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, SUNBELT CONFERENCE, AND WESTERN ATHLETIC CONFERENCE,

Petitioners,

v.

SHAWNE ALSTON, ET AL.,

Respondents.

On Petition for a 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

Pursuant to Rule 29.6 of the Rules of this Court, petitioners incorporate by reference the corporate disclosure statement that appears in the petition for a writ of certiorari. No amendments are needed to make that statement current.

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REPLY BRIEF FOR PETITIONERS

Plaintiffs conspicuously do not deny the key features of the holdings below. They could hardly dispute that the Ninth Circuit confirmed a single district judge as the perpetual overseer of college sports. They evidently embrace the idea that, under the standard set by the Ninth Circuit, litigation against the NCAA and its member schools will continue endlessly, with vast antitrust liability to follow after every change—or even every consideration of change—in NCAA eligibility rules. Despite half-hearted efforts to minimize the magnitude of the student-athlete compensation authorized by the Ninth Circuit, plaintiffs must recognize that the ruling below will cause sweeping changes to college sports, for the first time permitting the payment of very substantial cash sums to student-athletes in return for playing. And plaintiffs agree that the courts below mandated all of these broad changes under the Sherman Act, even as Congress and the states are considering very different sorts of modifications to college sports as a matter of legislative policy.

In nevertheless opposing review, plaintiffs maintain that the decisions below, for all their enormous practical importance, simply applied the Rule of Reason to the record in modest and unexceptional ways. But that is not so: The extraordinary result below—only the second decision (following the Ninth Circuit's own earlier ruling in *O'Bannon*) ever to have premised antitrust liability on an NCAA eligibility rule—was the product of an equally aberrational legal analysis. As the petition showed and petitioners' *amici* confirm, the Ninth Circuit effectively applied a least-restrictive alternative test that will make liability for a wide

range of joint ventures inevitable, discouraging procompetitive decision-making. And so far as NCAA eligibility rules in particular are concerned, the holding below cements an acknowledged conflict in the circuits on the controlling standard; plaintiffs' contrary argument rests on the assertion that the Seventh and other circuits did not mean what they plainly said.

As Justice Kavanaugh very recently observed, addressing similar circumstances: "Ordinarily, a decision of such legal and economic significance might warrant this Court's review." *National Football League* v. *Ninth Inning, Inc.*, 2020 WL 6385695, at *1 (U.S. Nov. 2, 2020) (Mem.) (Kavanaugh, J., respecting the denial of certiorari). And here, unlike in *Ninth Inning*, the Ninth Circuit's decision is both final and immediately consequential. This Court should grant review and reverse.

A. The Ninth Circuit misapplied the Rule of Reason.

1. Plaintiffs seize on isolated snippets of language from the Ninth Circuit's opinion to argue that its decision was an ordinary application of the Rule of Reason. Opp. 24-26. But that argument obscures the real nature and necessary practical implications of the decisions below, which effectively require defendants to satisfy a least restrictive alternative test. As *amici* antitrust economists explain, "both the district court and Ninth Circuit effectively applied a 'least' restrictive alternative approach without placing any burden on the plaintiffs to show that the alternative approach could preserve the NCAA's conception of its own product design." *Amici* Antitrust Economists Br. 3. See *Amici* Antitrust Law and Business School Professors Br. 3-4.

The course taken by the Ninth Circuit to reach its finding of liability proves that point. Plaintiffs in this case challenge "the NCAA's entire [student-athlete] compensation framework" (Pet. App. 17a), which includes a substantial set of interconnected limits on payments to student-athletes that, in the aggregate, are designed to preserve the unique status of college sports. Assessing this challenge, the courts below found that distinguishing college from professional sports—which, as this Court recognized in *Board of Regents*, is the manifest goal of these rules—*does* have a procompetitive effect. *Id.* at 147a-148a, 42a-43a. Nevertheless, at the second stage of the Rule of Reason analysis, the Ninth Circuit required defendants to show that "*each type* of challenged rule" is procompetitive. *Id.* at 42a (emphasis added). Under that standard, defendants must prove that every restrictive element of the NCAA rules is strictly necessary—that is, must satisfy a least restrictive alternative test.

And that understanding of the decision below is confirmed by the Ninth Circuit's analysis at the third stage of the Rule of Reason inquiry, where it held that plaintiffs established the availability of a less restrictive alternative because "the NCAA presented no evidence that demand will suffer" if payments to student athletes are increased. Pet. App. 45a. Despite the court of appeals' additional passing statement that plaintiffs were required to establish a less restrictive alternative (*id.* at 43a), the court of appeals' actual approach flipped the proper placement of the burden at the third stage: Defendants were obligated to prove that demand *would* suffer if the rules were changed.

That placement of the burden is critical. As explained in the petition (at 33-35), it always will be possible for plaintiffs in a case like this to argue that increasing permissible payments by just a little bit (or eliminating just one of a set of restrictive rules) will not diminish demand for college sports, while it will be nearly impossible for defendants to prove that increasing student-athlete benefits just a little will destroy the rules' procompetitive value. Plaintiffs make no response to the petition's showing that, under such an approach, no procompetitive restriction ever will be sustainable, leading joint ventures to lose the ability to design and market their products. See Pet. 33-35; *Amici* Antitrust Economists Br. 6-8. The Ninth Circuit's decision therefore will be a template for future antitrust challenges, both to NCAA rules and to myriad other joint ventures.

2. Plaintiffs seek to avoid this conclusion by asserting that the NCAA is not a joint venture at all because its member institutions are horizontal competitors. Opp. 26-28. In fact, however, joint ventures *typically* involve horizontal competitors. See, *e.g.*, *American Needle*, 560 U.S. at 202 (although teams comprising the National Football League are horizontal competitors, "'[t]he special characteristics of this industry may provide a justification' for many kinds of agreements") (quoting *Brown* v. *Pro Football, Inc.,* 518 U.S. 231, 252 (1996)). Justice Kavanaugh recently made that point, explaining that the "[t]he NFL and its member teams operate as a joint venture" and observing that a rule precluding joint action by the teams "appears to be in substantial tension with antitrust principles and precedents." *Ninth Inning*, 2020 WL 6385695, at *1. That conclusion applies with obvious force in this case, where "[i]n order to preserve the

character and quality of the 'product'"—college sports—"athletes must not be paid." *Board of Regents,* 468 U.S. at 102.

It is no answer for plaintiffs to further insist that the Rule of Reason applies to joint ventures (Opp. 28); the issue is not *whether* the Rule of Reason applies in this case—everyone agrees that it does—but *how* it applies. Here, rules that distinguish college from professional sports actually define the jointly produced product and therefore are both necessary and procompetitive. See *Board of Regents*, 468 U.S. at 117-118; *Amici* Antitrust Economists Br. 9. In such circumstances, under the Rule of Reason as articulated by this Court and applied by other courts of appeals, courts should not "calibrate degrees of legal necessity." *Rothery Storage*, 792 F.2d at 227. Plaintiffs make no response.

Plaintiffs also get no further with their lengthy recitation of the district court's factual findings and their declaration that the Rule of Reason is "fact-based." Opp. 2, 12-13, 25-26. Those findings are beside the point if evaluated under the wrong legal standard—as happened below. Nor are defendants asking for "antitrust immunity," as plaintiffs repeatedly assert. Opp. 4, 30. To the contrary, we agree that "[i]t makes perfect economic sense * * * for antitrust courts to scrutinize firms and collaborations when they create *restraints that go beyond the product design itself*." *Amici* Antitrust Economists Br. 7. And even as to NCAA eligibility rules, which define the college sports product, Rule of Reason scrutiny governs. But when joint action is necessary if the product is to be marketed at all, "the agreement is likely to survive the Rule of Reason." *American Needle,* 560 U.S. at

203. The courts below disregarded that fundamental principle.

B. The Circuits are in conflict on the Rule of Reason standard governing the NCAA and other joint ventures.

Plaintiffs make no serious response to the petition's demonstration that the circuits are in conflict on the level of scrutiny that is appropriate when a joint venture's rules in general, and NCAA eligibility rules in particular, are challenged. Pet. 20-26. The decisions that disagree with the Ninth Circuit did not, as plaintiffs would have it, simply accept an NCAA "assertion" that eligibility rules are procompetitive. Opp. 2. Instead, expressly following *Board of Regents*, these courts found that rules designed to preserve the unique status of college sports are presumptively procompetitive. The Ninth Circuit has followed a different approach.[1]

1. The Seventh Circuit held in *Deppe* that "most NCAA eligibility rules are entitled to the procompetitive presumption announced in *Board of Regents* because they define what it means to be a student-athlete and thus preserve the tradition and amateur character of college athletics." 893 F.3d at 502; see Pet. 23-24. The Ninth Circuit, in the decision below and in *O'Bannon*, definitively rejected that approach. See Pet. 8-9, 24; Pet. App. 29a-30a. *Deppe* thus confirmed and solidified the conflict between the Seventh and Ninth Circuits that the Ninth Circuit had expressly acknowledged in *O'Bannon*. See Pet. 23-24.

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[1] Plaintiffs are wrong in contending that defendants did not make this argument below. Opp. 23. Defendants noted that the Ninth Circuit had rejected the argument in *O'Bannon*, specifically preserving it here. Def. Joint. Op. CA. Br. 25 n.2.

Plaintiffs' principal response is that *Deppe*, although decided three years after *O'Bannon*, applied "pre-*O'Bannon* law." Opp. 20. But *Deppe* states the *current* standard in the Seventh Circuit; that rule cannot be reconciled with the Ninth Circuit's approach, both in this case and in *O'Bannon*; and the Seventh Circuit, applying the *Deppe* rule, would have decided this case differently than did the Ninth Circuit.[2]

In seeking to avoid that latter conclusion, plaintiffs note that the Seventh Circuit, in *Agnew*, held that NCAA rules limiting the number of permissible athletic scholarships and restricting scholarships to one year's length are not designed to preserve amateurism, and therefore are not presumptively procompetitive. Opp. 21. But the Seventh Circuit reached that conclusion in *Agnew* because it found that "[t]he Bylaws at issue in th[at] case" were "not eligibility rules, nor do we conclude that they 'fit into the same mold' as eligibility rules." 683 F.3d at 343. That was so because "[i]ssuing more scholarships (thus creating more amateur players) and issuing longer scholarships cannot be said to have an obviously negative impact on amateurism." *Id.* at 344.

This case, in sharp contrast, involves a challenge to student-payment eligibility rules that seeks to "dismantle the NCAA's *entire* [student-athlete] compensation framework." Pet. App. 17a (emphasis added). It is hard to imagine rules that are more "clearly meant

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[2] The *Deppe* plaintiffs addressed *O'Bannon* at length in briefing before the Seventh Circuit, so there is no doubt that the Seventh Circuit accounted for, and rejected, the Ninth Circuit's approach. See Appellants' Opening Br., *Deppe* v. *NCAA,* No. 17-1711 (7th Cir.), 2017 WL 2225300; Appellants' Reply Br., *Deppe* v. *NCAA,* No. 17-1711 (7th Cir.), 2017 WL 2851227.

to help maintain the revered tradition of amateurism in college sports or the preservation of the student-athlete in higher education." *Deppe*, 893 F.3d at 501 (internal quotations omitted). The litigation here, which was brought specifically to increase payments to student-athletes who were then playing, therefore surely would have come out the other way in the Seventh Circuit. See *Agnew*, 683 F.3d at 343 ("bylaws eliminating the eligibility of players who receive cash payments beyond the costs attendant to receiving an education * * * clearly protect[] amateurism").

2. As for the Third Circuit's decision in *Smith* and the Fifth Circuit's ruling in *McCormack*—decisions that also upheld NCAA eligibility rules as presumptively procompetitive (Pet. 24-25)—plaintiffs observe only that those courts invoked the Rule of Reason. Opp. 20-21. But that is a non sequitur. Again, the question is not whether but *how* the Rule of Reason applies. The "twinkling of an eye" standard is not a departure from the Rule of Reason; it is a recognition that, "depending upon the concerted activity in question, the rule of Reason may not require a detailed analysis." *American Needle*, 560 U.S. at 203. The Third, Fifth, and Seventh Circuits applied that principle to find NCAA eligibility rules lawful without a detailed factual showing. See Pet. 24-25. The Ninth Circuit expressly disagrees. See Pet. App. 38a (district court "reasonably relied on demand analyses, survey evidence, and NCAA testimony").[3]

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[3] Plaintiffs' argument that the decision below "faithfully" followed *Board of Regents* (Opp. 1) is obviously wrong; in this case, as in *O'Bannon*, the Ninth Circuit dismissed this Court's considered language in *Board of Regents* as outdated dicta. See Pet. 21-22.

3. Although plaintiffs place great weight on this Court's denial of certiorari in *O'Bannon* (Opp. 1, 10-11), the distinctions between this case and *O'Bannon* confirm the importance of review here. Whatever doubt existed on the subject at the time *O'Bannon* was decided, the Seventh Circuit's post-*O'Bannon* decision in *Deppe* and the Ninth Circuit's expansive reading of *O'Bannon* below make the conflict in the circuits undeniable. Moreover, the court below characterized *O'Bannon* as having involved "a narrow challenge to restrictions on [name, image, and likeness] compensation," while "[b]y contrast, this action more broadly targets the 'interconnected set of NCAA rules that limit the compensation [student-athletes] may receive in exchange for their athletic services.'" Pet. App. 31a-32a (quoting *Alston,* 375 F. Supp. 3d at 1062).

And in *O'Bannon* the NCAA had abandoned the only bylaw that would have been affected by the Ninth Circuit's decision even prior to that court's ruling, greatly limiting the practical importance of the case (see Pet. 9 n.1); here, the courts below ordered sweeping changes to the whole set of NCAA eligibility rules. These developments mean that this case is vastly more significant than was *O'Bannon*, and make the need for review now compelling.

C. The errors committed below will have enormously important and destructive effects.

Plaintiffs make no response to the petition's showing that the decisions below will have enormously important practical consequences, for college sports and for joint ventures more generally.

First, plaintiffs do not deny that the district court has appointed itself the perpetual overseer of college

sports. To the contrary, by emphasizing the extent to which the Ninth Circuit reviewed the district court's decision under a highly deferential standard (Opp. 17, 26), plaintiffs accentuate the degree to which a single judge is now responsible for setting the eligibility rules that govern college sports nationwide. See Pet. 27.

Second, plaintiffs evidently recognize that the decisions below will unleash never-ending litigation against the NCAA and its member institutions, centered in the Ninth Circuit, with potentially enormous liability to follow over and over again. As plaintiffs' counsel here *already* have initiated a new set of such suits, they hardly could contend otherwise. See Pet. 28.

Third, the opposition confirms the extent to which the approach taken below makes the NCAA's authority to design its product into a one-way ratchet, with any liberalization of the payment rules to be used by future plaintiffs as a basis for establishing that prior rules, including rules that have not been changed, were illegal. Plaintiffs thus now insist that changes to the amateurism rules over time show that the rules never had, and now don't have, validity—arguing that every change is a source of liability. Opp. 8-9, 30; see Pet. 29.

Fourth, plaintiffs are wrong when they assert vaguely, and conclusorily, that changes to the NCAA rules mandated by the courts below are "modest" (an anodyne adjective to which they add the pregnant qualifier "in many respects," leaving apparent that in unspecified *other* respects, the changes are not modest at all). Opp. 3. Plaintiffs make no response to our

showings, among other things, that the decisions allow annual cash payments of at least $5600 to all student athletes—a sea change in current practice that will have profound consequences; and that the decision also permits limitless, and possibly abusive, cash payments to student-athletes for internships. Pet. 30. It is no answer to these concerns that individual schools are not required to make such payments. Opp. 3. As noted by Justice White in *Board of Regents*, absent jointly adopted amateurism rules, a race to the bottom is inevitable: "No single institution could confidently enforce its own standards since it could not trust its competitors to do the same." 468 U.S. at 122 (White, J., dissenting).

Fifth, we show in the petition that the holdings below threaten to undermine the validity of all joint ventures. Pet. 31. For the reasons already noted, plaintiffs' response—that the NCAA is not a joint venture—is plainly wrong. Consequently, there is little doubt that the Ninth Circuit's approach will subject the standards adopted by legitimate business joint ventures to continuous judicial second-guessing, with treble damages imposed if the businesses guess wrong on the judicial response. See *Amici* Antitrust Economists Br. 11-13; *Amici* Antitrust Law and Business School Professors Br. 7-9.

Finally, plaintiffs' presentation confirms that the changes to the student-athlete payment rules that they demand are more appropriately presented to Congress and the states than to an antitrust court. Plaintiffs invoke concerns of equity and policy. Opp. 5-6, 29-30. But those considerations, which avowedly are motivating Congress's and the states' current consideration of legislation addressing student-athlete

compensation, have no place in the antitrust-law analysis. Pet. 32. Absent correction of the errors made below, any forthcoming legislation will be premised on the Ninth Circuit's misstatement of the existing Sherman Act constraints on NCAA rules, which inevitably will distort the development of new standards in this important area. Correction of the errors made below therefore would clarify antitrust principles, while assuring that litigation and legislation remain on appropriately separate paths.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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