

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL COLLEGIATE ATHLETIC)
ASSOCIATION,)
 Petitioner,)
 v.) No. 20-512
SHAWNE ALSTON, ET AL.,)
 Respondents.)

AMERICAN ATHLETIC CONFERENCE,)
ET AL.,)
 Petitioners,)
 v.) No. 20-520
SHAWNE ALSTON, ET AL.,)
 Respondents.)

Pages: 1 through 90
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14 SHAWNE ALSTON, ET AL.,)

15 Respondents.)

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17 Washington, D.C.

18 Wednesday, March 31, 2021

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20 The above-entitled matter came on

21 for oral argument before the Supreme Court of the

22 United States at 10:00 a.m.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 20-512, National Collegiate Athletic Association versus Alston, and the consolidated case.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONERS

MR. WAXMAN: Good morning, Mr. Chief Justice, and may it please the court.

For more than a hundred years, the distinct character of college sports has been that it's played by students who are amateurs, which is to say that they are not paid for their play. Maintaining that distinct character is both procompetitive, because it differentiates the NCAA's product from professional sports, and can be achieved only through agreement.

The lower courts agreed that the NCAA's conception of amateurism is procompetitive, but, in striking down several of the rules, they made two fundamental errors. First, they defined their own "much narrower" conception of amateurism to mean only that

1 athletes not be paid unlimited amounts unrelated
2 to education. And they then imposed a regime
3 that permits athletes to be paid thousands of
4 dollars each year just for playing on a team and
5 unlimited cash for "post-eligibility
6 internships."

7 That manifestly preserves neither the
8 NCAA's demarcation between college and
9 professional sports, nor even the lower courts',
10 because whatever their labels, these new
11 allowances are akin to professional salaries,
12 especially given the truly unique history here.

13 A rule that is reasonably designed to
14 preserve amateurism as the NCAA has defined it
15 should be upheld. Ruse -- rules that do not
16 enforce the amateur status of athletes, by
17 contrast, may be subject to detailed scrutiny.

18 Decades of judicial experience show
19 that that distinction is both sensible and
20 administrable, and the alternative is perpetual
21 litigation and judicial superintendence, as the
22 past 12 years in the Ninth Circuit so vividly
23 illustrate and portend.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Mr. Waxman, do

1 you want us to apply the so-called quick look
2 approach in evaluating these restrictions? Is
3 that right?

4 MR. WAXMAN: That's right in this
5 sense. And let me just say, Mr. Chief Justice,
6 first of all, look, we understand that there's
7 been a trial here, and we -- we are perfectly
8 prepared to explain, as we tried to in our
9 briefs, why, notwithstanding the trial, reversal
10 is required, and the antitrust laws do not
11 permit the Court to impose the decree that it
12 did.

13 But we think that in order to avoid
14 the situation that we currently have where we
15 have endless line-drawing and judicial
16 supervision, pocket -- punctuated by requests
17 for treble damages, it's important for the Court
18 to speak clearly here.

19 And I will say that given that we have
20 what the -- what the government acknowledges is
21 a truly unique situation in which we have a
22 product that is defined by the restraint on
23 competition, it is perfectly appropriate and
24 necessary for the Court to examine in whatever
25 detail is necessary whether the product that's

1 produced really is procompetitive.

2 CHIEF JUSTICE ROBERTS: Well, but your

3 --

4 MR. WAXMAN: And it is.

5 CHIEF JUSTICE ROBERTS: -- your friend

6 on the other side says we've never used the

7 Quick Look Doctrine to uphold restrictions, only

8 to strike them down.

9 MR. WAXMAN: Well, look, Quick Look is

10 a particular phrase. We haven't used it. But

11 this Court has made Clear that the Rule of

12 Reason represents a continuum of scrutiny. As

13 the Court explained in Cal Dental, the Court

14 needs to determine the inquiry mete for the

15 circumstances.

16 This Court recognized the fact that in

17 -- in American -- Section 6 of American Needle,

18 that a form of Quick Look or abbreviated review

19 may well be appropriate to uphold the very kind

20 of rules that are at issue here.

21 And more broadly, Mr. Chief Justice,

22 in antitrust cases like Brooke Group and Trinko,

23 the Court has adopted clear standards that a

24 plaintiff must meet in order to overcome

25 dismissal.

1 And the rationale for the approach
2 that we advocate -- advocate is similar to what
3 prompted the Court in those other circumstances
4 to impose such a deferential review. And I will
5 say --

6 CHIEF JUSTICE ROBERTS: I -- I --

7 MR. WAXMAN: -- that --

8 CHIEF JUSTICE ROBERTS: -- I -- I
9 think maybe, Mr. Waxman, the one limitation that
10 is the most troublesome is -- or -- or lack of
11 limitation, I guess, that schools can pay up to
12 \$50,000 for a \$10 million insurance policy to
13 protect student-athletes for future earnings.

14 Now that sounds very much like pay for
15 play. You know, you're -- you're paying the
16 insurance premium so that they will play at
17 college and not in the pros. Doesn't that
18 undermine the amateur status theory you have?

19 MR. WAXMAN: Well, I'll say two
20 things, Mr. Chief Justice.

21 First of all, one can dispute whether
22 one particular line or not is drawn in the right
23 place. But the notion that this particular rule
24 -- and I'll explain its rationale in a minute --
25 which allows --

1 CHIEF JUSTICE ROBERTS: Well, less
2 than -- you'll explain it in less than a minute.

3 MR. WAXMAN: I'll explain it in less
4 than a minute. Loss-of-value insurance, which
5 has been provided in a few instances by some
6 schools administering their student activity
7 fund, is a form of insurance against injury,
8 just like disability insurance and extended
9 medical insurance. It is a cost of
10 participating in athletics that permits athletes
11 who want to receive an education instead of pay
12 for their play can continue to do so.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas.

16 MR. WAXMAN: Thank you.

17 JUSTICE THOMAS: Thank you, Mr. Chief
18 Justice.

19 Mr. Waxman, just a little bit -- a
20 matter of curiosity to me. You put a lot of
21 weight on -- focus on amateurism. Is there a
22 similar -- and -- and you look at the
23 limitations of the benefits or pay to players.

24 But is there a similar focus on the
25 compensation to coaches to maintain that

1 distinction between amateur coaches, coaches in
2 the amateur ranks, as opposed to coaches in the
3 pro ranks?

4 MR. WAXMAN: Thank you, Justice
5 Thomas. So the NCAA previously had a rule that
6 limited the amount of compensation that coaches
7 could receive. It was challenged in the Tenth
8 Circuit in a case called Law versus NCAA.

9 The NCAA sought to defend that rule on
10 the amateurism principle. And what the Tenth
11 Circuit said was, look, rules that are
12 reasonably designed to protect the amateur
13 status of student-athletes should be upheld in
14 the twinkling of an eye.

15 But coaches are not student-athletes.
16 They are professionals, just like professors and
17 presidents, and, therefore, the Court applied
18 full Rule of Reason review and struck down the
19 limitation on coaches. So the NCAA is no longer
20 permitted under the antitrust laws from in any
21 way restraining the salaries of coaches and
22 other professionals.

23 JUSTICE THOMAS: Well, it just strikes
24 me as odd that the coaches' salaries have
25 ballooned and they're in the amateur ranks, as

1 are the players.

2 But be that as it may, in Board of
3 Regents, at least as I read it, the -- where the
4 NCAA also defended its -- or the amateurism
5 interest, we -- did we conduct a deferential
6 Quick Look review?

7 MR. WAXMAN: Well, the -- Mr. Chief
8 Justice, the -- the amateurism rules --

9 JUSTICE THOMAS: Thank you for --

10 MR. WAXMAN: -- that the eligibility
11 --

12 JUSTICE THOMAS: -- the promotion, by
13 the way.

14 MR. WAXMAN: I -- I'm sorry, but I'm
15 sure you would be terrific at that, Justice
16 Thomas. Let me just say that --

17 CHIEF JUSTICE ROBERTS: There's no --
18 there's no opening, Mr. Waxman.

19 MR. WAXMAN: I -- there's nothing more
20 I can say that will not get me into trouble, so
21 let me answer Justice Thomas's question.

22 The -- the rules that were challenged
23 in Board of Regents were a particular restraint
24 on the -- the number of televised games that the
25 NCAA would allow its teams to hold. And what

1 the Court said is, number one, because this is
2 an industry in which agreement is necessary for
3 the product to exist at all, we will apply the
4 Rule of Reason, and we will apply a full Rule of
5 Reason inquiry into the procompetitive benefits
6 of the television rule because they do not fit
7 the mold of the core rules that define the
8 product itself, that is, the rule -- the
9 eligibility rules that require that contestants
10 be students and amateurs.

11 And it's from that that both we and
12 this Court in Section 6 of American Needle
13 derive the principle that when a rule on its
14 face is shown to advance the principle of
15 amateur athletic competition, it should be
16 withheld in the twink -- in the so-called
17 twinkling of an eye.

18 JUSTICE THOMAS: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Breyer.

21 JUSTICE BREYER: I have two questions.
22 The first one is, what is it precisely that you
23 are complaining about in this Court? From much
24 of what has been argued, I thought it was the
25 injunction part on page -- pages 119a, 47a, and

1 208a.

2 And -- and the injunction and the
3 court of appeals seem to say, NCAA, you cannot
4 limit giving them musical instruments,
5 computers, et cetera, and then they add the cost
6 of post-eligibility internships, vocational
7 schools -- does that mean, like, law school --
8 and there are a few couple other things.

9 MR. WAXMAN: So --

10 JUSTICE BREYER: Is it that you just
11 think these -- you know what the latter things
12 are. They're -- they're in your mind, okay.
13 That could be hundreds of thousands of dollars.
14 I mean, law school is expensive. I don't know
15 if it's a vocational school, but they -- they --
16 they could be. They could be very, very
17 expensive.

18 So that limit may come close to
19 saying, NCAA, you can let these schools get away
20 with murder in terms of what they give the
21 athletes and you have to. Or --

22 MR. WAXMAN: So --

23 JUSTICE BREYER: -- it might be some
24 minor thing. But is that what you're attacking,
25 or you're attacking other things as well or

1 what?

2 MR. WAXMAN: Justice Breyer, let me
3 start with the general and proceed to the
4 particular. Your first question is, what is it
5 that you're complaining about.

6 JUSTICE BREYER: Yep.

7 MR. WAXMAN: We think that -- we think
8 that antitrust courts lack the authority to
9 redefine the central differentiating feature of
10 the NCAA's procompetitive product, particularly
11 where the history and context show so plainly --

12 JUSTICE BREYER: Yeah, yeah.

13 MR. WAXMAN: -- that the --

14 JUSTICE BREYER: I understand that.
15 But I say it has to end up in something so that
16 telling you to do something you don't want to do
17 --

18 MR. WAXMAN: And --

19 JUSTICE BREYER: -- is that thing
20 they're telling you.

21 MR. WAXMAN: -- what they're -- they
22 have imposed in this decree, which is on page
23 167a to 170a of the appendix to our petition --

24 JUSTICE BREYER: Mm-hmm.

25 MR. WAXMAN: -- they have imposed a

1 regime in which student-athletes can be paid
2 large sums of money on account of their athletic
3 performance, which does not distinguish college
4 from professional sports, much less as --

5 JUSTICE BREYER: Okay. Which -- which
6 --

7 MR. WAXMAN: -- effectively --

8 JUSTICE BREYER: -- which --

9 MR. WAXMAN: -- as the challenged
10 rule.

11 JUSTICE BREYER: -- which one allows
12 you to do it? What's the line, what's the
13 sentence that allows you to do that? Because I
14 felt the court -- the court of appeals was
15 saying, no, it doesn't let them do it, it
16 doesn't do that.

17 MR. WAXMAN: I'll -- I'll give you
18 three examples if I have the time.

19 Number one, the Court now says that we
20 cannot pro -- we cannot restrain schools from
21 awarding to every Division I athlete, just for
22 being on the team, \$5,980 per year, God help us.
23 That is nothing but pay for play.

24 JUSTICE BREYER: Okay.

25 MR. WAXMAN: Number two, that we have

1 to -- we cannot restrain, put in any way any
2 limit on the number of post-eligibility paid
3 internships that student-athletes can receive.

4 JUSTICE BREYER: Thank you.

5 MR. WAXMAN: And with respect to the
6 long laundry list that is reflected in paragraph
7 2, what the court has said is we cannot place
8 any limits on anything that can be deemed an
9 educational -- educational -- "related to
10 education," when, in the present world, as the
11 district court recognized, we permit
12 student-athletes to receive the actual and
13 necessary educational expenses, including every
14 single one of these things provided that they
15 are actually necessary and reasonably limited.
16 And the court said, no, you can't place any
17 limit on that.

18 And we can put labels aside. That
19 con -- that permits school to allow pay for
20 play. And the -- and the reason why we need to
21 allow the NCAA to continue to enforce the
22 amateurism principle, which is well understood,
23 is, in fact, illustrated by Justice Thomas's
24 point about the college coaches. We know what
25 happened to college coaches' salaries when the

1 court struck down the NCAA's rules limiting
2 those salaries. They went through the roof.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Alito.

6 JUSTICE ALITO: Mr. Waxman, let me put
7 on the table some of what is said by those who
8 challenge your idea of amateurism. The briefs
9 that are supported -- that are submitted in
10 support of the Respondents paint a pretty stark
11 picture, and they argue that colleges with
12 powerhouse football and basketball programs are
13 really exploiting the students that they
14 recruit. They have programs that bring in
15 billions of dollars. As Justice Thomas
16 mentioned, the -- this money funds enormous
17 salaries for coaches and others in huge athletic
18 departments. But the athletes themselves have a
19 pretty hard life. They face training
20 requirements that leave little time or energy
21 for study, constant pressure to put sports above
22 study, pressure to drop out of hard majors and
23 hard classes, really shockingly low graduation
24 rates. Only a tiny percentage ever go on to
25 make any money in professional sports. So the

1 argument is they are recruited, they're used up,
2 and then they're cast aside without even a
3 college degree. So they say, how can this be
4 defended in the name of amateurism?

5 MR. WAXMAN: Well, let me -- let me
6 respond. I mean, there -- there is a healthy
7 debate going on in legislatures around the
8 country over whether college athletes should, as
9 a matter of principle, be paid. Our view -- and
10 -- and that is not an antitrust question. Our
11 own view is, if you allow them to be paid, they
12 will be spending even more time on their
13 athletics and -- and devoting even less
14 attention to academics.

15 But the NCAA has rules limiting to 35
16 hours a week the number of hours that a Division
17 I athlete can spend, and this applies to all
18 Division I athletes, just not in the two sports
19 in a few schools that happen to make money.

20 You say that the schools are making
21 billions of dollars on this. There are 1100
22 schools that belong to the NCAA. Twenty-four
23 or, in some years, 25 schools make money on
24 their athletic programs. The rest of the
25 programs are subsidized by general revenue,

1 student fees, and tuition. And the notion that
2 they graduate at lower rates and they have post
3 outcomes is contrary to the evidence in this
4 case.

5 JUSTICE ALITO: Well, no, I --

6 MR. WAXMAN: The evidence in the --

7 JUSTICE ALITO: -- what you say is --
8 what you say is true of -- of the thousands and
9 thousands of real student-athletes, but what's
10 the graduation rate for football players in the
11 power conferences?

12 MR. WAXMAN: You know, I can't cite
13 you the -- from memory, the statistics.
14 Professor Heckman, who was one of the witnesses
15 at trial, testified, and all I can remember is
16 that what he said -- and there is support for
17 this in independent studies in some of the
18 amicus briefs supporting us -- are that Division
19 I athletes graduate at higher rates than
20 students who are not athletes --

21 JUSTICE ALITO: Yeah, the -- the --
22 the athletes --

23 MR. WAXMAN: -- and have better
24 outcomes following graduation.

25 JUSTICE ALITO: Yeah, the athletes on

1 the crew and -- and fencing, but, for the -- the
2 powerhouse basketball and football programs,
3 it's different.

4 Let me -- let me squeeze in one more
5 question, which seems -- goes to the heart of
6 what I'm wrestling with. You say that what's
7 distinctive about your product is that your
8 players are not paid. And that was true a
9 hundred years ago.

10 But, in fact, they are paid. They get
11 lower admission standards. They get tuition,
12 room and board, and other things. That's a form
13 of pay. So the distinction is not whether
14 they're going to be paid. It's the form in
15 which they're going to be paid and how much
16 they're going to be paid, isn't that right?

17 MR. WAXMAN: It is not right. The
18 principle -- the NCAA for decades has defined
19 "pay" to mean compensation in excess of -- in excess
20 of two things: Number one, allowances for
21 educational expenses, and educational can
22 include both academic and athletic. That is the
23 reasonable and necessary expenses to obtain an
24 education. And, number two, certain sort of
25 token prizes and awards for exceptional

1 performance that are characteristic of amateur
2 leagues and --

3 JUSTICE ALITO: Thank you, Mr. Waxman.
4 My time is up.

5 MR. WAXMAN: Thank you, Justice Alito.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor.

8 JUSTICE SOTOMAYOR: I thought,
9 Mr. Waxman, that the district court's injunction
10 only prohibits the NCAA from limiting
11 education-related expenses. It does not
12 prohibit the conference from doing so.

13 So, if your priority is maintaining
14 amateurism in college athletics and you and your
15 members think that increasing education-related
16 benefits will undermine the spirit of
17 amateurism, why don't the conferences impose
18 those limits?

19 MR. WAXMAN: I mean, I think this
20 Court gave the answer to that question, Justice
21 Sotomayor, in Board of Regents, which is this is
22 a classic example of a prisoner -- prisoner's
23 dilemma in which national agreement is the only
24 solution. There is no doubt that what has
25 happened with respect to the pay of college

1 coaches and other professionals will happen if
2 conferences or individual schools are permitted
3 to remove these restrictions.

4 JUSTICE SOTOMAYOR: Well --

5 MR. WAXMAN: And --

6 JUSTICE SOTOMAYOR: I'm sorry.

7 Continue.

8 MR. WAXMAN: No, I'm sorry. I -- that
9 -- that -- I believe that's a sufficient answer
10 to your question.

11 JUSTICE SOTOMAYOR: So it --

12 MR. WAXMAN: Maybe it's not sufficient
13 --

14 JUSTICE SOTOMAYOR: -- it didn't seem
15 to me --

16 MR. WAXMAN: -- but it's my answer to
17 your question.

18 JUSTICE SOTOMAYOR: -- it didn't seem
19 to me that either the Ninth Circuit or the
20 district court prohibits the NCAA from limit --
21 limiting educational-related expenses to those
22 that are reasonable. So --

23 MR. WAXMAN: So --

24 JUSTICE SOTOMAYOR: -- all of your
25 parade of horrors, the government says, are

1 taken care of by that limitation. If you think
2 that internships should be related in some way
3 to the educational experience, you could pass
4 rules to that effect. So why doesn't that take
5 care of your parade of horrors?

6 MR. WAXMAN: Justice Sotomayor, you
7 keep saying reasonable educational expenses.
8 What the decree says is that we may not limit in
9 any way compensation or benefits that are in any
10 way "related to education," and includes -- and
11 no one disputes this -- the fact that we may --
12 that school -- under her decree, schools may
13 provide \$5,980 per year to every Division I
14 athlete just for being on a team. And once a
15 court gets into line-drawing in this respect,
16 the litigation and level of judicial
17 superintendence is inevitable.

18 And so why \$5,980? If this Court were
19 to affirm, within a month there will be another
20 lawsuit, in addition to the two that are already
21 now working their way through the district court
22 in Oakland, which will say, number one, well, we
23 have an expert who says that we don't think that
24 consumers would be that bothered if it were
25 \$8,000 a year, and so we want \$8,000 a year to

1 be imposed, and, by the way, we also want treble
2 damages for the fact that, for all these years,
3 we haven't been getting our \$5,980.

4 The district court says no limits
5 whatsoever on a postgraduate internship. The
6 next lawsuit says we want treble damages because
7 we weren't given unlimited postgraduate
8 internships. And then there's another lawsuit
9 that says, well, why does it have to be just
10 postgraduate --

11 JUSTICE SOTOMAYOR: I get your point
12 --

13 MR. WAXMAN: -- internships.

14 JUSTICE SOTOMAYOR: -- counsel, but --

15 MR. WAXMAN: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan.

17 JUSTICE KAGAN: Mr. Waxman, the way
18 you talk about amateurism, it -- it sounds
19 awfully high-minded. But there's another way to
20 think about what's going on here, and that's
21 that schools that are naturally competitors as
22 to athletes have all gotten together in an
23 organization, an organization that has
24 undisputed market power, and they use that power
25 to fix athletic salaries at extremely low

1 levels, far lower than what the market would set
2 if it were allowed to operate.

3 So why shouldn't we think of it in
4 just that kind of way, that these are
5 competitors, all getting together with total
6 market power, fixing prices?

7 MR. WAXMAN: Well, I think, the first
8 answer I would give you is this is not some
9 product, some differentiated product that has
10 just been created and we're now testing whether
11 or not it was adopted in good faith.

12 We're talking about a product that was
13 created 116 years ago in response to abuses that
14 were occurring as a result of instances of
15 professionalism in athletics in order to restore
16 integrity and the social value of college
17 athletics. Almost a hundred years ago, Justice
18 Brandeis in the Chicago --

19 JUSTICE KAGAN: Well, you can only
20 ride on the history, I think, Mr. Waxman, for so
21 long. I mean, a great deal has changed since a
22 hundred years ago in the way that
23 student-athletes are treated. And, you know,
24 I'll take you back to Justice Alito's question
25 and the kind of payments that they're given.

1 You know, a great deal has changed even since
2 Board of Regents, let alone a hundred years ago.

3 So I guess it doesn't move me all that
4 much that there's a history to this if what is
5 going on now is that competitors as to labor are
6 combining to fix prices.

7 MR. WAXMAN: So, look, the -- their --
8 the -- the -- the way that the Rule of -- the
9 Rule of Reason applies here, this Court has
10 said, because sports leagues produce a product
11 that can't be reduce -- produced without
12 agreement. And this is, as your question points
13 out --

14 JUSTICE KAGAN: Well, for sure --

15 MR. WAXMAN: -- that an --

16 JUSTICE KAGAN: -- that's true about
17 some things. I mean, you know, sports leagues
18 have to get together to figure out the rules of
19 the game, how many people are going to be on --
20 on the court at any one time. So, of course,
21 there are things that there needs to be
22 cooperation for. But why does there -- there --
23 why does there need to be cooperation on the
24 cost of labor?

25 MR. WAXMAN: Because the cost of labor

1 in this unique instance is what is the
2 differentiating feature that provides a
3 procompetitive product.

4 JUSTICE KAGAN: So I think --

5 MR. WAXMAN: And when you have --

6 JUSTICE KAGAN: -- if that were true,
7 Mr. Waxman, you would have an argument. But, as
8 I understand what the trial court did here, it
9 basically took a lot of evidence as to that
10 question, as to whether the lack of pay to play
11 was anything that consumers wanted, and what it
12 found was that consumers didn't really care
13 about that. The -- the -- the other side's
14 experts found on the basis of survey evidence
15 and so forth that payments of \$10,000 or more
16 would not affect demand.

17 Your expert failed to show anything to
18 the contrary. Essentially, you're saying that
19 the differentiating feature is the lack of pay
20 to play. But the evidence in this trial
21 suggested exactly the opposite.

22 MR. WAXMAN: So the evidence in this
23 trial very much did not suggest exactly the
24 opposite. And just to take one example, when
25 the -- when their survey expert tested people's

1 reactions to giving them a -- you know, a
2 \$10,000 academic award, something like 10
3 percent of the respondents said that they would
4 be less interested and would watch less if
5 that's the case.

6 The question -- the fact that -- the
7 procompetitive differentiation is not
8 necessarily measured by net consumer demand.
9 They're -- the independent value of preserving
10 consumer choice is not the value of maximizing
11 consumer interest.

12 JUSTICE KAGAN: Thank you, Mr. Waxman.

13 MR. WAXMAN: Otherwise, you wouldn't
14 have specialized products, and the only --

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch.

17 JUSTICE GORSUCH: Mr. Waxman, it seems
18 to me you -- you start in a place that I -- I
19 can readily sign up to, which is that joint
20 ventures often need to have agreements that
21 would otherwise look anticompetitive, whether
22 they're territorial allocations or price
23 agreements, in order to create a product that
24 wouldn't otherwise exist. And we usually give
25 that a pretty quick look, maybe even a twinkling

1 of the eye.

2 So that all -- that all makes sense to
3 me, and we certainly don't want to go back to
4 the bad old days of reviewing any joint venture
5 agreement that restricts competition through per
6 se analysis or -- or something that looks like a
7 strict scrutiny analysis, which I understand you
8 condemn the -- the Ninth Circuit for doing.

9 So I understand all of that. I think
10 the trick comes for me at least sort of where
11 Justice Kagan was alluding to, which is, here,
12 the agreement that's really at the center of the
13 case is an agreement among competitors to fix
14 price with the labor market, where you have
15 monopsony control, and that's unusual.

16 The normal joint venture is -- is in a
17 competitive market. But, here, the NCAA has
18 monopsony control over labor price. There
19 aren't other leagues which might compete with
20 the NCAA that might allow payments, and you
21 could test consumer demand that way. So why --
22 why isn't the -- the monopsony control over the
23 labor market at least an appropriate basis for a
24 more -- more searching Rule of Reason analysis?

25 MR. WAXMAN: Thank you, Justice

1 Gorsuch. So let me be -- let me be very clear.
2 Given that this is the rare product that is
3 defined by the restriction on competition --
4 compensation, it is -- we're not saying that
5 it's not appropriate for a court to examine in
6 whatever detail is necessary whether the product
7 really is procompetitive, but, if it is -- and
8 in this case, there is an agreement that the
9 inquiry at step 2, is our product
10 differentiating and procompetitive, everyone
11 agrees that the answer is yes.

12 Once that is a given, where there is
13 no plausible argument that the challenged rules
14 aren't reasonably related to the amateur status
15 of student-athletes, which is the
16 differentiating feature, we think that
17 abbreviated review is all that's necessary. And
18 that's a principle that the Fifth Circuit in
19 McCormack, the Third Circuit in Smith, and the
20 Seventh Circuit in Deppe applied, and we think
21 that was -- was blessed by this Court in
22 American Needle and looking to and quoting the
23 relevant language from Board of Regents.

24 JUSTICE GORSUCH: I -- I -- I -- I
25 guess I'm not sure I -- I heard a direct

1 response to my question.

2 MR. WAXMAN: In that case, I
3 apologize.

4 JUSTICE GORSUCH: No, no, no, no, no,
5 no apologies. Let's just -- just drill down a
6 little bit further. I -- I guess what I'm
7 trying to ask you, and maybe I did so
8 inartfully, is whether the fact that the NCAA
9 has monopsony control over the labor market, it
10 is a sole purchaser of the labor -- does that
11 make a difference in our Rule -- what would
12 otherwise be a forgiving Rule of Reason analysis
13 to a joint venture?

14 MR. WAXMAN: I see. I see. So it
15 makes all the difference in the world for
16 purposes of step 1 of the Rule of Reason, which
17 is, that as this case comes to this Court,
18 there's no dispute that the -- the
19 no-pay-for-play rule imposes a significant
20 restraint on a relevant antitrust market,
21 absolutely, just as -- and as this case comes to
22 this Court, there is no dispute that those
23 restraints have a substantial procompetitive
24 benefit.

25 And so the inquiry -- the level -- the

1 question of what level of inquiry is appropriate
2 in applying the Rule of Reason rests in this
3 case on step 3.

4 JUSTICE GORSUCH: Thank you.

5 MR. WAXMAN: I hope that answered your
6 question.

7 JUSTICE GORSUCH: Good -- good enough.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh.

10 JUSTICE GORSUCH: Thank you very much.
11 My time's expired.

12 JUSTICE KAVANAUGH: Thank you, Chief
13 Justice.

14 And good morning, Mr. Waxman. I want
15 to pick up from Justice Kagan and Justice
16 Gorsuch and identify some issues of concern to
17 me as I look at this.

18 I start from the idea that the
19 antitrust laws should not be a cover for
20 exploitation of the student-athletes, so that is
21 a concern, an overarching concern here.

22 I see your rhetoric and tradition and
23 history argument being very similar to the
24 arguments that were made for exempting baseball
25 from the antitrust laws, *Flood v. Kuhn*, Federal

1 -- Federal Baseball, and -- and that -- that
2 exemption has not been replicated in other
3 sports in other cases.

4 And then, in Regents, as Justice Kagan
5 said, that really was from a different era, it
6 -- it was dicta, not sure it was fully
7 considered dicta, and in any event, from a
8 different era.

9 So then we get to regular antitrust
10 law, Rule of Reason, and I just want to drill
11 down on your asserted procompetitive
12 justification and how you say the product is
13 differentiated.

14 It does seem, as Justice Kagan and
15 Justice Gorsuch suggested, Justice Alito, that
16 schools are conspiring with competitors,
17 agreeing with competitors, I'll say that, to pay
18 no salaries to the workers who are making the
19 schools billions of dollars on the theory that
20 consumers want the schools to pay their workers
21 nothing. And that just seems entirely circular
22 and even somewhat disturbing.

23 And then, as Justice Kagan says, it's
24 not even factually supported in the record in
25 this case. It seems to blend back to the

1 tradition argument, and all things circle back
2 to this idea, well, it should just -- just don't
3 worry about it, college athletics is different,
4 just like baseball.

5 So those are the concerns I have
6 initially. Interested in your response.

7 MR. WAXMAN: Well, those are -- those
8 are a lot of concerns. I hope I can remember
9 them all and address them all.

10 The -- the notion that these
11 amateurism rules were imposed or constitute a
12 cover for exploitation of athletes is, A, wrong
13 and, B, not an antitrust issue. It may very
14 well be a policy issue that policymakers, like
15 legislatures, can address about whether they --
16 whether they think an amateur -- the amateurism
17 model that is -- as the economists supporting us
18 say is -- has produced perhaps the most
19 procompetitive product in American industrial
20 history, is worth it.

21 We are not asking for an exemption
22 from the Rule of Reason. There is no question
23 that, as the Court said in Board of Regents,
24 because this is a product that can't exist
25 without agreement, the Rule of Reason applies.

1 And our position is -- and this, I
2 think, goes to your -- let me just say that we
3 think that -- I -- Board of Regents is 80 -- is
4 37 years old, but we think that the observation
5 that the Court made in Board of Regents about
6 the value that consumers place on the tradition
7 of amateur intercollegiate athletics is just as
8 true today.

9 And, again, adverting, as you did, to
10 Justice Kagan's point, even assuming that the
11 evidence in this case supported a conclusion
12 that consumers would be just as happy if
13 athletes were paid or athletes were paid \$10,000
14 a year for just being on the team, that doesn't
15 defeat the fact -- the procompetitive benefit
16 that we provide. The --

17 JUSTICE KAVANAUGH: But, if the
18 consumers don't care -- I mean, you said earlier
19 this would allow the players to receive \$6,000 a
20 year, as if that were some exorbitant amount
21 when the TV contracts are in the billions. Six
22 thousand a year is not -- not a lot given the
23 time and the injuries and the inability to go to
24 class or to major in the thing they want to or
25 to do summer jobs. I mean, you're talking about

1 \$6,000 as if it's some exorbitant amount.

2 MR. WAXMAN: Look, we -- we -- we have
3 rules and there is a very, very clear and stable
4 line that defines the feature of our product.
5 The -- the amount of hours spent and what majors
6 they pick and all that sort of stuff reflects --
7 applies to every Division I athlete in all 24
8 NCAA division sports. And if there is a problem
9 with the NCAA enforcing its hours restrictions
10 or in some way disadvantaging students who
11 happen to be athletes, that's not an antitrust
12 issue. That may be an issue with --

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Barrett.

16 JUSTICE BARRETT: Good morning,
17 Mr. Waxman. I want to --

18 MR. WAXMAN: Good morning, Justice
19 Barrett.

20 JUSTICE BARRETT: I'd like to return
21 to Justice Alito's questions to you in which he
22 said that tuition and all of these educational
23 in-kind benefits really are a form of pay --

24 MR. WAXMAN: Mm-hmm.

25 JUSTICE BARRETT: -- when you answered

1 and you said it's not pay because the NCAA has
2 defined "pay" as the reasonable and necessary
3 expenses to obtain education.

4 But I'm wondering, why does the NCAA
5 get to define what pay is? And I think, you
6 know, this is based on experience, but there are
7 certainly plenty of parents and students -- I
8 mean, some people want to play in college for
9 the love of the game. Some people think they'll
10 be able to go pro. A lot of people do it
11 because they want to be able to afford college
12 educations or -- or, you know, get the in-kind
13 benefit equal to, you know, say, 30- or 40,000
14 dollars worth of -- of tuition. So why do you
15 get to define what pay is?

16 MR. WAXMAN: Well, I think there's a
17 -- the general principle, Justice Barrett, is --
18 and I think this is -- this is simply received
19 wisdom for antitrust law purposes -- is
20 producers get to define their product. They get
21 to define the features of their product.

22 We have long defined our product to
23 exclude from pay the reasonable and necessary
24 expenses of obtaining an education. We give
25 scholarships and we have student assistance

1 funds for all kinds of students, whether they're
2 athletes or not.

3 Our definition, which has been stable
4 over decades, long predating Board of Regents,
5 is that it is -- you're not being paid to play
6 if you receive an allowance for the actual and
7 necessary expenses of your education, whether
8 those expenses be --

9 JUSTICE BARRETT: And is that how you
10 would define an amateur, as someone who is
11 unpaid? Because I think that gets back to the
12 point of is it a procompetitive or a legitimate
13 procompetitive justification to say that
14 consumers love watching unpaid -- unpaid people
15 play sports?

16 MR. WAXMAN: Yes, indeed. In fact, in
17 Board of Regents and, in fact, even in the
18 majority opinion in O'Bannon, the -- the -- the
19 Court said that the principle of amateurism is
20 well understood and it means, in both cases,
21 they said, you are not paid for play, but you
22 may receive the expenses of obtaining an
23 education.

24 And, in fact, in O'Bannon, the reason
25 that the Court struck down a -- a since

1 abandoned rule of the NCAA that prohibited
2 schools from paying -- making athletic
3 scholarships up to the full amount of the cost
4 of attendance was that the -- the Ninth Circuit
5 said, well, even the NCAA admits that that is
6 not a rule that distinguishes amateurs from
7 professionalism because the cost of attendance
8 is the cost -- the expense of an education.

9 So, yes, that is our line.

10 JUSTICE BARRETT: I want to shift
11 gears, Mr. Waxman, and ask you about the effects
12 that ruling against you might have.

13 So, you know, you told Justice Thomas
14 that the ballooning of coaches' salaries is
15 attributable to the -- the ruling in the Tenth
16 Circuit that they can't be capped under the
17 antitrust laws. So, if we rule against you,
18 what's the impact of the decision on Title IX in
19 women's sports?

20 MR. WAXMAN: Well, Title IX is an
21 independent mandate, and, you know, the schools
22 have to -- obviously, have to adhere to the
23 Title IX mandate.

24 The evidence in the case showed that
25 if schools were, in fact, required to make the

1 kind of payments that the district judge imposed
2 in her final decree, schools would -- I mean,
3 they have to come up with the money somewhere,
4 the -- you know, the -- the \$6,000 a year
5 amounts to seven -- \$735 million per year that
6 schools have to come up with in addition to the
7 -- the retrospective treble damages awards.

8 And the -- the evidence was that
9 schools would, per force, reduce the number of
10 "non-revenue sports," men's and women's sports,
11 thus reducing the advantages and offerings
12 available to student-athletes in those other
13 sports.

14 I mean, I think my point about what
15 the consequences are is I -- I think we can see
16 in the Ninth Circuit what the consequences of
17 allowing district judges to hear evidence in
18 successive cases, well, people don't care about
19 this or people don't care about that, and so
20 raise the line up and up --

21 JUSTICE BARRETT: I'm sorry,
22 Mr. Waxman. My time expired.

23 MR. WAXMAN: Oh, I'm -- I'm so sorry.

24 CHIEF JUSTICE ROBERTS: A minute to
25 wrap up, Mr. Waxman.

1 MR. WAXMAN: Thank you, Mr. Chief
2 Justice.

3 For over a hundred years, the NCAA has
4 administered procompetitive amateurism rules
5 needing to account for multiple constituencies
6 and changing circumstances, as the questions
7 today illustrate. It offends the antitrust laws
8 for a court to appoint itself as a
9 superintendent to second-guess those judgments,
10 blurring the distinction between college and
11 professional sports, and facilitating successive
12 lawsuits and treble damages award, all based on
13 supposed evidence that an alternative regime of
14 the court's devising wouldn't diminish net
15 viewer interest.

16 This is the one and only case in the
17 history of the Sherman Act ever to strike down
18 restraints that are what differentiates the
19 product, and particularly in the unique
20 circumstances here, it was manifest error to do
21 so.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Kessler.

1 ORAL ARGUMENT OF JEFFREY L. KESSLER

2 ON BEHALF OF THE RESPONDENTS

3 MR. KESSLER: Good morning, Mr. Chief
4 Justice, and may it please the Court:

5 The naked horizontal monopsony
6 restraints that the competing NCAA schools have
7 adopted in these labor markets would be per se
8 unlawful in any other context. But, under Board
9 of Regents and American Needle, the need for the
10 NCAA schools to cooperate leads to the
11 conclusion that the Rule of Reason applies.

12 The courts below recognized this, and,
13 as a result, Petitioners had ample latitude to
14 prove a procompetitive justification for all
15 their restraints. Petitioners' complaint is not
16 a legal one. It's that they lost on the facts.
17 But that is not a basis for appealing to this
18 Court.

19 For five decades, the NCAA has argued
20 that economic competition among its member
21 schools would destroy consumer demand for
22 college sports. In Board of Regents, it was
23 competition for TV broadcast. In the Law case,
24 it was competition not for all coaches' but for
25 assistant coaches' salaries. In O'Bannon, it

1 was name, image, and likenesses.

2 Each time, the Court struck down the
3 restraints under the Rule of Reason, and history
4 has proven the courts were correct. Demand for
5 college sports has continued to flourish.

6 And, by the way, this has never been
7 stable. As recently as 2015, the NCAA said you
8 couldn't provide even the most basic cost of
9 attendance for the athletes. This case is more
10 of the same. It is just the latest iteration of
11 the repeatedly debunked claims that competition
12 will destroy consumer demand for college sports
13 and that the NCAA should have a judicially
14 created antitrust exemption because of an
15 imaginary revered tradition that they argue for.

16 CHIEF JUSTICE ROBERTS: Now, Mr.
17 Kessler, the --

18 MR. KESSLER: This should cause --

19 CHIEF JUSTICE ROBERTS: -- the thing
20 that concerns me about your approach that was
21 adopted by the court below, the NCAA has a
22 number of limitations that are designed to
23 ensure that its product is amateur athletic
24 competition.

25 And you look at and the district court

1 looks at one rule, and let's say it's a limit of
2 \$2,000 for something, and you say we can make
3 that less restrictive. Let's make it \$2,500,
4 and that's fine, and that doesn't alter the
5 public perception of what's going on.

6 But then you go on to another rule and
7 fiddle with that in the same way and another one
8 and another one, and -- and it's like a game of
9 Jenga. You've got this nice solid block that
10 protects the sort of product the schools want to
11 provide, and you pull out one log and then
12 another and everything's fine, then another and
13 another and all of a sudden the whole thing's
14 come -- comes crashing down.

15 What -- what's your answer to that way
16 of looking at it?

17 MR. KESSLER: I do not believe that is
18 what the district court did here under the
19 prevailing law. What the district court did is
20 it tested factually whether the NCAA could prove
21 a procompetitive justification for all of its
22 rules together and found that it failed.

23 It then looked and said, can it
24 justify some categories of its rules, and it
25 found that it succeeded. Then, at step 3, we

1 had the burden to show it was patently and
2 inexplicably stricter than necessary so that
3 there was substantially less restrictive
4 alternatives available.

5 And the basic alternative the Court
6 imposed was not to micromanage. It was a
7 general rule that there's no justification for
8 limiting education-related benefits because,
9 after all, what the consumers and others care
10 about is they be students.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 MR. KESSLER: And they wanted --

14 CHIEF JUSTICE ROBERTS: Justice
15 Thomas.

16 JUSTICE THOMAS: Thank you, Mr. Chief
17 Justice.

18 Briefly, Mr. Kessler, the -- just
19 following up on what you just said, what if you
20 have a consumer survey that suggests tomorrow
21 that the consumers think it's fine for amateur
22 athletes to make \$20,000 a year? Would we be
23 back in court with litigation suggest -- about
24 that rather -- as opposed to the \$6,000 a year?

25 MR. KESSLER: I do not believe that is

1 correct for two reasons.

2 First, the step 3 burden is to show
3 that the rules are patently and inexplicably
4 stricter than necessary and that it has to be a
5 substantially less restrictive alternative.
6 That type of small versions are never going to
7 pass that test.

8 But, more importantly, here, the court
9 did not set this \$5,980 limit. The NCAA did.
10 What the court found is the NCAA allows those
11 types of payments for athletes for performing on
12 the field, pay for play. And since the NCAA did
13 not see any damage to its product by allowing a
14 star player to make that for winning a ball
15 game, for being an MP -- MVP --

16 JUSTICE THOMAS: You know, that -- I'm
17 sorry to cut you off, Mr. Kessler, but that --
18 that sounds fine for the upper-level schools,
19 whether it's, you know -- you know, Alabama,
20 Ohio State, and Nebraska, but it doesn't -- for
21 the schools that have more modest circumstances,
22 it would seem that they would begin to -- the --
23 the bigger schools would begin to cherry-pick
24 with the transfer portal the athletes from the
25 lower schools simply because they're able to

1 afford this income that you're talking about.

2 So have you considered that as a
3 problem in an environment where you're trying to
4 remain -- maintain competitiveness and amateur
5 status?

6 MR. KESSLER: So there's a reason,
7 Your Honor, that the NCAA doesn't assert
8 competitive balance as a defense in this case,
9 and that's because those schools don't compete
10 now.

11 Now Alabama pays its weight coaches
12 \$700,000 a year. None of those small schools
13 can do that. They build palaces.

14 What these competition restraints do
15 is they divert the big schools' money to these
16 other areas to compete, but it doesn't change
17 the competition. And, remember, this injunction
18 doesn't require one school to pay anything. It
19 simply said the NCAA can't prohibit it, but the
20 conferences can. So, for example, the Patriot
21 League doesn't even allow their schools to pay
22 athletic scholarships. Conferences can adapt
23 for the smaller schools.

24 CHIEF JUSTICE ROBERTS: Justice --

25 JUSTICE THOMAS: Thank you.

1 CHIEF JUSTICE ROBERTS: -- Justice
2 Breyer.

3 JUSTICE BREYER: I think, if we really
4 have a case here, it's a tough case for me, and
5 the reason it's so tough is -- for me is because
6 this is not an ordinary product. This is an
7 effort to bring into the world something that's
8 brought joy and all kinds of things to -- to
9 millions and millions of people, and it's only
10 partly economic. Okay?

11 So I worry a lot about judges getting
12 into the business of deciding how amateur sports
13 should be run. And I can think of ways around
14 that. First, you could just say it's a
15 different kind of product. This is what you
16 would lose on it.

17 Second, you could say that consumer
18 demand is not at all the only criteria. You
19 could have a purple widget joint venture and you
20 say nobody can make red widgets and, I'm sorry,
21 they can't, even if consumers would just as much
22 like red widgets because it's a purple widget
23 joint venture.

24 Or you could say this is a Rule of
25 Reason, take into account other things. Take

1 into account administrative problems in working
2 out these rules for the NCAA and the fact
3 that -- that nobody can work with 40,000
4 professors in schools and everybody thinking
5 something different. You're going to obviously
6 end up with something of a mess. And it's a
7 tough problem for them.

8 Now, having thought of four or five
9 different ways by means of which you lose, I
10 also think I'm very worried about my ways,
11 because how do I do it? If I say these things,
12 I might be also affecting the real economic
13 joint venture, like for technology companies.

14 Now I'm telling you my real thoughts,
15 and I'd like to hear your and also Mr. Wackman
16 -- Waxman's response.

17 MR. KESSLER: Your Honor, first, I
18 would say that I do believe, under the Rule of
19 Reason and the antitrust laws, the
20 procompetitive justification must be
21 competition-enhancing. That's what Board of
22 Regents says. That's what the unanimous
23 decision in American Needle says. That's what
24 Professional Engineer says.

25 Every case has said that. And the

1 reason is, if there's something special about
2 the NCAA that deserves not to be subject to the
3 antitrust laws, that's a congressional policy
4 determination. It's not something this Court
5 has the ability to weigh against the competition
6 mandate that's under the Rule of Reason.

7 I would also say, Your Honor, we have
8 looked at these claims from the NCAA over and
9 over again that each loss was going to hurt
10 college sports and destroy this revered
11 tradition. It's never happened. We --

12 CHIEF JUSTICE ROBERTS: Justice Alito.

13 JUSTICE ALITO: Do you think that the
14 product that is produced by the top football and
15 basketball schools has a distinctive character?
16 And, if so, what is that characteristic?

17 MR. KESSLER: I think it is what the
18 court found is that students play in the games,
19 which is a distinction from professional sports.
20 I think that's what all their witnesses in the
21 NCAA testified to. That's what the survey
22 evidence suggests. So I believe that is the
23 distinction. And, of course, we're not
24 challenging any restrictions or rules regarding
25 that they have to be students. And, in fact,

1 the education-related benefits here would help
2 them to succeed as students.

3 JUSTICE ALITO: Do you think there's
4 any -- that the NCAA could put any limitation on
5 educational benefits for which athletes could
6 bargain?

7 MR. KESSLER: I think the injunction
8 allows the NCAA -- and this was alluded to -- to
9 set reasonable rules to define what the
10 education benefits are and how they are related
11 to education. They also were given the right,
12 under the injunction, for rules as to how the
13 benefits would be provided. So I think the
14 court gave a lot of discretion to the NCAA in a
15 way that will still allow for there -- there to
16 be competition in making a better education
17 experience for the athletes, which Mark Emmert,
18 the president of the NCAA, publicly declared,
19 after we won, that this was a good thing.

20 JUSTICE ALITO: Do you think that what
21 the district court allowed here and the Ninth
22 Circuit sustained as the outer limit could --
23 would the antitrust laws allow applicants,
24 student -- recruited athletes to bargain for,
25 let's say, a guarantee not to lose a scholarship

1 if they're injured, a guarantee of tuition, room
2 and board for a certain number of years after
3 eligibility so that they would be able to
4 graduate, the provision of tuition, room and
5 board for graduate studies? Is there a limit?

6 MR. KESSLER: So I believe what the
7 antitrust laws do is prohibit the NCAA from
8 having restrictions that can't be justified
9 under the rule of reason. If they had a
10 restriction, for example, that said colleges
11 could not provide a -- a four-year or five-year
12 guarantee that their scholarship would stay in
13 place, I believe that might not survive the rule
14 of reason scrutiny.

15 JUSTICE ALITO: I see.

16 MR. KESSLER: But the antitrust laws
17 don't compel schools to do anything. The idea
18 is allow the markets to decide what schools have
19 the choice to provide.

20 JUSTICE ALITO: All right. Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor.

23 JUSTICE SOTOMAYOR: Counsel, you
24 declined to cross-petition the judgment below,
25 correct?

1 MR. KESSLER: Yes.

2 JUSTICE SOTOMAYOR: So for purposes of
3 this Court's review, you are not asking for any
4 broader relief than that already provided by the
5 district court, correct?

6 MR. KESSLER: That is correct, Your
7 Honor.

8 JUSTICE SOTOMAYOR: You're not asking
9 us to address the issues that Justice Alito or
10 others, including Justice Kavanaugh, have raised
11 on whether or not there should be any limits,
12 educational or noneducational? You're happy
13 with the injunction you got?

14 MR. KESSLER: We are not asking for
15 broader relief than affirming the rulings below.

16 JUSTICE SOTOMAYOR: All right. Number
17 two, generally speaking, antitrust courts do not
18 get into the business of price administration.
19 Why are the -- the limits of the injunction
20 below of academic achievement awards at a fixed
21 price of \$5,980 not a de facto price setting?

22 MR. KESSLER: So the entity who set
23 that price was the NCAA. What the court simply
24 said is that, whatever the NCAA rules allow to
25 give to athletes now in a pay for play, if you

1 win a ball game, if you're the MVP, if you have
2 some other achievement, they allow you to get
3 \$5980. The court said then you can't, NCAA, use
4 your monopsony power in a labor market to
5 prevent the schools and conferences from giving
6 as much, not more, as -- as much as they already
7 allow.

8 So this is not judicial price fixing.
9 This is just taking the NCAA's determinations
10 and saying you can't justify a restraint on
11 education achievement. And I also would note
12 it's not just for being on a team. With all due
13 respect to -- to my colleague, it has to be for
14 academic achievement. And the conferences, for
15 example, could individually say, it has to be a
16 3.0 or you have to make progress to get your
17 degree or other things. It's not just for being
18 on the team.

19 JUSTICE SOTOMAYOR: Does that
20 award make --

21 CHIEF JUSTICE ROBERTS: Justice Kagan.

22 JUSTICE KAGAN: Mr. Kessler, I
23 recognize that you didn't cross-petition, but I
24 can't believe that you think that this \$5980
25 award was the limit of where the district court

1 could have gone. So I just thought, you know,
2 on this record -- here's the question: On this
3 record, how high could the district court have
4 gone before compromising consumer demand for
5 college sports?

6 MR. KESSLER: So Your Honor is
7 correct, we advocated for broader relief below.
8 We advocated the NCAA should not impose the
9 restriction. It should be left to the
10 individual conferences who don't have market
11 power. They don't have monopsony to decide if
12 any rules were needed.

13 But, secondarily, we put in consumer
14 survey evidence that, at a minimum, showed that
15 consumers said they were perfectly fine, they
16 would keep watching sports, if they got a
17 \$10,000 award for academic achievement --

18 JUSTICE KAGAN: Do you think that the
19 evidence that you put in allowed a \$10,000 award
20 -- award --

21 MR. KESSLER: Absolutely, Your Honor.
22 That was --

23 JUSTICE KAGAN: Did -- did it allow
24 more than that, or would you have -- would you
25 say that was all the evidence indicated? If I

1 had said 15,000, does the evidence support going
2 up to 15,000?

3 MR. KESSLER: We did not put in survey
4 evidence for more than 10,000, but what we did
5 put in is that the schools already do like
6 \$50,000 for protection against lost professional
7 earnings, and that's had no impact on consumer
8 demand. Their -- their expert --

9 JUSTICE KAGAN: Well, that seems to
10 raise two --

11 MR. KESSLER: Their corporate
12 witness --

13 JUSTICE KAGAN: I mean, your answers
14 here raise two questions, Mr. Kessler. And the
15 first is -- is what you've heard before from
16 some of my colleagues, a kind of floodgates
17 argument, like what's next? It's just going to
18 go up and up and up, and pretty soon it will
19 just be a regular labor market.

20 And the second is, isn't there some --
21 some kind of arbitrariness about this \$5980
22 award that we should react badly to?

23 MR. KESSLER: I don't believe so, Your
24 Honor, because it is -- if you review it, the
25 award doesn't even mention the dollar number.

1 It simply says the NCAA cannot set a limit on
2 academic achievement awards that is lower than
3 what it allows for the greatest example of pay
4 for play --

5 JUSTICE KAGAN: Thank you,
6 Mr. Kessler.

7 MR. KESSLER: -- which is giving cash
8 awards.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch.

11 JUSTICE GORSUCH: Mr. Kessler, I'd
12 just like to talk about antitrust law generally
13 for a moment and pick up on where I left off
14 with your opponent.

15 Normally, in joint venture law, this
16 Court has come to recognize that we shouldn't be
17 flyspecking individual aspects of covenants not
18 to compete amongst joint venture participants
19 because they're creating a new product that
20 wouldn't otherwise be available in a market, and
21 the rule of reason should be pretty light and
22 that plaintiff bears a heavy burden to show that
23 a covenant not to compete violates the Sherman
24 Act. This case, the -- the Ninth Circuit, the
25 district court, applied a pretty searching

1 inquiry on covenants, each and individual aspect
2 of them.

3 What, in your view, as a matter of law
4 -- forget about the facts for a moment -- makes
5 that kind of searching inquiry appropriate?

6 MR. KESSLER: So I believe, Your
7 Honor, that the Court has been very consistent
8 in every joint venture case, whether it is
9 American Needle or whether it is Dagher or
10 whether it is Broadcast Music, that the remedy
11 for joint ventures is the traditional rule of
12 reason, even when they're doing things that
13 would otherwise be subject to per se rules or
14 quick look rules or something like that.

15 And the rule of reason, we have found,
16 can accommodate that. That has been a hundred
17 years of jurisprudence.

18 JUSTICE GORSUCH: Let me -- let me
19 just stop you there. Does it have something to
20 do with the fact that this product market,
21 there's only one and that the NCAA has monopoly
22 control over the labor market? You called it
23 monopsony control. You've referred to it a few
24 times. What -- what role does that play or
25 influence should it have in how we view the rule

1 of reason's application in this circumstance?

2 MR. KESSLER: I believe it has a great
3 deal to do with it, Your Honor, because what it
4 means is, unlike any other joint venture, okay,
5 we have a complete monopsony control over this
6 market, so there's no way for competition to
7 show if the NCAA's ever-shifting decisions, not
8 stable decisions, on what constitutes pay for
9 play is procompetitive or not procompetitive.
10 It just could impose its will.

11 And under Rule of Reason, we do
12 balance things together. Ultimately, it's a
13 balancing analysis, and the greater the market
14 power collectively, and this is not a single
15 firm case, the collective market power in this
16 labor market, I do believe that justifies at
17 least the application of the traditional Rule of
18 Reason, which is all that was applied here.

19 And in particular, Your Honor, I think
20 Footnote 6 of -- of American Needle direct --
21 directly -- 7, I'm sorry, Footnote 7, of
22 American Needle directly addresses this, where
23 the NFL said, well, we have to define our
24 product as NFL football, and the Court said, of
25 course, you have to define your product as NFL

1 football, but that doesn't entitle you not to be
2 subject to the normal Rule of Reason --

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 MR. KESSLER: -- which is that that --

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh.

8 JUSTICE KAVANAUGH: Thank you, Chief
9 Justice.

10 Good morning, Mr. Kessler.

11 First, you agree that the NCAA can
12 require that the athletes be enrolled students
13 in good standing, correct?

14 MR. KESSLER: Yes, I do, Your Honor.

15 JUSTICE KAVANAUGH: As Justice
16 Sotomayor and Justice Kagan raised, I think we
17 need to think about what the next case would
18 look like if we rule in your favor in this case.
19 As Justice Sotomayor correctly pointed out,
20 you're asking for a narrow ruling here, but the
21 rationale behind that ruling could generate
22 follow-on litigation.

23 What in your view is the endgame of
24 this litigation if you -- not this particular
25 litigation but of future litigation. Is the

1 endgame collective bargaining? Is the endgame
2 legislation? I think this picks up on Justice
3 Breyer's questions as well.

4 MR. KESSLER: So, Your Honor, it's
5 difficult for me to predict legislation or
6 collective bargaining, but I would talk about
7 antitrust endgame. In the antitrust endgame,
8 it's simply to apply the Rule of Reason, which
9 the NCAA has been subject to for at least 37
10 years, which all the sports leagues are subject
11 to --

12 JUSTICE KAVANAUGH: But if the --

13 MR. KESSLER: -- and --

14 JUSTICE KAVANAUGH: -- sorry to
15 interrupt, but your position, I think, in the
16 district court was that all the compensation
17 limits are contrary to the Rule of Reason,
18 correct?

19 MR. KESSLER: Yes, and I lost that as
20 a matter of fact. And they've now won on that
21 issue twice, as a matter of fact, under the Rule
22 of Reason. And facts would probably have to
23 change further for a different result to happen.

24 If there are new material facts in the
25 future, then we know under antitrust law the

1 Rule of Reason could come out differently at a
2 future date. But I have no reason to think that
3 I would win today on facts that I just lost on
4 yesterday.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett.

8 JUSTICE BARRETT: Mr. Kessler, the
9 tenor to me when I read it of both the district
10 court and Ninth Circuit opinions is that they
11 were trying not to do too much. And -- and
12 this, I think, goes back to Justice Breyer's
13 description of, you know, this is a delicate
14 area. On the one hand, there's concern about
15 blowing up the NCAA and something that people
16 have, as Justice Breyer -- Justice Breyer put
17 it, gotten so much joy out of but then, you
18 know, messing up general antitrust law.

19 So it seemed to me that the lower
20 court opinions were kind of saying, like, the
21 educational expenses weren't that big of a deal.
22 The cash, you know, it wasn't that high an
23 amount. You yourself described the injunction
24 as narrow and an effort by the court to give the
25 NCAA as much leeway as possible, is how you put

1 it in your brief.

2 So given all of that, how are -- how
3 is the injunction a substantially less
4 restrictive alternative, or do you disagree that
5 it had to be substantially less restrictive and
6 just had to be less restrictive?

7 MR. KESSLER: Oh, I believe it was
8 substantially less restrictive, Your Honor,
9 because it allowed the NCAA to continue to
10 impose all of its restraints on compensation not
11 related to education, and it said that what it
12 can't justify, what it can't do, is just
13 education-related restraint, but the reason we
14 know it's substantially less restrictive is
15 because there are life-changing benefits for
16 these athletes that will be provided.

17 The vocational schools we're talking
18 about is, if you don't graduate, as many of
19 these athletes don't, then maybe they can go to
20 a blue-collar vocational school and at least
21 have a career after earning all of these
22 billions of dollars. The NCAA won't allow that.

23 It's life-changing. If you can get a
24 local internship, which every other student can
25 get on campus, except for these athletes, who

1 work 50 hours a week before they attend a
2 certain class. So, Your Honor, I think it is
3 substantially less restrictive. It will be
4 life-changing for these athletes. And most
5 importantly, it's what the facts led to under
6 normal traditional Rule of Reason analysis.

7 JUSTICE BARRETT: Thank you, Mr.
8 Kessler.

9 CHIEF JUSTICE ROBERTS: A minute to
10 wrap up, Mr. Kessler.

11 MR. KESSLER: Thank you.

12 The district court here found, as a
13 matter of fact, that the NCAA's restraints on
14 education-related benefits cannot be justified
15 as reasonable, necessary -- reasonably necessary
16 to maintain demand for college sports or define
17 the NCAA's product.

18 This Court should not create a special
19 judicial antitrust exemption based on any claims
20 that the NCAA is somehow special. That is for
21 Congress, not the courts. The Rule of Reason
22 already provides ample latitude to joint
23 ventures, to organizations like this, to sports
24 leagues, to assert what you need to assert to
25 justify the restraints you need.

1 And Twombly allows the dismissal of
2 claims at the outset so there'll be no parade of
3 horribles if someone were to challenge a rule
4 that clearly was procompetitive on its face and
5 did not cause anticompetitive effects.

6 Finally, Your Honor, as Footnote 15 of
7 Board of Regents says, when you have
8 fact-findings of a district court approved by a
9 court of appeals, this Court should not
10 second-guess those findings, and, here, this was
11 found to be an unreasonable restraint of trade.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 MR. KESSLER: Thank you very much.

15 CHIEF JUSTICE ROBERTS: General
16 Prelogar.

17 ORAL ARGUMENT OF ELIZABETH B. PRELOGAR
18 FOR THE UNITED STATES, AS AMICUS CURIAE,
19 SUPPORTING THE RESPONDENTS

20 GENERAL PRELOGAR: Thank you,
21 Mr. Chief Justice, and may it please the Court:
22 The Rule of Reason is the traditional
23 standard for assessing antitrust liability, and
24 the lower courts properly applied that framework
25 to the facts found by the district court.

1 Usually a per se rule would prevent
2 competitors from arguing that their horizontal
3 agreements not to pay their workforce are
4 procompetitive. But the lower courts here,
5 following Board of Regents, correctly gave the
6 NCAA the opportunity to show that its
7 compensation rules fuel consumer interest in
8 college sports as a distinct product. And the
9 courts ultimately upheld most of the challenged
10 restrictions under the Rule of Reason.

11 Petitioners now seek to avoid that
12 analysis altogether. They ask this Court to
13 uphold the restraints on educational benefits
14 only under what they call a Quick Look or
15 deferential review.

16 But this Court has never upheld
17 restraints that have severe anticompetitive
18 effects without traditional Rule of Reason
19 analysis, and this case, involving horizontal
20 price-fixing in the market for student-athlete
21 labor, where the NCAA has monopsony power, would
22 not be the place to start.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel -- or thank you, General. The -- you
25 frequently emphasize that the restrictions

1 imposed by the court below were modest ones, but
2 I don't think the principle was. And when you
3 go through, as I was mentioning to your -- your
4 friend, there will be a wide number of rules
5 that are subject to challenge, if not in this
6 litigation, in subsequent cases.

7 And the effect it seems to me is to
8 substitute the Court's view for the business
9 judgment of the people responsible for a joint
10 venture that we have upheld as procompetitive.
11 And I just don't know if the judge is the best
12 person to assess the competitive effect of the
13 rules or the people managing the joint venture.

14 Do you have any thoughts about that?

15 GENERAL PRELOGAR: So I think,
16 Mr. Chief Justice, that the legal standards
17 themselves guard against having courts come in
18 and micromanage the rules of the NCAA, and --
19 and there are really two aspects to that.

20 The first is the fact that the Rule of
21 Reason applies in the first place. So
22 Plaintiffs here aren't going to be able to
23 benefit -- benefit from any kind of per se or
24 categorical rule. They'll have to meet their
25 step 1 burden to show a substantial

1 anticompetitive effect. And -- and that's an
2 important check, because Plaintiffs won't be
3 able to show that with respect to each and every
4 challenged rule.

5 And the -- the second part of the
6 legal analysis that I emphasized is the step 3
7 inquiry into a less restrictive alternative.
8 The lower courts here were very clear that they
9 were not seeking to impose marginal rule changes
10 on the NCAA. They said that this was a patently
11 and inexplicably more restrictive set of rules
12 than was necessary.

13 So I think applying those legal
14 standards is not going to lead the courts
15 rushing into trying to dismantle the NCAA's
16 framework rule by rule.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas.

20 JUSTICE THOMAS: Yes, thank you,
21 Mr. Chief Justice.

22 General, the -- I'm still a bit
23 perplexed as to how the NCAA would be able to
24 preserve what it thinks is an important
25 distinction between student-athletes and

1 professional athletes without constantly being
2 involved in litigation.

3 What's your reaction to that and
4 how -- I mean, how do we resolve that part of
5 the future problems that I see down the road?

6 GENERAL PRELOGAR: So I think that the
7 way that that's resolved is by giving credence
8 to the procompetitive justification that was
9 asserted here, the idea that these rules really
10 do help to differentiate the product in the eyes
11 of consumers. And, ultimately, applying that
12 standard here, the district court upheld most of
13 the compensation rules. So it found that, in
14 fact, with respect to all of the limits on
15 compensation that are unrelated to education,
16 consumers actually pay attention to that in
17 thinking of college sports as something distinct
18 and different.

19 But I think where the NCAA goes wrong
20 is in suggesting that the analysis should be
21 based on its own perspective of what it thinks
22 supports amateurism, because amateurism is not
23 its own free-floating ideal under the antitrust
24 laws. It's not something that the competition
25 laws focus on to aspire to in and of its own

1 right. It's -- it's only relevant to the extent
2 that it actually connects up to that
3 procompetitive purpose of differentiating the
4 product for consumers themselves.

5 JUSTICE THOMAS: Well, you know,
6 that's -- as we've seen, the world has changed
7 in sports, and it could change dramatically
8 again, and the next survey or at least the
9 impression that the public has about amateur
10 athletics could suggest that, well, 10- or
11 20,000 dollars cash is fine, and still preserve
12 the amateur status.

13 So wouldn't that lead to future
14 litigation?

15 GENERAL PRELOGAR: Well, certainly, if
16 the -- if the facts change and if plaintiffs
17 could make that showing, which they weren't able
18 to make here -- ultimately, the district court
19 rejected that argument -- but, if they were able
20 to make that showing, then I think it's very
21 much properly assessed by an antitrust court to
22 see whether the significant anticompetitive
23 effects are justified. And, ultimately, if
24 they're not justified, and that means that there
25 has to be greater competition, there's nothing

1 inherently wrong with that. That's the
2 overriding purpose and aim of the Sherman Act.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Breyer.

6 JUSTICE BREYER: What's your instant
7 reaction, and I wonder what Mr. Waxman's is, to
8 the following? Which you will disagree with.

9 One, a joint venture sometimes can
10 have a noneconomic, sometimes, as well as an
11 economic objective.

12 Two, the word "reason" means reason.

13 And when you consider whether a rule
14 is unreasonable because there is a less
15 restrictive alternative, take into account that
16 noneconomic reason, the impossibility of
17 measuring everything against consumer demand or
18 the undesirability where there is that
19 noneconomic reason, the difficulty of measuring
20 each mini rule against something called consumer
21 demand.

22 And, four, the difficulty of
23 administering a system that has thousands of
24 members. Okay?

25 Now suppose I were to write that.

1 What would be your instant reaction of why
2 that's totally wrong?

3 GENERAL PRELOGAR: The reason I think
4 that would be wrong, Justice Breyer, is because
5 this Court has said over and over again that
6 those types of noneconomic interests are not
7 cognizable under the antitrust laws, that courts
8 shouldn't be in the business of trying to
9 evaluate whether there are other socially
10 important ideals to be promoted or -- or other
11 things to consider that don't go to effects on
12 competition.

13 That's obviously something Congress
14 could consider. If there are special rules that
15 are needed in this context to take account of
16 those kinds of noneconomic interests, then
17 Congress is well positioned to assess it and --
18 and draw the right line.

19 But to actually try to incorporate
20 that into Sherman Act analysis would be at odds
21 with precedent, and I think it would open up the
22 door to having to balance a -- a host of
23 considerations that aren't properly assessed
24 when you're looking at whether or not something
25 is, on balance, anticompetitive.

1 JUSTICE BREYER: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Alito.

3 JUSTICE ALITO: What do you think is
4 the distinctive characteristic of the NCA's --
5 the NCAA's product? Could you define it as
6 precisely as possible?

7 GENERAL PRELOGAR: So I think that,
8 based on the district court's factual findings
9 here, the things that the court said defined the
10 product were principally the fact that the
11 students are bona fide students at the school
12 and also that they're not paid to play in the
13 form of receiving compensation that's unrelated
14 to education.

15 I don't think it has a fixed
16 definition, Justice Alito. I think that it's
17 going to turn on this actual factual inquiry
18 into what consumers think about when they're
19 differentiating college sports from professional
20 sports. But at least based on the evidence that
21 the district court received, those were the
22 factual findings it reached.

23 JUSTICE ALITO: Does your analysis of
24 this case depend on the NCAA's having monopsony
25 power?

1 GENERAL PRELOGAR: I think it is a
2 critical fact here for a couple of different
3 reasons, and the principal one is that it shows
4 the severe anticompetitive effects that were
5 observed at step 1 of the Rule of Reason. That
6 is ordinarily, in the typical antitrust case, a
7 -- a burden that plaintiffs sometimes can't
8 meet, but, here, it was essentially undisputed.
9 The district court found at summary judgment
10 that Petitioners weren't meaningfully disputing
11 that these restrictions have enormous
12 consequences in the market for student-athlete
13 labor.

14 And I think that actually shows why
15 the rule that Petitioners are asking for, this
16 idea of Quick Look review, would be so anomalous
17 given the nature of these restraints and the
18 severe anticompetitive effects that they --

19 JUSTICE ALITO: Let me give you this
20 example: There are a lot of old-time
21 sports fans who are turned off by the enormous
22 salaries that are earned by professional
23 athletes. So suppose a group said we want to
24 take advantage of this unmet demand. We're
25 going to organize a new professional league, but

1 we are going to cap the salaries of all of our
2 players at 1955 levels, corrected for inflation.

3 Would that get a quick look? Would it
4 be analyzed under the Rule of Reason? Would it
5 be per se a violation of the Sherman Act?

6 GENERAL PRELOGAR: So I think the Rule
7 of Reason would properly apply to that
8 hypothetical, but there would be a serious first
9 question about market power and whether that
10 kind of league that organizes to try to create a
11 -- a distinct product is actually exercising the
12 kind of power that can produce the substantial
13 anticompetitive effect that satisfies the burden
14 at step 1.

15 JUSTICE ALITO: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor.

18 JUSTICE SOTOMAYOR: I'm not sure that
19 you have given me comfort on some of the
20 questions that my -- that the Chief Justice
21 asked, which is, how do we know that we're not
22 just destroying the game as it exists? Meaning
23 we're being told by Mr. Waxman that all of these
24 education-related payments can become
25 extravagant and, as a result, be viewed by the

1 public as pay for play.

2 Any fix would come after the fact,
3 after the game has been -- after amateurism has
4 been destroyed in college sports. How do we
5 ensure that doesn't happen?

6 GENERAL PRELOGAR: So I think that
7 this in -- interpretation of the injunction that
8 Mr. Waxman offered is overly broad and doesn't
9 accord with the district court's factual
10 findings or what it actually ordered in this
11 case. I recognize the concern about destroying
12 college sports, and it is at odds with the legal
13 standards the court applied and its ultimate
14 conclusions here. It upheld most of the
15 challenged restraints. It said that the NCAA
16 could continue to cap compensation that's
17 entirely unrelated to education.

18 And, with respect to the scope of the
19 injunction itself, the court was focused on
20 legitimate educational expenses. That is what
21 the Ninth Circuit said, and I think it accords
22 with the factual findings that from the
23 perspective of consumers, with respect to that
24 narrow category of benefits, it doesn't play any
25 role whosoever in defining the product of

1 college sports. So there's no reason to prevent
2 the students from obtaining those benefits.

3 JUSTICE SOTOMAYOR: What position do
4 you take with respect to that \$5980 limitation
5 on educational expenses? Why should educational
6 expenses be limited in any way -- awards be
7 limited in any way?

8 GENERAL PRELOGAR: Well, the district
9 court made a factual finding, Justice Sotomayor,
10 that having unlimited cash payments for
11 education, even if they were in the form of
12 academic awards, could start to blur the
13 distinction between college and professional
14 sports. And -- and no one's seeking to
15 challenge that as clearly erroneous.

16 With respect to the actual amount,
17 it's, I think, critical to recognize that the
18 court was focused on the fact that the students
19 are already eligible for athletic awards in --
20 in that same amount. So the court, as Mr.
21 Kessler said, wasn't setting a specific price;
22 it was saying, hey, the students can already get
23 athletic awards, and it's not suppressing
24 demand, it's not suggesting that college sports
25 is losing its distinctive character. There's no

1 reason to prevent them from getting academic
2 awards that are of equal value.

3 JUSTICE SOTOMAYOR: Thank you,
4 counsel.

5 CHIEF JUSTICE ROBERTS: Justice Kagan.

6 JUSTICE KAGAN: General, would I be
7 wrong to think that this \$5980 was essentially
8 taken out of thin air, that it's arbitrary? I
9 mean, you mentioned that it was designed to
10 match these athletic awards. But, as far as I
11 know, there's no evidence that any single player
12 has ever received that amount in athletic
13 awards. Wasn't the court just looking for any
14 old number to, you know, hang its hat on, but
15 the -- the one it came up with was essentially
16 arbitrary?

17 GENERAL PRELOGAR: I don't think it's
18 right to characterize it as arbitrary, and --
19 and I think the key here is to recognize that
20 this is just making the students eligible for
21 awards up to that amount, and -- and there's no
22 suggestion in the district court's injunction
23 that every student automatically can receive one
24 of these awards just for playing on a team.

25 That -- that's the gloss that Mr.

1 Waxman attempted to put on it, but there's
2 nothing in the injunction that prevents the NCAA
3 from enforcing criteria, for example, on whether
4 there should be actual benchmarks, certain GPAs,
5 to make sure that these awards actually reward
6 academic achievement and aren't used as
7 disguised pay-for-play payments.

8 So I think that it's well grounded in
9 the factual findings. And, importantly, no
10 one's seeking to challenge those here. It -- it
11 doesn't show that there's any problem with the
12 legal analysis that the court applied.

13 JUSTICE KAGAN: I -- I asked Mr.
14 Kessler this same question.

15 Do you think on this record the
16 district court could have gone further.

17 GENERAL PRELOGAR: I think potentially
18 based on the evidence that came in, the district
19 court could have made a factual finding that
20 higher payments wouldn't blur the distinction
21 between professional and college sports.

22 But -- but what seemed key to the
23 district court's conclusions here was the
24 difference between educational and
25 noneducational benefits. And I think that was a

1 principal line to draw based on the fact that
2 the district court found them.

3 JUSTICE KAGAN: Thank you, General.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch.

6 JUSTICE GORSUCH: General, see -- see
7 if you disagree with any of this and, if so,
8 please tell me why, that normally this Court has
9 come to recognize that ancillary restraints in
10 joint ventures, including price restraints,
11 territorial restraints, are procompetitive and
12 deserve a very light look from courts because
13 the joint venture creates a new product that
14 wouldn't otherwise exist and that is
15 procompetitive.

16 We recognize, though, that that's
17 assuming a competitive market. And what
18 differentiates this case is that the NCAA is the
19 market for student-athlete labor. It has
20 monopsony control.

21 And so that, that unique feature is
22 what justifies the more searching inquiry that
23 took place in this case. And that it might be a
24 very different case if there were multiple
25 leagues or here conferences that had

1 restrictions on price that are paid to
2 student-athletes.

3 And that some, some conferences
4 without market power, for example, might be able
5 to do that, fully compliant with the antitrust
6 laws. It's just that you can't set one rule for
7 the whole market.

8 GENERAL PRELOGAR: I think I agree
9 with -- with almost everything you said, Justice
10 Gorsuch, with one small modification, which was
11 that I don't think it's quite accurate to say
12 that joint ventures get a light look.

13 But I think what normally happens is
14 that a plaintiff seeking to challenge a joint
15 venture under the rule of reason might not be
16 able to show the kinds of market power that --
17 that demonstrates that there is a substantial
18 anticompetitive effect.

19 So I think that keys in to exactly
20 what you identified, which is that the monopsony
21 power here that the NCAA exercises for the
22 entire market for student-athlete labor is part
23 of what triggers the significant anticompetitive
24 effects that were essentially undisputed below.

25 JUSTICE GORSUCH: And it would be very

1 different if there were a more competitive
2 market, and that it would be a very different
3 case if, for example, one individual or a number
4 of individual conferences had restrictions like
5 this. It's just that it impacts the whole of
6 the market.

7 GENERAL PRELOGAR: That's exactly
8 right and, in fact, the district court's
9 injunction permits the conferences to set their
10 own limits in recognition that the conferences
11 can tailor compensation limits or educational
12 benefits.

13 And a student who is unhappy with what
14 he or she can get from one conference, can go
15 and seek out competition from another
16 conference.

17 So I do think that that would
18 dramatically change the nature of the case at
19 all steps of the rule of reason.

20 JUSTICE GORSUCH: And consumers could
21 also choose between which teams they -- they --
22 they choose to -- to follow as a result.

23 GENERAL PRELOGAR: That's right.

24 JUSTICE GORSUCH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh.

2 JUSTICE KAVANAUGH: Thank you, Chief
3 Justice, and welcome, General Prelogar.

4 The label of education-related
5 benefits I think Mr. Waxman would say is being
6 stretched here, and that this is really going to
7 turn into very quickly just an automatic payment
8 to student-athletes and, thus, it's a mistake, I
9 think he would say, to call it education
10 related.

11 What's your response to that?

12 GENERAL PRELOGAR: So the Ninth
13 Circuit considered this argument expressly and
14 said that interpreting the injunction to
15 authorize sham payments or illegitimate benefits
16 is -- is -- is not an accurate representation.

17 The district court here was clearly
18 focused on legitimate educational benefits. It
19 said these benefits are normally confined to
20 their actual value. They're usually provided in
21 kind. And so things like the \$500,000 paid
22 internship, to a speaker internship, wouldn't
23 qualify, wouldn't fall within the scope of the
24 injunction at the outset.

25 But, in any event, if there is any

1 confusion on this score, if there is ambiguity
2 the district court specifically invited the NCAA
3 to define what benefits are reasonably related
4 to education.

5 And there is no reason to think that
6 the district court would reject the definition
7 that -- that codifies this idea that the
8 benefits have to be legitimate.

9 JUSTICE KAVANAUGH: On this record do
10 you think a district court could have set limits
11 that were significantly higher than the limits
12 that were set by the district court here?

13 GENERAL PRELOGAR: So it would have
14 been difficult to -- to set limits on some of
15 these educational benefits that aren't tied to
16 their actual value. So I -- I think that that's
17 kind of an inherent constraining feature of this
18 injunction.

19 It's certainly true that some of these
20 benefits, like graduate scholarships and so
21 forth, might be worth quite a lot to the
22 student, but they are inherently limited by
23 actual value, which is part of what the court
24 said fueled this acceptance that this wasn't
25 going to become a vehicle for pay-per-play.

1 JUSTICE KAVANAUGH: Thank you,
2 General.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett.

5 JUSTICE BARRETT: Good morning,
6 Justice Prelogar. I have a question about
7 the cross-market analysis that the court
8 performed at step 2. So it balanced the
9 competition in the labor market against the
10 market for college sports.

11 And I understand that that's the way
12 the case came to us because that's the framework
13 the lower courts used and the one on which the
14 parties agreed.

15 But some of the amici have criticized
16 it. So I'm wondering if you think it is, you
17 know, performing any kind of distorting effect
18 that would influence the way we think about this
19 case in a bad way?

20 GENERAL PRELOGAR: So this issue of
21 cross-market balancing raises complex questions
22 under the antitrust laws.

23 And ultimately, as you've identified,
24 Justice Barrett, the -- the parties haven't
25 briefed it, the lower courts didn't consider it,

1 and we think that the courts should take the
2 market definitions as a given here and not try
3 to more broadly consider when and under what
4 circumstances cross-market balancing can be
5 considered.

6 I -- I'd note, too, that I think the
7 parties took their lead from Board of Regents
8 because there the court did clearly contemplate
9 that a procompetitive justification could be
10 based on the idea of preserving college sports
11 as a distinct product and seemed to think that
12 that would justify restraints in this market.

13 So for that reason I'd urge the Court
14 to -- to leave for another day any broader
15 questions about how cross-market balancing
16 should be conducted.

17 JUSTICE BARRETT: Thank you, General.

18 CHIEF JUSTICE ROBERTS: A minute to
19 wrap up, General.

20 GENERAL PRELOGAR: Thank you,
21 Mr. Chief Justice.

22 If I could just leave the Court with
23 one overarching thought, it's -- it's this:
24 Petitioners are wrong to argue that any
25 restrictions related to their conception of

1 amateurism, including their horizontal price
2 fixing agreements, must be upheld without
3 analysis rather than applying the rule of
4 reason.

5 That would be an extraordinary
6 departure from traditional antitrust principles.
7 Amateurism's relevant here only insofar as
8 Petitioners can actually show that it increases
9 consumer choice by distinguishing college sports
10 from professional sports.

11 And they made the showing with respect
12 to most of their compensation rules, but as a
13 factual matter they couldn't make this showing
14 with respect to educational benefits.

15 So there is no procompetitive
16 justification to deprive student-athletes of the
17 opportunity to obtain those educational benefits
18 through ordinary market competition.

19 We, therefore, urge the Court to
20 affirm.

21 CHIEF JUSTICE ROBERTS: Thank you.

22 Rebuttal, Mr. Waxman.

23 REBUTTAL ARGUMENT OF SETH P. WAXMAN

24 IN SUPPORT OF PETITIONERS

25 MR. WAXMAN: Thank you, Mr. Chief

1 Justice.

2 Justice Gorsuch, monopsony power does
3 not take away the producer's right to define the
4 product any more for the NCAA than, for example,
5 for the Little League, which eight years ago got
6 \$80 million for its television contract.

7 There is no argument here that the
8 rule of reason shouldn't be applied. Our point
9 is that the rule of reason requires that these
10 restraints be accepted because they -- the
11 product is clearly procompetitive and the -- the
12 court's -- the -- the court's decree essentially
13 remakes the procompetitive feature of the
14 product itself.

15 And so, Justice Breyer, this is not an
16 ordinary product or an ordinary market. This is
17 education. And cases like Klars and Goldfarb
18 make clear that, where actors are not purely
19 economic but are also attempting to achieve
20 other purposes, certain rules and restrictions
21 are applied differently than to pure commercial
22 enterprises.

23 And the restraint here, you're worried
24 about technology cases and everything, this is
25 as the government acknowledges the rare case in

1 which the challenged restraint is the
2 procompetitive differentiating feature of the
3 product.

4 Net consumer demand is not the test.
5 The -- even if the Court's less restrictive
6 alternative would preserve a distinction, it
7 clearly reduces the distinction and, therefore,
8 it's not as effective in preserving the benefits
9 of our conception of amateurism. Otherwise,
10 courts can use less restrictive alternatives to
11 chip away at a joint venture's business
12 judgments until eventually the differentiation
13 is barely discernible.

14 At -- at step 3, the question has to
15 be whether there is a less restrictive
16 alternative that's as effective in preserving
17 the NCAA's conception, not one that's as
18 effective in preserving some kind of
19 differentiation between the NCAA and pro sports.
20 Just focusing on differentiation as an abstract
21 conception would allow courts to completely
22 replace a business's product with one of the
23 court's own making as long as it was still
24 differentiated.

25 At step 3, the less restrictive

1 alternative has to preserve the same type and
2 degree of benefit shown at step 3, and so, once
3 it's determined that no-pay amateurism
4 differentiates and is, therefore,
5 procompetitive, antitrust law doesn't require a
6 producer to adopt an alternative that reduces
7 the differentiation or replaces it with a
8 different differentiation altogether.

9 Once carts -- courts start drawing
10 their own lines, and according to the government
11 here everything is factual and depends on the
12 record, perpetual litigation and judicial
13 superintendence are inevitable. Just \$5980 that
14 has so captured the Court's imagination this
15 morning require months of post-trial litigation
16 in front of this judicial superintendent just to
17 figure out what that number is for the time
18 being.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 The case is submitted.

23 (Whereupon, at 11:34 a.m., the case
24 was submitted.)

25

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