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 Writs 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 NEITHER PARTY

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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.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is somewhat ironic that this case falls so near the 100-year anniversary of *Federal Baseball v. National League*, 259 U.S. 200 (1922), a well-debated opinion by this Court that gave a particular sports league—and, for decades *only* that sports league—broad immunity from the antitrust laws. In doing so, this Court set up the field of sports antitrust law in a way that would position professional baseball apart from the

[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. All parties have either filed blanket consents to the filing of *amicus* briefs with the Clerk's office or have given their direct consent to the filing of this brief.

[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.

other leagues to a degree that this Court would later remark is "unrealistic, inconsistent, or illogical." *Radovich v. National Football League*, 352 U.S. 445, 452 (1957). Indeed, even a sitting member of this Court has remarked on the baseball exemption's controversial nature, noting that *Federal Baseball* has been "pilloried pretty consistently in the legal literature since at least the 1940s." Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption: Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 34 J. SUP. CT. HIST. 183, 192 (2009).

Of course, Justice Alito noted agreement with commentary that *Federal Baseball* was mostly correct for its time, deeming a scholarly assessment of *Federal Baseball*'s criticism as "principally for things that were not in the opinion, but later added by *Toolson* and *Flood*" to be seemingly "accurate." *Id*. at 193 (quoting Kevin McDonald, *Antitrust and Baseball: Stealing Holmes*, 1998 J. SUP. CT. HIST. 89, 122 (1998)); *see also Toolson v. New York Yankees*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972) (each affirming baseball's antitrust exemption on the basis of *stare decisis*). As Justice Alito mentioned, this Court had "at least two opportunities to overrule the *Federal Baseball* case," and did so both times "over withering dissents." Alito, *supra*, at 192. Thus, while *Federal Baseball* may not deserve its notorious reputation, decisions by this Court to continue to affirm the baseball exemption—even while completely undercutting *Federal Baseball*'s legal underpinnings in *Flood*, 407 U.S. at 282-83—are certainly fair game for questioning.

While Petitioners have strategically refused to frame it this way, this Court now—99 years after *Federal Baseball*—once again faces a question about whether to grant a request by a sports league to grant it an antitrust exemption. But unlike *Toolson* and *Flood*, the doctrinal history underpinning this case presents little basis for an argument of binding *stare decisis* based on past court decisions, as the language continuously pointed to by Petitioners as compelling the courts to grant them "ample latitude" under the antitrust laws is merely dicta. *NCAA v. Board of Regents*, 468 U.S. 85, 120A (1984). After all—as the Ninth Circuit found—while this Court "certainly discussed the NCAA's amateurism rules at great length" in *Board of Regents*, "it did not do so in order to pass upon the rules' merits, given that they were not before the Court." *O'Bannon v. NCAA*, 802 F.3d 1049, 1063 (9th Cir. 2015).

The Court should hold firm to decades of precedent strongly disfavoring implicit, court-made antitrust exemptions. This Court has repeatedly noted a "heavy presumption against implicit exemptions" to the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 777 (1975). *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 powers should be reserved to Congress, who has thus far declined to grant the Petitioners that deference despite repeated opportunities to do so. In fact, such opportunities have only increased in recent years; Petitioners have had no less than three opportunities to lobby Congress for legislative relief in public Senate hearings since July 1, 2020. *See Exploring a Compensation Framework for Intercollegiate Athletics Before the S. Comm. on Com., Sci., and Transp.*, 116th Cong. (2020); *Protecting the Integrity of College Athletics Before the S. Comm. on the Judiciary*, 116th Cong. (2020); *Compensating College Athletes: Examining the Potential Impact on Athletes and Institutions Before the S. Comm. on Health, Ed., Labor, and Pensions*, 116th Cong. (2020). But, as of yet, there is no signed bill or reported consensus granting them the antitrust immunity that they now seek from this Court.

At the heart of this Court's justification for affirming the baseball exemption in *Toolson*, 346 U.S. at 357, was that "Congress . . . had [*Federal Baseball*] under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect." If that statement is true, its corollary must also be true: that since Congress has had plenty of opportunities to consider the Petitioners' requests for antitrust immunity but "has not seen fit" to grant that request through legislation, this Court should cede to Congress's inaction. *Id*.

Amicus curiae takes no position on whether the Ninth Circuit decision should be affirmed or overruled.

Instead, the position set forth in this brief is that regardless of this Court's conclusion in this case, the Petitioners' underlying assertions that they are entitled to antitrust immunity for amateurism-related activities based on the precedent of *Board of Regents*, 468 U.S. 85 (1984), should be rejected. As argued, *Board of Regents* provides no *stare decisis* on this point, and any approach by this Court that grants such antitrust immunity fails to consider the powerful lessons of the Court-enacted baseball antitrust exemption.

ARGUMENT

I. There is No Existing Basis Under *Board of Regents* or Other Supreme Court Precedent to Grant the Petitioners a Broad, Threshold-Level Exemption from the Antitrust Laws

For the past thirty-six years, lower courts have wrestled with how to interpret this Court's language in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), specifically the portions of Justice John Paul Stevens's decision that discuss the NCAA's eligibility rules concerning the amateur status of college athletes. In his conclusion to this decision, Justice Stevens wrote that the NCAA "plays a critical role in the maintenance of a revered tradition of amateurism in college sports." *Id*. at 120A. As such, Justice Stevens wrote, there is "no question but that" the NCAA "needs ample latitude to play that role" to "preserve a tradition that might otherwise die." *Id*.

It is in that call for "ample latitude" where courts have struggled with formulating a proportional response under the *Board of Regents* precedent. As frequently discussed by the Petitioners, the Seventh Circuit cited this language to find that NCAA bylaws that "'fit into the same mold' as eligibility rules" and "clearly protect[] amateurism" require a finding by a court "to deem such rules procompetitive," as "they define what it means to be an amateur or a student-athlete, and are therefore essential to the very existence of the product of college football." *Agnew v. NCAA*, 683 F.3d 328, 343 (7th Cir. 2012).

The Seventh Circuit's broad interpretation of *Board of Regents* as having compelled courts to give wide-ranging deference for NCAA amateurism activities can also be shown through its spread to other areas of law. For example, the Seventh Circuit recently cited *Board of Regents* to hold that college athletes cannot be subject to federal wage and hour law, as, in their view, the "revered tradition of amateurism in college sports" cited by Justice Stevens "defines the economic reality of the relationship between student athletes and their schools." *Berger v. NCAA*, 843 F.3d 285, 291 (7th Cir. 2016). As such, the Seventh Circuit found that the standard multifactor tests for employment status "'fail to capture the true nature of the relationship' between student athletes and their schools" and thus found that relationship to not represent an employment relationship. *Id*. (quoting *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992).)

Conversely, in the presently appealed case the Ninth Circuit properly affirmed the district court's use of the Rule of Reason test to determine the legality of the disputed NCAA bylaws. *See In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation*, 958 F.3d 1239, 1254-55 (9th Cir. 2020). Rather than relying on *Board of Regents* to grant wide immunity to the Petitioners activities—as the Seventh Circuit has prescribed—the Ninth Circuit gave due deference to the preservation of amateurism in college sports by allowing it as a procompetitive purpose at the second step of Rule of Reason analysis before affirming the district court's fact-based finding that the bylaws at issue were more restrictive than necessary to preserve amateurism in college sports. This is precisely how the Rule of Reason should operate, and—barring a Congressionally-mandated antitrust exemption—exactly how deference to the preservation of amateurism should be afforded under *Board of Regents* when analyzing NCAA activities under the antitrust laws.

Instead of granting the Petitioners a threshold-level exemption from antitrust law the Ninth Circuit accurately placed the question of what comprises "ample latitude" into the Rule of Reason test, allowing the Petitioners to argue the merits of its preservation of "'amateurism,' which, in turn, 'widen[s] consumer choice' by maintaining a distinction between college and professional sports" as a procompetitive rationale that may—or may not—outweigh its activities in restraint of trade. *In re NCAA*, 958 F.3d at 1257; *see also O'Bannon*, 802 F.3d at 1058-59 (discussing the merits

of preservation of amateurism as a procompetitive purpose to its restraints of trade at the second step of the Rule of Reason test). This allows courts to consider whether these rules are "*patently* and *inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives." *O'Bannon*, 802 F.3d at 1075 (emphasis in original); *In re National Collegiate Athletic Association*, 958 F.3d at 1260.

There can be no question that the Ninth Circuit's approach is the only correct interpretation of the breadth of the "ample latitude" that must be provided to NCAA activities and at what stage of antitrust litigation that "ample latitude" must be considered. Justice Stevens and the rest of the *Board of Regents* majority, after all, did not explicitly state that this "ample latitude" must be in the form of a wholesale, threshold-level exemption from the antitrust laws, or any other law at that. Such questions were not even before the Court in *Board of Regents*.

Indeed, the NCAA rules that *were* before the Court in *Board of Regents*—output restrictions on college football television broadcasts—were found to have "restricted rather than enhanced the place of intercollegiate athletics." *Board of Regents*, 468 U.S. at 120A. While Justice Stevens did write of rules that "are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive," no language by the *Board of Regents* Court explicitly stated that those rules should be fully above the law. *Id*. This essential point was noted by the Third Circuit in *Smith v. NCAA*, 139 F.3d 180, 185 (3d Cir. 1998), *vacated on*

other grounds, *NCAA v. Smith*, 525 U.S. 459 (1999), as they stated that "no court of appeals expressly has addressed the issue of whether antitrust laws apply to the NCAA's promulgation of eligibility rules." Given that *Smith* was decided fourteen years after *Board of Regents*, one can reasonably assume that the Third Circuit was aware of this Court's call for "ample latitude" in *Board of Regents* and did not read "ample latitude" as representing a wholesale exemption from antitrust law.

Supporting this much more limited reading of *Board of Regents* is entirely consistent with this Court's long disfavor of implicit, court-made exemptions to the antitrust laws. *See, e.g.*, *Goldfarb v. Virginia State Bar*, 421 U.S. at 777 ("[O]ur cases have repeatedly established that there is a heavy presumption against implicit exemptions [to § 1 of the Sherman Act]"); *California v. FPC*, 369 U.S. at 485 ("Immunity from the antitrust laws is not lightly implied").[3] A

[3] While this Court held in *American Needle v. NFL*, 560 U.S. 183 (2010), that "teams that need to cooperate are not trapped by antitrust law" as their shared interests "provide[ ] perfectly sensible justification for making a host of collective decisions," that holding was clear that Rule of Reason analysis is still required to weigh that justification against its anticompetitive costs, even if that analysis "can sometimes be applied in the twinkling of an eye." *Id*. at 202-04 (quoting *Board of Regents*, 468 U.S. at 110). Instead, Petitioners seek a ruling—based on the Seventh Circuit's holdings in *Agnew*, 683 F.3d at 341-42, and *Deppe*, 893 F.3d at 501-02—that all restrictions of the college athlete labor market in furtherance of amateurism are presumptively procompetitive, thus automatically outweighing any alleged anticompetitive harm put before the court. This request is not consistent with *American Needle*.

wholesale "procompetitive presumption"—as formulated by the Seventh Circuit in *Agnew v. NCAA*, 683 F.3d at 341-42, and applied in *Deppe v. NCAA*, 893 F.3d 498, 501-02 (7th Cir. 2018)—is too close to a blanket exemption from the Sherman Act to be warranted under the law. By contrast, the Ninth Circuit's approach in this litigation, which places the onus on the Petitioners to prove that their alleged procompetitive rationales—including the defense and maintenance of amateurism—outweigh the clear anticompetitive effects of the Petitioners' price fixing schemes, is the approach that should be adopted moving forward.

II. Granting Antitrust Immunity to the Petitioners in this Case Would Repeat the Same Mistakes of *Federal Baseball v. National League*

Regardless of what one might think of this Court's creation of the baseball antitrust exemption in *Federal Baseball v. National League*, 259 U.S. 200, it is undisputed that numerous judges—including those on this Court—have bemoaned its existence. The Second Circuit famously referred to *Federal Baseball* as "not one of Mr. Justice Holmes' happiest days" while deeming the rationale of *Toolson*'s affirmance of *Federal Baseball* to be "extremely dubious." *Salerno v. American League*, 429 F.2d 1003, 1005 (2d Cir. 1970). Even while affirming the baseball exemption in *Flood v. Kuhn*, 707 U.S. at 282, this Court called the baseball exemption "an exception and an anomaly" and an "aberration." Writing in dissent, Justice Douglas called the baseball

exemption "a derelict in the stream of the law that we, its creator, should remove." *Id*. at 286 (Douglas, J., dissenting). In fact, this Court wrote in an earlier case (which declined to extend the baseball exemption to professional football) that "were we considering the question of baseball for the first time upon a clean slate we would have no doubts" that the sport should not receive the protection given to them in *Federal Baseball*. *Radovich*, 352 U.S. at 452.

In the years following *Federal Baseball*, this Court has steadfastly refused to extend baseball's antitrust immunity to other professional sports. *See Radovich*, 352 U.S. 445 (declining to exempt professional football from antitrust law); *United States v. International Boxing Club of New York*, 348 U.S. 236 (1955) (declining to exempt professional boxing from antitrust law); *Flood*, 707 U.S. at 282-83 ("Other professional sports operating interstate—football, boxing, basketball, and, presumably, hockey and golf—are not so exempt.") As noted above, the Third Circuit found fourteen years after *Board of Regents* that no court—including this one—had "addressed the issue of whether antitrust laws apply to the NCAA's promulgation of eligibility rules." *Smith*, 139 F.3d at 185.

But should *Alston* be found in favor of the Petitioners in a manner similar to a "procompetitive presumption" for amateurism rules as the Seventh Circuit has now twice espoused, *see Agnew*, 683 F.3d at 341-42; *Deppe*, 893 F.3d at 501-02—or, even worse, by declaring NCAA amateurism restrictions to be non- or even "anti-commercial" as the Sixth Circuit did in *Bassett v.*

NCAA, 528 F.3d 426, 433 (6th Cir. 2008)—the mistakes of *Federal Baseball* would be repeated all over again. The Petitioners make their request for antitrust deference based on the preservation of 'amateurism,' citing *Board of Regents*. However, Judge Wilken at the Northern District Court of California correctly found that this concept of 'amateurism' in intercollegiate sports comes with "no stand-alone definition" and a wholly incomplete and inconsistent explanation of what can be considered to be "pay," at least based on plain language definitions of the term. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation*, 375 F. Supp. 3d 1058, 1070-71 (N.D. Cal. 2019).

The flimsy nature of the Petitioners' request for antitrust deference based on 'amateurism' can only bring back strong memories of *Federal Baseball*'s definition of professional baseball as merely "exhibitions . . . which are purely state affairs." *Federal Baseball*, 259 U.S. at 208. Just as how that definition may have been true in 1922 but is not true now, the Petitioners' and some lower courts' vision of the relationship between college athletes and their schools as entirely divorced from economic consideration may have been true several decades ago (including when *Board of Regents* was decided), but is certainly not true in modern times. *See Agnew*, 683 F.3d at 338-41 (describing the clearly economic nature of the modern intercollegiate sports labor market.) Given that trajectory, one wonders what judges and legal scholars 100 years from now might think of the Court's decision in this case should that decision have the effect of granting antitrust

immunity to NCAA activities, even if that immunity is narrower than the nearly-unlimited exemption that baseball enjoys to this day.

Moreover, unlike in *Federal Baseball*'s progeny—*Toolson* and *Flood*—no *stare decisis* binds this Court to continue any existing antitrust immunity. Regardless of what one may think of the power of language in *Board of Regents*, language on amateurism is merely dicta, as noted above. It is dicta that should certainly be given its fair respect, but it is dicta that gives no firm statement that the Court is bound to give any true, threshold-level antitrust immunity to the Petitioners, as demonstrated by the circuit split between courts attempting to interpret the *Board of Regents* amateurism language. *Board of Regents*'s call for courts to afford the NCAA "ample latitude" to promulgate amateurism restrictions is vague enough to be interpretable in an infinite number of ways, even by simply allowing amateurism as a valid procompetitive purpose in Rule of Reason analysis. That is exactly what the lower court did in this case. *See In re National Collegiate Athletic Association*, 958 F.3d at 1257-59 (allowing "a much narrower conception of amateurism that still gives rise to procompetitive effects" to be balanced as a procompetitive justification, rather than the NCAA's "expansive conception of amateurism" that was found at the trial court to be unsupported by the evidence). "Ample latitude" does not necessarily require an effective threshold-level exemption for activities implicating amateurism in college sports. Thus, as precedent, the disputed *Board of Regents* language is

wholly distinguishable from the much more directive *Federal Baseball* doctrine that was relied upon as *stare decisis* in *Toolson* and *Flood*.

In sum, *amicus curiae* respectfully argues that if this Court were to assess a broad reading of the well-cited *Board of Regents* language on amateurism to grant antitrust immunity to the NCAA, it would be accepting the NCAA's implicit argument that inter-collegiate sports is entitled to special treatment as compared with the other sports leagues. A "revered tradition of amateurism in college sports"—as assessed by this Court more than 35 years ago—is not sufficient to justify such treatment. *Board of Regents*, 85 U.S. at 120A. The grant of the decidedly baseball-like special treatment that Petitioners seek would be—in this Court's own words—"unrealistic, inconsistent, or illogical." *Radovich*, 352 U.S. at 452. Furthermore, as this Court has repeatedly stated, such grants should be exclusively in the hands of Congress, not the courts.

III. Granting Antitrust Immunity to the Petitioners in this Case Would Disrupt the Ongoing Legislative Process Surrounding College Athletic Reform

It is of little secret that the Petitioners have been engaged with various members of Congress to lobby for legislation to preempt recently passed state legislation forcing change in NCAA name, image, and likeness (NIL) policy. *See, e.g.*, Brett McMurphy, Twitter (May 29, 2020), https://twitter.com/Brett_McMurphy/status/

1266411058044035075 (attaching a letter from five Petitioner athletic conferences to Congress asking Congress to enact federal NIL legislation); 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 even cited this Congressional action in their own petition for writ of certiorari. Pet. for Writ of Certiorari at 6, *NCAA v. Alston*, 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").

Such legislation would presumably include—if Congress so chooses—immunity from antitrust enforcement. Indeed, lawyers from the Department of Justice recently sent a letter to the NCAA warning that their proposed direction on NIL reform measures "may raise concerns under the antitrust laws." Steve Berkowitz & Christine Brennan, *Justice Department warns NCAA over transfer and name, image, likeness rules*, USA TODAY (Jan. 8, 2021), https://www.usatoday.com/story/sports/ncaaf/2021/01/08/justice-department-warns-ncaa-over-transfer-and-money-making-rules/6599747002/. Citing this letter, the NCAA has now delayed voting on its proposed NIL and athlete transfer rules indefinitely, presumably waiting to see whether

it can receive antitrust immunity for these rules from Congress—or from this Court in this case—first. Steve Berkowitz, *NCAA Division I Council delays vote on transfer rules and name, image and likeness*, USA TODAY (Jan. 11, 2021), https://www.usatoday.com/story/sports/ncaaf/2021/01/11/ncaa-voted-delayed-transfer-rules-name-image-and-likeness/6629391002/.

But in the past year the Petitioners have been afforded no less than three opportunities to lobby Congress in legislative hearings debating the extent to which Congress should intervene. *See Compensating College Athletes: Examining the Potential Impact on Athletes and Institutions Before the S. Comm. on Health, Ed., Labor, and Pensions*, 116th Cong. (2020); *Exploring a Compensation Framework for Intercollegiate Athletics Before the S. Comm. on Com., Sci., and Transp.*, 116th Cong. (2020); *Protecting the Integrity of College Athletics Before the S. Comm. on the Judiciary*, 116th Cong. (2020). These efforts have led to several proposed bills, some of which have been formally submitted by several different Members of Congress for committee review. *See, e.g.*, Fairness in Collegiate Athletics Act, S. 4004, 116th Cong. (2020) (introduced by Senator Marco Rubio); Collegiate Athlete Compensation Rights Act, S. 5003, 116th Cong. (2020) (introduced by Senator Roger Wicker); Student Athlete Level Playing Field Act, H. R. 8382, 116th Cong. (2020) (introduced by Representative Anthony Gonzalez).

Most of this proposed legislation includes some degree of antitrust immunity for the Petitioners' activities, as well as immunity under federal and state

wage-and-hour statutes like the Fair Labor Standards Act. *See* Andy Staples and Nicole Auerbach, *Which bill to compensate college athletes will win out, and which one should?*, THE ATHLETIC (Dec. 28, 2020), https://theathletic.com/2287100/2020/12/28/ncaa-congress-name-image-likeness-bill/ (summarizing the proposed NIL legislation before Congress.) But Congress has thus far failed to take any action to pass this legislation and grant the relief that the Petitioners now seek from this Court. *See Flood*, 407 U.S. at 281-83 (citing as persuasive the "numerous and persistent" legislative proposals that Congress failed to pass and finding that since Congress had yet to enact this legislation, they clearly intended baseball's treatment under the antitrust laws to remain as is.)

Because of the lack of *Federal Baseball*-like *stare decisis* or existing legislation already prescribing the NCAA antitrust immunity for amateurism restrictions, this Court's prior precedent placing the role of creating antitrust immunity in the hands of the legislative branch should hold. As an example, this case has strong similarities to the fact pattern leading to this Court's holding in *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 348 (1963), where 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.

Despite Petitioners' 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.") Such power should be left in the hands of the legislative branch, which will allow Congress to grant the Petitioners antitrust immunity only when it sees fit.

CONCLUSION

As noted, *amicus curiae* takes no position on whether the Ninth Circuit decision should be affirmed or overruled. This brief instead submits that the Court in this case is faced with a second choice and question of law: whether to affirm the Seventh Circuit's approach in *Agnew v. NCAA*, 683 F.3d at 341-42, and *Deppe v. NCAA*, 893 F.3d at 501-02, of granting broad antitrust immunity through a "procompetitive presumption" for

the Petitioners' activities related to amateurism; or whether to affirm the Ninth Circuit's approach, which has rejected Petitioners' claim to antitrust immunity and instead forced them to justify their conduct by balancing procompetitive effects against anticompetitive harms.

In the view of *amicus curiae*, that decision should be clear. The Ninth Circuit's approach properly applies the Rule of Reason to weigh the merits of the Petitioners' conduct in its proper holistic context. By contrast, the Seventh Circuit precedent relied on by the Petitioners improperly reads *Board of Regents* dicta to grant implied antitrust immunity in a way that runs counter to decades of Court precedent. Affirming that approach over the Ninth Circuit's methodology—thus reading into *Board of Regents* an antitrust exemption for amateur sports—would resurrect the failed reasoning of *Toolson* and *Flood*.

This Court should not create another sport-specific antitrust exemption that would haunt its legacy. This is particularly true since unlike in *Toolson* and *Flood*—where Congress was faced with the choice of whether to *remove* an antitrust exemption created by firm and decisive doctrine by this Court—Congress is currently deciding whether to *add* antitrust immunity by answering the Petitioners' call to exempt amateurism restrictions through legislation. Thus, regardless of how the Court rules in this case, its decision should properly leave the decision of antitrust immunity for amateurism activities to the legislative branch. This can be done by either affirming the Ninth Circuit's

holding, or by taking a more narrow but decisive approach to reversal that makes clear that regardless of this Court's judgment of the Ninth Circuit's findings, its approach of relying on Rule of Reason analysis is the only correct and proper means of determining the legality of NCAA amateurism restrictions under the antitrust laws.

Respectfully submitted,

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January 27, 2021