No. 20-512

IN THE

Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

SHAWNE ALSTON, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit erroneously held, in conflict with decisions of other circuits and general antitrust principles, that the National Collegiate Athletic Association eligibility rules regarding compensation of student-athletes violate federal antitrust law.

PARTIES TO THE PROCEEDING

Petitioner, defendant-appellant-cross-appellee below, is the National Collegiate Athletic Association.

Respondents, plaintiffs-appellees-cross-appellants below, are Shawne Alston, Don Banks, Duane Bennett, John Bohannon, Barry Brunetti, India Chaney, Chris Davenport, Dax Dellenbach, Sharrif Floyd, Kendall Gregory-McGhee, Justine Hartman, Nigel Hayes, Ashley Holliday, Dalenta Jameral Stephens, Alec James, Afure Jemerigbe, Martin Jenkins, Kenyata Johnson, Nicholas Kindler, Alex Lauricella, Johnathan Moore, Kevin Perry, Anfornee Stewart, Chris Stone, Kyle Theret, Michel'le Thomas, Kendall Timmons, and William Tyndall.

Other defendants-appellants-cross-appellees below were the American Athletic Conference; the Atlantic Coast Conference; The Big Ten Conference, Inc.; The Big 12 Conference, Inc.; Conference USA; the Mid-American Conference; the Mountain West Conference; the Pac-12 Conference; the Southeastern Conference; the Sun Belt Conference; and the Western Athletic Conference.

CORPORATE DISCLOSURE STATEMENT

The National Collegiate Athletic Association is an unincorporated, non-profit membership association composed of about 1,200 member schools and conferences. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 4

JURISDICTION 4

STATUTORY PROVISION INVOLVED 4

STATEMENT 5

A. The NCAA Oversees Amateur Intercollegiate Athletics As An Integral Component Of Higher Education 5

B. *Board Of Regents* And Prior Antitrust Challenges To NCAA Amateurism Principles And Rules 8

C. Procedural History 10

SUMMARY OF ARGUMENT 14

ARGUMENT 17

I. BECAUSE THE CHALLENGED RULES ARE REASONABLY RELATED TO DEFINING NCAA SPORTS, THEY SHOULD BE REVIEWED DEFERENTIALLY AND UPHELD WITHOUT "DETAILED ANALYSIS" 17

TABLE OF CONTENTS—Continued

Page

A. Restraints Reasonably Related To Defining A Joint Venture's Procompetitive Product Should Be Reviewed Deferentially And Upheld Without Detailed Rule-Of-Reason Analysis 18

B. *Board Of Regents* Teaches That The NCAA's Amateurism Rules Define The Joint Venture's Procompetitive Activity 21

C. This Court And Others Have Adhered To The Principles Articulated In *Board Of Regents* 24

D. The Rules Challenged Here Define The Amateur Character Of College Sports And Thus Should Be Upheld Without "Detailed Analysis" 26

E. Abbreviated Deferential Rule-Of-Reason Analysis Is Further Warranted Because The NCAA Regulates Intercollegiate Athletics As Part Of Its Member Schools' Educational Mission 31

II. EVEN UNDER FULL RULE-OF-REASON ANALYSIS, THE CHALLENGED RULES ARE VALID; THE NINTH CIRCUIT INVALIDATED THEM ONLY BY COMMITTING GRAVE ERRORS 34

A. The Court Of Appeals Badly Misapplied The Rule Of Reason 35

TABLE OF CONTENTS—Continued

Page

1. The Ninth Circuit impermissibly redefined a central feature of the NCAA's procompetitive product 35

2. The Ninth Circuit wrongly required the NCAA to prove that "each type of challenged rule" has procompetitive benefits 38

B. The Challenged Rules Are Valid Because They Have Procompetitive Effects And No Alternative Would Be Virtually As Effective At Maintaining The True Distinction Between College And Professional Sports 43

III. THE DECISION BELOW WILL LEAD TO ENDLESS ANTITRUST CHALLENGES 50

CONCLUSION 52

TABLE OF AUTHORITIES

CASES

Page(s)

Agnew v. *NCAA*, 683 F.3d 328 (7th Cir. 2012) 9, 25

American Motor Inns, Inc. v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975) 36, 42

American Needle v. *NFL*, 560 U.S. 183 (2010) 2, 15, 18-20, 24-26, 29, 31, 33

Arizona v. *Maricopa County Medical Society*, 457 U.S. 332 (1982) 19, 21

Association for Intercollegiate Athletics for Women v. *NCAA*, 558 F. Supp. 487 (D.D.C. 1983) 32

Bell Atlantic Corp. v. *Twombly*, 550 U.S. 544 (2007) 20

Berkey Photo, Inc. v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) 42

Broadcast Music, Inc. v. *CBS, Inc.*, 441 U.S. 1 (1979) 19

Bruce Drug, Inc. v. *Hollister, Inc.*, 688 F.2d 853 (1st Cir. 1982) 42

California Dental Ass'n v. *FTC*, 526 U.S. 756 (1999) 19, 31

Chicago Board of Trade v. *United States*, 246 U.S. 231 (1918) 18

Chicago Professional Sports Limited Partnership v. *NBA*, 95 F.3d 593 (7th Cir. 1996) 35

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TABLE OF AUTHORITIES—Continued

Page(s)

Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984) 19

Deppe v. *NCAA*, 893 F.3d 498 (7th Cir. 2018) 25

Dr. Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911) 41

Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975) 33

Jefferson Parish Hospital District No. 2 v. *Hyde*, 466 U.S. 2 (1984) 40

Klor's, Inc. v. *Broadway–Hale Stores, Inc.*, 359 U.S. 207 (1959) 33

Leegin Creative Leather Products, Inc. v. *PSKS, Inc.*, 551 U.S. 877 (2007) 19

Matsushita Electric Industrial Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 21

McCormack v. *NCAA*, 845 F.2d 1338 (5th Cir. 1988) 9, 26

NCAA v. *Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984) ..... *passim*

Northwest Wholesale Stationers, Inc. v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) 21

O'Bannon v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015) 5, 9-10, 28-29, 46

Ohio v. *American Express*, 138 S. Ct. 2274 (2018) 10, 18

TABLE OF AUTHORITIES—Continued

Page(s)

Race Tires America, Inc. v. *Hoosier Racing Tire Corp.*, 614 F.3d 57 (3d Cir. 2010).....20, 31

Rothery Storage & Van Co. v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986).....41

Seminole Tribe v. *Florida*, 517 U.S. 44 (1996).....29

Smith v. *NCAA*, 139 F.3d 180 (3d Cir. 1998).....9, 26

Texaco v. *Dagher*, 547 U.S. 1 (2006).....21

United States v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).....41

Verizon Communications Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).....35, 43

STATUTORY PROVISIONS

15 U.S.C. §1 ..... 4-5, 8-9, 11, 18, 24

20 U.S.C.
§1087kk 7
§1087*ll* 7

28 U.S.C. §1254 4

OTHER AUTHORITIES

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Men's Final Four Viewership, https://tinyurl.com/y6dplune 5

Minor League Basketball Teams Offer Some the Chance to Play, to Keep Their NBA Dreams Alive, Fox News (July 3, 2013), https://tinyurl.com/y48nlz69 36

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What Is The NCAA?, https://tinyurl.com/y4kpswnl 5

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BRIEF FOR PETITIONER

INTRODUCTION

The Ninth Circuit misapplied established antitrust principles in ways that threaten not only the cherished American institution of college sports, but also procompetitive joint ventures more generally, to the detriment of consumers and business alike. Its judgment should be reversed.

Intercollegiate athletics has a long and valued history as an integral component of undergraduate education. Athletics contributes to the overall college experience, plays a lasting role for alumni, provides playing opportunities to the nearly half-million young men and women who compete annually, and helps many student-athletes obtain a college education, which carries sub-

stantial long-term benefits. It also attracts millions of fans.

The National Collegiate Athletic Association (NCAA) has overseen intercollegiate athletics as an integral component of college education for more than 115 years. And for virtually all of that time, a defining characteristic of NCAA-regulated college sports has been that they are played by *amateur* student-athletes, i.e., college students who are not paid for their play. As this Court has recognized, amateurism in college sports is procompetitive because it widens choices for consumers by distinguishing college sports from professional sports.

To preserve amateurism, the NCAA and its member colleges and universities must agree on a body of eligibility rules limiting athletics-based compensation for student-athletes. In other words, agreement is necessary for the "product" of amateur college sports to be available at all. And as this Court explained in *NCAA* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), the NCAA "needs ample latitude to play" its "critical role in the maintenance of a revered tradition of amateurism in college sports," *id.* at 120; *see also id.* at 101 (noting the Court's "respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics").

As courts other than the Ninth Circuit have understood, *Board of Regents* teaches that NCAA rules that are reasonably related to preserving amateurism in college sports are procompetitive and should be upheld against antitrust challenge after an abbreviated deferential review, i.e., upheld without what this Court has called "detailed analysis" under antitrust law's rule of reason, *American Needle* v. *NFL*, 560 U.S. 183, 203

(2010). Abbreviated deferential review is consistent with antitrust principles governing sports leagues and other joint ventures, and it accounts in particular for the fact that the NCAA and its members maintain amateurism in college sports as part of serving a societally important non-commercial objective: higher education.

The NCAA's eligibility rules regarding compensation of student-athletes, which respondents challenged in this litigation, satisfy abbreviated deferential review and therefore should have been upheld on the pleadings. Instead, the courts below rejected this Court's and other circuits' teachings; subjected the rules to years of litigation, a full trial, and stringent rule-of-reason scrutiny; and deemed several of those rules unlawful.

Even if detailed rule-of-reason scrutiny had been appropriate, the Ninth Circuit's analysis was critically flawed. The court impermissibly redefined a key feature of NCAA sports, claiming that amateurism means not that student-athletes "must not be paid," *Board of Regents*, 468 U.S. at 102, but rather that student-athletes must not be paid *unlimited* amounts unrelated to education. That novel definition, one even respondents never offered, has no basis in the record (or reality). The Ninth Circuit also relieved plaintiffs of their burden to prove that the challenged rules unreasonably restrain trade, instead placing a "heavy burden" on the NCAA (Pet. App. 34a) to prove that each category of its rules is procompetitive and that an alternative compensation regime created by the district court could not preserve the procompetitive distinction between college and professional sports. That alternative regime—under which the NCAA must permit student-athletes to receive unlimited "education-related benefits," including post-eligibility internships that pay unlimited

amounts in cash and can be used for recruiting or retention—will vitiate the distinction between college and professional sports. And via the permanent injunction the Ninth Circuit upheld, the alternative regime will also effectively make a single judge in California the superintendent of a significant component of college sports.

The Ninth Circuit's approval of this judicial micromanagement of the NCAA denies the NCAA the latitude this Court has said it needs, and endorses unduly stringent scrutiny of agreements that define the central features of sports leagues' and other joint ventures' products. The decision thus twists the rule of reason into a tool to punish (and thereby deter) procompetitive activity. It should not stand.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1a-63a) is published at 958 F.3d 1239. The district court's opinion (Pet. App. 65a-165a) is published at 375 F. Supp. 3d 1058. Its permanent injunction (Pet. App. 167a-170a) is unpublished.

JURISDICTION

The Ninth Circuit entered judgment on May 18, 2020. The petition for a writ of certiorari was filed on October 15, 2020, and granted on December 16, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act provides in relevant part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade

or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. §1.

STATEMENT

A. The NCAA Oversees Amateur Intercollegiate Athletics As An Integral Component Of Higher Education

1. The NCAA was formed in 1905 to address "problems [that] had brought college football to a moment of crisis," including that schools were "hir[ing] nonstudent ringers to compete on their teams" and "purchas[ing] players away from other schools." *O'Bannon* v. *NCAA*, 802 F.3d 1049, 1053 (9th Cir. 2015). "Since its inception …, the NCAA has played an important role in the regulation of … collegiate sports." *Board of Regents*, 468 U.S. at 88.

Today, the NCAA's membership comprises about 1,100 colleges and universities, organized into three divisions. Pet. App. 8a. Division I includes the largest schools, and it generally offers the highest level of athletic competition and the most financial aid to student-athletes. *Id.* Within Division I, football programs are subdivided into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision, with FBS schools generally offering the higher level of competition. *Id.*

Each year, nearly half a million student-athletes participate in two dozen NCAA-sanctioned sports. *What Is The NCAA?*, https://tinyurl.com/y4kpswnl (all websites herein visited February 1, 2021). And millions more people watch NCAA competitions in person or on television. *See*, *e.g.*, *Men's Final Four Viewership*, https://tinyurl.com/y6dplune. Indeed, college sports have long been "more popular than [comparable] pro-

fessional sports." *Board of Regents*, 468 U.S. at 102; *see also* Gallup, *In Depth: Topics A to Z Sports*, https://tinyurl.com/y5e69fqp; ER215-216.[1]

But despite the commercial appeal of a few Division I sports (particularly FBS football and men's basketball), schools' "primary mission" remains "educating [their] students," ER153-154, with "athletics programs … designed to be a vital part of the education[]," ER274. Accordingly, a "basic purpose of [the NCAA] is to maintain intercollegiate athletics as an integral part of the educational program." *Id.*

2. For decades, the NCAA has maintained eligibility rules designed to "retain a clear line of demarcation between intercollegiate athletics and professional sports." ER274. In particular, the hallmark of NCAA sports is that the players are both amateurs and students at their schools. *Board of Regents*, 468 U.S. at 102. "[T]o preserve the character and quality" of college sports, therefore, NCAA rules have long provided that "athletes must not be paid, must be required to attend class, and the like." *Id.* This "tradition of amateurism" "adds richness and diversity to intercollegiate athletics." *Id.* at 120.

NCAA rules preserve amateurism by providing that student-athletes become ineligible to play if they use their "athletics skill … for pay in any form" in their sport. ER280. The rules allow schools, however, to cover student-athletes' legitimate (i.e., reasonable and necessary) educational expenses, ER284-287, 1422-1440; Tr.886-887, and also allow student-athletes to re-

[1] "ER" citations are to the excerpts of record filed with the Ninth Circuit.

ceive modest awards recognizing athletic or academic achievement, ER288-289, 296-297.

The principal measure of legitimate academic expenses is "cost of attendance," or COA, a term enshrined in federal law, *see* 20 U.S.C. §1087kk. COA encompasses tuition and fees; required "equipment, materials, or supplies"; room and board; books; a computer; transportation; and "miscellaneous personal expenses." *Id.* §1087*ll*. NCAA rules permit student-athletes to receive financial aid up to COA, whether in the form of an athletic scholarship, non-athletics-based aid, or a combination of both. ER284, 286-287. The rules further allow schools to cover legitimate academic expenses above COA. For example, student-athletes with exceptional financial need can receive Pell grants from the federal government. ER287; U.S. Department of Education, Federal Student Aid Office, *Federal Pell Grants Are Usually Awarded Only to Undergraduate Students*, https://tinyurl.com/y54xcgq5. Schools may also cover student-athletes' atypical financial expenses using two funds: the Student Assistance Fund (SAF) and the Academic Enhancement Fund (AEF). ER268-269, 284-285, 294-295; *see also* Pet. App. 9a n.3.

Finally, NCAA rules allow student-athletes to receive modest awards that recognize individual or team achievements. Most awards "may not include cash or cash equivalents," and their limits range from $80 (in the form of a certificate, medal, or plaque) for, among other things, a specialized performance in a single contest to $1,500 (in the form of a trophy) for being a conference's athlete or scholar-athlete of the year. ER288-289, 296-297. Additionally, schools may annually provide a $10,000 "Senior Scholar-Athlete Award" for graduate school to two graduating student-athletes, with the funds disbursed directly to the graduate

school. ER289. All the award limits are designed to ensure that awards do not become vehicles for disguised pay-for-play. ER170-171.

B. *Board Of Regents* And Prior Antitrust Challenges To NCAA Amateurism Principles And Rules

1. In *Board of Regents*, this Court provided an extended explanation of the proper treatment of NCAA rules under the antitrust laws.

The Court first held that because intercollegiate athletics is an endeavor "in which horizontal restraints on competition are essential if the product is to be available," a "per se rule" that NCAA agreements violate section 1 of the Sherman Act would be inappropriate. 468 U.S. at 100-101. The Court then explained that the NCAA's "standards of amateurism" and "standards for academic eligibility," *id.* at 88, are "procompetitive" because they "differentiate[]" NCAA sports from "professional sports to which it might otherwise be comparable," thereby "widen[ing] consumer choice," *id.* at 101-102.

By contrast, the Court concluded, the television plan at issue in the case (a plan for broadcasting college-football games) did "not … fit into the same mold as do rules defining … the eligibility of participants," because the plan was "not based on a desire to maintain the integrity of college football as a distinct and attractive product." 468 U.S. at 116-117. It was therefore subject to detailed rule-of-reason analysis, under which it was held invalid. *Id.* at 104-120. In so holding, however, the Court emphasized both that the NCAA "needs ample latitude to play" its "critical role in the maintenance of a revered tradition of amateurism in

college sports," and that "the preservation of the student athlete in higher education … is entirely consistent with the goals of the Sherman Act." *Id.* at 120.

2. For decades after *Board of Regents*, courts relied on it to hold that NCAA eligibility rules reasonably related to preserving student-athletes' amateur status should be upheld against challenges under section 1 of the Sherman Act without a trial or detailed antitrust scrutiny. *See, e.g.*, *Agnew* v. *NCAA*, 683 F.3d 328, 341-345 (7th Cir. 2012); *Smith* v. *NCAA*, 139 F.3d 180, 186-187 (3d Cir. 1998) (subsequent history omitted); *McCormack* v. *NCAA*, 845 F.2d 1338, 1340, 1343-1345 (5th Cir. 1988). In 2015, however, the Ninth Circuit broke with this judicial consensus. In *O'Bannon* v. *NCAA*, a class of current and former FBS football and Division I men's basketball players claimed that NCAA eligibility rules limiting compensation for student-athletes violated antitrust law by precluding student-athletes from being paid for the use of their names, images, or likenesses, *see* 802 F.3d at 1052. After holding a bench trial and applying "thorough" scrutiny, the district court declared the rules unlawful. *Id.* at 1052-1053.

On appeal, the Ninth Circuit first concluded that all NCAA rules—even those designed to maintain amateurism—are subject to trial and detailed rule-of-reason scrutiny. *See O'Bannon*, 802 F.3d at 1063-1064. Applying such scrutiny, the court held that although "the district court probably underestimated the NCAA's commitment to amateurism," *id.* at 1073, it had not clearly erred in invalidating the NCAA's *below*-COA cap on athletic scholarships (a cap the NCAA had by then eliminated), because that cap "ha[d] no relation" to maintaining amateurism. *Id.* at 1075. But, the Ninth Circuit held, the district court had clearly erred

in requiring the NCAA to allow every student-athlete to receive $5,000 per year above COA in "cash sums untethered to educational expenses," because it was "self-evident" that paying student-athletes "will vitiate their amateur status." *Id.* at 1076-1079.

C. Procedural History

1. While *O'Bannon* was pending, Division I football and basketball players filed additional antitrust class actions against the NCAA and eleven member conferences seeking invalidation of all NCAA eligibility rules regarding student-athlete compensation—i.e., seeking to "dismantle the NCAA's entire compensation framework," Pet. App. 14a. The cases were assigned to the district judge presiding over *O'Bannon* and (with one exception) consolidated. *Id.*

After the Ninth Circuit decided *O'Bannon*, the district court here addressed the extent to which that decision had preclusive effect on the analysis of the challenged rules under the three-step rule of reason. Pet. App. 15a-16a. Under that rule, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Ohio* v. *American Express*, 138 S. Ct. 2274, 2284 (2018). "If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint." *Id.* And "[i]f the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.* The test assists courts in resolving the ultimate question under the Sherman Act: whether a restraint unreasonably restrains trade.

The district court ruled that *O'Bannon* was preclusive as to step 1 of the rule of reason (which favored respondents) but not step 2 or 3 (which would have favored the NCAA), and it set the case for a bench trial on those latter steps. Pet. App. 15a-16a. After trial, the court held that some of the challenged rules violate section 1 of the Sherman Act. Pet. App. 17a-24a.

At step 2 of its rule-of-reason analysis, the district court acknowledged that "maintaining a distinction between college sports and professional sports" is procompetitive. Pet. App. 107a. But it rejected the NCAA's long-held understanding of that distinction, i.e., that professionals but not amateurs are paid to play. In the court's view, the distinction is instead that "student-athletes do not receive *unlimited* payments unrelated to education, akin to salaries seen in professional sports leagues." Pet. App. 108a (emphasis added). Having adopted this distinction (for which it cited no record support or other authority), the court concluded that the challenged rules are "more restrictive than necessary" insofar as they "limit or prohibit noncash education-related benefits." Pet. App. 109a.

The district court next rejected, at step 3, every less-restrictive alternative respondents had offered. Instead, the court announced an alternative of its own, one created to track the court's invented distinction between college and professional sports. Under this alternative, the NCAA could limit benefits unrelated to education but would be "generally prohibit[ed] … from limiting education-related benefits," except that the NCAA could impose, for "academic or graduation awards or incentives," any limit that it imposed on "athletics participation awards." Pet. App. 66a-67a.

The district court entered a permanent injunction reflecting this alternative, enumerating myriad items "related to education" that "the NCAA may not … limit" student-athletes from receiving. Pet. App. 167a-168a. In particular, the injunction permits schools to offer current and future student-athletes: unlimited cash payments for post-eligibility internships, an annual cash payment of up to $5,980 to every student-athlete who maintains academic eligibility, and unlimited tangible items that can be described as somehow "related to education." Pet. App. 168a-169a; D. Ct. Dkt. No. 1329. The injunction states that the list of permissible items "may be amended" but only with the district court's pre-approval. Pet. App. 168a. And while the injunction permits the NCAA to "adopt … a definition of … 'related to education,'" it requires the NCAA to obtain the court's permission to "incorporate that definition" into the injunction. Pet. App. 167a-168a.

2. The Ninth Circuit affirmed. It first held that respondents' claim was not precluded by *O'Bannon*'s upholding of the NCAA's eligibility rules, because the NCAA had modestly relaxed a few rules after the *O'Bannon* record closed. Pet. App. 26a-32a. Although the NCAA had invoked *O'Bannon*'s warning about the "danger" of "future plaintiffs" pursuing "essentially the same claim again and again," Pet. App. 32a n.13, the Ninth Circuit here stated that *O'Bannon* actually endorsed such endless litigation, *id.* The court reaffirmed *O'Bannon*'s rejection of the NCAA's argument that under *Board of Regents*, the challenged rules are "valid as a matter of law." Pet. App. 12a-13a. Instead, the court held, the rules were properly subjected again to trial and detailed rule-of-reason scrutiny. Pet. App. 34a-45a.

In applying that scrutiny, the Ninth Circuit did not deny either that "maintaining a distinction between college and professional sports" is procompetitive, Pet. App. 34a-35a, or that the NCAA's conception of amateurism preserves that distinction. The court asserted, however, that "[a]lthough both *Board of Regents* and *O'Bannon* … define amateurism to exclude payment for athletic performance, neither purports to immortalize that definition as a matter of law." Pet. App. 37a. And here, the court said, "the record supports a much narrower conception of amateurism that still gives rise to procompetitive effects: Not paying student-athletes unlimited payments unrelated to education." *Id.* In other words, the court concluded that student-athletes would not be professionals even if they were paid huge sums, so long as they did not receive *unlimited* amounts "unrelated to education." *Id.* The court reasoned that the distinction between college and professional sports would still be preserved in that circumstance because even unlimited "education-related benefits … could not be confused with a professional athlete's salary." Pet. App. 35a. The court also deemed it "doubtful that a consumer could mistake a *post-eligibility* internship"—for which student-athletes, under the injunction, can be paid unlimited amounts in cash—"for a professional athlete's salary." Pet. App. 44a.

The Ninth Circuit next held that the district court's alternative scheme would be "virtually as effective" as the NCAA's rules in differentiating college from professional sports. Pet. App. 41a-45a. In response to the NCAA's argument that the "uncapped benefits" the injunction allows would become "vehicles for unlimited cash payments," the court adopted a narrowing gloss, limiting the injunction's allowance of "non-cash educa-

tion-related benefits" to "*legitimate* education-related costs." Pet. App. 43a-44a. The court adopted no such limitation, however, on the injunction's cash allowances: the post-eligibility internships (for which pay can, as noted, be unlimited) and the academic and graduation awards and incentives.

Finally, the Ninth Circuit determined that the injunction did not improperly aggrandize the district court's power. Pet. App. 47a-48a. And it rejected respondents' cross-appeal, which sought a broader injunction that struck NCAA rules limiting non-education-related payments, Pet. App. 47a-51a.

SUMMARY OF ARGUMENT

I.A. This Court has long made clear—including in the context of NCAA-regulated college sports—that offering a distinct product is procompetitive because it affords consumers more choice. The Court has also made clear that antitrust law's rule of reason is flexible, and able to be applied quickly to uphold a procompetitive restraint. Accordingly, if a distinct product can exist only by horizontal agreement, restraints that are reasonably related to defining that product should be subject to abbreviated deferential review under the rule of reason, rather than being subjected to trial and detailed antitrust scrutiny.

B. Consistent with these principles, this Court explained in *Board of Regents* that the NCAA acts procompetitively when it enables college sports to be offered as a product that is distinct from professional sports. And a defining feature of that distinct product, *Board of Regents* further explained, is amateurism, i.e., that student-athletes are not paid to play. Thus, the Court concluded, "[i]t is reasonable to assume that most

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." 468 U.S. at 117.

C. This Court has reaffirmed *Board of Regents*'s teachings, explaining that where agreement is necessary for a procompetitive product to exist, restraints that define the product can be upheld without "detailed analysis," *American Needle*, 560 U.S. at 203. Courts other than the Ninth Circuit have likewise understood *Board of Regents* and its progeny to mean that NCAA rules reasonably designed to uphold amateurism in college sports are procompetitive and should be upheld at the pleading stage.

D. The eligibility rules challenged here define the character of NCAA athletics and therefore should be upheld based on abbreviated deferential analysis. The contrary views expressed by respondents and the Ninth Circuit—including that *Board of Regents*'s extended discussion of how antitrust law applies to NCAA rules was dicta—are untenable.

E. Deferential abbreviated review is further warranted because the NCAA is not primarily a commercial venture, but rather an association the core mission of which is to facilitate intercollegiate sports as an important component of the educational opportunities offered by its member schools. Analysis under the "flexible" rule of reason properly takes account of that educational orientation.

II. Even if detailed rule-of-reason scrutiny were warranted, the Ninth Circuit's analysis was severely flawed.

A.1. The lower courts erroneously redefined amateurism. The NCAA's longstanding conception of amateurism—reflected in *Board of Regents*—is that student-athletes "must not be paid" to play, 468 U.S. at 102. But the courts below embraced a starkly different understanding, namely that amateurs can be paid anything except "unlimited [amounts] unrelated to education." Pet. App. 37a. Courts, however, have no authority to redefine key features of a procompetitive joint venture's products. And even if they did, the definition the lower courts embraced (one respondents never adduced) has no basis in the record or common experience.

2. The Ninth Circuit also improperly required the NCAA to prove at step 2 that *each type* of challenged rule has procompetitive benefits, rather than simply that—as is indisputable—the challenged rules *collectively* have such benefits. This approach marked an impermissible shift from step 1, where respondents were allowed to carry their initial burden by showing that the rules collectively (rather than individually) have anticompetitive effects. It also meant that the lower courts effectively conducted the step-3 analysis (where respondents would have had the burden of proof) at step 2 (where the NCAA had it). And it effectively imposed a requirement that the NCAA's restraints be the *least* restrictive way of achieving a procompetitive benefit. This Court has long rejected such a requirement.

B. Under a correct application of the rule of reason, the challenged rules are valid. The NCAA showed that the body of rules creates procompetitive benefits, and respondents offered no alternative that would be virtually as effective at maintaining the actual distinction between college sports and professional sports.

The district court's alternative would vitiate that procompetitive distinction.

III. The decision below authorizes judges to micromanage joint ventures, something they have neither the authority nor the expertise to do. And it endorses litigation over and over of the same antitrust claims against the NCAA. That is the antithesis of the "ample latitude" to regulate college sports that this Court correctly said the NCAA should have. *Board of Regents*, 468 U.S. at 120.

ARGUMENT

I. BECAUSE THE CHALLENGED RULES ARE REASONABLY RELATED TO DEFINING NCAA SPORTS, THEY SHOULD BE REVIEWED DEFERENTIALLY AND UPHELD WITHOUT "DETAILED ANALYSIS"

Under longstanding antitrust precedent, offering a distinct product is procompetitive, because it gives consumers additional choice. This Court has accordingly recognized—particularly in the context of joint ventures—that if a distinct product can exist only by horizontal agreement, restraints that are reasonably related to defining the product are valid and should be upheld without further analysis under the rule of reason.

This Court applied these principles to the NCAA in *Board of Regents*, explaining that the NCAA (a joint venture) acts procompetitively by offering the "product" of college sports that is different from professional sports because the participants are not only students but also amateurs, i.e., not paid to play. Hence, *Board of Regents* concluded, it is reasonable to assume that the rules defining and preserving that product, including rules that student-athletes "must not be paid," 468 U.S. at 102, are likewise procompetitive. The Court has

subsequently reaffirmed these principles, explaining (in a case challenging another sports league's rule) that agreements that define the product being offered will likely survive rule of reason scrutiny—and that such scrutiny need not involve "detailed analysis." *American Needle*, 560 U.S. at 203. Several circuits, meanwhile, have held that under *Board of Regents*, NCAA amateurism rules are procompetitive as a matter of law and should be upheld at the motion-to-dismiss stage. These cases were correctly decided and require rejection of respondents' antitrust challenge.

A. Restraints Reasonably Related To Defining A Joint Venture's Procompetitive Product Should Be Reviewed Deferentially And Upheld Without Detailed Rule-Of-Reason Analysis

1. Although section 1 of the Sherman Act "prohibits '[e]very contract [or] combination … in restraint of trade,'" "[t]his Court has long … understood §1 'to outlaw only *unreasonable* restraints.'" *Ohio*, 138 S. Ct. at 2283 (first alteration in original) (quoting 15 U.S.C. §1). "The true test of legality," therefore, "is whether the restraint … merely regulates and perhaps thereby promotes competition or whether it … may suppress or even destroy competition." *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918); *accord Board of Regents*, 468 U.S. at 104.

Applying this test, the Court has held that "[h]orizontal price fixing and output limitation are ordinarily condemned … under an 'illegal per se' approach because the probability that these practices are anticompetitive is so high." *Board of Regents*, 468 U.S. at 100. "[M]ost restraints," however, are analyzed "under the so-called 'rule of reason,'" which requires an evalua-

tion of "whether under all the circumstances … the restrictive practice imposes an unreasonable restraint on competition." *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 343 (1982). There is no dispute that the rule of reason applies here.

2. As this Court has made clear, the rule of reason is "flexible," and its application does not always require "detailed analysis." *American Needle*, 560 U.S. at 203. "What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 780-781 (1999). Accordingly, "[c]ourts can … devise … presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones." *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 898-899 (2007).

The need "to promote procompetitive" restraints is especially salient in the context of joint ventures. Although such ventures frequently involve horizontal restraints, they also "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984). And because offering "a different product," *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 22 (1979), is itself "procompetitive," *Board of Regents*, 468 U.S. at 102, "[j]oint ventures and other cooperative arrangements are … not usually unlawful" if an agreement—even an "agreement on price"—"is necessary to market the product at all," *Broadcast Music*, 441 U.S. at 23. In fact, "[w]hen restraints on competition are essential if the product is to be available," an "agreement" adopting such restraints "is likely to survive the Rule of Reason." *American Needle*, 560 U.S. at 203 (quotation marks omitted) (citing *Board of*

Regents and *Broadcast Music*). And "depending upon the concerted activity in question," such agreements can be upheld under the rule of reason "'in the twinkling of an eye.'" *Id.* (quoting *Board of Regents*, 468 U.S. at 109 n.39).

That approach is particularly appropriate with defining restraints adopted by sports leagues, because this Court has recognized that such leagues are perhaps "the leading example" of "an industry in which horizontal restraints on competition are essential if the product is to be available," *Board of Regents*, 468 U.S. at 101. Consistent with that recognition, "courts have generally accorded sports organizations a certain degree of deference and freedom" to define their "basic rules and guidelines." *Race Tires America, Inc.* v. *Hoosier Racing Tire Corp.*, 614 F.3d 57, 80, 82 (3d Cir. 2010) (citing cases from this Court and three other circuits). In particular, "sports-related organizations should have the right to determine for themselves the … rules that they believe best advance their respective sport …, without undue and costly interference on the part of courts." *Id.* at 83. So long as a court is "not confronted with a situation in which the [league] offers … no justification … for its actions or its justifications are offered in bad faith or are otherwise nonsensical," *id.* at 81, the restraint should be upheld without detailed rule-of-reason analysis. All this, of course, is fully consistent with this Court's admonition in *Board of Regents* that the NCAA needs "ample latitude" to regulate intercollegiate athletics, 468 U.S. at 120.

Sports organizations "deserve a bright-line rule to follow so they can avoid potential antitrust liability as well as time-consuming and expensive antitrust litigation." *Race Tires*, 614 F.3d at 80; *see also*, *e.g.*, *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 558-559 (2007)

(noting the especially high costs of antitrust litigation); *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) (similar). Abbreviated deferential review under the rule of reason, in other words, reflects not only that many joint-venture agreements are procompetitive, but also that subjecting every such agreement to full rule-of-reason scrutiny can "chill the very conduct the antitrust laws are designed to protect," *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). Such review recognizes that joint ventures could not function (and consumers would be worse off) if the very agreements that define a joint venture's procompetitive product could be invalidated as unreasonable restraints of trade. It also recognizes, relatedly, that "a joint venture, like any other firm, must have the discretion to determine" the defining features of its products, even if that means forming an agreement that might otherwise be unlawful. *Texaco* v. *Dagher*, 547 U.S. 1, 7 (2006). And it reflects the reality that "[j]udges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition," *Arizona*, 457 U.S. at 343, which creates a significant risk of courts misapplying the rule of reason in ways that punish and thereby deter socially and economically beneficially activity, activity that Congress intended to promote.

B. *Board Of Regents* Teaches That The NCAA's Amateurism Rules Define The Joint Venture's Procompetitive Activity

Board of Regents applied the foregoing principles to an antitrust challenge brought against an NCAA plan for televising college football games. The Court

began its analysis by observing, as noted, that "league sports" is perhaps "the leading example" of "an industry in which horizontal restraints on competition are essential if the product is to be available." 468 U.S. at 101. NCAA sports certainly requires such restraints, the Court explained, because:

> [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. A myriad of [such] rules … all must be agreed upon, and all restrain the manner in which institutions compete.

Id. These facts, the Court continued, took the NCAA's agreements outside the ordinary antitrust rule that horizontal price-fixing and output-limiting agreements are illegal per se. *See id.* at 100, 117.

Board of Regents then addressed how different types of NCAA restraints are properly analyzed for antitrust purposes. The Court recognized that the NCAA's procompetitive activity is offering not just sports but a "particular brand" of sports, namely, amateur college sports. 468 U.S. at 101. And, the Court elaborated, "to preserve the character and quality of th[is] 'product,' athletes must not be paid, must be required to attend class, and the like." *Id.* at 102. These rules, the Court continued, "differentiate[] college [sports] from and make[] it more popular than professional sports to which it might otherwise be comparable." *Id.* at 101-102. *Board of Regents* thus recognized the critical role that horizontal agreements play in creating and maintaining the NCAA's distinct "product."

Id. at 101. Indeed, the Court stated that "the integrity of the 'product' cannot be preserved except by mutual agreement." *Id.* at 102. In short, the Court said:

> the NCAA plays a vital role in enabling college [sports] to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and thus *can be viewed as procompetitive*.

Id. (emphasis added).

Reinforcing this analysis, *Board of Regents* then explained that the challenged television plan was subject to detailed rule-of-reason analysis because it did *not* "fit into the same mold as do rules defining the conditions of the contest[or] the eligibility of participants"—i.e., the restraints reasonably related to defining the NCAA's product. 468 U.S. at 117. The plan was not, that is, "based on a desire to maintain the integrity of college football as a distinct and attractive product." *Id.* at 116. And because the plan was not sufficiently "related" to any procompetitive "justification," it did not survive detailed rule-of-reason scrutiny. *Id.* at 116-118. By contrast, the Court emphasized, "most of the regulatory controls of the NCAA" define and preserve the distinct character of its product, so "[i]t is reasonable to assume that [those] controls … are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive." *Id.* at 117; *see also id.* at 103 ("Respondents concede that the great majority of the NCAA's regulations enhance competition[.]").

C. This Court And Others Have Adhered To The Principles Articulated In *Board Of Regents*

Since *Board of Regents*, this Court has reaffirmed that case's teachings, specifically with respect to sports leagues, and lower courts have concluded that *Board of Regents* requires upholding NCAA amateurism rules without detailed rule-of-reason analysis.

1. *American Needle, Inc.* v. *NFL* was an antitrust challenge to coordinated marketing activity by professional football teams. 560 U.S. at 187. This Court first "conclude[d] that the NFL's licensing activities" "constitute concerted action that is not categorically beyond the coverage of § 1" of the Sherman Act. *Id.* at 186. At the same time, the Court explained, "teams that need to cooperate are not trapped by antitrust law." *Id.* at 202. In particular, the Court stated, "[w]hen 'restraints on competition are essential if the product is to be available at all,'" not only are "*per se* rules of illegality … inapplicable," but joint ventures' agreements are also "likely to survive the Rule of Reason." *Id.* at 203 (quoting *Board of Regents*, 468 U.S. at 101). Indeed, the Court observed, "depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye'" to uphold a challenged restraint. *Id.* at 203 (quoting *Board of Regents*, 468 U.S. at 109 n.39). That is because the "special characteristics of [sports leagues] may provide a justification for many kinds of agreements." *Id.* at 202. *American Needle* thus echoed and reaffirmed *Board of Regents*'s key conclusion that restraints reasonably related to defining a sports league's or other joint venture's distinct product are procompetitive because they enable a product to exist that would otherwise be unavailable,

and hence should be upheld against antitrust challenge without detailed rule-of-reason analysis.

2. Other than the Ninth Circuit, the courts of appeals—drawing on *Board of Regents* and *American Needle*—have uniformly rejected at the pleading stage, i.e., without trial or detailed rule-of-reason scrutiny, antitrust challenges to NCAA rules that plainly serve to preserve amateurism.

The Seventh Circuit, for example, has repeatedly held that if an NCAA rule is "'clearly meant to help maintain … amateurism in college sports,'" then the rule "is presumptively procompetitive" and an antitrust attack on it "should be dismissed on the pleadings" because "a full rule-of-reason analysis is unnecessary." *Deppe* v. *NCAA*, 893 F.3d 498, 501-504 (7th Cir. 2018) (quoting *Agnew*, 683 F.3d at 342-343). Because such rules are "essential to the very existence of the product of college" sports, the court held, "scrutinizing [them] conflicts with the Supreme Court's admonition in *Board of Regents* that the NCAA needs 'ample latitude' to preserve the product of college sports." *Id.* at 502-503. A court should therefore ask "whether a rule is, on its face, supportive of the 'no payment' and 'student-athlete' models, not whether 'no payment' rules are themselves procompetitive—under *Board of Regents*, they clearly are." *Agnew*, 683 F.3d at 343 n.7. And when a rule fits that description, it should be sustained "'in the twinkling of an eye'—that is, at the motion-to-dismiss stage." *Id.* at 341 (citing *American Needle*, 560 U.S. at 203) (citation omitted). A "more searching Rule of Reason analysis will be necessary," the court said, only if a rule is "not directly related to the separation of amateur athletics from pay-for-play athletics." *Id.* at 343, 345.

Similarly, the Fifth Circuit had "little difficulty" affirming the dismissal of a complaint challenging NCAA rules "restricting the benefits that may be awarded student athletes." *McCormack*, 845 F.2d at 1340, 1344. The court emphasized that in "sporting enterprises a few rules are essential to [a venture's] survival." *Id.* at 1344. And applying *Board of Regents*, the court concluded that because NCAA "eligibility rules create the product and allow its survival," they must be upheld without a trial or detailed rule-of-reason scrutiny. *Id.* at 1344-1345.

The Third Circuit, too, has upheld NCAA eligibility rules as procompetitive at the motion-to-dismiss stage. In *Smith* v. *NCAA*, the court observed that "in general, the NCAA's eligibility rules allow for the survival of the product, amateur sports." 139 F.3d at 187. The court then determined that the rule at issue—prohibiting graduate students from participating in intercollegiate sports at institutions different from where they earned their undergraduate degrees—was "a reasonable restraint which furthers … fair competition and the survival of intercollegiate athletics and is thus procompetitive." *Id.* Because the rule "so clearly survives a rule of reason analysis," the court did "not hesitate" to uphold it on the pleadings. *Id.*

D. The Rules Challenged Here Define The Amateur Character Of College Sports And Thus Should Be Upheld Without "Detailed Analysis"

Under the framework and cases just discussed, the NCAA amateurism rules challenged here should have been upheld without a trial or "detailed" rule-of-reason analysis, *American Needle*, 560 U.S. at 203, because they are a rational effort to preserve the distinctly am-

ateur character of college athletics, and thus define the product offered.

1. Respondents challenged the entire body of NCAA eligibility rules regarding student-athlete compensation. Those rules are the "standards of amateurism" that *Board of Regents* recognized as a central procompetitive feature of NCAA sports. 468 U.S. at 88. They thus do not merely "fit" the "mold" of rules providing that "athletes must not be paid," *id.* at 102, 117—they *are* the mold. Without agreement on these rules, the NCAA could not maintain the "character and quality" of college sports that differentiates it from professional sports. *Id.* at 101-102. Accordingly, no detailed rule-of-reason analysis is necessary or appropriate; the rules are procompetitive as a matter of law.

Indeed, the lower courts here agreed that preserving the amateur status of intercollegiate athletes differentiates college sports from professional sports and therefore is procompetitive. As the Ninth Circuit observed, "the district court properly 'credit[ed] the importance to consumer demand of maintaining a distinction between college and professional sports.'" Pet. App. 34a-35a (quoting Pet. App. 107a). The challenged rules—the NCAA's "entire compensation framework" for student-athletes, Pet. App. 14a—are facially and rationally designed to accomplish that differentiation, by preventing student-athletes from receiving what professional athletes receive, i.e., payments for their athletic play beyond coverage of legitimate expenses and modest achievement awards.

2.a. In nonetheless invalidating the challenged rules, the Ninth Circuit (both here and in *O'Bannon*) first dismissed what it called *Board of Regents*'s "long encomium to amateurism" as "impressive-sounding …

dicta." *O'Bannon*, 802 F.3d at 1063; *accord* Pet. App. 37a. All that *Board of Regents* actually held, the Ninth Circuit asserted, was that NCAA rules are always subject to full rule-of-reason analysis rather than being illegal per se. *O'Bannon*, 802 F.3d at 1063. That is wrong. As explained, *see supra* pp.21-23, what the Ninth Circuit derided as "encomium," *O'Bannon*, 802 F.3d at 1063, was this Court's identification of a defining aspect of the product the NCAA creates: intercollegiate athletic competition. In fact, the Ninth Circuit was manifestly incorrect to say that the "encomium" was offered only to explain why NCAA rules "should be analyzed under the Rule of Reason, rather than held … illegal per se," *Id.* at 1064. This Court's explanation for *that* holding was simple, and given separately: "[T]his case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." 468 U.S. at 100-101. But as discussed, the Court went further, explicating how different types of NCAA rules should be assessed *after* being held not illegal per se.

That explanation, moreover, was central to this Court's holding that the television plan at issue was subject to detailed rule-of-reason analysis. It would have been pointless for the Court to say that the plan did not "fit into the same mold" as the eligibility rules, 468 U.S. at 117, and distinguish the plan from rules "based on a desire to maintain the integrity of college football as a distinct and attractive product," *id.* at 116, if both the television plan and eligibility rules are subject to the same scrutiny. And because it was central to the holding, *Board of Regents*'s reasoning—that the television plan was subject to detailed rule-of-reason scrutiny because it was not like the NCAA's amateurism rules—has full stare decisis effect. *See Seminole*

Tribe v. *Florida*, 517 U.S. 44, 66-67 (1996). If there were any doubt about that, *American Needle* dispelled it by relying on *Board of Regents* to reiterate that sports leagues' rules can sometimes be upheld "'in the twinkling of an eye.'" 560 U.S. at 203 (quoting *Board of Regents*, 468 U.S. at 109 n.39).

The Ninth Circuit also considered the NCAA's commitment to amateurism a sham because NCAA rules permit student-athletes to receive certain amounts above COA. *See* Pet. App. 9a-10a, 30a-31a, 36a. But the court misunderstood the NCAA's conception of amateurism, mischaracterizing it as being that student-athletes can receive "Not One Penny" over COA. Pet. App. 38a. As explained, *see supra* pp.6-8, the NCAA's conception is instead that student-athletes cannot be paid for their athletic play but can receive coverage of legitimate expenses as well as modest achievement awards, even if they exceed COA. This conception is not new; NCAA rules have long allowed such expenses and awards to exceed COA through "stipends, Pell Grants, and AEF [and] SAF distributions," Pet. App. 10a; *see also* Pet. App. 30a-31a. And while the Ninth Circuit stressed that after *O'Bannon*, "many more student-athletes began to receive above-COA payments," Pet. App. 10a, that was the inevitable byproduct of a rule change (raising the athletic-scholarship cap to COA) that the Ninth Circuit itself determined was consistent with "the NCAA's own standards" of amateurism. *O'Bannon*, 802 F.3d at 1075. It does not remotely show that the NCAA's decades-long adherence to its conception of amateurism is a sham. In any event, the Ninth Circuit's critique about above-COA benefits is at most a disagreement about how to implement the principle of amateurism on the margins, such as where exactly to draw the line be-

tween legitimate expenses and illegitimate "benefits." If "ample latitude" means anything, it means that such marginal judgments belong not to federal antitrust courts but to the NCAA.[2]

b. Respondents have offered two other arguments against abbreviated rule-of-reason approval of NCAA amateurism rules. First, respondents have argued (e.g., Opp. 18) that the commercialization of college sports renders *Board of Regents* irrelevant. That is wrong. To begin with, when *Board of Regents* was decided, FBS football and Division 1 basketball were already commercialized; the television plan at issue there called for broadcasters to pay more than $130 million (in 1984 dollars) to televise a limited number of games. 468 U.S. at 92-93. And the court of appeals cases discussed above that applied *Board of Regents* to uphold NCAA amateurism rules without detailed rule-of-reason scrutiny were decided throughout the years when the commercialization of FBS football and Division I basketball supposedly increased. More importantly, *Board of Regents*'s analysis was expressly not based on the NCAA's "nonprofit" status. *Id.* at 100 n.22. It was instead predicated on antitrust principles applicable to joint ventures generally. That is why *American Needle* could draw on *Board of Regents*'s framework in addressing an avowedly profit-maximizing commercial enterprise, the NFL. *See supra* pp.24-25.

Second, respondents have argued (e.g., Opp. 4, 30) that the NCAA is seeking "antitrust immunity." That

[2] The Ninth Circuit's other criticisms of the NCAA and its rules were based on the trial record and therefore are not appropriately considered under an abbreviated rule-of-reason analysis. Regardless, they lack merit. *See infra* pp.34-50.

too is incorrect. *See Race Tires*, 614 F.3d at 81 (rejecting a similar argument). The NCAA is not arguing that it engages in anticompetitive behavior that cannot be redressed through the antitrust laws. *That* would be antitrust immunity. The NCAA is arguing that its eligibility rules are so clearly *procompetitive* that their lawfulness under the antitrust laws can and should be determined early in litigation. The NCAA's position, in other words, is that this litigation presents the scenario this Court identified in *American Needle*: an application of the "flexible Rule of Reason" that does "not require a detailed analysis" and that recognizes that "[w]hen restraints on competition are essential if the product is to be available … the [challenged] agreement is likely to survive the Rule of Reason," 560 U.S. at 203 (citing *Board of Regents* and *Broadcast Music*) (quotation marks omitted).

E. Abbreviated Deferential Rule-Of-Reason Analysis Is Further Warranted Because The NCAA Regulates Intercollegiate Athletics As Part Of Its Member Schools' Educational Mission

Detailed rule-of-reason analysis is inappropriate here for an additional reason: Even though a few college sports have substantial commercial appeal, the NCAA and its member schools are not commercial enterprises; they oversee intercollegiate athletics as an integral part of the undergraduate experience. That too bears on "an enquiry meet for the case," one that "look[s] to the circumstances, details, and logic of a restraint." *California Dental*, 526 U.S. at 780-781.

The NCAA's members are institutions of higher education, and their "primary mission" is "educating [their] students." ER153-154; *accord* ER211-212. In-

tercollegiate athletics constitutes "an important part of the educational experience," ER213, enhancing student-athletes' personal development and education. ER153-155, 183-184, 213, 225-227, 259-260. Athletics also enables some individuals to attend college who would otherwise be financially unable to do so. ER155, 173-176. Finally, athletics builds a sense of community among students and faculty, encourages loyalty and support from alumni, and helps create a public profile that attracts new students. ER155-156, 209-210, 214. Unlike a typical business, then, the NCAA exists "'primarily to enhance the contribution made by amateur athletic competition to the process of higher education as distinguished from realizing maximum return on it as an entertainment commodity.'" *Board of Regents*, 468 U.S. at 122 (White, J., dissenting) (quoting *Association for Intercollegiate Athletics for Women* v. *NCAA*, 558 F. Supp. 487, 494 (D.D.C. 1983), *aff'd*, 735 F.2d 577 (D.C. Cir. 1984)).

Were the NCAA a commercial association, it would behave differently. For example, it would allow teams to play more games each season (which would increase revenue but impair student-athletes' completion of their coursework) and would pursue commercial opportunities it currently declines. It also would not require schools to field teams in so many sports—including women's sports, consistent with Title IX—because virtually all college sports are unprofitable. ER154-155, 263-264; Tr.279-280, 1843-1844, 1846, 1848-1849. Nor would it reward schools for engaging in the unprofitable behavior of offering additional sports programs and granting additional scholarships. Tr.2138, 2141-2142.

The educational orientation of the NCAA and its members is relevant because the Sherman Act "is aimed primarily at combinations having commercial ob-

jectives and is applied only to a very limited extent to organizations … which normally have other objectives." *Klor's, Inc.* v. *Broadway–Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959). The rule of reason, as noted, is "flexible," *American Needle*, 560 U.S. at 203, and this Court has recognized specifically that "[t]he public service aspect, and other features of [an organization], may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788 n.17 (1975); *see also id.* ("[T]hat a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act."). That is so because the societal benefits provided by organizations that are focused primarily on non-commercial objectives may not easily be demonstrated through the type of evidence typically proffered in antitrust litigation, meaning that a standard application of antitrust law would be too likely to invalidate restraints that yield substantial benefits. That outcome would be inconsistent with the fact that the Sherman Act was intended to promote "material progress … while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Board of Regents*, 468 U.S. at 104 n.27. Indeed, "as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity." *Id.* at 101 n.23.

* * *

The NCAA's amateurism rules allow it to offer a distinct product, one that offers myriad benefits to student-athletes and the educational environment at their schools, and that is enjoyed by millions of fans. This

Court's precedent holds—both in terms of general principles and in terms of the specific application of those principles to the NCAA—that rules reasonably related to defining that distinct product are procompetitive and should be upheld without a trial or full rule-of-reason scrutiny. The Court should therefore reverse the Ninth Circuit's judgment and remand with directions that judgment be entered in favor of the NCAA on all of respondents' claims.

II. EVEN UNDER FULL RULE-OF-REASON ANALYSIS, THE CHALLENGED RULES ARE VALID; THE NINTH CIRCUIT INVALIDATED THEM ONLY BY COMMITTING GRAVE ERRORS

Even if the court of appeals had been right to subject the challenged NCAA rules to detailed rule-of-reason scrutiny, the court fundamentally misapplied that scrutiny. Under a proper analysis, respondents failed to carry their burden to show that the challenged rules unreasonably restrain trade and hence violate antitrust law. In particular, plaintiffs failed to establish an alternative that could preserve the procompetitive benefits the challenged rules provide, which is to maintain the rule that student-athletes "must not be paid," *Board of Regents*, 468 U.S. at 102—and thereby make college sports a "product" distinct from professional sports.

A. The Court Of Appeals Badly Misapplied The Rule Of Reason

1. The Ninth Circuit impermissibly redefined a central feature of the NCAA's procompetitive product

As discussed, *Board of Regents* explained that the NCAA's "tradition of amateurism," 468 U.S. at 120, defines the "character and quality" of the intercollegiate-athletics league that the NCAA offers to student-athletes and fans, *id.* at 102. The lower courts here, however, replaced the NCAA's and *Board of Regents*'s conception of amateurism—that student-athletes "must not be paid," *id.*—with what the Ninth Circuit called "a much narrower conception of amateurism," namely, "[n]ot paying student-athletes unlimited payments unrelated to education," Pet. App. 37a. Under that redefinition, student-athletes would still be amateurs even if they were paid large sums, as long as they were not paid, in the district court's words, "unlimited [amounts] unrelated to education, akin to salaries seen in professional sports." Pet. App. 108a.

This redefinition of amateurism was erroneous in two ways.

First, antitrust law does not empower courts to redefine key features of a procompetitive joint venture's product. Antitrust courts are "ill suited" to "act as central planners," *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004), and hence "the antitrust laws do not deputize district judges as one-man regulatory agencies," *Chicago Professional Sports Limited Partnership* v. *NBA*, 95 F.3d 593, 597 (7th Cir. 1996). Because courts lack the requisite expertise—and because federal antitrust law is not intended to deprive American businesses of the

right to define their own offerings—courts should not "be … second-guessing business judgments," *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975). They should instead leave such judgments to those with experience and expertise in the relevant field. The lower courts' redefinition here was especially improper given the "ample latitude" *Board of Regents* said the NCAA must have to regulate intercollegiate athletics. 468 U.S. at 120.

Second, the lower courts' new definition of what it means to be an amateur rather than a professional is fictional. It contradicts *Board of Regents*, which recognized that what distinguishes college and professional sports—and defines the product the NCAA wishes to offer—is that student-athletes are not paid to play at all. *See* 468 U.S. at 102. And it contradicts reality, because professional athletes do *not* receive "unlimited payments," Pet. App. 37a (whether related to education or not). Indeed, many professional athletes, particularly minor league athletes, are paid very small amounts for their athletic play, sometimes "as little as $100 a game," *Minor League Basketball Teams Offer Some the Chance to Play, to Keep Their NBA Dreams Alive*, Fox News (July 3, 2013), https://tinyurl.com/y48nlz69; *see also* ER200. No testimony, no document, *nothing* in the record suggests that professional athletes receive "unlimited" pay.

The district court suggested that its new definition was justified by the NCAA's practice of allowing student-athletes to receive certain amounts above COA. Pet. App. 108. In the court's view, because those allowances have not diminished consumer demand for NCAA sports, "it follows that the distinction between college and professional sports arises because student-athletes do not receive unlimited payments unrelated

to education." *Id.* But this reasoning—which the Ninth Circuit echoed in wrongly stating that the NCAA's conception of amateurism is "Not One Penny" above COA, Pet. App. 37a—does not "follow[]" at all. As elaborated below, the allowances in question are entirely consistent with the NCAA's longstanding conception of amateurism, which permits student-athletes to receive legitimate educational expenses and modest achievement awards. In any event, whether or not those limited above-COA allowances diminish consumer demand, they do not support the district court's leap to the massively greater payments the court's alternative regime permits.

Seemingly recognizing the error in the district court's assertion that professional athletes receive unlimited pay, the Ninth Circuit rewrote that claim in a footnote, asserting that "the district court was using the term 'unlimited pay' as shorthand for … *cash* payments *unrelated to education and akin to professional salaries*." Pet. App. 40a n.16. That revisionist formulation still constitutes an impermissible judicial redefinition of the NCAA's product. It also lacks merit on its own terms. First, defining the line between amateur and professional sports in terms of what is "akin to professional salaries" is tautological. Second, it is self-evident that the payments to student-athletes allowed by the decision below—including unlimited cash payments for "post-eligibility internships" and thousands of dollars per year in "awards and incentives," Pet. App. 23a—are "akin to professional salaries," Pet. App. 40a n.16, in every meaningful sense. Finally, a nebulous and capacious requirement that those payments be somehow "[]related to education," *id.*, does not meaningfully separate them from professional salaries. As just noted, for example, the decision below permits

schools to use paid internships to recruit and retain student-athletes (with the highest paying internships surely going to the best athletes). It would be easy for schools to label such internships "related to education," even if a star athlete was given, say, a six-month "internship" at a sneaker company or auto dealership that paid $500,000. But fans, student-athletes, and everyone else would recognize the reality: that student athletes were being paid large sums in cash for their athletic play—with the "internships" a thinly disguised vehicle for funneling them quintessentially professional salaries.

In short, the lower courts redefined a key feature of the NCAA's product, a step courts are not permitted to take, and the redefinition they embraced is fictional. This redefining, moreover, was essential to the invalidation of the challenged rules: Under the *actual* distinction between amateurs and professionals—that amateurs are "not … paid," *Board of Regents*, 468 U.S. at 102—respondents could not possibly have shown (and the lower courts did not find) that allowing student-athletes to be paid unlimited amounts that are somehow "related to" education would preserve the amateur-professional distinction "as well as the challenged rules do," Pet. App. 41a. Because that *is* the actual distinction, the decision below will severely muddle if not entirely eradicate the procompetitive differentiation that this Court and others have recognized as the decades-long hallmark of NCAA sports.

2. The Ninth Circuit wrongly required the NCAA to prove that "each type of challenged rule" has procompetitive benefits

As explained, under the rule of reason, the plaintiff bears the initial burden to prove that challenged re-

straints have significant anticompetitive effects in a relevant market; the defendant (if such effects are proven) must then show that those restraints have procompetitive benefits; and the plaintiff (if such benefits are shown) has the ultimate burden to prove that the restraints unreasonably restrain trade because those benefits could be achieved through a substantially less restrictive alternative. *See supra* p.10. Here, because respondents challenged "the NCAA's entire compensation framework," Pet. App. 14a, the lower courts held that respondents had carried their step-1 burden by showing that "the NCAA rules" *as a whole* have the requisite anticompetitive effects Pet. App. 33a-34a. But rather than then reviewing at step 2 whether those rules as a whole produced the procompetitive benefits of offering a distinctive product—which they indisputably do—the courts imposed on the NCAA a "heavy burden," Pet. App. 34a, to prove that "each type of challenged rule," Pet. App. 39a, independently has procompetitive benefits. That completely mangled the rule-of-reason analysis.

a. In the first place, the lower courts, as just noted, improperly examined the challenged rules at different levels of generality at steps 1 and 2 of the rule-of-reason analysis. Respondents were deemed to have satisfied their initial burden by showing that the challenged rules *collectively* have anticompetitive effects. (Respondents did not try to make, and surely could not have made, that showing as to "each type of challenged rule," Pet. App. 39a.) For the rule-of-reason analysis to be coherent—and to accurately identify unreasonable restraints—the NCAA's burden had to be to show that the challenged rules collectively have procompetitive benefits. Otherwise, the NCAA would be required to prove a procompetitive benefit for individual rules that

were never proven to have substantial anticompetitive effects. And as elaborated below, the NCAA unquestionably did show that the challenged rules *collectively* have procompetitive benefits. That should have been the end of the step-2 analysis, with respondents then required to carry their ultimate burden to show that those benefits could be achieved in a substantially less restrictive way. Instead, the Ninth Circuit required the NCAA to prove that "each type of challenged rule" has procompetitive benefits. *Id.*

That was improper. The court could not apply one level of generality to make it easier for respondents to carry their initial burden, and then change to a different—more granular—level to make it harder for the NCAA to carry *its* intermediate burden. By doing so, the lower courts effectively conducted the step-3 analysis at step 2—thereby relieving respondents of their ultimate "burden of proving" that the challenged agreement "unreasonably restrained competition," *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2, 29 (1984) (subsequent history omitted). To say at step 2 that only "*some*" rules are needed to achieve procompetitive benefits, Pet. App. 39a, is to say that there is an alternative that could preserve those benefits: a regime without the rules that lack the benefits. The lower courts thus pretermitted any meaningful step-3 analysis, improperly putting the burden on the NCAA to prove that its rules (in fact, each type) do not unreasonably restrain competition. And that burden shift was substantial, both because respondents' ultimate burden was to make a "strong" showing that a viable alternative existed, Pet. App. 40a, and because the Ninth Circuit imposed on the NCAA a "heavy burden"

to show individual procompetitive benefits, Pet. App. 34a.[3]

b. By requiring the NCAA to show that "each type of challenged rule" is procompetitive, Pet. App. 39a—and invalidating each type as to which that showing supposedly was not made—the courts below also effectively imposed a requirement that a restraint be the least restrictive way of achieving the procompetitive benefits. Antitrust law, however, does not require businesses to use "the *least* … restrictive provision that [they] could have." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58 n.29 (1977). As its name suggests, the rule of reason requires only that an agreement be "reasonably necessary," *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967) (subsequent history omitted), or "fairly necessary," *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 406 (1911) (subsequent history omitted), to achieve a procompetitive benefit.

Unlike the Ninth Circuit, other courts have followed this Court's precedent, holding that courts "should [not] calibrate degrees of reasonable necessity" such that the "lawfulness of conduct turns upon judgments of degrees of efficiency." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 227-228 (D.C. Cir. 1986); *see also id.* at 229 n.11. One circuit, for example, holds that "[i]n a rule of reason case, the test is not whether the defendant deployed the least restric-

[3] Even when it reached step 3—where there was effectively nothing left to do given its step-2 analysis—the Ninth Circuit erroneously kept the burden on the NCAA, faulting it for "present[ing] no evidence that demand will suffer if schools are free to reimburse education-related expenses of inherently limited value," Pet. App. 42a; *accord* Pet. App. 43a, 44a.

tive alternative" but "whether the restriction actually implemented is 'fairly necessary'" to achieve the procompetitive objective. *American Motor*, 521 F.2d at 1248; *quoted in part in Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir. 1979). Another similarly holds that businesses need not "adopt the least restrictive means of stopping [competitors] from selling abroad, but merely means reasonably suited to that purpose." *Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853, 860 (1st Cir. 1982). A leading antitrust commentator has made the same point in regard to the NCAA's amateurism rules, stating that "[m]etering' small deviations [in amateurism] is not an appropriate antitrust function." Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & Bus. 369, 377 (2016).

What these authorities recognize is that a "'no less restrictive alternative' test … would place an undue burden on the ordinary conduct of business," with joint ventures exposed to litigation (including treble damages) based on nothing more than "the imaginations of lawyers" in "conjur[ing] up" some marginally less-restrictive alternative. *American Motor*, 521 F.2d at 1249. And because a "skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements," Areeda & Hovenkamp, 11 *Antitrust Law* ¶1913b (5th ed. 2020), a least-restrictive standard would open the floodgates to antitrust litigation against the NCAA, other sports leagues, and joint ventures more generally, "interfer[ing] with the legitimate objectives at issue without … adding that much to competition." Areeda & Hovenkamp, 7 *Antitrust Law* ¶1505b; *see also* ABA Antitrust Section, Monograph No. 23, The Rule of Reason 123 (1999) (a least-restrictive test would "plac[e] the courts in the awkward position of routinely second-

guessing business decisions"). It would also put antitrust courts in the role of "central planners" that this Court has warned they are "ill-suited" to perform, *Trinko*, 540 U.S. at 408.

B. The Challenged Rules Are Valid Because They Have Procompetitive Effects And No Alternative Would Be Virtually As Effective At Maintaining The True Distinction Between College And Professional Sports

Under a proper analysis, plaintiffs did not and could not carry their burden to show that any alternative to the challenged rules could preserve those rules' procompetitive benefits by maintaining the true distinction between amateur and professional sports.

1.a. There can be no serious question that the NCAA eligibility rules have procompetitive benefits; even the Ninth Circuit recognized—as *Board of Regents* required—that the NCAA's conception of amateurism is procompetitive. In particular, the court agreed that "maintaining a distinction between college and professional sports" is procompetitive, Pet. App. 34a-35a, and it implicitly conceded that the NCAA's model accomplishes that objective, stating that the district court's "narrower conception" of amateurism "*still* gives rise to procompetitive effects," Pet. App. 37a (emphasis added).

Were evidence needed to support that undisputed point, it was plentiful. Witnesses with decades of experience in college sports, higher education, and sports broadcasting testified that the NCAA's conception of amateurism contributes to the popularity of college sports by distinguishing it from professional sports. These witnesses included Pac-12 Commissioner Larry

Scott, who testified that multiple consumer-perception surveys and conversations he had with various constituencies made it "clear … that the vast majority of consumers think amateurism is a very important component of college sports," ER199, 207, and that a "very large majority of consumers value amateurism … and would not like to see [student-athletes] be paid," ER207. Similarly, Eugene Smith, the Ohio State University's athletics director, testified (based on nearly forty years of experience running college-sports programs) that the no-pay model of amateurism is "basic and core" to college sports. ER172, 178-182, 185-186. He also testified that many fans and donors are "opposed to pay-for-play" and that allowing pay-for-play would "significantly" "affect the demand for college sports" among fans, donors, and sponsors. ER187-197. And American Athletic Conference Commissioner Michael Aresco testified, based on his experience as an ESPN and CBS executive and later as a conference commissioner, that "amateurism … contributes to consumer demand." ER216-223. From the broadcaster's perspective, he explained, NCAA sports is "a unique property that … resonate[s] with fans because it wasn't professionalized at all," in contrast to minor leagues, which have "never been popular." ER215-216.

This lay testimony was corroborated by expert evidence from Dr. Bruce Isaacson, a marketing and consumer-behavior expert. He testified that in his survey of nearly 1,100 college-sports fans, nearly a third reported that they watch college sports because they "like the fact that college players are amateurs and/or are not paid." ER233-234; *see also* ER240. In fact, this was one of the top three reasons that survey participants selected for watching college sports. ER237-238.

b. The Ninth Circuit offered no valid basis to reject any of this evidence.

To begin with, the court simply ignored the relevant lay testimony, pointing instead to the district court's conclusion that *different* lay testimony, about the importance of NCAA athletes being students, did not show procompetitive benefits. Pet. App. 21a. That different testimony does not undermine the testimony just discussed from Messrs. Scott, Smith, and Aresco.

As for Isaacson's survey, the Ninth Circuit dismissed its results as reflecting "a consumer preference for 'amateurism,'" not the effects "on consumer behavior." Pet. App. 38a. But while preferences and behavior may not be "the same thing," *id.*, there is a clear relationship between them, Tr.1949-1950; D. Ct. Dkt. No. 986-3 at 39-40, and the Ninth Circuit cited no legal or economic authority that evidence showing a restraint's effect on consumer preference is a "flaw" under the rule of reason, Pet. App. 38a. To the contrary, *Board of Regents* treated consumer preference as a key factor in applying the rule of reason, stating that antitrust law "command[s] that price and supply be responsive to consumer preference." 468 U.S. at 110; *see also id.* at 107 ("A restraint that … reduc[es] the importance of consumer preference in setting price and output is not consistent with … antitrust law.").

The Ninth Circuit also dismissed the survey as "hopelessly ambiguous" because it "listed 'amateurs and/or not paid' as one possible reason [for watching college sports], but failed to indicate that 'amateurs' means 'not paid' or to otherwise define 'amateurs.'" Pet. App. 20a-21a. The common understanding of "amateur," however, is that the athlete is not paid to play the sport—as both this Court and the Ninth Circuit

have recognized, *see Board of Regents*, 468 U.S. at 102 ("athletes must not be paid"); *O'Bannon*, 802 F.3d at 1076 ("not paying student-athletes is *precisely what makes them amateurs*"); *id.* at 1076 n.20. The survey thus showed that the NCAA's commonly understood conception of amateurism differentiates college sports from professional sports.[4]

2. Because the NCAA showed that the challenged rules have procompetitive benefits, respondents had the ultimate burden to show that the rules are unreasonable because those benefits could be achieved through a substantially less restrictive alternative. Respondents failed to do so. The Ninth Circuit's contrary conclusion—that the alternative regime the district court adopted would preserve the distinction between amateurs and professional—is indefensible.

The Ninth Circuit thought that requiring the NCAA to allow every student-athlete to receive unlimited payments "related to education"—including post-eligibility internships for which student-athletes could be paid unlimited amounts in cash—as well as thou-

[4] Even evaluating eligibility rules individually, the evidence does not support the lower courts' conclusion that some rules have no procompetitive benefits. The Ninth Circuit's contrary view rested principally on what the court characterized as evidence "that the NCAA has loosened its restrictions on above-COA, education-related benefits since *O'Bannon* without adversely affecting consumer demand." Pet. App. 36a. But all the examples the court gave are consistent with the NCAA's conception of amateurism. The court thought otherwise because it misunderstood that conception as prohibiting student-athletes from receiving "One Penny" over COA, Pet. App. 38a. As explained, the NCAA's conception of amateurism allows coverage of student-athletes' legitimate expenses and modest awards to recognize genuine achievement. Every benefit the court cited falls into one of those categories. *E.g.*, Pet. App. 36a, 42a-43a.

sands of dollars in cash annually in "academic or graduation awards and incentives," Pet. App. 66a-67a, would preserve amateurism "just as well as the challenged rules do" because all these payments "are easily distinguishable from professional salaries," Pet. App. 41a-42a. That is so, the court claimed, because the payments are "'connect[ed] to education'; 'their value is inherently limited to their actual costs'; and 'they can be provided in kind, not in cash.'" Pet. App. 41a-42a (alteration in original). That is simply untrue.

Start with "paid post-eligibility internships." Pet. App. 23a. They obviously *would* be paid in cash (a fact the Ninth Circuit ignored in repeatedly suggesting that the district court set aside only limits on "non-cash" payments, Pet. App. 18a, 22a, 35a, 36a, 37a, 44a). Those cash payments, moreover, could be *unlimited*; there are no "inherent[] … actual costs" associated with an internship, Pet. App. 41a-42a. While the Ninth Circuit asserted that it is "doubtful that a consumer could mistake a *post-eligibility* internship for a professional athlete's salary," Pet. App. 44a, it offered nothing to support that assertion—confirming plaintiffs' failure to carry their ultimate burden of proof. The Ninth Circuit's assertion, moreover, defies common-sense: Although the internships must take place post-eligibility, they can be *promised* to student-athletes well before eligibility expires, including during recruitment. Consumers would thus certainly understand that cash payments for internships were part of the compensation for student-athletes' athletic play. *See also supra* pp.37-38.

Next, consider the mandate that the NCAA allow schools to offer every student-athlete thousands of dollars each year (in cash) as "academic or graduation awards and incentives." Pet. App. 66a-67a. Under the

decision below, these awards and incentives can be given simply for meeting the NCAA's minimum academic-eligibility requirements, i.e., simply for being on a team. That is the very definition of a professional salary. The Ninth Circuit's only defense of this element of the district court's alternative was that the NCAA already permits student-athletes to receive an equivalent amount in "aggregate athletic participation awards." Pet. App. 44a. That comparison is baseless. Most allowable awards are for genuine individual or team *achievement*, and the few that are simply for participation are tokens of extremely low value. ER288-289, 296-297. Most awards, moreover, are received by only a few student-athletes each year, and the record contains no evidence that any student-athlete has ever received the maximum aggregate value. No NCAA rule remotely allows schools to pay thousands of dollars in cash to every student-athlete simply for maintaining eligibility.

Finally, the alternative's requirement that schools be allowed to provide "tangible," in-kind "benefits" is likewise inconsistent with amateurism (and hence would not be virtually as effective as the challenged rules at preserving the procompetitive benefits of the NCAA's rules). Although the value of any particular tangible item may be inherently limited, the district court's alternative permits an unlimited number of such items. And the requirement that items be "education-related" would not prevent schools from offering recruits and student-athletes thousands of dollars' worth of high-end computers, musical instruments, vehicles (to get to class), and other unnecessary or inordinately valuable items just because they are nominally "related to the pursuit of academic studies," Pet. App. 167a-168a. The Ninth Circuit asserted that the district court

"expressly envisioned" that the "'non-cash education-related benefits'" would be limited to "'*legitimate* education-related costs,' not luxury cars or expensive musical instruments for students who are *not* studying music." Pet. App. 43a-44a (quoting Pet. App. 155a). That additional requirement would certainly narrow the scope of the district court's compensation scheme, but it does not appear in the injunction. Pet. App. 167a-170a. Indeed, limiting the court's alternative to "legitimate education-related costs" would render it not an alternative at all, because NCAA rules, as explained, already permit coverage of all genuinely legitimate educational expenses. *See supra* pp.6-8.[5]

In short, the district court's alternative to the challenged rules would significantly dilute if not entirely eviscerate the procompetitive distinction between college and professional athletes. It assuredly would not preserve that distinction as well as the challenged rules. It would also have serious negative effects on the educational experience of many student-athletes, e.g., forcing some schools to reallocate resources by reducing the number of sports teams or scholarships they offer, thereby depriving many student-athletes of the opportunity to play a sport or even to pursue a college education at all. Tr.891-893, 1401-1402.

* * *

The trial evidence demonstrated that the NCAA's commitment to maintaining amateurism (implemented through the no-pay rules) differentiates college sports from professional sports and thus has the procompeti-

[5] The decisions below and the injunction are also silent as to whether these tangible "benefits" would fall within the NCAA's restrictions on selling benefits and awards for cash.

tive effect of widening consumer choice. And there was no finding that any alternative regime would be virtually as effective at maintaining *that* differentiation, i.e., maintaining a regime in which student-athletes are not paid to play. Even if a detailed rule-of-reason analysis had been proper, therefore, the result of that analysis should have been the rejection of respondents' antitrust claims.

III. THE DECISION BELOW WILL LEAD TO ENDLESS ANTITRUST CHALLENGES

The Ninth Circuit's approach allows judges to micromanage joint ventures, even though judges have neither the authority nor the expertise to do so, *see supra* pp.35-36. Coupled with its view that decisions upholding a restraint under the rule of reason have no precedential force, such that litigation of "essentially the same claim again and again" is proper, Pet. App. 26a-32a & n.13, the Ninth Circuit's approach empowers plaintiffs' lawyers to sue to have judges assume control over significant portions of successful procompetitive businesses.

This is not a hypothetical concern for the NCAA. As explained, this litigation was initiated even before *O'Bannon* was concluded—by nearly identical classes of plaintiffs. Likewise, before the Ninth Circuit proceedings here concluded, yet another similar lawsuit was filed and assigned to the same judge. It is thus clear that a cadre of lawyers is bent on "dismantl[ing] the NCAA's entire compensation framework," Pet. App. 14a. That is hardly surprising, given the Ninth Circuit's invitation to serial antitrust litigation—including when the NCAA *relaxes* its rules (or, indeed, makes no changes at all). The result is effectively to install a single judge in California as the superinten-

dent of a significant component of college sports, supported by the continual refinement of arguments and evidence that lawyers representing essentially the same class can achieve through repeated litigation seeking treble damages (and attorney's fees). Far from according the NCAA the deference sports organizations generally receive and the NCAA specifically "needs" to play its "critical role in the maintenance of … amateurism in college sports," *Board of Regents*, 468 U.S. at 120, the decision below leaves the NCAA with virtually no latitude, to the detriment of student-athletes, their schools, and fans alike.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2021