Nos. 20-512 and 20-520

In the Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

v.

SHAWNE ALSTON, ET AL.

AMERICAN ATHLETIC CONFERENCE, ET AL., PETITIONERS

v.

SHAWNE ALSTON, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the courts below correctly applied the rule of reason in finding that some of the National Collegiate Athletic Association's rules fixing the compensation and benefits that member schools can offer when competing for student-athletes' services violate Section 1 of the Sherman Act, 15 U.S.C. 1.

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INTEREST OF THE UNITED STATES

This case presents the question whether certain rules adopted by the National Collegiate Athletic Association (NCAA) to limit the compensation and benefits that member schools may offer student-athletes violate Section 1 of the Sherman Act, 15 U.S.C. 1. The Department of Justice and the Federal Trade Commission en-

force the federal antitrust laws and have a strong interest in their correct application. The United States therefore has a substantial interest in the question presented.

STATEMENT

1. Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. 1. This Court has "understood § 1 'to outlaw only *unreasonable* restraints.'" *Ohio* v. *American Express Co.*, 138 S. Ct. 2274, 2283 (2018) (quoting *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997)).

"A small group of restraints are unreasonable *per se* because they always or almost always tend to restrict competition and decrease output." *American Express Co.*, 138 S. Ct. at 2283 (citation and internal quotation marks omitted). Those include "horizontal restraints—restraints imposed by agreement between competitors"—to fix prices or allocate markets. *Id.* at 2283-2284 (citation and internal quotation marks omitted). Most restraints, however, "are judged under the 'rule of reason.'" *Id.* at 2284 (citation and internal quotation marks omitted). Although the precise nature of the economic inquiry required under the rule of reason varies from case to case, see *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 779-781 (1999), in traditional rule-of-reason analysis "a three-step, burden-shifting framework" is used "to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest," *American Express Co.*, 138 S. Ct. at 2284 (brackets, citations, and internal quotation marks omitted).

Under that three-step framework, "the plaintiff has the initial burden to prove that the challenged restraint

has a substantial anticompetitive effect that harms consumers in the relevant market." *American Express Co.*, 138 S. Ct. at 2284. If the plaintiff establishes such an effect, the burden at step two "shifts to the defendant to show a procompetitive rationale for the restraint." *Ibid.* "If the defendant makes this showing, then the burden shifts back to the plaintiff" at step three "to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Ibid.* If the plaintiff does not identify such alternatives, the court determines whether "the challenged behavior is, on balance, unreasonable." 7 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1502, at 399 (4th ed. 2017).

2. a. Petitioner in No. 20-512, the NCAA, establishes rules for athletic competition among its member schools. Pet. App. 7a.[1] The NCAA's Division I comprises approximately 350 schools and 32 conferences. *Id.* at 8a. Division I football is further divided into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision. *Id.* at 8a, 65a-68a. Petitioners in No. 20-520 (Conference petitioners) are eleven NCAA conferences that participate in FBS football and Division I basketball. *Id.* at 65a.

The NCAA limits the compensation and benefits that its member schools can offer student-athletes. Pet. App. 7a-8a. The NCAA views such rules as "preserv[ing] the character and quality" of college athletics and distinguishing it from "professional sports." *NCAA* v. *Board of Regents*, 468 U.S. 85, 102 (1984); see Pet. App. 7a. Although this Court has never squarely addressed a challenge to the NCAA's amateurism rules, it has described

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[1] "Pet. App." citations are to the appendix in *NCAA* v. *Alston*, No. 20-512.

intercollegiate athletics as "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. It has also stated that certain characteristics of intercollegiate athletics—that "athletes must not be paid, must be required to attend class, and the like"—"cannot be preserved except by mutual agreement." *Id.* at 102.

b. In 2015, the Ninth Circuit reviewed a challenge to NCAA rules that prohibited payments to student-athletes for using their names, images, and likenesses. *O'Bannon* v. *NCAA*, 802 F.3d 1049, cert. denied, 137 S. Ct. 277 (2016). Relying on *Board of Regents*, *supra*, the NCAA argued that "any Section 1 challenge to its amateurism rules must fail as a matter of law." *O'Bannon*, 802 F.3d at 1063. The *O'Bannon* court rejected that argument, explaining that the *Board of Regents* plaintiffs had challenged "the NCAA's then-prevailing rules for televising college football games," not its rules regarding student-athlete compensation. *Id.* at 1061; see *id.* at 1061-1063.

Applying the rule of reason, the *O'Bannon* court held that the challenged rules were "more restrictive than necessary to maintain [the NCAA's] tradition of amateurism in support of the college sports market." 802 F.3d at 1079. The court affirmed the district court's determination that the NCAA must "permit its schools to provide up to the cost of attendance" to their student-athletes. *Ibid.*[2] But the court of appeals vacated a portion of the district court's judgment that required the NCAA to allow its member schools to pay student-athletes up to $5000 per

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[2] Each school calculates the cost of attendance in accordance with federal regulations. Pet. App. 70a. "[F]ull grant-in-aid" scholarships include "tuition and fees, room and board, books and other expenses related to attendance at the institution up to the cost of attendance." *Ibid.* (brackets and citation omitted).

year in deferred compensation. *Ibid.* The court explained that paying student-athletes "cash sums untethered to educational expenses" was a "quantum leap" from "offering student-athletes education-related compensation." *Id.* at 1078; see *id.* at 1076.

3. Under current NCAA rules, student-athletes may receive "full grant[s]-in-aid" up to the cost of attendance, "government grants," certain "payments from outside entities," including for participating in the Olympics, and benefits deemed "'incidental to athletics participation,'" including monetary awards for certain achievements "such as qualifying for a bowl game in FBS football." Pet. App. 70a, 86a, 91a. Conferences also may pay student-athletes from the Student Assistance Fund and the Academic Enhancement Fund to "meet[] financial needs" or to "recognize academic achievement." *Id.* at 87a-88a & n.15. Each school may additionally award two "Senior Scholar Awards" per year of up to $10,000 per student for "post-eligibility graduate school." *Id.* at 90a. And Division I athletes may obtain "loss-of-value insurance," travel reimbursement for "family members to attend certain events," "unlimited food," and "medical care for athletics-related injuries for at least two years after graduation." *Id.* at 80a-81a.

4. Respondents are FBS football and Division 1 men's and women's basketball players who received or will receive full athletic scholarships during the pendency of this litigation. Pet. App. 14a-15a. Respondents challenged the "interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services." *Id.* at 65a-66a.

Following a bench trial, the district court held that certain NCAA limits on student-athlete compensation violated the Sherman Act. Pet. App. 65a-165a. The court observed that "the existence of an agreement * * * restraining trade * * * was undisputed." *Id.* at 74a. The court then applied the rule of reason. The parties agreed that the relevant market for assessing anticompetitive effects at step one was "the market for Student-Athletes' labor." *Id.* at 34a, 35a n.14; see *id.* at 75a-76a. The court determined that the challenged rules have "severe anticompetitive effects" in that market, which petitioners "did not meaningfully dispute." *Id.* at 77a, 82a, 139a-140a.

At step two, the burden shifted to petitioners to show that the challenged "conduct 'brings about some procompetitive effect.'" Pet. App. 140a (quoting *O'Bannon*, 802 F.3d at 1073). The parties agreed that "the market to be assessed" at step two was "the market for college sports." *Id.* at 35a n.14; see *id.* at 83a, 141a. The district court "credit[ed] the importance to consumer demand of maintaining a distinction between college sports and professional sports." *Id.* at 107a. But because student-athletes "currently can receive thousands or tens of thousands of dollars" in compensation in addition to the cost of attendance, the court found that the "distinction between college and professional sports arises because student-athletes do not receive unlimited payments unrelated to education, akin to salaries seen in professional sports leagues." *Id.* at 108a; see *id.* at 141a-147a.

Based on the evidence before it, the district court grouped the challenged compensation restrictions "into three categories: (1) the limit on the grant-in-aid at not less than the cost of attendance; (2) compensation and

benefits unrelated to education paid on top of a grant-in-aid; [and] (3) compensation and benefits related to education provided on top of a grant-in-aid." Pet. App. 147a-148a. The court determined that the limits in the first two categories "are procompetitive relative to having no limits, to the extent that they help maintain consumer demand for college sports as a distinct product by preventing unlimited cash payments unrelated to education." *Id.* at 148a. As to the third category, however, the court found that petitioners had demonstrated the "procompetitive" nature of only some of the limits on compensation and benefits related to education. *Ibid.* The court determined that "limits on academic or graduation awards and incentives that are provided in cash or cash-equivalents" had been shown to be procompetitive, because those awards and incentives "could become a vehicle for unlimited payments." *Ibid.* By contrast, the court found that "limits or prohibitions on most other benefits related to education"—such as "tutoring, graduate school tuition, and paid internships"—"ha[d] not been shown to have an effect on enhancing consumer demand for college sports as a distinct product." *Ibid.*; see *id.* at 108a-109a.

At step three, the burden shifted back to respondents to demonstrate, for the rules found to have procompetitive benefits, "that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect." Pet. App. 152a. While stating that it "must afford the NCAA 'ample latitude' to superintend college athletics," the district court observed that, when a restraint "'is patently and inexplicably stricter than is necessary to accomplish' demonstrated procompetitive objectives, 'an antitrust court can and should

invalidate it.'" *Id.* at 152a-153a (quoting *O'Bannon*, 802 F.3d at 1074-1075).

The district court identified a less restrictive alternative that would eliminate the outright ban on providing academic or graduation awards or incentives in cash but would allow the NCAA to cap such awards, with individual conferences permitted to set even lower limits. Pet. App. 120a, 153a; see *id.* at 169a-170a. Under that approach, the NCAA can "continue to cap the grant-in-aid at not less than the cost of attendance," "can also continue to limit compensation and benefits" that are "unrelated to education," and additionally can "continue to limit academic or graduation awards or incentives, provided in cash or cash-equivalent on top of a grant-in-aid, as long as the limit is not less than the athletics participation awards limit." *Ibid.* The court concluded that this alternative "would be virtually as effective as the challenged set of rules" in preserving consumer demand for Division I basketball and FBS football "as a product distinct from professional sports." *Id.* at 154a. Having identified a viable less restrictive alternative, the court declined to "weigh[] the anticompetitive effects of the challenged restraints against their procompetitive benefits as a final balancing consideration." *Id.* at 159a; see *id.* at 159a-162a. The court also rejected respondents' other proposed alternatives, including "eliminat[ing] all NCAA limits on compensation." *Id.* at 117a.

The district court enjoined the NCAA and its member schools and conferences from agreeing to fix or limit specified categories of education-related benefits. Pet. App. 167a-168a. The parties may seek amendments to this list, and with the court's approval, the NCAA may promulgate "a definition of compensation and benefits that are 'related to education.'" *Ibid.* The injunction

also allows each member conference and school to impose its own independent limits on education-related benefits offered to student-athletes. *Id.* at 169a.

5. The court of appeals affirmed the "liability determination and injunction in all respects." Pet. App. 52a; see *id.* at 1a-63a.

As in the district court, petitioners did not dispute market definition or the findings of significant anticompetitive effects at step one of the rule of reason. Pet. App. 34a. At step two, the court of appeals recognized that "[i]mproving customer choice is procompetitive," *ibid.* (citation omitted), and that "the district court properly credited the importance to consumer demand of maintaining a distinction between college and professional sports," *id.* at 34a-35a (brackets and citation omitted). But the court determined that "[t]he record amply supports" the district court's findings that "only *some* of the challenged rules serve that procompetitive purpose." *Id.* at 35a-36a. In particular, the court explained that "[t]he district court reasonably relied on demand analyses, survey evidence, and NCAA testimony indicating that caps on non-cash, education-related benefits have no demand-preserving effect and, therefore, lack a procompetitive justification." *Ibid.*; see *id.* at 40a.

At step three, the court of appeals held that the district court had identified a "'substantially less restrictive'" alternative that would be "'virtually as effective' in serving the procompetitive purposes of the NCAA's current rules, and 'without significantly increased cost'"—namely, prohibiting the NCAA from "(i) capping certain education-related benefits and (ii) limiting academic or graduation awards or incentives below the maximum amount that an individual athlete may receive

in athletic participation awards, while (iii) permitting individual conferences to set limits on education-related benefits." Pet. App. 33a, 40a-41a (quoting *O'Bannon*, 802 F.3d at 1074) (citation and footnote omitted); see *id.* at 33a, 41a-46a.

Respondents argued on cross-appeal "that the district court should have enjoined all NCAA compensation limits." Pet. App. 47a (emphasis omitted). The court of appeals rejected that argument, concluding that the district court had "struck the right balance" between "prevent[ing] anticompetitive harm to" respondents and "preserving the popularity of college sports." *Ibid.* The court of appeals also upheld the permanent injunction, rejecting petitioners' argument that the injunction was impermissibly vague. *Ibid.*[3]

SUMMARY OF ARGUMENT

The courts below correctly held that petitioners' limitations on student-athlete compensation are subject to standard rule-of-reason review, and they properly applied that framework to the facts found by the district court.

A. From an antitrust perspective, athletic competition among NCAA schools is an unusual product. The schools must agree on at least some aspects of the competition, and the NCAA and its member schools have long marketed student-athletes' amateur status as an

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[3] Judge Smith joined "the panel opinion in full" but wrote separately to address "cross-market analysis" under the rule of reason. Pet. App. 53a-63a. Although the parties had agreed on the relevant markets—the market for student-athletic services at step one, and the market for college sports at step two—Judge Smith expressed the view that rule-of-reason analysis should be "confined to the single market identified from the outset." *Id.* at 60a. That issue is not raised in this Court.

essential aspect of intercollegiate sports. To maintain the product's appeal to consumers who value amateurism, the schools must implement agreements among competitors that eliminate an element of price competition. Although such arrangements would ordinarily be invalid per se, the unique features of the product here made such treatment inappropriate.

Contrary to petitioners' contentions, however, neither those product characteristics nor this Court's precedents suggest that the challenged restraints should have been analyzed under a standard more relaxed than the traditional rule of reason. The Court in *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984), did not endorse such a standard. And neither the NCAA's status as a joint venture nor the educational mission of petitioners and their member schools supports that approach. This Court has never upheld a restraint of trade under Section 1 based on a "quick look" or "[a]bbreviated deferential" review, *e.g.*, Conf. Br. 13; NCAA Br. 21, and it should not do so here, where the challenged restraints are horizontal price-fixing agreements among competitors who exercise monopsony control in the relevant labor market.

B. In resolving the parties' disagreement concerning steps two and three of the rule of reason, the courts below properly applied established antitrust principles to the facts found by the district court.

1. At step two, the courts below credited petitioners' contention that promoting amateurism widens consumer choice, and thereby enhances competition, by maintaining a distinction between college and professional athletics. But the courts also reasonably determined, based on the evidence submitted at trial, that

some of the challenged rules did not actually foster consumer demand.

Petitioners' contrary arguments lack merit. The courts below did not redefine the product by determining the extent to which the challenged rules actually fuel consumer demand; they did not require petitioners to prove the absence of a less restrictive alternative; and the district court's decision to consider the restraints in three groups was both reasonable and unchallenged below.

2. At step three, the burden shifted back to respondents "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). The courts below reasonably determined that removing certain limitations on education-related benefits would not hamper consumer demand.

Contrary to petitioners' contentions, the courts below did not require that petitioners' restraints be the least restrictive alternative, or suggest that a plaintiff can prevail at step three by identifying a "marginal[]" improvement to the challenged restraint, Conf. Br. 47. Rather, in approving a less stringent set of compensation limits as an alternative to the NCAA's rules, the courts below described that alternative as *substantially* less restrictive than the NCAA regime. Pet. App. 33a, 152a. Petitioners' concerns about repeat litigation or judicial micro-management of joint ventures are thus unfounded.

3. Petitioners have not asked this Court to review particular components of the less restrictive alternative approved by the district court. While they briefly suggest that the courts below erred with respect to paid

post-eligibility internships and academic and graduation awards, the courts' rulings were reasonable given the district court's factual findings.

ARGUMENT

THE COURTS BELOW CORRECTLY HELD THAT THE NCAA'S RULES ARE SUBJECT TO TRADITIONAL RULE-OF-REASON REVIEW, AND THEY PROPERLY APPLIED THAT FRAMEWORK TO THE FACTS FOUND BY THE DISTRICT COURT

The Sherman Act is "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition." *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). Resting "on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress," "the policy unequivocally laid down by the Act is competition." *Ibid.* Section 1 of the Act, 15 U.S.C. 1, prohibits unreasonable restraints of trade, and "[t]he rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1," *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885 (2007).

The rule of reason is a "flexible" standard. *American Needle, Inc.* v. *National Football League*, 560 U.S. 183, 203 (2010). But neither the unique nature of intercollegiate athletics nor this Court's precedents required the courts below to limit their antitrust scrutiny to a "'quick look,'" *e.g.*, Conf. Br. 13, or "abbreviated deferential review," *e.g.*, NCAA Br. 21. Instead, the courts below appropriately recognized the unique nature of intercollegiate athletics by (a) acknowledging that some coordination among the NCAA's member schools is nec-

essary; (b) crediting petitioners' argument that preserving amateurism in college sports "widens consumer choice," Pet. App. 34a (brackets omitted); and (c) rejecting respondents' proposal to "eliminate all NCAA limits on compensation" to student-athletes, *id.* at 117a; see *id.* at 47a; pp. 8, 10, *supra*.

Far from disregarding the distinct character of the product that petitioners and their member schools market, the courts below largely *upheld* horizontal price-fixing agreements that in most contexts would be unlawful per se, based on a rationale for concerted action (*i.e.*, that not paying the schools' laborers fosters consumer demand) that few businesses could plausibly assert. The lower courts' disposition of the case was adverse to petitioners only insofar as those courts found that particular aspects of the NCAA's compensation restrictions could be eliminated or relaxed without meaningfully impairing consumer demand. That holding was consistent with the applicable burden-shifting framework, and it followed logically from the district court's factual findings.

A. Petitioners' Restraints On Student-Athlete Compensation Are Subject To Fact-Intensive Scrutiny Under The Rule Of Reason

1. Under Section 1 of the Sherman Act, agreements among competitors that eliminate an element of price competition—*i.e.*, "horizontal" price-fixing restraints—ordinarily are per se unlawful. See, *e.g.*, *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647-648 (1980) (per curiam); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218-226 & n.59 (1940). But the usual approach under Section 1 is the rule of reason. *Leegin*, 551 U.S. at 885; see *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 5 (2006).

That approach entails "a fact-specific assessment" to distinguish between restrictions "that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Ohio* v. *American Express Co.*, 138 S. Ct. 2274, 2284 (2018) (citation omitted); see pp. 2-3, *supra*.

2. From an antitrust perspective, the product that the NCAA and its member schools provide is unusual in two respects. Because no single entity could produce athletic competition among the schools, member institutions must agree on at least some aspects of the competition among them. In addition, the NCAA and its member schools have long marketed student-athletes' amateur status as an essential attribute of intercollegiate sports. Few 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. And even fewer could plausibly assert a need to coordinate those payment policies among competitors.

Given those unusual features of the relevant "product," the courts below appropriately recognized that the challenged rules should be reviewed under the fact-intensive rule of reason, rather than condemned under the per se rule that governs most horizontal price-fixing agreements. But the product's unusual features do not justify the more relaxed antitrust scrutiny that petitioners advocate, under which the NCAA's "amateurism" rules would be upheld after a "'quick look,' without detailed factual review," Conf. Br. 13; or "on the pleadings" after "[a]bbreviated deferential review," NCAA Br. 3, 21, 27.

In *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984), this Court considered an NCAA plan that limited the

number of televised intercollegiate football games and the minimum aggregate price paid to the schools. *Id.* at 92-94. The Court explained that the plan constituted "[h]orizontal price fixing and output limitation" that would ordinarily be "'illegal *per se*.'" *Id.* at 100 (citation omitted). The Court nevertheless declined "to apply a *per se* rule" because intercollegiate athletics is "an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 100-101; see *id.* at 101-102. But in recognition that "'no elaborate industry analysis is required to demonstrate the anticompetitive character'" of "an agreement not to compete in terms of price" and that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis," the Court applied an abbreviated form of the "Rule of Reason"—later termed "quick-look" analysis—to hold that the television plan violated Section 1. *Id.* at 103, 109-110 (citation omitted); see *id.* at 103-120; *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 770 (1999).

Although the restraints actually at issue in *Board of Regents* involved the televising of games, petitioners rely (*e.g.*, NCAA Br. 20, 23; Conf. Br. 24) on the Court's statement that, "[i]n order to preserve the character and quality" of intercollegiate athletics, "athletes must not be paid." 468 U.S. at 102. The Court found it "reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics," *id.* at 117, and it stated that the NCAA "needs ample latitude" to maintain "a revered tradition of amateurism in college sports," *id.* at 120.

Those statements indicate that petitioners should have a fair opportunity to demonstrate the procompetitive virtues of horizontal restraints that ordinarily would be per se invalid, but they do not suggest that courts should reflexively reject all challenges to the amateurism rules. Those rules were not before the Court, and the statements regarding their reasonableness were "assum[ptions]." *Board of Regents*, 468 U.S. at 117. And because the Court decided *Board of Regents* more than 35 years ago, assumptions about the then-existing amateurism rules cannot preclude respondents from showing that, in light of present market conditions, some aspects of the NCAA's current athlete-compensation restrictions are unreasonable today. As explained above (see pp. 6-10, *supra*), moreover, the courts below did not conclude that the NCAA's amateurism rules writ large have ceased to serve their original procompetitive purpose. They simply held that certain aspects of those rules could be modified without impairing consumer demand.

Petitioners also rely (*e.g.*, NCAA Br. 20; Conf. Br. 20) on the Court's statement that "the rule of reason can sometimes be applied in the twinkling of an eye." *Board of Regents*, 468 U.S. at 110 n.39 (citation omitted). But the Court was explaining that, even when "joint buying or selling arrangements are not unlawful per se," a court applying the rule of reason "would not hesitate in *enjoining*" them in certain circumstances. *Ibid.* (emphasis added; citation omitted). While petitioners emphasize (*e.g.*, NCAA Br. 19-20; Conf. Br. 20) the Court's later suggestion that some agreements could be *upheld* "in the twinkling of an eye," *American Needle*, 560 U.S. at 203 (citation omitted), that statement was dicta. In neither *American Needle* nor in any subsequent decision

has this Court sustained a challenged horizontal restriction without first applying traditional rule-of-reason review.

Even if some restraints could properly be upheld after abbreviated analysis, that approach is inappropriate here. The scope of the rule-of-reason inquiry "depend[s] upon the concerted activity in question." *American Needle*, 560 U.S. at 203; see *California Dental Ass'n*, 526 U.S. at 781 (requiring "an enquiry meet for the case"). This case involves horizontal price-fixing agreements among competitors in a market where they exercise monopsony control. See Pet. App. 33a-34a, 68a-69a, 82a. Petitioners' unusual product and circumstances justify a departure from the usual per se condemnation.[4] But the fact that horizontal price-fixing ordinarily is per se invalid makes petitioners' argument for deferential antitrust scrutiny and "quick-look" approval especially untenable. Quick-look approval would be particularly inappropriate here because petitioners have not argued that the restrictions found to be invalid have a "net procompetitive effect," *California Dental Ass'n*, 526 U.S. at 771—*i.e.*, that the "costs to competition" in the labor market are "outweighed by" increased competition in the output market, *id.* at 775.

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[4] While the particular characteristics of an *industry* generally do not justify departing from the per se rule against horizontal price-fixing, see *Arizona* v. *Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 349-350 (1982), the nature of the *product* here—in particular, the fact that agreement is necessary for college sports to be available at all—warrants application of the rule of reason, see *Board of Regents*, 468 U.S. at 119. The per se rule still applies to horizontal price-fixing agreements among colleges in other contexts (*e.g.*, an agreement fixing professors' salaries).

3. Petitioners' other arguments for less rigorous scrutiny lack merit.

a. Petitioners rely (NCAA Br. 19-21; Conf. Br. 22-23) on the NCAA's status as a joint venture. But this "Court's precedent involving joint ventures" does not "imply any special treatment or differing antitrust analysis." *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958, 964-965 (10th Cir. 1994), cert. denied, 515 U.S. 1152 (1995). While joint-venture agreements typically are not per se invalid, see p. 20 n.5, *infra*, they are subject to "discriminating examination under the rule of reason," even when they are "necessary to market the product at all." *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 23-24 (1979); see, *e.g.*, *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 295-298 (1985); *Board of Regents*, 468 U.S. at 103.

Even after a defendant has established that a challenged restraint will produce procompetitive benefits, the rule of reason allows plaintiffs at step three to prevail by identifying a less restrictive alternative (or by showing that the restraint is on balance unreasonable, see p. 3, *supra*). Step three is designed specifically for situations where antitrust defendants establish a procompetitive rationale for concerted action. It comes into play only when that condition is satisfied, and its whole purpose is to give plaintiffs an opportunity to demonstrate that the defendant's own procompetitive ends could be achieved through less restrictive means. It therefore would make no sense to treat the existence of a legitimate collaboration as a reason not to conduct full rule-of-reason review at all.

b. Relying on *Dagher*, petitioners contend that more deferential review is appropriate for "core" features of

their product. Conf. Br. 31-32; cf. NCAA Br. 26-27. But while the NCAA rules at issue here help to distinguish intercollegiate sports from competing products, they are not "core" restraints as the *Dagher* Court used that term.

The dispute in *Dagher* arose after "Texaco and Shell Oil formed a joint venture, Equilon, to consolidate their operations in the western United States, thereby ending competition between the two companies in the domestic refining and marketing of gasoline." 547 U.S. at 4. The Court held that, once Equilon had been formed, its decision to charge the same price for Texaco- and Shell-branded gasoline in that region was not "a pricing agreement between competing entities," *id.* at 6, but instead was "the core activity" of the integrated "joint venture itself," *id.* at 7. The Court distinguished that pricing decision from the television rules at issue in *Board of Regents*, which it described as restricting "nonventure activities," *ibid.*, *i.e.*, the competition *between* individual NCAA member schools seeking "to attract television revenues," *Board of Regents*, 468 U.S. at 99; see *id.* at 113-115.[5]

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[5] Restraints on "nonventure activities" imposed by a legitimate joint venture ordinarily are analyzed under the ancillary-restraints doctrine. *Dagher*, 547 U.S. at 7. Restraints are "ancillary" when they are "subordinate and collateral to a separate, legitimate transaction," and "reasonably necessary" to the transaction's procompetitive goals. *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224, 227 (D.C. Cir. 1986) (Bork, J), cert. denied, 479 U.S. 1033 (1987). A restraint that satisfies those criteria is exempt from per se invalidation and subject to a "discriminating assessment" under "the Rule of Reason." *Polk Bros.* v. *Forest City Enters., Inc.*, 776 F.2d 185, 189-190 (7th Cir. 1985) (Easterbrook, J.); accord *Major League Baseball Props., Inc.* v. *Salvino, Inc.*, 542 F.3d 290, 339 n.7 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment).

Unlike the "core" pricing conduct in *Dagher*, petitioners' amateurism rules are a "pricing agreement between competing entities." *Dagher*, 547 U.S. at 6. Those rules restrain the schools' nonventure competition in the labor market, where the NCAA's members "compete against each other to attract * * * athletes." *Board of Regents*, 468 U.S. at 99; see Conf. Pet. 29 (acknowledging that the NCAA's "members compete for recruits on a national basis"). Rules that restrict the schools from using student-athlete compensation as an element of that labor-market competition are not analogous to the "core" pricing decision in *Dagher*. See 547 U.S. at 7. And even on a more colloquial understanding of the term "core restraint," it would be anomalous to apply that term to restrictions that have been found not to affect consumer demand.

c. The NCAA contends that "abbreviated deferential" review is appropriate because "the NCAA and its member schools are not commercial enterprises," but rather "maintain amateurism in college sports as part of serving [the] societally important non-commercial objective" of "higher education." NCAA Br. 3, 31. As the Conference petitioners acknowledge (Br. 49-50), however, "the antitrust laws * * * focus narrowly on competition and take no account of broader questions of fairness, or of educational and athletic policy." See, *e.g.*, *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 690 (1978) ("[T]he inquiry is confined to a consideration of impact on competitive conditions."). In *Board of Regents*, this Court observed both that Section 1 "applies to" nonprofit entities, and that "the NCAA's nonprofit character is questionable at best" because "the NCAA and its member institutions are in fact organized to maximize revenues." 468 U.S. at 100 & n.22.

The latter observation is particularly salient here because this case concerns FBS football and Division I basketball—extremely lucrative endeavors. See, *e.g.*, Pet. App. 10a.

To be sure, the fact that the schools are schools and the athletes are students may cause some consumers to view petitioners' compensation restrictions more sympathetically than they would view similar agreements among ordinary for-profit businesses. That effect may well have contributed to petitioners' success in establishing the requisite procompetitive justification, and in prevailing under the rule of reason with respect to substantial elements of their compensation rules. See pp. 6-10, 13-14, *supra*. But petitioners' educational mission provides no basis for dispensing with traditional rule-of-reason analysis.

B. The Courts Below Properly Applied The Rule Of Reason

Petitioners contend that even if the rule of reason applies, the courts below erred at steps two and three. Contrary to petitioners' arguments, the lower courts' analyses followed logically from the district court's factual findings.

1. The courts below correctly applied step two of the rule of reason

a. Because it was undisputed that the challenged restrictions had significant anticompetitive effects, petitioners faced "a heavy burden" at step two to "competitively justif[y]" the rules' "apparent deviation from the operations of a free market." *Board of Regents*, 468 U.S. at 113; see *American Express Co.*, 138 S. Ct. at 2284. Satisfying this burden requires more than simply "a plausible connection" between the restraint and "a legitimate objective." 7 Areeda & Hovenkamp ¶ 1505b, at

436. Rather, petitioners were required to show that "the real effect of the restraint is to increase output (or decrease price)." 11 Herbert Hovenkamp, *Antitrust Law* ¶ 1914c, at 409 (4th ed. 2018); see *California Dental Ass'n*, 526 U.S. at 775 n.12 (requiring "empirical evidence of procompetitive effects"). The courts below properly held that petitioners had met this burden for some, but not all, of the challenged restraints.

The courts below reasonably credited petitioners' argument that promoting amateurism is procompetitive because it "'widen[s] consumer choice' by maintaining a distinction between college and professional sports." Pet. App. 34a (brackets in original); see *id.* at 35a-36a, 107a. Providing a new product, or increasing an existing product's appeal to consumers by differentiating it from other products, generally can have procompetitive effects. See *Board of Regents*, 468 U.S. at 101-102. To be sure, the mechanism by which the NCAA seeks to achieve that effect—*i.e.*, requiring member schools not to compensate their laborers—ordinarily could not be expected to enhance consumer demand. See p. 14, *supra*. Consistent with this Court's suggestion in *Board of Regents*, however, the courts below concluded that the NCAA's restraints on student-athletes' compensation could have procompetitive effects.

Having found a legitimate procompetitive interest in preserving demand for college sports, the courts below concluded that some, but not all, of the challenged rules had been shown to serve that interest. In particular, the court of appeals credited the district court's finding that consumer demand for college sports as a unique amateur product is furthered by rules limiting "payments unrelated to education" and "athletic scholarships" above the cost of attendance, as well as "certain

restrictions on cash academic or graduation awards and incentives." Pet. App. 35a. The courts determined that eliminating those restrictions could blur the distinction between college and professional sports, and thus undermine "consumer demand for college sports as a distinct product." *Id.* at 148a; see *id.* at 34a-40a.

The courts below likewise acted reasonably, however, in determining that petitioners had not carried their burden with respect to rules limiting certain education-related benefits. See Pet. App. 34a-40a. The district court reached that conclusion based on an extensive factual record and the court's evaluation of competing expert testimony. See *id.* at 92a-94a (explaining reasons for not crediting petitioners' "only economics expert on the issue of consumer demand"); *id.* at 94a-99a (discussing and crediting competing expert's testimony that certain prior increases in student-athletes' compensation had not reduced consumer demand); *id.* at 99a-103a (discussing competing survey evidence and finding respondents' evidence more credible). The trial judge's nuanced fact-based assessment is entitled to an appellate court's respect.

b. Petitioners challenge several aspects of the lower courts' analysis at step two of the rule of reason. Those critiques are mistaken.

i. Petitioners assert (*e.g.*, NCAA Br. 35-36) that the courts below "redefin[ed]" the product by rejecting petitioners' proffered conception of amateurism—that only professionals are "paid to play"—in favor of the understanding that student-athletes do not receive "cash payments unrelated to education and akin to professional salaries." Pet. App. 40a n.16 (emphasis omitted);

see *id.* at 147a-148a; Conf. Br. 35.[6] Petitioners' argument misapprehends the way in which amateurism relates to this case, and it gives insufficient weight to the district court's factual findings.

Amateurism is not a freestanding procompetitive justification, but instead is relevant at step two of the rule of reason only insofar as it "enhances competition" in the market for sports entertainment. *Board of Regents*, 468 U.S. at 103-104; see Pet. App. 141a. An *individual school* could lawfully adopt an amateurism policy for non-economic reasons, *e.g.*, because it believed that such a policy would improve its intellectual culture. But such non-economic rationales are not "acceptable justification[s] for an otherwise unlawful restraint of trade" produced by an agreement among competitors. *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990); see *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 448, 462 (1986). Thus, 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

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[6] Petitioners suggest that the court of appeals inappropriately "rewrote" the district court's definition of amateurism, which was that student-athletes are "'not [paid] unlimited payments unrelated to education.'" NCAA Br. 35, 37 (brackets and citation omitted); see Conf. Br. 36-37. As the court of appeals explained, however, the district court's discussion of "unlimited pay" was meant to contrast the types of education-related payments that student-athletes may receive with the payments that professional athletes earn. See Pet. App. 40a n.16; see also *id.* at 147a-148a. The district court thus correctly focused on whether various NCAA rules could be expected to perform what for antitrust purposes is their relevant function, *i.e.*, increasing consumer demand for college athletics by distinguishing that product from professional sports.

restrictions make the product more attractive *to consumers*. See *American Express Co.*, 138 S. Ct. at 2284 (Rule-of-reason analysis is used "to 'distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.'") (brackets omitted).[7]

To that end, the district court observed that petitioners "nowhere define[d] the nature of the amateurism they claim consumers insist upon." Pet. App. 83a. The court therefore turned to the record, which "show[ed] that many forms of payment, often in unrestricted cash, from schools and other sources, are allowed by the NCAA as 'not pay,' and thus as not inconsistent with amateurism." *Id.* at 85a; see *id.* at 38a, 147a. The record contained "considerable evidence that college sports have retained their distinctive popularity despite an increase in permissible forms of" compensation and benefits above the cost of attendance. *Id.* at 38a. The courts below thus reasonably determined that, because consumer demand did not depend on a pure "no pay to play" conception of amateurism, petitioners' stated desire to adhere to that conception did not by itself provide a procompetitive justification for the challenged rules. Cf. *Board of Regents*, 468 U.S. at 119-120 (rejecting NCAA's proffered procompetitive justification for television restrictions based on factual determination

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[7] While making a product more attractive to consumers can be a legitimate procompetitive justification, proof that restraints on labor compensation would lower costs and thus lower the prices charged to customers would not establish a procompetitive justification. See *Law* v. *NCAA*, 134 F.3d 1010, 1023 (10th Cir.), cert. denied, 525 U.S. 822 (1998).

that "consumption will materially increase if the controls are removed").

ii. At step two of its rule-of-reason analysis, the district court divided the challenged restraints into three categories. See Pet. App. 147a-148a. The court further divided the third category ("compensation and benefits related to education provided on top of a grant-in-aid") into distinct types of payments, concluding that "only some have been * * * shown to be procompetitive, namely limits on academic or graduation awards and incentives that are provided in cash or cash-equivalents." *Id.* at 148a. Petitioners argue that the court instead should have considered "the body of NCAA eligibility rules" "in the aggregate," presumably to make a single step-two determination whether the rules taken together served a procompetitive purpose. Conf. Br. 35; see NCAA Br. 38-42. But petitioners did not make that argument in the court of appeals, and the court did not address it; the issue therefore is not properly presented here.

In any event, petitioners cite no judicial decision or principle of antitrust law that categorically requires courts to combine different restraints when analyzing their competitive effects at step two. Nor would such a rigid rule make sense. Within a single case, plaintiffs may challenge multiple restraints—and defendants may proffer different procompetitive rationales for the various restrictions, or may assert that different restrictions serve the same procompetitive objective but in different ways or to different degrees. Whether collective consideration of related restraints is appropriate at step two, and how any such consideration should occur, will depend in part on case-specific factors. The categorical requirement that petitioners advocate could

enable defendants to insulate anticompetitive restraints by packaging them with procompetitive ones.

While recognizing that the challenged amateurism rules were "interconnected," Pet. App. 65a, the district court appropriately probed petitioners' suggestion that the rules all promoted competition in the output market in the same way. The court determined that, *for consumers*, a key "distinction between college and professional sports arises from the fact that student-athletes do not receive unlimited cash payments, especially those unrelated to education." *Id.* at 147a. The court therefore concluded that the challenged restrictions were best understood as falling into three categories: "(1) the limit on the grant-in-aid at not less than the cost of attendance; (2) compensation and benefits *unrelated* to education paid on top of a grant-in-aid; [and] (3) compensation and benefits *related* to education provided on top of a grant-in-aid." *Id.* at 147a-148a (emphases added). While the court might have grouped the restrictions differently, its analysis reflected reasonable inferences from the record before it.[8]

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[8] Petitioners complain (NCAA Br. 39-40; Conf. Br. 34-35) that, while the district court divided the challenged restrictions into categories for purposes of step-two analysis, it determined at step one that the rules in the aggregate impeded competition in the relevant labor market. Petitioners did not argue below, however, that any particular restrictions should be summarily upheld at step one based on a lack of anticompetitive effect. More generally, even where a court divides challenged restrictions into categories at either or both of the first two steps, there is no reason to suppose that the two groupings should be the same, *i.e.*, that restrictions having similar anticompetitive effects will also have similar procompetitive justifications.

iii. Petitioners also assert that the courts below "improperly required the NCAA to prove the absence of a less restrictive alternative at step 2 of the rule of reason inquiry." Conf. Br. 34 (capitalization altered; emphasis omitted); see NCAA Br. 40-41. That is incorrect. Both courts recognized that at step two, petitioners bore the burden of showing that the challenged rules were procompetitive, Pet. App. 34a, 140a, while respondents were required at step three to "make a strong evidentiary showing that their proposed" less restrictive alternatives would "be virtually as effective in serving the procompetitive purposes of the NCAA's current rules," *id.* at 40a (citation and internal quotation marks omitted); see *id.* at 152a.

Petitioners contend (NCAA Br. 40) that, by deciding at step two that some rules lacked a competitive justification, the district court improperly "pretermitted any meaningful step-3 analysis." As discussed above, however, the lower courts properly considered at step two whether petitioners' rules *actually* served their asserted procompetitive justification. Where petitioners did not meet that burden—*e.g.*, for rules that "restrict inherently limited, non-cash, education-related benefits" like "scholarships for graduate school"—step-three analysis was unnecessary. Pet. App. 152a, 154a; see, *e.g.*, *American Express Co.*, 138 S. Ct. at 2284 (court proceeds to step three "[i]f the defendant" makes the requisite step-two showing).

iv. Finally, there is no reason to suppose that the district court's step-two decision to divide the challenged amateurism rules into categories, rather than considering them en masse, affected the court's ultimate disposition of the case. At step two the court weeded out only

a subset of the rules in the third category, *i.e.*, "compensation and benefits related to education provided on top of a grant-in-aid." Pet. App. 148a. At step three the court identified, as the appropriate less restrictive alternative, a regime that incorporated the existing NCAA rules within the first two categories and a modified version of the rules in the third category. See *id.* at 118a. Given the court's rationales for approving that alternative, see *id.* at 121a-126a, there is no reason to believe that the court would have identified a different less restrictive alternative if it had found at step two that the amateurism rules in the aggregate were procompetitive.

2. The lower courts' step-three analyses were sound

a. At step three of the rule of reason, respondents had the burden "to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *American Express Co.*, 138 S. Ct. at 2284. The district court's analysis of respondents' proffered alternatives, and the court of appeals' affirmance of the district court's judgment, followed logically from the district court's factual findings.

The courts below determined that petitioners could allow member schools to provide a greater range of benefits to student-athletes, while still distinguishing college from professional sports and thus achieving the procompetitive objective established at step two. Pet. App. 152a. The district court identified a less restrictive alternative that eliminated NCAA caps on certain "education-related benefits," including "post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; expenses for pre- and post-eligibility tutoring;

expenses related to studying abroad that are not covered by the cost of attendance; and paid post-eligibility internships." *Id.* at 41a, 119a. The courts below viewed the record evidence as establishing that such compensation and benefits would not reduce consumer demand for college sports because they could "not provide a vehicle for" the sorts of "unlimited cash payments, unrelated to education," that would impair consumers' perception of college sports as a distinct product. *Id.* at 119a; see *id.* at 41a-43a.

b. Petitioners contend that the courts below required their restraints to be the "least restrictive alternative." NCAA Br. 41-43 (citation omitted); Conf. Br. 38-39 (emphasis omitted). That is incorrect. Rather, those courts determined that a "substantially less restrictive" alternative, Pet. App. 33a (quoting *O'Bannon*, 802 F.3d at 1070), would "preserve consumer demand for college athletics just as well as the challenged rules do," *id.* at 41a; see *id.* at 152a. If horizontal restraints can be made substantially less restrictive of labor-market competition, while still promoting consumer demand for college sports to the same degree, student-athletes should benefit from that additional competition. See 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 352c, at 289 (4th ed. 2014) ("Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services."). And where, as here, a plaintiff challenges a group of restrictions, an appropriate less restrictive alternative may be a subset that includes some, but not all, of the existing limits.

Petitioners express concern that the decision below will incentivize repeat litigation in which courts successively impose "marginally less restrictive approaches."

Conf. Br. 47 (citation omitted); see *id.* at 42; NCAA Br. 42, 50. But nothing in the opinions below suggests that the Ninth Circuit would find it sufficient, at step three, for a plaintiff to identify a "marginal[]" improvement on the challenged restraint. Conf. Br. 47. Rather, the court of appeals described the alternative compensation limits that the district court had approved as "substantially" less restrictive than the challenged NCAA rules. See p. 9, *supra*. Indeed, both of the courts below viewed the NCAA rules as "patently and inexplicably stricter than is necessary to accomplish" petitioners' procompetitive purposes. Pet. App. 33a, 152a (quoting *O'Bannon*, 802 F.3d at 1075) (emphasis omitted). Rulings premised on that rationale do not presage future judicial micro-management of legitimate joint ventures.[9]

3. Petitioners' critiques regarding particular restraints provide no basis for reversal

Petitioners do not ask this Court to review individually the various components of the less restrictive alternative approved by the district court. Petitioners suggest, however, that two aspects of that alternative demonstrate the errors in the lower courts' analysis. Particularly in light of the deference due to the district court's findings of fact, those critiques provide no basis for reversal.

a. Petitioners suggest (NCAA Br. 47; Conf. Br. 42) that the courts below erred in barring the NCAA from limiting paid post-eligibility internships. Based on the record before it, however, the district court reasonably

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[9] While petitioners now contend (*e.g.*, Conf. Br. 2) that the district court's injunction was too detailed, they argued below that the injunction was too vague. Pets. C.A. Br. 66-69; Pet. App. 46a.

determined that such internships would not affect consumer demand. See Pet. App. 98a (discussing a University of Nebraska program that allows payment of "up to $7,500 for education-related endeavors," including post-eligibility internships).

Petitioners do not dispute that *typical* paid internships for college students provide modest remuneration bearing no resemblance to a professional athlete's salary. Instead, petitioners highlight the possibility of *atypical* lucrative internships given by "boosters" (Conf. Br. 42) or by schools to athletes after their college careers. See NCAA Br. 47. But the injunction does not affect NCAA rules that prohibit boosters from providing such internships. Pet. App. 167a-168a (addressing post-eligibility internships "made available from *conferences or schools*") (emphasis added). And while the NCAA suggests (Br. 47) that post-eligibility internships might be "*promised* to student-athletes well before eligibility expires," the injunction does not appear to foreclose the NCAA from maintaining rules that prohibit advance assurances of post-eligibility payments. See NCAA, *2020-21 NCAA: DIVISION I MANUAL* Arts. 12.1.2(b), 13.2.1 (effective Aug. 1, 2020), https://www.ncaapublications.com/p-4605-2020-2021-ncaa-division-i-manual.aspx; Pet. App. 167a.

Petitioners' fears about highly lucrative post-eligibility internships rest on an overly broad reading of the injunction. The injunction prohibits the NCAA from "agreeing to fix or limit compensation or benefits related to education," including paid post-eligibility internships, computers, graduate-school tuition, and science equipment. Pet. App. 168a. "The context here makes plain that it 'cannot have been the district court's intent' for

uncapped benefits to be vehicles for unlimited cash payments." *Id.* at 43a (citation omitted). Properly construed, the injunction does not permit schools to award lucrative internships unrelated to educational objectives, just as it does not encompass "luxury cars or expensive musical instruments for students who are *not* studying music." *Id.* at 44a; see *ibid.* (allowing "*legitimate* education-related costs") (citation omitted). Individual conferences may further restrict the availability of internships, and the NCAA may adopt a definition of "compensation and benefits that are 'related to education,'" as well as rules, bylaws, or policies that "regulate[] how conferences or schools provide" post-eligibility paid internships. *Id.* at 168a.

b. Petitioners also fault (NCAA Pet. 47-48; Conf. Pet. 43) the courts below for requiring the NCAA to permit payment of "academic and graduation" awards and incentives up to the aggregate amount that a student-athlete could receive in "athletics participation" awards under the current rules, Pet. App. 120a; see *id.* at 9a & n.2, 23a n.10, 44a. But here again, the decisions below flowed logically from the district court's factual findings. See *id.* at 44a-45a.

The district court explained that "[a]llowing the NCAA to cap education-related awards and incentives at the athletics participation awards limit, *which is an amount that has been shown not to decrease consumer demand*," would serve the NCAA's interest in "prevent[ing] unlimited cash, demand-reducing payments" but would be "less restrictive than maintaining the current" prohibitions. Pet. App. 120a (emphasis added); see *id.* at 102a-103a. The injunction allows the NCAA to reduce the caps on athletic awards; it simply states that the NCAA limit on "academic and graduation

awards" can be no lower than whatever athletic-award cap the NCAA chooses. The injunction also permits individual conferences to impose additional limits on academic and graduation awards. *Id.* at 169a.

Petitioners assert (*e.g.*, NCAA Br. 47-48) that this alternative would allow a school to pay every football or basketball player several thousand dollars each year simply for maintaining the minimum GPA required for athletic eligibility. But while the injunction speaks directly to what limits the NCAA may place on the *amount* of permissible "academic and graduation awards," it does not discuss the criteria that schools may use to determine eligibility for such awards. If petitioners believe (for example) that payments for maintaining a particular GPA should be subject to NCAA bans (or to lower caps than the injunction contemplates) because they would not reward genuine academic achievement, petitioners may seek clarification or modification of the injunction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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