No. 20-520

In the Supreme Court of the United States

AMERICAN ATHLETIC CONFERENCE, THE ATLANTIC COAST CONFERENCE, THE BIG TEN CONFERENCE, INC., THE BIG 12 CONFERENCE, INC., CONFERENCE USA, MID-AMERICAN CONFERENCE, MOUNTAIN WEST CONFERENCE, PAC-12 CONFERENCE, SOUTHEASTERN CONFERENCE, SUN BELT CONFERENCE, AND WESTERN ATHLETIC CONFERENCE,

Petitioners,

v.

SHAWNE ALSTON, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

A currently accurate corporate disclosure statement is included in the petition for a writ of certiorari.

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REPLY BRIEF FOR PETITIONERS

Plaintiffs and the United States offer very different theories of the case. Plaintiffs treat this suit as a routine conspiracy to fix the price of widgets, denying that the NCAA's member schools participate in a joint venture at all. Resp. Br. 2, 19-20. The United States, in sharp contrast, recognizes that joint action is essential if college sports are to exist, repeatedly acknowledging the "unique nature" and "unusual features" of the college sports "product." U.S. Br. 13, 15. But these different starting points lead to the same erroneous conclusion.

As the case comes to this Court, it is settled that the preservation of amateur college sports as a unique product is procompetitive—a conclusion unequivocally endorsed by this Court in *Board of Regents*, described by Professor Hovenkamp as "well-established" (Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J. L. & Bus. 369, 377 (2016)), and confirmed by the district court's findings below. The lines drawn by the NCAA to preserve that product are eminently reasonable, building on and refining many decades of consistent practice. The courts below were wrong to redraw those lines.

I. The NCAA eligibility rules should have been upheld on a quick look.

In addressing the standard of review that governs their claim, plaintiffs repeat like a mantra that defendants seek an "antitrust exemption" or "immunity." *E.g.*, Resp. Br. 1, 18, 19, 21, 22, 23. But saying something loudly does not make it so. Defendants do not request immunity; to the contrary, they ask the Court to apply the "quick" or "quicker" look approach

to the Rule of Reason that it endorsed in decisions like *American Needle* and *California Dental*.

As for the United States, its principal reason for rejecting a quick-look standard is that "fact-intensive scrutiny" is the "usual approach" under the Rule of Reason (U.S. Br. 14)—even as it acknowledges that college sports are "unique" and "unusual." Yet it is those unique features that make a quick look appropriate here.

A. Quick-look review may be used to reject liability.

Plaintiffs initially maintain that antitrust liability never may be rejected on a quick look. They contend that the quick-look doctrine is asymmetrical, fully embracing resolution of antitrust cases "in the twinkling of an eye," but only to impose, and not to turn aside, liability. Resp. Br. 33-36. See also U.S. Br. 17. This misunderstands the Rule of Reason.

To begin with, the Court already has rejected plaintiffs' position. In *American Needle*, the Court embraced the idea that a quick look may preclude liability in a closely related context: Explaining that "[f]ootball teams that need to cooperate are not trapped by antitrust law," the Court specifically noted that "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 202, 203 (citation omitted). Quick-look review thus does not substitute ***for*** the Rule of Reason; it ***is*** Rule of Reason review, conducted in the manner most appropriate in the circumstances of the case. That is because, in resolving Sherman Act claims, "[w]hat is required * * * is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *California Dental*, 526 U.S. at

781. That principle applies whichever direction the review leads.

Nor do plaintiffs identify any reason why an abbreviated review is appropriate to impose, but not reject, liability. Actually, the need for mechanisms with which to resolve antitrust cases expeditiously is greatest when liability is plainly unwarranted. Antitrust litigation often imposes enormous burdens on defendants. See Opening Br. 19 & n.3. Where a court can be confident in "the twinkling of an eye" that such litigation is insupportable because the challenged conduct is procompetitive, there is a compelling reason to avoid expensive litigation that discourages desirable activity and, at its worst, may result in coerced settlements.

Plaintiffs, but not the United States, also insist that the quick-look approach no longer could have any place in this case because trial already has occurred. Resp. Br. 22. But that contention assumes that the lower courts' fact-intensive application of the Rule of Reason was error-free. It was not. See Opening Br. 33-44; *infra* at 11-20. Rather than correct the lower courts' errors by engaging in an unnecessarily detailed review, this Court can, and should, give the case a quick look. Resolving the case now on that ground would have the additional advantage of demonstrating the proper approach to resolution of future challenges like the one here—guidance that is especially important because there is every reason to expect that plaintiffs otherwise will continue initiating such cases against the NCAA in perpetuity. See Opening Br. 46.

B. The NCAA eligibility rules should have been upheld on a quick look.

When plaintiffs and the United States address the substance of the quick look, they misunderstand both our argument and the nature of the doctrine. The appropriate review here, and the one we advocate, is not "no look" (Resp. Br. 1), any more than this Court embraced a "no look" approach in *California Dental* or *American Needle*. Instead, a court should give the case sufficient scrutiny to satisfy itself that the claims appropriately may be resolved without more detailed review. Our opening brief makes that showing here: it demonstrates that restraints are necessary if a desirable and competition-enhancing college-sports product is to exist; and that the particular restraints at issue here are a reasonable way to make that product available. Neither plaintiffs nor the United States refutes that showing.

1. Joint action is necessary to define the product.

This case differs from the usual price-fixing suit, where the agreement is between entities whose only connection is as competitors; and even from the circumstances of most joint ventures, where the defendants collaborate to achieve economies of scale or other efficiencies. See Opening Br. 22. We therefore do not suggest, as the United States supposes, that "the existence of a legitimate collaboration," without more, is "a reason not to conduct full Rule of Reason review." U.S. Br. 19.

This case not only "involves an industry in which horizontal restraints on competition are essential if the product is to be available at all" (*Board of Regents*,

468 U.S. at 101), but joint action—including agreement on the rules identifying who is permitted to play NCAA sports—unquestionably is necessary ***to define the product***. That point is not debatable, and was not questioned by the courts below, which upheld (or did not dispute) many of the rules limiting who may play college sports. These circumstances offer an obvious and legitimate explanation for the joint action challenged here. It is thus beside the point that, as the United States notes, agreements involving joint ventures typically are subject to "'discriminating examination under the Rule of Reason'" (U.S. Br. 19); this is not a typical joint venture agreement.

Plaintiffs' responses also miss the mark. Although they contend that the NCAA is not a joint venture "in the labor markets at issue" (Resp. Br. 37), the NCAA unquestionably ***is*** a joint venture in the only relevant sense: the operation of a sports league where, "to preserve the character and quality of the 'product,' athletes must not be paid to play." *Board of Regents*, 468 U.S. at 102. That NCAA member schools compete vigorously in some aspects of athletics—and, for that matter, in their non-athletic endeavors—hardly means that they do not engage in legitimate joint action regarding the core function of operating a sports league. See *American Needle*, 560 U.S. at 202-204; cf. *Dagher*, 547 U.S. at 5-7.

Nor do we say that a joint venture, even a sports league where the contents of the governing rules "must be agreed upon" (*Board of Regents*, 468 U.S. at 101), is entitled to absolute deference in defining its product. *Contra* Resp. Br. 37. For example, it is possible to imagine sham arrangements where the agree-

ment is concocted to mask a naked restraint on competition. Cf. *Dagher*, 547 U.S. at 6 n.1. But the courts below did not suggest that this is such a case—their view was that the NCAA's definition of amateurism is inconsistent, not that it is pretextual—and any such argument would be belied by the context and history showing that the NCAA eligibility rules were created and have been maintained for legitimate and procompetitive purposes.

2. Board of Regents dictates rejection of liability here.

Plaintiffs' argument against quick-look review also turns *Board of Regents* inside out. Plaintiffs are correct that *Board of Regents* treated full Rule-of-Reason review as appropriate for the NCAA's ancillary restraints. Resp. Br. 26-27. But the Court did not, as plaintiffs suggest, equate full Rule-of-Reason scrutiny with "ample latitude." See *id.* at 27. The Court instead observed that the NCAA needs "ample latitude" to play its "critical role in the maintenance of a revered tradition of amateurism in college sports." 468 U.S. at 120. For that core element of the NCAA's product, the Court stated flatly that "athletes must not be paid," expressly contrasting the amateurism rules with the telecast restraints challenged in *Board of Regents*, which "do not * * * fit into the same mold" as those "defining * * * the eligibility of participants." *Id.* at 117.[1]

[1] The United States is wrong to contend that the NCAA eligibility rules are "[u]nlike the 'core' pricing conduct in *Dagher*." U.S. Br. 21. The NCAA's joint venture is a sports league, and the rules of play—necessarily including those defining eligibility ***to*** play—surely "involve[] the core activity of the joint venture itself." 547 U.S. at 7. The government's further contention that it would be

The Court's discussion explicitly assumed the validity of the NCAA's eligibility rules. And it is not just we that say so: The courts ***uniformly*** have read *Board of Regents* that way, beginning shortly after issuance with the Fifth Circuit's decision in *McCormack* and running through the Seventh Circuit's recent holding in *Deppe*. See Opening Br. 26-29.

Plaintiffs nevertheless assert that *Board of Regents*' discussion of NCAA eligibility rules was dicta. Resp. Br. 29. (Tellingly, the government makes no such assertion. See U.S. Br. 16-17.) Yet plaintiffs do not respond to our showing that *Board of Regents*' discussion of the eligibility rules, and its contrast of those rules with the NCAA broadcast limits, was central to the Court's reasoning and therefore an element of its holding. Opening Br. 25-26.

Plaintiffs likewise are wrong to say that *Board of Regents*' analysis does not still govern, or that college sports today bears "no resemblance" to its operation in 1984. Resp. Br. 29-30; see U.S. Br. 17. *Board of Regents* applied antitrust principles that were settled even at the time, and the Court has cited the decision repeatedly in the intervening years as a leading Sherman Act authority, with no hint of disapproval. See, *e.g.*, *American Needle*, 560 U.S. at 192, 202. And although it is true that college sports generate substantial revenues, that also was true at the time of *Board of Regents*. The single broadcast arrangement at issue in that case involved payments exceeding $130 million

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"anomalous" to treat as a core restraint an agreement that has been found not to affect consumer demand (U.S. Br. 21) is a non sequitur; the impact on demand has nothing to do with the quality of the restraint as an integral—that is, a "core"—part of the venture's joint activity.

(see 468 U.S. at 93)—well over $300 million in 2021 dollars—and NCAA sports generated revenues exceeding $1 billion that year. See NCAA, *Revenues and expenses of intercollegiate athletics programs, analysis of financial trends and relationships 1981-1985*, at 21 (Sept. 1986), https://tinyurl.com/8k28j5wj. The Court therefore could not have been under the impression when it decided *Board of Regents* that college sports were played with materially different economic motivations than operate today; and plaintiffs cannot reasonably assert that the same decision that predictably led to increased revenue is no longer valid because revenue increased.

The great success of college sports, both before and after *Board of Regents*, therefore confirms that the NCAA and its member institutions have created a very desirable product—demonstrating that the rules establishing that product are procompetitive—but does nothing to show that college sports have fundamentally changed in character during the intervening years.

3. Judicial experience militates against liability.

We showed in our opening brief that judicial experience can support "a confident conclusion about the principal tendency of a restriction." *California Dental*, 526 U.S. at 781; see Opening Br. 26-29. Plaintiffs do not deny that is so, and also do not deny that resolution of a case on a quick look may be appropriate when "analyses in case after case reach identical conclusions." *California Dental*, 526 U.S. at 781. Nor do they dispute that we have just such experience here, where for 30 years every decision to address NCAA eligibility rules outside of the Ninth Circuit has upheld them.

Plaintiffs simply urge the Court to disregard this body of law as resting on "out-of-date NCAA mythology," even though one these decisions is fewer than three years old. Resp. Br. 31.

But this contention assumes its conclusion. What plaintiffs label "mythology," courts have identified as real-world experience showing that NCAA eligibility rules are procompetitive. That multiple courts independently have reached this conclusion provides confidence that the NCAA eligibility rules are procompetitive. For its part, the United States disregards this consideration altogether.

4. History and common sense validate the NCAA eligibility rules.

Finally, and perhaps most fundamentally, neither plaintiffs nor the United States has anything to say about the common sense of the matter—that is, about the circumstances surrounding the development and century-long maintenance of amateur college sports, or about the practical considerations that must animate the operation of a college sports league.

Plaintiffs notably do not deny that the NCAA's predecessor organization announced the no pay-to-play amateurism principle, not as a money-saving conspiracy, but to root out abuses in college sports; that amateurism continued as the defining characteristic of college sports over succeeding generations; or that athletics has long been part of colleges' legitimate educational mission. Nor do plaintiffs say that this Court was wrong, nearly 80 years after the amateurism principle was first announced, to embrace the "revered tradition of amateurism in college sports." *Board of Regents*, 468 U.S. at 120.

At the same time, plaintiffs also do not deny that participants in a sports league ***must*** agree on jointly adopted rules that govern the league's operation. And they do not contend that a league based on amateurism necessarily is illegitimate; they hardly could, given this Court's statements praising amateurism in *Board of Regents* and the finding below that colleges ***may*** jointly preclude payments to student-athletes that are "unrelated to education." So necessarily, as the case comes to this Court, plaintiffs' contention is simply that the NCAA drew the amateurism line in the wrong place.

* * *

These considerations all demonstrate that the "circumstances, details, and logic" of the eligibility rules support a finding that the rules are procompetitive. The agreement challenged here, governing conduct where joint action is unavoidable, concerns the sort of arrangement that this Court has said could be assumed to be procompetitive. It makes possible a valuable and integral component of a broader educational enterprise.[2] And it cannot fairly be characterized as having been commenced "on bad faith or [as] * * * otherwise nonsensical." *Race Tires America*, 614

[2] We agree that "petitioners' educational mission" does not offer antitrust immunity. U.S. Br. 22. But our recognition that amateurism rules advance legitimate educational purposes is relevant to the determination whether the rules have anticompetitive tendencies. "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" in Sherman Act cases because "knowledge of intent may help the court to interpret facts and to predict consequences." *Board of Trade of City of Chicago* v. *United States*, 246 U.S. 231, 238 (1918).

F.3d at 81. When the Court "draw[s] on its judicial experience and common sense" (*Ashcroft* v. *Iqbal*, 556 U.S. 662, 679 (2009)), those considerations should lead it to reject the antitrust challenge in this case "in the twinkling of an eye."

II. The courts below misapplied Rule of Reason burden-shifting review.

Rule of Reason review can take a variety of forms, from a "quick look," to a more robust "quicker look," to cases where three-step burden-shifting is appropriate. Opening Br. 21-22. Here, the courts below took the most intrusive approach—and still got the answer wrong. They invoked the Rule of Reason to rewrite NCAA rules that draw reasonable lines to effectuate procompetitive purposes. Plaintiffs and the United States offer very different defenses of that judgment, but both embrace the wrong legal standard and disregard or mischaracterize what actually happened in the lower courts. Accordingly, if the Court moves beyond a quick look to fuller Rule of Reason review, it still should reverse the judgment below.

A. The district court effectively conducted a less-restrictive-alternative inquiry at step 2 of the Rule-of-Reason test.

In our opening brief, we explained how the lower courts erred in their application of the Rule of Reason's step 2 inquiry. At that stage, defendants had the burden of showing that the NCAA rules, as they currently exist, are procompetitive. The courts below found that defendants made that showing because differentiating college from professional sports—as the NCAA rules prohibiting pay unquestionably do—is procompetitive. The district court was wrong to go further at step 2 by obligating the defendants to prove

that the same procompetitive benefits could not be obtained from less restrictive rules. See Opening Br. 34-38. The responses to this point offered by plaintiffs and the United States are deeply confused.

1. Plaintiffs offer no substantive defense of the step 2 holding.

Plaintiffs' response is entirely semantic. Plaintiffs say that the district court considered the NCAA rules "in the aggregate," not "one by one," and therefore recognize that the question is whether that body of rules is procompetitive. Resp. Br. 41. Plaintiffs also acknowledge that the courts below ***did*** find the rules to be procompetitive, recognizing that "the district court was willing to 'credit[] the importance to consumer demand of maintaining a distinction between college sports and professional sports.'" *Id.* at 32 (quoting NCAA Pet. App. 21a).

Plaintiffs nevertheless insist that the district court was right to go further at step 2, determining that the NCAA rules are too restrictive, because: (1) those rules have "abandoned any coherent definition of amateurism"; and (2) although the court could have stopped its step 2 analysis upon finding the rules incoherent, the court "threw [defendants] a step-2 lifeline" by finding it procompetitive to distinguish college from professional sports. Resp. Br. 42 (quoting NCAA Pet. App. 92a). These assertions are either beside the point or meaningless.

Even assuming that the NCAA's definition of amateurism has inconsistencies,[3] the dispositive consideration at step 2 is that the district court found the

[3] In fact, that assertion is wrong. That students should not be paid to play has been, and remains, the controlling principle of

NCAA rules prohibiting pay to be procompetitive. Any inquiry into whether those rules really could be narrowed while fully preserving demand for the college-sports product should have been made at step 3, with the burden on plaintiffs. And having found the NCAA eligibility rules to be procompetitive, throwing defendants a "lifeline" wasn't a matter of optional grace on the district court's part; restrictions either are or aren't procompetitive, and if they are—as the courts below found the NCAA's rules to be here—step 2 is satisfied as a matter of law.

Plaintiffs also are wrong when they insist that the courts below did not make defendants' burden more difficult than it should have been at step 2. Resp. Br. 44. Burdens of proof and persuasion have real impact, and are placed where they are for a purpose. In the Rule-of-Reason inquiry, those burdens are assigned to avoid giving defendants the impossible obligation to anticipate and refute hypothetical less restrictive alternatives. See C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 Colum. L. Rev. 927, 979-80 (2016). The decisions below did that here, effectively requiring defendants to prove that the district court's novel definition would not be virtually as

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NCAA sports. The asserted incoherence of the rules stems from the unavoidable reality that reasonable people can disagree on where to draw the amateurism lines, where amateur student-athletes properly receive payments for legitimate educational and athletic expenses, and where the NCAA has tried to respond as appropriate to changing circumstances. See Opening Br. 5-7. We note that the United States has not accused the NCAA of incoherence in its definition of amateurism, instead recognizing, with evident approval, that "the NCAA and its member schools have long marketed student-athletes' amateur status as an essential attribute of intercollegiate sports." U.S. Br. 15.

effective as the existing eligibility rules in preserving consumer demand for NCAA sports. See Opening Br. 37-39.

The United States makes a very different step 2 argument. It says that the courts below ***did*** review the NCAA restrictions rule by rule, reporting that the district court found some, but not all, of the rules to be procompetitive. U.S. Br. 22-24; see *id*. at 27. The rules that survived this step 2 review, the United States continues, moved on to step 3. *Id*. at 29-30. This recalibration of plaintiffs' argument, however, requires the United States to engage in gymnastics that would make antitrust doctrine incoherent.

First, the United States is wrong when it says that NCAA eligibility rules were appropriately considered rule-by-rule at step 2 after those rules had been considered as a group at step 1. U.S. Br. 27-28. That approach allows for a bizarre and asymmetrical mismatch, permitting a court to hold particular restraints individually invalid at step 2 because not shown to be procompetitive, even though those same individual restraints had not been established at step 1 to have substantial anticompetitive effects. And that, in fact, is what the United States says happened here; the government recognizes that the district court conducted the step 1 inquiry in the aggregate (see U.S. Br. 27 n.8; see also Opening Br. 34-35), even as, in the United States' telling, the court disaggregated the rules at step 2.

Second, the government makes no real response to our demonstration that the courts below effectively conducted the less-restrictive-alternative analysis at step 2, flipping the burden and improperly requiring defendants to show that a less restrictive alternative

is ***not*** available. See Opening Br. 37-39. In arguing to the contrary, the government says that the individual NCAA rules shown to be procompetitive at step 2 moved on to review at step 3. U.S. Br. 29. But by purporting to find at step 2 that the NCAA rules are procompetitive only to the extent that they prevent unlimited cash payments that are unrelated to education—a distinction plaintiffs concede does not exist within the rules (Resp. Br. 41)—the district court predetermined the outcome at step 3. An individual rule that failed to make the grade at step 2 would never reach step 3; and even if the rules are viewed in the aggregate, the limits exceeding those found procompetitive at step 2 inevitably would be eliminated at step 3 as more restrictive than necessary. The government has nothing to say about this distortion of the Sherman Act analysis.

B. The courts below should have upheld the NCAA's rules at step 3 of the Rule-of-Reason test.

In our opening brief, we also showed that the courts below went astray at step 3 by faulting defendants for not offering evidence to disprove the effectiveness of the district court's favored less restrictive alternative; that this error effectively subjected defendants to a ***least*** restrictive alternative requirement; and that lines drawn by entities like sports leagues should be upheld at step 3 when those lines are reasonable. Opening Br. 38-44. Neither plaintiffs nor the government offers any real response to these points.

1. Plaintiffs and the government ignore the lower courts' step 3 errors.

Plaintiffs content themselves with a conclusory recital of the step 3 test articulated by the courts below. Resp. Br. 46. They say nothing about what the courts ***actually did*** at step 3, the requirements the courts imposed on defendants, or the step 3 errors identified in our opening brief.

For its part, the government says that the step 3 holding below "followed logically from the district court's factual findings." U.S. Br. 30. But as we showed in our opening brief (at 38-39), those findings were infected by misallocation of the burden of proof, including the Ninth Circuit's reliance on defendants' failure at step 3 to "present evidence that demand would suffer" if expanded pay-to-play is permitted—even though plaintiffs had the burden at that stage. Pet. App. 45a. The government ignores this point.

The government does deny that the courts below effectively imposed a least-restrictive-alternative standard, asserting that the rules concocted by the courts are "substantially" less restrictive than the existing NCAA rules. U.S. Br. 31-32. But our point is that the approach taken below has the effect of condemning NCAA rules at step 2, before the less-restrictive-alternative standard of step 3 even comes into play. That converts the requirement into one of least restrictive alternative. Again, the government offers no response.

Moreover, the government's portrayal of what happened below is misleading, relying on what it characterizes as "[t]he district court's analysis of [plaintiffs'] proffered [less restrictive] alternatives." U.S. Br. 30; see *id.* at 30-32. But the district court ***rejected*** the

alternatives proposed by plaintiffs and came up with its own substitute, which it identified as a proposal of plaintiffs "as modified by the court." Pet. App. 158a. Defendants did not learn about the possibility of this alternative—which included, among other things, authorization of limitless paid post-eligibility internships and annual $6000 cash "academic achievement" payments—until the district court issued its decision. Defendants therefore never had an opportunity during the Rule-of-Reason analysis to address the alternative adopted by the district court.

2. The courts below should have upheld the NCAA's reasonable line drawing.

Plaintiffs and the United States also commit a more fundamental error: they urge application of the wrong standard at step 3.

As discussed above in connection with the "quick look" analysis, joint action is necessary here both to define and to produce the product. In that context, once defendants show at step 2 that the product as so defined is indeed procompetitive, the product should survive at step 3 so long as the lines used to establish that definition are reasonable. See Opening Br. 41-44. As then-Justice Rehnquist recognized, the ultimate question in a Rule of Reason case is one of "reasonableness," a standard also embraced by Judge Bork and other authorities. See Opening Br. 40-41.

That standard makes particular sense in the unusual setting here. For legitimate jointly produced products that are ***defined*** by the governing rules, lines must be drawn somewhere, and often can reasonably be drawn in more than one place. And it is no answer to say that the placement of a product-defining line simply can't be reasonable if that line could

have been drawn elsewhere in a manner that would be "substantially less restrictive." After all, determining whether a different product definition would in fact be "substantially" less restrictive, and whether the product as so defined would be just as effective with the targeted segment of the market (and, indeed, actually would be the same product), itself requires the exercise of judgment. In such circumstances, so long as the product is shown to have procompetitive value, it is difficult "to perceive significant social gain from channeling transactions into one form or another." *Continental T.V., Inc.*, 433 U.S. at 58 n.9.

The United States nevertheless maintains that it is immaterial defendants here seek to market an amateur college-sports product in which the players are not paid to play; all that matters, the government says, is that consumers would be just as happy with a similar product where players ***are*** paid something (but not too much) to play. See U.S. Br. 25-26 ("what matters for antitrust purposes is not whether the *NCAA* (or its member schools or conferences) view particular amateurism-related restrictions as integral to the product, but whether those restrictions make the product more attractive to consumers"). But that isn't so; what defendants want to sell ***does*** matter—so long as they have established that their preferred amateur college-sports product is procompetitive. As Judge Easterbrook wrote for the Seventh Circuit, "[t]o say that participants in an organization may cooperate is to say that they may control what they make and how to sell it." *Chicago Prof'l Sports Ltd. P'ship*, 95 F.3d at 598.

Consider this example. A professional basketball league defines its sport as having five players per

team on the court at a time. Would-be professional basketball players sue the league under the Sherman Act, arguing that professional basketball should be altered so that it is played by seven players at a time; that modification of the game would be substantially less restrictive, the plaintiffs argue, because it would significantly increase the demand for inputs in the labor market for professional basketball players.

Is it conceivable that such a suit would succeed, even if plaintiffs' expert credibly testified that consumers would enjoy seven-player basketball just as much as the five-player version? Surely not. Lines must be drawn defining the sport; the lines as drawn by the defendant basketball league create a product that is demanded by consumers, even though consumers might like a variant of that product just as much; and those lines are reasonable. Those factors should mandate judgment for the basketball-league defendants—and in principle, this case is no different.[4]

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[4] Of course, college sports differ from our hypothetical basketball league in one obvious respect: college athletics are defined not only by how many players take the court at a time but by whether those players are paid. And as the United States observes, "[f]ew businesses could credibly assert that their products are defined by the compensation (or lack thereof) that their workers receive, much less that their compensation policies foster consumer demand." U.S. Br. 15. But the United States acknowledges that NCAA sports ***is*** that rare business, as *Board of Regents* recognized. That being so, the NCAA's sports-defining eligibility rules are identical in principle to the rules setting the number of players that take the court in our professional basketball league. The *amicus* States supporting plaintiffs acknowledge that "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." Ariz. Br. 16.

3. Key elements of the district court's injunction were a product of its legal errors.

When the government attempts to defend the district court's creation of new categories of pay for college football and basketball players, its discussion vividly illustrates how the court's misapplication of the legal standard infected its ruling.

As we showed in our opening brief (at 10-11, 17-18), the district court noted that the NCAA rules permit schools to offer student-athletes tokens of participation in athletics and awards for exceptional athletic achievement, and that it is theoretically possible for a student-athlete to receive aggregate awards of these sorts worth approximately $6000 in a year. Because the possibility of such payments "ha[d] not been shown to reduce consumer demand" for college sports, the court continued, schools ***also*** must be permitted to make very different sorts of "academic and graduation awards" in that same amount to ***all*** student-athletes who are eligible to play college sports (Pet. App. 162a)—even though, as the Ninth Circuit acknowledged, there was no evidence in the record that ***any*** student-athlete ever had received payments anywhere close to that amount. See *id.* at 47a.

The government now says that the district court's authorization of these annual "academic achievement" payments of almost $6000 to all student-athletes "flowed logically from the district court's factual findings" and that, in any event, any overreach in this ruling could be remedied on a motion for clarification or modification of the injunction. U.S. Br. 34-35. This contention is wrong.

Given the likelihood that schools will race each other to the bottom once universal "academic achievement" payments are authorized (see *Board of Regents*, 468 U.S. at 122 (White, J., dissenting)), the district court's injunction threatens to make pay-to-play ubiquitous in college football and basketball. Yet it hardly "flow[s] logically" from the district court's finding that consumers are unbothered by very occasional awards for exceptional athletic achievement to its conclusion that fans would be just as indifferent to naked and universal pay-to-play going to all players. And it should be needless to say that the government does not establish that the district court's sleight-of-hand reasoning was correct, or harmless, because defendants could ask the same district judge to modify or clarify her initial set of mistakes.

We also showed in our opening brief that the injunction requires schools to permit post-eligibility cash internships with no limits on pay. Opening Br. 17. The government responds "that *typical* paid internships for college students provide modest remuneration." U.S. Br. 33. But that observation is circular; the change wrought ***by*** the injunction authorizes cash payments for future internships in unlimited amounts, which for some student-athletes will ***become*** typical.[5] The government adds that, "[p]roperly construed, the injunction does not permit schools to award lucrative internships unrelated to educational

[5] Answering our observation that boosters might finance such internships, the government responds that the injunction affects only internships made available from conferences or schools. U.S. Br. 33. But it is common for boosters to run their contributions through schools. See, *e.g.*, Yong Jae Ko, et al., *What Motivates Donors to Athletic Programs: A New Model of Donor Behavior*, 43 Nonprofit and Voluntary Sector Quarterly 523 (2014).

objectives." *Id.* at 34. "Educational" is not defined in the injunction, however, so even if the government's ipse dixit construction of the injunction is the one intended, it offers no actual protection against pay-to-play and associated recruiting abuses.

Moreover, in rejecting the NCAA's reasonable approach to academic achievement payments and paid internships, the lower courts not only adopted the role of "central planners" (*Law Offices of Curtis V. Trinko, LLP*, 540 U.S. at 408), but also made inevitable unending litigation in which each expansion of benefits supports the imposition of liability for not expanding the benefits further, or for not having expanded them in the past. Thus, the courts below cited the increase to full cost of attendance (at issue in *O'Bannon*) as support for the award ordered here, and the same district court has already ordered discovery to proceed in the next such case.

Most fundamentally, the government's discussion confirms that the courts below went astray by failing to defer to the NCAA's reasonable line-drawing judgments regarding its rules prohibiting pay. Given the long history of amateurism in college sports and the district court's finding that compensation limits procompetitively distinguish college from professional athletics, it surely was reasonable for the NCAA to conclude that its desire to authorize the occasional rare award for exceptional athletic achievement did not require it also to permit universal pay-to-play, with the significant change in the character of college athletics that such a revision necessarily would entail. And given that the government itself recognizes that "highly lucrative post-eligibility internships" are

problematic, it also was reasonable for the NCAA to impose prophylactic rules precluding such payments.

That should have been the end of the inquiry. Plaintiffs' and the government's much more intrusive approach invites litigation and arbitrary decisions, will lead to false Sherman Act positives, and encourages judges to make technical decisions that are well beyond their expertise—all without making a substantial addition to competition or consumer welfare.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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