No. 20-512

IN THE

Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

SHAWNE ALSTON, *et al.*,
Respondents.

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

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INTRODUCTION

For 12 years and running, a single district judge has entertained successive challenges to the NCAA's amateurism rules, which define college sports as a unique product. Here, the judge adopted an alternative tailored to her newly invented conception of amateurism, a conception that has no basis in reality and that erodes the distinct character of NCAA sports. In endorsing that outcome, the Ninth Circuit eliminated the latitude this Court has said the NCAA must have to administer intercollegiate athletics, and blessed judicial superintendence of a defining aspect of college sports. As the NCAA's opening brief explained, many things are wrong with that picture.

In defending what transpired below, respondents distort what this case is about. It is not about whether

NCAA rules are immune from antitrust liability, or about factual findings that were made in applying the rule of reason. This case concerns three questions: (1) whether the NCAA's conception of amateurism—that student-athletes not be paid to play—has procompetitive effects, (2) whether NCAA rules that implement that conception by prohibiting the massive payments the Ninth Circuit approved are valid, and (3) whether antitrust challenges to such rules should be rejected without detailed rule-of-reason analysis.

The answer to all three questions is yes. That conclusion flows from both *NCAA* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984)—which explained that NCAA rules regarding the "eligibility of participants" are "procompetitive" because they differentiate college and professional sports, *id.* at 102, 117—and *American Needle, Inc.* v. *NFL*, 560 U.S. 183 (2010), which explained that restraints can be upheld under the rule of reason without "detailed analysis," *id.* at 203. Respondents misinterpret or ignore critical aspects of these cases, but as courts outside the Ninth Circuit have understood, the cases require that NCAA amateurism rules be sustained against antitrust attack on the pleadings.

Respondents also offer no persuasive defense of the Ninth Circuit's legal errors in applying full rule-of-reason scrutiny. Respondents say those errors were actually factual findings, that the lower courts found the challenged rules lacked procompetitive benefits, and that petitioners were not required to defend each category of rule. As explained herein, all of that is wrong. This Court should reverse and—because respondents failed to show an equally effective alternative to the challenged rules—direct entry of judgment for petitioners.

ARGUMENT

I. NCAA AMATEURISM RULES ARE SUBJECT TO ABBREVIATED RULE-OF-REASON ANALYSIS

A. The NCAA Does Not Seek Antitrust Immunity

Respondents argue at length that the NCAA seeks antitrust exemption or immunity. Resp. Br. (RB) 21-40. As explained (Opening Br. (OB) 30-31), that is incorrect.

"A claim of [antitrust] immunity or exemption is … an affirmative defense to conduct which is otherwise assumed to be unlawful." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 600 (1976); *see also Flood* v. *Kuhn*, 407 U.S. 258, 282, 285 (1972). The NCAA contends instead that its amateurism rules are *lawful* because they are reasonably designed to create a product distinct from professional sports. That the rules are plainly lawful is why deferential, abbreviated rule-of-reason analysis is appropriate: to avoid unnecessarily imposing the burden of constant antitrust litigation and the risk that erroneous decisions—like the one here—will prohibit or chill procompetitive conduct that benefits fans, student-athletes, and others. *See* OB20-21, 31-33.

Abbreviated review would not function as an immunity or exemption in practice, as respondents suggest (RB22). To prevail under such review, the NCAA must show that the challenged rules are reasonably designed to preserve amateurism. Decisions from both this Court and others demonstrate that this is an administrable and meaningful inquiry. For example, *Board of Regents* determined that the television plan challenged there was not adopted "to maintain the integrity of college football as a distinct and attractive product," and thus did not "fit into the same mold as do

rules defining … the eligibility of participants." 468 U.S. at 116-117. Similarly, *Agnew* v. *NCAA*, 683 F.3d 328 (7th Cir. 2012), held at the pleading stage that rules limiting the number and duration of athletic scholarships were—"as a facial matter"—"not directly related to the separation of amateur athletics from pay-for-play athletics" and therefore did not "'fit into the same mold' as eligibility rules," *id.* at 343-345. And *Law* v. *NCAA*, 134 F.3d 1010 (10th Cir. 1998), determined that a rule limiting coaches' salaries was not "designed to ensure the amateur status of student athletes," *id.* at 1021-1024 & n.14. Respondents never reconcile their dire predictions about the implications of the NCAA's position with this precedent.

B. Caselaw Supports Abbreviated Rule-Of-Reason Analysis Here

Respondents contend that—notions of immunity aside—*Board of Regents*, *American Needle*, and the other cases the NCAA cited do not justify abbreviated rule-of-reason analysis. That too is wrong.

1. In respondents' view (RB27-28), *Board of Regents* says nothing more about amateurism rules than that they are subject to the rule of reason. The NCAA has repeatedly explained (OB21-23, 28; Pet. 24-25) why that is incorrect. This Court went *beyond* holding, *see* 468 U.S. at 101, that NCAA rules are not illegal per se but rather evaluated under the rule of reason. It explained that NCAA "rules defining … the eligibility of participants" (which include the amateurism rules) are valid under antitrust law—"justifiable … and therefore procompetitive"—*id.* at 117, because they define the "particular brand" of sports the NCAA markets and thus procompetitively "differentiate[] college" sports from professional sports. *Id.* at 101-102. In contrast,

the Court explained, rules that have anticompetitive effects but do not "fit into the same mold" as the eligibility rules (such as the television plan at issue) will be invalidated absent some other justification, because they are "not based on a desire to maintain the integrity of college football as a distinct and attractive product." *Id.* at 116-117. It would have been pointless for the Court to identify a "mold" if NCAA rules received the same treatment whether they fit that mold or not.

Respondents and the government counter that this Court merely deemed it "reasonable to assume" that the amateurism rules are valid, without actually so concluding. RB29; U.S. Br.17. In reality, what the Court considered "reasonable to assume" was the *proportion* of NCAA rules—"most"—that are valid because they fit the mold of rules "defining … the eligibility of participants." 468 U.S. at 117. The Court, that is, recognized that some NCAA rules (like the television plan) will not fit that mold, and thus will warrant further rule-of-reason analysis.

The government also suggests (Br.16-17) that *Board of Regents* envisioned a different dichotomy: Rules that fit the mold receive detailed rule-of-reason scrutiny, whereas rules that do not are *invalidated* under a "quick look." That is incorrect; the quick look the government cites merely allowed the television plan's *anticompetitive effects* to be established without analysis of the NCAA's market power, 468 U.S. at 104-113. It had nothing to do with whether the plan would nonetheless ultimately be justified under the rule of reason. *See id.* at 113-115 (assessing proffered procompetitive benefits). As to that issue, the Court's analysis shows, as explained, that even when a challenged rule has anticompetitive effects, fitting the "mold" would suffice to uphold it. *See id.* at 104-120.

The government's reading, moreover, is refuted by *American Needle*, which explained—quoting *Board of Regents*—that some sports-league rules can be *upheld* under an abbreviated analysis, because:

> When "restraints on competition are essential if the product is to be available at all," … the agreement is likely to survive the Rule of Reason.… And depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it "can sometimes be applied in the twinkling of an eye."

560 U.S. at 203 (footnote omitted) (citing *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 23 (1979)).

Respondents characterize this passage as merely "a prediction about the outcome of the factual analysis on remand." RB36. But the passage nowhere mentions remand proceedings. And there was no argument in this Court about whether the NFL's conduct could survive rule-of-reason analysis; the Court had "only a narrow issue to decide": whether that conduct was outside section 1 of the Sherman Act because the NFL was acting as a single entity. 560 U.S. at 189. The quoted passage, therefore, provides generally applicable observations about antitrust law—which is why it cites not only *Board of Regents* but also cases outside the sports context, *Broadcast Music* and *Texaco Inc.* v. *Dagher*, 547 U.S. 1 (2006). All that aside, even if the Court *had* only been predicting the outcome on remand, that would still show that certain sports-league agreements can be upheld without detailed analysis.

2. Respondents echo the Ninth Circuit in arguing (RB28-29) that *Board of Regents*' discussion of the amateurism rules is dicta. But the NCAA's opening brief explained that the discussion not only was central to

this Court's holding and thus is precedential, OB27-28, but also was (as just explained) reaffirmed in *American Needle*, OB24-25.

Respondents also contend (RB29-30) that the "fact-based" nature of antitrust analysis diminishes *Board of Regents*' precedential effect, and that "top-tier college football and basketball" have become "commercial enterprises the magnitude of which the Court in the 1980s could not have fathomed." Once more, the NCAA opening brief addressed this, explaining (at 30) that college sports were already highly commercialized in the 1980s, *see Board of Regents of University of Oklahoma* v. *NCAA*, 546 F. Supp. 1276, 1288 (W.D. Okla. 1982) (calling college football "big business"), and, more importantly, that nothing in *Board of Regents*' discussion of amateurism turned on the degree of commercialization. Other courts have recognized this, including the Seventh Circuit in holding only three years ago that—in light of *Board of Regents*—an antitrust challenge to an NCAA rule facially "meant to help maintain … amateurism in college sports … should be dismissed on the pleadings." *Deppe* v. *NCAA*, 893 F.3d 498, 501-504 (7th Cir. 2018).

This Court has never suggested, moreover, that antitrust decisions have diminished precedential effect with respect to (as here) the same restraints previously upheld, certainly where (as here) "the theoretical underpinnings of those decisions" have not been "called into serious question," *State Oil Co.* v. *Khan*, 522 U.S. 3, 21 (1997).

3. Respondents argue (RB35) that other than *Deppe*, "no case … has applied the 'quick look' doctrine to uphold a restraint." What matters are not labels, however, but the fact that there is ample precedent for

upholding NCAA amateurism rules without detailed rule-of-reason analysis. The Third and Fifth Circuits have done so, applying much the same analysis as *Deppe* (and *Agnew*). *See* OB25-26. (Respondents' only answer is that these cases do not reflect "today's commercial realities," RB31. That fails for the reasons already given.) And as just noted, *American Needle* endorsed the same approach for certain sports-league agreements.

These cases reflect that antitrust law requires "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 780-781 (1999). Consistent with that, this Court has held that "[c]ourts can … devise … presumptions" both "to prohibit anticompetitive restraints" and "to promote procompetitive ones." *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 898-899 (2007); *accord Novell, Inc.* v. *Microsoft Corp.*, 731 F.3d 1064, 1073 (10th Cir. 2013) (Gorsuch, J.) ("courts have fashioned rules of presumptive legality for certain … conduct"). *Contra* RB33-36; *see* U.S. Br.17-18. This Court has adopted the latter where "false condemnations 'are especially costly,'" it is "difficult for antitrust courts to evaluate" conduct, or "[j]udicial oversight" would lead to "interminable litigation." *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004); *accord Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993).

All of these factors are present here. For example, this case and *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015), have subjected the NCAA to 12 years of non-stop litigation—and yet another case is now proceeding before the same district judge. OB50. Moreover, after holding in *O'Bannon* that antitrust law does

not require the NCAA to permit schools to provide student-athletes more than cost of attendance, *see* 802 F.3d at 1079, the Ninth Circuit reversed course here, holding that antitrust law *does* require that (principally because the NCAA had revised its rules to comply with *O'Bannon* and marginally increased a few other allowances). Under the Ninth Circuit's regime, no end to litigation is in sight: Every adjustment to NCAA rules—judicially compelled or not—will be deemed another "natural experiment," Pet. App. 20a, and leveraged into another trial and likely revision of the "revered tradition of amateurism in college sports," *Board of Regents*, 468 U.S. at 120.

Respondents claim (BR49) that this prediction "could be expressed by every other … business[] subject to rule-of-reason review." But they point to no other organization that similarly faces interminable litigation aimed at a defining and longstanding element of its "product," *Board of Regents*, 468 U.S. at 102. Sports organizations in particular "deserve a bright-line rule to follow," to "avoid potential antitrust liability as well as time-consuming and expensive antitrust litigation." *Race Tires America, Inc.* v. *Hoosier Racing Tire Corp.*, 614 F.3d 57, 80 (3d Cir. 2010). For reasons explained (OB12, 20-21, 31-33, 50-51), such a rule is especially appropriate here.

4. Respondents contend (RB25) that "social policy or any other non-competition-enhancing justification" do not justify abbreviated review. The NCAA, however, relies on *competition-enhancing* justifications: Amateurism widens choice and promotes consumer interest in college sports. OB27, 43-44. Moreover, this Court's precedent teaches that antitrust review *can* account for the educational and other societal benefits that would be lost without amateurism. *See* OB32-33

(citing cases). Respondents ignore that precedent, instead citing (RB25) *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978). But that case holds only that a restraint cannot be justified on the ground that "competition [is] contrary to the public interest." *Id.* at 684, 692-696. As just noted, that is not the NCAA's position.

Professional Engineers explains, moreover, that "the facts peculiar to [a] business, the history of [a] restraint, and the reason why it was adopted" must be considered. 435 U.S. at 692; *accord Board of Trade of City of Chicago* v. *United States*, 246 U.S. 231, 238 (1918) ("The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."). Here, both the educational purpose behind amateur intercollegiate athletics and amateurism's long history support abbreviated rule-of-reason analysis—and refute respondents' suggestion (RB49-50) that such review would have to be applied to more typical joint enterprises as well.

5. Finally, respondents contend (RB37) that joint-venture principles are inapplicable because "NCAA members do not act as a joint venture in the labor markets at issue." But *Board of Regents* repeatedly described the NCAA as a "joint venture," 468 U.S. at 101, 113, 114 n.54, and it held—notwithstanding that schools compete for student-athletes—that "the integrity" of the NCAA's product is defined by rules governing those supposed labor markets (including that "athletes must not be paid") and "cannot be preserved except by mutual agreement" affecting those markets, *id.* at 102. Likewise, *American Needle* treated sports leagues as joint ventures despite acknowledging that "teams compete with one another … for … playing personnel," 560

U.S. at 196-197. Respondents counter (RB39) that *American Needle* declined to accord "deference" to the NFL. But the "narrow issue" this Court addressed, *id.* at 189—whether the NFL was acting as "a single enterprise" outside section 1, *id.*—did not implicate deference.

The government agrees that the NCAA is a joint venture, but it labels the amateurism rules "nonventure" restraints, subject to the "ancillary restraints doctrine" (Br.20-21 & n.5). That is incorrect. Although *Board of Regents* indicated that the television plan challenged there was a nonventure restraint, *see Dagher*, 547 U.S. at 7, it made clear that the amateurism rules govern a core activity of the NCAA's joint enterprise, defining "the character and quality of the 'product,'" 468 U.S. at 102; *see Dagher*, 547 U.S. at 7-8 (deeming "pricing" a "core activity of the joint venture").

II. THE NINTH CIRCUIT'S RULE-OF-REASON ANALYSIS WAS FATALLY FLAWED

In defending the Ninth Circuit's detailed rule-of-reason analysis, respondents assert (RB40, 45-46) that the NCAA is challenging "findings of fact," and relatedly that "amateurism … is a *factual* argument, not a legal defense" (RB33). Neither point is correct.

The concept of amateurism as intrinsically different from professionalism is part of our shared culture, experience, and vocabulary—and has been for well over a century, *see* OB5. That is why *Board of Regents* did not look to the record in concluding that one key feature distinguishing NCAA and professional sports is that student-athletes are "not … paid," 468 U.S. at 102. Even the Ninth Circuit in *O'Bannon* rejected respondents' notion that amateurism can be defined anew eve-

ry time a fact-finder is presented with a particular body of surveys, testimony, or other evidence; in that court's words, "we … have some shared conception of what makes an amateur an amateur," and even if "[w]e [do] not agree on all the particulars, … the basic difference [is]: if you're paid for performance, you're not an amateur." 802 F.3d at 1076 n.20 (quotation marks omitted). These cases did not "assume[] away" a key question (RB33); they resolved it appropriately.

More generally, the NCAA argues here that the lower courts committed *legal* errors in applying the rule of reason, not factual ones. If this Court had agreed with respondents—who similarly argued at the petition stage that this case is largely factual (Opp.25-26)—it presumably would not have granted review, *see* S. Ct. R. 10; *see also United States* v. *Williams*, 504 U.S. 36, 40 (1992) (arguments made opposing certiorari are "necessarily considered and rejected" when the Court grants review).

A. The Lower Courts Improperly Redefined Amateurism

Respondents' central defense of the lower courts' rule-of-reason analysis (RB44) is that those courts "did not invent a new, narrower definition of amateurism; Petitioners failed to prove a broader one." Both parts of that contention are false.

1. The Ninth Circuit explicitly stated that the district court adopted "a much narrower conception of amateurism." Pet. App. 37a. And respondents do not answer the NCAA's core argument (OB36-38) that this "narrower conception" is not only nothing like the NCAA's conception, but also devoid of support in reality and (if it matters) the record. Nor do respondents

dispute the NCAA's argument (OB35-36) that courts lack authority under the antitrust laws to redefine the NCAA's procompetitive product—particularly where history and context show so plainly that amateurism was adopted, and has been maintained, for reasons unrelated to any anticompetitive purpose.

2. Petitioners proved that rules implementing the NCAA's conception of amateurism are procompetitive: The lower courts "'credit[ed] the importance to consumer demand of maintaining a distinction between college and professional sports,'" Pet. App. 34a-35a (quoting Pet. App. 107a), and conceded that the NCAA's amateurism rules maintain that distinction, *see* OB43 (citing Pet. App. 37a). Extensive factual development was unnecessary to support those points—although substantial fact and expert evidence did so. OB43-46. Respondents cite no contrary trial evidence, because there was none.

3. Respondents echo the lower courts' claim that the NCAA "has abandoned 'any coherent definition of amateurism.'" RB42 (quoting Pet. App. 92a). In reality, the NCAA's "definition" is what it has long been: that student-athletes are not paid to play, meaning that payments beyond legitimate educational expenses plus token awards for genuine athletic achievement are not permitted. And as explained (OB29-30, 36-37), respondents' "abandon[ment]" assertion rests on a misunderstanding of the NCAA's conception of amateurism. For example, respondents emphasize (RB13-14) that the NCAA has expanded permissible allowances over time. Those changes, however (*see* D0680), did not alter the NCAA's conception of amateurism; they adjusted its implementation in light of changing student needs and the NCAA's experience over time about what creates significant risks of disguised pay-for-play,

see ER162, 638-639; Tr.1556. *O'Bannon* itself held that the most significant recent change, raising the cap on athletic scholarships to COA, accorded with "the NCAA's own standards" of amateurism. 802 F.3d at 1075. (Respondents ignore that this change accounts for most of the additional amounts student-athletes have been permitted to receive—and that respondents invoke in arguing that the NCAA has abandoned amateurism.) If "ample latitude" means anything, it must mean that the NCAA can make adjustments to the precise implementation of amateurism.

Respondents also accuse the NCAA of flip-flopping on NIL payments: authorizing rule changes to allow NIL compensation after arguing in *O'Bannon* that such NIL compensation "would be ruinous to college sports." RB10-11. But what the NCAA opposed in *O'Bannon* were pay-for-play payments—e.g., payments from institutions for the use of student-athletes' NIL *as college athletes* in game broadcasts and videogames. 802 F.3d at 1057. By contrast, the NCAA Board of Governors recently authorized the divisions to propose rules regarding NIL compensation only to the extent that such compensation would be both consistent with the NCAA's conception of amateurism and "accompanied by guardrails sufficient to ensure" that any NIL compensation is not "a disguised form of pay for athletics participation." Federal & State Legislation Working Group Final Report & Recommendations at 1 (Apr. 17, 2020), https://tinyurl.com/t74cswgo.

Respondents also say (RB14) that the testimony of Kevin Lennon, the NCAA's 30(b)(6) witness, shows the NCAA has abandoned amateurism. That is false. Lennon testified that "the principle of amateurism overlays all the bylaws," ER1376; that any allowances "must be consistent with the principle of amateurism," ER1382;

see Tr.1283-1284, 1303-1304; and that allowances are limited so as to comply with amateurism, i.e., to ensure that they do not "morph into pay," Tr.1277; *see also*, *e.g.*, ER163-164, 1383; Tr. 1308-1309.

Respondents likewise go astray in relatedly contending (RB14) that petitioners' "witnesses admitted that they had never even attempted to study any relationship between the compensation restraints and consumer demand." There was in fact abundant evidence that NCAA members studied that relationship. *See*, *e.g.*, D0239; D0541; D0683. More importantly, antitrust law does not require any studies. Organizations can legitimately judge what differentiates their products without such studies, and certainly studies are not required to establish the procompetitive benefit of maintaining amateur college athletics as a product distinct from professional sports.

Lastly, respondents suggest (RB6, 8) that college coaches' salaries show that the NCAA has abandoned amateurism. But unlike student-athletes, coaches *are* professionals—just as teachers are professionals whereas their pupils are not. As the Tenth Circuit put it, "courts have only legitimized rules designed to ensure the amateur status of student athletes, not coaches." *Law*, 134 F.3d at 1022 n.14.

4. The government argues (Br.25) that amateurism is not "a freestanding procompetitive justification," but instead is "relevant at step two … only insofar as it 'enhances competition.'" That argument lacks merit.

First, as *Board of Regents* held, maintaining amateurism in college sports is procompetitive because it "differentiate[s]" college from professional sports and thereby "widen[s] consumer choice" for both fans and athletes. 468 U.S. at 101-102. Consequently, rules rea-

sonably designed to preserve amateurism are procompetitive *because* they promote product differentiation and thus enhance competition. *See United States* v. *Brown University*, 5 F.3d 658, 675 (3d Cir. 1993) ("Enhancement of consumer choice is a traditional objective of the antitrust laws and has also been acknowledged as a procompetitive benefit." (citing *Board of Regents*, 468 U.S. at 102)).

Second, the government (Br.25 n.6) incorrectly equates "enhanc[ing] competition" with "increasing consumer demand," asserting that the latter is amateurism rules' "relevant function." The lower courts made the same mistake, stressing, for example, that consumer demand had not been reduced by certain prior rule modifications (the "natural experiments") and allegedly would not be reduced by allowances for the "education-related benefits" tested in the survey of respondents' expert. Pet. App. 20a-21a, 36a, 102a-103a; *see also* RB45. But the procompetitive benefit of differentiation is not necessarily measured by net consumer demand. If it were, antitrust law would perversely invalidate joint venture restraints that enable specialized products, to the detriment of consumers who prefer them. And it would also require convergence of professional and NCAA sports into whatever amalgam of athletic competition proves most popular with sports fans—according to the particular surveys adduced to a particular fact-finder in a particular trial.

The record shows that a substantial percentage of fans choose NCAA sports because its players are amateurs. OB44; ER846; Tr.1792. Even if many other fans might prefer to blur (or be indifferent to blurring) college and professional sports, nothing more is needed to reach the self-evident conclusion that amateurism

meaningfully differentiates the two—and is therefore procompetitive.[1]

5. Respondents' final rationale for the lower courts' redefinition of amateurism (RB14, 42) is that what really "drive[s] fan interest" in NCAA sports is that the athletes are students. That contention contradicts *Board of Regents*' recognition that "not be[ing] paid," *in addition to* being a student, is what defines the "character and quality" of NCAA sports, 468 U.S. at 102. It also contradicts respondents' economist, who "would not say that amateurism has nothing to do with consumer demand," Tr.58. And it contradicts the district court's finding, affirmed by the Ninth Circuit, that "preserving amateurism" is "procompetitive." Pet. App. 4a; *see also* Pet. App. 35a, 49a-50a.[2]

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[1] In any event, respondents' survey evidence understated consumer interest in amateurism. First, many allowances it tested were substantially similar to what the NCAA already permitted (*see* OB29-30, 46 n.4), and the ones that departed substantially from preexisting rules—the "academic incentive payments" and the "graduation incentive payments"—yielded the highest percentage of respondents who would watch or attend NCAA sports "less often," ER846. Second, respondents' survey investigated consumer response to each allowance *in isolation*, rather than examining consumer response to eliminating all the rules deemed by the lower courts not to be procompetitive, i.e., those limiting "education-related benefits," *see* Tr.1657-1658.

[2] Respondents suggest (RB44) that the NCAA cannot "justify" a restraint of the "labor markets for student-athletes" by invoking the "claimed procompetitive effects" in the market for sports viewers. This argument was neither pressed nor passed upon below, Pet. App. 35a n.14, so it is not properly before this Court, *e.g.*, *Williams*, 504 U.S. at 41. Regardless, the argument fails: Amateurism rules are also procompetitive in the labor market, "widen[ing] consumer choice" not only for "sports fans but also [for] athletes." *Board of Regents*, 468 U.S. at 102.

B. The Lower Courts Improperly Required Petitioners To Prove The Benefits Of Each Type Of Challenged Rule

As the NCAA explained (OB38-43), the lower courts erroneously required petitioners to prove that "each type of challenged rule," Pet. App. 47a, has procompetitive benefits, thereby collapsing step 3 of the rule-of-reason analysis into step 2—which absolved respondents of their burden of proof. Respondents' denial that this occurred is not credible.[3]

Respondents contend (RB41-43) that the lower courts "did not sub-divide the rules," but rather "examine[d] whether Petitioners had proven a procompetitive justification for all aspects of the rules in the aggregate." The Ninth Circuit, however, admitted that the district court considered "the procompetitive effects achieved *by each type of challenged rule*, ultimately concluding that the NCAA 'sufficiently showed a procompetitive effect of *some aspects* of the challenged compensation scheme.'" Pet. App.39a (emphases added) (quoting Pet. App. 151a). Based on that, the lower courts concluded, "NCAA compensation limits preserve demand [only] to the extent they prevent unlimited cash payments akin to professional salaries." Pet. App. 40a. There is thus no doubt that the courts considered sub-groups of the rules at step 2.

More fundamentally, it is incoherent to say that petitioners proved a "narrower" justification. Either am-

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[3] The government asserts (Br.27) that petitioners' challenge on this issue was not made below. That is wrong, *see* Opening C.A. Br. 42-43; C.A. Response-and-Reply Br. 31-35, but regardless, any waiver was itself waived when respondents failed to object in the brief in opposition, *see* S. Ct. R. 15.2; *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 584 n.1 (2018).

ateurism differentiates college from professional sports or it doesn't. Hence, when respondents say (RB15, 20, 43) that the lower courts found the NCAA proved procompetitive benefits only "to the extent" that the rules prevent unlimited payments unrelated to education, what they mean is that petitioners failed to prove that a less-restrictive compensation system would not *also* differentiate college from professional sports—which is an admission that the lower courts combined steps 2 and 3, thereby erroneously placing respondents' burden on petitioners.

For its part, the government (Br.27-28) caricatures the NCAA brief as arguing that antitrust law "categorically requires courts to combine different restraints when analyzing their competitive effects at step two." In fact, the NCAA argues (OB39-40) that the lower courts had to consider the procompetitive effects of the challenged rules together because of a "case-specific factor[]," U.S. Br.27: At step 1, respondents claimed, and the lower courts found, anticompetitive effects *only in the aggregate*. Because the courts never found that the rules limiting "education-related benefits" had anticompetitive effects in isolation, the courts had no warrant to invalidate those rules for lack of procompetitive effects. Consequently, the NCAA's position does not "enable defendants to insulate anticompetitive restraints by packaging them with procompetitive ones," U.S. Br.28. *Respondents* "packaged" the rules for rule-of-reason purposes.[4]

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[4] The government also asserts (Br.28 n.8) that petitioners did not argue below that any rules "should be summarily upheld at step one based on a lack of anticompetitive effect." But there was no need to, because respondents' only claim of anticompetitive harm was, again, directed at the challenged rules collectively—a claim the NCAA *did* dispute, D.Ct. Dkt. 704 at 20-24.

Lastly, the government contends (Br.29-30) that requiring the NCAA to prove the procompetitive benefits of each type of challenged rule was harmless error. But that error led directly to the lower courts' rejection of the NCAA's conception of amateurism in favor of the "narrower conception" invented out of thin air by the district court. OB35, 39-40. If not for this atomistic approach, step 2 would have ended with the (correct) finding that the challenged rules collectively are procompetitive, thereby requiring respondents to prove at step 3 that an alternative compensation system would preserve the procompetitive benefits equally well. They certainly could not have carried that burden as to the NCAA's conception of amateurism, but regardless they did not carry it (as explained in the next section) as to the "narrower conception" of amateurism the lower courts erroneously adopted. For that reason, the judgment should be reversed and entry of judgment for petitioners directed.

C. Respondents' Defense Of The District Court's Alternative Compensation System Fails

The alternative compensation system the district court adopted is not a legitimate alternative, under either the NCAA's longstanding conception of amateurism or the novel one the district court invented. OB37-38, 46-49.[5] The alternative permits every student-athlete to receive thousands of dollars per year in "aca-

[5] At trial, respondents offered two purported less-restrictive alternatives, D.Ct. Dkt. 987-1 at 41-44, both of which the district court rejected. Instead, the court announced its own alternative when it entered judgment. The court's remedy derived but differed from a suggestion it elicited from respondents following trial, D.Ct. Dkt. 1099-3 at 42-43; *see* RB10 (wrongly suggesting otherwise).

demic or graduation awards or incentives" merely for being on a team, plus unlimited cash pay for "post-eligibility internships." That manifestly does not preserve the NCAA's line of demarcation between college and professional sports; neither the lower courts nor respondents have suggested otherwise. But the alternative does not even serve the courts' "narrower conception" of amateurism, Pet. App. 39a, because these new allowances are indistinguishable from professional salaries.

First, requiring the NCAA to permit schools to provide all student-athletes $6,000 in cash every year they maintain some minimal academic threshold is pay-for-play, pure and simple. Respondents argue (RB48) that this limit "comes from the NCAA itself" because in theory a preternaturally gifted student-athlete on a once-in-a-generation team might receive that total amount. Even leaving aside the Ninth Circuit's recognition (Pet. App. 44a) that the record contains no evidence that any athlete has ever received this amount, or anything like it, there is simply no equivalence between an award to one student-athlete for surpassing achievement and a regime that permits all student-athletes to receive thousands of dollars in cash just for being on a team.

Second, requiring the NCAA to permit unlimited-pay internships is an invitation to pay-for-play. Respondents argue—for the first time—that such internships can "be funded only by a conference or institution." RB47. But schools and conferences regularly provide funds supplied by other entities. Maintaining the ability to prevent substantial payments far beyond legitimate educational expenses is a fundamental reason why the NCAA needs much greater leeway to craft compensation rules than the lower courts afforded it.

The government observes (Br.33) that the NCAA does "not dispute that *typical* paid internships" are unlike professional salaries, focusing "[i]nstead" on "atypical lucrative internships given … to athletes after their college careers." That is true, because the latter, i.e., internships that can pay unlimited cash, Pet. App. 167a-168a, are what the lower courts allowed. By contrast, "typical" internships (which NCAA rules permit) provide "institutional financial aid" toward coverage of legitimate educational expenses, Pet. App. 42a-43a; *see* ER165-167, 284 (Bylaw 15.01.5.2). That does nothing to support respondents.

The government contends (Br.33-35) that the NCAA could solve any problems with the lower courts' alternative system by adopting rules defining "related to education" or "regulat[ing] how conferences or schools provide" such benefits, Pet. App. 168a. But what restrictions the district court would approve is entirely unclear. More importantly, the injunction expressly bars the NCAA from "limit[ing]" these benefits, *id.*, so the NCAA will have no ability to ensure they cover only legitimate educational expenses.

Lastly, respondents argue (RB47-48) that conferences can still "promulgate whatever additional rules, if any, they find necessary to preserve consumer demand." That does not justify the decision below. For one thing, it ignores the obvious fact that without national agreement, individual conferences (and schools) will face enormous pressure to relax their rules to improve their competitiveness, notwithstanding harm to interest in college sports. *Board of Regents* recognized this, saying that "the integrity of the 'product' cannot be preserved except by mutual agreement" because "if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might

soon be destroyed." 468 U.S. at 102. For another thing, respondents' argument concedes that compensation limits more restrictive than the lower courts adopted might indeed be necessary to maintain the distinction between college and professional sports. That concession confirms that plaintiffs did not prove that the alternative regime would be as effective as the NCAA's rules at preserving that procompetitive distinction.

Respondents had a full opportunity to prove their case, and after petitioners carried their step-2 burden to prove procompetitive benefits, *see* OB43-46, respondents failed to offer an alternative to the challenged rules that would be virtually as effective at preserving the procompetitive benefit those rules offer. The proper course here is thus to reverse and direct the entry of judgment for petitioners.[6]

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[6] Respondents insinuate (RB11, 18) that if no valid less-restrictive alternative exists, the challenged rules' anticompetitive and procompetitive effects must be "balanc[ed]" at a fourth rule-of-reason step. *Accord* U.S. Br.3. But respondents have waived any balancing argument, by failing to actually make one in their brief and by conceding at the petition stage that "the rule of reason involves a 'three-step[] … framework,'" Opp.24; *see Granite Rock Co.* v. *International Brotherhood of Teamsters*, 561 U.S. 287, 306 (2010). Regardless, no coherent balancing of the incommensurate anticompetitive and procompetitive effects is possible here. *See* Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & Bus. 369, 383-384 (2016). Balancing would merely allow courts to substitute their own—potentially "soft economic and even ideological"—views for the NCAA's business judgment. *Id.* at 374.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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