where Petitioners and *amicus curiae* diverge, however, is which side of the circuit split should be affirmed.

When looking at the contextual doctrine of these citations, the differentiated handling of NCAA rules by the various circuits is highly dependent on the framing and positioning of NCAA rules as either eligibility rules or as general commercial activity. Based on the reasoning in the NCAA amateurism network cases—with particular focus on particular benchmark cases in the network—four categories of NCAA rules can be recognized:

> 1. "True" eligibility rules (as deemed in *O'Bannon*, 802 F.3d at 1066) like transfer rules and rules impacting on-field matters like equipment (*see*, *e.g., Warrior Sports, Inc. v. NCAA*, No. 08-14812, 2009 WL 230562 (E.D. Mich. 2009), *aff'd on other grounds*, 623 F.3d 281 (6th Cir. 2010); *Marucci Sports v. NCAA*, 751 F.3d 368 (5th Cir. 2014)) and uniforms (*see*, *e.g.*, *Adidas America v. NCAA*, 40 F.Supp.2d 1275 (D. Kan. 1999));
>
> 2. Rules impacting education-based compensation, including restrictions on the number and length of available scholarships (*see*, *e.g.*, *Agnew*, *supra*; *In re NCAA I-A Walk-On Football Players Litigation*, 398 F.Supp.2d 1144 (W.D. Wash. 2005));

3. Rules impacting compensation to players outside of scholarships, which includes sanctions on schools who compensate recruits (*Bassett*, *supra*) along with more general restrictions on compensation for player names, images, and likenesses (as challenged in *O'Bannon*, *supra*) and college athlete grant-in-aid (as challenged in *Alston*, *supra*); and,

4. Rules impacting general NCAA operations mostly unrelated to amateurism, including tournament scheduling (*see*, *e.g.*, *Worldwide Basketball & Sports Tours v. NCAA*, 388 F.3d 955 (6th Cir. 2004); *Metro. Intercollegiate Basketball Ass'n v. NCAA*, 337 F.Supp.2d 563 (S.D.N.Y. 2004)).

The differences between the circuits regarding these categories of NCAA bylaws is illustrated in tabular form in Figure 2.

Third Circuit (Smith) and **Sixth Circuit**
(Worldwide Basketball/Basset/Marshall)

EXEMPT (Non- or "Anti-" Commercial)			**RULE OF REASON**
<u>Category 1</u> "True" Eligibility Rules (e.g. year-in-residence transfer rule & equipment rule)	**<u>Category 2</u> Rules Impacting Scholarships** (e.g. limits on number & length of scholarships)	**<u>Category 3</u> Rules Impacting Compensation** (e.g. sanctions for paying players & NIL restrictions	**<u>Category 4</u> General NCAA Operations** (e.g. sanctioning of outside tournaments)

Seventh Circuit (Agnew)

EXEMPT (Presm. Procom.)	**RULE OF REASON**	**EXEMPT (Presm. Procom.)**	**RULE OF REASON**
<u>Category 1</u> "True" Eligibility Rules (e.g. year-in-residence transfer rule & equipment rule)	**<u>Category 2</u> Rules Impacting Scholarships** (e.g. limits on number & length of scholarships)	**<u>Category 3</u> Rules Impacting Compensation** (e.g. sanctions for paying players & NIL restrictions	**<u>Category 4</u> General NCAA Operations** (e.g. sanctioning of outside tournaments)

Ninth Circuit (O'Bannon/Alston)

EXEMPT (Non-Comm.?)		**RULE OF REASON**	
Category 1 **"True" Eligibility Rules** (e.g. year-in-residence transfer rule & equipment rule)	**Category 2** **Rules Impacting Scholarships** (e.g. limits on number & length of scholarships)	**Category 3** **Rules Impacting Compensation** (e.g. sanctions for paying players & NIL restrictions	**Category 4** **General NCAA Operations** (e.g. sanctioning of outside tournaments)

Figure 2: Illustration of the three-tiered circuit split (by category) in applying antitrust law to NCAA bylaws

For the so-called "true" eligibility rules, there does not seem to be much disagreement among the circuits. Even while the Ninth Circuit in *O'Bannon* sharply disagreed with *Agnew*'s overall pronunciation of a pro-competitive presumption in favor of Petitioners, the Ninth Circuit in that case also distinguished *Smith* and its impact on "true" eligibility rules from the compensation rules at issue rather than rejecting *Smith*'s reasoning outright. *O'Bannon*, 802 F.3d at 1065-66. This treatment of *Smith* signals that perhaps the Ninth Circuit would reject a challenge to one of these "true" eligibility rules on a threshold basis similarly to how the Third and Seventh Circuit treated these cases in *Smith* and the Seventh Circuit's follow-up to *Agnew*,

Deppe v. NCAA, 893 F.3d 498 (7th Cir. 2018), respectively.[6]

Similarly, all of the courts seem to agree that the fourth enunciated category involves purely commercial activity that easily passes beyond the threshold exemption question in favor of deciding based on Rule of Reason analysis. Of all of the cases analyzed in a study of the case law network surrounding antitrust application to NCAA rules (*see* Sam C. Ehrlich, *A Three-Tiered Circuit Split: Why the Supreme Court Needs to Hear Alston v. NCAA* (2020 working paper)), just one—the oddly-decided and later-overturned Hawaii Court of Appeals decision in *Aloha Sports v. NCAA*, No. CAAP-15-0000663, 2017 WL 4890131, at *5 (Haw. Ct. App. 2017), *rev'd on other grounds*, *Field v. NCAA*, 143 Haw. 362 (Haw. 2018)—found that NCAA activity in regards to its agreements with outside entities was non-commercial and therefore not subject to Sherman Act scrutiny. Even the Sixth Circuit, which has clearly favored a much broader interpretation of *Board of Regents*'s "ample latitude" language in favor

[6] It must be noted that this discussion of *Smith* was merely dicta; the Ninth Circuit has yet to tackle this discussion in a case involving these so-called "true" eligibility rules. The Ninth Circuit did in 2001 hear one case that concerned a challenge to one of these eligibility rules—specifically a similar transfer restriction to the rule challenged in *Deppe*—but the Ninth Circuit punted on the commercial/noncommercial issue, skipping that issue to proceed to market analysis while "assum[ing], without deciding, that the transfer rule is subject to the federal antitrust laws." *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062-64 (9th Cir. 2001).

of Petitioners, decisively found such NCAA activity to be commercial in *Worldwide Basketball*, *supra*.

The disputed rules are within the second and third categories, which in a broad sense can be combined into rules involving player compensation. These categories include limitations on education-based compensation including athletic scholarships (limits on what, per NCAA rules, college athletes *can* receive) and restrictions on outside compensation (limits on what college athletes *cannot* receive).

When looking at these categories together, the Sixth Circuit splits from both the Seventh and Ninth Circuits. The Sixth Circuit in *Bassett* found that rules restricting player compensation are not just non-commercial but "*anti*-commercial," as they "violate[] the spirit of amateur athletics." *Bassett*, 528 F.3d at 433. The Ninth Circuit in *O'Bannon* clearly disagreed with this sentiment, calling *Bassett*'s reasoning "simply wrong." *O'Bannon*, 802 F.3d at 1066. And while the Sixth Circuit has not heard a case on NCAA limitations on scholarship like the rules challenged in *Agnew*, the Seventh Circuit's description of the commercial market created through the transactions of "full scholarships in exchange for athletic services" very clearly contrasts with the Sixth Circuit's reasoning in *Bassett*. If the Sixth Circuit thinks that rules removing monetary compensation from amateur sports are "anti-commercial" because they keep the sport free of transactions where schools "provid[e] remuneration to athletes in exchange for their commitments to play for the violator's football program," they must also

agree that athletic scholarships are not "renumeration," and thus the transaction of athletic performance for a scholarship would not be considered commercial in nature. *Bassett*, 528 F.3d at 433.

The differences in these categories are clearly represented by two district court cases decided since *Agnew* and *Bassett*: *Pennsylvania v. NCAA*, 948 F.Supp.2d 416 (M.D. Pa. 2013) and *Marshall v. ESPN*, 111 F.Supp.3d 815, 834 (M.D. Tenn. 2015). In *Pennsylvania*—a challenge to the NCAA's actions taking away allotted athletic scholarships from Pennsylvania State University as punishing for the Jerry Sandusky sexual abuse scandal—the Middle District of Pennsylvania found the argument in *Agnew* that "scholarship limits constitute commercial activity" to be "unpersuasive." *Pennsylvania*, 948 F.Supp.2d at 426. Of *Agnew*'s rule that "the Sherman Act 'applies generally' to [the NCAA's] activities," the court wrote that the Seventh Circuit's holding "is not the law in this Circuit" and thus does not need to be followed. *Id*. (citing *Agnew*, 683 F.3d at 340). Similarly, the Middle District of Tennessee in *Marshall* also applied the Sixth Circuit's rule distinguishing between commercial and noncommercial activity—while also writing that *Agnew* "is not controlling." 111 F.Supp.3d at 834, *aff'd*, 668 Fed. Appx. 155 (6th Cir. 2016).[7] While district court

[7] The Sixth Circuit itself did not directly address the threshold question of antitrust applicability in their unpublished, three-paragraph decision but did adopt the district court's reasoning in whole, deeming it "notably sound and thorough." *Marshall*, 668 Fed. Appx. at 157. Notably, whereas Pennsylvania represents the second enumerated category of NCAA rules (education-based

opinions cannot conclusively be used to show the current opinion of the circuit courts of appeal, *Pennsylvania* and *Marshall* at least demonstrate that the differences between the circuits on this issue have led to confusion in the district courts as to which standard to apply.

The split between the Seventh and Ninth Circuits comes in the third category—restrictions on outside compensation to college athletes. In *Agnew*, the Seventh Circuit rejected the NCAA's attempted characterization of the scholarship limits at issue as analogous to rules forbidding outside compensation. *Agnew*, 683 F.3d at 343. Distinguishing scholarship limits from these outside compensation rules, the Seventh Circuit wrote that "[t]here may not be such a thing as a student-athlete, for instance, if it was not for the NCAA rules requiring class attendance," and "[t]he same goes for bylaws eliminating the eligibility of players who receive cash payments beyond the costs attendant to receiving an education—a rule that clearly protects amateurism." *Id*. (citing *McCormack v. NCAA*, 845 F.2d

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compensation, i.e. athletic scholarships), *Marshall*—an attempt by college athletes to enter the market for the licensing, use, and sale of their names, images, and likenesses on television broadcasts—represents the third category as a challenge to a restriction on 'outside' compensation. This is notable in that the Sixth Circuit's opinion in *Marshall* affirming the district court's holdings did not once mention the Ninth Circuit's opinion in *O'Bannon*, even despite similar fact patterns (both concerned restrictions on athlete use of name, image, and likeness rights) and the fact that the *Marshall* opinion was released three months after *O'Bannon*. *Marshall*, 668 Fed. Appx. at 156-57.

1338 (5th Cir. 1988)). This language gives a clear picture of the Seventh Circuit's interpretation of these "cash payments beyond the costs attendant to receiving an education" as eligibility rules contained within *Board of Regents*'s "ample latitude" and this court's own reading of *Board of Regents* as to find these rules presumptively procompetitive. *Id*.

The Ninth Circuit clearly disagrees with the framing of compensation limits as eligibility rules. Indeed, *O'Bannon* and *Alston*—two cases touching on restrictions to compensation—were both allowed to proceed to Rule of Reason analysis. *O'Bannon*, 802 F.3d at 1066; *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation*, 375 F.Supp.3d 1058 (N.D. Cal. 2019), *aff'd*, *Alston v. NCAA*, 958 F.3d 1239 (9th Cir. 2020).

Of course, the Ninth Circuit still did draw something of a line in regard to compensation limits in rejecting the district court's imposition of a $5,000 per year stipend. *O'Bannon*, 802 F.3d at 1076-79. Writing that "[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap," the Ninth Circuit made clear that *Board of Regents*'s plea for courts to give Petitioners "'ample latitude' to superintend college athletes" does, in their view, allow the NCAA to restrict compensation "untethered to education." *Id*. at 1078-79 (citing *Board of Regents*, 468 U.S. at 120). But the vital difference here is this distinction was made on *Rule of Reason* grounds—finding error in the district court's grant of this stipend as "a substantially

less restrictive alternative restraint" to the challenged restrictions on NIL rights—rather than giving Petitioners a wholesale exemption in this category.[8] *O'Bannon*, 802 F.3d at 1079.

A similar determination was made in the presently-appealed case, where the Ninth Circuit affirmed the district court's finding that, based on *O'Bannon* and *Board of Regents*, Petitioners could cap outside compensation but could not do the same for education-related compensation; the latter represented overbroad means to accomplish the procompetitive goal of preserving the difference between amateur and professional sports. *Alston*, 958 F.3d at 1260-62. Just as with *O'Bannon*, this determination was made by applying the "less restrictive alternative" prong of Rule of Reason analysis, rather than reading *Board of Regents*'s call for "ample latitude" as a call to wholly exempt NCAA amateurism rules from antitrust law as the other circuits' rules clearly imply. This represents the *correct* way that antitrust law should be applied to NCAA amateurism rules, and the correct interpretation of *Board of Regents*.

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[8] The full statement in *O'Bannon* to this extent reads: "In light of [the difference between education-related compensation and outside compensation], the meager evidence in the record, and the Supreme Court's admonition that we must afford the NCAA 'ample latitude' to superintend college athletics, . . . we think it is clear the district court erred in concluding that small payments in deferred compensation are a substantially less restrictive alternative restraint." *Board of Regents*, 802 F.3d at 1079 (citation omitted).

In sum, while the Ninth Circuit has properly applied the Rule of Reason in weighing the procompetitive aspects of NCAA amateurism rules against their anticompetitive effects, the Third, Sixth, and Seventh Circuits have—to varying degrees—repeatedly dismissed challenges to NCAA amateurism rules on a *threshold* basis, thereby granting NCAA exemption from antitrust laws that should not exist. Based on this Court's repeated disfavor of implicit antitrust exemption, the Ninth Circuit's opinion in the presently-appealed case should be elevated as the only correct reading of *Board of Regents*.

II. Certiorari Should be Granted to Reaffirm This Court's Repeated Disfavor of Judge-Made Implied Antitrust Exemptions

As argued above, contrary to Petitioners' arguments, the circuit split that truly exists in this case is between the Ninth Circuit's correct Rule of Reason-based analysis and the implicit threshold-level exemption granted to NCAA amateurism rules by the Third, Sixth, and Seventh Circuits through their incorrect reading of the *Board of Regents* dicta. Judging by this Court's repeated disfavor of implied antitrust exemptions, the Ninth Circuit's approach should be affirmed as the only correct interpretation of *Board of Regents*.

The grant of what is effectively implicit antitrust immunity by the Third, Sixth, and Seventh Circuits is clearly in conflict with a long line of precedent at this Court. This Court has repeatedly noted a "heavy

presumption against implicit exemptions" to the Sherman Act. *Goldfarb v. Virginia State Bar*, 421 U.S. at 777. *See also California v. FPC*, 369 U.S. 482, 485 (1962) ("Immunity from the antitrust laws is not lightly implied"); *Group Life & Health Ins. v. Royal Drug*, 440 U.S. 205, 231 (1979) ("It is well settled that exemptions from the antitrust laws are to be narrowly construed"); *So. Motor Carriers Rate Conf. v. United States*, 471 U.S. 48, 67 (1985) ("Implied antitrust immunities, however, are disfavored. . . ."). Such presumption carries particular weight in the context here, as numerous circuit courts have misread *Board of Regents*, 468 U.S. at 120A, to grant implied antitrust immunity to various NCAA activities. As such, petition for certiorari should be granted in this case not only to affirm the Ninth Circuit's holding, but to reject the Third, Sixth, and Seventh Circuits' incorrect reading of *Board of Regents* and the disfavored implied antitrust immunity this incorrect reading created.

Indeed, this Court's holding in *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 348 (1963) is particularly apt here. In *Philadelphia Nat. Bank*, this Court rejected the argument that Congress intended to confer an antitrust exemption to the banking industry through a 1950 amendment which had added an assets-acquisition provision to § 7 of the Clayton Act. *Id*. at 340-48. Reviewing the legislative history of the amendment, this Court stated that there was "no indication . . . that Congress wished to confer a special dispensation upon the banking industry" and if Congress had wished to grant a wider exemption than the

narrow amendment granting exemption solely to asset acquisition, "surely it would have exempted the industry" either at that time or through later legislation. *Id*. at 348.

A similar argument presents itself in the presently-appealed case. In response to the Ninth Circuit's holdings in *O'Bannon* and *Alston*—along with state legislation forcing NCAA member institutes to allow college athletes to profit off of their name, image, and likeness—the NCAA has repeatedly asked Congress to grant them protection from antitrust law as part of a global name, image, and likeness bill. *See*, *e.g.*, NCAA Board of Governors, Federal and State Legislation Working Group, Final Report and Recommendations at 27 (Apr. 17, 2020), https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf; *Protecting the Integrity of College Athletics: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 4 (2020) (statement of Mark Emmert, President, National Collegiate Athletic Association). Petitioners have even cited this Congressional action in their own petition for writ of certiorari. Pet. for Writ of Certiorari at 6, No. 20-512 (Oct. 15, 2020) (noting that Congress "is considering (with petitioner's active involvement) whether to adopt federal legislation regarding student-athlete compensation").

Despite Petitioner's efforts, Congress has thus far refused to grant this request. Like the bankers in *Philadelphia Nat. Bank*, Petitioners should not be permitted to continue to usurp the legislative process by asking this Court to grant them antitrust protection

that Congress has, at least thus far, declined to grant to them. *See So. Motor Carriers Rate Conf.*, 471 U.S. at 67 ("Only Congress, expressly or by implication, may authorize price fixing, and has done so in particular industries or compelling circumstances").

But more critically, the Third, Sixth, and Seventh Circuit's guiding precedent in *Smith*, *Bassett*, and *Agnew/Deppe* show that *such an implied antitrust exemption essentially already exists*. The Third, Sixth, and Seventh Circuits' holdings in those cases are the ultimate examples of the courts creating an implied antitrust exemption where none should be created. As the Ninth Circuit (correctly) argued in *O'Bannon*, Justice Stevens's call for the courts to give "ample latitude" was nothing more than dicta, as *Board of Regents* was about the schools' ability to sell television broadcasting rights, not about the amateur status of college athletes. 802 F.3d at 1063. Indeed, as the Ninth Circuit pointed out in *O'Bannon*, *Board of Regents* was actually about "why NCAA rules should be analyzed under the Rule of Reason, rather than held to be illegal per se." *Id*. This point presumably also applies to the implied immunity granted to Petitioners by the Third, Sixth, and Seventh Circuits. And based on this Court's repeated refusal to find implied antitrust exemptions based on creative reading of *statutory* law (*see, e.g.*, *Philadelphia Nat. Bank*, 374 U.S. at 340-48), the Third, Sixth, and Seventh Circuits' finding of implied antitrust immunity *based on Supreme Court dicta* is clearly a mistake that requires correction by this Court.

As the Ninth Circuit also concluded in *O'Bannon*, even if the *Board of Regents* language in question was not dicta, "it would not support the tremendous weight" placed upon it by *Smith*, *Bassett*, *Agnew*, and Petitioners themselves. 802 F.3d at 1063. The granting of "ample latitude" by the courts to the maintenance of amateurism can simply mean giving Petitioners' offered procompetitive effects additional weight and consideration when balancing them against the anticompetitive effects of Petitioners' activities. This is exactly what the Ninth Circuit has done in the presently-appealed case, and the refusal of the Ninth Circuit to read Board of Regents as granting a disfavored implied antitrust exemption should be affirmed by this Court, especially given the conflicting precedent in *Smith*, *Bassett*, and *Agnew* where implied antitrust immunity was granted to Petitioners' amateurism-based activities.

Petitioners—guided by the implied antitrust immunity erroneously granted to them by the Third, Sixth, and Seventh Circuits—wish for this Court to confer onto them a judge-made antitrust exemption of the scale granted to professional baseball in *Federal Baseball v. National League*, 259 U.S. 200 (1922); *Toolson v. New York Yankees*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). This Court has repeatedly refused to extend the baseball exemption to other sports and other contexts (*see*, *e.g.*, *Radovich v. National Football League*, 352 U.S. 445 (1957); *United States v. International Boxing Club*, 348 U.S. 236 (1955)) and has repeatedly bemoaned the grant of

antitrust immunity to baseball even while affirming it on the basis of *stare decisis*. *See Radovich*, 352 U.S. at 452 (deeming the baseball exemption "unrealistic, inconsistent, or illogical"); *Flood*, 407 U.S. at 282 ("With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball"). This Court should hear and affirm this case in order to ensure that a judicially-created exemption to the antitrust laws on the scale of the exemption granted to baseball in *Federal Baseball* does not—and cannot—happen again.

CONCLUSION

Amicus curiae's argument that this Court should grant certiorari in this case ultimately boils down to a simple issue: a circuit split exists where one set of circuits have granted Petitioners various degrees of implied antitrust immunity while another circuit has not. As such, *amicus curiae* ultimately agrees with Petitioners that certiorari should be granted in this case but disagrees as to the final goal of the court, if the petition should be granted.

This Court should grant certiorari in this case in order to resolve the circuit split and to hold firm to repeated prior precedent disfavoring implied antitrust immunity.

Respectfully submitted,

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