No.

# In the Supreme Court of the United States

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

*Petitioners*,

v.

SHAWNE ALSTON, ET AL.,

*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

The National Collegiate Athletic Association (NCAA) is a nonprofit association that sets the rules governing college athletics, including the rules limiting the payments that colleges may make to student-athletes. As this Court has explained, "the NCAA seeks to market a particular brand of [sports]—college [sports]. The identification of this 'product' with an academic tradition differentiates college [sports] from and makes it more popular than professional sports to which it might otherwise be comparable," and "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like." *NCAA* v. *Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101-102 (1984).

In this case, however, the district court held that the NCAA student-athlete payment limits violate the Sherman Act. It imposed a detailed injunction prescribing the types of payments that colleges must be permitted to make to student-athletes, retained jurisdiction, and directed the parties to seek guidance from the court before making certain future changes to NCAA rules. The Ninth Circuit affirmed, holding that the NCAA could have used less restrictive rules to achieve its procompetitive goal.

The question presented is:

Whether the Sherman Act authorizes a court to subject the product-defining rules of a joint venture to full Rule of Reason review, and to hold those rules unlawful if, in the court's view, they are not the least restrictive means that could have been used to accomplish their procompetitive goal.

## PARTIES TO THE PROCEEDINGS

Petitioners, defendants-appellants below, are American Athletic Conference; Atlantic Coast Conference; The Big Ten Conference, Inc.; The Big 12 Conference, Inc.; Conference USA; Mid-American Conference; Mountain West Conference, Inc.; Pac-12 Conference; Southeastern Conference; Sun Belt Conference; and Western Athletic Conference. The National Collegiate Athletic Association also was a defendant-appellant below.

Respondents, plaintiffs-appellees below, are class representatives Shawne Alston; Don Banks; Duane Bennett; John Bohannon; Barry Brunetti; India Chaney; Chris Daven-port; Dax Dellenbach; Sharrif Floyd; Kendall Gregory-McGhee; Justine Hartman; Nigel Hayes; Ashley Holliday; Dalenta Jameral Stephens; Alec James; Afure Jemerigbe; Martin Jenkins; Kenyata Johnson; Nicholas Kindler; Alex Lauricella; Johnathan Moore; Kevin Perry; Anfornee Stewart; Chris Stone; Kyle Theret; Michel'le Thomas; Kendall Timmons; and William Tyndall.

## CORPORATE DISCLOSURE STATEMENT

The American Athletic Conference is a D.C. not-for-profit corporation head-quartered in Irving, Texas. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The Atlantic Coast Conference is a North Carolina not-for-profit unincorporated association headquartered in Greensboro, North Carolina. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The Big Ten Conference, Inc. is a Delaware not-for-profit corporation with its principal place of business in Rosemont, Illinois. It has no corporate parent,

and no publicly held corporation owns 10 percent or more of its stock.

The Big 12 Conference, Inc. is a Delaware not-for-profit corporation with its principal place of business in Irving, Texas. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

Conference USA is an Illinois not-for-profit corporation with its principal place of business in Dallas, Texas. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

The Mid-American Conference is an Ohio not-for-profit corporation headquartered in Cleveland, Ohio. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The Mountain West Conference is a Colorado not-for-profit corporation headquartered in Colorado Springs, Colorado. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The Pac-12 Conference is a California not-for-profit unincorporated association headquartered in San Francisco, California. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The Southeastern Conference is an Alabama unincorporated not-for-profit association headquartered in Birmingham, Alabama. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The Sun Belt Conference is a Louisiana not-for-profit corporation headquartered in New Orleans, Louisiana. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The Western Athletic Conference is a Colorado not-for-profit corporation headquartered in Englewood, Colorado. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

**RELATED PROCEEDINGS**

United States District Court (N.D. Cal.):

1. *House, et al.* v. *NCAA, et al.*, No. 4:20-cv-3919 (pending).

2. *Oliver, et al.* v. *NCAA, et al.*, No. 4:20-cv-04527 (pending).

3. *Jenkins et al.* v. *National Collegiate Athletic Association et al.*, No. 4:14-cv-2758 (dismissed).

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## PETITION FOR A WRIT OF CERTIORARI

American Athletic Conference; Atlantic Coast Conference; The Big Ten Conference, Inc.; The Big 12 Conference, Inc.; Conference USA; Mid-American Conference; Mountain West Conference, Inc.; Pac-12 Conference; Southeastern Conference; Sun Belt Conference; and Western Athletic Conference respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 958 F.3d 1239. The relevant opinion of the district court (Pet. App. 103a-206a) is reported at 375 F. Supp. 3d 1058. The district court's permanent injunction (Pet. App. 207a-210a) is reported at 2019 WL 1593939.

## JURISDICTION

The court of appeals entered judgment on May 18, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

## STATEMENT

The district court below held that NCAA rules prohibiting colleges from paying student-athletes to play are, in substantial part, inconsistent with the

Sherman Act. The court remedied that supposed violation by composing a detailed list of payments that schools must be permitted to make to student-athletes, and by retaining jurisdiction to approve proposed future changes in the payment rules—seemingly in perpetuity. The Ninth Circuit affirmed that decision, holding that, because the NCAA student-athlete payment rules could have been drawn in a more permissive manner without eliminating college athletics as a discrete "product," the rules *must* be drawn in that manner.

For several reasons, the Ninth Circuit's decision should not stand.

*First*, the decision below misunderstood the controlling Sherman Act principles, in a manner that departs from this Court's holdings and solidifies an acknowledged conflict in the circuits. The Ninth Circuit improperly shifted onto defendants the plaintiffs' heavy burden to show the availability of a less restrictive alternative, effectively requiring a joint venture to prove that its rules are the *least* restrictive ones possible; this Court and other courts of appeals have rejected that impossible standard as an invitation to endless litigation. At the same time, the court below departed from holdings of other circuits that, in closely analogous circumstances, give the NCAA much greater deference in the design of its "product": These courts have recognized that "most NCAA eligibility rules are entitled to [a] procompetitive presumption" and that "a full rule-of-reason analysis is unnecessary" to uphold such rules under the Sherman Act. *Deppe* v. *NCAA,* 893 F.3d 498, 502, 503-504 (7th Cir. 2018).

*Second*, the Ninth Circuit's ruling gives a single judge ongoing, czar-like authority over college sports nationwide. This is an inappropriate role for a court to assume under any circumstance: This Court and other courts of appeals have long warned against close judicial management of ongoing enterprises under the guise of an antitrust judgment. See, *e.g.*, *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (antitrust courts are "ill-suited" to "act as central planners"). The manner in which the courts below overreached is especially apparent in the current environment, where Congress and many individual States—as well as the NCAA and the affected schools themselves—are even now deeply engaged in determining whether (and if so, how) college athletes should receive compensation. Resolution of that question is properly addressed through the political process, not through distorted application of the antitrust laws.

*Third*, the immediate practical consequences of the decision below are immense, and pernicious. Even as Congress and the States are considering the issue of acceptable payments to student-athletes, the decision below will alter the practices of the more than one thousand NCAA-member educational institutions and the lives of hundreds of thousands of students. The decision may fundamentally change college sports, a pastime of consuming interest to millions of people across the Nation. And it will trigger unending litigation against, and likely impose enormous liability on, nonprofit institutions, even as they are suffering from the effects of the Covid-19 pandemic—a parade of new lawsuits that already has started. Review by this Court therefore is warranted.

### A. The NCAA and college athletics

As this Court has recognized, NCAA college athletics, like all sports leagues, is an endeavor "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. In particular, college sports is maintained as a discrete form of competition by the NCAA, a nonprofit educational association whose membership includes more than one thousand public and private colleges and universities, and more than 100 nonprofit athletic conferences and other organizations. See *What Is The NCAA?,* https://tinyurl.com/y4kpswnl; Pet. App. 10a. Since it was formed "in 1905 in response to a public outcry concerning abuses in intercollegiate athletics" (*Board of Regents*, 468 U.S. at 121 (White, J., dissenting)), the NCAA "has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs." *Board of Regents*, 468 U.S. at 88 (majority opinion).

This Court has characterized "[w]hat the NCAA and its member institutions market * * * [a]s competition itself—contests between competing institutions." *Board of Regents*, 468 U.S. at 101. The Court added that "this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed." *Ibid*. Because "the NCAA seeks to market a particular brand of [sports]—college [sports]"—"[t]he identification of this 'product' with an academic tradition differentiates college [sports] from and makes it more popular than professional sports to which it might otherwise be comparable[.]" *Id.* at 101-102. And, the Court continued, "[i]n order to preserve the character and

quality of the 'product,' athletes must not be paid, must be required to attend class, and the like." *Id.* at 102.

Today, nearly half a million student-athletes participate in NCAA-administered athletics each year, playing two dozen sports. *What Is The NCAA*?, https://tinyurl.com/y4kpswnl. Although certain teams at some schools generate large revenues, the vast majority are subsidized by their schools, with any available income from the higher-revenue sports used to subsidize sports that are not self-sufficient. C.A. ER 154, 155 (Trial Tr. (Hatch)); C.A. ER 263-264 (JEX 17: NCAA Research, *Revenues and Expenses*, 2004–2016)). Meanwhile, the schools' "primary mission" remains "educating [their] students" (C.A. ER 153-154) (Trial Tr. (Hatch)), with intercollegiate athletics offered as "an important part of the educational experience." C.A. ER 213 (Trial Tr. (Blank)). Or, as Justice White put it 35 years ago, the NCAA "'exist[s] primarily to enhance the contribution made by amateur athletic competition to the process of higher education.'" *Board of Regents*, 468 U.S. at 122 (White, J., dissenting).

### B. Amateurism and the NCAA's eligibility rules

From its inception, a defining feature of NCAA sports has been amateurism, the principle that student-athletes are not professionals and "must not be paid" to play. *Board of Regents*, 468 U.S. at 102; see *id.* at 118 (NCAA rules "are justifiable means of fostering competition among amateur athletic teams"). This no-pay amateurism principle has long been thought central to "preserv[ing] the character and quality of the [college sport] 'product.'" *Ibid.*

In *Board of Regents*, the Court held that NCAA limits on football television broadcasts were subject to challenge under the Sherman Act. 468 U.S. at 113-120. At the same time, however, the Court explained in detail that "a certain degree of cooperation is necessary if the type of competition that [the NCAA] and its member institutions seek to market is to be preserved." *Id.* at 117. The Court continued:

> It is 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. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

*Ibid.*

Given this understanding, the NCAA consistently has maintained a body of eligibility rules designed to prohibit student-athletes from being paid for their play, while allowing schools to reimburse student-athletes for their reasonable and necessary academic and athletic expenses. See*, e.g.*, C.A. ER 284-287 (JEX 24, NCAA Bylaws), 290-295 (JEX 24, NCAA Bylaws), 1422-1440 (JEX 25, NCAA Bylaws); see also Pet. App. 11a (quoting NCAA "'Amateurism Rule,' which strips student-athletes of eligibility for intercollegiate competition if they '[u]se[] [their] athletics skill (directly or indirectly) for pay in any form in [their] sport,'"

with "'[p]ay" * * * defined as the 'receipt of funds, awards or benefits not permitted by governing legislation'"). The rules also permit student-athletes to receive limited awards to recognize special academic or athletic achievement. See C.A. ER 288-289, 296-297 (JEX 24, NCAA Bylaws).

The principal quantum of education expenses is "cost of attendance" (COA), a term defined by federal law and the measure used to determine the financial assistance students may receive to attend school. 20 U.S.C. § 1087kk. COA includes tuition and fees (including "any [required] equipment, materials, or supplies"), room and board, books, a computer, transportation, and other "miscellaneous personal expenses." *Id.* § 1087*ll*. Each school independently determines "the appropriate and reasonable amounts" for its students. C.A. ER 324 (JEX 1517, Federal Student Aid Handbook); see also 20 U.S.C. § 1087kk.

NCAA rules permit student-athletes to receive financial aid up to COA, and also permit schools to "adjust[]" COA for student-athletes "on an individual basis." C.A. ER 285 (JEX 24, NCAA Bylaws). Financial aid may be provided through an athletic scholarship—called a "grant-in-aid" (GIA)—other financial aid, or both. C.A. ER 284, 286-287 (same). Schools may also use specialized funds to cover student-athletes' additional legitimate expenses. See C.A. ER 268-269 (JEX 21, 2018 Division I Revenue Distribution Plan), 284-285, 294-295 (JEX 24, NCAA Bylaws). And student-athletes who demonstrate exceptional financial need may receive Pell grants from the federal government. C.A. ER 287.

Finally, NCAA rules allow schools to provide limited tokens of achievement to recognize exceptional

athletic performance by individual student-athletes or teams. The value of these awards, which include trophies and plaques, ranges from $175 for a team's most-improved or most-valuable player to $1,500 for a conference's athlete (or scholar-athlete) of the year. C.A. ER 288-289, 296-297 (JEX 24, NCAA Bylaws). Additionally, schools may annually give a $10,000 Senior School Award for graduate school to two graduating student-athletes. C.A. ER 289 (JEX 24, NCAA Bylaws). The limits are designed to ensure that awards do not become vehicles for disguised pay-for-play. C.A. ER 170-171 (Trial Tr. (Lennon)).

### C. The Ninth Circuit's prior decision on NCAA eligibility rules

In *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015), cert. denied, 137 S. Ct. 277 (2016), a class of former NCAA football and men's basketball players brought suit under the Sherman Act, challenging NCAA rules that limit permissible payments to student-athletes for their names, images, and likenesses (NILs). The *O'Bannon* district court, in what appears to have been "the first [decision] by any federal court to hold that any aspect of the NCAA's amateurism rules violate[s] the antitrust laws, let alone to mandate * * * that the NCAA change its practices" (*id.* at 1053), held that the NCAA acted unlawfully by (1) not permitting schools to pay student-athletes full COA (the prior rule had limited payments for certain living expenses included in COA) and (2) not permitting colleges to make deferred cash payments to student-athletes of up to $5000 per year in school. See *id.* at 1060-61.

On appeal, the Ninth Circuit dismissed what it termed this Court's "long encomium to amateurism"

rules in *Board of Regents* as "impressive-sounding" but "dicta." 802 F.3d at 1063. The court of appeals then upheld the *O'Bannon* district court's ruling authorizing COA payments (*id.* at 1074-76),[1] but set aside the requirement that schools be permitted to make deferred $5000 annual cash payments to student-athletes. *Id.* at 1076-79. As the Ninth Circuit noted in reaching this latter conclusion, "not paying student-athletes is *precisely what makes them amateurs*." *Id.* at 1076.

**D. The district court's decision**

While *O'Bannon* was still pending, individuals suing as representatives of several classes of NCAA Division I football and basketball players—classes that largely overlap the *O'Bannon* class—filed a new antitrust action against petitioners (eleven collegiate conferences) and the NCAA. Plaintiffs maintained that the NCAA student-athlete payment limits are an anticompetitive restraint of trade and sought to "dismantle the NCAA's entire compensation framework." Pet. App. 17a. The cases were assigned to the same district judge who presided over *O'Bannon*.

The district court purported to apply the Rule of Reason's three-step burden-shifting approach in assessing this claim, under which (1) the plaintiffs must establish that the defendants restrained trade; (2) the burden then shifts to the defendants to show that the

[1] By the time the Ninth Circuit ruled, the NCAA itself had set aside the bar on payment of COA, agreeing that "giving student-athletes scholarships up to their full costs of attendance would not violate the NCAA's principles of amateurism because all the money given to students would be going to cover their 'legitimate costs' to attend school." 802 F.3d at 1075.

restraint had procompetitive effects; and (3) the burden then shifts back to the plaintiffs to demonstrate that substantially less restrictive alternatives are available that would be virtually as effective as the challenged restraints at achieving those procompetitive effects. Pet. App. 115a-166a. See also *Ohio* v. *Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). Because the court determined at the first step that the challenged NCAA rules restrain trade (Pet. App. 113a-115a), a conclusion that is not now in dispute, the focus at the 10-day trial was on the remaining two elements of the test.

On these points, the district court first found that, because the NCAA rules permit schools to make limited, defined payments of various sorts to college athletes, the NCAA's traditional focus on amateurism and not paying for play is illusory. Pet. App. 180a-189a. But the court also determined that the preservation of *some* distinction between college and professional sports does have procompetitive value because it maintains a discrete college sport product that is valued by consumers. Adopting a test that had not been proposed by either party, the court then held 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 147a-148a.[2]

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[2] The court of appeals subsequently opined that, "[i]n context, the district court was using the term 'unlimited pay' as shorthand for payments that run the risk of eroding consumer perception of student-athletes as students—that is, *cash* payments *unrelated to education* and *akin to professional salaries*." Pet. App. 43a n.16.

From this starting point, the court concluded that "[r]ules that prevent unlimited payments such as those observed in professional sports leagues * * * are procompetitive when compared to having no such restrictions." Pet. App. 148a. These permissible rules, in the court's view, are those that limit payments to student-athletes that are "unrelated to education" or that cap payments at education-related costs. *Id.* at 157a.

The court then turned to the Rule of Reason's third burden-shifting step, holding that the current NCAA rules "are more restrictive than necessary to prevent demand-reducing unlimited compensation indistinguishable from that observed in professional sports." Pet. App. 155a. In the court's view, the NCAA payment limits could be modified by requiring use of an alternative approach that would allow for larger payments to student-athletes while still adequately preserving college sports as a distinct product. Among other things, the court sought to accomplish this goal by:

**(a)** Invalidating most NCAA limits on payments "related to education," including those that the NCAA "currently prohibits or limits in some fashion." Pet. App. 158a. These include payments for computers; scientific equipment; musical instruments and other tangible items not currently included in the cost of attendance but "related to the pursuit of various academic studies"; 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 study abroad; and paid post-eligibility internships. *Ibid.*

**(b)** Requiring the NCAA to permit cash payments to student-athletes in the form of graduation awards or "academic incentives" with no minimum academic achievement thresholds—while allowing the NCAA to cap such payments at an annual amount not lower than the "maximum amount of compensation that an individual student-athlete could receive in an academic school year in participation, championship, or special achievement awards (combined)." Pet. App. 159a.

As drawn by the court, this element of its ruling requires the NCAA to permit schools to pay *all* student-athletes in the plaintiff classes annual cash "academic incentives" in an amount equal to the largest sum that *any* student-athlete theoretically could be paid in combined athletics participation, championship, and special achievement awards. The court evidently believed this amount to be $5600 (see Pet. App. 187a), although there is no evidence that any student ever actually has received awards of these types with a value anywhere close to that amount. Pet. App. 47a.[3]

**(c)** Allowing individual conferences "to set or maintain limits on education-related benefits that the NCAA will not be allowed to cap" and to "set limits on academic awards and incentives." Pet. App. 160a.

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[3] Respondents maintain that the aggregate amount is $15,000 or more. See Pl. Response to Def. Mot. for Clarification of Permanent Injunction, *In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.*, No. 4:14-md-02541-CW (N.D. Cal. Oct. 6, 2020), Dkt. 1305. As noted below (at page 27), that question is now back before the district court on defendants' motion for clarification.

The court incorporated these limits in a permanent injunction. Pet. App. 209a. In so doing, it provided that its list of permissible compensation and benefits "related to education" may be amended on the motion of any party, and that the NCAA may adopt a definition of benefits "related to education"—but only with the court's permission. *Id.* at 210a.

**E. The Ninth Circuit's decision**

The Ninth Circuit affirmed. Pet. App. 1a-66a.[4] Insofar as is relevant here, the court began by observing that "the NCAA bears a 'heavy burden' of 'competitively justify[ing]' its undisputed 'deviation from the operations of a free market.'" *Id.* at 36a-37a (quoting *Board of Regents*, 468 U.S. at 113). From there, the court of appeals concluded that the district court correctly conducted a detailed factual analysis of whether the NCAA's eligibility rules have a "demand-preserving effect." *Id.* at 38a. And as it had in *O'Bannon*, the Ninth Circuit dismissed this Court's "discussion of amateurism [in *Board of Regents* as] 'dicta.'" *Id.* at 39a-40a.

At the second step of the Rule of Reason test, the court of appeals accepted the district court's conclusion "that the NCAA 'sufficiently show[ed] a procompetitive effect of some aspects of the challenged compensation scheme,' but not all." Pet. App. 42a (emphasis omitted). "In short," the Ninth Circuit concluded, "NCAA compensation limits preserve demand to the extent they prevent unlimited cash payments akin to

[4] The Ninth Circuit rejected the argument that principles of res judicata and stare decisis flowing from its prior holding in *O'Bannon* dictated a ruling for defendants. Pet. App. 28a-35a. Those issues are not presented here.

professional salaries, but not insofar as they restrict certain education-related benefits." *Id.* at 42a-43a.

Turning to the third step of the Rule of Reason inquiry, the Ninth Circuit then held that "[t]he district court reasonably concluded that uncapping certain education-related benefits would preserve consumer demand for college athletics just as well as the challenged rules do." Pet. App. 44a. In the court of appeals' view, "'[s]uch benefits are easily distinguishable from professional salaries, as they are "connect[ed] to education'; 'their value is inherently limited to their actual costs'; and 'they can be provided in kind, not in cash.'" *Ibid.*

In particular, the court found it crucial that "the NCAA presented no evidence that demand will suffer if schools are free to reimburse education-related expenses of inherently limited value." Pet. App. 45a. The court of appeals also opined that academic achievement awards up to the $5600 annual payments approved by the district court would not affect consumer demand. *Id.* at 48a. Accordingly, the Ninth Circuit approved the district court's rewrite of the NCAA rules so that, in the appellate court's view, the judge-devised standards would allow for payments that "would preserve consumer demand for college athletics just as well as the challenged rules do." *Id.* at 44a.

## REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision will have wide-ranging and destructive effects. It conflicts with the decisions of other courts of appeals. It distorts antitrust law. It damages college athletics. And it gives a federal court a wholly inappropriate supervisory role over the activities of a nationwide joint venture. This Court should review, and set aside, that decision.

## I. The Ninth Circuit's decision conflicts with the holdings of other courts of appeals and of this Court.

The Ninth Circuit's ruling creates two conflicts with the holdings of other courts of appeals and of this Court. In its practical operation, the Ninth Circuit's standard requires a joint venture to operate with an impossible level of precision, on pain of antitrust liability if a reviewing court finds that the defendants' rules could have been made marginally more permissive—an approach that has been rejected by other courts. At the same time, the court below refused to treat NCAA eligibility rules as presumptively procompetitive, departing from the Rule of Reason analysis used by other courts of appeals and expressly rejecting the contrary approach of the Seventh Circuit. This Court should resolve those conflicts, which derive in significant part from disagreement about the meaning of the Court's decisions.

### A. The Ninth Circuit's decision shifted the burden of proof, effectively adopting a *least* restrictive alternative standard and departing from the rulings of other courts of appeals and of this Court.

At the outset, the Ninth Circuit erred by effectively requiring defendants to prove that they had adopted the *least* restrictive alternative that would preserve college sports, an approach that departs from principles announced by this Court and other courts of appeals. Once it is found that a related body of restrictive organizational rules have significant procompetitive effects because they are essential if a desirable product is to be marketed at all (as unquestionably is true of the NCAA amateurism rules), judges should not be empowered to rewrite those rules to make them

marginally less restrictive, or—what is the same thing in practice—to require that the rules be the least restrictive ones possible. The Ninth Circuit's contrary conclusion is wrong.

1. As noted above, the courts below used the Rule of Reason's "three-step, burden-shifting framework." *Am. Express Co.*, 138 S. Ct. at 2284. In the circumstances here, there is no doubt that, at the second step, defendants demonstrated a "procompetitive rationale" for their amateurism rules. *Ibid.* This Court explained in *Board of Regents* that preventing pay-for-play distinguishes college athletes from their professional counterparts in a manner that is desired by consumers, and the Ninth Circuit itself recognized in this case that it *is* procompetitive to preserve a discrete college sport product that is characterized by limits on student compensation—albeit only after that court embraced what it called a "narrower conception of amateurism." Pet. App. 40a.

Despite concluding that the NCAA's amateurism rules serve legitimate procompetitive interests, however, the Ninth Circuit placed the burden on defendants at the second step of the Rule of Reason inquiry to prove that "each type of challenged rule" (Pet. App. 42a) is essential to differentiate college from professional sports. The Ninth Circuit then held that a host of adjustments to the NCAA's rules would be "virtually as effective" as the current rules: (a) "uncapping certain education-related benefits," including not only "computers, science equipment, and musical instruments" but also "post-eligibility scholarships," "study-abroad expenses," and "paid post-eligibility internships"; (b) permitting schools to make academic or graduation payments with no minimum standards of

academic achievement at least up to the maximum theoretical amount a single student-athlete could receive in athletic participation awards; and (c) permitting individual conferences to set limits on education-related benefits. Pet. App. 25a-26a.

The inevitable consequence of this approach is a "least restrictive alternative" standard. If antitrust defendants must prove that each element of their restrictive rules is as procompetitive as can be, all that will be left, once the rules that fail to make the grade are rejected, will be those regarded by the court as strictly necessary—that is, the least restrictive rules needed to achieve the procompetitive goal. In essence, the Ninth Circuit required defendants to demonstrate not that the NCAA amateurism rules reasonably promote a distinction between college and professional sports, but that every restrictive element of those rules is *necessary* to achieve the procompetitive benefits of amateurism.

2. As then-Justice Rehnquist long ago recognized, the antitrust laws "impose a standard of reasonableness, not a standard of absolute necessity." *Nat'l Football League* v. *N. Am. Soccer League*, 459 U.S. 1074, 1079 (1982) (dissenting from denial of certiorari). See *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967) (restraint need only be "reasonably necessary" to meet competitive purpose). Unsurprisingly, then, the Ninth Circuit's mode of analysis conflicts with the approach of other circuits.

The Third Circuit, for example, in one of the leading decisions on the point, held that "[i]n a rule of reason case, the test is not whether the defendant deployed the least restrictive alternative" but "whether

the restriction actually implemented is 'fairly necessary'" to achieve the procompetitive objective. *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1248 (3d Cir. 1975). Similarly, the First Circuit held that a business is "not required to adopt the least restrictive means of stopping [a competitor] from selling abroad, but merely means reasonably suited to that purpose." *Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853, 860 (1st Cir. 1984). The Fifth Circuit, in this very context, rejected an antitrust challenge to NCAA eligibility rules because those rules "reasonably further [the NCAA's] goal." *McCormack* v. *NCAA*, 845 F.2d 1338, 1345 (5th Cir. 1988).

And Judge Bork, writing for the D.C. Circuit, explained that, when a defendant imposes restraints that are "reasonably necessary to the business it is authorized to conduct," courts are not to "calibrate degrees of reasonable necessity." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 227 (D.C. Cir. 1986). "Once it is clear that restraints can only be intended to enhance efficiency rather than to restrict output, the degree of restraint is a matter of business rather than legal judgment." *Id.* at 229 n.11.

These decisions are consistent with the broad consensus among courts and commentators on how to assess, at the third step of the Rule of Reason inquiry, whether there is a less restrictive alternative to the challenged rules. In these circuits, antitrust plaintiffs cannot prevail simply by showing that the defendants could have achieved their permitted goals by using a different restraint with a marginally less restrictive impact. Rather, the plaintiffs must show that "any legitimate objectives can be achieved in a *substantially*

less restrictive manner." *Nat'l Hockey League* v. *Plymouth Whalers Hockey*, 325 F.3d 712, 719 (6th Cir. 2003) (emphasis added).[5]

After all, "one can frequently conceive of a less restrictive approach. Yet, to require the very least restrictive choice might interfere with the legitimate objectives at issue without, at the margin, adding that much to competition." Philip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1505b (4th ed. 2020 cum. supp.). See also *In re Beltone Elecs. Corp.*, 100 F.T.C. 68, 95 (1982) ("[a] comparison of alternatives may be useful in particular cases, but the emphasis appropriately belongs on the overall reasonableness of the challenged restraint, not whether some hypothetically less restrictive scheme could be devised").

Other courts therefore would reject the Ninth Circuit's result here: They would overturn the NCAA's rules only if plaintiffs demonstrated that the NCAA's differentiated product could be achieved with substantially reduced restrictions. The Ninth Circuit, in contrast, shifted the burden and applied the wrong standard, requiring defendants to prove that every element of the NCAA rules is necessary to achieve the rules' procompetitive objective.

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[5] See, *e.g.*, *Law* v. *NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) (plaintiff must prove "the challenged conduct is not reasonably necessary to achieve the legitimate objectives"); *Flegel* v. *Christian Hosp., Ne.-Nw.*, 4 F.3d 682, 688 (8th Cir. 1993) (similar).

### B. The Ninth Circuit's decision departs from the holdings of this Court and other courts of appeals that joint venture rules defining a product are reviewed deferentially.

In addition, the Ninth Circuit's approach exacerbates an acknowledged conflict in the circuits on a recurring issue of great practical importance: the level of scrutiny that is appropriate when a joint venture's rules in general, and the NCAA's rules in particular, are challenged under the Sherman Act.

1. This Court has recognized that, when joint action is necessary if a product is to be marketed at all, "the agreement is likely to survive the Rule of Reason." *American Needle, Inc.* v. *NFL*, 560 U.S. 183, 203 (2010). Thus, the Court has observed that, "depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye.'" *Ibid.* (quoting *Board of Regents*, 468 U.S. at 110 n.39). In the joint venture context, this "twinkling of an eye" standard reinforces the courts' hostility to the form of judicial second-guessing inherent in a least-restrictive alternative requirement. The impropriety of determining whether already reasonable rules could be made marginally less restrictive is an important reason that "detailed analysis" of such rules is unnecessary. See *Texaco, Inc.* v. *Dagher*, 547 U.S. 1, 7 (2006) (collaborations have more leeway to impose restraints that are "ancillary to the legitimate and competitive purposes of the business association"); *Broadcast Music, Inc.* v. *CBS, Inc.* (*BMI*), 441 U.S. 1, 23 (1979) ("[j]oint ventures and other cooperative arrangements" are "not usually unlawful * * * where the agreement * * * is necessary to market the product at all").

*Board of Regents* adds significantly to the strength of this principle, supporting the conclusion that judicial over-involvement in real-world decisions would be particularly harmful in the context of college athletics because the college sport "product" must be defined by joint action. The Court there recognized that "the integrity of the 'product' cannot be preserved except by mutual agreement[.]" 468 U.S. at 102. "Thus, the NCAA plays a vital role in enabling college [sports] to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable." *Ibid*. That is the paradigm of the type of agreement that is "not usually unlawful" because the producers of the product *must* cooperate. *BMI*, 441 U.S. at 23.

In this setting, where the jointly devised restrictions define the product, the Court added: "It is 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." 468 U.S. at 117. And it concluded with the observation that "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." *Id*. at 120.

The Ninth Circuit acknowledged in its decision below that *Board of Regents* accepted the NCAA's definition of "amateurism to exclude payment for athletic

performance." Pet. App. 39a-40a. But the court of appeals opined that *Board of Regents* does not grant "perpetual blanket approval for the NCAA's compensation rules," and dismissed *Board of Regents*' "discussion of amateurism [as] 'dicta.'" *Id.* at 15a, 40a. The court of appeals thus doubled down on its prior dismissal of *Board of Regents* in *O'Bannon*.

In fact, however, this Court's elaborate discussion of amateurism in *Board of Regents* was a key element of its explanation why NCAA rules on television broadcasts—which lack the essential character of the eligibility rules—*were* open to antitrust challenge; the amateurism discussion therefore was *not* dicta. And in any event, the *Board of Regents* amateurism analysis was lengthy and well-considered, and was embraced by Justices White and Rehnquist in their *Board of Regents* dissent. *See* 468 U.S. at 101-103, 117 (majority opinion); *id.* at 121-23 (White, J., dissenting). In such circumstances, the court of appeals' cavalier dismissal of what it derisively labeled this Court's "encomium to amateurism" was inappropriate. If that discussion is to be set aside, this Court, and not the Ninth Circuit, should be the one to take the step.

2. That is especially so because other courts of appeals have read *Board of Regents* quite differently from the Ninth Circuit: Its decision contributes to a conflict on the proper legal standard to apply when resolving challenges to NCAA eligibility rules. That division stems from disagreement regarding this Court's decision in *Board of Regents* and will lead to nationally applicable NCAA rules being treated differently in different parts of the country—despite the fact that a national sports association cannot operate

effectively without uniform standards applicable nationwide. That disarray can be resolved only by this Court's review.

Most notably, other courts of appeals have taken a very different approach than the Ninth Circuit in addressing challenges to NCAA eligibility rules. Although the Ninth Circuit in this case purported to disclaim judicial micromanagement of the NCAA (Pet. App. 139a-140), it largely dismissed *Board of Regents*' endorsement of the amateurism principle and (like the district court) engaged in a close review of the record in search of support for the procompetitive value of particular NCAA compensation limits, looking to "demand analyses, survey evidence, and NCAA testimony." See *id.* at 38a-39a; 140a-143a. Other courts, however, expressly have taken a very different tack, finding that NCAA eligibility rules should be upheld without detailed factual inquiry.

a. The Seventh Circuit, in *Deppe* v. *NCAA,* 893 F.3d 498 (7th Cir. 2018), recently upheld the NCAA's year-in-residence eligibility rule. Pointing to *Board of Regents*, the court declared that the "'first—and possibly only—question to be answered when NCAA bylaws are challenged is whether the NCAA regulations at issue are of the type that have been blessed by the Supreme Court [in *Board of Regents*], making them presumptively procompetitive.'" *Id.* at 501 (quoting *Agnew* v. *NCAA*, 683 F.3d 328, 341 (7th Cir. 2012)). The Seventh Circuit added that "an NCAA bylaw is presumptively procompetitive when it is clearly meant to help maintain the revered tradition of amateurism in college sports or the preservation of the student-athlete in higher education." *Ibid.* (citations and internal quotation marks omitted). Thus, "most

NCAA eligibility rules are entitled to the procompetitive presumption announced in *Board of Regents* because they define what it means to be a student-athlete and thus preserve the tradition and amateur character of college athletics." *Id.* at 502.

Accordingly, the court affirmed dismissal of the suit on the pleadings, with no specific evidentiary showing that the year-in-residence rule was necessary to preserve consumer interest in college sport. This approach is settled in the Seventh Circuit; *Deppe* faithfully applied the standard previously articulated in *Agnew*. See *Agnew*, 683 F.3d at 343 n.7 (question is "whether a rule is, on its face, supportive of the 'no payment' and 'student-athlete' models, not whether 'no payment' rules are themselves procompetitive—under *Board of Regents*, they clearly are").

This case therefore would have come out differently if decided by the Seventh Circuit: Limits on payments to student-athletes, even more than the year-in-residence rule upheld in *Deppe*, are meant to preserve "the tradition and amateur character of college athletics." There is no doubt about the existence of this conflict: In *O'Bannon*, the Ninth Circuit expressly recognized the disagreement, refusing to adopt the Seventh Circuit's "*Agnew* presumption" and "doubt[ing] that was the [Supreme] Court's intent." 802 F.3d at 1064.

b. Similarly, in *Smith* v. *NCAA*, 139 F.3d 180, 186-187 (3d Cir. 1998), vacated on other grounds, 525 U.S. 459, 464 n.2 (1999), the Third Circuit, in an alternative holding, upheld NCAA limits on post-graduate eligibility. Also relying on *Board of Regents*, the court did not look to specific evidence supporting the procompetitive value of the rule; instead, it presumed

that, "in general, the NCAA's eligibility rules allow for the survival of the product, amateur sports, and allow for an even playing field. * * * Likewise, the bylaw at issue here is a reasonable restraint which furthers the NCAA's goal of fair competition and the survival of intercollegiate athletics and is thus procompetitive." *Id.* at 187. After reciting a number of policies that could be furthered by the rule, the court concluded: "[W]e think that the bylaw so clearly survives a rule of reason analysis that we do not hesitate upholding it by affirming an order granting a motion to dismiss Smith's antitrust count for failure to state a claim on which relief can be granted." *Ibid.*

c. In *McCormack* v. *NCAA*, 845 F.2d 1338 (5th Cir. 1988), the Fifth Circuit upheld penalties that the NCAA imposed on Southern Methodist University for exceeding compensation limits. Also invoking *Board of Regents*, the court concluded that it need not examine the details of the particular rules and payments involved. Instead, it held: "That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable. We therefore conclude that the plaintiffs *cannot prove any set of facts* that would carry their antitrust claim and that the motion to dismiss was properly granted." *Id.* at 1345 (emphasis added).

d. Moreover, although those decisions are the ones most directly on point here, courts addressing challenges to sports league rules outside the college setting also "have generally accorded sports organizations a certain degree of deference and freedom to act in similar circumstances," so long as the organization "offers" a "justification" for its rules that is not "in bad

faith or * * * otherwise nonsensical." *Race Tires America, Inc*. v. *Hoosier Racing Tire Corp*., 614 F.3d 57, 80, 81 (3d Cir. 2010). These courts have recognized that sports sanctioning bodies and similar entities "deserve a bright-line rule to follow so they can avoid potential antitrust liability as well as time-consuming and expensive antitrust litigation," and that, "[c]ontrary to the pro-competitive purposes of antitrust law, this [liability and litigation] expense may have a very real anti-competitive effect." *Id*. at 80. "[S]ports-related organizations should have the right to determine for themselves the * * * rules that they believe best advance their respective sport * * *, without undue and costly interference on the part of courts and juries." *Id*. at 83.

In sum, other courts of appeals have used a very different analysis in addressing challenges to NCAA eligibility rules than did the Ninth Circuit in this case—and these differing approaches led to different results. These differences follow in substantial part from divergent understandings of this Court's decision in *Board of Regents*. This Court should address that disagreement so as to settle the meaning of its own prior ruling.

## II. The legal errors committed below will have destructive and enormously important national consequences.

The need for review is especially acute because the issues in this case have significant practical importance—for educational institutions, college athletics, and joint ventures generally. The district court's injunction will prompt fundamental changes in the nature of college sports. The Ninth Circuit's decision affirming that injunction makes the district court the

long-term supervisor of college athletics as conducted across the Nation. That holding also empowers antitrust courts to become policymakers in this area, even as Congress and the States are deciding whether to exercise supervision over the rules governing college sports. And the decisions below necessarily will lead to an avalanche of litigation, imposing significant costs on already-stretched educational institutions. Moreover, the significance of the Ninth Circuit's decision transcends college sports, endorsing an antitrust standard that puts at risk many legitimate and procompetitive joint ventures.

*First*, under the decisions below, the district court's supervision of the rules it has imposed on college sports will be ongoing and never-ending. The Ninth Circuit's holding places a single district court in continuing charge of college athletics nationwide. Every rule change affecting eligibility will produce a court fight; the court's approval must be sought if the NCAA seeks to modify the court's definition of "related to education," and either side may seek an order modifying the injunction. This prospect is not theoretical; the defendants *already* have been forced to seek clarification of the annual amount that the court believes schools must be permitted to pay all student-athletes in the plaintiff classes in graduation or "academic achievement" cash awards, in a proceeding where plaintiffs insist that amount to be at least $15,000. See note 3, *supra*.

*Second*, and similarly, the Ninth Circuit's holding invites an unending stream of litigation challenging NCAA amateurism rules. That will be very costly simply in terms of litigation expense—the Court repeatedly has noted the extremely burdensome nature

of antitrust lawsuits (see, *e.g.*, *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 558-59 (2007))—and could involve significant damages claims as well.

Prior to the Ninth Circuit's decision in *O'Bannon*, such antitrust suits against the NCAA uniformly had been rejected. See page 8, *supra*. But the danger of strike-suit litigation is greatly exacerbated by a Ninth Circuit ruling that can be expected to encourage additional such challenges. This prospect also is not theoretical; just weeks after the decision below, national classes of student-athletes brought suit seeking treble damages from the NCAA and some conferences based on antitrust claims that are substantially identical to those advanced in this case and in *O'Bannon*. See Class Action Complaint, *House* v. *NCAA*, No. 20-cv-3919 (N.D. Cal. June 15, 2020), ECF No. 1. The judge who decided both this case and *O'Bannon* then deemed the new suit a related case and assigned it to herself. Related Case Order, *House* (June 23, 2020), ECF No. 15. Indeed, in its decision below, the Ninth Circuit specifically noted, with evident approval, the possibility of "future plaintiffs pursuing essentially the same claim again and again" against the defendants here. Pet. App. 33a n.13.

*Third*, the Ninth Circuit's approach turns the NCAA's authority to design its product into a one-way ratchet. Any change (or even public consideration of change) will lead to (1) claims for damages for the period prior to the change on the theory that the prior rules violated the Sherman Act: the change will be said to show that those rules had not been necessary to preserve consumer demand; and (2) challenges to other rules on the ground that the change shows that they are no longer necessary and therefore violate the

antitrust laws. And every judicial modification of the rules that increases permissible cash payments to student-athletes will inevitably be followed by a class action seeking hundreds of millions of dollars in damages—as occurred in the now-settled portion of this action, when defendants paid over $200 million based on the modest increase in scholarship limits implemented during the *O'Bannon* case. Thus, the Ninth Circuit's approach will, paradoxically, tend to freeze existing student-athlete compensation limits in place, discouraging innovation and loosening of the standards.

*Fourth*, the rules governing a national institution like the NCAA, whose members compete for recruits on a national basis and compete on the field for national championships, must be nationally uniform. That reality calls for this Court's review. Insofar as the circuits use different standards in assessing challenges to NCAA eligibility rules—as they now expressly do—inconsistent holdings regarding the validity of those rules in different parts of the country are inevitable. Alternatively, plaintiffs' lawyers will invoke the antitrust laws' liberal venue provisions to bring all future suits involving nationwide classes of student-athletes in the Ninth Circuit (see 15 U.S.C. §§ 15, 22), where they will be governed by the standard announced in this case. The last word on this important subject should be spoken by this Court, rather than the Ninth Circuit.

And that is especially so because this case arises in a factual setting that itself is important and of great popular interest. College athletics is a significant American institution, the rules of which directly affect hundreds of thousands of college athletes and more

than a thousand NCAA-member educational institutions, and are of intense interest to untold millions of additional people across the Nation. In *Board of Regents*, the Court thus described amateur college athletics as "an important American tradition" (468 U.S. at 101 n.23) that is "revered." *Id.* at 120. The standards used to assess the legality of the rules governing that tradition should be clear and settled.

*Fifth*, the decisions below will change the nature of college sports in very significant ways. The injunction in this case provides, for example, that schools must be permitted to offer student-athletes paid internships, with no limits on pay. This means that paid post-eligibility internships, uncapped in amount, may now be given by boosters to student-athletes attending their favored school—boosters who understand the effect that a pattern of such internships will have on recruiting.

And so long as NCAA rules permit athletic participation awards at the current level, the injunction requires that schools be permitted to make annual "academic achievement" cash payments of at least $5600 to every student-athlete in the affected classes who meets minimum NCAA academic eligibility standards—which is to say, to every student who is eligible to play. This is a naked regime of pay-for-play, resting solely on the ipse dixit of the courts below that the maximum value of plaques, trophies, and other awards presented to a few students for the most exceptional performance will be identical in their effects to much larger awards that are made available to *all students* regardless of their performance. Given the prior recognition that, "[i]n order to preserve the character and quality of the 'product,' [college] athletes

must not be paid" (*Board of Regents*, 468 U.S. at 102), a change of this magnitude should be considered by this Court.

*Sixth*, and more broadly, allowing the sort of challenge endorsed by the Ninth Circuit here would permit plaintiffs to contest individual parts of *any* package of related restraints that could succeed equally well if made marginally less restrictive, allowing targeted antitrust suits directed at small parts of many large enterprises. Although the focus here necessarily is on the NCAA, the antitrust rules at issue have important implications for all business joint ventures. The concern that plaintiffs will embrace the Ninth Circuit's approach by seeking to chip away at joint venture rules is not unrealistic; after all, a "skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements." Philip Areeda & Herbert Hovenkamp, 11 *Fundamentals of Antitrust Law* ¶1913b (4th ed. 2020).

And as this Court itself has recognized, federal judges "often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition." *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 343 (1982); see also Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 8-9 (1984) ("[I]t is impossible to determine the difference in efficiency between a known practice and some hypothetical alternative."). A system in which district judges act as central planners reviewing and revising business judgments after the fact therefore will discourage many kinds of useful cooperative decision-making and undermine the purposes the antitrust laws are meant to serve.

*Finally*, we recognize that there currently is an intense policy debate ongoing about the claimed exploitation of student-athletes and the possible liberalization of the NCAA's NIL rules. See, *e.g.*, NCAA Board of Governors Federal and State Legislation Working Group, *Final Report and Recommendations* (Apr. 17, 2020), https://tinyurl.com/yxq8rtd9. But these policy questions are not the subject of the antitrust laws, which focus narrowly on competition and take no account of broader questions of fairness, or of educational and athletic policy. See *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978).

Indeed, Congress is actively considering whether and, if so, how to reform college athletics[6]; some States have enacted laws in this area and other States are considering legislation[7]; and the NCAA is itself addressing these questions. The Ninth Circuit's expansive view of antitrust authority—and the district court's continuing control over NCAA eligibility rules—will only interfere with that process. The future structure of college sports is appropriately resolved by policymakers, not antitrust courts.

**III. The Ninth Circuit's decision is wrong.**

The decision below does not only confuse the law and create significant practical difficulties; for reasons already touched upon, it also is wrong, making errors that will undermine key purposes of the antitrust laws.

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[6] See U.S. Sen. Comm. on Health, Educ., Labor & Pensions, *Compensating College Athletes: Examining the Potential Impact on Athletes and Institutions* (Sept. 15, 2020), https://tinyurl.com/yyqcfhub.

[7] *See, e.g.*, Cal. S.B. 206 (Sept. 30, 2019) and Cal. Educ. Code § 67456; Fla. S.B. 646 (June 12, 2020), Fla. Stat. § 1006.74.

1. As we have explained, once antitrust plaintiffs show that restraints have a substantial anticompetitive effect, it becomes the defendants' burden to come forward with a "procompetitive rationale" for the restraints; if that is done, the burden shifts back to the plaintiffs to demonstrate that any procompetitive benefits can be "reasonably achieved through less anticompetitive means." *Am. Express Co.*, 138 S. Ct. at 2284. Here, the courts below acknowledged that defendants *did* establish a procompetitive rationale for rules that distinguish college from professional sports. Pet. App. 15a-16a, 20a-24a. They could hardly have found otherwise. This Court expressly reached that conclusion in *Board of Regents*, and other courts, most recently the Seventh Circuit, have held that NCAA eligibility rules "are entitled to the procompetitive presumption announced in *Board of Regents* because they define what it means to be a student-athlete and thus preserve the tradition and amateur character of college athletics." *Deppe*, 893 F.3d at 502.

And once it is determined that the defendants' joint action is "reasonably necessary" to create a desirable product (*Rothery Storage & Van Co.*, 792 F.2d at 228), the Sherman Act does not empower courts to find that plaintiffs prevail at the third step of the Rule of Reason inquiry simply by concluding that the lines could have been drawn elsewhere. If that result were permissible, as Prof. Hovenkamp and other leading antitrust scholars argued as *amici* supporting the NCAA before the Ninth Circuit in *O'Bannon*, "restraints reasonably necessary to achieving valid business objectives could be subject to antitrust condemnation—including exposure to treble damages—based solely on the creativity of antitrust lawyers imagining

marginally less restrictive approaches." Br. for Antitrust Scholars in Support of Appellant at 15, *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015) (Nos. 14-16601, 14-17068), ECF No. 17.

As these scholars continued, pointing to examples of actual litigation:

> With only a modest extrapolation from the reasoning of the [Ninth Circuit], a court could have decided that obstetricians really only need 30 months of residency training to perform C-sections rather than 36, and therefore condemned the credentialing requirements [that required the longer residency period.] A court likewise could have decided that * * * five-year transportation assignments * * * should instead have been four years. * * * The possibilities are limited only by the imagination of the antitrust bar and the willingness of the bench to indulge it.

*Ibid.* See also Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J. L. & Bus. 369, 377 (2016) (criticizing *O'Bannon*, "'[m]etering' small deviations [in amateurism] is not an appropriate antitrust function").

The factual context here illustrates this point forcefully. Acknowledging that the plaintiffs are challenging the totality of the NCAA's pay-for-play rules, the Ninth Circuit found it appropriate to identify those rules that it thought are, and those that it thought are not, sufficiently procompetitive. See Pet. App. 42a (considering "the procompetitive effects achieved by each type of challenged [NCAA] rule"). But under such an approach, no limit ever would be sustainable; plaintiffs always could show that a mod-

erate tweak in existing rules would preserve public interest in the product. (Why permit two scholarships rather than three? If computers are provided, why not monitors, or printers, or ink? If black ink is provided, why not also red?) In a sort of Zeno's paradox, plaintiffs always could advance by stages towards the complete elimination of useful and procompetitive restrictions. The joint design and marketing of products would be subject to perpetual judicial second-guessing, resulting in uncertainty and unwarranted limits on procompetitive joint conduct—both of which the Court has said are disfavored by the antitrust laws.

2. In addition, proper application of the "twinkling-of-an-eye" standard also would have led to a different result here. As the Seventh Circuit has explained, NCAA rules that are "clearly meant to help maintain the 'revered tradition of amateurism in college sports'" should be "presumed procompetitive." *Agnew*, 683 F.3d at 342-343. Absent good reason to treat the eligibility restrictions challenged in this case as the "rare exception to this general principle" (*Deppe*, 893 F.3d at 502), that should be the end of the inquiry—not, as the Ninth Circuit concluded, a prelude to judicial red-penciling of the rules. *Id.* at 503. And no such rare exception applies here: The pay-to-play limit is the central, long-standing component of the amateurism standard that historically has differentiated college from professional sports.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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