Nos. 20-512, -520

In the
Supreme Court of the United States

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

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

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ARIZONA, COLORADO, DELAWARE, ILLINOIS, MINNESOTA, NEW YORK, OREGON, AND PENNSYLVANIA AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

This appeal raises important legal questions about how to apply the rule of reason to anticompetitive conduct in collegiate athletics. More specifically, Petitioners argue that the horizontal restraints on competition at issue are so pro-competitive that they are nearly exempt from antitrust scrutiny—asking the Court not to apply the normal rule of reason framework but instead "quick look" rule of reason because the restraints at issue further "amateurism."

Amici States of Arizona, Colorado, Delaware, Illinois, Minnesota, New York, Oregon, and Pennsylvania ("Amici States") have a direct interest in ensuring that they may continue to effectively enforce antitrust laws to preserve vigorous competition in all areas of the economy, including collegiate athletics, which is now a multi-billion dollar industry. Petitioners' request for a watered-down version of the rule of reason based on malleable notions of "amateurism" would significantly hamper Amici States' ability to preserve competition in collegiate athletics. The Amici States have a distinct interest in ensuring that federal courts subject horizontal restraints with the potential to cause anti-competitive harm, such as those at issue here, to rule of reason review.

Congress has authorized the Attorneys General of the Amici States to bring federal antitrust actions to protect their citizens from the harmful effects of anticompetitive conduct. 15 U.S.C. § 15c; *see also Georgia v. Pa. R.R. Co.*, 324 U.S. 439 (1945). The Amici States therefore have a strong interest in ensuring that the courts apply clear and effective standards for liability under the Sherman Act, 15 U.S.C. §§ 1 *et seq*. Each of

the Amici States is home to college athletes who participate in FBS college football or Division One college basketball. Each of the Amici States, therefore, has an interest in ensuring a competitive marketplace for collegiate athletic skills and that the federal courts analyze anti-competitive conduct affecting collegiate athletes in the same manner that such conduct would be analyzed in other industries.

SUMMARY OF THE ARGUMENT

College athletics generates billions of dollars in revenue every year. That money primarily benefits the National Collegiate Athletic Association ("NCAA"), college conferences, universities, coaching staffs, and administrative support personnel. But consumers do not frequent billion dollar stadiums or tune into sports television networks to watch any of those individuals or entities perform. They tune in to watch the college athletes who actually play the game. In a free market, then, it is those college athletes who should also benefit from the athletic services that consumers have come to greatly value.

College athletics is not a free market though. Instead, for decades, the NCAA, college conferences, and universities, through horizontal agreements, have artificially suppressed the benefits or compensation provided to college athletes. They have done so by arguing (often successfully) that college athletics cannot exist without anti-competitive restraints on the benefits that universities provide to college athletes. The label they have chosen for this concept is "amateurism." According to Petitioners (the NCAA and the Power 5 conferences), without "amateurism" college athletics would vanish.

1. Petitioners argue that the necessity for "amateurism" is so self-evident that any restraint arguably furthering that concept is virtually exempt from analysis under the Sherman Act. As support, they point primarily to certain comments Justice Stevens made in the Court's decision in *NCAA v. Board of Regents*. And they claim the district court and Ninth Circuit below committed reversible error by fully reviewing the anti-competitive restraints under the rule of reason.

The Court should reject Petitioners' request for truncated antitrust review. Horizontal restraints like those at issue here are ordinarily *per se* illegal under the Sherman Act. The Court clarified in *Board of Regents*, however, that the NCAA's restraints are instead subject to rule of reason analysis. While Justice Stevens explained that certain of the NCAA's restraints may be necessary for the existence of the product the NCAA oversees—primarily rules relating to how athletic games are played—he did so to explain why the NCAA's rules are not *per se* illegal. *Board of Regents* merely establishes that in all cases the NCAA's rules are subject to full rule of reason analysis.

This Court's later decision in *American Needle* supports this conclusion. There, the Court made clear that restraints alleged to be necessary to create a product must be analyzed carefully and even if necessary, are subject to traditional rule of reason review. The Court warned that otherwise any cartel could insist that their cooperation is necessary to create the cartel product and compete with other products.

Decisions from the Court and lower courts analyzing restraints in other industries confirm the applicability of rule of reason analysis. Whether it is professional sports leagues, professional or non-profit associations, or joint ventures, the Court and lower courts have repeatedly confirmed that the Sherman Act and rule of reason apply.

Here, the restraints at issue do not address how football or basketball games are actually played (*i.e.*, the number of games played or the number of athletes on the field at one time). Instead, they limit the amount that college athletes can benefit from participation in those games. Moreover, Petitioners' pro-competitive justification based on "amateurism" is questionable at best. Thus, the Ninth Circuit and district court were correct to analyze Petitioners' restraints under the rule of reason.

2. Petitioners' sole justification for the restraints at issue is that they further "amateurism." Petitioners' formal definition of that phrase has remained relatively unchanged over the last century, but their actual conception of the phrase and the rules used to carry it out have repeatedly changed.

Prior to the 1940's, universities and colleges were not allowed to provide any financial benefits (even need based) to student athletes. In 1948, the NCAA passed the "Sanity Code," pursuant to which a student-athlete could receive a tuition and fees scholarship (not room and board) if the student had a demonstrated financial need and met the school's normal admissions requirements. In 1956, the NCAA began allowing schools to grant college athletes scholarships based on athletic ability, but only at the amount of a

full "grant in aid," which included such items as tuition, fees, room and board, books, and cash for incidental expenses.

In 1975, the NCAA revised its definition of a full "grant in aid" to disallow cash payments for incidental expenses. In 2001, the NCAA began allowing college athletes participating in the Olympics to receive bonuses for medaling. College athletes have received hundreds of thousands of dollars under this exception but remain "amateurs" to the NCAA. In 2004, the NCAA began to allow college athletes to receive federal Pell grants (currently valued at up to $6495) in excess of the grant in aid and cost of attendance amounts. In 2013, the NCAA began allowing athletes in individual sports (such as Cross Country and Track & Field) and tennis to accept prize money up to $10,000 based on performance.

In 2014, the NCAA voted to allow universities to award college athletes athletic scholarships up to the full cost of attendance (in excess of the grant in aid amount). During the 2015-16 academic year, the amount of the stipend to cover full cost of attendance ranged between $2,000 and $6,000.

Petitioners' alterations of "amateurism" continue. In January 2021, the NCAA was set to vote on legislation to permit college athletes to receive compensation from third parties for endorsing or sponsoring products and making personal appearances, but delayed doing so after criticism from the United States Department of Justice.

This history demonstrates that Petitioners have no fixed conception of the phrase "amateurism." It appears that Petitioners believe that an "amateur" is

simply any athlete who does not receive more benefits than Petitioners' rules at the time permit. This circular and ambiguous conception of the phrase "amateurism" significantly undercuts Petitioners' sole justification for exemption from the rule of reason.

3. Petitioners' amici suggest that the district court's injunction will spell financial doom for Petitioners. This concern is misplaced.

The first response to this financial concern is that neither Petitioners nor their member universities will actually lose money if they choose to provide additional benefits to college athletes. A major "expense" of university of athletics departments is student aid. A major component of student aid is tuition to attend the university. While the amount of tuition required to attend universities has expanded rapidly in recent years, tuition "expenses" paid by athletic departments go right back to the university as revenue. Moreover, universities benefit from athletics in other ways not reflected on the athletic department's financial statements—for example, increased applications for enrollment and non-athletic donations from alumni.

Even if Petitioners or their member universities lose money, it will be as a result of their own decision to prioritize coaching salaries, administrative personnel, and lavish facilities over providing benefits to the athletes who actually generate revenue. In recent years, athletic department spending on sports facilities and salaries for coaching staffs and administrative personnel has exploded in an arms race among universities. The Court should not permit Petitioners' and their member universities' own spending decisions to

justify continued anti-competitive restraints on the athletes who create their wealth.

ARGUMENT

I. PETITIONERS' RESTRAINTS SHOULD BE SUBJECT TO FULL RULE OF REASON REVIEW.

A. This Court's Precedents Establish Rule of Reason as the Correct Standard in Most Cases.

Section 1 of the Sherman Act forbids ""[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Based on the common law in existence when the Sherman Act was passed, the Court has long interpreted § 1 to "to outlaw only unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Restraints can be unreasonable in one of two ways. A small number of restraints—horizontal agreements between competitors being one example—are *per se* unreasonable because they "always or almost always tend to restrict competition and decrease output." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988). "Restraints that are not unreasonable *per se* are judged under the 'rule of reason.'" *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

"The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1." *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). Application of the rule of reason in the mine run of antitrust cases recognizes that ""[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are

generally disfavored in antitrust law." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-467 (1992). "In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Leegin*, 551 U.S. at 886.

To apply the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). The rule of reason takes account of "specific information about the relevant business" and "the restraint's history, nature, and effect." *Khan*, 522 U.S. at 10. At step one of the rule of reason, "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*, 138 S. Ct. at 2284. At step two, "the burden shifts to the defendant to show a procompetitive rationale for the restraint." *Id.* And, at step three, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.*

Petitioners' restraints here are horizontal restraints among competitors on the amount of benefits to be provided certain student athletes for their athletic prowess. As horizontal restraints among competitors, those restraints would ordinarily be *per se* violations of the Sherman Act. *See Bus. Elecs. Corp.*, 485 U.S. at 723. The district court and the Ninth Circuit, however, applied traditional rule of reason review to those restraints, recognizing that the unique nature of

college athletics may occasionally require horizontal restraints on competition. *See In re NCAA Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1256-1263 (9th Cir. 2020); *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1097-1109 (N.D. Cal. 2019). Applying the rule of reason, the Ninth Circuit concluded that Petitioners' restraints are unreasonably anti-competitive. 958 F.3d at 1252.

B. The Argument that "Quick Look" Rule of Reason Applies Here is Unsupported.

Petitioners fault the district court and Ninth Circuit for applying the rule of reason. They argue that the lower courts should have gone further and presumed Respondents' restraints to be legal because those restraints are justified by "amateurism." Although unclear exactly what standard Petitioners would ultimately have the Court apply, it is clear they ask the Court to hold that any restraint they characterize as "furthering amateurism" is virtually exempt from antitrust scrutiny. The Court should reject Petitioners' request for a pass under the Sherman Act through the mere invocation of "amateurism." The cases Petitioners rely upon do not support the existence of the exception they seek, and neither do scores of decisions from this Court and lower courts addressing antitrust review of sports leagues, institutions of higher education, and joint ventures.

1. *NCAA v. Board of Regents*, the primary case Respondents rely upon and the only instance when the Court has considered the merits of an NCAA restraint, supports the conclusion that rule-of-reason applies here. That case was about college football television rights, not college athlete benefits. The Court

considered the legality of a horizontal restraint on the ability of individual member schools to allow television broadcasts of college football games. *See* 468 U.S. 85, 91-94 (1984). The NCAA attempted to justify the restraint based on "the adverse effects of live television upon football game attendance." *Id.* at 91. Both the district court and the Tenth Circuit concluded that the restraint was *per se* illegal under § 1. *See Bd. of Regents v. NCAA*, 546 F. Supp. 1276, 1311 (W.D. Okla. 1982) ("The television controls of NCAA are per se violations of s 1 of the Sherman Act."); *Bd. of Regents v. NCAA*, 707 F.2d 1147, 1156 (10th Cir. 1983) ("We affirm the district court's ruling that the television plan constitutes per se illegal price fixing.").

The Court affirmed, although it did so "under the Rule of Reason." *See Bd. of Regents*, 468 U.S. at 103; *see also id.* at 100 ("[W]e have decided that it would be inappropriate to apply a per se rule to this case."). At step one of the rule of reason, the Court concluded that the NCAA "does possess market power" and the television plan "restrains price and output"—thus "many telecasts that would occur in a competitive market are foreclosed by the NCAA's plan." *Id.* at 104-111. At step two, the Court rejected the NCAA's proffered procompetitive justifications based on the district court's factual finding that the television plan would decrease output and increase price. *Id.* at 114-115. Finally, the Court explained that the television plan was not "related to any neutral standard" or "tailored to serve such an interest" in maintaining a competitive balance between schools. *Id.* at 117-119.

Petitioners selectively quote portions of Justice Stevens' majority opinion to support entitlement to a presumption of legality. Specifically, Petitioners make

much of the Court's statement in response to the NCAA's necessity argument at step three that "[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." *Id.* at 117.

That statement, and others like it in *Board of Regents* (a case the NCAA lost), do not support that Petitioners are entitled to lax antitrust review. To begin, it would have been exceedingly odd for the Court to establish a presumption of *legality* in a case addressing whether the NCAA was subject to a presumption of *illegality*. But that is not what the Court did. Rather, the statements Petitioners cite are best understood in proper context as reasons why the Court decided that the NCAA is subject to traditional rule of reason review, not *per se* illegality, even as to ordinarily illegal horizontal restraints on competition.

This is evident from the Court's statement that "despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, *a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints*." *See id.* at 103. It is also clear from the fact that the Court included the passage Petitioners primarily seize upon only to explain "[o]ur decision not to apply a per se rule[.]" *See id.* at 117. Similarly, the "twinkling of an eye" language that Petitioners seize upon, and that the Court later repeated in *American Needle*, was referencing a federal court's ability to recognize an *illegal* "domestic selling arrangement" in the "twinkling of an eye" and "[e]ven without a trial." *See id.* at 109 n.39. So, at

bottom, *Board of Regents* merely establishes that, in all cases, the NCAA gets an opportunity to justify its restraints.

If *Board of Regents* supports truncated review, it is in the opposite direction as that Petitioners urge. In other words, certain restraints on competition are so obviously anti-competitive that the rule of reason can be conducted in a truncated fashion. *See id.* After all, the Court's analysis in *Board of Regents* turned largely on the district court's factual findings, including primarily the district court's finding that the restraint would reduce output and increase price. *See id.* at 104-120; *see also* Lawrence A. Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 Cal. L. Rev. 835, 854 (1987) ("NCAA, then, did not break new ideological ground. In terms of the central meaning of antitrust, it reaffirmed traditions long established, but newly under attack. What is distinctive in the opinion is its teaching that where competitive processes suffer blatant and significant injury—in this instance, by coercion—rule of reason analysis can be completed with dispatch.").

2. The Court's decision in *American Needle, Inc. v. National Football League*, supports Respondents, *not* Petitioners. There, the Court considered a request for what amounted to antitrust immunity from National Football League Properties ("NFLP"), a joint venture between the National Football League ("NFL") and its 32 separately-owned professional football teams "to develop, license, and market their intellectual property." 560 U.S. 183, 186-187 (2010). NFLP argued that it was categorically beyond the reach of § 1 because it is a single entity (*i.e.*, the Court should disregard the separate existence of the NFL and its 32

teams) and therefore cannot engage in a "contract, combination . . ., or conspiracy." *Id.* at 189.

The Court rejected NFLP's request for antitrust immunity. In so doing, the Court made crystal clear that "[w]hen 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and *instead the restraint must be judged according to the flexible Rule of Reason*." *Id.* at 203 (emphasis added). Similarly, the Court explained that "necessity of cooperation is a factor relevant to whether the agreement is subject to the Rule of Reason." *Id.* at 199 n.6. Thus, while a horizontal restraint allegedly required for a product to exist can remove the restraint from *per se* illegality, *American Needle* does not support that necessity exempts horizontal restraints nearly entirely from antitrust scrutiny under the rule of reason.

The Court in *American Needle* made some additional important observations. The Court pointed out that not all horizontal agreements in sports leagues will be necessary for the product to be available: "[E]ven if leaguewide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football." *Id.* at 199 n.7. Similarly, the Court warned against *carte blanche* immunity based on claims of necessity: "Of course the NFL produces NFL football; but that does not mean that cooperation amongst NFL teams is immune from § 1 scrutiny. Members of any cartel could insist that their cooperation is necessary to produce the 'cartel product' and compete with other products." *Id.* In other words, because restraints like Petitioners' here would ordinarily be *per se* illegal, claims of necessity must be

reviewed carefully, and even if true, only entitle such restraints to rule of reason review.

3. Cases from analogous industries further show that this Court, and lower courts, apply rule of reason review to determine the lawfulness under the Sherman Act of restraints such as that in the instant case.

If the Court were to analogize Petitioners to professional sports leagues, Petitioners are not entitled to antitrust immunity and rule of reason applies. Not only was that borne out as to the NFL in *American Needle*, but it is true of nearly all professional sports leagues. *See Radovich v. Nat'l Football League*, 352 U.S. 445, 452 (1957) ("[T]he volume of interstate business involved in organized professional football places it within the provisions of the Act."); *United States v. Int'l Boxing Club of N.Y.*, 348 U.S. 236, 244 (1955) (rejecting a Sherman Act exemption for the promoters of professional boxing); *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1205 (1971) ("Basketball, however, does not enjoy exemption from the antitrust laws."); *Phila. World Hockey Club v. Phila. Hockey Club*, 351 F. Supp. 462, 466 n.3 (E.D. Pa. 1972) ("I hold that hockey is not exempt from the federal anti-trust law[.]); *Blalock v. Ladies Pro. Golf Ass'n*, 359 F. Supp. 1260, 1263 (N.D. Ga. 1973) ("[P]rofessional golf is subject to the antitrust laws.").

The only exception is professional baseball, but that exception has been characterized by the Court as "an anomaly" and retained merely for historical reasons. *See Flood v. Kuhn*, 407 U.S. 258, 282 (1972) ("With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly.").

If the Court were instead to view Petitioners as nonprofit professional or educational institutions, Petitioners' restraints are subject to traditional rule of reason review. *See Calif. Dental Ass'n v. FTC*, 526 U.S. 756, 769-72 (1999) (rejecting quick-look rule of reason and instead applying rule of reason analysis to a dental association's advertising restrictions); *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 576 (1982) ("[I]t is beyond debate that nonprofit organizations can be held liable under the antitrust laws."); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787-788 (1975) (finding nonprofit professional association violated Sherman Act).

And, similarly, if the Court were instead to analogize Petitioners to joint ventures, Petitioners' restraints are subject to rule of reason review. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5-7 (2006) (holding that the rule of reason governs joint ventures and requires plaintiffs to "demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful"); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979) (evaluating a joint venture and its blanket licensing agreement under the rule of reason and explaining that "[w]hen two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act"); *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 337 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment) ("[T]he Supreme Court has concluded that joint ventures should normally be analyzed under a rule of reason, requiring an inquiry into market power and structure and the actual effects of any restraints on trade.").

4. Finally, Amici States are not suggesting that the nature of the NCAA as a group of competitive sports leagues for amateur student-athletes should play no role in the analysis. Nor are they suggesting that the NCAA is prohibited from adopting any rules limiting compensation in furtherance of "amateurism" in collegiate athletics. Rather, the nature of the restraint should be considered within the traditional rule of reason analysis. If the restraint at issue is facially anti-competitive and clearly does not define the competition to be marketed, like the restraints at issue in *Board of Regents*, then the NCAA's pro-competitive justifications must be exceedingly strong and, if not, the rule of reason analysis can end quickly. On the other hand, if the restraint at issue clearly defines the actual product or service to be marketed, then little or no additional pro-competitive justification is required and the rule of reason analysis can end. This includes "rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed." *Bd. of Regents*, 468 U.S. at 101.

Most cases will fall in the middle (i.e., they will not be obviously necessary for the product to exist or pro- or anti-competitive). In those cases, whether the restraint is unreasonable should be analyzed using rule of reason review. After all, separating the pro-competitive wheat from the anti-competitive chaff is the primary purpose for the rule of reason. *Leegin*, 551 U.S. at 886. And, in such middle-ground cases, the district court's factual findings, including as to the likely anti-competitive impact of the challenged restraint, should be reviewed deferentially. *See Bd. of Regents*, 468 U.S. at 114 ("[P]etitioner's argument is

refuted by the District Court's finding concerning price and output.").

Here, Petitioners' horizontal agreements regarding benefits to be provided to certain college athletes do not directly define the football and basketball games to be marketed. Instead, they impact what certain college athletes receive for playing the game. Petitioners cannot seriously argue that amateur college football and basketball would necessarily cease existence if college athletes were to receive some additional benefits, even if in excess of cost of attendance. Instead, the key question is whether Petitioners' restraints are adequately supported by a pro-competitive "amateurism" justification. The rule of reason provides flexibility based on the particular facts of each case, but Petitioners provide no sound basis for imposing an exemption from liability in every case that claims amateurism as one justification for the restraints on trade. Thus, the district court and the Ninth Circuit correctly applied rule of reason analysis to those restraints. And the district court's factual findings, as in *Board of Regents*, should be accorded deference.

II. THE COURT SHOULD VIEW PETITIONERS' "AMATEURISM" JUSTIFICATION WITH SKEPTICISM.

Petitioners repeatedly advance the argument that the anti-competitive restraints at issue are justified because they further "amateurism." *See In re NCAA Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1257 (9th Cir. 2020) ("On appeal, the NCAA advances a single procompetitive justification: The challenged rules preserve 'amateurism[.]'"). The Court should review Petitioners' "amateurism" justification with

healthy skepticism. Over the last century, Petitioners' conception of that phrase has frequently changed, casting significant doubt on the legitimacy of "amateurism" as a justification.

Petitioners' definition of "amateurism" has remained largely the same over the last century. In 1916, the NCAA bylaws explained that an "amateur" is "one who participates in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits directly derived therefrom." Today, the NCAA constitution's provision on "The Principle of Amateurism" similarly provides that "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived." Thus, the 1916 explanation "does not differ dramatically from the current 'Principle of Amateurism' in words." Kristen R. Muenzen, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 Marquette Sports L. Rev. 257, 260 (2003) [hereinafter, "*NCAA's Version of Amateurism*"].

While Petitioners' definition of "amateurism" has remained static, the rules Petitioners purport to use to achieve "amateurism" have repeatedly changed. That Petitioners' methods of achieving amateurism have been so malleable, and yet college football and basketball have become so popular, casts significant doubt on the legitimacy of "amateurism" as a pro-competitive justification and severely undercuts Petitioners' argument that the trial court's injunction spells doom.

Football first began as a college sport in the 1890's. From the beginning, there was pressure to win and, unfortunately, that only increased the brutality of the

sport. Early in a game between Princeton and Dartmouth, for example, Princeton players intentionally broke Dartmouth's star player's collarbone. A Union College player died during a game with New York University. In 1905, President Theodore Roosevelt summoned the presidents of Yale, Harvard, and Princeton to discuss how to make the game safer for college athletes. Although that meeting did not result in any real reform, the public attention it garnered lent legitimacy to the issue of safety in college football. Jim Weathersby, *Teddy Roosevelt's Role in the Creation of the NCAA*, Sports Historian (July 6, 2016), available at https://www.thesportshistorian.com/teddy-roosevelts-role-in-the-creation-of-the-ncaa/#.

Later that year, representatives from roughly sixty universities met in New York. The group adopted a new set of rules for college football and established a new organization to enforce those rules. That new organization, the Intercollegiate Athletic Association of the United States, became Petitioner the NCAA in 1910. *Id.*; *see also NCAA's Version of Amateurism*, at 257.

Early on, the NCAA did not allow college athletes to receive any benefit in return for their athletic services. In 1906, the NCAA's position was that "[f]inancial inducements from any source, including faculty or university financial aid committees, were not allowed. Singling out prominent athletic students from preparatory schools was a violation of the amateur code, as was playing those who were not bona fide students." Allen L. Sack & Ellen J. Staurowsky, *College Athletes for Hire: the Evolution and Legacy of the NCAA's Amateur Myth* 34 (1998).

During the 1920's, competition between schools for the best players increased significantly. This, predictably, led schools to use improper inducements to attract the best players. The NCAA attempted to put a stop to "pay-for-play" arrangements "by restricting eligibility for college sports to athletes who received no compensation whatsoever." *O'Bannon v. NCAA*, 802 F.3d 1049, 1054 (9th Cir. 2015). The NCAA, as a voluntary organization, lacked any effective enforcement mechanism so "schools continued to pay their athletes under the table in a variety of creative ways." *Id.*

The issue only worsened during the 1940's. Veterans returning from World War II were typically more experienced athletes than their non-veteran counterparts because of the athletic teams the veterans participated on in the armed services. Schools who could successfully recruit these soldiers from across the country enjoyed a distinct advantage. Players began to openly peddle their services to the highest bidder. Donald S. Andrews, *The G.I. Bill and College Football: The Birth of a Spectacular Sport*, 55 J. of Physical Educ., Recreation, & Dance 23, 23-26 (1984).

Finally, the NCAA had enough. In 1948, the NCAA strengthened its enforcement abilities through enactment of the "Sanity Code." *See O'Bannon*, 802 F.3d at 1054. The NCAA included "a set of rules that prohibited schools from giving athletes financial aid that was based on athletic ability and not available to ordinary students." *Id.* "[A] student-athlete could receive a tuition and fees scholarship (not room and board) if the student had a demonstrated financial need and met the school's normal admissions requirements." Andrew Zimbalist, *Unpaid Professionals: Commercialism and Conflict in Big-Time College*

Sports 23 (1999). The Sanity Code also created, for the first time, "a Compliance Committee that could terminate an institution's NCAA membership." *O'Bannon*, 802 F.3d at 1054.

Just eight years later, in 1956, the NCAA changed its rules to allow schools to grant college athletes scholarships based on athletic ability. *Id.* "These scholarships were capped at the amount of a full 'grant in aid,'" which was defined as commonly accepted educational expenses, and included such items as tuition, fees, room and board, books, and cash for incidental expenses such as laundry. *Id.*; *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 974 (N.D. Cal. 2014). College athletes could receive additional aid not related to their athletic skills, up to the "cost of attendance." *O'Bannon*, 802 F.3d at 1054. If a college athlete received financial aid in excess of the "grant in aid" amount, she could lose eligibility for collegiate athletics. *Id.*

In 1975, the NCAA revised its definition of a full "grant in aid" to include "commonly accepted educational expenses (i.e., tuition and fees, room and board and course-related books)." This, in effect, removed cash for incidental expenses from the amount of a full grant in aid. *O'Bannon*, 7 F. Supp. 3d at 974.

In 2001, the NCAA made an exception for college athletes participating on the U.S. Olympic Team, allowing them to receive payments for winning Olympic medals. So, in 2016, swimmer Katie Ledecky was paid $115,000 for her Olympic performance and yet enrolled at Stanford and participated on its swim team later that year. In 2015, the NCAA revised the exception to allow college athletes to receive payment

from foreign countries for Olympic participation. Thus, in 2016, Singapore paid Joseph Schooling $740,000 for winning a gold medal in swimming, with no impact on his eligibility to swim at the University of Texas. Jon Solomon, *NCAA prez concerned by Texas swimmer paid $740k for winning Olympic gold*, CBS Sports (Sep. 8, 2016, 7:08 PM), available at https://www.cbssports.com/college-football/news/ncaa-president-concerned-by-texas-swimmer-paid-740000-for-winning-olympic-gold/.

In 2004, the NCAA amended its rules to allow college athletes to receive federal Pell grants (currently valued at up to $6495) in excess of the grant in aid and cost of attendance amounts. *O'Bannon*, 7 F. Supp. 3d at 974. In 2013, the NCAA began allowing athletes in individual sports (such as Cross Country and Track & Field) to accept prize money based on performance but limited to actual and necessary expenses for participating. Tennis players, however, are allowed to receive up to $10,000 in prize money even if unrelated to expenses. *Id.*

In 2011, the NCAA's Division I Board of Directors voted to adopt a $2,000 stipend to cover an athlete's full cost of attendance, but 125 Division I institutions voted to override the decision, scuttling the increase.

Finally, on August 7, 2014, the day before the trial court's ruling in *O'Bannon*, the NCAA changed its rules to allow individual conferences to allow their member schools to award athletic scholarships up to the full cost of attendance (in excess of the grant in aid amount). *O'Bannon*, 802 F.3d at 1054. "The 80 member schools of the five largest athletic conferences in the country voted in January 2015 to take that step,

and the scholarship cap at those schools is now at the full cost of attendance." *Id.* at 1055. For the 2015-2016 academic year, the amount of the stipend to cover full cost of attendance typically ranged from $2,000 to $6,000, depending on the school. Jon Solomon, *2015-16 CBS Sports FBS college football cost of attendance database*, CBS Sports (Aug. 20, 2015, 9:30 AM), available at https://www.cbssports.com/college-football/news/2015-16-cbs-sports-fbs-college-football-cost-of-attendance-database/.

Five years after *O'Bannon*, Petitioners' alterations continue. In January 2021, the NCAA was set to vote on legislation to permit college athletes to receive compensation from third parties for endorsing or sponsoring products and making personal appearances. The NCAA delayed the vote on the legislation after the United States Department of Justice warned the NCAA that certain aspects of the legislation could violate the antitrust laws. Ralph D. Russo, *After DOJ warning, NCAA to delay vote on compensation rules*, Associated Press (Jan. 9, 2021), available at https://apnews.com/article/athlete-compensation-mark-emmert-legislation-laws-f456f4ffa9869653573c146bf5387a34.

This history demonstrates that Petitioners have no fixed conception of what the phrase "amateurism" actually means. What that phrase meant in 1928 is different from what it meant in 1948, and what it meant in 1948 is different from what it meant in 2008. In just the last seven years, Petitioners' understanding of the phrase has changed significantly. Today, a college athlete can receive full cost of attendance, thousands of dollars in stipends or grants, thousands of dollars in prize money, and hundreds of thousands of

dollars in Olympic performance bonuses and still be an amateur. To Petitioners, "amateurism" appears to mean one who is not compensated beyond the current restrictions Petitioners have imposed. The inherent circularity and ambiguity of Petitioners' "amateurism" justification thus significantly limits its function as a *per se* exception from antitrust scrutiny, and instead strongly supports applying rule-of-reason analysis'. *See In re NCAA Grant-In-Aid Cap Antitrust Litig.*, 958 F.3d at 1259 ("Amateurism does not have a fixed definition, as NCAA officials themselves have conceded.").

History also shows a gradual easing of restrictions on the financial benefits available to college athletes. And yet big-time college football and basketball have simultaneously enjoyed immense and increasing public popularity. This is consistent with the consumer demand evidence the district court relied upon in step two of the rule of reason analysis. *See id.* at 1258 ("Dr. Rascher's and Dr. Noll's demand analyses demonstrate that the NCAA has loosened its restrictions on above-COA, education-related benefits since O'Bannon without adversely affecting consumer demand."); *see also* Thomas A. Baker III, Marc Edelman, & Nicholas M. Watanabe, *Debunking the NCAA's Myth that Amateurism Conforms with Antitrust Law: a Legal and Statistical Analysis*, 85 Tenn. L. Rev. 661, 695 (2018) ("[B]oth the models for live attendance and television viewership find no statistical evidence that the increases in stipends have any relationship with consumer interest in college football games."). Petitioners' arguments that the district court's injunction, by further easing restrictions, threatens the very existence of college football and basketball as a product for

consumer consumption, therefore, should not be taken seriously.

III. THE ADDITIONAL BENEFITS ALLOWED STUDENT ATHLETES UNDER THE DISTRICT COURT'S INJUNCTION WILL NOT SPELL FINANCIAL RUIN FOR PETITIONERS OR THEIR MEMBERS.

The financial landscape in big-time college football and basketball has also changed significantly over the last thirty years (and particularly since *Board of Regents*), further undercutting "amateurism" as a justification for a *per se* exception from antitrust scrutiny. Petitioners' amici, however, suggest that the district court's injunction could have a devastating impact on the financial position of their member schools. Not only are the additional benefits for student athletes covered in the district court's injunction optional, the notion that member universities covered by the injunction, by voluntarily conferring such benefits, will suffer catastrophic financial harm ignores reality.

Since the Court's decision in *Board of Regents* in 1984, "the television audience for college athletics has skyrocketed. This is true for the major athletic conferences during their regular seasons, for preseason and holiday exhibition matches, and especially for postseason contests." Stanton Wheeler, *Rethinking Amateurism and the NCAA*, 15 Stan. L. & Pol'y Rev. 213, 213 (2004).

The Department of Education reports that total sports revenues across all FBS schools was $2.4 billion in 2003. By 2018, that amount had increased to $7.6 billion, a 216% increase. *See Equity in Athletics Data Analysis*, U.S. Dept. of Educ., [hereinafter, "*Equity in*

Athletics Data"], https://ope.ed.gov/athletics/Trend/public/#/subjects (last visited Feb. 24, 2021). "That growth has been fueled by a select group of sports and programs which have collectively cashed in on a seemingly insatiable demand, driven by broadcasting deals that bring college sports to nearly every screen." *See* Sen. Chris Murphy, *Madness, Inc., How everyone is getting rich off college sports – except the players*, at 4 available at https://www.murphy.senate.gov/imo/media/doc/NCAA%20Report_FINAL.pdf (last visited Feb. 24, 2021). Student aid, however, has only increased from $605 million in 2003 to $1.5 billion in 2018, a substantially lower increase of 147%. *See Equity in Athletics Data.*

College football has become particularly lucrative. In 2018, college football alone generated $4.7 billion in revenue for FBS schools. *Id.* With 127 FBS schools having college football teams, each school earned average annual revenue in excess of $37 million from football alone. *Id.*

Revenue growth from athletics has been even more impressive in the Power 5 conferences (Petitioners ACC, Big 10, Big 12, Pac 12, and SEC). In 2005, the Pac 12 Conference had total revenues of $319.7 million. By 2018, that amount grew to over $1 billion. The Southeastern Conference had total revenues of $600 million in 2005. By 2018, that amount grew to almost $1.9 billion.

With all this revenue, how can it possibly be that the Power 5 schools stand to lose money if forced to provide additional benefits to the student athletes generating the bulk of the revenue?

One response is that they will not actually lose money. It will only appear that way because of the way athletic departments account for expenses. For example, one of the major expenses for any athletic department is student aid and a big portion of student aid is tuition and fees. But tuition payments, although reflected as an athletic department expense, still benefit the university and will be reflected as revenue elsewhere on the university's books. Tuition has been increasing rapidly across the country in recent years. In Arizona, resident tuition at the three public universities increased by over 300% in the fifteen years from 2003 to 2018. These increases have created the faux appearance of increased student aid to athletes and increased expenses for athletic departments.

Of course, an athletic department also generates revenue not reflected on its own books. In 2017, after winning the 2016 national championship in football, Clemson conducted a survey of admitted students to see how that success had factored into their decision to apply. Thirty percent reported that Clemson's football success was moderately, very or extremely influential. Brittany Mayes & Emily Giambalvo, *Does sports glory create a spike in college applications? It's not a slam dunk*, Wash. Post (Dec. 6, 2018), available at https://www.washingtonpost.com/graphics/2018/sports/ncaa-applicants/. Moreover, a school's success in sports, particularly football, likely results in additional athletic and non-athletic giving by alumni. *See* Gi-Yong Koo & Stephen W. Dittmore, *Effects of Intercollegiate Athletics on Private Giving in Higher Education*, 7 J. of Issues in Intercollegiate Athletics 1, 12 (2014).

The other response to alleged athletic department financial losses is that any such losses are likely a direct result of bloated budgets and an ongoing arms race among athletic departments, which benefits primarily football and basketball coaching staffs and athletic department officials, not student athletes. The fact that athletic departments are already competing over coaches' salaries and facilities, shows that allowing some competition over student compensation will not bring about financial ruin.

Big-name college coaches in football and basketball now collect enormous salaries and benefits The University of Alabama paid its head football coach, Nick Saban, $9.3 million in 2020. *NCAA Salaries*, USA Today, available at https://sports.usatoday.com/ncaa/salaries/ (last updated Nov. 12, 2020). There are more than eighty Division One head football coaches who made more than $1 million in 2020. *Id.* The total amount spent on salaries for head and assistant coaches across all sports at FBS schools has more than tripled since 2005, and in 2018 was in excess of $1.5 billion. *See College Athletics Financial Information Database*, Knight Commission on Intercollegiate Athletics, [hereinafter, "*Financial Information Database*"], available at http://cafidatabase.knightcommission .org/fbs (last visited Feb. 24, 2021).

Athletic department spending on support and administrative personnel has similarly skyrocketed. Athletic Directors have used the sacrosanct status of their departments to hire armies of high-priced administrators. As Gregg Easterbrook explained over a decade ago, when the issue was not yet nearly as pronounced, "[i]n an era when budget stress is causing classes to be cut and core academic missions to be

scaled back, many collegiate athletic departments are the most overstaffed organizations this side of a Monty Python sketch." Gregg Easterbrook, *Why are athletic departments so big?,* ESPN (Dec. 7, 2010) [hereinafter, "*Why are athletic departments so big?*"], available at http://www.espn.com/espn/page2/story?sportCat=nfl&page=easterbrook/101207_tuesday_morning_quarterback.

A survey the NCAA conducted in 2017 showed that the Notre Dame football program had a combined 45 on-field coaches, strength coaches, graduate assistants and support staff, followed by Texas (44), Georgia (42), Auburn (41) and Michigan (40). Dennis Dodd, *As NCAA zeroes in on college football staff sizes, survey shows inconsistencies*, CSB Sports (May 15, 2017, 10:56 AM), available at https://www.cbssports.com/college-football/news/as-ncaa-zeroes-in-on-college-football-staff-sizes-survey-shows-inconsistencies/. In 2018, FBS schools spent well over $1.5 billion on compensation for support and administrative personnel. *See Financial Information Database*.

Finally, spending on athletics facilities has also mushroomed. "Football stadiums and basketball arenas now must be complemented by practice facilities, professional-quality locker rooms, players' lounges with high-definition televisions and video game systems, and luxury suites to coax more money from boosters." Will Hobson & Steven Rich, *Colleges spend fortunes on lavish athletic facilities*, Chi. Trib. (Dec. 23, 2015, 6:40 AM), available at https://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html. In 2014, universities in the Power Five conferences "spent $772 million

combined on athletic facilities, an 89-percent increase from $408 million spent in 2004, adjusted for inflation." *Id.* In 2018, FBS schools spent an astronomical $1.88 billion on facilities and equipment. *See Financial Information Database*.

Of course, within legal limits, universities are free to spend their sports revenue how they see fit. But their own decision to pump billions of dollars into coaches, administrative personnel, and stadiums should not be used as pretext for anti-competitive restraints on the athletes who actually generate the revenue allowing those expenses. *See Why are athletic departments so big?* ("Yet bloated staffing, which benefits the well-off and comfortable, continues, while God forbid some recruit from a poor family should eat an unauthorized cheeseburger."). Indeed, the lack of the ability of players to be paid—even for their name and likeness—may well contribute to "excess rents" being paid to coaches as a proxy for the notoriety and success of the players.

Since the Court decided *Board of Regents* in 1984, much has changed in college athletics. In the decades since, Petitioners have made immense sums while acting more and more like their professional counterparts in the NFL and NBA. It is extremely unfair for Petitioners to enjoy the spoils of such professionalism while continuing to insist that those who generate such spoils are restricted by "amateurism" from receiving any additional benefits whatsoever. That said, to the extent that there are concerns about fraud, deceptive, or other rule-breaking behavior that would be hidden under the guise of paying players for their name and likeness, for example, the NCAA needs to focus on those concerns and develop responses

targeted to specifically identified harms. The NCAA's broad invocation of amateurism is plainly insufficient to shield its restraints from antitrust oversight.

CONCLUSION

Amici States respectfully request that the Court hold that Petitioners' restraints on competition are subject to rule of reason review. Amici States further request that the Court review Petitioners' "amateurism" justification with skepticism and reject the notion that the district court's injunction will spell financial doom for Petitioners.

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