Nos. 20-512, 20-520

In the Supreme Court of the United States

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

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

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether restraints that competing NCAA member schools have agreed to impose in the name of "amateurism" should be exempt from challenge under the antitrust laws, as Petitioners contend, or whether they are subject to scrutiny under the rule of reason—a fact-based analysis that this Court and the courts of appeals have uniformly applied to agreements restricting competition among NCAA members and that the courts below undertook based on the particular facts established at trial in this case.

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INTRODUCTION

The petitions in this case largely repeat arguments the NCAA made in a petition that this Court denied just a few years ago. In *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015), the Ninth Circuit upheld a district court's application of the Sherman Act's rule of reason to a particular set of facts, invalidating restraints that the NCAA's member schools had agreed to impose on compensation for the use of student-athletes' names, images, and likenesses. Although both sides sought certiorari, this Court denied review. Both petitions in this case discuss *O'Bannon* at length.

This case is even less deserving of the Court's attention. The decision below does not plough any new legal ground; it applies the same, well-established antitrust standards to a different set of facts—here, facts relating to restrictions on benefits relating specifically to the student-athletes' education. As in *O'Bannon*, the courts below faithfully followed this Court's precedents, including *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984), which held that NCAA rules must be analyzed under the rule of reason. As in *O'Bannon*, the NCAA claims a conflict with other circuits, but a careful analysis shows that no conflict exists. As in *O'Bannon*, this case does not concern how antitrust law might apply to "joint ventures"—a structure that neither this Court nor the courts below have found applies to competitor schools within the NCAA. And—critically—since *O'Bannon*, Congress and state legislatures have begun to consider for themselves the question of player compensation and benefits in college sports. This legislative effort makes certiorari especially inappropriate.

Since *Board of Regents*, this Court's instructions have been clear: NCAA rules are subject to the rule of reason. This sensible rule of antitrust law requires courts to evaluate a restraint in the context of the market as it actually exists at the time. If a complaint does not plausibly allege an antitrust violation in a particular market—or if discovery does not reveal any genuine dispute of material fact—the court may perform the necessary analysis on motions, without a full-blown trial. But nothing in *Board of Regents* requires that a court uphold NCAA rules without discovery or trial, based simply on the NCAA's assertion that those rules are somehow linked to "amateurism." That is what Petitioners seek—a declaration from this Court that such rules must be upheld "without fact-intensive rule-of-reason analysis." NCAA Pet. 19. *Board of Regents* holds otherwise.

Indeed, applying the fact-based rule of reason is even more important today, given how much the facts have changed since *Board of Regents*. In the last 36 years, Division I basketball and Football Bowl Subdivision ("FBS") football have become multi-billion-dollar industries. The NCAA and its member conferences and schools receive billions of dollars every year through the hard work, sweat, and sometimes broken bodies of student-athletes. Coaches, assistant coaches, and athletic directors take millions in salaries. Yet the schools have agreed among themselves to limit what student-athletes may receive for their work in generating these extraordinary revenues. The agreements among these schools represent a classic horizontal restraint of trade—an agreement among competitors to limit how much they will have to expend to compete for talent and labor.

To be sure, some NCAA rules may be necessary to protect consumer demand for college sports as a distinct "product." But as a factual matter, the restraints in this case are not. The trial record shows that the challenged restraints are cost-cutting measures, plain and simple, and not reasonably necessary to maintain consumer demand for college sports. As a result, the district court found that they constitute unreasonable restraints of trade.

The decisions below are modest in many respects. They apply only to NCAA restrictions on *education-related benefits* that schools may offer Division I basketball and FBS football players—benefits like computers, science equipment, musical instruments, post-graduate scholarships, tutoring, study abroad, academic awards, and internships. In that sense, the injunction is of great consequence to the student-athletes whose work and sacrifice drive the multi-billion-dollar industry that is NCAA Division I football and basketball. But the injunction does not authorize so-called *pay for play*, which Petitioners argue would be the end of "amateur" sports. Nor does it *require* any school to provide these kinds of education-related benefits or prevent an individual conference from restricting such benefits if it chooses. In short, it simply enables individual schools and conferences to compete among themselves. There is no reason to believe that eliminating restraints on education-related benefits will "fundamentally transform the century-old institution of NCAA sports," as Petitioners claim. NCAA Pet. 5. Petitioners' sky-is-falling rhetoric is neither true nor appropriate in the context of a petition for certiorari from a fact-bound application of well-established law.

In the end, what Petitioners seek is nothing less than antitrust immunity. But they are making that request on the wrong side of First Street. If Congress believed there was a national interest in avoiding antitrust oversight of anticompetitive behavior in college athletics, it would have granted the NCAA's repeated requests for immunity. Yet it has declined to do so. To the contrary, Congress and many state legislatures have either adopted or are now considering proposals to require the NCAA and its members to roll back their restrictions on athlete compensation, recognizing the profound inequity of a system that enables conference executives, athletic directors, coaches, schools, television networks, and a host of others to make billions of dollars on the backs of young, often underprivileged players. One thing is clear, however: antitrust immunity for college sports is a question for the legislatures, not the courts. The current proposals pending in Congress and state legislatures—including the NCAA's latest request for antitrust immunity—provide yet another reason for this Court to decline review.

For these and other reasons, certiorari is even more inappropriate in this case than it was in *O'Bannon*. This Court should deny review.

STATEMENT

A. The Business of College Sports and the NCAA's Ever-Changing Definition of "Amateurism"

The NCAA is a private, membership-based organization that, among other things, seeks to restrain economic competition in the multi-billion-dollar in-

tercollegiate sports industry.[1] It accomplishes this goal through agreements among its member schools, each of which compete horizontally, both on the field and off. This competition is particularly fierce in the relevant economic markets—the labor markets for Division I men's and women's basketball players and for football players in the FBS, formerly known as Division I-A.[2] In these markets, schools compete for players' services in exchange for packages of compensation and benefits. That competition is restrained by horizontal agreements among NCAA members, restricting the type and amount of compensation and benefits—including education-related benefits—that schools may offer in these markets.

Division I basketball and FBS football have become particularly lucrative enterprises, generating billions of dollars in annual revenue. For example, the total value of the NCAA's current "March Madness" basketball broadcasting contract, which extends through 2032, is $19.6 billion, while the FBS football conferences' current multi-year deal with ESPN for the College Football Playoff is worth $5.64 billion. NCAA Pet. App. 68a. At the same time, each confer-

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[1] In addition to their NCAA membership, most schools are also members of one of the conferences, which serve as additional regulators and organizers of intercollegiate athletics. The conferences have authority in areas that overlap with NCAA rules, such as schedules and rules of the game, and in areas in which the NCAA does not have a role, such as the sale of the member schools' combined media rights for the regular seasons.

[2] The FBS represents the highest level of college football, consisting of the largest and most competitive NCAA programs. There are ten conferences and approximately 130 schools in the FBS. Eleven conferences are among Petitioners in this case; all but the Western Athletic Conference participate in FBS football.

ence negotiates its own regular-season football and basketball contracts with broadcasters, with the largest conferences generating over $500 million in annual revenue. *Id.* at 68–69a (explaining that the Southeastern Conference "made more than $409 million in revenues from television contracts alone in 2017, with its total conference revenues exceeding $650 million that year"). These massive sums allow schools to spend lavishly, including on "seven-figure coaches' salaries" and "palatial athletic facilities." *Id.* at 17a. Yet the elite athletes in these sports—the ones whose talent and labor make it all possible—receive almost none of this revenue.

Although college athletics can be an avocation that complements and enhances student-athletes' educational experiences, that could not be further from the truth in the multi-billion-dollar businesses that are today's Division I and FBS football. With so much money at stake, "coaches and others in the Division 1 ecosystem make sure that Student-Athletes put athletics first, which makes it difficult for them to compete for academic success with students more focused on academics. They are often forced to miss class, to neglect their studies, and to forego courses whose schedules conflict with the sports in which they participate." *Id.* at 53a (Smith, J., concurring). Indeed, the district court in this case affirmatively found that athletes in these markets face significant barriers that prevent their full integration into the educational experiences and campus life of other students. *Id.* at 109a–115a.

While FBS football and Division I basketball mirror their professional counterparts in nearly all respects—including by paying coaches and executives seven-figure salaries and playing games for television

audiences in the midst of a pandemic—the NCAA continues to cling to the pretext of "amateurism," insisting that the compensation and benefits available to student-athletes must be severely constrained to avoid "eliminating the procompetitive distinction between college and professional sports"—which, it claims, would hamper consumer demand. NCAA Pet. 33. Yet the district court found—based on testimony by Petitioners' own witnesses, among other evidence—that the critical factor that "drives demand" for college sports today is not the lack of compensation but rather the athletes' status as *students* at a particular school. NCAA Pet. App. 21a. As the district court explained, "[d]efense lay witnesses * * * testified that consumer demand for Division I basketball and FBS football is driven by consumers' perception that student-athletes are, in fact, students." *Id.* at 107a.[3]

Despite this, NCAA members have adopted detailed compensation and benefit restraints that have nothing to do with requiring that athletes remain students. In fact, the district court found, as a factual matter, that the specific restraints at issue here—limits on benefits related to education—"do not appear to be set * * * based on considerations of consumer demand." *Id.* at 145a. Instead, the NCAA's own representatives testified that the rules are based on "cost considerations." Ct. App. ER641.

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[3] Critically, the student-athletes here do not challenge Petitioners' academic eligibility requirements. Further, the injunction concerns only the rules restricting competition for education-related benefits that schools may offer Division I basketball and FBS football players—benefits that actually *enhance* the athletes' status and experience as students. NCAA Pet. App. 121a.

The rest of the trial record confirms this. Over the years, the compensation and benefits available to student-athletes in Division I basketball and FBS football have changed and increased, reflecting fundamental shifts in the NCAA's view of "amateurism"—and yet there has been no negative impact on demand for college sports. Quite the opposite. This incongruence led the lower courts to find, as a factual matter, that in the present day, the NCAA's rules "'do not follow any coherent definition of amateurism.'" *Id*. at 19a (quoting district court).

This case does not represent the first time that the NCAA has defended its rules as essential to "amateurism" and preserving college sports, only to find that even without such rules, consumer demand remains as strong as ever. In *Board of Regents*, for example, the NCAA warned that competition among schools to sell their broadcast rights would pose an existential threat to amateurism and consumer demand.[4] Today such competition flourishes and, as a result, college athletics generates billions in broadcast revenue, without any negative impact on demand. In *Law* v. *NCAA*, the NCAA resisted allowing unrestrained competition among schools to compensate assistant basketball coaches, contending that it was contrary to the collegiate model.[5] Today such competition is permitted, with assistant coaches often

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[4] 468 U.S. at 119 (rejecting NCAA argument that restricting sale of broadcast rights was necessary "to preserve amateurism").

[5] 134 F.3d 1010, 1021–24 (10th Cir. 1998) (rejecting NCAA's proposed procompetitive justifications for restricting assistant coach salaries).

earning millions,[6] and demand still thrives. In *White* v. *NCAA*, the NCAA opposed allowing schools to compete with one another by offering full cost-of-attendance scholarships, calling such compensation "pay for play."[7] Today such competition is permitted; cost-of-attendance scholarships and even compensation *above* the cost of attendance are pervasive, and demand still thrives. NCAA Pet. App. 19a–20a. And in *O'Bannon*, the NCAA decried payments to student-athletes in exchange for the use of their names, images, and likenesses as "anathema to amateurism" and warned that such payments would "blur the clear line between amateur college sports and their professional counterparts."[8] Today the NCAA—under pressure from state legislatures and Congress—has decided that such payments are consistent with its amateurism model and should be permitted.[9]

As this history and the factual record make clear, "amateurism" is a moving goalpost; it is whatever Petitioners say it is at any given time. In Division I basketball and FBS football, it is little more than a pretext. It is certainly not a Sherman Act concept, much less a get-out-of-jail-free card that insulates any particular set of NCAA restraints from scrutiny.

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[6] Between 2009 and 2015, for example, the salaries of assistant men's basketball coaches increased by nearly 40%. C.A. ER701.

[7] NCAA Mem. P. & A. in Supp. Summ. J. at 28, *White* v. *NCAA*, No. 06-cv-999 (C.D. Cal. Oct. 22, 2007), ECF No. 220.

[8] Br. for NCAA at 57, *O'Bannon* v. *NCAA*, No. 14-16601 (9th Cir. Nov. 14, 2014), ECF No. 13-1.

[9] *See* NCAA Board of Governors Federal and State Legislation Working Group, Final Report and Recommendations (Apr. 17, 2020), https://tinyurl.com/yxq8rtd9.

B. District Court Proceedings

Recognizing the immense economic disparity between the NCAA's ever-growing FBS football and Division I basketball enterprises and the student-athletes who drive them, a group of football players and men's and women's basketball players filed this suit against the NCAA and its largest athletic conferences, challenging the rules that restrict student-athlete compensation. The student-athletes contended that without these restrictions, they would be compensated at a level more commensurate with the value they confer on their schools, conferences, and the NCAA.

While the case was pending, the Ninth Circuit issued its decision in *O'Bannon*—an antitrust challenge brought against the NCAA (but not the conferences) by a class of current and former football and men's (but not women's) basketball players. These players challenged NCAA rules that prohibited compensation for the use of their names, images, and likenesses in game footage or videogames. As relevant here, *O'Bannon* reaffirmed what this Court and many others had held—that the NCAA's rules *are* subject to antitrust challenge. Based on a careful review of the factual record in that case, the Ninth Circuit affirmed an injunction permitting schools to use revenues generated from the use of athletes' names, images, and likenesses to increase the NCAA's scholarship limit and fund athletes' full cost of attendance—a federally defined measure of a student's cost to attend school.

The *O'Bannon* parties each filed petitions for writ of certiorari, with the NCAA's petition resting on virtually identical grounds as the petitions here. *See*,

e.g., Pet. for a Writ of Certiorari, *NCAA* v. *O'Bannon*, No. 15-1388, 2016 WL 2866087, at 10 (U.S. May 13, 2016) ("*O'Bannon* Pet.") ("the Ninth Circuit disregarded *Board of Regents*"); *id.* at 10–11 ("the Ninth Circuit set aside the restraint because it was not the *least* restrictive one possible") (emphasis in original); *id.* at 15–16 ("*American Needle*—citing *Board of Regents*—reaffirmed that restraints essential to a joint-venture product" should be upheld); *id.* at 16–18 (contending that the Ninth Circuit's decision "departs from other circuits' precedent," which holds that "NCAA amateurism rules should be upheld without detailed rule-of-reason analysis (let alone a trial)"); *id.* at 26 ("The decision below will only increase the frequency of [antitrust] challenges" faced by the NCAA); *id.* at 27 ("The need for review is particularly strong given the nationwide scope and importance of college athletics"). Both parties' petitions were denied. 137 S. Ct. 277 (2016).

Following the Ninth Circuit's *O'Bannon* decision, Petitioners here moved for judgment on the pleadings, arguing that *O'Bannon* foreclosed the claims in this case as a matter of *res judicata*. The district court denied the motion because, among other things, this case involves a different set of horizontal compensation restraints, and the factual record on competition in the relevant markets had changed substantially since *O'Bannon*. The petitions here do not challenge that ruling.

After discovery, the parties cross-moved for summary judgment. The district court again rejected Petitioners' preclusion arguments. On the merits, the court granted summary judgment in favor of the players in part, finding no genuine issue of fact as to whether the challenged rules substantially restricted

competition in the relevant markets. In rendering that decision, the court adopted—at the request of *both* parties—a market definition consisting of the national markets for athletes' labor in Division I basketball and FBS football. NCAA Pet. App. 75a–76a. (On appeal, Petitioners did not—and do not now—contest the court's findings relating to anticompetitive effect and the relevant market.) As for the rest of the motion, the court found that triable issues remained at the second and third steps of the rule of reason.

After a ten-day bench trial—reflecting a starkly different factual record from any prior antitrust case concerning NCAA rules—the district court entered judgment in favor of the plaintiff classes. The court held that the limits on education-related benefits did not serve any procompetitive purpose, including the NCAA's professed purpose of preserving the distinction between college and professional sports. *Id.* at 109a. Specifically, the court found that the NCAA has defined its product as distinct from professional sports by ensuring that student-athletes are not allowed to receive unlimited, non-education-related cash compensation like professional athletes and that they maintain "student" status. *Id.* at 121a. Yet the NCAA continues to impose caps and prohibitions on education-related benefits that do not serve that purpose and do not preserve consumer demand—benefits like computers, science equipment, musical instruments, post-graduate scholarships, tutoring, study abroad, academic awards, and internships. Indeed, the court found as a factual matter that market competition to provide the best package of education-related benefits will only reinforce the perception

that student-athletes are students—which, again, is the critical driver of consumer demand. *Ibid.*

Still, the court found that there "may" be a limited pro-competitive justification for "some" of the challenged restraints, to the extent they preserve the distinction between college and professional sports by preventing unlimited payments that are unrelated to education. *Id.* at 147a. But the court went on to find that the students had proven a less restrictive alternative to achieve that goal—a system in which the restrictions on education-related benefits are eliminated, leaving individual conferences to decide whether and to what degree any demand-enhancing limitations on educational benefits are warranted at the conference level. *Id.* at 151a–159a.

As a remedy, the district court enjoined the NCAA from maintaining national rules capping education-related compensation and benefits, while otherwise leaving the NCAA as the legislator of its own rulebook. The injunction permits the NCAA to establish its own definition of "related to education" and allows individual conferences to impose their own, more stringent education-related compensation caps. *Id.* at 168a. It also requires the NCAA to permit schools and conferences to offer academic and graduation incentive awards, with any cap on such awards set no lower than the amount the NCAA allows for athletics-based awards. *Id.* at 168a–169a.

Following the decision, NCAA President Mark Emmert publicly lauded the injunction as "'an inherently good thing'" and not in any way fundamentally inconsistent with the NCAA's principles, as it would foster competition among conferences and schools "'over who can provide the best educational experi-

ence.'" *Id.* at 42a (Ninth Circuit decision, quoting Associated Press, *Emmert: Ruling reinforced fundamentals of NCAA*, ESPN (Apr. 4, 2019)).

C. The Ninth Circuit's Opinion

Reviewing the trial record in its entirety, the Ninth Circuit panel unanimously affirmed the district court's findings and injunction.

The court began by noting that "[a]ntitrust decisions are particularly-fact-bound" and affirmed the district court's holding that *O'Bannon* had no preclusive effect on this case, which involved a fundamentally different factual record. NCAA Pet. App. 27a.

Next, the Ninth Circuit described the traditional rule of reason "three-step framework":

> (1) [the] Student-Athletes bear the initial burden of showing that the restraint produces significant anticompetitive effects within the relevant market; (2) if they carry that burden, the NCAA must come forward with evidence of the restraint's procompetitive effects; and (3) [the] Student-Athletes must then show that any legitimate objectives can be achieved in a substantially less restrictive matter.

Id. at 33a (citations and quotations omitted).

The Ninth Circuit found the district court's factual and legal conclusions to be well-grounded at every step. At step one, it held that the "district court properly concluded that the Student-Athletes carried their burden" to show significant anticompetitive effects, noting that the district court's findings "have substantial support in the record." *Id.* at 33a–34a (citations and quotations omitted). At step two, the Ninth Circuit held that the district court "properly

'credit[ed] the importance to consumer demand of maintaining a distinction between college and professional sports,'" while also finding that while "*some* of the challenged rules" may serve a procompetitive purpose, the limits on "'non-cash education-related benefits'" do not. *Id.* at 34a–35a (quoting district court, emphasis in original). Finally, at step three, the Ninth Circuit confirmed that "it [w]as the Student-Athletes' burden to make a strong evidentiary showing that their proposed [less restrictive alternatives] to the challenged scheme are viable"—that is, "virtually as effective as the challenged rules in achieving the only procompetitive effect" that Petitioners had shown. *Id.* at 40a, 66a. The district court had correctly allocated the burden of proof on this issue, rejecting two of the student-athletes' three proffered "less restrictive alternatives." *Id.* at 22a; *see also id.* at 46a ("The [district] court's findings at step three are supported by the record, and certainly not clearly erroneous."). As the Ninth Circuit explained, its assessment of the entire record led it to hold that "the district court properly applied the Rule of Reason in determining that the enjoined rules are unlawful restraints of trade." *Id.* at 7a.

Two days before the mandate was set to issue, Petitioners moved the Ninth Circuit for a stay, claiming they would be irreparably harmed if they were required to permit additional education-related benefits. After the Ninth Circuit summarily denied the motion, Petitioners unsuccessfully sought a stay from this Court, based on the same arguments. The mandate issued on August 12, 2020.

Despite their claimed irreparable injury, Petitioners waited until October 15—a full two months after

the mandate, and the last possible day under the Court's rules—to file their petitions.

REASONS FOR DENYING THE PETITIONS

I. The decision below is entirely consistent with this Court's precedents.

As in the NCAA's petition in *O'Bannon*, Petitioners here incorrectly contend that *Board of Regents* prohibits a court from conducting a fact-based rule-of-reason inquiry for any rule they adopt in the name of "amateurism." *Compare* AAC Pet. 20–21 *and* NCAA Pet. 17–18 *with O'Bannon* Pet., 2016 WL 2866087, at *17 ("*Board of Regents* and *American Needle* [v. *NFL*, 560 U.S. 183 (2010)] mean that NCAA rules that define what it means to be an amateur or a student-athlete should be sustained in the twinkling of an eye—that is, at the motion-to-dismiss stage") (citation and quotation omitted). According to Petitioners, *Board of Regents* established this rule to preserve their "'ample latitude'" to oversee college sports. *Compare* NCAA Pet. 19 *with O'Bannon* Pet., 2016 WL 2866087, at *11.

This Court's cases say no such thing. To the contrary, the *Board of Regents* Court squarely held that NCAA rules *are* subject to antitrust scrutiny under the rule of reason. 468 U.S. at 103–04. Even Petitioners themselves describe *Board of Regents* that way, stating that "[i]n that case, this Court explained that because league sports are 'an industry in which horizontal restraints on competition are essential if the product is to be available at all,' NCAA rules should be evaluated for antitrust purposes under the rule of reason, rather than deemed illegal per se. 468 U.S. at 100–101." NCAA Pet. 9; *see id.* at 17 ("This Court held in *Board of Regents* that NCAA rules

would be evaluated under the rule of reason * * * ."). Applying the rule of reason, the *Board of Regents* Court ultimately ruled *against* the NCAA, holding that the restraint at issue was unreasonable in light of the specific facts found at trial. 468 U.S. at 120.

The district court here faithfully followed *Board of Regents* and applied the rule of reason to the facts. After holding that the complaint sufficiently stated a claim, the court supervised discovery, compiled an evidentiary record, evaluated the parties' motions for summary judgment, found genuine issues of material fact, and held a two-week trial. Then the court issued a 102-page decision applying the rule of reason to the facts presented, finding that the challenged rules were anticompetitive and unlawful. The Ninth Circuit appropriately reviewed this factual conclusion deferentially, finding no clear error. Again, this is precisely what happened in *Board of Regents* itself, in which this Court reviewed a lower court's application of the rule of reason to a set of NCAA rules after a trial and affirmed an order enjoining them.

To be sure, *Board of Regents* also discussed the NCAA generally, commenting that the NCAA was perceived to play a "critical role in the maintenance of a revered tradition of amateurism in college sports." 468 U.S. at 120. The Court also observed—notably, in an entirely different era in college sports—that it was "reasonable to assume that most * * * NCAA [rules] are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive." *Id*. at 117. But nothing in *Board of Regents* indicates that the Court intended this observation to function as binding legal doctrine and to prevent judges decades into the future from evaluating whether such an "assum[ption]" remained "reasona-

ble," no matter how much the factual circumstances changed.

And changed they have. The facts in the relevant markets bear no resemblance to what the *Board of Regents* Court understood at that time about the NCAA and the tradition of "amateurism." As discussed above, the business of Division I basketball and elite football has grown exponentially in the last three decades, becoming a massive, multi-billion dollar industry on the backs of unpaid students who would obtain far more compensation for their labor in a competitive market. Moreover, the trial record below established that in the years since *Board of Regents*, the NCAA has abandoned "any coherent definition" or tradition of amateurism in Division I basketball and FBS football, allowing significant changes in the compensation that schools are allowed to provide. NCAA Pet. App. 92a; *see also id.* at 144a ("amateurism, and amounts of permissible student-athlete compensation have changed materially over time").

Petitioners' position gains no more support from *American Needle*—a case that also formed the basis of their unsuccessful petition in *O'Bannon*. *Compare* NCAA Pet. 17 (quoting *American Needle*, 560 U.S. at 203) *with O'Bannon* Pet., 2016 WL 2866087, at *12 (same). In *American Needle*, a unanimous Court rejected the NFL's argument for antitrust immunity and held that the challenged acts were concerted activity subject to the rule of reason. 560 U.S. at 203. The Court explained that "[w]hen 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason." *Id.* (quoting *Board of Re-*

gents, 468 U.S. at 101). That is precisely what the courts did in this case.

To be sure, *Board of Regents* and *American Needle* observe that the rule of reason "'can sometimes be applied in the twinkling of an eye'"—that is, without a "detailed analysis"—depending on "the concerted activity in question." *American Needle*, 560 U.S. at 203 (quoting *Board of Regents*, 468 U.S. at 109 n.39). But this is far from a substantive presumption in the NCAA's favor. In *Board of Regents*, the Court used the phrase "twinkling of an eye" to explain that some restraints may be so obviously *anti*-competitive that they can be summarily *struck down*. 468 U.S. at 109 n.39. And when the Court repeated that phrase in *American Needle*, it also specifically rejected the NFL's plea for antitrust immunity, declining to prescribe a "twinkling of an eye" approach to the restrictions in that case and instead remanding for a rule-of-reason analysis, with the observation that competition for "playing personnel" is an area where horizontal agreements must be subject to the rule of reason. 560 U.S. at 203. Neither of these cases establishes a presumption in a sports league's favor, and neither suggests that it would ever be error to apply the rule of reason on a full factual record, as the district court did here.

In any event, the Ninth Circuit here was not asked to (and did not) address any legal question about "presumptions" under *Board of Regents* or *American Needle*. Instead, it followed this Court's direction and reviewed the district court's factual application of the rule of reason for clear error, finding none. Petitioners may disagree with the courts' factual conclusions, but their disagreement does not warrant this Court's review.

II. The decision below does not implicate any conflict among the Courts of Appeals.

Petitioners similarly regurgitate the same arguments about the same alleged conflict of circuit authority that they raised in their unsuccessful *O'Bannon* petition. All but one of the decisions Petitioners cite for the purported split occurred before the *O'Bannon* petition and were cited there too. *Compare* NCAA Pet. 19–23 *and* AAC Pet. 23–25 *with* *O'Bannon* Pet., 2016 WL 2866087, at *16–18 (citing *Agnew* v. *NCAA*, 683 F.3d 328 (7th Cir. 2012); *McCormack* v. *NCAA*, 845 F.2d 1338 (5th Cir. 1998); *Smith* v. *NCAA*, 139 F.3d 180 (3d Cir. 1998)). The one exception is *Deppe* v. *NCAA*, 893 F.3d 498 (7th Cir. 2018), which, as discussed below, applied the rule articulated in *Agnew* and is thus a post-*O'Bannon* decision that applied pre-*O'Bannon* law. And, in any event, none of the cases relied upon by Petitioners presents any conflict with the Ninth Circuit's decision here.

In *Smith*, a case from the 1980s, the Third Circuit considered an NCAA rule that involved an athlete's status as a student at the institution—a very different kind of rule than the ones at issue here. *See* 139 F.3d at 183 n.2 (quoting challenged NCAA rule). The court held that the rule did not "relate[] to the NCAA's commercial or business activities" and thus it did not fall under the Sherman Act in the first place. *Id.* at 185–86. And—critically—the court confirmed that if the Sherman Act did apply, it "would analyze [the rule] under the rule of reason." *Id.* at 186. Although the court proceeded to cite this Court's then-recent observations in *Board of Regents*, it did not hold that *Board of Regents* controlled the disposition as a matter of law; it simply concluded that "the by-

law [in question] so clearly survives a rule of reason analysis" that the claim could be resolved on a motion to dismiss. *Id.* at 187.

McCormack—the only decision in another circuit that addressed limits on compensation to players—also applied the rule of reason to a particular set of factual allegations. 845 F.2d at 1343. But the Fifth Circuit did not read *Board of Regents* to immunize the rule from antitrust scrutiny or to establish a presumption in favor of any particular NCAA rule. It noted the NCAA's argument on that point but found that it "need not address" the issue because of the sparsity of the plaintiffs' allegations, which could not support a claim under the rule of reason. *Ibid.*

In *Agnew*, the Seventh Circuit theorized that there may be a presumption under *Board of Regents* that certain classes of NCAA rules are lawful, but it declined to apply any presumption to the NCAA rules before it, which limited the number and length of athletic scholarships. 683 F.3d at 343–44. The court reasoned that such rules "are not inherently or obviously necessary for the preservation of amateurism, the student-athlete, or the general product of college football." *Id.* at 344. While the NCAA argued that such rules are necessary for parity between more wealthy and less wealthy schools, the court rejected that argument, noting that the claim was "weakened" by the then-recent genesis of those rules and the fact that they were recently rescinded. *Ibid.* In the court's assessment, the challenged rules—like the ones at issue here—"seem[ed] to be aimed at containing university costs, not preserving the product of college football." *Ibid.* Thus, the court declined to apply any presumption of lawfulness at the pleading stage, explaining that the NCAA's argument was "far too

great a leap to make without evidentiary proof at the full Rule of Reason stage." *Ibid*.

The only post-*O'Bannon* case cited by Petitioners is *Deppe*, in which the Seventh Circuit explicitly applied the rule it had previously set out in *Agnew*. 893 F.3d at 503–04. Thus, while the decision in *Deppe* is new, the Seventh Circuit's approach is not. And, critically, the kinds of NCAA rules at issue in *Deppe* were even further afield from the rules challenged here than the rules in *Agnew* were. *Compare Deppe*, 493 F.3d at 502 (rule requiring athlete to spend a year enrolled at institution before being eligible to participate in athletics) *with Agnew*, 683 F.3d at 344 (rules limiting number and extent of scholarships). Because the eligibility rule in *Deppe* was academics-driven, the Seventh Circuit applied the presumption of lawfulness it had outlined in *Agnew* but had declined to apply in that case. 893 F.3d at 502.

Still, it is wrong to say that this case "would have come out differently if decided by the Seventh Circuit." AAC Pet. 24. The rules at issue here are far more like the ones at issue in *Agnew*, which related to scholarships—an education–related benefit that conferences or schools may choose to provide. Further, as in *Agnew*, the rules here "seem to be aimed at containing university costs, not preserving the product of college football." 683 F.3d at 344; *see* NCAA Pet. App. 145a, 148a–149a n.42 (challenged rules were based not on consumer demand but on cost). Thus, there is every reason to believe that the Seventh Circuit would agree with the Ninth that the rules in this case are subject to a full, rigorous analysis under the rule of reason. Indeed, these are exactly the type of anti-competitive agreements for which no procompetitive presumption would ever be proper. *See* P. Areeda &

H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 1902a (4th ed. 2018) (explaining that "[h]orizontal agreements are antitrust's most 'suspect' classification, which as a class provoke harder looks than any other arrangement," and referring to "naked price fixing" as one of "the most threatening circumstances" to free competition).

Nor is there any inconsistency between the decision below and the Third Circuit's decision in *Race Tires America, Inc.* v. *Hoosier Racing Tire Corp.*, 614 F.3d 57 (3d Cir. 2010), *cited in* NCAA Pet. 3–4. The *Race Tires* decision does not suggest antitrust immunity, as Petitioners suggest; instead, it confirms that sports sanctioning bodies are required to prove "good faith, sufficient pro-competitive or business justifications" for their rules, based on the facts of the case. *Id.* at 81. Moreover, the Third Circuit explicitly warned against "establish[ing] an overly broad rule detached from the specific facts" because of the "highly fact-specific nature of the antitrust standards." *Id.* at 80. This is the opposite of establishing some kind of presumption.

Finally, even if there were some tension among the circuits—and there is none—this case would be a poor vehicle for resolving it. The Ninth Circuit was never asked to rule on whether the rules challenged here should have been afforded a presumption of lawfulness rather than analyzed under the rule of reason. And, again, the rules in this case are far more like *Agnew*'s limits on scholarships—to which the Seventh Circuit refused to apply any presumption—than they are like *Deppe*'s year-in-residence rule. Thus, if there is any real disagreement between the Seventh Circuit and the Ninth—and the cases thus

far do not reflect one—that disagreement would not make a difference in this case.

III. The decision below faithfully applied the rule of reason framework.

Contrary to Petitioners' assertions (*e.g.*, AAC Pet. 15–19), the Ninth Circuit carefully applied the traditional rule of reason framework based on well-established precedent. As this Court recently reaffirmed, the rule of reason involves a "three-step, burden shifting framework":

> [T]he plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

Ohio v. *American Express Co.*, 138 S.Ct. 2274, 2284 (2018) (citations omitted).

Petitioners' only *legal* objection to the Ninth Circuit's analysis is their suggestion that it "effectively requir[ed] defendants to prove that they had adopted the *least* restrictive alternative that would preserve college sports." AAC Pet. 15. But the Ninth Circuit did no such thing. Instead, it held unequivocally that it was the "*Student-Athletes'* burden to make a strong evidentiary showing" on less restrictive alternatives. NCAA Pet. App. 40a (emphasis added, quotation omitted). It further held that a court may "invalidate a restraint and replace it with [a less restrictive al-

ternative] only if the restraint is '*patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives'"—and that Plaintiffs bore the burden to demonstrate that a significantly less restrictive alternative was available. *Id.* at 33a (citation and quotation omitted).

Applying the traditional standard, the court held that "the district court reasonably concluded that market competition in connection with education-related benefits will only reinforce consumers' perception of student-athletes as students, thereby preserving demand." *Id.* at 43a. That conclusion was based on the district court's detailed factual findings, including that the "NCAA's 'own witnesses' testified that 'consumer demand for [D1] basketball and FBS football is driven largely by consumers' perception that student-athletes are, in fact, students.'" *Ibid.* (alteration in original).

Again, the Ninth Circuit did not establish any new legal principle; this is the same test that the court applied in *O'Bannon* and that this Court reaffirmed in *Ohio* v. *American Express* just two years ago. None of this presents any unsettled legal question that requires this Court's review.

IV. The decision below turns on fact-bound conclusions after a lengthy bench trial.

The nature of the Ninth Circuit's decision further undermines Petitioners' request for certiorari. The decision does not set forth any new or remarkable principles of law. Instead, the only significant issues of law before the court had to do with Petitioners' unsuccessful argument that the claims in this case were precluded by *O'Bannon* under principles of *stare decisis* and *res judicata*—issues that Petitioners have de-

clined to raise here. *See* AAC Pet. 13 n.4.

With respect to the petitions, then, all that is at issue is the Ninth Circuit's appropriately deferential review of the district court's application of the rule of reason, based on the trial record in its entirety. This is an inherently fact-specific analysis. *See Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 899 (2007) (discussing the "case-by-case adjudication contemplated by the rule of reason"); *Maple Flooring Mfrs.' Ass'n* v. *United States*, 268 U.S. 563, 579 (1925) ("[E]ach case arising under the Sherman Act must be determined upon the particular facts disclosed by the record"). The facts may change over time, requiring a new evaluation. *Leegin*, 551 U.S. at 899 (Sherman Act's prohibitions on restraints of trade "evolve to meet the dynamics of present economic conditions"); Areeda & Hovenkamp, *supra*, ¶ 1205c3 ("[C]ontinuing contracts in restraint of trade * * * are typically subject to continuing reexamination," and "even a judicial holding that a particular agreement is lawful does not immunize it from later suit or preclude its reexamination as circumstances change.").

On its face, the Ninth Circuit's decision expressly turned on "deferen[ce]" to specific factual findings and an "examin[ation of] the record 'in its entirety." NCAA Pet. App. 44a (citation omitted). This was entirely appropriate—and, in any event, involves fact-based decisionmaking not appropriate for this Court's review.

V. The decision below has no implications for joint ventures.

Petitioners insist that absent review by this Court, the decision below "endors[es] an antitrust

standard that puts at risk many legitimate and pro-competitive joint ventures." AAC Pet. 27; s*ee also* NCAA Pet. 29 (the decision below "will have sweeping detrimental consequences for college sports and joint ventures more generally"). Not so. Far from being a "joint venture," Petitioners and their member schools are direct, horizontal *competitors* in the relevant markets at issue in this case—the labor markets in Division I basketball and FBS football.

The relevant antitrust markets in this case were identified based on undisputed evidence at the summary judgment phase and left unchallenged by Petitioners on appeal. They are the "national markets for Plaintiffs' labor in the form of athletic services in men's and women's Division I basketball and FBS football, wherein each class member participates in his or her sport-specific market." NCAA Pet. App. 137a. "In these markets, the class-member recruits sell their athletic services to the schools that participate in Division I basketball and FBS football in exchange for grants-in-aid and other compensation and benefits." *Id* at 137a–138a.

In these markets, the NCAA's members are competitors, not joint venturers producing a common product. Petitioners point to no findings in the record establishing that the NCAA's thousands of disparate and diverse members comprise a joint venture in the relevant labor markets. Indeed, the term "joint venture" cannot be found in either the district court's or Ninth Circuit's decisions.

As this Court observed about the NFL in *American Needle*,

> [t]he fact that [NCAA schools] share an interest in making the entire league successful and

> profitable, and that they must cooperate in the production of scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case [that is, agreements to constrain horizontal competition] is still concerted activity under the Sherman Act that is subject to § 1 analysis.

560 U.S. at 202–03; *see also Board of Regents*, 468 U.S. at 113–14 (rejecting NCAA's proffered justification "that its television plan constitutes a cooperative 'joint venture' which assists in the marketing of broadcast rights and hence is procompetitive"); *Law*, 134 F.3d at 1018 n.10 (rejecting NCAA's proffered "joint venture" defense in antitrust challenge to NCAA rules capping compensation for assistant coaches).

Further, even if the decision below somehow did relate to the antitrust treatment of joint ventures, the NCAA's concern about it is misplaced. It is already well established that joint venture agreements are susceptible to antitrust challenge and must be analyzed under the rule of reason. As this Court has explained, because "[j]oint ventures * * * are [] not usually unlawful," these agreements should not be held *per se* illegal but rather "should be subjected to a more discriminating examination under the rule of reason." *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 23–24 (1979) (noting the agreements "may not ultimately survive that attack").

Finally, and again, the NCAA raised these same supposed joint venture concerns in its unsuccessful *O'Bannon* petition. *E.g.*, 2016 WL 2866087, at *3 ("The Ninth Circuit's ruling jeopardizes the vitality of

not only the NCAA and other amateur sports leagues, but also joint ventures more generally"). They are no more worthy of this Court's review today.

VI. The ongoing legislative efforts in this area make this case particularly unsuitable for review.

Finally, even if there were some need for clarification in the antitrust laws as they apply to NCAA rules, this would be the wrong time for the Court to weigh in, given the ongoing legislative efforts in this area. In recent months, federal and state legislatures have either enacted or considered laws that would allow student-athletes to be paid for the use of their names, images, and likenesses. Five states have already passed such laws, with Florida's scheduled to go into effect on July 1, 2021. And numerous other states have considered or are considering similar bills. Congress is also heavily involved, with bills currently pending in both the House and the Senate, and hearings on student-athlete compensation held by two Senate committees in just the past several months.

Petitioners are actively participating in this legislative process—even proposing their own legislation. *See* Ltr. from Power Five Comm'rs to Cong. Leadership at 1 (May 23, 2020)[10] ("We share the view that federal legislation should be enacted to permit Division I student-athletes to pursue payment from third parties for NIL licensing."); R. Dellenger, *NCAA Presents Congress with Bold Proposal for NIL Legisla-*

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[10] https://assets.documentcloud.org/documents/6933292/Power-Five-letter-to-Congress.pdf.

tion, SPORTS ILLUSTRATED (July 31, 2020)[11] (discussing the NCAA's proposed Intercollegiate Amateur Sports Act of 2020). Indeed, despite their strenuous opposition in *O'Bannon* to compensation for the use of players' names, images, and likenesses, Petitioners have now reversed course and embraced such compensation and are expected to permit it as soon this winter. With the definition of "amateurism" in a state of flux and the legislative branch already actively engaged, certiorari would be particularly inappropriate.

Petitioners' legislative proposals also advocate for effectively the same antitrust immunity that they seek from this Court. *See* May 23 Ltr. at 1 (proposing that federal legislation include "protection from potential legal liability under antitrust and other laws"). One currently pending Senate bill has a safe harbor for the NCAA and its members. *See* Fairness in Collegiate Athletics Act, S.4004, § 4(b) (2020) (except for enforcement by the Federal Trade Commission, "no cause of action shall lie or be maintained in any court against any intercollegiate athletic association, or any institution of higher education which is a member of such association for the adoption or enforcement of a policy, rule, or program established under" the proposed legislation).

In the end, whether through changes by the NCAA's members, by Congress, or by state legislatures, the "amateurism" model is once again in the midst of a paradigm shift. Even if certiorari were

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[11] https://www.si.com/college/2020/07/31/ncaa-sends-congress-nil-legislation-proposal.

otherwise warranted, this would be the wrong time for the Court to intervene.

CONCLUSION

The courts below applied the well-established rule of reason to a particular set of facts, finding—based on a full trial record—that the agreement of NCAA members to restrict education-related benefits is an unreasonable restraint of trade. Petitioners' argument essentially seeks antitrust immunity—a request that should be directed to Congress, not to this Court. The writ should be denied.

Respectfully submitted.

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