

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

REPLY BRIEF FOR PETITIONER

GLENN D. POMERANTZ
KELLY M. KLAUS
MUNGER, TOLLES &
OLSON LLP
560 Mission St., 27th Floor
San Francisco, CA 94105

GREGORY L. CURTNER
ROBERT J. WIERENGA
SCHIFF HARDIN LLP
350 Main St., Suite 210
Ann Arbor, MI 48104

SETH P. WAXMAN
Counsel of Record
LEON GREENFIELD
DANIEL S. VOLCHOK
DAVID M. LEHN
MATTHEW GUARNIERI
ARI J. SAVITZKY
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

CORPORATE DISCLOSURE STATEMENT

The disclosure statement in the petition remains accurate.

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Despite styling their response a brief in opposition, respondents actually urge this Court to take up the NCAA's lead question. That approach, almost unheard of for a private litigant, is manifestly driven by respondents' realization that the questions in their own petition (No. 15-1167) are unworthy of review, and therefore that their only hope for certiorari is to link their petition to the NCAA's. This ploy—which includes respondents devoting parts of their response to their separate petition—should be rejected. There is no “piggybacking” exception to the certiorari criteria. The NCAA's questions should be granted because they satisfy those criteria (hence the substantial amicus support); respondents' should be denied because they do not (hence the lack of any such support).

ARGUMENT

I. THE NCAA'S FIRST QUESTION WARRANTS REVIEW

A. As the NCAA's petition explained, the Ninth Circuit erred in holding the challenged NCAA rules unlawful. That unprecedented holding contravened: (1) this Court's requirement of latitude for rules that enable joint ventures' products, (2) the Court's insistence that antitrust courts not use rule-of-reason analysis as a smokescreen for micromanagement, and (3) other circuits' decisions following those mandates. Pet. 9-26. The petition also explained (at 26-28) that the decision below threatens both a venerable American institution—organized college athletics—and joint ventures generally. These circumstances justify further review.

Respondents agree. They declare the issue “worthy of this Court's review” (Opp. 1) and urge that it be granted (Opp. 1, 16-17, 41). For the reasons given in the petition and supporting amicus briefs, that recommendation should be accepted.

B. Respondents argue at length about the merits of this first question. Full responses must await merits briefing, but certain points demand prompt correction.

1. In discussing *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), respondents fixate (Opp. 17-19) on the outcome. But that is not what matters here, because this Court expressly distinguished the television rule “challenged in th[at] case” from “rules defining the ... eligibility of participants,” 468 U.S. at 117, i.e., the rules at issue here. In particular, the Court said, the television rule was “not based on a desire to maintain the integrity of college [sports] as a distinct ... product.” *Id.* at 116. Eligibility rules, by contrast, *are* “essential if the [NCAA’s] product is to be available at all.” *Id.* at 101; *see also id.* at 102 (“to preserve the ... ‘product,’ athletes must not be paid”). Such rules, the Court deemed it “reasonable to assume,” are “justifiable means of fostering ... amateur athletic [competition,] and therefore procompetitive,” i.e., lawful. *Id.* at 117. They thus should be upheld “in the twinkling of an eye.” *Id.* at 109 n.39.

Respondents try to dismiss this crucial analysis by claiming (Opp. 19) that “twinkling” equates to the “quick look” doctrine, and hence can be used only to condemn a restraint. That is wrong. This Court has used “twinkling”—which means applying “the Rule of Reason” without “a detailed analysis”—in discussing when a restraint “is likely to *survive* the Rule of Reason.” *American Needle, Inc. v. NFL*, 560 U.S. 183, 203 (2010) (emphasis added).

Respondents also contend (*e.g.*, Opp. 21-22) that *Board of Regents*’ analysis was dicta. The NCAA’s petition explained (at 16) why that is incorrect; respondents offer no answer. Respondents relatedly label the

analysis “[o]utdated” (Opp. 23). *American Needle*’s reaffirmation of the analysis refutes that claim (Pet. 16), but the claim itself is an admission that the Ninth Circuit departed from this Court’s precedent. Finally, respondents ignore the NCAA’s explanation (Pet. 12-13) that *Board of Regents* simply applied this Court’s established joint-venture precedent.

2. Regarding the circuit conflict the NCAA described (Pet. 16-18), respondents state (Opp. 27) that other circuits “applied the Rule of Reason, rather than deeming the restraints procompetitive as a matter of law.” That dichotomy is incoherent: A court can apply the rule of reason—without “detailed analysis,” *American Needle*, 560 U.S. at 203—in ruling as a matter of law, including on a motion to dismiss or at summary judgment. *See, e.g., Smith v. NCAA*, 139 F.3d 180, 187 (3d Cir. 1998) (“the bylaw so clearly survives a rule of reason analysis that we ... affirm[] an order granting a motion to dismiss”), *vacated on other grounds*, 525 U.S. 459, 464 n.2 (1999). That is what other circuits did, in conflict with the Ninth Circuit here.

3. Respondents erroneously assert (Opp. 20), that the NCAA relies on a “pretrial” “[p]resumption” that is irrelevant because there has been a trial. That is not correct. What the NCAA argues is that under a proper analysis, the challenged rules are procompetitive (that is, valid) as a matter of law. The fact that trial has occurred does not foreclose such a ruling, *e.g., Fed. R. Civ. P. 50*, or prevent appellate courts from correcting the district court’s failure to so rule.

4. Respondents say virtually nothing about the NCAA’s separate argument (Pet. 18-26) that the Ninth Circuit erroneously required a showing that the challenged rules were the *least* restrictive way to achieve

procompetitive benefits. Respondents argue only (Opp. 25) that this Court should blindly credit the Ninth Circuit’s recitation of the proper standard, rather than confronting what that court actually did. This Court has rejected that approach, reversing where “the Court of Appeals recited th[e correct] standard” but then “evaluate[d] respondent’s claim” under a different one. *Price v. Vincent*, 538 U.S. 634, 639 (2003). The Ninth Circuit did likewise here—and thereby departed from decisions of this Court and other circuits.

II. RESPONDENTS’ PETITION SHOULD BE DENIED

As the NCAA’s opposition explained, respondents’ questions presented implicate no conflict or error by the Ninth Circuit. Respondents assert, however (Opp. 1), that their two questions “relate[]” to the NCAA’s (cert.-worthy) antitrust question. But the certiorari criteria are not relaxed for “related” questions. This Court, for example, frequently takes up fewer than all the questions a petitioner presents, even though they are sufficiently “related” to be joined in one petition. Yet respondents request a relatedness-based grant *across* petitions. They provide no supporting authority, and the NCAA knows of none.¹

Respondents relatedly claim (Cert. Reply 3) that “granting all three questions would avoid the need for this Court to parse the Ninth Circuit opinion.” That is bizarre. Whether respondents are implying that this Court does not carefully review the decision below in granted cases, or suggesting the Court should undertake full briefing, argument, and decision of two addi-

¹ Indeed, this Court recently granted only one of two petitions (*Venezuela v. Helmerich & Payne International Drilling Co.*, No. 15-423) arising from the same judgment.

tional issues just to avoid deciding whether those issues deserve review in the first place, the argument is plainly insubstantial.

Respondents also contend (Opp. 1) that their first question is a “precondition” to the NCAA’s antitrust issue. If respondents actually believed that mattered, they would support review of the NCAA’s second question, which concerns standing and thus is surely a “precondition” to the antitrust issues. Furthermore, if there were a “precondition” (or “antecedent” (Resps.’ Cert. Reply 1)) exception to the certiorari criteria, this Court could not take up sentencing issues while denying review of conviction-related issues—as it has, *see Wood v. Allen*, No. 08-9156—or review jury-instruction challenges while denying review of antecedent police-investigation issues—as it also has, *see Burrage v. United States*, No. 12-7515. In any event, respondents’ first question asks what flexibility courts have “in determining an appropriate remedy for a [Sherman Act] violation.” Resps. Pet. i. Remedy issues are not “antecedent” to the NCAA’s antitrust question, which concerns liability.

Respondents’ first question also rests on misreading the decision below. *See* NCAA Opp. 8-11. Respondents say (Cert. Reply 4-7) their reading mirrors the dissent’s below. Not so. The dissent disputed whether the “record ... support[ed the] conclusion that paying student-athletes ... will significantly reduce consumer demand.” Pet. App. 63a n.3; *accord* Pet. App. 60a. That fact-bound dispute does not warrant review.

Nor does respondents’ second question merit review. In urging review of that question, respondents say (Opp. 1) that the parties “agree that the Ninth Circuit” erred in its less-restrictive-alternative analysis.

That superficial similarity elides the critical point that the parties challenge application of the less-restrictive-alternative analysis to entirely separate alternatives. There is thus no meaningful connection between the two challenges. And respondents' challenge fails for the reasons the NCAA's opposition identified, including that respondents mischaracterize the decision below as addressing remedy rather than liability. Respondents deny this mischaracterization, quoting (Cert. Reply 10) the Ninth Circuit's reference to "remedy." But that reference appears in a sentence explaining the court's application of "the Rule of Reason." Pet. App. 3a. As respondents' petition acknowledges (at 21), the rule of reason addresses liability, not remedy.

Respondents also assert (Opp. 26) that the Ninth Circuit did not engage in balancing. That argument is waived because respondents never contended in the Ninth Circuit (nor even in their certiorari petition) that balancing was required.

Most importantly, respondents offer no answer to the dispositive point that, even accepting their mischaracterization of the decision below, the district court could not lawfully have ordered the NCAA to allow cash payments to student-athletes *above* cost of attendance as a remedy for its capping payments to student-athletes *below* COA. NCAA Opp. 18-19.

III. LOWER COURTS ARE DIVIDED OVER THE FIRST AMENDMENT ISSUE, AND THIS CASE IS A GOOD VEHICLE TO ADDRESS IT

The NCAA's second question presented is when the First Amendment bars right-of-publicity claims based on the non-misleading and non-gratuitous use of individuals' names, images, or likenesses (NILs). That recurring question is outcome-determinative here: If

the claims on which this litigation is premised are barred then respondents lack standing, because their alleged harm is student-athletes' inability to license their NILs for videogames and broadcasts, and there would be no such licensing if the rights are unenforceable. As twenty-eight law professors explain in their amicus brief, moreover (at 24), "[l]ower courts are all over the map" on this First Amendment issue. Given that that disarray threatens to chill enormous amounts of expression, this Court's review is warranted.

A. As discussed in the petition (at 33-34) and the law-professors' amicus brief (at 7-19), lower courts employ various tests in deciding when the First Amendment precludes right-of-publicity claims stemming from NIL use. Respondents argue (Opp. 40) that many of the relevant cases did not involve "athlete NILs in videogames." But while a conflict exists even on that narrow framing, *see* Professors' Br. 4, 16-17 (discussing *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007)), the framing itself is improper. Courts are divided over the *legal* question; the fact that it arises here in the context of videogames rather than another medium is irrelevant, because the First Amendment protects videogames "[l]ike the protected books, plays, and movies that preceded them." *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 790 (2011), *quoted in In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268, 1271 (9th Cir. 2013) (hereafter *Keller*). That is why the Ninth Circuit has applied the same transformative-use test to a greeting card that it applied to videogames here. *See Hilton v. Hallmark Cards*, 599 F.3d 894, 910 (9th Cir. 2009). In short, respondents' suggestion (Opp. 40) that "further percolation ... is warranted" is meritless—but does im-

plicitly acknowledge that the question is worthy of review.

B. Equally baseless are respondents' claims that this is a poor vehicle to address the entrenched lower-court conflict. Respondents first label it "[t]elling[]" (Opp. 29) that "the NCAA did not seek *certiorari* in *Keller*." That would be irrelevant even if true, but the NCAA *did* seek review in *Keller*, moving to intervene (because it had participated on appeal as an amicus), after the original petitioner settled. See Mot. & Pet., *NCAA v. Keller*, No. 13M54 (Oct. 25, 2013). This Court denied intervention, perhaps because *Keller*, like *Electronic Arts, Inc. v. Davis*, No. 15-424 (U.S.), was an interlocutory appeal from the denial of a state-law motion to dismiss—a posture raising threshold jurisdictional questions. See Professors' Br. 5-6. No such questions exist here.

Respondents next contend (Opp. 29) that the First Amendment is "tangential[]" here because they brought no right-of-publicity claim. Their antitrust claim, however, rests on the theory that the NCAA "collude[d]" with schools "to depress to zero any compensation for use of Plaintiffs' NILs." Resp. C.A. Br. 24. The claim thus assumes the existence of enforceable publicity rights, and hence directly implicates whether the First Amendment precludes right-of-publicity claims based on those rights. If so, then respondents cannot maintain this action.²

² The NCAA is therefore not seeking "a determination of ... third parties' First Amendment rights" (Opp. 30). It asserts *its* right not to be subjected to litigation by plaintiffs who lack standing.

Respondents also note (Opp. 31) that “[t]he Ninth Circuit made only a passing reference ... to *Keller*.” But that was because *Keller* so obviously dictated the result. Pet. App. 36a n.13; *see also* Pet. App. 59a n.1 (op. of Thomas, C.J.) (agreeing that respondents had established standing “[b]ecause we are bound by ... *Keller*”). If anything, this point rebuffs respondents’ argument that this case is a poor vehicle because it involves no right-of-publicity claim. *Keller* unquestionably involved such claims, yet the panel here (correctly) saw *Keller* as directly on point.

Respondents next argue (Opp. 31-35) that the First Amendment is irrelevant here because at trial they introduced evidence of licensing of NIL rights, in live broadcasts as well as videogames. To begin with, however, the Ninth Circuit never reached the “thornier questions” raised by standing based on broadcast-related right-of-publicity claims. Pet. App. 33a. Those questions would remain open for the Ninth Circuit on remand, but that is not a ground for denying review. This Court frequently takes up an issue even though other questions not reached below could theoretically produce the same outcome on remand. *E.g.*, *Maples v. Thomas*, 132 S. Ct. 912, 927-928 (2012); *Bullcoming v. New Mexico*, 564 U.S. 647, 668 n.11 (2011).

That aside, respondents’ arguments about actual NIL licensing are without merit. As the lower courts here recognized, such licensing represented sophisticated, litigation-averse entities’ reaction to the uncertainty over whether the First Amendment protects speakers from right-of-publicity claims that are based on NIL use. *See* Pet. App. 37a (companies might license NIL rights “rather than test the enforceability of those rights in court”), 135a (“television networks ... sought to acquire these rights as a precautionary

measure”). Nothing adduced at trial, or in respondents’ opposition—including Trial Transcript 1671 (cited in Opp. 31)—supports respondents’ highly counterintuitive suggestion (Opp. 32) that “video game makers ... w[ould] continue to pay to use athlete NILs” if this Court dispelled that uncertainty. *That* is what matters, not whether licensing occurred historically in the face of uncertainty. Dispelling that uncertainty is crucial, moreover, because another possible reaction to it (likely the only one available to less-wealthy speakers) is to refrain from speaking at all. Such chilling is antithetical to the First Amendment.³

Citing no authority, respondents next assert (Opp. 35-36) that they would lack standing only if “the First Amendment *categorically precludes* recognizing any ... value” in their NILs. Respondents never made this argument below—despite having the burden to establish standing, *see Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)—and so it is waived. It also lacks merit. Respondents posit (Opp. 35) that student-athletes could (“conceivably”) sue schools for unjust enrichment or restitution, “seeking a share of ... broadcast revenues.” But again, the standing ruling here rested on videogames; broadcast arguments thus do not bear on whether this is a good vehicle. Regardless, if student-athletes have no enforceable right to

³ In making these arguments, respondents quote extensively from the decision below, relegating to a footnote (Opp. 33 n.9) the key point that the quotations concerned the Copyright Act. Respondents baldly aver (*id.*) that the quotations are “equally applicable to the NCAA’s First Amendment argument,” but the Ninth Circuit obviously did not agree, or else it would have said so rather than rejecting the First Amendment argument based solely on *Keller*.

control use of their NILs in the relevant videogames or broadcasts, there would be no basis for recovery on respondents' other (far-afield) theories.

Lastly, respondents fault the NCAA (Opp. 38) for supposedly not arguing that the result here would be different under any other First Amendment test. The NCAA did so argue, however, explaining (Pet. 34) that under the proper analysis, right-of-publicity claims are permitted only when the challenged expression is “[c]ommercial speech that falsely claims a product endorsement” or “gratuitous use of a celebrity’s image, unrelated to any expressive content.” The videogames here obviously fall into neither category, and hence correcting the Ninth Circuit’s First Amendment error would make a difference. *See* Professors’ Br. 13. Respondents never contend otherwise.

C. Respondents briefly defend *Keller* on the merits, characterizing it as “entirely consistent” (Opp. 39) with *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). But *Zacchini*, as this Court emphasized, was not about mere NIL use; it involved reproduction of a performer-producer’s *complete performance*. *See, e.g., id.* at 573 n.10; *accord* Professors’ Br. 6-7. *Zacchini* therefore recognizes only the right of one who “produce[s] a performance of interest to the public” to control broadcast of the “entire act,” 433 U.S. at 575-576, analogous to organizers’ right to control entrance to their events. *See, e.g., Wisconsin Interscholastic Athletic Ass’n v. Gannett Co.*, 658 F.3d 614, 624 (7th Cir. 2011) (discussing this narrow scope). Nothing in *Zacchini* endorses the subjective line-drawing or punishment of truthful speech—and the consequent widespread chilling—that *Keller*’s First Amendment

analysis engenders. *See* Pet. 30-33; Professors' Br. 19-24.⁴

CONCLUSION

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

Respectfully submitted.

GLENN D. POMERANTZ
KELLY M. KLAUS
MUNGER, TOLLES &
OLSON LLP
560 Mission St., 27th Floor
San Francisco, CA 94105

GREGORY L. CURTNER
ROBERT J. WIERENGA
SCHIFF HARDIN LLP
350 Main St., Suite 210
Ann Arbor, MI 48104

SETH P. WAXMAN
Counsel of Record
LEON GREENFIELD
DANIEL S. VOLCHOK
DAVID M. LEHN
MATTHEW GUARNIERI
ARI J. SAVITZKY
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

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⁴ In discussing *Zacchini*, respondents cite (Opp. 37-38) the *Restatement (Third) of Unfair Competition* §47 (1995)—without acknowledging that it endorses (at cmt. c) the test the NCAA and its amici espouse. *See* Professors' Br. 12.