No. 20-520

In the Supreme Court of the United States

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

Petitioners,

v.

SHAWNE ALSTON, ET AL.,

Respondents.

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

BRIEF FOR PETITIONERS

BRITT M. MILLER
ANDREW S. ROSENMAN
JED W. GLICKSTEIN
Mayer Brown LLP
71 South Wacker Dr.
Chicago, IL 60606
(312) 782-0600

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
RICHARD J. FAVRETTO
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner The Big Ten Conference, Inc.

[Additional counsel on inside cover]

ROBERT W. FULLER, III
LAWRENCE C. MOORE, III
PEARLYNN G. HOUCK
ERIK R. ZIMMERMAN
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon St., Suite 1900
Charlotte, N.C. 28246

MARK SEIFERT
Seifert Law Firm
50 California St., Suite 1500
San Francisco, CA 94111

Counsel for Southeastern Conference

BENJAMIN C. BLOCK
Covington & Burling LLP
One CityCenter
850 Tenth St. N.W.
Washington, D.C. 20001

Counsel for the American Athletic Conference

LEANE K. CAPPS
CAITLIN J. MORGAN
Polsinelli PC
2950 North Harwood St., Suite 2100
Dallas, TX 75201

AMY D. FITTS
Polsinelli PC
900 West 48th Pl., Suite 900
Kansas City, MO 64112

Counsel for The Big 12 Conference, Inc. & Conference USA

BART H. WILLIAMS
SCOTT P. COOPER
KYLE A. CASAZZA
JENNIFER L. JONES
SHAWN S. LEDINGHAM, JR.
Proskauer Rose LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067

Counsel for Pac-12 Conference

R. TODD HUNT
BENJAMIN G. CHOJNACKI
Walter Haverfield LLP
The Tower at Erieview
1301 East 9th St.,
Suite 3500
Cleveland, OH 44114

Counsel for Mid-American Conference

MERYL MACKLIN
Bryan Cave Leighton Paisner LLP
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111

RICHARD YOUNG
BRENT E. RYCHENER
Bryan Cave Leighton Paisner LLP
90 South Cascade Ave.,
Suite 1300
Colorado Springs, CO 80903

Counsel for Mountain West Conference

JON BRADLEY
Bradley Devitt Haas & Watkins, P.C
2201 Ford Street
Golden, CO 80401

Counsel for Western Athletic Conference

MARK A. CUNNINGHAM
Jones Walker LLP
201 St. Charles Ave.
50th Floor
New Orleans, LA 70170

Counsel for Sun Belt Conference

D. ERIK ALBRIGHT
GREGORY G. HOLLAND
Fox Rothschild LLP
230 North Elm St.,
Suite 1200
Greensboro, N.C. 27401

JONATHAN P. HEYL
Fox Rothschild LLP
101 North Tryon St.,
Suite 1300
Charlotte, N.C. 28246

Counsel for Atlantic Coast Conference

QUESTION PRESENTED

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

PARTIES TO THE PROCEEDINGS

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

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

CORPORATE DISCLOSURE STATEMENT

A currently accurate corporate disclosure statement is included in the petition for a writ of certiorari.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

BRIEF FOR PETITIONERS

OPINIONS BELOW

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

JURISDICTION

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

STATUTORY PROVISION INVOLVED

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

STATEMENT

The National Collegiate Athletic Association (NCAA) sets rules governing college athletics. For generations, NCAA rules have provided that student-athletes may not be paid to play. Although the precise manner in which that principle is implemented has changed over time, the NCAA and its member institutions consistently have regarded the amateurism requirement as central to the unique character of college sports. This Court has agreed. The Court also has concluded—as has every other court to consider the question, but for the courts below—that the antitrust laws do not authorize federal judges to re-engineer the

NCAA's amateurism rules. That conclusion follows from the broader antitrust principle that, when joint action is necessary for a product to exist at all (as manifestly is true of college sports), the producers are entitled to deference in defining their product.

The courts below disagreed. The district court held that NCAA rules prohibiting colleges from paying student-athletes to play are, in substantial part, inconsistent with the Sherman Act. The court remedied that supposed violation by formulating its own definition of amateurism, creating a lengthy list of payments that schools must be permitted to make to student-athletes, and retaining jurisdiction to approve proposed future changes in the payment rules—seemingly in perpetuity. The Ninth Circuit affirmed that decision, holding that, because the challenged NCAA rules restricting student-athlete compensation could have been drawn in a more permissive manner without eliminating college athletics as a discrete "product," the rules *must* be drawn in that manner.

That holding is wrong; it would turn the Sherman Act into an engine for the destruction of useful and procompetitive collaborations throughout the economy. When joint action involving application of a set of related rules is necessary to create a desirable product, it almost always will be possible for antitrust plaintiffs to argue that one or another of the rules could have been tweaked, or that the lines drawn by the producers could have been moved a bit one way or the other. If that is enough to state an antitrust claim, litigation will be endless, fear of liability will stifle innovation, and judges will have ultimate responsibility for administering procompetitive joint ventures.

That is not, and should not be, the law. Here, it should be obvious on a "quick look" that product-defining NCAA rules, essential to preserve the character of college sports as they have existed for over a century, are not subject to judicial second-guessing. And even under full Rule of Reason analysis, the NCAA's interconnected player-eligibility rules plainly are procompetitive. This Court should hold those rules to be consistent with the Sherman Act.

A. The NCAA and college athletics

As this Court has recognized, NCAA college athletics, like sports leagues generally, is an endeavor "in which horizontal restraints on competition are essential if the product is to be available at all." *NCAA* v. *Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984). In particular, college sports is maintained as a discrete form of competition by the NCAA, a nonprofit educational association whose membership includes more than one thousand public and private colleges and universities, and more than 100 nonprofit athletic conferences and other organizations. See *What Is The NCAA?,* https://tinyurl.com/y4kpswnl; Pet. App. 10a. Formed "in 1905 in response to a public outcry concerning abuses in intercollegiate athletics" (*Board of Regents*, 468 U.S. at 121 (White, J., dissenting)), the NCAA adopted bylaws in 1906 establishing the "Principles of Amateur Sport" and went on to promulgate "playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs." *Board of Regents*, 468 U.S. at 88 (majority opinion).

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

Today, nearly half a million student-athletes participate in NCAA-administered athletics each year, playing two dozen sports. *What Is The NCAA*?, https://tinyurl.com/y4kpswnl. Although certain teams at some schools generate large revenues, the vast majority of teams are subsidized by their schools. C.A. ER 154, 155 (Trial Tr. (Hatch)); C.A. ER 263-264 (JEX 17: NCAA Research, *Revenues and Expenses*, 2004–2016)). Few schools produce significant revenues from college sports, and even fewer produce any positive net revenues. NCAA.org, NCAA Research (2020), https://tinyurl.com/y3ouozcl. Meanwhile, the schools' "primary mission" remains "educating [their] students" (C.A. ER 153-154) (Trial Tr. (Hatch)), with intercollegiate athletics offered as "an important part of the educational experience." C.A. ER 213 (Trial Tr. (Blank)). Or, as Justice White put it, the NCAA "'exist[s] primarily to enhance the contribution made by

amateur athletic competition to the process of higher education.'" *Board of Regents*, 468 U.S. at 122 (White, J., dissenting).

B. Amateurism and the NCAA's eligibility rules

From its inception, a defining feature of NCAA sports has been amateurism, the principle that student-athletes are not professionals and "must not be paid" to play. *Board of Regents*, 468 U.S. at 102; see *id.* at 117 (NCAA rules "are justifiable means of fostering competition among amateur athletic teams"). This no-pay amateurism principle consistently has been recognized as central to "preserv[ing] the character and quality of the [college sports] 'product.'" *Id.* at 102.[1]

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

---

[1] See, *e.g.*, *New York Football Giants, Inc.* v. *Los Angeles Chargers Football Club, Inc.*, 291 F.2d 471, 472 n.1 (5th Cir. 1961) (citing "well understood rules" of the NCAA on amateurism); Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 Marq. Sports L. Rev. 9 (2000); PROCEEDINGS OF THE FIRST ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE UNITED STATES (1906) (students shall not be "paid or receive[], directly or indirectly, any money or financial concession" to "play in, or enter any athletic contest").

> It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

Ibid.

Given this understanding, the NCAA maintains a body of eligibility rules designed to prohibit student-athletes from being paid for their play, while allowing schools to reimburse student-athletes for their reasonable and necessary academic and athletic expenses. See*, e.g.*, C.A. ER 284-287 (JEX 24, NCAA Bylaws), 290-295 (JEX 24, NCAA Bylaws), 1422-1440 (JEX 25, NCAA Bylaws); see also Pet. App. 11a (quoting NCAA "'Amateurism Rule,' which strips student-athletes of eligibility for intercollegiate competition if they '[u]se[] [their] athletics skill (directly or indirectly) for pay in any form in [their] sport,'" with "'[p]ay" * * * defined as the 'receipt of funds, awards or benefits not permitted by governing legislation'").

The principal quantum of education expenses is "cost of attendance" (COA), a term defined by federal law that determines the financial assistance students may receive to attend school. 20 U.S.C. § 1087kk. COA includes tuition and fees, room and board, books, a computer, transportation, and other "miscellaneous

personal expenses." *Id.* § 1087*ll*. Each school independently determines "the appropriate and reasonable amounts" for its students. C.A. ER 324 (JEX 1517, Federal Student Aid Handbook).

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

Finally, NCAA rules allow schools to provide limited awards to recognize special academic or athletic achievement by individual student-athletes or teams. See C.A. ER 288-289, 296-297 (JEX 24, NCAA Bylaws). The value limits for these awards, which include trophies and plaques, ranges from $175 for a team's most-improved or most-valuable player to $1,500 for a conference's athlete (or scholar-athlete) of the year. C.A. ER 288-289, 296-297 (JEX 24, NCAA Bylaws). The limits are designed to ensure that awards do not become vehicles for disguised pay-for-play. C.A. ER 170-171 (Trial Tr. (Lennon)).

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

In *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015), a class of former NCAA football and men's basketball players challenged NCAA rules that limit permissible payments to student-athletes for their names, images, and likenesses (NILs). The *O'Bannon* district court—in "the first [decision] by any federal court to hold that any aspect of the NCAA's amateurism rules violate[s] the antitrust laws, let alone to mandate * * * that the NCAA change its practices" (*id.* at 1053)—held that the NCAA acted unlawfully by (1) not permitting schools to award student-athletes full COA athletic scholarships (the prior rule did not allow athletic scholarships to include certain living expenses included in COA) and (2) not permitting colleges to make deferred cash payments to student-athletes of up to $5000 per year. See *id.* at 1060-61.

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

D. The district court's decision

While *O'Bannon* was still pending, individuals suing as representatives of several classes of NCAA

Football Bowl Subdivision football and Division I basketball players filed this action against petitioners (eleven collegiate conferences) and the NCAA. Plaintiffs maintained that the NCAA student-athlete payment limits are an anticompetitive restraint of trade and sought to "dismantle the NCAA's entire compensation framework." Pet. App. 17a. The cases were assigned to the same district judge who presided over *O'Bannon*.

The district court purported to apply a three-step Rule of Reason burden-shifting approach in assessing this claim, under which (1) plaintiffs must establish that the defendants restrained trade; (2) the burden then shifts to defendants to show that the restraint had procompetitive effects; and (3) the burden then shifts back to plaintiffs to demonstrate that substantially less restrictive alternatives are available that would be virtually as effective as the challenged restraints at achieving those procompetitive effects. Pet. App. 115a-166a. See also *Ohio* v. *Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (*Amex*). Because the court determined at the first step that the challenged NCAA rules restrain trade (Pet. App. 113a-115a), the focus at the 10-day trial was on the remaining two elements of the test.

On these points, the district court first found that, because the NCAA rules permit schools to offer limited, defined benefits of various sorts to college athletes, the NCAA's traditional focus on amateurism and not paying for play is illusory. Pet. App. 180a-189a. But the court also determined that the preservation of *some* distinction between college and professional sports has procompetitive value because it

maintains a discrete college-sport product that consumers value. Adopting a definition of amateurism that had not been proposed by either party, the court then held that "the distinction between college and professional sports arises because student-athletes do not receive unlimited payments unrelated to education, akin to salaries seen in professional sports leagues." *Id.* at 147a-148a. The court therefore regarded as procompetitive only restrictions on such "unlimited" payments. *Id.* at 157a.

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

(a) Invalidating certain NCAA limits on payments that the court deemed "related to education," including those that the NCAA "currently prohibits or limits in some fashion." Pet. App. 158a. These include, among a great many other things, paid post-eligibility internships. *Ibid.*

(b) Requiring the NCAA to permit cash payments to student-athletes in the form of graduation awards or "academic incentives" with no minimum academic achievement thresholds. The court allowed the NCAA to cap such payments at an annual amount not lower than the "maximum amount of compensation that an

individual student-athlete could receive in an academic school year in participation, championship, or special achievement awards (combined)." Pet. App. 159a. This requires the NCAA to permit schools to pay *all* student-athletes in the plaintiff classes annual cash "academic incentives" in an amount equal to the largest cash value that *any* student-athlete theoretically could be paid for winning a combination of athletics participation, championship, and special achievement awards.[2]

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

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

E. The Ninth Circuit's decision

The Ninth Circuit affirmed. Pet. App. 1a-66a. Insofar as is relevant here, the court began by stating—based on language from *Board of Regents* addressing the NCAA's television plan, rather than its amateurism rules—that "the NCAA bears a 'heavy burden' of

---

[2] The district court originally set this figure at $5600. See Pet. App. 187a. Upon the defendants' motion for clarification and plaintiffs' argument that the amount actually is $15,000, the district court re-set the figure at $5980. Order Granting Motion for Clarification of Injunction at 5, *In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541 (N.D. Cal. Dec. 30, 2020), ECF No. 1329.

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

At the second step of the Rule of Reason test, the court of appeals accepted the district court's conclusion "that the NCAA 'sufficiently show[ed] a procompetitive effect of some aspects of the challenged compensation scheme,' but not all." Pet. App. 42a (emphasis omitted). "In short," the Ninth Circuit concluded, "NCAA compensation limits preserve demand to the extent they prevent unlimited cash payments akin to professional salaries, but not insofar as they restrict certain education-related benefits." *Id.* at 42a-43a.

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

The court found it crucial that "the NCAA presented no evidence that demand will suffer if schools

are free to reimburse education-related expenses of inherently limited value." Pet. App. 45a. Accordingly, the Ninth Circuit approved the district court's rewrite of the NCAA rules so that, in the appellate court's view, the judge-devised standards would allow for payments that "would preserve consumer demand for college athletics just as well as the challenged rules do." *Id*. at 44a.

SUMMARY OF ARGUMENT

A. The district court should have upheld the challenged NCAA rules on a "quick look," without detailed factual review. This Court has held that not all antitrust suits call for close scrutiny of the record under the Rule of Reason; when history, logic, and judicial experience make the proper outcome clear, "a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look." *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 770-71 (1999). Here, a quick look reveals that the challenged rules are procompetitive and therefore lawful, for several reasons.

First, this Court already has said so. In *Board of Regents*, the Court, applying broadly applicable antitrust principles, recognized that the NCAA is a joint venture whose members must act collaboratively to offer a product that is valued by consumers. As a matter of simple logic, that college-sports product can exist only if schools agree on limits to student-athlete compensation. And when, as here, agreement is necessary for creation of a desirable product, a joint venture's product design is not open to judicial second-guessing.

Second, that conclusion is confirmed by judicial experience. With the exception of the holdings in this

case and *O'Bannon*, courts uniformly have found the product-defining rules of the NCAA and other sports leagues to be procompetitive. Those repeated holdings offer confidence that these rules are valid.

Third, no special circumstances counsel against resolution on a quick look here. The NCAA amateurism principle has governed college sports for generations, and has been recognized by courts as central to the enterprise throughout that time; it cannot be seriously contended that the eligibility rules were created to disguise an anticompetitive conspiracy. And the rules challenged here are not ancillary to the NCAA's goal; they involve a core element of its jointly created product. Consequently, this Court should reverse the judgment below and order dismissal of the action.

B. The claims here also fail full Rule of Reason review. At the second step of the three-stage Rule of Reason inquiry, defendants carried their burden of showing that the current set of NCAA eligibility rules is procompetitive; the district court found that it *is* procompetitive to distinguish college from professional sports, as the rules plainly do. That should have ended the Step 2 inquiry. But the courts below went further, finding that the rules are procompetitive only to the extent that they limit *certain* types of payments to student-athletes—on the ground that defendants failed to prove that some additional forms of compensation proposed by the courts could be permitted without undermining the distinction of the NCAA's product from professional sports. That was wrong; it effectively placed the burden on defendants to show that they could not have defined their product in a less restrictive manner.

And this error led the courts below to reach the wrong conclusion at Step 3 of the inquiry. Having found at Step 2 that the defendants failed to show that NCAA limits preventing certain kinds of additional payments to student-athletes are procompetitive, it inevitably followed that the courts also found the existing rules to be *more* restrictive than necessary. That conclusion, too, was incorrect. It effectively required the NCAA to use the *least* restrictive possible set of payment limits. But this Court and other lower courts uniformly have rejected such a requirement as imposing an impossible burden on antitrust defendants.

Instead, the proper inquiry is whether the restrictions defining a jointly produced product fall within a zone of reasonableness. Because the NCAA's rules plainly satisfy that standard, the Court should order dismissal of this action on that ground as well.

C. By allowing judges to require redesign of a joint venture's procompetitive product, the decisions below run afoul of fundamental antitrust policy. This Court has made clear that judges are not well-suited to act as "central planners" who exercise continuing oversight over economic activity—but that is what the courts did here. The approach of the courts below, which unilaterally alters a joint venture's product-defining rules, also means that every product change can give rise to antitrust liability, inviting never-ending litigation. This Court has cautioned repeatedly that the antitrust laws should not be read to countenance such a result.

ARGUMENT

Before addressing the intricacies of the Sherman Act, it is helpful to start with the common sense of the

matter. Sports played by amateur college students who are competing on behalf of their schools and are not paid to play are different in character—in the language of this Court, such athletics are a different "product"—than sports played by professional teams.

For more than a century, consumers of college sports, as well as the NCAA and its member institutions, have regarded those sports as a unique form of athletic endeavor that is distinct from professional sports and other sports offerings. This Court and the lower courts (with the exception of the courts below) consistently have identified college sports as a "particular brand" of athletic competition that rests on a "tradition of amateurism." *Board of Regents*, 468 U.S. at 101, 120. And judges, including Justices of this Court, have long found it obvious that not paying student-athletes to play is what defines that college-sports product. Absent limits on such payments, college athletes would become poorly (and, sometimes, not-so-poorly) paid professionals, the "particular brand" of college sports would lose its distinct character, and consumers would lose a desired product.

Like sports leagues and other ventures that create unique products through joint action, the NCAA and its members must agree on the design of the product. Because the product here is sports played by bona fide students who are amateurs, defining the product necessarily means agreeing on the rules that establish eligibility to play. And because the controlling concepts—"student," "amateur," "professional," "pay to play"—are not self-defining, lines have to be drawn to establish what conduct is, and is not, permissible. Fundamentally, the question in this case is who draws those lines: the joint venturers who design, produce,

and market the product; or judges who believe that they can marginally improve the product design.

The Ninth Circuit gave the wrong answer to that question. It believed that, notwithstanding this Court's contrary conclusion in *Board of Regents*, the antitrust laws empowered the district court to rewrite the rules governing eligibility to play college sports. But when joint action is necessary to create a product that demonstrably increases competition and therefore provides real value for consumers, the Sherman Act does not get in the producers' way; such collaborations are procompetitive and therefore not only legal, but encouraged by antitrust policy. That principle requires dismissal of this suit.

The mischief that can be caused by allowing suits challenging product definition to proceed is evident here. The decisions below will change the long-standing nature of college sports in destructive and very significant ways. They require, for example, that student-athletes be permitted to receive paid post-eligibility internships, with no limits on pay. Such internships, uncapped in amount, may now be given by boosters to athletes attending their favored school—boosters who understand the effect that a pattern of such internships will have on recruiting.

Moreover, so long as NCAA rules permit athletics-participation awards at the current level, the injunction requires that schools be permitted to make annual "academic achievement" cash payments of almost $6000 to every student athlete in the affected classes who meets minimum NCAA academic eligibility standards—which is to say, to every student who is eligible to play. This is, for the first time in the NCAA's history, a naked regime of pay-for-play. Given

this Court's prior recognition that, "[i]n order to preserve the character and quality of the 'product,' [college] athletes must not be paid" (*Board of Regents*, 468 U.S. at 102), the preferences of a single judge (upheld by a Ninth Circuit panel on a highly deferential standard of review) have upended the long-settled and historically sanctioned practices defining college sports. The courts below should, instead, have rejected the challenge to the player-eligibility rules.

I. The NCAA player-eligibility rules should have been found lawful on a "quick look."

At the outset, the Court's antitrust precedents delineate the proper analysis here in two respects: they identify the overarching set of policies that animate the Sherman Act, along with the analytical tools used by the Court to effectuate those policies; and they describe the economic and procompetitive value of joint ventures such as sports leagues that offer a product requiring agreed-upon action if the product is to exist at all. In combination, those precedents show that the claims here should have been, and should now be, rejected on a "quick look."

A. Antitrust policy can be furthered by resolution of Sherman Act claims on a "quick look."

As the Court has often noted, the Sherman Act's prohibition of "[e]very" contract or combination in restraint of trade cannot be given literal effect. See, *e.g.*, *American Needle, Inc.* v. *NFL*, 560 U.S. 183, 189 (2010); *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 885 (2007). The goal of a court applying the Act is instead to "distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating

competition that are in the consumer's best interest." *Amex*, 138 S. Ct. at 2284.

In applying these principles, preserving vigorous competition is of course a key consideration. See, *e.g.*, *American Needle*, 560 U.S. at 195-96. But the Court also has emphasized the importance of avoiding the suppression of joint action that makes desirable products more widely available, has a net procompetitive effect, and therefore benefits consumers. Uncertain standards may lead to unwarranted findings of liability, which directly preclude (and wrongly impose liability for engaging in) beneficial joint conduct. And less directly, antitrust litigation is famously expensive and burdensome. See, *e.g.*, *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 558-59 (2007). Fear of both wrongful determinations of liability and costly strike-suit litigation therefore will discourage useful, procompetitive behavior.[3] Consequently, use of analytical tools that distinguish between meritorious and unwarranted antitrust lawsuits—reliably, quickly, and efficiently—is critically important in avoiding destructive litigation.

In the usual case courts will resolve an antitrust suit through application of the Rule of Reason, which typically involves development of a full record on "which antitrust plaintiffs must demonstrate that a

---

[3] See, *e.g.*, *Verizon Comm'cs, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (warning against "mistaken inferences" and "false condemnations" in antitrust); *United States* v. *U. S. Gypsum Co.*, 438 U.S. 422, 441 (1978) ("[P]rocompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment.").

particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 5 (2006). But the Court also has approved various abbreviated methods for application of the Sherman Act, in circumstances where experience and economic logic give a court confidence that a claim of liability can be resolved—one way or the other—without detailed factual inquiry.

Thus, the Court has held that "naked" horizontal price-fixing agreements between firms that have no business relationship other than as competitors usually are per se illegal because those "circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *Board of Regents*, 468 U.S. at 103-104. Other forms of horizontal conduct are subject to the Rule of Reason in theory but can be found illegal on a limited "quick look" because, "[e]ven without a trial," "one can hardly imagine a pro-competitive justification actually probable in fact or strong enough in principle to make this particular joint selling arrangement reasonable." *Id.* at 109 n.39 (citation and internal quotation marks omitted). See *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 770-71 (1999).

And the Court has indicated that other combinations may be found *legal* on such a quick look: "[D]epending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it can sometimes be applied in the twinkling of an eye." *American Needle*, 560 U.S. at 203 (quoting *Board of Regents*, 468 U.S. at 110 n.39). Consistent with *Board of Regents*, *American Needle* reaffirmed that courts should, as a matter of experience and economic

logic, afford deference to restraints reasonably related to the design of a sports league's or other joint venture's unique product. Such restraints should be upheld as procompetitive without further development of a factual record or trial.

In all, "the quality of proof required should vary with the circumstances." *California Dental*, 526 U.S. at 780 (citation and internal quotation marks omitted). "But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition." *Board of Regents*, 468 U.S. at 104.

B. The NCAA player-eligibility rules challenged here should have been upheld on a "quick look."

Against this background, the NCAA rules at issue here should have been subjected to a "quick look" by the district court and, upon that look, upheld in the "twinkling of an eye." Of course, not everything done by a sports league should escape full Rule of Reason review. Some rules, although ancillary to the agreement defining the league's product, are not central to its operation; an example is the NCAA broadcast limit at issue in *Board of Regents* itself. But in the context of an entity like a sports league, joint action that defines a desirable product and is necessary for that product to exist is presumptively procompetitive and therefore lawful absent extraordinary circumstances—which are not present in this case.

In determining the level of scrutiny that should be given a challenged restraint, "[w]hat is required * * * is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The logic is to

see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *California Dental*, 526 U.S. at 781. For several reasons, "an observer with even a rudimentary understanding of economics" (*id.* at 770) should conclude that—given their "the circumstances, details, and logic"—the NCAA's player-eligibility rules are procompetitive.

1. Joint action is necessary if the college-sports product is to be available.

To begin with, the defendants in this litigation participate in a joint venture. See generally *Dagher*, 547 U.S. at 6-7. Although joint ventures often are deemed procompetitive simply because they offer efficiencies and cost savings to the participants (see, *e.g.*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 768 (1984)), the joint action at issue here has a much more fundamental value: it actually *defines* the venture's product. Indeed, this case "involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Board of Regents*, 468 U.S. at 101. As the Court recognized in *Board of Regents*, quoting an oft-repeated observation of Judge Bork, "league sports" is "[p]erhaps the leading example" of "activities [that] can only be carried out jointly." *Ibid.* (quoting Robert Bork, *The Antitrust Paradox* 278 (1978)). Put more colorfully: "a league with one team would be like one hand clapping." *Chicago Prof'l Sports Ltd. P'ship* v. *National Basketball Ass'n*, 95 F.3d 593, 598-599 (7th Cir. 1996) (Easterbrook, J.).

In fact, collaboration by the NCAA's member institutions is necessary regarding *two* related types of rules that are indispensable for the creation of the unique college-sports product. One set concerns the rules of play. As noted at the outset, "[a] myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete." *Board of Regents,* 468 U.S. at 101. This sort of agreement unquestionably is essential to the existence of any sports league, and surely is both noncontroversial and not subject to challenge under the Sherman Act.

And as the Court also made clear in *Board of Regents*, insofar as the NCAA is concerned, agreement is necessary not only as to the rules governing play *on* the field, but also as to *who* may play and—an inextricably related consideration—what benefits they may receive to play: "[T]he NCAA seeks to market a particular brand of [sports]—college [sports]. * * * In order to preserve the character and quality of the 'product,' athletes must not be paid to play, must be required to attend class, and the like." 468 U.S. at 101-102.

2. This Court concluded in* Board of Regents *that the player-eligibility rules are valid.

Largely for that reason, this Court *already* has held that the NCAA player-eligibility rules are procompetitive. As just noted, the Court recognized in *Board of Regents* that the "particular brand" of athletics marketed by the NCAA is "college" sports, and that "to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend

class, and the like. And the character of the 'product' cannot be preserved except by mutual agreement[.]" 468 U.S. at 102. The Court then expressly contrasted those rules with the "specific restraints on football telecasts that [were] challenged in" *Board of Regents*, noting that the broadcast limits "do not * * * fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture." *Id.* at 117. Although using different terminology, the Court then endorsed approval of these eligibility rules on what we today would characterize as a "quick look" by adding: "It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics." *Ibid*.

The Court went even further, reiterating at several points its commonsense conclusion that jointly adopted rules mandating the amateurism of college athletes are presumptively procompetitive. It emphasized that "the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice * * * and hence can be viewed as procompetitive." 468 U.S. at 102. The Court later repeated a nearly identical formulation, explaining:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role,

> or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.

Id. at 120. See *ibid.* ("consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die").

And on this point, the Court was unanimous. In dissent, Justice White and then-Justice Rehnquist had no doubt about the validity of the body of NCAA amateurism rules. *See* 468 U.S. at 122 (White, J., dissenting) ("the NCAA ensures the continued availability of a unique and valuable product, the very existence of which might well be threatened by unbridled competition in the economic sphere"). Indeed, they noted that no one even "question[ed] the validity of these [eligibility and other amateurism rules] under the Rule of Reason." *Id.* at 123.

In this case, the Ninth Circuit acknowledged that *Board of Regents* "define[d] amateurism to exclude payment for athletic performance." Pet. App. 39a-40a. But the court of appeals opined that *Board of Regents* does not "purport[] to immortalize that definition as a matter of law," and dismissed *Board of Regents*' "discussion of amateurism [as] 'dicta.'" *Id.* at 40a. In fact, this Court's treatment of amateurism was a key element of its explanation why NCAA rules on television broadcasts *were* open to challenge, and therefore was not dicta. The Court's holding that the broadcast limits were invalid rested in part on its repeated contrast of those limits with the player-eligibility rules, as well as on its explanation that the broadcast restrictions were not related to the preservation of amateurism. And "[w]hen an opinion issues for the Court, it is not

only the result but also those portions of the opinion necessary to that result by which [the Court is] bound." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 66-67 (1996).

In any event, the *Board of Regents* amateurism discussion was lengthy and well-considered. And *Board of Regents* did not state a special rule for the NCAA; it applied broad and generally applicable standards of antitrust law, recognizing the particular status of joint ventures that collaborate not simply to obtain efficiencies of scale, but to produce a desirable product that would not otherwise exist. The principles articulated in *Board of Regents* therefore should be followed not only because the Court articulated them (itself a good enough reason), but because they are correct, as a reflection of consistently applied antitrust doctrine.

3. Experience with NCAA player-eligibility rules confirms that they are procompetitive.

Decades of judicial experience and judgment confirm that quick-look analysis is appropriate in this case. In the years after *Board of Regents*, federal courts consistently rejected antitrust challenges to NCAA rules limiting student-athlete compensation. Consistent with *Board of Regents*, these courts did more than find such challenges meritless on review of the record; they recognized that the case against liability was so strong that full Rule of Reason scrutiny was unnecessary. In short, until the Ninth Circuit's decision in *O'Bannon*, "the line between 'amateur' and 'professional' athletics was a well-established benchmark that courts had repeatedly approved." Herbert

Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J. L. & Bus. 369, 377 (2016).

For example, in *Deppe* v. *NCAA,* 893 F.3d 498 (7th Cir. 2018), the Seventh Circuit upheld the NCAA's year-in-residence eligibility rule. The court declared that "an NCAA bylaw is presumptively procompetitive when it is clearly meant to help maintain the revered tradition of amateurism in college sports or the preservation of the student-athlete in higher education." *Id.* at 501 (citations and internal quotation marks omitted). Accordingly, "most NCAA eligibility rules are entitled to the procompetitive presumption announced in *Board of Regents* because they define what it means to be a student-athlete and thus preserve the tradition and amateur character of college athletics." *Id.* at 502. The court therefore affirmed dismissal of the suit on the pleadings, with no specific evidentiary showing that the year-in-residence rule was necessary to preserve consumer interest in college sports—that is, on a quick look.

Other courts have reached the same conclusion. In *Smith* v. *NCAA*, 139 F.3d 180, 186-187 (3d Cir. 1998), vacated on other grounds, 525 U.S. 459, 464 n.2 (1999), the Third Circuit found it unnecessary to consider specific evidence supporting the procompetitive value of NCAA limits on post-graduate eligibility; instead, it presumed that "the bylaw at issue here is a reasonable restraint which furthers the NCAA's goal of fair competition and the survival of intercollegiate athletics and is thus procompetitive." *Id.* at 187. And in *McCormack* v. *NCAA*, 845 F.2d 1338 (5th Cir. 1988), the court upheld penalties that the NCAA imposed on Southern Methodist University for exceeding compensation limits, finding: "That the NCAA has not

distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable. We therefore conclude that the plaintiffs cannot prove any set of facts that would carry their antitrust claim and that the motion to dismiss was properly granted." *Id.* at 1345. See also *Law* v. *NCAA*, 134 F.3d 1010, 1021, 1022 n.14 (10th Cir. 1998) (NCAA rules defining "the eligibility of participants[] are justifiable under the antitrust laws because they are necessary to create the product of competitive college sports").

Moreover, courts addressing challenges to sports-league rules outside the college setting also "have generally accorded sports organizations a certain degree of deference and freedom to act in similar circumstances," so long as the organization "offers" a "justification" for its rules that is not "in bad faith or * * * otherwise nonsensical." *Race Tires Am., Inc.* v. *Hoosier Racing Tire Corp.*, 614 F.3d 57, 80, 81 (3d Cir. 2010). These courts have recognized that such entities "deserve a bright-line rule to follow so they can avoid potential antitrust liability as well as time-consuming and expensive antitrust litigation," and that, "[c]ontrary to the pro-competitive purposes of antitrust law, this [liability and litigation] expense may have a very real anti-competitive effect." *Id.* at 80. "[S]ports-related organizations should have the right to determine for themselves the * * * rules that they believe best advance their respective sport * * *, without undue and costly interference on the part of courts and juries." *Id.* at 83. See also *American Needle*, 560 U.S. at 203 (addressing NFL, when restraints are necessary to make the product available, "the agreement is likely to survive the Rule of Reason"); *cf. Broadcast Music, Inc.* v. *CBS, Inc.* ("*BMI*"), 441 U.S. 1, 23 (1979)

23 ("Joint ventures and other cooperative arrangements are not usually unlawful * * * where the agreement * * * is necessary to market the product at all.").

Against this consistent body of authority, the Ninth Circuit's contrary conclusion is a striking outlier. Prior to the decisions below and the related decisions by the Ninth Circuit and district court in *O'Bannon*, *no* court ever had held that "any aspect of the NCAA's amateurism rules violate the antitrust laws, let alone * * * mandate[d] * * * that the NCAA change its practices." *O'Bannon*, 802 F.3d at 1053. Nor, so far as we are aware, has any federal or state antitrust enforcement agency ever has initiated a proceeding to challenge those rules.

This history is highly suggestive. "[C]onsiderable experience with the type of restraint at issue" may make departure from full Rule of Reason analysis appropriate. *Leegin*, 551 U.S. at 886. See *BMI*, 441 U.S. at 9. Courts have that experience regarding NCAA eligibility rules, as to which "analyses in case after case reach identical conclusions." *California Dental*, 526 U.S. at 781. In these circumstances, the district court should have reached a "confident conclusion" about the validity of those rules "from a quick (or at least quicker) look." *Ibid*.

4. The player-eligibility rules are legitimate, core elements of the NCAA's product.

Nor are there any special circumstances here that make a quick look inappropriate. The NCAA eligibility rules are the means by which a joint venture defines a product that requires adherence to agreed-upon standards if that product is to exist; absent good reason to treat the restrictions challenged in this case

as the "rare exception to th[e] general principle" that NCAA eligibility rules are valid attempts to separate college from professional sports (*Deppe*, 893 F.3d at 502), that should be the end of the inquiry.

a. As in *Deppe*, the challenged rules "define what it means to be a student-athlete and thus preserve the tradition and amateur character of college athletics." 893 F.3d at 502. Whatever one thinks of the NCAA and its collegiate model as a matter of policy, it could hardly be suggested that the amateurism principle was implemented to disguise an anticompetitive conspiracy. Cf. *Dagher*, 547 U.S. at 6 n.1. Although the NCAA has adjusted the no-pay-for-play rules at the edges over time, amateurism has been the central element of college sports for generations. See pages 5-6, *supra*. This Court has declared its "respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics" (*Board of Regents*, 468 U.S. at 101); recognized that "the NCAA plays a vital role in enabling college football to preserve its character" (*id.* at 102); and acknowledged that "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports" that "is entirely consistent with the goals of the Sherman Act." *Id.* at 120.

The Court thus found it obvious that college sports characterized by amateurism is a real and discrete product, defined by essential joint action. And it is evident that consumers agree: "Whether measured by consumer demand or any other metric, [amateur college athletic competition] is one of the most successful products in the history of our economy." *Amici* Antitrust Economists (supporting certiorari) Br. 4. This all

offers confidence that college sports defined by amateurism is a legitimate product—and that the agreement necessary to offer that product survives a Sherman Act quick look.

b. Moreover, in contrast to cases involving challenges to sports-league activities that are ancillary to the joint venture's animating agreement, like the *Board of Regents* challenge to the NCAA broadcast limits, here "the business practices being challenged involve the core activity of the joint venture itself." *Dagher*, 547 U.S. at 7. The NCAA rules at issue in this case are not peripheral to preservation of the no-pay-for-play model; the courts below acknowledged that the challenge here is directed at "dismantl[ing] the NCAA's entire compensation framework" (Pet. App. 17a) and "targets the 'interconnected set of NCAA rules that limit the compensation [student-athletes] may receive in exchange for their athletic services." *Id*. at 31a-32a (citation omitted).

To be sure, plaintiffs argue and the courts below held that the NCAA could achieve its procompetitive goals in less restrictive ways. We explain below why full Rule of Reason review does not support that conclusion. But before reaching that point, such an argument simply is not well-taken on a quick look. As defined by the joint venture, the product here is college sports, played by bona fide students who are not paid to play. Jointly adopted, product-defining rules are essential for the availability of that product. And to survive a quick look, it is enough that the aggregate set of rules could reasonably be thought to provide for the creation of the product.

For a court to go further and modify the aggregated set of rules would allow judges to redesign the

joint venture's product. But antitrust law permits a joint venture to design its own products, and "[t]o say that participants in an organization may cooperate is to say that they may control what they make and how to sell it." *Chicago Prof'l Sports Ltd. P'ship*, 95 F.3d at 598. Especially where mutually dependent joint ventures like sports leagues are concerned, there is a compelling need for certainty and predictability in the governing rules. See generally Frank Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 4-9, 12-13 (1984). That principle is best effectuated by dismissal of the suit here on a quick look.

c. For all of these reasons, the district court should have dismissed this suit without detailed factual review. The case involves a challenge to a product produced in circumstances where joint action is necessary; there is a long history of judicial recognition in these very circumstances that the challenged action is procompetitive; this Court has reached that conclusion; and no special circumstances suggest caution.

Moreover, after wrongly refusing to dismiss the case on a quick look and instead holding a trial, the courts below *did* find that there is a real distinction between college and professional sports, and that drawing this distinction has competitive value. That finding shows that the NCAA rules are not advanced "in bad faith or * * * otherwise nonsensical" (*Race Tires America*, 614 F.3d at 81), which—even if a "quicker look" is thought to allow for some factual review—confirms that the case lacks merit. This Court therefore should reverse the judgment below and order dismissal of the action.

II. Alternatively, the NCAA rules survive full Rule of Reason review.

If the Court agrees that plaintiffs' challenge fails on a quick look, the case is at an end. But even if it were appropriate to subject the NCAA's amateurism rules to full-blown review under the Rule of Reason, the Ninth Circuit erred in holding that those rules fail the governing test.

The "basic question" under the Rule of Reason is whether a restraint has "significant unjustified anticompetitive consequences." *FTC* v. *Actavis, Inc.*, 570 U.S. 136, 160 (2013). As the Court has indicated, that inquiry appropriately makes use of a "three-step, burden-shifting" framework. *Amex*, 138 S. Ct. at 2284. Under this approach, the plaintiff bears the initial burden of proving that the challenged restraint has substantial anticompetitive effects in a relevant market. If the plaintiff makes this showing, the burden shifts to the defendant, who must offer a procompetitive rationale for the restraint. Finally, the burden shifts back to the plaintiff, who must show that the restraint's procompetitive objectives "could be reasonably achieved through less anticompetitive means." *Ibid.*

Before the Ninth Circuit, the parties focused on the second and third steps of the inquiry. See Pet. App. 36a. At the second step, although the Ninth Circuit begrudgingly acknowledged that the NCAA's pay-for-play rules have a procompetitive effect by distinguishing college from professional sports, it did so only after holding that the defendants had to show that each aspect of the NCAA's amateurism rules furthered the court's own "conception" of college sports—one it declared to be "much narrower" than the

NCAA's. *Id.* at 40a. The court of appeals then approved the district court's rewrite of pay-for-play restrictions at Step 3 of the inquiry to reflect that novel conception of amateurism.

That approach to the Rule of Reason was wrong. The courts below conducted at Step 2 of the test the inquiry that they should have made at Step 3, effectively placing the burden on *defendants* to show that they could *not* have achieved their procompetitive ends through less restrictive means—rather than on *plaintiffs* to show that defendants *could* have achieved their procompetitive ends through less restrictive means. That misunderstanding effectively forced defendants to demonstrate that their product design uses the *least* restrictive alternative, a standard that usually will be impossible to meet. And it results in judges acting as product designers and central planners—as happened in this case. Had the courts below applied the Rule of Reason standard properly, they would have held that the NCAA's amateurism rules are reasonable and therefore lawful. Judgment for defendants is warranted.

A. The Ninth Circuit improperly required the NCAA to prove the absence of a less restrictive alternative at Step 2 of the Rule of Reason inquiry.

Both courts below opined that plaintiffs carried their burden at Step 1 of the Rule of Reason test by demonstrating that the NCAA's rules limit student-athlete compensation. They concluded that the NCAA's rules in the aggregate—*i.e.*, "the current, interconnected set of NCAA rules that limit the compensation [student-athletes] may receive in exchange for

their athletic services" (Pet. App. 103a)—have a substantial anticompetitive effect. *Id.* at 115a-121a; see also *id*. at 36a. That approach of reviewing rules in the aggregate was correct: "the content of the restraint is the sum total of everything that the parties have 'agreed' about and that is alleged to injure competition." Philip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1504d (4th ed. 2020 cum. supp.).

At Step 2 of the Rule of Reason test, however, the lower courts' mode of analysis hopped the track. At that stage, as at Step 1, the courts should have looked at the body of NCAA eligibility rules, asking whether it is procompetitive because it provides a product that is valued by consumers and that would not otherwise exist. If conducted properly, that would have been a very short inquiry. It is apparent from history and this Court's analysis in *Board of Regents* that rules distinguishing amateur from professional sports are procompetitive. And insofar as additional evidentiary support for that proposition is necessary, the district court expressly *found* as much on the record here, determining that the challenged rules draw such a distinction. Pet. App. 147a-148a. The Step 2 inquiry therefore should have ended there, and the district court should have proceeded to Step 3, where plaintiffs would have had the burden to prove that defendants could have achieved their procompetitive objectives through less restrictive means.

But that is not what the district court did. Instead, at Step 2 it opined that the NCAA did not adequately define amateurism (Pet. App. 121a-124a); reviewed the various kinds of payments students may receive under the existing NCAA rules (*id*. at 124a-

130a); looked at evidence it thought showed that more of various kinds of payments could be made without suppressing consumer demand for college sports (*id.* at 130a-145a); and then found that limits on payments to students *are* effective in preserving demand—but only up to a point, and treating defendants' Step 2 showing as adequate only up to that point. See *id.* at 146a-148a,; see also *id.* at 37a-43a.

In the course of this analysis, the district court, almost in so many words, identified and adopted a definition of amateurism that supposedly is a less restrictive alternative to the NCAA's actual definition, concluding that student-athletes are adequately distinguished from professionals so long as they "do not receive unlimited payments unrelated to education, akin to salaries seen in professional sports leagues." Pet. App. 147a-148a. That definition, which allows significant payments to students for playing, is not an approach that ever has been taken by the NCAA and finds no support in the record. Yet the district court ruled, at Step 2, that the NCAA's eligibility rules were procompetitive only to the extent that they furthered this alternative definition.

The Ninth Circuit, evidently recognizing that the district court's formulation is insupportable on the record, subsequently opined that the district court *really* meant to find amateurism rules procompetitive insofar as they prevent unlimited "*cash* payments, *unrelated to education* and *akin to professional salaries*." *Id.* 43a n.16. But this definition, too, is not one that describes the college-sports product offered by the NCAA and its members, which is embodied by the *entirety* of the NCAA eligibility rules. Even so, having

opined that this alternative definition is the real "dividing line between student-athletes and professionals" (*id.*), the Ninth Circuit then approved the district court's judgment that "only *some* of the challenged [NCAA] rules serve that procompetitive purpose," adding that "the remaining rules" "do nothing to foster or preserve demand." *Id.* at 43a. See *id.* at 42a ("district court properly considered whether the challenged rules themselves * * * have procompetitive benefits"); *id.* at 38a ("The district court concluded * * * that only *some* of the challenged rules serve that procompetitive purpose").[4]

Because defendants had the burden of proof at Step 2, the effect of the lower courts' approach was to impose upon them the insuperable burden of having to prove a negative: *the absence* of a less restrictive alternative. See generally *Standard Oil Co.* v. *United States*, 337 U.S. 293, 309–10 (1949) (requiring such a counter-factual demonstration "would be a standard of proof if not virtually impossible to meet, at least most ill-suited for ascertainment by courts"). But that approach is wrong. Here, having found that the product currently offered by defendants *is* procompetitive—a product defined by the whole set of NCAA player-eligibility rules—the courts below should have ended their Step 2 inquiry, without determining

[4] The Ninth Circuit's reasoning rested in part on the court's derisive mischaracterization of the NCAA's concept of amateurism as allowing "Not One Penny" over COA. Pet. App. 40a. In fact, the defendants' longstanding conception of amateurism permits schools to cover all legitimate educational expenses and allows student-athletes to receive modest recognition awards, even if those expenses and awards exceed COA.

whether defendants could have defined that product in a less restrictive manner.

B. The Ninth Circuit improperly used a "least restrictive alternative" test at Step 3.

The Ninth Circuit's misstep at Step 2 of the Rule of Reason inquiry inevitably led to further error at Step 3, misallocating the burden of proof and converting the *less*- into a *least*-restrictive alternative standard.

1. The Ninth Circuit effectively placed the burden of proof on defendants at Step 3.

If defendants must show the absence of a less restrictive alternative at Step 2, failure to make that showing for any element of the restraint at issue will doom the defendants' case when the burden ostensibly shifts back to the plaintiffs at Step 3. At that point, the plaintiffs will need only to observe that the court has already found that some element of the restraint can be loosened without reducing consumer demand. In those circumstances, making that change will, almost as a matter of course, be deemed an equally effective "less restrictive alternative" that supports a ruling for plaintiffs.

That is exactly what happened here. After offering their own alternative "conception" of college sports at Step 2, the courts below at Step 3 analyzed various ways in which payments to student athletes that currently are barred by the NCAA rules could be permitted under the courts' alternative definition. Pet. App. 43a. Unsurprisingly, the Ninth Circuit found that, "as already detailed" (*id.* at 44a), NCAA requirements barring forms of compensation that the district court had determined *not to be procompetitive* at Step 2 also

were correctly deemed *not necessary to achieve procompetitive purposes* at Step 3. Because the defendants have the burden of proof at Step 2, this sleight-of-hand effectively also placed the burden on defendants at Step 3.

And in fact, the Ninth Circuit made that burden express. It condemned defendants' argument at Step 3 because they presented "no evidence that demand would suffer" if the NCAA's rules were overhauled to conform with the court's understanding of college sports. Pet. App. 45a. But proving that counterfactual will almost always be just as impossible for defendants at Step 3 as it is at Step 2. See generally C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 Colum. L. Rev. 927, 979-980 (2016). Instead, as we show below, the Ninth Circuit should have required plaintiffs to show at Step 3 that the NCAA's product definition falls outside a zone of reasonableness.

2. The Rule of Reason does not require use of the least restrictive alternative.

The flaw in the lower courts" application of Step 3 also comes clear from a related consequence of that approach. If antitrust defendants must prove that each element of their restrictive rules is as procompetitive as can be, all that will be left, once those elements that fail to make the grade are rejected, will be those regarded by the court as strictly necessary—that is, the *least* restrictive elements needed to serve the defendants' procompetitive purpose.

It is well-established, however, that the antitrust laws do not require defendants to structure their operations in the least restrictive manner possible—and

for good reason. Especially in hindsight, "one can frequently conceive of a less restrictive approach. Yet to require the very least restrictive choice might interfere with the legitimate objectives at issue without, at the margin, adding that much to competition." Areeda & Hovenkamp, *Antitrust Law* ¶ 1505b. Such an approach often would end up affirmatively harming consumers by interfering with the ability of joint venturers to define, control, and market desired products.

Thus, in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967), the Court held that a restraint must be only "reasonably necessary" to meet a competitive problem to satisfy the Rule of Reason. Similarly, in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 59 n.29 (1977), the Court noted that, while a given restriction "was neither the least nor the most restrictive provision that [the defendant] could have used," the Court was "unable to perceive significant social gain from channeling transactions into one form or another." As then-Justice Rehnquist later observed, the antitrust laws "impose a standard of reasonableness, not a standard of absolute necessity." *Nat'l Football League* v. *N. Am. Soccer League*, 459 U.S. 1074, 1079 (1982) (dissenting from denial of certiorari).

These views have been repeatedly affirmed by the lower courts. As the Third Circuit held in one of the leading decisions on the point, "[i]n a rule of reason case, the test is not whether the defendant deployed the least restrictive alternative" but "whether the restriction actually implemented is 'fairly necessary'" to achieve the procompetitive objective. *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1248 (3d Cir. 1975).

In a seminal opinion on these issues, Judge Bork, writing for the D.C. Circuit, likewise explained that when a defendant imposes restraints that are "reasonably necessary to the business it is authorized to conduct," courts are not to "calibrate degrees of reasonable necessity." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 227 (D.C. Cir. 1986). "Once it is clear that restraints can only be intended to enhance efficiency rather than to restrict output, the degree of restraint is a matter of business rather than legal judgment." *Id.* at 229 n.11. Or, as the First Circuit put it, a business is "not required to adopt the least restrictive means" of furthering a procompetitive goal, but "merely means reasonably suited to that purpose." *Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853, 860 (1st Cir. 1984). See also *McCormack*, 845 F.2d at 1345 (NCAA player-eligibility rules lawful if they "reasonably further [the NCAA's] goal" of creating "a product distinct from professional [sports]").

3. Joint ventures are entitled to draw reasonable lines in defining their products.

The destructive effect of a least-restrictive-alternative approach is especially apparent as applied to joint ventures like sports leagues, where the lines defining the product often could reasonably have been drawn at more than one place. Presumably for that reason, the Court recognized in *Board of Regents* that the NCAA must have "ample latitude" in "the maintenance of a revered tradition of amateurism in college sports." 468 U.S. at 120; see also *Race Tires America*, 614 F.3d at 80 (sports organizations need "a certain degree of deference and freedom to act"). But a least-restrictive-alternative test does not give the NCAA ample latitude; it gives the NCAA no latitude at all.

As one sports-law scholar has observed, "trying to apply the rule of reason to [individual] restraints is a fool's errand—no restraint in isolation is necessary even though some type of restraint is, so any restraint is always at risk of being found illegal." Gary R. Roberts, in Jeremy Davis, *A Roundtable Discussion for the Digital Age:* Brady *v.* NFL, Ent. & Sports Law 1, 6, (Summer 2011). "Because any single sports-league restraint may have only a modest impact" on a particular procompetitive aim, "courts will frequently be inclined to strike down the challenged practice on the grounds that its particular terms are not essential." Nathaniel Grow, *Regulating Professional Sports Leagues,* 72 Wash. & Lee L. Rev. 573, 592 (2015). Accordingly, the Ninth Circuit's approach "risks exposing leagues to a 'death by a thousand cuts' as courts strike down various rules on a piecemeal basis without fully appreciating how they fit into the larger framework." *Id*. at 591-592.

And the undeniable fact is, for jointly produced products that are defined by the governing rules, lines must be drawn somewhere—and even if one can imagine moving one line in isolation without undermining consumer demand for the product, that does not mean that placement of the initial line was unreasonable. For instance, the Ninth Circuit affirmed the district court's injunction against NCAA rules prohibiting payments to players for post-eligibility internships. Pet. App. 26a; see *id*. at 158a. Exactly where the dividing line lies between amateurism and professional compensation may be a matter that has no mechanical or definitive resolution. But it surely is reasonable for the NCAA to limit paid internships to avoid the danger that (for example) boosters will offer massive sums to star recruits, a practice that would

significantly erode the distinction between amateur and professional sports. Whether that is so, and where the line should be drawn (no paid internships? limits on who may pay, or the amounts that may be paid?) is a matter for the joint venture, not for a court.

When establishing joint rules to govern the nature of a product, there will always be such judgment calls that can be questioned in hindsight. And that is particularly so for organizations like the NCAA, which serve multiple stakeholders and have more than one goal that may bear on where to draw the required line. See *Board of Regents*, 468 U.S. at 122 (White, J., dissenting) (NCAA's goal is "'to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body'") (citation omitted).

4. Defendants prevail in this case under a proper application of the Rule of Reason.

When the Rule of Reason is correctly applied in this case, plaintiffs cannot succeed on their challenge to the NCAA's amateurism rules. Like other joint ventures, the NCAA is entitled to draw reasonable lines in defining its product. Plaintiffs did not show, and could not have shown, that the NCAA drew those lines unreasonably here. As explained above, for example, the NCAA's limit on paid internships was a reasonable choice. Indeed, as also explained above, the alternative rules adopted by the lower courts—which, among other things, include rules allowing cash awards of almost $6000 merely for being eligible to play—would fundamentally change the nature of college sports and create a regime of transparent pay-for-play. *See supra*, at 10-11. The Rule of Reason does not

require the NCAA to adopt manifestly unreasonable rules that would so squarely contradict the organization's long tradition of amateurism.

Thus, the district court's failure to dismiss plaintiffs' claim on application of a full Rule of Reason inquiry was wrong. If the Court reaches that issue, here again, it should reverse and order dismissal.

III. The Ninth Circuit's approach undermines the policies of the antitrust laws.

As the preceding discussion of both the quick look and the Rule of Reason inquiries suggests, the understanding that the antitrust laws do not empower courts to require defendants to upend otherwise reasonable restraints on commerce so as to make them somewhat less restrictive—even if some aspect of the restraints, considered in isolation, was not proved to be procompetitive—serves key Sherman Act purposes.

First, that understanding prevents judges from acting as "central planners"—a role that courts are "ill-suited" to play. *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004). Judges "often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition." *Arizona* v. *Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 343 (1982). If courts do not have the institutional capability to decide "the proper price, quantity, and other terms of dealing" (*Trinko*, 540 U.S. at 408), they are all the more poorly equipped to determine the proper bundle of rules necessary to define a concept like "amateurism." See Hovenkamp, *supra*, 12 N.Y.U. J. L. & Bus. at 377 (criticizing *O'Bannon*, "'[m]etering' small deviations [in amateurism] is not an appropriate antitrust function"). After all, "[i]f courts have trouble

identifying and balancing the effects of actual restraints that have been implemented, it is unrealistic to expect a court to be able to determine the relative pro- and anticompetitive effects of hypothetical alternatives." Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 Am. U. L. Rev. 561, 604 (2009).

This problem is compounded by the continued oversight required by the injunction in this case. Under the decisions below, the district court's supervision of the rules it has imposed on college sports will be ongoing and never-ending. Every NCAA rule change affecting player eligibility will produce a court fight; the court's approval must be sought if the NCAA seeks to modify the court's definition of "related to education"; and either side may seek an order modifying the injunction.

This prospect is not theoretical. The defendants *already* have been forced to seek clarification of the annual amount that the court believes schools must be permitted to pay all student-athletes in the plaintiff classes in graduation or "academic achievement" cash awards. But "the antitrust laws do not deputize district judges as one-man regulatory agencies." *Chicago Prof'l Sports Ltd. P'ship*, 95 F.3d at 597. As this Court has explained, therefore, "continuing supervision of a highly detailed decree" is not an appropriate function for an antitrust court. *Trinko*, 540 U.S. at 415.[5]

---

[5] In rejoinder to *Trinko*, the Ninth Circuit opined that "the district court did not *fix* the value of [the] academic awards" allowed under the injunction because the task of adjusting the "aggregate value of athletic participation awards[] remains in the NCAA's court." Pet. App. 48a. But it was the court, not the NCAA, that

Second, the Ninth Circuit's approach often will make redesign of a joint venture's product a practical impossibility. Any change to rules (or even public consideration of change) will lead to claims for damages for the period prior to the change, on the theory that the change shows that those rules had not been necessary to preserve consumer demand.

This, too, is not a hypothetical concern. As explained above, plaintiffs have repeatedly pointed to NCAA rule modifications as "proof" that the rules are, and were, anticompetitive and unnecessary to preserve consumer demand for the product. For example, the court below found it probative that the NCAA lifted some limits on COA payments after *O'Bannon* "without adversely affecting consumer demand." Pet. App. 38a.[6] And in now-pending litigation, plaintiffs in part premise their challenge to NCAA limits on payments for use of student-athlete NILs on the NCAA's *consideration* of possible changes to that rule. See Class Action Complaint ¶¶ 211-216, *House* v. *NCAA*, No. 20-cv-3919 (N.D. Cal. June 15, 2020), ECF No. 1.

---

determined that the rules must be changed to allow payment of *cash* academic awards to every student athlete equal in amount to the total value of athletic trophies and awards that a hypothetical superstar player might be able to win.

[6] By the time the Ninth Circuit ruled in *O'Bannon*, the NCAA itself had set aside the bar on full COA athletic scholarships, agreeing that "giving student-athletes scholarships up to their full costs of attendance would not violate the NCAA's principles of amateurism because all the money given to students would be going to cover their 'legitimate costs' to attend school." 802 F.3d at 1075. The Ninth Circuit cited that change in holding the COA limit to have violated the Sherman Act. See *ibid.* So the NCAA's rules change contributed to the finding of liability in *O'Bannon*, which in turn contributed to the further finding of liability in this case.

Thus, the Ninth Circuit's approach, paradoxically, tends to freeze existing student-athlete payment limits in place, as the fear of generating liability discourages NCAA innovation that could benefit student-athletes while preserving the college sport "product."

Third, a rule of law that permits courts to re-define a joint venture's product, or tinker with individual restraints by removing those viewed as insufficiently procompetitive, will encourage endless litigation. Plaintiffs always will be able to claim that a moderate change to one or more rules will be less restrictive while not undermining consumer interest in the product.

This danger is hardly limited to the NCAA, or to sports leagues. As leading antitrust scholars explained prior to the Ninth Circuit's decision in *O'Bannon*, if such an approach to the Rule of Reason becomes the norm, "restraints reasonably necessary to achieving valid business objectives could be subject to antitrust condemnation—including exposure to treble damages—based solely on the creativity of antitrust lawyers imagining marginally less restrictive approaches." Br. for Antitrust Scholars in Support of Appellant at 15, *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015) (Nos. 14-16601, 14-17068), ECF No. 17. As these scholars continued, pointing to examples of actual litigation:

> With only a modest extrapolation from the reasoning of the [*O'Bannon* district court], a court could have decided that obstetricians really only need 30 months of residency training to perform C-sections rather than 36, and therefore condemned the credentialing requirements [that required the longer resi-

> dency period.] A court likewise could have decided that * * * five-year transportation assignments * * * should instead have been four years. * * * The possibilities are limited only by the imagination of the antitrust bar and the willingness of the bench to indulge it.

Ibid.[7]

Under the Ninth Circuit's approach, plaintiffs always could advance by stages towards the complete elimination of useful and procompetitive restrictions. The joint design and marketing of products would be subject to perpetual judicial second-guessing, resulting in uncertainty and unwarranted limits on procompetitive collaborations. See Frank H. Easterbrook, *Ignorance and Antitrust*, in *Antitrust, Innovation, And Competitiveness* 119 (Thomas M. Jorde & David J. Teece eds., 1992). And even if judges were sometimes just as capable of re-designing products as the products' creators, "the costs of wrongly condemning a beneficial practice may exceed the costs of wrongly tolerating a harmful one." *Chicago Prof'l Sports Ltd. P'ship* v. *Nat'l Basketball Ass'n*, 961 F.2d 667, 676 (7th Cir. 1992). "Markets slowly but surely undermine practices that injure consumers," but "[c]ompetition does not undermine judicial decisions." *Ibid.*

---

[7] See also, *e.g.*, Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 Tul. L. Rev. 2631, 2670 (1996) (explaining that the least restrictive alternative doctrine risks "plac[ing] an impossible burden on every type of joint organization whose rules are subject to the rule of reason" by "allow[ing] plaintiffs to play this slippery-slope game of cherry-picking individual rules and hypothesizing less restrictive variations").

Accordingly, the decision below raises precisely the concerns the Court has identified in urging caution against overly expansive antitrust liability. See page19, *supra*. The antitrust laws should not make defendants into "guarantors that the imaginations of lawyers"—or judges—"could not conjure up some method of achieving the business purpose in question that would result in somewhat lesser restrictions of trade." *American Motor Inns*, 521 F.2d at 1249. Once it is determined that the defendants' joint action is "reasonably necessary" to create a desirable product (*Rothery Storage & Van Co.*, 792 F.2d at 227)—surely the case of the NCAA eligibility rules at issue here, as recognized by the Court in *Board of Regents* and confirmed by generations of practice and repeated judicial decisions—the inquiry should be at an end.

Of course, this does not mean that the NCAA's rules are wholly immune from scrutiny. There currently is an intense policy debate ongoing about possible liberalization of the NCAA's NIL rules. Congress is actively considering whether and, if so, how to reform elements of college athletics[8]; some States have enacted laws in this area and other States are considering legislation.[9] But these policy questions are not the subject of the antitrust laws, which focus narrowly on competition and take no account of broader questions of fairness, or of educational and athletic policy. See *National Soc'y of Prof'l Eng'rs* v. *United States*,

---

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

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

435 U.S. 679, 692 (1978). The future structure of college sports is appropriately resolved by colleges and policymakers, not antitrust courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

BRITT M. MILLER
ANDREW S. ROSENMAN
JED W. GLICKSTEIN
Mayer Brown LLP
71 South Wacker Dr.
Chicago, IL 60606
(312) 782-0600

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
RICHARD J. FAVRETTO
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for The Big Ten Conference, Inc.

[Additional counsel on following pages]

FEBRUARY 2021

ROBERT W. FULLER, III
LAWRENCE C. MOORE, III
PEARLYNN G. HOUCK
ERIK R. ZIMMERMAN
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon St., Suite 1900
Charlotte, N.C. 28246

MARK SEIFERT
Seifert Law Firm
50 California St., Suite 1500
San Francisco, CA 94111

Counsel for Southeastern Conference

BENJAMIN C. BLOCK
Covington & Burling LLP
One CityCenter
850 Tenth St. N.W.
Washington, D.C. 20001

Counsel for the American Athletic Conference

LEANE K. CAPPS
CAITLIN J. MORGAN
Polsinelli PC
2950 North Harwood St., Suite 2100
Dallas, TX 75201

AMY D. FITTS
Polsinelli PC
900 West 48th Pl., Suite 900
Kansas City, MO 64112

Counsel for The Big 12 Conference, Inc. & Conference USA

BART H. WILLIAMS
SCOTT P. COOPER
KYLE A. CASAZZA
JENNIFER L. JONES
SHAWN S. LEDINGHAM, JR.
Proskauer Rose LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067

Counsel for Pac-12 Conference

R. TODD HUNT
BENJAMIN G. CHOJNACKI
Walter Haverfield LLP
The Tower at Erieview
1301 East 9th St.,
Suite 3500
Cleveland, OH 44114

Counsel for Mid-American Conference

MERYL MACKLIN
Bryan Cave Leighton Paisner LLP
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111

RICHARD YOUNG
BRENT E. RYCHENER
Bryan Cave Leighton Paisner LLP
90 South Cascade Ave.,
Suite 1300
Colorado Springs, CO 80903

Counsel for Mountain West Conference

JON BRADLEY
Bradley Devitt Haas & Watkins, P.C
2201 Ford Street
Golden, CO 80401

Counsel for Western Athletic Conference

MARK A. CUNNINGHAM
Jones Walker LLP
201 St. Charles Ave.
50th Floor
New Orleans, LA 70170

Counsel for Sun Belt Conference

D. ERIK ALBRIGHT
GREGORY G. HOLLAND
Fox Rothschild LLP
230 North Elm St.,
Suite 1200
Greensboro, N.C. 27401

JONATHAN P. HEYL
Fox Rothschild LLP
101 North Tryon St.,
Suite 1300
Charlotte, N.C. 28246

Counsel for Atlantic Coast Conference