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Brief of Amici Curiae 65 Professors of Law, Business, Economics, and Sports Management in Support of Respondents

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Nos. 20-512, 20-520

IN THE
Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

SHAWNE ALSTON, et al.,
Respondents.

AMERICAN ATHLETIC CONFERENCE, et al.,
Petitioners,

v.

SHAWNE ALSTON, et al.,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* 65 PROFESSORS OF LAW, BUSINESS, ECONOMICS, AND SPORTS MANAGEMENT IN SUPPORT OF RESPONDENTS

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National Society of Professional Engineers v. United States,
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Other Authorities

American Bar Association, Section of Antitrust Law, *Federal Statutory Exemptions From Antitrust Law* (2007) 7

Antitrust Modernization Commission, *Report and Recommendations* (2007) 7

7 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law*: *An Analysis of Antitrust Principles and Their Application* (4th ed. 2017) 26, 27, 30, 31

Thomas A. Baker III, Marc Edelman, & Nicholas M. Watanabe, *Debunking the NCAA's Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 Tenn. L. Rev. 661 (2018)..... 16

Michael A. Carrier, *The Four-Step Rule of Reason*, 33 Antitrust 50 (2019) 30, 31

Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. Rev. 1265 .....22, 28

Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827 (2009)..... 21

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1 National Commission for the Review of Antitrust Laws and Procedures, *Report to the President and the Attorney General* (1979) .. 7

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INTERESTS OF *AMICI CURIAE*

Amici are professors of law, business, economics, and sports management. (A list of signatories is included in the Appendix.) Their sole interest in this case is to ensure that antitrust law develops in a way that serves the public interest by promoting competition.[1]

Amici are numerous and diverse, differ in our legal and political views, and disagree about some details of this litigation. But we are united in our agreement on three primary points. *First*, Petitioners seek to unwind a century of antitrust law by obtaining immunity for anticompetitive conduct. *Second*, Petitioners mischaracterize numerous rulings, most notably this Court's opinion in *NCAA v. Board of Regents of the University of Oklahoma,* 468 U.S. 85 (1984). And *third*, Petitioners aim to overturn a hornbook Rule-of-Reason analysis by which the lower courts corrected the NCAA's own failure to offer antitrust justifications.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Petitioners argue that *Board of Regents* excused the NCAA from evidentiary obligations strongly presumed to govern all matters under Section 1 of the Sherman Act. They claim this Court gave the NCAA an antitrust immunity enjoyed by no other entity in American law, a sui generis power to

[1] No person other than *amici curiae* or their counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket consents to the filing of *amicus* briefs.

decide that values other than price, quality, and output can justify its trade restraints. And they assert that this Court did all that despite its insistence throughout antitrust history that markets—not committees of competitors—decide which products succeed and fail, and despite its own deep hostility to scope limits and social-value defenses.

2. Petitioners build that argument almost entirely out of a few pages of dicta in *Board of Regents,* presented in sometimes misleading ways. They cite *Board of Regents*—a case the NCAA lost—145 times on 61 pages, take dicta out of context, selectively edit quotations, and disregard that decision's setting. They also misrepresent lower court decisions and fail to report that one of them draws the same line between procompetitive and anticompetitive restraints as did the lower courts in this case. At most, only one case in their purported "judicial consensus" comes close to holding what they say.

3. Petitioners recognize that if their proffered immunity is rejected, they must defend their restraint with actual evidence. But their evidentiary demonstration fared poorly below, so they mischaracterize the Rule of Reason and its application in this case. We mostly ignore their review of facts and remedial details, and we believe this Court should too. *See Board of Regents,* 468 U.S. at 98 n.15 (noting the "great weight" attached to facts found by both lower courts); Brief for the United States, *Board of Regents,* 468 U.S. 85, at 34 (view of President Reagan's Solicitor General that

"there is no reason for this Court to overturn the factual findings on which the two lower courts agree").

Instead, we argue the following: Petitioners' failure at the first stage of the Rule of Reason was substantial and undisputed. Plaintiffs demonstrated "severe" anticompetitive effects, as "the challenged restraints suppress competition and fix the price of student-athletes' services." Pet. App. 139a.[2]

Petitioners' showing at the second stage was also very weak. They largely rested on their definition of "amateurism" without showing benefits to price, quality, or output. The evidence they offered of legally relevant gains was found by the courts to be slim. Moreover, they succeeded at all only because the courts worked to help them, looking for evidence within their presentation on "amateurism" that could be understood in legally cognizable terms of consumer demand. It is thus ironic that they now blame the *courts* for "judicial micromanagement," "central plann[ing]," and "endless litigation." The courts merely made an effort to find legally relevant benefits within an otherwise weak evidentiary showing.

Petitioners respond to that substantial showing of net anticompetitive harm with logical critiques of the lower courts' handling of the second and third stages. They claim that the courts should have considered the NCAA's justification as one package rather than individual justifications, and that the failure to do so led to a "least restrictive alternative"

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[2] Citations to "Pet. App." are to the Appendix in No. 20-512.

requirement. A review of the 897 Rule-of-Reason cases in the modern era, however, finds no support for this position in the caselaw. We also explain that the "less restrictive alternative" formulation used below was the most demanding standard imposed on plaintiffs by any court in the past four decades. In any event, Petitioners' critiques of the lower courts' analyses at the second and third stages are beside the point. Even if plaintiffs had not shown a competitively preferred alternative, the case would have proceeded to the fourth stage—balancing—and under the lopsided evidence of net competitive injury below, the plaintiffs most likely would have won.

Once the trial court appropriately found an unreasonable restraint, it was faced with a choice of remedy. It could either ban the conduct outright, which would be even worse from Petitioners' perspective, or enter some sort of conduct remedy. It is no court's fault that finding limits short of an outright ban entails factual judgments linked to the harm and benefits the parties could show. Petitioners' critique of the injunction's details effectively relitigates fact-finding that was, at worst, a necessary evil to rectify their own conduct and sparse evidentiary showing. The courts below were clear that the NCAA can design its product any way it likes, except that if it horizontally fixes the price of an input—conduct that in other sectors could send people to prison—it should respect certain limits, and should expect to defend them from time to time with evidence of legally relevant benefits.

4. Because Petitioners advance no other basis for reversal, and the law was otherwise applied properly below, we urge affirmance.

ARGUMENT

I. PETITIONERS' ARGUMENTS WOULD UNDERMINE COMPETITION AND CONFLICT WITH ANTITRUST LAW

The substance of the new rule Petitioners ask this Court to create would sharply conflict with established antitrust policy. It would be a new immunity or scope limitation of a kind this Court has long opposed. It would also empower the NCAA, alone among antitrust defendants, to choose values of its own liking—not price, quality or output—and use them to excuse conduct that would otherwise be illegal. As a corollary, the NCAA would enjoy a unique authority to preserve a product in a particular form, even one at odds with consumer preference expressed through free markets. Relatedly, the NCAA would gain a special, favorable antitrust treatment available to none of the thousands of other desirable and important economic integrations throughout the economy. Nor, finally, do Petitioners gain any special advantage by calling the NCAA a "joint venture."

A. Petitioners' Rule Would Limit Antitrust Scope in a Way Deeply Disfavored by This Court

Though they characterize it in various ways, Petitioners seek what is effectively a new judicial immunity. They mostly argue that it would not be

unusual,[3] and briefly quibble that it is not semantically an "immunity," because plaintiffs would still have the satisfaction of filing complaints before the courts summarily dismiss them all. NCAA Br. 30–31. But Petitioners claim that "amateurism rules are procompetitive as a matter of law," *id.* at 18, and that dismissal is required "on the pleadings" as to any rule the NCAA calls "amateurism," *id.* at 25, a categorization that is "not subject to judicial second-guessing." Conf. Br. 3; *see also* NCAA Br. 43 (courts are "required" to recognize "that the NCAA's conception of amateurism is procompetitive"). They imagine a rule that would render some changing and uncertain class of conduct categorically beyond antitrust oversight.

If there is consensus in antitrust about any single issue, it is that exemptions, immunities, and other scope limitations are rarely justified. "Language more comprehensive" than the antitrust statutes "is difficult to conceive." *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944). That language captures Congress's aim "to strike as broadly as it could." *Goldfarb v. Va. State Bar*, 421

[3] Petitioners imply different and inconsistent justifications for their rule, and sometimes seem to acknowledge that it would be special. Sometimes they emphasize the NCAA's uniqueness—they dwell on its special history and claim that college sports are non-commercial, educational, and social. Brief for Petitioner NCAA [NCAA Br.] 5–8, 31–33; Brief for Petitioner Conferences [Conf. Br.] 4–5. But other times, they claim their rule already applies in all business sectors. *E.g.*, Conf. Br. 26 ("*Board of Regents* did not state a special rule for the NCAA; it applied broad and generally applicable standards of antitrust law"). These inconsistencies make no difference to our arguments.

U.S. 773, 787 (1975). More than a century of this Court's precedent has established that "[r]epeals of [antitrust] by implication … are strongly disfavored" because "antitrust … [is] a fundamental national economic policy …." *Carnation Co. v. Pac. Westbound Conf.*, 383 U.S. 213, 217–18 (1966). Even where Congress makes exemptions, this Court reads them narrowly. *E.g.*, *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982). These fundamental tenets are shared by other antitrust institutions. Every official study panel set up over many decades, by Republican and Democratic Presidents and by Congress, has called for the repeal or restriction of antitrust scope limits.[4] And the enforcement agencies, under control of either party, have agreed,[5] as has the leading professional organization. *See* Am. Bar Ass'n, Section of Antitrust Law, *Federal Statutory Exemptions From Antitrust Law* 291–315 (2007).

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[4] Antitrust Modernization Comm'n, *Rep. and Recommendations* 336–38 (2007); 1 Nat'l Comm'n for the Review of Antitrust Laws and Procedures, *Rep. to the President and the Att'y Gen.* 177–316 (1979); *Rep. of the Task Force on Productivity and Competition*, *reprinted in* 115 Cong. Rec. 15933, 15934, 15937 (June 16, 1969); *Rep. of the White House Task Force on Antitrust Policy*, *reprinted in* 115 Cong. Rec. 13890, 13897 (May 27, 1969); *Rep. of the Att'y Gen.'s Comm. to Study the Antitrust Laws* 269 (1955).

[5] *E.g.*, Makan Delrahim, Asst. Att'y Gen., *Examining Exemptions and Immunities from the Antitrust Laws,* Remarks as Prepared for Antitrust Division's First Competition and Deregulation Roundtable (March 14, 2018); Christine A. Varney, Asst. Att'y Gen., *Antitrust Immunities*, Remarks as Prepared for the American Antitrust Institute's 11th Annual Conference (June 24, 2010).

B. Private Entities Do Not Get to Choose Their Own Non-Competition Antitrust Values

Petitioners' rule also would allow the NCAA to preserve values it considers important and use them to justify trade restraints that would be illegal if used by any other entity. Their "amateurism" concept still has no determinate content,[6] and they don't often explain which values it contains or if there are any limits on them. But Petitioners clearly believe that the NCAA may promote objectives based on morality, nostalgia, or other social policy concerns, and sometimes they admit it explicitly—as when they claim the NCAA enjoys antitrust deference because it "serv[es] a societally important non-commercial objective." NCAA Br. 3. In fact, Petitioners seek to save those values *from competition itself*. Their major stated concern is that, without horizontal restraints, competition among schools for athletic talent would jeopardize values they prefer but markets do not.

Antitrust entirely precludes these arguments. Congress has already chosen the values that are relevant to antitrust cases, and they are few,

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[6] All the courts in *O'Bannon* and this case so found, despite the NCAA's opportunity to explain the concept in two full trials and two appeals. The district court in *O'Bannon* found the definition "malleable," lacking any "single definition," and frequently "revised[,] … sometimes in significant and contradictory ways." *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014). And the district court here found it lacking "coherent definition," "circular," and without any consistency except that "the NCAA has decided to forbid [something]." Pet. App. 83a, 92a, 142a.

narrowly delineated, and well known. If conduct subject to antitrust law impedes quality-adjusted price competition, then the only evidence that can mitigate its illegality is an improvement in price, quality, or output—as measured by an increase in consumer demand. It is no defense that a restraint serves some other social value or protects society from ruinous competition. *E.g.*, *FTC v. Super. Ct. Trial Lawyers Ass'n,* 493 U.S. 411, 421–22 (1990); *FTC v. Ind. Fed'n of Dentists,* 476 U.S. 447, 463 (1986); *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 692 (1978); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 222 (1940). *Board of Regents* itself rejected such an argument. The NCAA could not limit broadcast games to protect live attendance on the "assumption that the product itself is insufficiently attractive to consumers" because that argument would be "inconsistent with the basic policy of the Sherman Act." 468 U.S. at 117; *see also id.* at 101 n.23 ("good motives will not validate an otherwise anticompetitive practice").

Longstanding precedent of this Court thus makes clear that "amateurism" is not a relevant legal category, and it has no independent significance in an antitrust case. It matters only to the extent that it improves price, quality, or output.

As Chief Judge Thomas explained in his *O'Bannon* concurrence, "amateurism is relevant only insofar as popular demand for college sports is increased by *consumer* perceptions of and desire for amateurism." *O'Bannon v. NCAA,* 802 F.3d 1049, 1082 (9th Cir. 2015) (Thomas, C.J., concurring in part and dissenting in part) (emphasis in original).

And the district court in this case appropriately explained that the restraints "cannot be deemed procompetitive simply because they promote or are consistent with amateurism," but instead "must have some procompetitive effect on the relevant market." Pet. App. 141a.

C. Markets, Not Committees of Competitors, Decide Which Products Succeed

As a corollary, Petitioners raise no legally relevant defense when they imply that particular products have a moral or intrinsic right to exist in their makers' preferred form. On the one hand, firms are free to sell whatever they like and design their products as they think best, and in appropriate cases they may design them collectively. But their products must then succeed or fail on their merits, by appealing to consumers in terms of price or quality. No producer or association could argue that it needs a trade restraint to preserve its product because consumers in unrestrained markets would have chosen something else.

For example, a given university might try to compete for athletic talent by increasing compensation. A rule prohibiting that competition might be justified if the evidence showed that the quality of the product, as measured by consumer demand, would be harmed by loss of team parity or consumer perception that such players are no longer "students" or the like. In fact, the courts below took that kind of evidence into account. But it is no defense to argue, as Petitioners do in various ways, that competition for talent should be suppressed

because member schools prefer their product to remain an "amateur" product, or that its "amateur" nature might not survive if competition for talent gives some schools better or more popular teams. Markets decide which products survive and, accordingly, how they will be designed.

This same principle would apply to the "definition" of any product, in sports or elsewhere. Imagine that a group of manufacturers collectively agrees not to purchase foreign-made inputs, or that food distributors agree to discontinue products with high-fructose corn syrup. If the firms take action to enforce those decisions, and are shown to have harmed quality-adjusted price competition, they could not defend themselves by arguing that foreign inputs are "un-American" or that high-sugar foods are unhealthy. They could only argue that *consumers* value products with domestic inputs or healthier ingredients, as proven by evidence that they would buy them at higher prices or in larger quantities. Non-antitrust values might be important and widely shared, but they are not legally relevant until Congress adopts them by statute.

D. No Other Economic Integration Is Treated as the NCAA Claims It Should Be Treated

Petitioners' proposed rule would give the NCAA more favorable treatment than the thousands of other economic integrations that face full Rule-of-Reason scrutiny. For example, Petitioners rely on the famous *Broadcast Music* decision, NCAA Br. 19 (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.,* 441 U.S. 1, 7 (1979)); Conf. Br. 28–29 (same),

but do not explain why the restraint there was subject to the full Rule of Reason, 441 U.S. at 24. That restraint made a stronger case for special protection because the product—a group license for musical compositions—literally could not exist without agreement. *See id.* at 20–22. The NCAA, by contrast, frequently changes its rules and tolerates inter-conference variation, and so proves by its own conduct that no particular restraints are required for the product to exist.

The NCAA likewise deserves no better treatment than professional sports leagues, which are much more economically integrated. The NCAA coordinates hundreds of disparate institutions fielding thousands of teams in a variety of sports, most of which will never face one another on the field, and it permits extensive rules variations among the sub-national conferences and organizations. Professional leagues are more closely integrated, typically consisting of a small number of similar units subject to one set of rules and frequently interacting. And yet this Court has held professional leagues subject to ordinary Section 1 treatment, even for conduct as to which their interests are aligned and collaboration could generate benefits. *American Needle, Inc. v. NFL,* 560 U.S. 183, 203 (2010).

Nor are amateur sports more important or special than the work of the economy's thousands of technological standard-setting organizations, as to which full Rule of Reason is the norm. *See* Sean P. Gates, *Standards, Innovation, and Antitrust: Integrating Innovation Concerns into the Analysis of*

Collaborative Standard Setting, 47 Emory L.J. 583, 627–30 (1998). Even though these entities' sole reason for being is to define products, this Court has felt comfortable finding their conduct illegal without special rules or deference. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 510–11 (1988); *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.,* 456 U.S. 556, 577 (1982). And while the groups now enjoy some special protections in Section 1 cases, it is only because Congress provided them by statute. *See* National Cooperative Research Act of 1984, Pub. L. No. 98-462, § 2, 98 Stat. 1815, *as amended, codified at* 15 U.S.C. §§ 4301–06. Likewise, Petitioners could not comfortably explain why amateur sports are more special or important than the large variety of important integrations that face full Rule-of-Reason analysis under the ancillary restraints rule.[7]

E. Calling the NCAA a "Joint Venture" Adds Nothing to Petitioners' Argument

Petitioners do not strengthen their argument by asserting that the NCAA is a "joint venture" or that it cooperates in ways "required for a product to

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[7] *See, e.g., Freeman v. San Diego Ass'n of Realtors,* 322 F.3d 1133, 1151 (9th Cir. 2003); *SCFC ILC, Inc. v. Visa USA, Inc.,* 36 F.3d 958, 970 (10th Cir. 1994); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210, 224 (D.C. Cir. 1986); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985); *see also Major League Baseball Props., Inc. v. Salvino, Inc.,* 542 F.3d 290, 338–39 (2d Cir. 2008) (Sotomayor, J., concurring); FTC & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* § 3.2 & Ex. 4 (2000).

exist." While courts have often been "bemused by the label 'joint venture,'" Robert Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of* Penn-Olin, 82 Harv. L. Rev. 1007, 1045–46 (1969), this Court has frequently told them not to be. Recently, for example, this Court unanimously found a professional sports league to be subject to ordinary Rule-of-Reason treatment because "[t]he mere fact that [firms] operate jointly in some sense does not mean that they are immune." *American Needle,* 560 U.S. at 199. After all, "[m]embers of any cartel could insist that their cooperation is necessary to produce the 'cartel product' and compete with other products." *Id.* at 199 n.7. Accordingly, "[a]n ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label," as "'[p]erhaps every agreement and combination in restraint of trade could be so labeled.'" *Id.* at 197 (quoting *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951)).

II. *BOARD OF REGENTS* CREATES NO SPECIAL RULE FAVORING THE NCAA

Not only is the substance of Petitioners' position contrary to the ordinary antitrust policy that applies in other sectors, but Petitioners gain no support from *Board of Regents*. That decision, which ruled *against* the NCAA, discussed amateurism only in dicta, and that discussion should be understood in its historical setting. Misleading excerpts from the ruling—or from lower court decisions—cannot fill the gaps in Petitioners' argument.

A. Dicta and Context Reject Petitioners' Radical Reinterpretation of *Board of Regents*

Dicta. Board of Regents did not hold what Petitioners claim it did. Petitioners argue that that case "*required*" courts to recognize that "the NCAA's conception of amateurism is procompetitive." NCAA Br. 43 (emphasis added). They frequently reiterate *Board of Regents'* dicta that amateur players "must not be paid," *see* NCAA Br. 2, 3, 6, 11, 14, 16, 17, 22, 27, 34, 35, 38, 45, 46; Conf. Br. 1, 5, 9, 16, 23, 31, even while acknowledging that they pay their players "modest" amounts, NCAA Br. 7, 27, 29, 37, 46 n.4. And they say in various ways that this was a "holding." Conf. Br. 23 (claiming that *Board of Regents* so "held"); *see generally id.* at 23–26; NCAA Br. 28–29 (contending that *Board of Regents* dicta "has full stare decisis effect").

As *Board of Regents* itself explained, however, this Court held "only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life." 468 U.S. at 120. That statement mentions neither amateurism nor evidentiary standards to be used in cases not before the Court. The brief discussion of amateurism, which Petitioners frequently cite, resolved no disputed matters of law and was subject to no fact findings in the trial record. *See id.* at 100–01 (clarifying that no part of this Court's "decision [was] based … on [its] respect for the NCAA's

historic role in the preservation and encouragement of intercollegiate amateur athletics"). Remarkably, the NCAA did not even argue in *Board of Regents* that "amateurism" justified its restraints, and its counsel admitted during oral argument that it "might be able to get more viewers … if it had semi-professional clubs rather than amateur clubs." *O'Bannon*, 7 F. Supp. 3d at 999 (quoting Oral Arg. Tr. at 25, *Board of Regents,* 468 U.S. 85).

Context. The context of *Board of Regents* casts further doubt on Petitioners' interpretation. Foreclosing judicial inquiry into uncertain facts would be quite at odds with the antitrust jurisprudence of the 1970s and 1980s. At that time, this Court was in the midst of a long season of repeal of per se antitrust rules, stressing the need for empirical caution. *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 49–59 (1977).

In fact, the questions at issue in *Board of Regents* were poorly suited for conclusory, categorical treatment. For years, sports economists had been bitterly divided over empirical claims that trade restraints improve team parity or consumer appeal. *Compare* Brief of Economists as *Amici Curiae* in Support of Respondents, *American Needle,* 560 U.S. 183, *with Amicus Curiae* Brief of Economists in Support of Petitioner, *American Needle,* 560 U.S. 183. Since then, the empirical literature has grown against those claims.[8] It would be uncanny for a

[8] *See, e.g.*, Rodney Fort & Jason Winfree, *15 Sports Myths and Why They're Wrong* 7–110 (2013); Thomas A. Baker III, Marc Edelman, & Nicholas M. Watanabe, *Debunking the NCAA's Myth that Amateurism Conforms with Antitrust Law: A Legal*

Court devoted to greater caution and empirical fullness to rule *a priori* on empirical matters that were sharply contested then and have grown more doubtful since.

B. Petitioners' Discussion of *Board of Regents* Is Misleading

Petitioners exaggerate and misinterpret *Board of Regents*. First, they misstate what *Board of Regents* held as to the television broadcast restraints that were actually at issue, claiming they were "subject to detailed rule-of-reason analysis." NCAA Br. 8, 23. Not only did *Board of Regents* not subject those restraints to the full Rule of Reason, but its holding that they enjoyed little deference at all is a leading application of the *pro-plaintiff* quick-look Rule of Reason. We know it was a quick-look case because the Court explicitly held that the television contract could be found illegal without any proof of market power. 468 U.S. at 109–10; *see also Cal. Dental Ass'n v. FTC,* 526 U.S. 756, 769–70 (1999) (describing application of quick look in *Board of Regents* as what this Court "held").

This misreading seems important to Petitioners' position. They imply that if the NCAA enjoys full-Rule-of-Reason treatment for even the grossest horizontal price and output restraints, then perhaps rules like the scholarship restraints in this case enjoy more deferential treatment. But on the

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and Statistical Analysis, 85 Tenn. L. Rev. 661, 698 (2018) (empirical study found "no change in consumption of [D1 Football Bowl Subdivision] Power Five football games following the first significant increase in student-athlete compensation in more than forty-two years").

contrary, the NCAA's restraints in *Board of Regents* were held nearly per se illegal because they were so obviously harmful.

Similarly, in a revealing moment, Petitioners conceal an important distinction that the Court was at pains to explain and that the *Board of Regents* dicta was about. Petitioners quote from *Board of Regents* that "the NCAA and its member institutions market … competition itself" and 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." NCAA Br. 22 (quoting 468 U.S. at 101). But they then make a misleading edit, quoting this Court that "[a] myriad of rules … all must be agreed upon." *Id.* (ellipses in Petitioner's Brief). The Court actually wrote that the "myriad" includes "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*." *Board of Regents,* 468 U.S. at 101 (emphasis added). Those restraints—rules of on-field play on which schools must agree—are far different than the price restrictions at issue in this case. *See, e.g.*, *American Needle,* 560 U.S. at 196–97 (stating that "contracts with … playing personnel" are an issue on which NFL teams "compete with one another").

C. The Lower Court "Consensus" Explicitly Rejects Petitioners' Position

The "consensus" of courts that Petitioners claim has read *Board of Regents* differently, NCAA Br. 9, is, at most, just one case. Petitioners' other cited

cases are inapposite, and one of the key decisions on which they rely tells us that they are not on point. In fact—remarkably—that decision drew exactly the same distinction between procompetitive and anticompetitive restraints that the lower courts did in this case.

Namely, *Agnew v. NCAA*, a case the NCAA won only because the plaintiff pled no relevant market at all, distinguished between NCAA rules governing "financial aid" and a category it described as "eligibility rules." 683 F.3d 328, 345–47 (7th Cir. 2012). The court borrowed from *Board of Regents* to make that distinction, *id.* at 339 (quoting 468 U.S. at 117), and to illustrate "eligibility," it offered the example of "rules requiring class attendance," *id.* at 343. "[F]inancial aid rules," on the other hand, including the scholarship limits in that case, deserved no "procompetitive presumption." *Id.* at 344. The court thought any such claim would be "far too great a leap to make without evidentiary proof at the full Rule of Reason stage." *Id.* In other words, *Agnew* thought "eligibility" rules are those that require players actually to be students, and it explicitly distinguished those rules from education-related compensation. That is the same distinction drawn by the courts below.

Deppe v. NCAA, 893 F.3d 498 (7th Cir. 2018), just confirmed the state of Seventh Circuit law, relying mainly on *Agnew* to hold that a residency requirement—involving no price or output restraint, and merely ensuring a person is a student at the school where they want to play—is an "eligibility" rule that enjoys favorable treatment. *Id.* at 502.

Thus, the Seventh Circuit has all but explicitly held that NCAA limits on education-related payments must face full Rule-of-Reason review. The law of the Seventh and Ninth Circuits is the same.

Petitioners cite two other inapt cases. *Smith v. NCAA* involved a non-monetary eligibility rule very similar to that in *Deppe*. 139 F.3d 180 (3d Cir. 1998). Likewise, in upholding tire specifications chosen to make car races more exciting—the equivalent of specifications for football players' shoes or helmets—*Race Tires America, Inc. v. Hoosier Racing Tire Corp*. involved no horizontal restraints at all, much less horizontal price restraints. 614 F.3d 57 (3d Cir. 2010).

That leaves only *McCormack v. NCAA,* 845 F.2d 1338 (5th Cir. 1988), which dismissed a challenge to financial benefits restrictions. But even that case did not find categorical immunity of the kind Petitioners claim, as it considered whether the plaintiff adequately alleged that the restraints would "stifle competition." *Id.* at 1345. To whatever extent *McCormack* found a special rule in *Board of Regents* for price and output restraints, it is wrong, and it is alone. It would conflict with both the Seventh and Ninth Circuits, and is incorrect for the reasons *amici* have explained.

III. THE COURTS BELOW FOUND A HORNBOOK VIOLATION OF ANTITRUST LAW

The district court in this case, affirmed by the Ninth Circuit, applied hornbook antitrust law. The courts' version of the Rule of Reason was deferential

to defendants, and the courts worked to help the defendants make their case by filling in weaknesses in the NCAA's evidence. The courts found "severe" injury at the first stage of the analysis, a finding that remains undisputed, offset only modestly by procompetitive benefits that the lower courts found within the NCAA's non-antitrust justifications. Given a finding of substantial net injury, the conclusion that the limited benefits could have been obtained without so much competitive damage naturally followed.

Petitioners now respond with abstract logical critiques of the district court's handling of Rule-of-Reason steps two and three. Their arguments are incorrect, especially given the very high bar the courts required plaintiffs to meet at the third stage. In any event, they find no support in the caselaw, and even if they were correct, there would have followed a balancing stage at which the defendants likely would have lost.

A. Plaintiffs Demonstrated "Severe" Anticompetitive Effects

The plaintiffs in this case demonstrated a particularly strong case under the Rule of Reason. Of the 897 Rule-of-Reason cases decided in the modern era, courts have disposed of nearly all at the initial stage on the grounds that the plaintiff failed to demonstrate a significant anticompetitive effect.[9]

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[9] Since 1977, courts decided 90% (809 of 897) on this ground, with the figure rising to 97% (391 of 402) after 1999. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827 (2009) (reviewing cases between 1999 and 2009); Michael A. Carrier, *The Real*

This case was very different. The plaintiffs demonstrated "severe" anticompetitive effects in the form of an "exercise [of] monopsony power" that "essentially eliminate[d] price competition …." Pet. App. 139a, 162a. Because "elite student-athletes lack any viable alternatives to [Division 1]," they must "accept … whatever compensation is offered to them," regardless of "whether any such compensation is an accurate reflection of the competitive value of their athletic services." Pet. App. 34a; *see also* Pet. App. 78a (noting harm from "artificially compressing and capping student-athlete compensation and reducing competition for student-athlete recruits by limiting the compensation offered in exchange for their athletic services").

Nor are these severe harms to the players hypothetical. As Judge Milan Smith noted in his concurrence below, "Student-Athletes work an average of 35–40 hours per week on athletic duties during their months-long athletic seasons," are "often forced to miss class, to neglect their studies, and to forego courses," and are "often prevented from obtaining internships or part-time paying jobs," while "the NCAA and Division 1 universities make *billions* of dollars from ticket sales, television contracts, merchandise, and other fruits that directly flow from the labors of Student-Athletes." Pet. App. 53a–54a (Smith, J., concurring) (emphasis in original); *see also* Tony Paul, *UM's Fab Five*

Rule of Reason: Bridging the Disconnect, 1999 B.Y.U. L. Rev. 1265 (reviewing cases from *Continental T.V.*, 433 U.S. 36 (1977) to 1999). The drafters reviewed every Rule-of-Reason case between 2009 and February 2021 for this brief.

Players Want to Break Down Barriers, The Detroit News, Oct. 8, 2016 (at the same time Michigan signed a deal with Nike in the early 1990s worth $170 million, members of the "Fab Five" basketball team had to pool their money so they could afford Taco Bell).

B. The Courts Below Gave the NCAA the Benefit of the Doubt on Its Purported Procompetitive Justifications

After the plaintiffs' demonstration at stage one, the burden shifted to the defendant to demonstrate a procompetitive justification. The NCAA, however, offered little related to any *antitrust* justification, instead relying on its own definition of "amateurism." Petitioners complain that the courts below didn't understand or didn't apply that definition properly—even though the district court applied the same definition as the NCAA's own expert, Pet. App. 40a n.16—but it doesn't matter. When called to provide legally relevant evidence, the defendants "offered no cogent explanation for why limits or prohibitions on these education-related benefits are necessary to preserve consumer demand," Pet. App. 148a, and their expert "did not even attempt to examine whether a relationship exists between [athlete] compensation and consumer demand," Pet. App. 144a. In affirming those findings, the Ninth Circuit noted that "the NCAA set limits on education-related benefits without consulting any demand studies." Pet. App. 36a.

By contrast, the district court relied on legally relevant evidence. It considered "demand analyses,

survey evidence, and NCAA testimony indicating that caps on non-cash, education-related benefits have no demand-preserving effect and, therefore, lack a procompetitive justification." Pet. App. 36a. It reviewed defendants' evidence carefully, searching for legally relevant benefits and finding that "some of the challenged rules serve [the NCAA's] procompetitive purpose: limits on above-COA [cost-of-attendance] payments unrelated to education, the COA cap on athletic scholarships, and certain restrictions on cash academic or graduation awards and incentives." Pet. App. 35a (emphasis omitted). The court found no benefit in "restricting 'non-cash education-related benefits,'" however, because those "benefits, like a scholarship for post-eligibility graduate school tuition, [are] inherently limited to [their] actual value, and could not be confused with a professional athlete's salary." Pet. App. 35a. The Ninth Circuit affirmed this distinction, holding that the district court "fairly found that 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." Pet. App. 40a.

C. Petitioners' Attacks on Steps Two and Three Are Incorrect and Would Make No Difference

Considering Harms and Benefits "As a Whole." Petitioners contend that the NCAA's evidence of procompetitive benefits would have been better received if the district court had "review[ed] at step 2 whether [the] rules as a whole produced the procompetitive benefits of offering a distinctive

product," implying that it was unfair to have considered the harms of "the NCAA rules as a whole ….." NCAA Br. 39 (emphasis and quotations omitted); *see* Conf. Br. 35. They argue that doing so had the effect of converting a "less" restrictive alternative test into a "least" restrictive one. NCAA Br. 41; Conf. Br. 37 ("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") (emphasis in original). Apparently as a variation on the same argument, Petitioners claim that they effectively bore the burden at stage three. Conf. Br. 39. They then contend that the district court would have avoided these problems by following a "reasonable necessity" test instead of one based on less restrictive alternatives. NCAA Br. 41–42; Conf. Br. 40.

Petitioners' argument finds no support in the caselaw and misapprehends the burden-shifting Rule of Reason. The argument is irrelevant at stage two, where courts do not inquire into the size or nature of the benefits shown, or compare them to the harm. At stage two, courts merely ask whether defendants have produced some indication of benefits to competition. If so, the burden shifts back to the plaintiff. Likewise, the purpose of stage three is not to compare the benefits to demonstrated harm, but only to ask whether they could be obtained with much less harm.

Petitioners argue that stage three subjected them to a "least" restrictive alternative analysis because the courts below didn't group their justifications together. But the courts could not and

should not have lumped Petitioners' claims into one justification. Whether or not the courts considered the harms separately or as a whole makes no difference because they found that each restraint has "severe" anticompetitive effects. Each of them "artificially compress[es] and cap[s] student-athlete compensation." Pet. App. 78a, 82a. And each prevents the compensation from "accurate[ly] reflect[ing] … the competitive value of … athletic services." Pet. App. 82a.

In contrast, some of Petitioners' justifications were supported by no evidence of consumer benefit at all, as they failed to show a connection between particular restraints and consumer demand. Petitioners seem to argue that the courts were required to credit those alleged benefits as part of a package because the harms were considered together. But if some proffered justifications are legally irrelevant, then courts should not be compelled to accept them.[10]

Nor can Petitioners find support in the caselaw for their argument. Having reviewed all 897 Rule-of-Reason cases in the modern era, we were unable to locate a single one in which a court examined the

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[10] Petitioners also misread the leading treatise on this point. The discussion there of "the content of the restraint," which includes "the sum total of everything that the parties have 'agreed' about," refers not to multiple rules but to the "enlarge[ment] or interpret[ation of] those documents by [the defendant's] conduct." 7 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law*: *An Analysis of Antitrust Principles and Their Application* ¶ 1504d, p. 421 (4th ed. 2017) ("Areeda & Hovenkamp") (italics omitted).

defendant's array of justifications in a bundle similar to what the NCAA is seeking.

Importance of third stage. Having found severe anticompetitive harm and (as reformulated in terms of consumer demand) some benefit, the district court moved to step three. This stage of the analysis is important: If a less restrictive alternative would attain the defendant's objectives nearly—or completely—as effectively while harming competition significantly less, then we can achieve the defendant's objectives with less competitive harm. Moreover, where a plaintiff demonstrates that the benefits did not require such significant competitive harms, courts can avoid the challenge of balancing harms and benefits. Areeda & Hovenkamp ¶ 1507d, p. 450. The third stage also avoids the "extreme" position of "tolerat[ing] every restraint whenever the defendant states a plausible connection with a legitimate objective and claims that the alternatives are unsatisfactory." *Id.* ¶ 1505b, p. 436.

Highest bar for less restrictive alternatives. The lower courts' approach at this third stage was not only appropriate, but also highly favorable to Petitioners. *First*, the courts below, relying on *O'Bannon*, applied the most demanding version of the analysis that courts have applied in the past four decades. It credited only alternatives when the restraint was "patently and inexplicably stricter than … necessary" and the alternative did not impose "'significantly increased cost.'" Pet. App. 41a (quoting *O'Bannon,* 802 F.3d at 1074–75 (emphasis omitted)). This is an extremely high bar that

requires a plaintiff to show that a restraint is clearly and without explanation more restrictive than needed. Such an analysis would *only* credit an alternative when the restraint is obviously disconnected from the defendant's justifications. Because it is so difficult to satisfy, it avoids judicial "tinker[ing]" to find marginally less restrictive alternatives, and in fact closely resembles the "reasonable necessity" standard that Petitioners prefer. *See* NCAA Br. 41; Conf. Br. 47, 49. A restraint that is clearly and inexplicably disconnected from the objective is not reasonably necessary to attain it. *See* Carrier, *Real Rule of Reason*, 1999 B.Y.U. L. Rev. at 1341–46.

Second, the courts connected the alternative with the defendant's objectives. A concern at the third stage is that courts might focus only on the existence of less restrictive alternatives, not on whether the alternative attains the defendant's objectives. That did not happen here. Again, the courts worked to shape the NCAA's focus on amateurism into a justification cognizable under the antitrust laws. This significant effort to rework the NCAA's justifications made it much more likely that the courts would—as they in fact did—consider whether the proffered alternatives would attain the goal of consumer demand, ensuring that they directly considered the link between alternatives and objectives.

Courts' applications of less restrictive alternatives. The district court accepted an alternative that would

> "(1) allow the NCAA to continue to limit grants-in-aid at not less than the [COA]; (2) allow the [NCAA] to continue to limit compensation and benefits unrelated to education; [and] (3) enjoin NCAA limits on most compensation and benefits that are related to education, but allow it to limit education-related academic or graduation awards and incentives, as long as the limits are not lower than its limits on athletic performance awards now or in the future." Pet. App. 118a.

This result is appropriate. It gives the NCAA the benefit of the doubt when there is any chance that the restrictions could possibly affect consumer demand. And it precisely matches the procompetitive justifications the courts accepted.

On the other hand, the 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. 41a. It is difficult to see how restrictions on *education*-related benefits like computers, science equipment, musical instruments, and tutoring make it more likely that consumers would watch college sports. In fact, if the NCAA actually sought to foster consumer demand, then "market competition in connection with education-related benefits" would itself "reinforce consumers' perception of student-athletes as students." Pet. App. 43a. Restrictions like these do not make student-athletes appear less like professionals or

enhance consumer demand, and are more likely explained as a cartel's cost-saving measure, which courts do not accept. Areeda & Hovenkamp ¶ 1508, p. 461.

D. Even in the Absence of a Less Restrictive Alternative, Plaintiffs Would Have Won at Balancing

In any event, none of Petitioners' attacks on the second- and third-stage analyses are ultimately relevant because even if plaintiffs had not shown a less restrictive alternative, this case would have gone to balancing. And at that stage, given "severe" anticompetitive effects and the NCAA's failure to consider effects on consumer demand, defendants likely would have lost.

All the sources relied on for this Court's recent formulation of the Rule-of-Reason test in *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018), required a balancing stage,[11] and the dissent in that case plainly contemplated one. *See id.* at 2291 (Breyer, J., dissenting) (stating that the plaintiff could win at the third stage "by showing that the legitimate objective does not outweigh the harm that competition will suffer, i.e., that the agreement 'on

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[11] *See* Michael A. Carrier, *The Four-Step Rule of Reason*, 33 Antitrust 50, 53 (2019) (analyzing *Capital Imaging Assocs. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537, 543 (2d Cir. 1993); 1 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 12.02[1] (2d ed. 2017); and most notably Areeda & Hovenkamp ¶ 1502, pp. 398–99 (explaining that if a plaintiff cannot show a less restrictive alternative, "the harms and benefits must be compared to reach a net judgment whether the challenged behavior is, on balance, reasonable")).

balance' remains unreasonable"). The leading treatise also contemplates balancing because, even if it is sometimes difficult or problematic, some opportunity for balancing is essential. Areeda & Hovenkamp ¶ 1507a, p. 442; *see also, e.g.,* Pet. App. 162a ("If no balancing were required at any point in the analysis, an egregious restraint with a minor procompetitive effect would have to be allowed to continue, merely because a qualifying less restrictive alternative was not shown."); Carrier, *The Four-Step Rule of Reason*, 33 Antitrust at 53–54. Other than conduct deemed per se illegal, antitrust doctrine requires courts to consider anticompetitive and procompetitive effects, and it is hard to see how a court can make this assessment without, at some point, having the chance to directly compare the two. In the context of this case, a balancing analysis likely would have led to the NCAA coming up short.

CONCLUSION

For the reasons above, this Court should affirm the decision of the court below.

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