**Nos. 20-512, 20-520**

# In the Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
*Petitioner*,
*v.*
SHAWNE ALSTON, ET AL.,
*Respondents*.

AMERICAN ATHLETIC CONFERENCE, ET AL.,
*Petitioners*,
*v.*
SHAWNE ALSTON, ET AL.,
*Respondents*.

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

## BRIEF FOR RESPONDENTS


STEVE W. BERMAN
EMILEE N. SISCO
*Hagens Berman Sobol Shapiro LLP*
1301 Second Ave., Ste. 2000
Seattle, WA 98101

BRUCE L. SIMON
BENJAMIN E. SHIFTAN
*Pearson, Simon & Warshaw, LLP*
350 Sansome St., Ste. 680
San Francisco, CA 94104

JEFFREY L. KESSLER
DAVID G. FEHER
DAVID L. GREENSPAN
*Winston & Strawn LLP*
200 Park Avenue
New York, NY 10166

LINDA T. COBERLY
*Counsel of Record*
*Winston & Strawn LLP*
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600
lcoberly@winston.com

[Additional counsel on inside cover]

BENJAMIN J. SIEGEL
*Hagens Berman Sobol Shapiro LLP*
715 Hearst Ave., Ste. 202
Berkeley, CA 94710

JEANIFER E. PARSIGIAN
*Winston & Strawn LLP*
101 California Street
San Francisco, CA 94111

ELIZABETH C. PRITZKER
JONATHAN K. LEVINE
BETHANY L. CARACUZZO
*Pritzker Levine LLP*
1900 Powell St., Ste. 450
Emeryville, CA 94608

*Counsel for Respondents*

## QUESTION PRESENTED

Whether compensation restraints that the NCAA defends as necessary for "amateurism" should be summarily exempt from Section 1 of the Sherman Act, as Petitioners contend, or whether courts should evaluate the competitive impact of those restraints using antitrust law's rule of reason—a fact- and market-based analysis that this Court has applied to agreements restricting competition among NCAA members.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**



**Other Authorities**

## INTRODUCTION

Petitioners seek nothing less than an outright exemption from Section 1 of the Sherman Act. Although they frame this exemption as a "quick look" (in the conferences' brief) or "abbreviated deferential review" (in the NCAA's), these euphemisms cannot disguise the true scope of their request. Both briefs contend that any NCAA rule related to "amateurism" must be upheld as lawful on the pleadings, without any factual inquiry and regardless of the economic realities. What Petitioners seek is an unprecedented per se rule of lawfulness. Their "quick look" is effectively "no look" at all.

Arguments like these are for Congress, not the courts. This Court has long recognized that only Congress may create exemptions from federal statutes, and it has never recognized the judicial exemption that Petitioners now seek. In *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984), the Court held that the NCAA—like any other association of economic competitors—is subject to Section 1 of the Sherman Act. And while the Court recognized that some cooperation is necessary, it made room for that cooperation by holding that the NCAA's horizontal restraints on competition would not be deemed unlawful per se. The Court instead applied the rule of reason—a flexible, fact-based analysis that accounts for the economic realities of the market and gives the NCAA a chance to prove a procompetitive justification for its restraints.

Nothing in this Court's cases supports declaring an NCAA restraint lawful per se when a fact-based analysis under the rule of reason shows otherwise. And that is exactly what the district court found here, based on a full trial record. Petitioners do not dispute

that the NCAA is a commercial enterprise with market power in the relevant markets—that is, the labor markets for the athletic services of Football Bowl Subdivision and Division I men's and women's basketball players. They also do not dispute that the NCAA's compensation restraints cause significant anticompetitive effects in these markets. But while Petitioners argue that NCAA rules are justified by "amateurism"—which they say is necessary to preserve college sports as a distinct product—the factual record showed otherwise. The court held that Petitioners did not prove their sweeping theory of "amateurism" as a procompetitive justification. And the student-athletes who brought this case proved that the challenged rules are patently more restrictive than necessary to preserve demand for college sports as a distinct product.

Petitioners ignore the court's factual findings, insisting that it is "obvious," "common sense," and "simple logic" that the restraints maintain an essential and demand-enhancing feature of college sports. Conf. Br. 13, 15–16. But this is a factual proposition to be proven, not a principle of law to be presumed. The NCAA's members do not operate as a "joint venture" in the relevant labor markets; to the contrary, they compete fiercely for recruits. And in any event, this Court unanimously held in *American Needle* v. *NFL*, 560 U.S. 183, 202–204 (2010), that rules restricting competition among the members of a sports league joint venture are subject to factual examination under the rule of reason. Here, the trial established—as a matter of *fact*—that the NCAA's restraints on education-related benefits are *not* reasonably necessary to preserve any product-defining, demand-enhancing feature of college sports. What Petitioners seek is not a "quicker" or more "abbreviated" resolution; they seek

a different outcome altogether—a finding of legality on the pleadings, contrary to the facts.

Nor is there any basis for Petitioners' argument that the courts did not apply the rule of reason correctly. Although Petitioners claim to take issue with the legal standards, their real dispute is with the district court's factual findings, which have ample support in the evidence presented at trial. Indeed, Petitioners never acknowledge the extraordinary burden the Ninth Circuit's cases place on antitrust plaintiffs, requiring them to prove that a challenged restraint is "'*patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives.'" Pet. App. 41a (citation omitted).[1]

And far from "micromanag[ing]" the NCAA's affairs, the district court drew its antitrust remedy narrowly, allowing the NCAA to continue restricting compensation *un*related to education and inviting the NCAA to define the education-related benefits that its rules must now permit. It also makes clear that the conferences within the NCAA may set their own, even stricter compensation limits if they choose to do so. The injunction is narrowly tailored to remedy the antitrust violations found at trial: it frees conferences and schools to compete for student-athletes by offering them enhanced education-related benefits to support their academic achievement.

This Court has already answered the NCAA's call for "ample latitude" in *Board of Regents*, and its response was to apply the rule of reason. Here, applying the rule of reason on a full trial record led the courts

[1] Citations to "Pet. App." are to the Appendix in No. 20-512. Citations to "ER" are to the Excerpts of Record in the Ninth Circuit.

below to find that the challenged restraints were unlawful. Petitioners may disagree on the facts, but they have not identified any error in the courts' application of the law. This Court should affirm.

## STATEMENT

### I. Background

Petitioners present a mythical rendition of the facts that ignores the trial record. Indeed, Petitioners' fundamental position—that the challenged restraints advance an essential, demand-enhancing feature of a joint product that would otherwise cease to exist—rests on factual assumptions that the district court expressly rejected. The account below reflects the district court's factual findings, which the Ninth Circuit affirmed. These findings are the foundation for this Court's review.

#### A. The NCAA is a membership organization of conferences and schools that, among other things, compete for the labor of student-athletes.

The NCAA's members include more than a thousand colleges and universities, which field teams in dozens of sports and compete in three tiers (Divisions I through III). Pet. App. 8a. This lawsuit concerns only the highest tiers of men's and women's basketball (Division I) and football (the Football Bowl Subdivision, or FBS).

Most Division I schools are members of an athletic conference. These conferences serve as additional regulators and organizers of intercollegiate athletics. "Conferences are required to be 'legislative bod[ies],' * * * and thus, they already can and do enact their own

rules." *Id.* at 124a (citing NCAA's Division I Constitution Article 3.3.1.1, alteration in original). The conferences conduct their own regular seasons in Division I basketball and FBS football in competition with each other, as economically separate sports leagues. *Id.* at 68a–69a.

Division I basketball and FBS football programs compete vigorously with one another to recruit top-tier student-athletes. Among other things, they offer recruits competitive packages of compensation and benefits. *Id.* at 77a–78a. The three relevant markets in this case are *labor* markets in which NCAA members are direct, horizontal competitors. *Id.* at 76a–82a.

### B. Since *Board of Regents*, FBS football and Division I basketball have become multi-billion-dollar industries.

Top-tier college basketball and football today are a far cry from the versions that existed in the 1980s, when this Court decided *Board of Regents*. Today, these sports generate billions of dollars in annual revenues for Petitioners—amounts that have "increased consistently over the years" and "are projected to continue to increase." Pet. App. 68a–69a.

For example, the NCAA's current broadcast contract for the "March Madness" basketball tournament is worth $19.6 billion; the FBS football conferences' current television deal for the College Football Playoff is valued at $5.64 billion. *Id.* at 68a. Each conference negotiates its own television contracts, often with its own network, and generates its own revenues from regular-season basketball and FBS football. *Ibid.* The largest conferences enjoy hundreds of millions of dollars each year on top of the sums distributed by the NCAA. *Id.* at 68a–69a (the SEC "made more than $409

million in revenues from television contracts alone in 2017, with its total conference revenues exceeding $650 million that year").

Because NCAA rules restrain the schools' ability to compete for talent by offering better compensation or benefit packages, the schools compete indirectly (and inefficiently) by spending lavishly on "seven-figure coaches' salaries" and "palatial athletic facilities." *Id.* at 17a; *see also* ER699–702, 1357–1358. Ironically, in six of the eight states that have submitted an amicus brief to express concern about the cost of providing additional education-related benefits to student-athletes, the highest paid public employee is a college football or basketball coach.[2]

The "haves" and "have nots" in Division I basketball and FBS football were established well before this case. This is why Petitioners have not attempted to justify their restraints here on the ground that they preserve "competitive balance" on the field. *See O'Bannon* v. *NCAA*, 802 F.3d 1049, 1059, 1072 (9th Cir. 2015) (failure to prove this justification), *cert. denied*, 137 S.Ct. 277 (2016).

As revenues have grown, so too have the demands on student-athletes. On average, athletes in these sports spend thirty-five to forty hours each week on

---

[2] *In 40 States, Sports Coaches are the Highest-Paid Public Employees*, FanBuzz (Dec. 31, 2019), https://tinyurl.com/3xq632qu (University of Georgia—$6.9 million annually; University of Alabama—$8.9 million; University of Arkansas—$4 million; University of Mississippi—$3.1 million; Clemson—$9.3 million; South Dakota State—$400,000). Even the football strength-and-conditioning coach at Alabama makes more than $500,000 a year. ER702.

team activities. ER674–675. In the most elite conferences—the "Power Five"—student-athletes devote even more time to their sports. As Ninth Circuit Judge Milan Smith explained in his concurrence below:

> [C]oaches and others in the Division [I] ecosystem make sure that Student-Athletes put athletics first, which makes it difficult for them to compete for academic success with students more focused on academics. They are often forced to miss class, to neglect their studies, and to forego courses whose schedules conflict with the sports in which they participate. In addition to lessening their chances at academic success because of the time they must devote to their sports obligations, Student-Athletes are often prevented from obtaining internships or part-time paying jobs, and, as a result, often lack both income and marketable work experience.

Pet. App. 53a; *see also* ER708.

A recent illustration of the non-amateur realities that dominate big-time college sports is Petitioners' decision to have FBS football players and Division I basketball players put their health at risk to continue generating huge revenues for their schools during a pandemic, while other students are told to attend school remotely and stay in their dorms. Such commercial exploitation of these student-athletes is hardly indicative of "a societally important non-commercial objective: higher education." NCAA Br. 3.

### C. NCAA members have agreed to fix the compensation and benefits they offer in competing for student-athletes' services.

Despite the massive revenues generated by these sports and the ever-growing demands on student-athletes, the NCAA's members continue to restrict the type and amount of compensation and benefits—including education-related benefits—that schools may offer in competing for recruits. Unlike most horizontal price-fixing agreements, however, Petitioners' is carried out in broad daylight, in a byzantine system of rules set forth in the Division I Manual.

For example, these rules prohibit schools from paying for various items "not currently included in the cost of attendance calculation but nonetheless related to the pursuit of various academic studies." Pet. App. 119a.[3] Schools are also barred from providing post-eligibility scholarships to complete undergraduate or graduate degrees at a different institution or covering the cost of vocational school. *Id.* at 90a, 119a. And, while coaches and administrators receive substantial bonuses when their student-athletes meet academic benchmarks, schools cannot offer the same type of academic incentives, in any amount, to the student-athletes themselves. ER633–636.

At the same time, NCAA rules have increasingly *allowed* other kinds of compensation, without any negative impact on demand for college sports. Currently, student-athletes may receive tens of thousands of dollars in compensation above full cost-of-attendance scholarships—compensation that is often unrelated to

[3] Each school calculates "cost of attendance" under federal regulations. Pet. App. 70a.

academics but overtly connected to athletic performance. Pet. App. 85a–92a, 142a–143a. This compensation includes payments from the NCAA's Student Assistance and Academic Enhancement Funds that have been used for things like loss-of-value insurance premiums, legal expenses, groceries, parking tickets, and clothing. Michigan State University, for example, spent $50,000 to buy a $10 million insurance policy for a basketball player to protect his future earnings. *Id.* at 9a, 87a–89a, 95a–96a; ER732–734. NCAA rules also allow schools to make payments for athletic achievements that can total almost $6,000 annually "in the form of Visa gift cards that can be used like cash." Pet. App. 86a.

As discussed below, the confluence of rules *restraining* some kinds of compensation (challenged here) and rules *permitting* other kinds of compensation reveals that the NCAA no longer follows any "coherent definition of amateurism." *Id.* at 92a. According to the former commissioner of one of the Power Five conferences, amateurism is "just a concept that I don't even know what it means. I really don't." *Id.* at 39a.

## II. Proceedings Below

### A. The Ninth Circuit first applied the rule of reason to NCAA compensation restraints in *O'Bannon*.

In *O'Bannon*, a group of then-current and former FBS football and Division I men's basketball players sued to challenge "the NCAA's amateurism rules, insofar as they prevented student-athletes from being compensated for the use of their NILs [names, images, and/or likenesses], [as] an illegal restraint of trade under Section 1 of the Sherman Act." 802 F.3d at 1055. Faithfully following this Court's decision in *Board of*

*Regents*, the Ninth Circuit held that while rules like these in another context "might be per se illegal price fixing, we are persuaded—as was the Supreme Court in *Board of Regents* and the district court here—that the appropriate rule is the Rule of Reason." *Id.* at 1069. This decision reflected the "Supreme Court's admonition that we must afford the NCAA 'ample latitude' to superintend college athletics." *Id.* at 1079 (quoting *Board of Regents*, 468 U.S. at 120). At the same time, the Ninth Circuit rejected the NCAA's argument that *Board of Regents* "approve[d] the NCAA's amateurism rules as categorically consistent with the Sherman Act"—concluding that "[t]he amateurism rules' validity must be proved, not presumed." *Id.* at 1063–1064.

Applying the rule of reason, the Ninth Circuit affirmed the decision of the district court insofar as it enjoined the NCAA from prohibiting full cost-of-attendance athletic scholarships as a means of compensating student-athletes for NIL rights. *Id.* at 1074–1076. But it reversed the portion of the district court's injunction permitting $5,000 NIL payments, crediting the NCAA's arguments that cash payments for NIL rights—no matter how small—would "blur the clear line between amateur college sports and their professional counterparts." NCAA Br. at 57, *O'Bannon* v. *NCAA*, 802 F.3d 1049 (No. 14-16601) (Dkt. 13-1); *O'Bannon*, 802 F.3d at 1078.

Since then, the NCAA has reversed course—further demonstrating that "amateurism" today lacks a coherent definition. After arguing that NIL compensation in any form would be ruinous to college sports, the NCAA today *embraces* NIL compensation. In an April 2020 working group report, the NCAA endorsed a broad spectrum of changes that would allow student-athletes to be compensated for the commercial use of

their NILs in "third-party endorsements or social media influencer activity, * * * [s]ocial media content creation and distribution; [p]romotion of student-athlete businesses (music, art, athletic lessons, etc.); and [p]ersonal promotional activities (autograph signings, etc.)." *NCAA Board of Governors Federal & State Legislation Working Group Final Report & Recommendations* at 22–23 (Apr. 17, 2020), https://tinyurl.com/t74cswgo. The NCAA has placed these changes on hold pending the Court's decision.

### B. The district court applied the rule of reason, making extensive findings of fact after a ten-day trial.

Whereas the complaint in *O'Bannon* had a "'limited scope,'" the complaint in this case "broadly target[ed] the 'interconnected set of NCAA rules that limit the compensation [student-athletes] may receive in exchange for their athletic services.'" Pet. App. 27a, 29a (citation omitted, alteration in original). The district court certified three classes of student-athletes—those in FBS football, Division I men's basketball, and Division I women's basketball.

The court followed *O'Bannon* and *Board of Regents* in holding that the restraints "'must be tested [using] a rule-of-reason analysis' as opposed to under the per se rule." Pet. App. 128a (citation omitted). It applied this framework to an extensive factual record developed at summary judgment and a ten-day trial. The court ultimately ruled in the student-athletes' favor at step 3 of the rule of reason, finding it unnecessary to conduct the step 4 "balancing" that the rule of reason calls for if plaintiffs fail to meet their burden of advancing a "'viable less restrictive alternative.'" *Id.* at 159a–160a (quoting *Cty. of Tuolumne* v. *Sonora Cmty.*

*Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) (in turn citing Philip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1507b (hereinafter, "Areeda")).

**1. The student-athletes proved anticompetitive effects in the three relevant labor markets.**

On summary judgment, the district court found that the student-athletes had satisfied their burden at step 1 of the rule of reason, presenting undisputed evidence that "the challenged restraints produce significant anticompetitive effects in the relevant market." Pet. App. 77a.

Critically, the court held—"at the request of both parties"—that the relevant markets here are not the *output* markets for college sports (in which consumers pay to watch games) but rather the *labor* markets for the services of the student-athletes. *Id.* at 75a–77a. The evidence showed unequivocally that "the challenged rules have the effect of artificially compressing and capping student-athlete compensation and reducing competition for student-athlete recruits." *Id.* at 78a.

Petitioners did not meaningfully dispute that evidence, nor did they challenge these step 1 rulings on appeal. Indeed, Petitioners themselves asked the court below to adopt the same market definitions that the Ninth Circuit applied in *O'Bannon*. *Id.* at 75a; *cf.* NCAA Br. 11 (suggesting incorrectly that the court found *O'Bannon* preclusive as to step 1).

### 2. Petitioners did not prove their broad procompetitive justifications, but the court held that the evidence proved a narrower one.

At step 2, the district court heard evidence about Petitioners' two proffered procompetitive justifications: (1) that the restraints implement the principle of "amateurism," which Petitioners claimed was essential to preserving consumer demand for college sports; and (2) that the restraints support the "integration" of student-athletes within academic communities. Pet. App. 83a–115a, 140a–151a.

***Amateurism***. In extensive findings of fact, the court found that the NCAA has abandoned "any coherent definition of amateurism." *Id.* at 92a. Petitioners' own witnesses admitted that the current rules allow for compensation that is "not related to the principle of amateurism." ER498 (NCAA corporate representative). Student-athletes today can and sometimes do receive tens of thousands of dollars in compensation *above* full cost-of-attendance scholarships, including payments overtly connected to athletic performance. *See supra* pp.8-9. As the court observed: "Because these awards are directly correlated with athletic performance, they appear, on their face, to be 'pay for play,' and thus, inconsistent with amateurism as Defendants and their witnesses describe that term. Yet, they are allowed." Pet. App. 142a. Multiple witnesses for Petitioners admitted that they have no idea what "amateurism" means. *Id.* at 83a–85a.

The court also found that "amateurism, and amounts of permissible student-athlete compensation, have changed materially over time." *Id.* at 144a; *see*

*also id.* at 69a–70a. These changes resulted in significant increases in the types and amounts of benefits provided to student-athletes. *Id.* at 95a–99a. At the same time, consumer demand for college sports "as a distinct product" has only *increased*, "suggest[ing] that additional increases in compensation would not reduce consumer demand." *Id.* at 143a–145a. Indeed, consumer survey evidence presented at trial demonstrated that permitting various forms of additional education-related benefits—from academic and graduation incentive payments up to $10,000, to graduate school scholarships, to post-eligibility study abroad—would not cause any decrease in consumer demand. *Id.* at 102a–103a.

Further, Petitioners' own witnesses testified that, when the NCAA "decides where to set a compensation cap," the caps are *not* based on any considerations of consumer demand. *Id.* at 103a–104a. Instead, the limits are based on considerations of "cost." ER641.

A parade of NCAA, conference, and university witnesses admitted that they had never even attempted to study any relationship between the compensation restraints and consumer demand.[4] To the contrary, the evidence showed that what *does* drive fan interest is not that the athletes are uncompensated, but rather "consumers' perception that student-athletes are, in fact, students." Pet. App. 107a, 121a, 156a.

---

[4] ER640–642 (NCAA 30(b)(6) witness); ER644 (NCAA Managing Director of Research); ER618 (American Athletic Conference Commissioner); ER442 (Big 12 30(b)(6) witness); ER604 (Mid-American Conference 30(b)(6) witness); ER616–617 (University of Wisconsin Chancellor); ER632–633 (Ohio State Athletic Director); ER650 (Wake Forest President).

Despite these conclusions, however—and giving Petitioners the benefit of the doubt—the district court held that the NCAA's compensation rules "may have some" procompetitive effect "to the extent that they serve to support the distinction between college sports and professional sports" by prohibiting "unlimited payments unrelated to education, akin to salaries seen in professional sports leagues." *Id*. at 108a. This procompetitive justification was narrower than the one Petitioners set out to prove, and it justified only "some" aspects of Petitioners' restraints. *Ibid*. Specifically, it did *not* justify restraints on "education-related benefits." *Id.* at 109a. Instead, the district court found that education-related benefits "serve to *emphasize* that the recipients are students, and not professional athletes." *Ibid.* (emphasis added).

***Academic Integration***. As for Petitioners' second proffered justification—ensuring better "academic integration"—the district court found that the evidence did not support it. Indeed, Petitioners' own expert witness testified "that additional compensation could *improve* outcomes for student-athletes." *Id.* at 110a–111a (emphasis added). Petitioners did not appeal any aspect of this conclusion. *Id.* at 18a n.8.

### 3. The student-athletes proved that the restraints were patently and inexplicably stricter than necessary to serve the narrower justification.

At step 3, the district court placed the burden squarely on the student-athletes to prove that the challenged restraints were "patently and inexplicably stricter than is necessary" to accomplish the narrower procompetitive justification. Pet. App. 152a. This required identifying a less restrictive alternative that is

"'virtually as effective,'" "'without significantly increasing cost.'" *Ibid.* (quoting *O'Bannon*, 802 F.3d at 1074, 1076 n.19).

The student-athletes presented three proposed "less restrictive alternatives," and the court rejected two of them. *Id.* at 116a–118a. It found that the student-athletes had carried their burden of proof only as to the third—the *most* restrictive—namely, that the NCAA could continue to prohibit cash compensation unrelated to education, while eliminating restrictions on *education-related* benefits, either in kind (computers, electronics, instruments, graduate scholarships, tutoring, study abroad, internships) or in the form of academic achievement incentive awards in an amount no greater than what the NCAA already allows for athletic achievement. *Id.* at 117a–121a.[5] The court found, as a matter of fact, that this alternative would be "virtually as effective" in preserving the distinction between professional and college sports, while being patently less restrictive on competition in the labor markets. *Id.* at 118a–126a, 153a–159a.

#### 4. Rather than enjoining the rules outright, the court crafted a narrower remedy with deference to the NCAA.

Given its findings under the rule of reason, the district court crafted a narrow injunction that provided substantial deference to the NCAA and mirrored the less restrictive alternative that the student-athletes proved. Pet. App. 167a–170a.

---

[5] In post-trial proceedings, the court accepted the NCAA's calculation that the annual cap should be $5,980 based on its rules for athletic achievement. D.Ct. Dkt. 1329.

Petitioners deride this as "micromanagement" (NCAA Br. 4), when in fact, the narrowness of the injunction was an effort by the court to give the NCAA as much leeway as possible. The injunction gives the NCAA substantial latitude to continue to restrict all forms of non-education-related compensation. It also allows the NCAA to propose its own definition of what benefits are "related to education" and thus may not be restricted. Pet. App. 168a. The injunction further leaves individual conferences the freedom to impose their own, more stringent education-related compensation caps if they choose to do so. *Id.* at 169a. Additionally, the injunction only prohibits the NCAA from restraining education-related benefits offered by "conferences or schools"—leaving in place existing restraints on benefits from boosters, sponsors, and other third parties. *Id.* at 167a. Finally, the injunction does not mandate *any* compensation but frees up competition between schools over education-related benefits. *Id.* at 167a–170a.

Notably, NCAA President Mark Emmert publicly lauded the injunction as "'an inherently good thing'" because it "foster[s] competition among conferences and schools 'over who can provide the best educational experience.'" *Id.* at 42a (Ninth Circuit decision, quoting Associated Press, *Emmert: Ruling reinforced fundamentals of NCAA*, ESPN (Apr. 4, 2019)).

**C. The Ninth Circuit affirmed.**

The Ninth Circuit unanimously affirmed the district court's legal conclusions and findings of fact. Pet. App. 7a. At step 1, it found that the "district court properly concluded that the Student-Athletes carried their burden" to show significant anticompetitive effects, and that the "NCAA does not dispute them." *Id.*

at 33a–34a. At step 2, it held that the district court "properly credit[ed] the importance to consumer demand of maintaining a distinction between college and professional sports." *Id.* at 34a–40a (alteration in original, quotation omitted). And at step 3, it affirmed the district court's conclusion that it was the "Student-Athletes' burden to make a strong evidentiary showing that their proposed [less restrictive alternatives] to the challenged scheme are viable"—that is, "virtually as effective" as the challenged rules in "serving the procompetitive purposes" that Petitioners had shown, and capable of being implemented "without significantly increased cost." *Id.* at 40a–41a (quotation omitted). Because the student-athletes met that burden (*id.* at 41a–46a), there was no reason to proceed to balancing the anticompetitive and procompetitive effects at step 4.

The Ninth Circuit also denied the student-athletes' cross-appeal seeking a broader injunction that would have enjoined *all* aspects of the challenged restraints. "In [the Ninth Circuit's] view, the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports." *Id.* at 47a.

## SUMMARY OF ARGUMENT

1. Petitioners seek a judicial exemption from Section 1 of the Sherman Act. Although they frame this exemption as a "quick look"—or as "abbreviated deferential review"—they effectively insist that courts must reject any challenge to NCAA amateurism rules on the pleadings. Here, that means finding a restraint lawful even when a trial based on facts and economics showed

that it is not. That is an exemption, no matter what Petitioners choose to call it.

Petitioners' arguments defy the statute's text, and this Court has been unwilling to imply an antitrust exemption when Congress has not enacted one. Petitioners' social policy arguments for the exemption—their claimed commitment to "an important American tradition," advancing "non-commercial objectives" in higher education, and concerns about lawsuits—are arguments for consideration by the elected branches of government, not by the courts.

Given this Court's aversion to creating judicial exemptions, it is no surprise that it has not recognized the one Petitioners assert here. Petitioners claim that *Board of Regents* created an irrebuttable presumption of lawfulness for all NCAA rules reasonably related to "amateurism." Not so. Instead, the Court responded to the NCAA's plea for "latitude" by holding that its horizontal restraints—which would otherwise be unlawful per se—are instead subject to the rule of reason. This flexible, fact-based analysis serves any legitimate need for latitude by allowing the NCAA to justify its rules based on their actual effect on competition in "today's market."

Without the irrefutable "presumption" of lawfulness Petitioners attribute to *Board of Regents*, their arguments collapse. The "quick look" is a tool that courts may use to *condemn* certain restraints; this Court has never used it to *uphold* a restraint as procompetitive without considering any less restrictive alternatives or conducting a balancing test. Nor can Petitioners frame the NCAA as a joint venture of producers entitled to absolute deference in defining their product. This case is about *labor* markets, in which

NCAA members compete vigorously. And in any event, joint ventures are not exempt from antitrust scrutiny; their agreements too are subject to the rule of reason.

2. Although Petitioners purport to challenge the lower courts' rule-of-reason analysis as legal error, their real dispute is with the trial court's fact-finding. Indeed, their arguments ignore the actual standards the lower courts applied.

The courts below did not make Petitioners' step 2 burden heavier by requiring a separate justification for "each type of rule" or by substituting their own conception of amateurism. Instead, the district court entertained Petitioners' broad conception—that NCAA compensation restraints collectively embody a principle of "amateurism" that is required to preserve demand for college sports—and found that the evidence at trial did not support it. Granting Petitioners the benefit of the doubt, however, the court found that their witnesses had proved a more modest justification—that restraints on compensation may be procompetitive to the extent they prevent unlimited cash payments unrelated to education. This approach made Petitioners' step 2 burden *lighter*, not heavier.

Nor did the courts place the burden on Petitioners to prove that their restraints are "the least restrictive" way to achieve their only proven justification. To the contrary, at step 3, the courts required the student-athletes to "make a strong evidentiary showing" that the NCAA's restraints were "*patently and inexplicably* stricter than is necessary" *and* that there is an alternative that is "virtually as effective in serving the procompetitive purposes" "without significantly increased

cost." Pet. App. 40a–41a (emphases added). Petitioners never discuss this strenuous test, much less explain why it is erroneous.

Finally, Petitioners' arguments about "judicial micromanagement" misconstrue the district court's remedy. What Petitioners deride as "micromanagement" was, in fact, the district court's effort to make its injunction as narrow as possible. Among other things, the injunction leaves in place all the restraints on compensation unrelated to education, allows the NCAA to propose its own definition of "education-related," and acknowledges the freedom of the individual conferences within the NCAA to set more restrictive rules on education-related benefits if they so choose.

3. Affirming the application of the rule of reason will serve the procompetitive policies of the Sherman Act. The very purpose of rule-of-reason analysis is to grant those who need to cooperate a chance to prove that their restraints are procompetitive in view of the facts and economic realities of the market. The "ample latitude" Petitioners seek animates the rule of reason, and the courts granted them that latitude here.

## ARGUMENT

### I. Petitioners' plea for an exemption from the Sherman Act contravenes every relevant precedent of this Court.

Central to both Petitioners' briefs is a demand for an antitrust exemption for any horizontal restraint they characterize as relating to "amateurism." The NCAA's brief frames this exemption as "abbreviated deferential review," in which any restraint reasonably related to amateurism "should be upheld" at the pleading stage "without further analysis under the rule of

reason." NCAA Br. 17. The conferences frame the exemption as a "quick look"—arguing that a doctrine designed to lessen the burden on antitrust plaintiffs should be repurposed to guarantee that any challenge to NCAA rules relating to "amateurism" will be summarily rejected. Conf. Br. 18–21.

In substance, though, what both briefs seek is a judicially created antitrust exemption. The proof of this lies in Petitioners' insistence that a "quicker" or more "abbreviated" review would necessarily produce a different outcome than the one the courts below reached on a full factual record. The focus of Petitioners' arguments is not just to avoid the administrative burden of a trial, but to *change the trial outcome*, through a presumption of lawfulness that cannot be rebutted by contrary findings of fact. In effect, Petitioners ask that this Court declare such rules lawful per se—not with a "quick look," but with "no look" at all.

Like the concept of amateurism, the scope of the exemption Petitioners seek is circular and elusive. At a minimum, the exemption would cover horizontal compensation restraints like those challenged here. But where does it end? Petitioners never specify which NCAA rules are "reasonably related to amateurism"; nor do they explain how a court could resolve that question on the pleadings.

Regardless of the scope, the controlling question is "whether an [antitrust] exemption should be granted in the first instance." *United States* v. *Int'l Boxing Club of N.Y.*, 348 U.S. 236, 243 (1955). As this Court has explained, this "is for Congress to resolve, not this Court." *Ibid.* Nothing in this Court's precedents supports an antitrust exemption for any category of NCAA

rules. Indeed, Petitioners' request is contrary to decades of antitrust jurisprudence.

### A. Petitioners' position defies the plain language of the Sherman Act, which contains no exemption for the NCAA.

Under Section 1 of the Sherman Act, "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce * * * is declared to be illegal." 15 U.S.C. § 1. The statute "reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." *Nat'l Soc'y of Prof'l Engineers* v. *United States*, 435 U.S. 679, 695 (1978). For many years, this Court has recognized that "the phrase 'restraint of trade' is best read to mean 'undue restraint'" and has "thus understood § 1 to outlaw only unreasonable restraints." *Ohio* v. *Am. Express*, 138 S.Ct. 2274, 2283 (2018) ("*Amex*") (quotation omitted).

When an exemption to the Sherman Act is appropriate, Congress has created one. For example, Section 6 of the Clayton Antitrust Act exempts certain labor activities from antitrust scrutiny. 15 U.S.C. § 17. The Capper-Volstead Act did the same for agricultural producer cooperatives (7 U.S.C. § 291), and the McCarran-Ferguson Act exempted the "business of insurance" (15 U.S.C. §§ 1011–1013). One study commissioned by Congress identified twenty-one statutory antitrust exemptions. Antitrust Modernization Commission, *Report & Recommendations* 378 (2007).

Some statutory exemptions have included higher education and sports leagues—but conspicuously *not* the NCAA. In 1961, for example, Congress adopted the Sports Broadcasting Act, which permits teams within

certain professional sports leagues to jointly sell television broadcast rights, and it amended that Act to shield the merger of the National Football League and the American Football League. 15 U.S.C. §§ 1291–1295. In higher education, Congress has immunized colleges' and universities' collaborations on certain aspects of need-based financial aid offerings to students. 15 U.S.C. § 1 note (2015) (Pub. L. No. 114-44). And in 2004, Congress granted an exemption in response to a lawsuit challenging the National Resident Matching Program as an illegal restraint on competition among educational hospitals in recruiting and compensating medical residents. 15 U.S.C. § 37b.

Where Congress has not adopted an exemption, this Court has been loathe to create one. As the Court explained in 1962, "[i]mmunity from the antitrust laws is not lightly implied." *California* v. *Fed. Power Comm'n*, 369 U.S. 482, 485 (1962). And even where Congress has conferred an exemption, this Court's precedents "consistently hold that exemptions from the antitrust laws must be construed narrowly." *Union Lab. Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 126 (1982); *accord Nat'l Broiler Mktg. Ass'n* v. *United States*, 436 U.S. 816, 823 (1978); *Fed. Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973) ("repeals of the antitrust laws by implication * * * are strongly disfavored") (quotation omitted, collecting cases).

The one outlier is the baseball exemption that this Court created a century ago. *Federal Baseball Club* v. *Nat'l League*, 259 U.S. 200 (1922). Fifty years later, however, the Court recognized this decision as an "exception and anomaly" that had "become an aberration confined to baseball." *Flood* v. *Kuhn*, 407 U.S. 258, 282 (1972). Indeed, Congress' consideration (and rejection) of exemptions for other professional sports led this

Court to limit the baseball exemption accordingly. *Radovich* v. *NFL*, 352 U.S. 445, 449–452 (1957) (declining to extend exemption to professional football).

For similar reasons—and applying the "longstanding congressional commitment to the policy of free markets and open competition" (*Union Lab.*, 458 U.S. at 126)—this Court has refused to allow litigants to justify a restraint of trade based on social policy or any other non-competition-enhancing justification. In *Professional Engineers*, the Court condemned a trade association's prohibition on its member-engineers bidding for projects based on price—a practice that the association claimed could jeopardize public safety. 435 U.S. at 679–680. The Court rejected this justification out of hand: "the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition * * * is properly addressed to Congress." *Id.* at 689; *see also FTC* v. *Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990) ("[S]ocial justifications" for a "restraint of trade * * * do not make it any less unlawful"). The "'orderly way'" to deal with non-competition-based arguments for special antitrust treatment "'is by legislation and not by court decision.'" *Flood*, 407 U.S. at 279 (quoting *Radovich*, 352 U.S. at 452).

This is fatal to Petitioners' attempt to justify an antitrust exemption based on amateurism "as part of serving a societally important non-commercial objective: higher education." NCAA Br. 3. Indeed, the NCAA goes so far as to argue that it should be exempt from any "standard application of antitrust law" because it "would be too likely to invalidate restraints that yield substantial [non-commercial] benefits." *Id.* at 33. This is an imprudent reversal of position for the

NCAA, which conceded to this Court in *Board of Regents* that it would "not argue[] that any educational or amateurism goals of the NCAA are a good reason for the NCAA to engage in monopolistic practices * * * because as we read this Court's cases, including *Engineers* and others, the goals other than economic are not reasons for monopolistic practices." Tr. of Oral Argument at 24:15–24:23, No. 83-271 (1984) (Frank H. Easterbrook, Counsel for NCAA).

If the NCAA believes that the educational mission of its members justifies an exemption from antitrust laws (NCAA Br. 31–34), it should advance that argument in Congress. Indeed, it is doing so today—so far without success.[6] As for this Court, however, its cases make clear that it will not legislate one.

### B. This Court's precedents provide no basis for a presumption that requires upholding "amateurism" restraints on the pleadings.

Unwilling to admit the extraordinary nature of their request for an exemption, Petitioners argue that the Court has already granted it. This argument is based on *Board of Regents*—a case that did not concern any amateurism restraints and that ultimately used a "quick look" to *condemn* NCAA rules. As discussed below, *Board of Regents* held the opposite of what Petitioners suggest. And without Petitioners' upside-down version of *Board of Regents*, their other arguments—

---

[6] *See Letter From Power Five Comm'rs to Congress Leadership* at 1 (May 23, 2020) (proposing that federal NIL legislation include "protection from potential legal liability under antitrust and other laws"); Fairness in Collegiate Athletics Act, S.4004, § 4(b) (2020).

based on this Court's cases relating to "quick look" and the law of joint ventures—fail as a matter of law.

This should come as no surprise. As this Court has explained, "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court [ ] prefer[s] to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" *See Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 466–467, 479 (1992) (quoting *Maple Flooring Mfrs.' Ass'n* v. *United States*, 268 U.S. 563, 579 (1925)). That is precisely—and unremarkably—what happened below.

### 1. *Board of Regents* confirms that NCAA rules are subject to the fact-intensive rule of reason.

According to Petitioners, *Board of Regents* holds that any rule framed as "preserving amateurism" is necessarily "procompetitive" and must be "upheld" on the complaint. NCAA Br. 2; *cf.* Conf. Br. 23–26. Under their theory, *Board of Regents* established this indelible rule to preserve the NCAA's "ample latitude" to oversee college sports. In fact, *Board of Regents* does the opposite: it recognizes the NCAA's need for latitude, but it responds by holding that the rule of reason applies.

*Board of Regents* concerned NCAA rules imposing caps on the number of college football games that could be televised. 468 U.S. at 91–94. Although these horizontal restraints were of the type ordinarily held unlawful per se, the Court concluded that automatic condemnation would be "inappropriate" because college football is "an industry in which horizontal restraints on competition are essential if the product is to be

available at all." *Id.* at 100–101. Recognizing the NCAA's need for "ample latitude," the Court held that its rules should be analyzed under the rule of reason—a test that would examine their actual competitive effects in the marketplace. *Id.* at 101–103. Then, in a "twinkling of an eye"—under what later became known as the "quick look" doctrine—this Court affirmed the conclusion that the restraints in that case were unlawful. *Id*. at 109 n.39, 120.

Petitioners ignore these aspects of *Board of Regents*, focusing instead on what the Court said about the NCAA in the course of holding that its rules should not be condemned as unlawful per se. They emphasize the Court's statement that certain NCAA rules—including those requiring that "athletes must not be paid, must be required to attend class, and the like"—"can be viewed as procompetitive" because they "enable[] a product to be marketed which might otherwise be unavailable." *Id.* at 102, *quoted in part at* NCAA Br. 22–23 *and* Conf. Br. 24. But this is precisely why the Court held that the rule of reason applies; it allows an evaluation of the rules' actual competitive effects in the market.

In any event, restraints on student-athlete compensation were not before the Court in *Board of Regents*. Even in a non-antitrust case, this Court is "not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated." *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006). This is particularly so if a "more complete argument demonstrate[s] that the dicta is not correct." *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (declining to give legal weight to an observation by the Court in *Quality King Distributors, Inc.* v. *L'anza Research International, Inc.*, 523 U.S. 135 (1998), because the

subject of the observation "was not at issue in *Quality King*"). And in *Board of Regents*, as in *Quality King*, this Court "hedged [its] statement" with qualifying words. *Compare Kirtsaeng*, 568 U.S. at 548 (in *Quality King*, "presumably"), *with Board of Regents*, 468 U.S. at 102 ("can be viewed as"), 117 ("reasonable to assume"). There is nothing in *Board of Regents* indicating that the Court intended its comments about amateurism to function as a binding legal doctrine to prevent a court decades in the future from evaluating whether such an "assum[ption]" remains "reasonable" no matter how much the factual circumstances have changed. *See Board of Regents*, 468 U.S. at 120 ("Today we hold only that" the NCAA's broadcast rules are illegal); *cf. Kirtsaeng*, 568 U.S. at 548 ("Is the Court having once written dicta calling a tomato a vegetable bound to deny that it is a fruit forever after?").

Even if *Board of Regents* had held that the NCAA's amateurism rules were impervious to challenge, that decision would not, as Petitioners suggest, have "full stare decisis effect." NCAA Br. 28. "This Court has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act." *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 461 (2015). Antitrust analysis is fact-based and market-based and thus changes over time. *E.g.*, *ibid.* ("Congress, we have explained, intended [the Sherman Act]'s reference to 'restraint of trade' to have 'changing content,' and authorized courts to oversee the term's 'dynamic potential.'") (quoting *Bus. Elecs. Corp.* v. *Sharp. Elecs. Corp.*, 485 U.S. 717, 731–732 (1988)); *State Oil* v. *Khan*, 522 U.S. 3, 20 (1997) (antitrust law "recogniz[es] and adapt[s] to changed circumstances and the lessons of accumulated experience"); *United States* v. *Topco Assocs., Inc.*,

405 U.S. 596, 607 (1972) ("An analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption."); *Maple Flooring*, 268 U.S. at 579 ("[E]ach case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and [ ] the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied"); *cf.* Areeda ¶ 1205c3 ("[E]ven a judicial holding that a particular agreement is lawful does not * * * preclude its reexamination as circumstances change").

Indeed, *Board of Regents* confirms that "today's market"—not the market of the past—controls the rule-of-reason analysis. 468 U.S. at 115–116. In the decades since *Board of Regents*, billions of dollars have flowed into top-tier college football and basketball, and these sports have evolved into commercial enterprises the magnitude of which the Court in the 1980s could not have fathomed. And FBS football bears no resemblance to the college football of the 1930s, when the author of the *Board of Regents* dissent—which Petitioners cite extensively—was the runner-up for the Heisman Trophy. *See*, *e.g.*, Conf. Br. 3, 4–5, 25, 43 (citing *Board Regents* (White, J., dissenting)). If there were ever an industry that demanded a re-examination under the facts of "today's market," this is it.

Petitioners' citations to various circuit-level decisions reflect the same flawed analysis. These cases rest, to varying degrees, on assumptions about college

sports in the 1980s that bear no resemblance to today's commercial realities.

In 1988, for example—in the only antitrust precedent outside the Ninth Circuit to consider NCAA player compensation restrictions—the Fifth Circuit affirmed the dismissal of a challenge on the pleadings. *McCormack* v. *NCAA*, 845 F.2d 1338, 1343 (5th Cir. 1988). The court assumed—without any facts—that "[t]he goal of the NCAA is to integrate athletics with academics," and that the challenged rules "reasonably further this goal." *Id.* at 1345. But if these assumptions were reasonable in the 1980s, they are not reasonable today: when the NCAA asserted this "academic integration" justification at trial in this case, the factual record disproved it. Pet. App. 110a–111a

Similarly, the Third Circuit affirmed the dismissal of a challenge to an NCAA student-athlete eligibility rule on the assumption that the NCAA is an "organization[] which ha[s] principally noncommercial objectives"—leading the court to conclude that the "Sherman Act does not apply to the NCAA's promulgation of eligibility requirements." *Smith* v. *NCAA*, 139 F.3d 180, 185–186 (3d Cir. 1998). Again, if this assumption about "principally noncommercial objectives" were ever true, it is undeniably false now. Even Petitioners no longer describe FBS football and Division I basketball as "principally noncommercial." *E.g.*, NCAA Br. 6.

The Seventh Circuit's approach likewise rests on out-of-date NCAA mythology. In *Deppe* v. *NCAA*—the only case that applied an alleged *Board of Regents* "presumption"—the court addressed "year-in-residence" rules for transferring student-athletes and stated that "'most—if not all—eligibility rules * * * fall

within the presumption of pro-competitiveness' established in *Board of Regents*." 893 F.3d 498, 502 (7th Cir. 2018) (quoting *Agnew* v. *NCAA*, 683 F.3d 328, 343 (7th Cir. 2012)). The court affirmed a dismissal on the pleadings without testing this assumption from 1984 against contemporary economic facts. And, even the Seventh Circuit has recognized that NCAA rules "aimed at containing university costs, not preserving the product of college football" do not enjoy the benefit of any presumption of lawfulness. *Agnew*, 683 F.3d at 343–344. Here, discovery showed that the challenged compensation rules were designed to control costs, rather than to promote demand for a collegiate sports product. *E.g.*, ER641.

If the Ninth Circuit had adopted such a "presumption" of lawfulness, *O'Bannon* would have been dismissed on the pleadings, and there would be no injunction permitting schools to offer full cost-of-attendance athletic scholarships, which the NCAA now concedes have not harmed demand. *See* Pet. App. 99a, 114a, 122a. Indeed, Petitioners now laud cost-of-attendance scholarships as good for amateurism—whereas before *O'Bannon*, they derided them as "pay-for-play." NCAA Br. in Supp. Summ. J. 28, *White* v. *NCAA*, No. 06-cv-0999 (C.D. Cal Oct. 22, 2007) (Dkt. 220).

To be sure, implausible antitrust challenges to NCAA rules, just like any implausible antitrust claims, may be dismissed on the pleadings. *See Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007). And plausible claims that proceed to discovery but nonetheless fail to present a genuine dispute of fact will not survive summary judgment. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). These tools provide courts and defendants—including sports

leagues and joint ventures—with ample means to dispose of non-meritorious antitrust claims before trial without undue costs or chilling procompetitive behavior. Petitioners do not require any judicially created special treatment that goes beyond the normal protections that all antitrust defendants have under the rule of reason and the Federal Rules of Civil Procedure.

At bottom, amateurism—what it means, where it ends, how it affects competition, and whether it is an essential characteristic distinguishing college sports—is a *factual* argument, not a legal defense. The question under Section 1 is not whether a restraint is reasonably necessary for *amateurism*; it is whether Petitioners' "amateurism" restraints are sufficiently procompetitive to overcome the significant anticompetitive harm they inflict in the labor markets. That factual question must be answered with proof under the rule of reason, not assumed away based on dicta from nearly forty years ago.

### 2. The "quick look" doctrine is about invalidating restraints, not upholding them as lawful per se.

The conferences take the distortion of *Board of Regents* one step further, claiming that it reflects a presumption of lawfulness through the "quick look" doctrine. *E.g.*, Conf. Br. 21. This fundamentally misapprehends the purpose of that doctrine. "Quick look" does not immunize restraints; it applies only to condemn them, including in *Board of Regents*.

"Quick look" is a level of antitrust scrutiny between "per se" and "rule of reason." It relieves the plaintiff of the obligation to plead and prove detailed competitive harm in a relevant market when "the great likelihood of anticompetitive effects can easily be ascertained."

*California Dental Ass'n* v. *FTC*, 526 U.S. 756, 770 (1999) (citing *Law* v. *NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998) and *Chicago Prof'l Sports Ltd. P'ship* v. *NBA*, 961 F.2d 667, 674–676 (7th Cir. 1992)). As *Board of Regents* put it, "[t]he essential point is that the rule of reason can sometimes be applied in the twinkling of an eye"—referring specifically to restraints that do not qualify for per se condemnation but nonetheless have sufficiently obvious anticompetitive effects that a court need not engage in a detailed analysis of the market. 468 U.S. at 110 n.39 (quotation omitted). "Quick look" is appropriate when the anticompetitive effects of a restraint are sufficiently obvious to "an observer with even a rudimentary understanding of economics," so that the court may depart from the traditional rule-of-reason steps and "shift[] to a defendant the [initial] burden to show empirical evidence of procompetitive effects." *FTC* v. *Actavis*, 570 U.S. 136, 159 (2013) (quotation omitted).

Accordingly, this Court's cases consistently discuss "quick look" as a shortcut for *condemning* anticompetitive restraints. *See, e.g.*, *Texaco, Inc.* v. *Dagher*, 547 U.S. 1, 7 n.3 (2006) ("[W]e have applied the quick look doctrine to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability."); *Board of Regents*, 468 U.S. at 109 ("As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." (quotation omitted)).

The same is true for the cases noting that "considerable experience with the type of restraint at issue may make departure from full Rule of Reason analysis appropriate." Conf. Br. 29 (quotation omitted). Both cases Petitioners cite for this proposition contemplate that a court may use its experience to depart from the "full rule of reason" to find the restraint per se unlawful. *See Leegin Creative Leather Prods.* v. *PSKS, Inc.*, 551 U.S. 877, 886 (2007) ("[T]he *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue"); *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979) ("[I]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations.") (citation omitted).

Other than the Seventh Circuit's decision in *Deppe*, we are aware of no case that has applied the "quick look" doctrine to *uphold* a restraint without scrutinizing the impact of that restraint in the relevant market. And until *Deppe*, even the Seventh Circuit had described "quick look" accurately: "[i]f a plaintiff can show that a defendant has engaged in naked restrictions on price or output, he can dispense with any showing of market power until a procompetitive justification is shown." *Agnew*, 683 F.3d at 337.

Ironically, the NCAA rules at issue are of the type that are "so plainly anticompetitive" that a "quick look" could apply to condemn them. *E.g.*, Areeda ¶ 1508 (quick look is appropriate when a "joint venture, professional association, network, or other joint association" employs a restraint that would readily be condemned per se if it "involve[ed] competitors * * * not engaged in any form of joint production or legitimate rule making"); *Law*, 134 F.3d at 1020 (applying

quick look to NCAA's "horizontal agreement to fix prices" of coaches' salaries). Petitioners have provided no basis for concluding that "quick look" can be turned on its head to embody a presumption upholding a restraint as lawful, particularly in the face of contrary findings of fact after trial.

*American Needle* is the only Supreme Court case to use the phrase "twinkling of an eye" in discussing the potential *procompetitive* effects of a restraint. *See* 560 U.S. at 203. But while *American Needle* stated that the NFL's collective decisions regarding the licensing of intellectual property may be "likely to survive the Rule of Reason" and "may not require a detailed analysis," it nonetheless *reversed* a grant of summary judgment for the NFL and remanded for trial to determine "[w]hat role [the claimed justification] plays in applying the Rule of Reason to the allegations in this case." *Id.* at 203–204; *see also id.* at 203 n.10 (citing Justice Brandeis's description of the fact-specific rule-of-reason analysis). Thus, *American Needle*'s observation that the challenged rule might survive in the "twinkling of an eye" was a prediction about the outcome of the factual analysis on remand, not an instruction to skip the analysis altogether. Indeed, if that is what the Court intended, it would not have reversed the grant of summary judgment.

### 3. This Court's joint venture cases do not apply and point to the rule of reason in any event.

Both Petitioners' briefs focus heavily on the allegation—not litigated at trial in this case—that the NCAA's members acted as a "joint venture" when they adopted their compensation restraints. *E.g.*, NCAA Br.

18 et seq.; Conf. Br. 22 et seq. This unproven proposition, they argue, entitles them to deference in designing their product.

As an initial matter, this argument rests on a false factual premise. NCAA members do not act as a joint venture in the labor markets at issue; they compete fiercely to attract the most talented student-athletes. Petitioners point to no findings in the record establishing that the NCAA's thousands of economically separate schools and conferences act as joint producers in labor markets—because there are none.

To be sure, the NCAA's members are acting "jointly" in this context—through a quintessential joining of "independent centers of decisionmaking" to bring about a horizontal restraint. *American Needle*, 560 U.S. at 191. They have suppressed competition over the price of labor through NCAA rules because the NCAA is "controlled by a group of competitors and serve[s], in essence, as a vehicle for ongoing concerted activity." *Ibid.* This is precisely what makes Petitioners subject to Section 1 of the Sherman Act—not exempt from it. *See id.* at 195 ("[T]he 'central evil addressed by Sherman Act § 1' is the 'elimin[ation of] competition that would otherwise exist'" (quoting Areeda ¶ 1462b, alterations in original).

In any event, this Court's cases do not support the argument that even a joint venture producing a product is entitled to absolute deference in defining that product. In each of *Broadcast Music*, *Dagher*, and *American Needle*, this Court left restraints on competition between the members of a joint venture subject to antitrust scrutiny under the rule of reason.

For example, Petitioners recite the language from *Broadcast Music* about price collaboration that is "necessary to market the product." *E.g.*, NCAA Br. 19 (quoting 441 U.S. at 23). The product in that case was a single blanket license for thousands of copyright owners' musical compositions. 441 U.S. at 20–21. But despite finding that collaboration was "necessary to market the product," the Court did not find the agreement to be lawful per se but instead remanded for a "more discriminating examination under the rule of reason." *Id.* at 23–24.

Similarly, in *Dagher*, defendants participated in the relevant market through an integrated joint venture in which they each invested, shared profits and losses, and set a single price for a joint product. 547 U.S. at 6. Even so, the holding of *Dagher* was merely to spare the joint venture's price-setting from per se condemnation. *Id.* at 8.

The most recent of the Court's joint venture cases—*American Needle*—does not help Petitioners either; in fact, it squarely forecloses their immunity request. Of course, the separate member schools and conferences of the NCAA are not as economically integrated as the members of the NFL—thirty-two football clubs that produce a single league product. But even for the NFL, the Court found that the league's members remain competitors in many respects, and it concluded that the rule of reason must apply to agreements that limit that competition, including in the labor market for players. *American Needle*, 560 U.S. at 196–199, 204.

As in *Broadcast Music*, the challenged practice in *American Needle* was the pooling of intellectual property for joint licensing. *Id.* at 187. The NFL insisted that this and other cooperation among its members

was necessary for the product of NFL football to be available at all, and it sought single-entity immunity from Section 1. *Id.* at 189–191.

A unanimous Court rejected this argument. The Court recognized that "[a]lthough two teams are needed to play a football game, not all aspects of elaborate interleague cooperation are necessary to produce a game." *Id.* at 199 n.7. Indeed, the Court warned that if the NFL were correct that a joint venture is entitled to broad deference in all respects, "[m]embers of any cartel could insist that their cooperation is necessary to produce the 'cartel product' and compete with other products." *Ibid.* And (highly relevant here) the Court specifically identified the teams' recruitment of "playing personnel"—their activity in the *labor* market—as an area of competition rather than necessary collaboration. *Id.* at 196–197. The Court held that the NFL's "concerted" activities—whether in an area of needed collaboration or not—"must be judged according to the flexible Rule of Reason." *Id.* at 203 (quoting *Board of Regents*, 468 U.S. at 101).

This same reasoning would apply here even if the NCAA were a joint venture like the NFL. Just because "a group of firms agree to produce a joint product * * * [and] operate jointly in some sense does not mean that they are immune" from antitrust scrutiny. *Id.* at 199. "[C]arv[ing] out a zone of antitrust immunity for conduct arguably related to league operations" would grant a sports league far too much deference; it would "put[] the cart before the horse" to *assume* that any particular kind of joint activity is "necessary to produce" that league's product. *Id.* at 199 n.7.

The NCAA urges this Court to ignore "criticisms of * * * its rules [that] were based on the trial record" as

"not appropriately considered under an abbreviated rule-of-reason analysis." NCAA Br. 30 n.2. But the trial record disproved the very presumption of lawfulness that Petitioners seek. Nothing in this Court's cases—joint venture or otherwise—supports affording Petitioners a presumption of legality that cannot be rebutted by contrary facts.

If the NCAA requires "ample latitude," the flexible rule of reason is the tool to provide it. The very purpose of the rule of reason is to balance conflicting competitive effects, employing the market-driven, case-by-case analysis that antitrust law requires. *See Prof'l Engineers*, 435 U.S. at 692. The rule of reason was this Court's answer to pleas for greater latitude by antitrust defendants in *Board of Regents, American Needle, Broadcast Music*, and *Dagher*. The same rule of reason properly applies here.

## II. The decisions below correctly applied the rule of reason.

Petitioners also argue that the courts below erred in their application of the rule of reason. But their stew of complaints reveals that their disagreement lies with the district court's findings of fact, not with the courts' standards of law. This Court "do[es] not try the facts of cases de novo." *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 381 (1956). "For [Petitioners] to succeed in this Court now, [they] must show that erroneous legal tests were applied to essential findings of fact or that the findings themselves were 'clearly erroneous * * *.'" *Ibid*. Petitioners here do not challenge any finding of fact under a "clear error" standard. *Cf. Board of Regents*, 468 U.S. at 98 n.15 (noting this Court's "usual practice" of according "great weight to a finding of fact which has been made by a

district court and approved by a court of appeals"). And despite indulging in two briefs, Petitioners do not discuss—much less challenge—the Ninth Circuit's formulation of the rule of reason.

### A. The courts below did not make Petitioners' step-2 burden heavier by requiring separate proof for "each type of rule."

The NCAA complains that the courts applied "different levels of generality at steps 1 and 2" of the rule of reason, focusing at step 1 on whether "the challenged rules *collectively* have anticompetitive effects," and at step 2 on whether "*each type* of challenged rule has procompetitive benefits." NCAA Br. 39–40 (second emphasis added, quotation omitted); *see also* Conf. Br. 33–38. This is wrong on multiple levels.

To begin, the courts below did *not* require Petitioners to justify their restraints one by one, as the briefs suggest. Nowhere in the decisions below will this Court find any rule-by-rule examination; to the contrary, Petitioners insisted that the rules are all "interconnected." Conf. Br. 3. Most of the challenged rules restrict both education-related and non-education-related compensation with the same prohibitory language, so there is no dichotomy between education-related and non-education-related rules.

Further, the district court *did* examine whether Petitioners had proven a procompetitive justification for all aspects of the rules in the aggregate—and it held that they had not. *See* Pet. App. 49a, 141a–149a. With respect to amateurism, Petitioners advanced a single, sweeping theory—that the rules collectively "represent the NCAA member schools' rational articulation of a common standard of amateurism, distinguishing collegiate from professional sports." D.Ct. Dkt. 993 at

16 (Opening Statement). Petitioners asserted that these rules "preserve consumer demand because amateurism is a key part of demand for college sports." D.Ct. Dkt. 1128 at 7 (Closing Brief).

But the district court found that Petitioners failed to prove this broad justification. Based on an extensive factual record, the court found that the NCAA today has abandoned "any coherent definition of amateurism." Pet. App. 92a. Although the challenged rules *restrain* compensation in many ways, Petitioners' own witnesses admitted that the rules also *allow* compensation that is "not related to the principle of amateurism." ER498. "The only common thread" distinguishing permissible compensation from impermissible compensation is "that the NCAA has decided to allow it." Pet. App. 92a. Student-athletes today may receive tens of thousands of dollars above full cost-of-attendance scholarships—payments that "appear, on their face, to be 'pay for play,' and thus, inconsistent with amateurism as Defendants and their witnesses describe that term. Yet, they are allowed." *Id.* at 142a.

Equally important, the court found that the permitted "pay for play" did *not* impair consumer demand for college sports as a product distinct from professional sports. *See supra* pp.13-15. The evidence showed instead that "consumer demand for Division I basketball and FBS football is driven by consumers' perception that student-athletes are, in fact, students." Pet. App. 107a. In short, the district court found that the evidence did not support Petitioners' broad "amateurism" theory as a procompetitive justification.

The court could have stopped there, but it did not; it threw Petitioners a step-2 lifeline. As the Ninth Circuit put it, despite finding Petitioners' evidence

"largely unpersuasive," the district court was willing to "credit[] the importance to consumer demand of maintaining a distinction between college sports and professional sports." *Id.* at 21a. Relying on Petitioners' witnesses, the district court held that their testimony supported a justification for the challenged rules much narrower than what Petitioners had argued. The testimony showed that the rules "may have some" procompetitive effect, but only "to the extent" that they prohibit "unlimited payments unrelated to education, akin to salaries seen in professional sports leagues." *Id*. at 108a. Based on this finding, the court moved on to step 3, where "[t]he burden shift[ed] to Plaintiffs to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules." *Id.* at 152a.

The Ninth Circuit's analysis similarly did not subdivide the rules. The NCAA points to the Ninth Circuit's observation that "the district court gave reasoned consideration to the procompetitive effects achieved by *each type of challenged rule*, ultimately concluding that the NCAA sufficiently show[ed] a procompetitive effect of some aspects of the challenged compensation scheme, but not all." *Id.* at 39a (emphases altered), *quoted in part at* NCAA Br. 39, 41. In saying this, the Ninth Circuit was not suggesting that the district court required separate justifications for each rule, when it obviously did not. Instead, the Ninth Circuit was contrasting the error it found in *O'Bannon*—where the district court had considered the procompetitive benefits "of *hypothetical* limits" on compensation—with the district court's analysis here, which considered the NCAA's proffered justification with respect to the entire "compensation scheme" that Petitioners had adopted. Pet. App. 39a–40a (emphasis in

original). The quoted language from the Ninth Circuit thus does not show any magnification of Petitioners' burden at step 2.

Indeed, as Judge Smith's concurrence explains, the Ninth Circuit granted Petitioners more leeway at step 2 than this Court's cases allow. The court permitted Petitioners to justify an anticompetitive restraint in one market (the labor markets for student-athletes) based on the claimed procompetitive effects in a different market (an output or product market, in which college sports compete for fans and viewers with professional sports). *See id*. at 57a–63a. This Court's precedents cast doubt on that approach. *E.g., Topco*, 405 U.S. at 611 ("If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts."); *accord Amex*, 138 S.Ct. at 2302–2303 (Breyer, J., dissenting).

In short, neither of the courts below did anything to make Petitioners' burden more difficult at step 2. Rather, the court considered Petitioners' broad "amateurism" justification for all aspects of the restraints and held that they failed to prove it. But it did find that Petitioners' witnesses proved a more modest justification. The court's willingness to do so made Petitioners' step 2 burden easier, not harder.

### B. The courts below did not invent a new, narrower definition of amateurism; Petitioners failed to prove a broader one.

For similar reasons, Petitioners are wrong to suggest that the district court substituted its own definition of amateurism. NCAA Br. 35–38; Conf. Br. 34–38. Essentially, Petitioners argue that the courts

below were required to accept Petitioners' asserted amateurism defense on its face. But the rule of reason places the burden of proving a procompetitive justification on defendants, and Petitioners failed to carry it.

Petitioners' real complaint is not a claim of legal error. It is a fact-based challenge on full display at pages forty-three through forty-six of the NCAA's brief, which sets out the facts as the NCAA wishes the district court had found them. *Accord* Conf. Br. 43–44. The NCAA chronicles its own witnesses' homages to amateurism, but it cites no evidence that demonstrates clear error in the district court's findings.

Indeed, accepting Petitioners' position would require overturning the district court's assessment of conflicting expert testimony—an essential fact-finding function within the province of the trial court. For example, the NCAA asks this Court to credit its expert testimony about a consumer survey that the district court found "hopelessly ambiguous." NCAA Br. 44–45; Pet. App. 100a–102a. This survey asked only what fans *liked* about college sports; it did not ask what would cause them to stop watching. Pet. App. 101a–102a (finding that the expert "d[id] not attempt to measure future behavior," and concluding, as the opposing expert had explained, that a consumer's stated "opposition" to a scenario with increased compensation "does not translate to a change in behavior if the scenario were implemented"). And Petitioners do not even mention the consumer survey by the opposing expert, which the court found "support[ed] the finding that the current limits on student-athlete compensation, to the extent they relate[d] to the scenarios that he tested, are not necessary to preserve consumer demand." *Id.* at 103a.

The court did not inject its own conception of amateurism; it weighed the evidence at trial—including conflicting expert testimony—and found that Petitioners did not prove that their broad amateurism claim was a coherent procompetitive justification. There is no basis for setting those factual findings aside.

### C. The courts did not collapse steps 2 and 3 or require Petitioners to prove they were using the "least restrictive alternative."

Petitioners also contend that the district court "effectively conducted the step-3 analysis at step-2" and improperly placed the burden on Petitioners to prove that their restraints were "the least restrictive way of achieving the procompetitive benefits." NCAA Br. 39–41; *see also* Conf. Br. 38–39. In fact, the court did the opposite. As the Ninth Circuit stated, at step 3, "it [wa]s [the] *Student-Athletes*' burden to make a strong evidentiary showing" that a less restrictive alternative is available. Pet. App. 40a (emphasis added, quotation omitted).

Petitioners never recite the legal standard that the courts below applied at step 3. Ninth Circuit precedents require plaintiffs to prove that a challenged restraint is "*patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives" *and* that there is a "viable" alternative that is "virtually as effective in serving the procompetitive purposes" "without significantly increased cost." *Id.* at 40a–41a (emphases in original, quotation omitted). This stringent test—ignored across Petitioners' 100-plus pages of briefing—is even more demanding than the step 3 test that this Court articulated in *Amex.* 138 S.Ct. at 2284 (holding that plaintiffs must show "the procompetitive efficiencies could be reasonably

achieved through less anticompetitive means"). The district court rejected two of the student-athletes' proffered less restrictive alternatives because they could not meet this stringent test, adopting only the *most* restrictive alternative they presented. Pet. App. 117a–118a.

### D. The injunction does not reflect "judicial micromanagement."

The flexibility and deference embodied in the district court's analysis also drove the drafting of its injunction. Every facet of the injunction has its roots in the NCAA's own rules *and* leaves the conferences free to adopt more stringent restrictions if they so choose. It is difficult to apprehend how this is not "ample latitude."

The injunction invites the NCAA to propose its *own* definition of the term "related to education." It imposes no limits on the NCAA's ability to prohibit compensation to student-athletes that is *not* related to education. And it allows each conference to impose whatever education-related compensation caps it chooses. *See supra* pp.16-17.

Petitioners nonetheless present a parade of horribles they warn will flow from allowing more education-related benefits. Most dramatically, they decry hypothetical internships ostensibly "related to education" "at a sneaker company or auto dealership that paid $500,000." NCAA Br. 37–38; *see also* Conf. Br. 17 ("boosters" will offer "internships, uncapped in amount" to star recruits). This is a reckless distortion of an injunction that enjoins restrictions on "compensation or benefits related to education *that may be made available from conferences or schools*" but that does not stop the NCAA from continuing to prohibit

compensation from car companies or boosters or anyone else. Pet. App. 167a (emphasis added). Indeed, the new rules Petitioners adopted to conform to the injunction expressly state that post-eligibility internships may be funded *only* by "a conference or institution." D.Ct. Dkt. 1302-2 (Bylaw 16.3.4(d)).

The same deference appears in the injunction's requirement that the NCAA allow schools (if they choose) to give student-athletes academic and graduation awards. The maximum amount of those awards—$5,980 annually—comes from the NCAA itself, based on what it already permits for athletic achievement awards. Pet. App. 168a–169a; D.Ct. Dkt. 1329. The NCAA's objection that a player should not earn academic awards "simply for being on a team" (NCAA Br. 47–48), ignores that the awards are "incentives" for "achievement" that individual conferences are free to limit in whatever manner they want (such as through a rigorous GPA requirement or a lower maximum amount). There is already "wide variation among conferences and [schools] in Division I in terms of the compensation they permit their student-athletes to receive within the current NCAA limits," and the conferences are more than capable of continuing to promulgate whatever additional rules, if any, they find necessary to preserve consumer demand. Pet. App. 104a–105a & n.26 (providing examples).

* * *

In sum, nothing about the lower courts' application of the rule of reason distorted the law, magnified Petitioners' burden, or usurped the "ample latitude" that the NCAA enjoys in overseeing college athletics. Peti-

tioners offer no basis for this Court to disturb the district court's application of the rule of reason and careful findings of fact.

## III. Applying the rule of reason to the NCAA promotes the policies underlying the Sherman Act.

It is Petitioners' request for antitrust immunity that merits rejection in the twinkling of an eye. They have made no showing—factually or legally—as to why the NCAA deserves a judicially created exemption from Section 1 of the Sherman Act that Congress has declined to provide.

The application of the rule of reason by the courts below furthers the policies of the Sherman Act, which promote competition. Schools will be able to compete with one another in the labor markets. Individual conferences will remain free to adopt their own limits. Class members will benefit economically and academically as schools compete to provide better education-related benefits. And meanwhile, the trial record establishes that none of this enhanced competition will jeopardize consumer demand.

Petitioners' dire warnings about endless antitrust litigation are no different than those that could be expressed by every other group of businesses subject to rule-of-reason review. The judicial creation of ad-hoc, industry-specific, "bright-line rules" would serve to complicate, not simplify, antitrust jurisprudence without the flexibility to adapt to changed circumstances. *Contra* NCAA Br. 20 (citing *Race Tires Am., Inc.* v. *Hoosier Racing Tire Corp.*, 614 F.3d 57, 80 (3d Cir. 2010)); Conf. Br. 28 (citing same). And it would lead to

endless requests for the courts to create antitrust exemptions for special industry reasons that must be the province of the legislative branch.

The fundamental purpose of the rule of reason is to give those who claim a need to collaborate a chance to prove justifications for restraints that have anticompetitive effects in a relevant market. The court then evaluates the restraints based on the evidence and, if they are found to have a procompetitive justification, places a heavy burden on the plaintiff to show why the challenged restraints are not reasonably necessary to accomplish those procompetitive effects. A rule-of-reason case is difficult for plaintiffs to win and provides "ample latitude" to antitrust defendants, especially when they are horizontal competitors. Petitioners were properly granted that latitude here.

## CONCLUSION

This Court should affirm the decision below and make clear that the NCAA and its members must comply with the antitrust laws absent a statutory exemption.

Respectfully submitted.

STEVE W. BERMAN
EMILEE N. SISCO
*Hagens Berman Sobol Shapiro LLP*
1301 Second Ave., Ste. 2000
Seattle, WA 98101

BENJAMIN J. SIEGEL
*Hagens Berman Sobol Shapiro LLP*
715 Hearst Ave., Ste. 202
Berkeley, CA 94710

BRUCE L. SIMON
BENJAMIN E. SHIFTAN
*Pearson, Simon & Warshaw, LLP*
350 Sansome St., Ste. 680
San Francisco, CA 94104

ELIZABETH C. PRITZKER
JONATHAN K. LEVINE
BETHANY L. CARACUZZO
*Pritzker Levine LLP*
1900 Powell St., Ste. 450
Emeryville, CA 94608

JEFFREY L. KESSLER
DAVID G. FEHER
DAVID L. GREENSPAN
*Winston & Strawn LLP*
200 Park Avenue
New York, NY 10166

LINDA T. COBERLY
*Counsel of Record*
*Winston & Strawn LLP*
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600
lcoberly@winston.com

JEANIFER E. PARSIGIAN
*Winston & Strawn LLP*
101 California Street
San Francisco, CA 94111

MARCH 2021