No. 20-512

IN THE

Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

SHAWNE ALSTON, *et al.*,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents provide no sound basis to deny certiorari; indeed, their opposition is predicated largely on misstatements, mischaracterizations, and irrelevant arguments. For example, respondents accuse the NCAA of seeking antitrust immunity, when in fact the NCAA simply urges a particular application of the rule of reason—one drawn directly from this Court's precedent—for NCAA rules that are (again under this Court's precedent) plainly procompetitive. That mischaracterization of the NCAA's argument also underlies respondents' effort to wave away the clear and entrenched circuit conflict, a conflict that yields inconsistent application of the Sherman Act, in derogation of this Court's recognition of "the importance of uniform interpretation of the antitrust law." *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 156 (1972).

Respondents also cast the decision below as both fact-based and modest. But the NCAA's petition presents a purely legal question, and the claim of modesty cannot be reconciled with the Ninth Circuit's holding that the NCAA must allow student-athletes to receive *unlimited* cash and in-kind payments, on the mere pretext that they are somehow "education-related." Nor can the latter claim be reconciled with the Ninth Circuit's creation of an unprecedented regime in which one judge can significantly micromanage intercollegiate athletics, and in which the NCAA is subject to perpetual antitrust litigation.

As for respondents' heavy reliance on the denial of certiorari in *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015), that ignores both the lack of precedential weight such denials carry and the important differences between *O'Bannon* and the decision below. Finally,

respondents invoke the possibility of federal or state legislation, but they never explain why that possibility (which is present in many cases yet almost always uncertain) justifies leaving the decision below in place to wreak havoc on the century-old institution of NCAA athletics and the law regarding joint ventures.

This Court's intervention is warranted.

ARGUMENT

I. THE CIRCUIT CONFLICT IS UNDENIABLE

Respondents' effort (Opp. 20) to dismiss the division among the courts of appeals over the question presented lacks merit.

A. As the petition explained (at 19-20), the Seventh Circuit has repeatedly held that if an NCAA rule, "'on its face,'" is "'clearly meant to help maintain … amateurism in college sports,'" then it "is presumptively procompetitive" and an antitrust challenge to it should be dismissed on the pleadings because "a full rule-of-reason analysis is unnecessary." *Deppe* v. *NCAA*, 893 F.3d 498, 501-504 (7th Cir. 2018) (quoting *Agnew* v. *NCAA*, 683 F.3d 328, 342-343 (7th Cir. 2012)) (quotation marks omitted). The Ninth Circuit, by contrast, has twice subjected NCAA rules limiting student-athlete compensation—rules clearly meant to help maintain amateurism—to trial and detailed rule-of-reason analysis. And it has rejected the Seventh Circuit's position as "unpersuasive" and "dubious," stating that it "would not adopt the *Agnew* presumption." *O'Bannon*, 802 F.3d at 1064.

Respondents assert, however (Opp. 21), that *Agnew*'s discussion was dicta and therefore cannot create a circuit conflict. But as respondents acknowledge (Opp. 22), *Deppe* "explicitly applied the rule … set out

in *Agnew*." Thus, whether or not *Agnew*'s discussion is dicta, *Deppe*'s square holding conflicts with the decision below.

Respondents also insist (Opp. 20-21, 23) that the decision below is consistent with, rather than in conflict with, decisions from other circuits, including *Smith* v. *NCAA*, 139 F.3d 180 (3d Cir. 1998), and *McCormack* v. *NCAA*, 845 F.2d 1338 (5th Cir. 1988). That would not eliminate the circuit conflict even if that were true. But it is not. Respondents' argument rests on the false premise that the NCAA seeks antitrust immunity. In fact, the NCAA does no such thing. It urges instead a particular *application* of the rule of reason, namely, that rules facially designed to prevent student-athletes from being paid to play should be upheld at the pleading stage. *See* Pet. 3, 19, 24. As discussed (Pet. 18-21), that is not how the Ninth Circuit applies the rule of reason to such rules, but it *is* how the Seventh, Third, and Fifth Circuits do, based on the need to accord the NCAA (like other sports-governing bodies) the "freedom" to define their "basic rules and guidelines," as long as they do so in "good faith," *Race Tires America, Inc.* v. *Hoosier Racing Tire Corp.*, 614 F.3d 57, 80-82 (3d Cir. 2010).

B. Respondents' next contend (Opp. 22) that the Seventh Circuit would not uphold the rules challenged here because they are similar to the rules at issue in *Agnew*. That is wrong. The rules in *Agnew* imposed a one-year limit on scholarships and limited the number of scholarships per team. *See* 683 F.3d at 344. Because the NCAA has long recognized that athletic scholarships are consistent with amateurism (in that they cover the academic expenses individuals incur in order to be student-athletes), *Agnew* concluded that the challenged limits on scholarships were not necessary to

preserve amateurism. *See id.* But *Agnew* also recognized that rules—like those challenged here—that are designed to prevent student-athletes from being paid "*beyond* educational expenses" are essential to preserving amateurism and thus should be sustained on the pleadings. *Id.* at 344-345. Respondents' attempt (Opp. 22) to equate the rules here with the very different rules in *Agnew*, by saying that both sets were "education-related," simply underscores that that phrase—which lies at the heart of the district court's injunction—is utterly malleable and ultimately meaningless as a limit on the benefits that student-athletes must be allowed to receive, Pet. 28.

C. Finally, respondents call (Opp. 23) this case a "poor vehicle" because the NCAA "never asked [the Ninth Circuit] to rule on" the questions presented. That is incorrect. The NCAA's opening brief below not only noted (at 25 n.2) that *O'Bannon* foreclosed the argument that the NCAA's "amateurism rules are valid as a matter of law under *Board of Regents*," but also "preserved this argument for further review," *id.* In any event, the panel reaffirmed *O'Bannon*'s rejection of that argument. Pet. App. 12a, 34a, 37a; *see* Pet. 22-23. The NCAA's argument was thus pressed *and* passed upon.

II. RESPONDENTS' ARGUMENT THAT THE DECISION BELOW IS CONSISTENT WITH *BOARD OF REGENTS* AND *AMERICAN NEEDLE* DISREGARDS CRITICAL ASPECTS OF THOSE CASES

Respondents argue (Opp. 16-19) that neither *NCAA* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), nor *American Needle, Inc.* v. *NFL*, 560 U.S. 183 (2010), supports the NCAA's position here. That argument fails.

A. In respondents' view (Opp. 16-17), *Board of Regents* stands for nothing more than that the rule of reason applies to the NCAA rules. That disregards *Board of Regents*' extended analysis of the different kinds of NCAA rules, 468 U.S. at 101-120, which would have been unnecessary if the Court had wanted to say only what plaintiffs posit, Pet. 24-25. Respondents also note (Opp. 17) that *Board of Regents* invalidated the NCAA television plan at issue after trial and a detailed rule-of-reason analysis. But as explained in the petition (at 10, 17), that was precisely because the plan did not "fit into the same mold as do rules defining … the eligibility of participants," i.e., rules "based on a desire to maintain the integrity of college [sports] as a distinct and attractive product." 468 U.S. at 116-117. Unlike the television plan, the Court observed, such rules are "procompetitive" and "justifiable," *id.* at 117—and the rule that "athletes must not be paid" is a quintessential example of such a rule, *id.* at 102. If the NCAA's compensation rules were to be treated like the television plan, as respondents say, the Court's lengthy explanation of the differences between the two types of rules would have been pointless.

Relatedly, respondents contend (Opp. 19) that *Board of Regents* "used the phrase 'twinkling of an eye' to explain that some restraints may be so obviously *anti*-competitive that they can be summarily *struck down*." But *American Needle* confirms that the phrase also means that some restraints can be summarily *upheld*. After rejecting the claim of immunity in *American Needle* (a claim that, as noted, the NCAA does not make), this Court addressed how NFL rules might nonetheless survive antitrust scrutiny; and it was in that context that the Court, noting that "teams that need to cooperate are not trapped by antitrust law,"

invoked the prospect of applying the rule of reason, i.e., upholding a rule, in the "'twinkling of an eye.'" 560 U.S. at 202-203.

Respondents also assert (Opp. 22-23) that "no procompetitive presumption would ever be proper" here because "[h]orizontal agreements are antitrust's most 'suspect' classification" (alteration in original) (quotation marks omitted). That assertion starkly illustrates how much respondents' position flouts *Board of Regents*. That decision made clear that even though NCAA rules are horizontal restraints, (1) they should be evaluated under the rule of reason, (2) which should be applied to afford the NCAA "ample latitude" to maintain the "revered tradition of amateurism," and (3) rules implementing the principle that "athletes must not be paid" are "procompetitive." 468 U.S. at 101-102, 117, 120.

B. Respondents further argue (Opp. 18) that *Board of Regents* is no longer relevant because college sports have "becom[e] a massive, multi-billion dollar industry" and "the NCAA has abandoned any coherent definition or tradition of amateurism" (quotation marks omitted). Both points are wrong.

First, respondents ignore that when *Board of Regents* was decided, intercollegiate sports was already highly commercialized; indeed, the television plan there called for broadcasters to pay more than $130 million (in 1984 dollars) to televise a limited number of games. 468 U.S. at 92-93. The intervening increase in the commercial interest in college sports does not justify ignoring this Court's precedent.

Second, the NCAA remains steadfastly committed to amateurism. *See, e.g.*, C.A. ER276 (NCAA Constitution reciting "Principle of Amateurism"). Like the

courts below, respondents mistakenly believe that amateurism traditionally permitted coverage only up to the federally defined "cost of attendance." *See* Opp. 9; Pet. App. 37a. But as the NCAA has explained (Pet. 7-9, 26), the traditional amateurism framework is not defined by COA, instead allowing coverage of all of student-athletes' legitimate expenses as well as small recognition awards, even if either category (or both) exceed COA. The only rule changes the NCAA has made recently regarding student-athlete compensation have been marginal and fit comfortably within this longstanding amateurism framework. *See* Defs.' C.A. Resp.-and-Reply Br. 5-15. That respondents rely on those changes as evidence that the compensation rules are unlawful (and the NCAA liable for treble antitrust damages) only underscores why the NCAA needs latitude to administer college athletics.

III. RESPONDENTS' ARGUMENTS REGARDING THE NATURE AND IMPACT OF THE NINTH CIRCUIT'S DECISION ARE BASELESS

Respondents contend that certiorari is unwarranted because the decision below is "modest" (Opp. 3); because it is highly fact-bound, involving "deferential review of the district court's application of the rule of reason, based on the trial record" (Opp. 26); and because it will have no impact on joint-venture law generally (Opp. 26-29). None of that is credible

A. The decision below is not "modest." It allows student-athletes to receive cash and in-kind payments far beyond the legitimate expenses and limited awards that NCAA rules already allowed. For example, the NCAA must now allow every student-athlete to be paid *unlimited* amounts in cash for participating in an "internship," Pet. App. 168a, plus thousands of dollars

per year in academic "awards or incentives," *id.* at 41a-45a, that can be awarded for nothing more than maintaining academic eligibility. These massive payments would leave little if anything of what this Court has called the "revered tradition of amateurism." *Board of Regents*, 468 U.S. at 120.

Respondents suggest (Opp. 3), that the Ninth Circuit's allowance of these huge payments is tempered by the fact that the court did not "*require* any school to provide these … benefits." But every decision invalidating an agreement under section 1 of the Sherman Act permits the affected entities to pursue the same actions independently. The decision's significance is that it forecloses agreement among NCAA members on the rules that define the "character and quality of the 'product,'" which *Board of Regents* recognized are "essential if the product is to be available at all." 468 U.S. at 101-102.

B. Likewise infirm is respondents' claim (Opp. 26) that "the Ninth Circuit's decision … involves fact-based decisionmaking not appropriate for the Court's review." The question presented here is in no way based on the specifics of the trial record or on any factual findings the court of appeals reviewed. Indeed, the essence of the NCAA's challenge is that there should not have *been* any trial, because under this Court's precedent (as correctly applied by other circuits), NCAA rules that facially serve to maintain amateurism should be upheld at the motion-to-dismiss stage, without detailed rule-of-reason analysis. Put another way, the petition asks the Court to (1) clarify the proper role of antitrust courts in reviewing core elements of a joint venture, and (2) correct the Ninth Circuit's misapplication of the rule of reason, which invites judicial micromanagement and reflects an understanding of the law that is "in substan-

tial tension with antitrust principles and precedents," *NFL* v. *Ninth Inning, Inc.*, 2020 WL 6385695, at *1 (U.S. Nov. 2, 2020) (Kavanaugh, J., statement respecting denial of certiorari).

C. Lastly, respondents contend (Opp. 26) that the decision below "has no implications for joint ventures" because the NCAA is not a joint venture. That claim is hard to take seriously. As *Board of Regents* explained, "'league sports'" are "'[p]erhaps the leading example'" of "'activities [that] can only be carried out jointly.'" 468 U.S. at 101. The Court thus left no doubt that it regarded the NCAA as a "joint venture." *Id.* at 113, 114 n.54.

Nor did the Court limit that characterization to the NCAA's *marketing* activity; rather, the Court made clear that the NCAA's status as a joint venture encompasses the association's definition and creation of its product, including its rules for student-athlete eligibility. "What the NCAA and its member institutions market," the Court explained, "is competition itself—contests between competing institutions." 468 U.S. at 101. And the "particular" type of competition that the NCAA markets, the Court elaborated, is "define[d]" by various rules, including "eligibility" rules that "athletes must not be paid, must be required to attend class, and the like." *Id.* at 101-102, 117. Thus, the Court declared, "the integrity of the 'product' cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed." *Id.* at 102. If more were needed, *American Needle* confirms that what *Board of Regents* said about the NCAA is true of sports leagues more generally: The Court noted that the NFL is a "joint venture" in which "[t]he teams compete with one another … for

contracts with … playing personnel." 560 U.S. at 196-197. There is accordingly no doubt that the decision below will harm not just the NCAA but also joint ventures generally

IV. THE DENIAL OF CERTIORARI IN *O'BANNON* IS IRRELEVANT

Respondents argue repeatedly (*e.g.*, Opp. 1, 4) that the eight-Justice Court's denial of certiorari in *O'Bannon* means certiorari should also be denied here. But such denials have no weight, *see Teague* v. *Lane*, 489 U.S. 288, 296 (1989), and this Court regularly grants certiorari on an issue after previously denying it. For example, in *Dutra Group* v. *Batterton*, 139 S. Ct. 2275 (2019), the Court granted review (and reversed) after denying certiorari on the same issue in the prior Term, *see id.* at 2282-2283; *American Triumph LLC* v. *Tabingo*, 138 S. Ct. 648 (2018) (Mem.) (denying certiorari). Similarly, in *Hurst* v. *Florida*, 577 U.S. 92 (2016), the Court granted review (and reversed) after denying certiorari on the same issue, *see* Br. in Opp. 16 & n.3, *Hurst*, No. 14-7505 (U.S. Jan. 12, 2015); *see also Murphy* v. *NCAA*, 138 S. Ct. 1461, 1471-1473 (2018) (granting review on an issue previously denied). In short, the denial of review in *O'Bannon* provides no basis not to grant certiorari here in order to resolve the circuit conflict on the important question presented.

This case, moreover, differs significantly from *O'Bannon*. To begin with, the decision below endorses perpetual antitrust re-litigation over NCAA amateurism rules, *see* Pet. 30-31, whereas *O'Bannon* had strongly suggested the opposite approach by drawing a bright line on what the NCAA was required to allow, *see* 802 F.3d at 1079. The decision below also requires the NCAA to permit student-athletes to receive *unlim-*

ited "education-related" payments, including in cash. Pet. 28-29. That greatly surpasses what *O'Bannon* required, which was only that the NCAA raise its athletic-scholarship cap to include certain "legitimate educational expenses." 802 F.3d at 1074-1077. Indeed, because the NCAA had raised the cap prior to the Ninth Circuit's decision in *O'Bannon*, *see id.* at 1054-1055, the district court's injunction had no practical effect, and hence the immediate stakes may have seemed low when certiorari was denied.

V. THE POSSIBILITY OF LEGISLATION IS NO REASON TO DENY REVIEW

Respondents contend (*e.g.*, Opp. 29-31) that the possibility of state or federal legislation regarding student-athlete compensation is grounds for denying certiorari. That possibility, of course, underscores that the Ninth Circuit overstepped the judiciary's proper boundaries in antitrust cases. As the petition explained (at 5-6, 26-27, 31-32), NCAA rules reflect a balancing of the interests of student-athletes, schools, coaches, faculty, other students, alumni, broadcasters, and fans; to the extent those judgments are not left to the NCAA and its members, they should be made by politically responsive branches of government, not courts. This Court's intervention is needed to correct the Ninth Circuit's improper use of antitrust law.

In any event, there is obviously no guarantee that Congress will enact legislation, and even if States do, that would portend balkanization of a national enterprise. More fundamentally, the mere possibility of legislation is not a sound basis to leave the decision below in place, given the significant detrimental effects it will have on the institution of NCAA intercollegiate athletics, and joint ventures more generally.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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