No. 15-1388

IN THE

Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

EDWARD J. O'BANNON, JR., *et al.*,
on behalf of themselves and all others similarly situated,
Respondents.

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

BRIEF OF *AMICUS CURIAE* BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA ANTITRUST LAW SECTION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Bar Association of the District of Columbia is a non-profit organization. Its Antitrust Law Section monitors developments in both antitrust law and practice, and includes members of the bar who specialize in antitrust law and have substantial interest in the adjudication of significant issues defining antitrust law and enforcement policies.

SUMMARY OF ARGUMENT

Members of this Court have characterized antitrust's rule of reason standard as "amorphous"[2] and "unruly." [3] With this case, the Court can accomplish three things: *first*, it can resolve the confusion over the rule of reason's analytical framework; *second*, it can reiterate that plaintiffs must prove, and the courts must assess, a significant anticompetitive effect within the entire relevant market, not simply one sliver of that market; *finally*, and most importantly, it can deliver a simpler standard—clear enough for lawyers to explain to their clients: If the challenged restraint is reasonably

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[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than amicus and its counsel has made a monetary contribution to the preparation and submission of this brief. All parties received timely notification of the BADC Antitrust Law Section's intent to file this brief, and all parties consent to its filing.

[2] *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1607, 191 L. Ed. 2d 511 (2015) (Scalia, J., dissenting).

[3] *F.T.C. v. Actavis, Inc.*, 133 S. Ct. 2223, 2245, 186 L. Ed. 2d 343 (2013) (Roberts, C.J., dissenting).

necessary to create a new product, and if the product is socially beneficial (for example, if the product increases output or consumer choice), then the restraint likely increases consumer welfare and is *presumptively* lawful under antitrust's rule of reason.

This presumption is consistent with the Court's prior holdings, several lower courts' holdings, and economic logic. The Ninth Circuit refused to employ this presumption. The District Court went further astray under the rule of reason in comparing the joint venture's conduct to what would happen in an "unrestrained market."

Both economic theory and Supreme Court precedent recognize that joint activity and ventures, at times, must impose restraints in order for the product or service to exist at all. Amateur athletics is a well-recognized example. As this Court recognized, the NCAA needs ample latitude to maintain the revered tradition of amateurism in college sports. This is precisely because in an "unrestrained" market, each university might seek a relative advantage, potentially fueling an arms race that leaves the universities, students, and public collectively worse off either because output is reduced, participation opportunity is curtailed, or resources are misallocated.

While recognizing the ample evidence of some universities' attempts to join this race to the bottom and drift toward professionalism, the lower court failed to appreciate how rambling through the wilds of the rule of reason would subject universities and high schools to liability. Rather than enabling schools to curb the arms race, the unprecedented ruling will only fuel the inefficient arms race.

Attempts by the NCAA and its member universities to maintain amateurism, integrate athletics with education, and prevent further commercial exploitation may now be subject to routine antitrust scrutiny, liability, and treble damages.

ARGUMENT

I. THE COURT SHOULD PROVIDE GREATER GUIDANCE ON ITS RULE OF REASON

Over the past century, the Court has supplied the Sherman Antitrust Act's legal standards. The Court's rule of reason is now the "prevailing," [4] "usual," [5] and "accepted standard" [6] for evaluating conduct under the Sherman Act. This standard involves a flexible factual inquiry into a restraint's overall competitive effect and "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."[7]

Despite its label, the rule of reason is not a directive defined ex ante (such as a speed limit). Instead, as many within antitrust circles recognize, the term embraces antitrust's vaguest, most open-ended principles, making prospective compliance with its requirements at times exceedingly difficult. Not surprisingly, the standard has drawn criticism

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[4] *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).
[5] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007).
[6] *Id.* at 885.
[7] *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

over the past century, including from the Court itself.[8]

A. The Vagaries of the Rule of Reason Are Apparent as the Lower Courts Apply Different Analytical Frameworks.

The lower courts diverge over the basic rule of reason framework. The Ninth Circuit and District Court outlined and applied a three-step analysis under the rule of reason:

> [1] The plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market. [2] If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint's procompetitive effects. [3] The plaintiff must then show that any legitimate objectives can be achieved in a substantially less restrictive manner.[9]

Other circuits apply four steps.[10]

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[8] *See, e.g.*, *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 281 (2007); *see also Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411, 192 L. Ed. 2d 463 (2015) ("whatever its merits may be for deciding antitrust claims, that 'elaborate inquiry' produces notoriously high litigation costs and unpredictable results") (quoting *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 343 (1982)); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1382 (2009) (collecting sources).

[9] *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1070 (9th Cir. 2015).

[10] *Geneva Pharm. Tech. Corp. v. Barr Lab., Inc.*, 386 F.3d 485, 507 (2d Cir. 2004); *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) ("Fourth, if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must

Because the lower courts here found for the Respondents on the third step—less restrictive alternatives—of the rule of reason analysis, one could argue that the balancing or weighing inquiry is irrelevant here. Nonetheless as a general antitrust matter, this is no small issue. Under the balancing inquiry, plaintiff must demonstrate that the restraint's anticompetitive harm outweighs the procompetitive benefit. Although courts infrequently reach this step, it is, at times, critical. The United States in the *Microsoft* case, for example, lost under this step in challenging several restraints.[11]

Thus when the lower courts apply different burden-shifting frameworks, the outcome can depend on the circuit in which plaintiff files.[12] Moreover, the balancing inquiry is interwoven with, and informs, the antitrust analysis, namely the restraint's overall impact on the relevant market, not just one component of that market. As this Court has reiterated, the factfinder must weigh "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[13]

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demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit."); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998) ("harms and benefits must be weighed against each other . . . to judge whether the challenged behavior is, on balance, reasonable").

[11] *Microsoft*, 253 F.3d at 63, 67 & 75.

[12] *Behrend v. Comcast Corp.*, No. CIV.A. 03-6604, 2012 WL 1231794, at *19 (E.D. Pa. Apr. 12, 2012) (noting how the Third Circuit has never specifically adopted this alternative, and other post-*Microsoft* appellate decisions have been silent on whether this alternative is available).

[13] *Leegin*, 551 U.S. at 885; *Sylvania*, 433 U.S. at 49.

B. *The District Court and Ninth Circuit Never Considered the Restraints' Impact Within the Relevant Antitrust Market.*

A fundamental problem is that the lower courts here never considered, as they must under the rule of reason, how the challenged restraints would actually impact consumers of the college education market, namely college students (besides those men playing basketball and football) and the parents who help pay the tuition. This is especially problematic when the magnitude of the alleged anticompetitive effect–namely the precise value of the athletes' names, images, and likenesses ("NIL") compensation–was, the Ninth Circuit observed, uncertain.[14] Nonetheless, for the appellate and district court, Respondents satisfied their burden under the rule of reason by showing that the NCAA's compensation rules fixed the price of only *one controversial component* (NIL rights) of the bundle of services that comprise the college education market.[15] The Ninth Circuit next leapt, without more, to conclude that the restraints had "a significant anticompetitive effect" on the entire college education market.[16] How the lower court reached that conclusion is perplexing.

The rule of reason, if consistent with the rule of law, cannot allow courts to conflate a "college education market" with men's basketball and football. Under the rule of reason, plaintiffs must prove, and the courts must assess, that the challenged restraint produces significant anticompetitive effects within

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[14] *O'Bannon*, 802 F.3d at 1072.
[15] *Id.*
[16] *Id.*

the entire market, not just one of many input components of that market. Otherwise the reviewing court has a partial picture of the restraint's competitive effect. It also increases the likelihood that the antitrust court, with this incomplete picture, will condemn pro-competitive activity and chill such activity in the future to the detriment of consumers.

The relevant market here was found to be a "college education market" in which Football Bowl Subdivision and Division I men's basketball schools "compete to recruit the best high school players by offering them 'unique bundles of goods and services' that include not only scholarships but also coaching, athletic facilities, and the opportunity to face high-quality athletic competition."[17]

One justification by the NCAA for its challenged restraints was that they enable the NCAA member schools "to provide greater financial support to women's sports and less prominent men's sports."[18] The District Court held that "[t]his is not a legitimate procompetitive justification."[19] The Ninth Circuit had a different take:

> It may be that what the NCAA means by this argument is that its compensation rules make it possible for schools to fund more scholarships than they otherwise could and thereby increase the number of opportunities that recruits have to play college sports. To the extent the NCAA is making that argument,

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[17] *O'Bannon*, 802 F.3d at 1070.
[18] *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1151 (N.D. Cal. 2014).
[19] *Id.*

> it is the functional equivalent of the NCAA's argument that the rules increase output in the college education market. The district court found that argument unproved, and we have affirmed that finding.[20]

Contrary to the Ninth Circuit's statement, the District Court found that output—namely opportunities for student-athletes to participate in Football Bowl Subdivision schools and Division I men's basketball—had "increased steadily over time."[21] The Ninth Circuit, however, replied that this argument misses the mark. Although output reductions are a common kind of anticompetitive effect in antitrust cases, a "reduction in output is not the only measure of anticompetitive effect."[22]

There is confusion here on multiple levels: *first* over what the District Court actually found; *second* over the relevant market (whether it is football and basketball scholarships or the broader college education market); and *third* over conflating output reductions with output-enhancing conduct, which is generally viewed as procompetitive.[23]

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[20] *O'Bannon*, 802 F.3d at 1073 n. 16.

[21] *Id*. at 1070 (quoting *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 981 (N.D. Cal. 2014)).

[22] *O'Bannon*, 802 F.3d at 1070 (internal quotation omitted).

[23] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 103 (1984) ("*Broadcast Music* squarely holds that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive."); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979) (examining whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what

We shall focus on the lower courts' confusion over the challenged restraints' effect within the relevant market. The District Court, as the NCAA raised on appeal, concentrated on sports fans, not students: it focused "solely on the question of whether amateurism increases consumers' (i.e., fans') demand for college sports and ignoring the fact that amateurism also increases choice for student-athletes by giving them 'the only opportunity [they will] have to obtain a college education while playing competitive sports as *students*.'"[24]

Of course, the consumer of the college education market is not the armchair fan, but college students and parents who help pay the tuition. Missing this distinction may be harmless if the restraints' effect on fans and students were identical. It isn't here. Fans may not care about the university's English department or whether the university offers crew or lacrosse. Students do. Students pick universities for myriad reasons, including college cost and financial aid, academic reputation, reputation for social activities, and job opportunities.[25] While some fans might prefer more money spent on college football, students might prefer collective restraints on football scholarships—especially if they allow universities to fund other academic programs, extracurricular activities, and sports. For example, approximately

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portion of the market, or instead one designed to increase economic efficiency and render markets more, rather than less, competitive).

[24] *O'Bannon*, 802 F.3d at 1072 (quoting NCAA).

[25] Kevin Eagan et al., *The American Freshman: National Norms Fall 2014*, UCLA Higher Education Research Institute 44 (2014), http://www.heri.ucla.edu/monographs/TheAmerican Freshman2014.pdf.

30 percent of incoming college students in one 2014 survey expected to play intercollegiate sports.[26] So students, like those at Temple University, might be alarmed if the university planned to cut crew and six other sports to fuel the arms race in football and men's basketball.[27]

The lower courts never considered the restraints' effect on the majority of students, who might find their academic, athletic, or extra-curricular program curtailed or eliminated in order for the university to not lag in the football and basketball arms race.[28] This concern, as the next part addresses, is real.

II. THE LOWER COURTS ERRED IN BASING THEIR HOLDING ON WHAT WOULD HAVE HAPPENED IN AN "UNRESTRAINED" MARKET WHEN THE RESTRAINTS WERE INTEGRAL TO CREATING THE UNIQUE PRODUCT.

A. The Ninth Circuit Endorsed the District Court's Faulty Reasoning.

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[26] *Id*. at 45.

[27] Susan Snyder, *Temple to Drop 7 Sports, Including Baseball, Rowing*, PHILADELPHIA INQUIRER, Dec. 08, 2013, *available at* http://articles.philly.com/2013-12-08/news/44908784_1_temple-university-the-inquirer-american-athletic-conference.

[28] Knight Commission on Intercollegiate Athletics, *A Call to Action: Reconnecting College Sports and Higher Education* 17 (June 2001), *available at* http://eric.ed.gov/?id=ED472205 (noting that while "a relative few programs flourish, many others have chosen to discontinue sports other than football or basketball to make ends meet. Even some of the 'haves' react to intense financial pressure to control costs by dropping so-called minor sports.").

There is a key difference in determining whether the NCAA's compensation rules restrained competition for a single aspect of an input and whether they reduced consumer welfare in the relevant market. As this Court intuitively grasped, joint ventures at times need restraints on competition in order for the product to become available and to avoid a race to the bottom that leaves the participants and society collectively worse off.[29]

The lower courts here, however, conflated the two. To find that the NCAA's compensation rules had a significant anticompetitive effect, the District Court asked what would have happened in an unrestrained market: "Were it not for those rules, the [district] court explained, schools would compete with each other by offering recruits compensation exceeding the cost of attendance, which would 'effectively lower the price that the recruits must pay for the combination of educational and athletic opportunities that the schools provide.'" [30] Respondents basically alleged that "student-athletes are harmed by this restraint because it prevents them from receiving compensation—specifically, for the use of their names, images, and likenesses—that they would receive in an unrestrained market."[31]

The Ninth Circuit upheld the faulty analysis:

> . . . if the NCAA's compensation rules did not exist, member schools would compete to offer

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[29] *NCAA*, 468 U.S. at 101-02.
[30] *O'Bannon*, 802 F.3d at 1057 (quoting 7 F. Supp. 3d at 972).
[31] *NCAA Student-Athlete Name & Likeness Licensing*, 37 F. Supp. 3d at 1138.

> recruits compensation for their [name, image, and likeness]; and . . . that the compensation rules therefore have a significant anticompetitive effect on the college education market, in that they fix an aspect of the "price" that recruits pay to attend college (or, alternatively, an aspect of the price that schools pay to secure recruits' services).[32]

B. *It Is Bad Legal and Economic Policy to Compare a Joint Venture's Conduct to What Would Have Happened in a Purely "Unrestrained Market," When the Unique Product Would Not Be Available in an "Unrestrained Market."*

Economic theory recognizes that joint ventures, at times, must impose restraints on competition for the product or service to exist at all. The economist Irving Fisher over a century ago examined two assumptions of any "unrestrained" laissez-faire doctrine:

> first, each individual is the best judge of what subserves his own interest, and the motive of self-interest leads him to secure the maximum of well-being for himself; and, secondly, since society is merely the sum of individuals, the effort of each to secure the maximum of well-being for himself has as its necessary effect to secure thereby also the maximum of well-being for society as a whole.[33]

Unrestrained competition benefits society when

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[32] *O'Bannon*, 802 F.3d at 1070.

[33] Irving Fisher, *Why Has the Doctrine of Laissez Faire Been Abandoned?*, SCIENCE, Jan. 4, 1907, at 19.

individual and group interests and incentives are aligned (or at least do not conflict). But when individual and group interests diverge, "unrestrained" competition for a relative advantage can leave the competitors and society collectively worse off.[34] One area of this suboptimal competition is where advantages and disadvantages are relative. [35] Economist Robert Frank used the bull elk as an example. It is in each elk's interest to have relatively larger antlers to defeat other bull elks. But the larger antlers compromise the elks' mobility, handicapping the herd's safety overall. Hockey players are another example. Hockey players prefer wearing helmets. But to secure a relative competitive advantage, one player may choose to play without a helmet. Other players follow. None enjoys a competitive advantage from playing helmetless. Collectively the hockey players are worse off.[36]

College sports are a well-recognized example of the need for collective action to promote amateur sports and the goals of higher education. Undoubtedly some universities, in an unrestrained market, would seek a relative advantage: they might extend the time that students could practice and limit the amount of time each student would have to prepare for, or attend, class. Universities would also pay some talented athletes to attend their schools.

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[34] ROBERT H. FRANK, THE DARWIN ECONOMY: LIBERTY, COMPETITION, AND THE COMMON GOOD 16, 138 (2011).

[35] *See* Fisher, *supra* note 33, at 24 ("A general increase in relative advantage is a contradiction in terms, so that in the end the racers as a whole have only their labor for their pains.").

[36] Frank, *supra* note 34, at 8–9, citing THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR (1978).

Resources are constrained at universities. If the athletic department is gripped in an arms race to attract talented athletes, other parts of the university, which face resource constraints, would suffer. If universities spend millions of dollars to attract talented athletes, others must do the same (or exit the activity). None of the universities sustain a competitive advantage; the overall educational experience in an unrestrained market would likely diminish, leaving the universities, students, and student-athletes collectively worse off.

Recognizing this race to the bottom, joint ventures often will require certain restraints to enable the product or service to be offered in the first place. The NCAA and high school rules seek to prevent this race to the bottom, namely to prevent amateur athletics, which are part of the unique offering of educational services, into becoming professional sports.

This Court recognized this basic economic principle:

> We need no empirical data to credit [the high school athletic association's] commonsense conclusion that hard-sell tactics directed at middle school students could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics. [The athletic association's] rule discourages precisely the sort of conduct that might lead to those harms, any one of which would detract from a high school sports league's ability to operate "efficiently and effectively." For that reason, the First

> Amendment does not excuse [the private high school Brentwood Academy] from abiding by the same antirecruiting rule that governs the conduct of its sister schools. To hold otherwise would undermine the principle, succinctly articulated by the dissenting judge at the Court of Appeals, that "[h]igh school football is a game. Games have rules." It is only fair that Brentwood follow them.[37]

The District Court had evidence of the NCAA seeking to curb the "arms race" and creeping professionalism that occurs in an unrestrained market.[38] The Ninth Circuit also noted the race to the bottom.[39] But what both courts failed to see is that to decelerate this "race to the bottom" or "arms race," and to preserve the unique product that students desire, namely college education, universities must agree to bind themselves collectively. For example, the Ninth Circuit noted how the Respondents were "not seeking to require that all schools pay their student-athletes; rather, they sought an injunction permitting schools to do so."[40] But once one university can pay student-athletes, other universities in that conference and other competing conferences will likely follow.

Thus the distinction between restraints that

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[37] *Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 300 (2007) (internal citations omitted).
[38] *O'Bannon*, 7 F. Supp. 3d at 1002.
[39] *O'Bannon*, 802 F.3d at 1053-54 (noting problems that brought college football to a moment of crisis, and how "competition among colleges to acquire the best players had come to resemble 'the contest in dreadnoughts' that had led to World War I").
[40] *Id.* at 1060.

reduce one facet of competition and restraints that reduce overall consumer welfare is key. The Knight Commission on Intercollegiate Athletics has examined how curbing the arms race through cooperative restraints is necessary to promote college education. The Commission recounted the escalating arms race: "[a]t many universities, institutional spending on high-profile sports is growing at double or triple the pace of spending on academics."[41] It noted that "[t]he growing emphasis on winning games and increasing television market share feeds the spending escalation because of the unfounded yet persistent belief that devoting more dollars to sports programs leads to greater athletic success and thus to greater revenues."[42] However, only "a tiny number of college athletics programs actually reap the financial rewards that come from selling high-priced tickets and winning championships."[43]

The dangers of an unrestrained market are significant: "considerable financial pressures and ever-increasing spending in today's college sports system could lead to permanent and untenable competition between academics and athletics," the Commission observed. The current model "could lead to a loss of credibility not just for intercollegiate

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[41] Knight Commission on Intercollegiate Athletics, *Restoring the Balance: Dollars, Values, and the Future of College Sports* 4 (2010), *available at* http://www.knightcommissionmedia.org/images/restoring_the_balance_2010.pdf.

[42] *Id.* at 3.

[43] *Id.*; Call to Action, *supra* note 28, at 16 ("NCAA's latest study of revenues and expenses at Divisions I and II institutions shows that just about 15 percent operate their athletics programs in the black. And deficits are growing every year.").

sports but for higher education itself."[44] As the Commission noted,

> . . . reliance on institutional resources to underwrite athletics programs is reaching the point at which some institutions must choose between funding sections of freshman English and funding the football team. And student-athletes in non-revenue sports risk seeing their teams lose funding or be cut entirely. These threats extend well beyond universities with high-budget athletics programs: it is clear that the spending race that too often characterizes major football and basketball programs is creating unacceptable financial pressures for everyone.[45]

This arms race, the Commission observed, is not entered into by NCAA fiat:

> Institutions, not the NCAA, decide what's best for themselves, and for many that means joining the arms race. Presidents and trustees accept their athletics department's argument that they have to keep up with the competition. When one school has a $50 million athletic budget and another gets along on $9 million, how can there be any pretense of competitive parity?[46]

The Knight Commission understood that "collective action is key to overcoming the dynamic of the athletics arms race" and that no "single college or

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[44] Restoring the Balance, *supra* note 41, at 7.
[45] *Id*. at 6.
[46] Call to Action, *supra* note 28, at 17.

university can afford to act unilaterally, nor can one conference act alone."[47] The Commission explained,

> As long as there is an athletics arms race, unilateral disarmament on the part of one institution would most assuredly be punished swiftly by loss of position and increased vulnerability. Change will come, sanity will be restored, only when the higher education community comes together to meet collectively the challenges its members face.[48]

Because the District Court and Ninth Circuit failed to grasp this, antitrust liability now stands in the universities' way.

III. THE NINTH CIRCUIT AND DISTRICT COURT IGNORED A KEY PRESUMPTION

So how did the lower courts here reach their unprecedented finding of liability? Not only did they fail to assess the restraints' overall impact on the "college education market," they ignored a basic antitrust principle: If the restraint is reasonably necessary to create a new product, and if the product is socially beneficial (for example, if the product increases output or consumer choice), then the restraint likely increases consumer welfare and is *presumptively* lawful under antitrust's rule of reason.

As this Court perceived, the presumption is key whenever the "integrity of the 'product' cannot be preserved except by mutual agreement."[49] This is especially apt when universities seek to avoid the

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[47] Restoring the Balance, *supra* note 41, at 26.
[48] *Id*. at 24.
[49] *NCAA*, 468 U.S. at 101-02.

arms race: "if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed."[50] As this Court observed,

> 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.[51]

Thus, in "such instances, the agreement is likely to survive the Rule of Reason."[52]

The lower courts here refused to apply this presumption, which other courts have applied.[53] As the Ninth Circuit stated, "The amateurism rules' validity must be proved, not presumed."[54]

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[50] *Id*.

[51] *Id*. at 120 (emphasis added).

[52] *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010) ("Joint ventures and other cooperative arrangements are also not usually unlawful . . . where the agreement . . . is necessary to market the product at all") (citing *BMI*, 441 U.S. at 23); *see also Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006).

[53] *See, e.g.*, *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 342-43 (7th Cir. 2012) (quoting *NCAA*, 468 U.S. at 101-02); *Marshall v. ESPN Inc.*, 111 F. Supp. 3d 815, 834 (M.D. Tenn. 2015) ("Right or wrong, under NCAA rules, other than the requirement that an athlete be a student, there can be no more basic eligibility rule for amateurism than that the athlete not be paid for playing his or her sport.").

[54] *O'Bannon*, 802 F.3d at 1064.

This command could subject legitimate joint ventures to widespread and indeterminate antitrust liability. Under the lower courts' approach, an antitrust plaintiff can single out a particular restraint integral to creating the product itself, compare the joint venture product to an altogether different product in an unrestrained market, and argue that the restraint is unnecessary and illegal. Joint ventures evolve over time. But it would be bad economic and legal policy to allow an antitrust case to test every change. This could chill innovation as future joint ventures hesitate in offering new products that require a restraint.

Thus when the joint venture increases consumer choice and output by offering a unique product, it is not the court's function under the rule of reason to determine whether amateurism is still relevant or whether another, distinct product in a market without the restraint (namely professional football or basketball) would be just as good.

IV. THE LOWER COURTS' REASONING WILL EXPOSE HIGH SCHOOLS AND UNIVERSITIES TO POTENTIALLY WIDESPREAD ANTITRUST LIABILITY AND THEREBY CHILL PROCOMPETITIVE ACTIVITY TO SOCIETY'S DETRIMENT

The Ninth Circuit sought to provide a limiting principle to the District Court's untethered analysis: The "difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed,

we see no basis for returning to a rule of amateurism and no defined stopping point."[55]

This is not a limiting principle; it is a cap on liability. The Ninth Circuit never provided any economic or legal principle that limits liability to Division I men's basketball and Football Bowl Subdivision schools. Agreements among universities to limit the number of (or not offer any) athletic scholarships would now be subject to antitrust attack.

Cheerleading is one example. Universities today do not pay cheerleaders for the use of their likeness on televised athletic contests. Although courts have not recognized university cheerleaders to have a property right in the use of their likeness in televised games, the District Court pointed to a contract among the Football Bowl Subdivision conferences, the University of Notre Dame, and Fox Broadcasting Company for the rights to telecast certain 2007, 2008, and 2009 bowl games. The contract provided "that the event organizer will be solely responsible for ensuring that Fox has 'the rights to use the name and likeness, photographs and biographies of all participants, game officials, *cheerleaders*' and other individuals connected to the game."[56] Because the contract specifically mentions the right to use the cheerleaders' likeness, the cheerleaders, under the District Court's logic, would have a property right in these licensing rights. They too would presumably be victims of an alleged price-fixing restraint, if the

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[55] *Id.* at 1078.

[56] *O'Bannon*, 7 F. Supp. 3d at 969 (emphasis added).

universities, through their conferences, agree not to pay cheerleaders for their licensing rights.[57]

Also consider the Ivy League colleges, which agree not to compete for students with merit or athletic scholarships.[58] The schools in the 1950s agreed that no athlete could receive any award beyond financial need, which they calculated using an agreed-upon formula: "The schools reasoned that if they were forced to bid for star students who had no financial need, the schools would have less money to give out to other students who had such need."[59]

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[57] Top Cheers, Cheerleading Scholarships, Student Loans, and Other Education Financing Options, http://www.topcheers.com /cheerleadingscholarships (accessed June 12, 2016) ("More and more colleges are beginning to offer cheerleading scholarships. Cheerleading scholarships come in many different forms, some offering only a couple hundred dollars a semester, and some paying full tuition.").

[58] "There are no academic or athletic scholarships in the Ivy League." Council of Ivy League Presidents and The Ivy League, The Ivy League, http://www.ivyleaguesports.com/information/ psa/index (accessed June 12, 2016).

[59] Gustavo E. Bamberger & Dennis W. Carlton, *Antitrust and Higher Education: MIT Financial Aid* (1993), *in* THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 191 (John E. Kwoka & Lawrence J. White eds., 3d ed. 1999). The United States challenged the restraint on financial aid with respect to non-athletes. The Third Circuit, sympathetic to MIT's justification for collective action, remanded for a broader inquiry:

> We note the unfortunate fact that financial aid resources are limited even at the Ivy League schools. A trade-off may need to be made between providing some financial aid to a large number of the most needy students or allowing the free market to bestow the limited financial aid on the very few most talented who may not need financial aid to attain their academic goals. Under such circumstances, if this trade-off is

The Ivy League schools, under the lower courts' rationale, would be liable. In an unrestrained market, some of the Ivy League schools might offer merit or athletic scholarships. But the restraints hardly reduced output in the college education market or of college sports. The Ivy League averages "more than 35 varsity teams at each school" and "provides more intercollegiate athletic opportunities per school than any other conference in the country."[60]

Compensation restraints on high school athletes would also be subject to antitrust attack. High school contests, including football and basketball contests, are now regularly televised around the country. Some private high schools recruit players,

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> proven to be worthy in terms of obtaining a more diverse student body (or other legitimate institutional goals), the limitation on the choices of the most talented students might not be so egregious as to trigger the obvious concerns which led the Court to reject the "public interest" justifications in *Professional Engineers* and *Indiana Dentists*. However, we leave it for the district court to decide whether full funding of need may be continued on an individual institutional basis, absent Overlap, whether tuition could be lowered as a way to compete for qualified "needy" students, or whether there are other imaginable creative alternatives to implement MIT's professed social welfare goal.

United States v. Brown Univ. in Providence in State of R.I., 5 F.3d 658, 677 (3d Cir. 1993). Ultimately, the parties settled, allowing the schools to agree to provide only need-based aid from college funds, on common principles for determining a student's needs, and on common financial aid forms. Massachusetts Institute of Technology, *Press Release on the Overlap Group Settlement*, Dec. 22, 1993, *available at* http://tech.mit.edu/Bulletins/ovrlp-pr.html.

[60] Council of Ivy League Presidents and The Ivy League, The Ivy League, History http://www.ivyleaguesports.com/history/overview (accessed June 12, 2016).

including post-graduate students, to play at their preparatory school.[61] In an "unrestrained market," some schools would pay the parents for gifted teenage students to play, especially if doing so increases the school's reputation. Thus private high schools in agreeing through their athletic association to restrain trade in depriving students the value of using their likeness in televised games would be embroiled in antitrust litigation. They would now have to prove how "amateurism brings about some procompetitive effect in order to justify it under the antitrust laws."[62]

The district court in *Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) aptly summarized the issue:

> The overriding purpose of the eligibility Rules, thus, is not to provide the NCAA with commercial advantage, but rather the opposite extreme—to prevent commercializing influences from destroying the unique "product" of NCAA college football. Even in the increasingly commercial modern world, this Court believes there is still validity to the Athenian concept of a complete education derived from fostering full growth of both mind and body. The overriding purpose behind the NCAA Rules at issue in this case is to preserve the unique atmosphere of competition between "student-athletes." This Court, therefore, rejects the notion that such

[61] Call to Action, *supra* note 28, at 21.
[62] *O'Bannon*, 802 F.3d at 1073.

> Rules may be judged or struck down by federal antitrust law.

One can scoff at the concept of the student-athlete and universities' attempts to hold the line against further inroads of professionalism. Respondents wrongly assume that the NCAA and its university members are self-interested, profit-maximizing entities that only make economically rational decisions. But as Respondents' expert recognized, the NCAA and universities are leaving "a lot of money on the table."

The reality, after the Ninth Circuit's ruling, is that the arms race will only quicken. More universities will outbid one another for a relative advantage. A few students may benefit; most students and universities will not. And the Athenian concept of a complete education will indeed become a historical artifact.

CONCLUSION

The NCAA's petition for a writ of certiorari should be granted.

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Respectfully submitted,

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