No. 15-1167

IN THE

Supreme Court of the United States

EDWARD C. O'BANNON, JR., ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES:

REPLY BRIEF FOR PETITIONERS

The NCAA opposes the Petition in this case (the "O'Bannon Pet.") but has filed its own Petition in No. 15-1388 ("NCAA Pet.") asking this Court to grant review on a closely related issue. Because of the intimate relationship between the NCAA's first question presented and the two questions presented in the O'Bannon Petition, this Court should grant review of all three questions.

The first NCAA question is:

> Whether the Ninth Circuit erred in holding that NCAA rules defining "the eligibility of participants" in NCAA-sponsored athletic contests, *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984), violated the Sherman Act.

NCAA Pet. i. This question asks whether *Board of Regents* effectively grants the NCAA antitrust immunity for its no-compensation rule – that is, whether its no-compensation rule should be deemed procompetitive as a matter of law "and should be upheld 'in the twinkling of an eye,' *i.e.*, without detailed rule-of-reason analysis" because it preserves the purportedly "distinct" product of "amateur" (*i.e.*, no-compensation) college sports. *Id.* at 10.

The first O'Bannon question asks whether the NCAA's purported interest in "amateurism" qualifies as a procompetitive justification under the antitrust laws. It is thus antecedent to the NCAA's first question, which *assumes* that "amateurism" is a valid procompetitive interest. The first NCAA

question cannot be answered meaningfully without also answering the first O'Bannon question.

Further, the Ninth Circuit's misapplication of *Board of Regents* was the basis for its improper elimination of the District Court's $5,000 trust-fund remedy. If the Court grants the first NCAA question, then it should also grant the first O'Bannon question, to enable review of the Ninth Circuit's misapplication of *Board of Regents* to truncate the District Court's remedy.

The second O'Bannon question is also inextricably intertwined with the NCAA's first question. The Ninth Circuit invoked *Board of Regents* as part of its less-restrictive-alternative test and opined that courts "should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics." Pet. App. 51a (citation and internal quotation marks omitted). Because "amateurism" is not a valid procompetitive justification, the *Board-of-Regents* thumb placed on the scale by the Ninth Circuit (as part of its less-restrictive-alternative analysis) is also legally flawed.

The NCAA's Petition supports the second O'Bannon question in other ways. First, the NCAA's Petition belittles the significance of "a few thousand dollars" in payments to athletes (NCAA Pet. 21 (citation omitted)) – a stance that belies its professed concern that small payments under the trust-fund remedy would interfere with "amateurism." In addition, the NCAA argues that the Ninth Circuit's

version of the less-restrictive-alternative test is erroneous and departs from established precedent. NCAA Pet. 18-26. If that test is flawed, then the Ninth Circuit should not have used it to invalidate part of the District Court's remedy.

In short, granting all three questions – the first NCAA question and both O'Bannon questions – would give this Court the full and unencumbered opportunity to examine the implications of *Board of Regents* for all aspects of the Ninth Circuit's decision, with respect to both liability and remedial issues.

Granting all three questions would also render moot the principal objection of the NCAA's BIO: that the O'Bannon Petition inaccurately describes the Ninth Circuit's decision. If the NCAA's first question is granted, the O'Bannon questions raise key predicate issues that this Court should decide as part of its resolution of the NCAA's first question. Although we submit that the O'Bannon Petition contains the better reading of the Ninth Circuit's decision, granting all three questions would avoid the need for this Court to parse the Ninth Circuit opinion.

The NCAA argues that the Sherman Act authorizes a group of competitors to fix prices for compensation at zero because fixing prices at zero – *i.e.*, what the NCAA calls "amateurism" – is what makes the group's product "unique" or "distinct." But college sports is big business. For example, the NCAA recently sold its men's basketball tournament

rights for $10.8 billion. Pet. App. 74a. Yet it conspires to suppress competition for the talents of the young athletes who are primarily responsible for making that revenue possible. In what was perhaps a Freudian slip, the NCAA refers to its "business decisions" regarding athlete compensation. BIO 6. The NCAA should not receive a windfall of categorical immunity for what in any other industry would be an unreasonable restraint of trade.

I. This Court Should Grant The First Question Presented.

A. Petitioners Correctly Characterize The Decision Below.

The Petition explained that, although the Ninth Circuit gave "lip service" to "the point that 'amateurism' was relevant only because of its effect on consumer demand" (Pet. 11), in fact the Ninth Circuit validated a (supposedly) procompetitive effect that was identical to the restraint.

The NCAA asserts that we "mischaracterize" the Ninth Circuit's decision. BIO 8. But we adopt the same reading of the decision as Chief Judge Thomas, who leveled exactly the same criticism in his opinion. He observed that the majority "misstates" the proper test when it "characterizes our task" as determining whether the trust fund remedy "would be 'virtually' as effective' in preserving amateurism as not allowing compensation." Pet. App. 69a-70a (quoting majority opinion).

Chief Judge Thomas continued:

> [T]he majority cites no record evidence to support its conclusion that paying student-athletes $5,000 in deferred compensation will significantly reduce consumer demand. Rather, the majority declares that it is a *"self-evident fact"* that "[t]he 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."

Id. at 69a n.28 (quoting majority opinion; emphasis added).

Chief Judge Thomas later reiterated that the majority had incorrectly imposed on Plaintiffs the burden "to show that the proposed alternatives are 'virtually as effective' at preserving *the concept of amateurism as the NCAA chooses to define it*." *Id.* at 73a (quoting majority opinion; emphasis added). He added, "we are not tasked with deciding what makes an amateur an amateur. We are tasked with determining . . . *consumer demand*." *Id.* at 73a-74a n.30 (emphasis added). "In terms of antitrust analysis, the distinction between amateur and professional sports is not for the court to delineate. It is a line for consumers to draw." *Id.* at 72a n.29.

Chief Judge Thomas' reading of the majority opinion was correct. The Ninth Circuit engaged in precisely the tautological reasoning that our Petition described: in the face of the District Court's findings and the admissions of the NCAA's own witnesses

that modest payments to athletes (especially if held in trust until graduation) would *not* reduce consumer demand (*id.* at 66a-69a), the Ninth Circuit simply asserted that the trust fund remedy was impermissible because "not paying student-athletes is *precisely what makes them amateurs*." *Id.* at 56a (emphasis in original). *See also id.* at 57a (citing "*the self-evident fact* that paying students for their NIL rights will vitiate their amateur status") (emphasis added); *id.* at 60a (discussing impact of the trust fund remedy on amateurism, rather than consumer demand: "even taking [Dr.] Pilson's comments at face value, as the dissent urges, his testimony cannot support the finding that paying student-athletes small sums will be virtually as effective in preserving amateurism as not paying them.").

In fact, in footnote 20 of its opinion, the majority responded directly to Chief Judge Thomas' criticism and *justified* its focus on determining whether the trust fund remedy would preserve "amateurism." According to the majority, "[a]mateurism is not divorced from the procompetitive benefit identified by the court; it is its *core element*," thus making it proper to analyze the impact of the trust-fund remedy on what the majority called a "shared conception of amateurism" as no-compensation. *Id.* at 56a-57a n.20 (emphasis added).

By crediting the NCAA's asserted interest in "amateurism," the Ninth Circuit allowed the NCAA to recharacterize the suppression of competition as an alleged "procompetitive benefit." Even now, the NCAA continues to equate the agreement — an

unreasonable restraint of trade — with the supposed benefit. *E.g.,* BIO 3 (referring to "the NCAA's general amateurism (i.e., no-pay-for-play) rules"); *id.* at 12-13 ("remedy of cash payments above COA to student-athletes . . . would 'vitiate their amateur status'") (citing Pet. App. 57a).

B. The Court of Appeals' Ruling Is Incorrect and Conflicts With Decisions of This Court and Other Courts.

The NCAA seeks to ground its asserted "amateurism" interest in *Board of Regents*, but it stretches that decision beyond the breaking point. The NCAA bases its argument on "relevant language from *Board of Regents*" (BIO 11), implicitly confessing it is relying on snippets of dicta, not a holding. The truth is that *Board of Regents* applied the Rule of Reason to find an antitrust *violation*, not to uphold an anticompetitive restraint under the rubric of "amateurism."

Board of Regents did not depart from the well-established body of antitrust law providing that the suppression of competition (such as an agreement not to pay college athletes) can never qualify as a "competitive benefit" under the Sherman Act. *See* Pet. 14-17. *Board of Regents* emphasized that "the essential inquiry" under the Sherman Act is "whether or not the challenged restraint enhances *competition*" and "the criterion to be used in judging the validity of a restraint on trade is its impact on *competition*." 468 U.S. at 104 (emphasis added). *Board of Regents* also stressed the role of consumer

demand in the Rule of Reason analysis, *see id.* at 119-20, while the Ninth Circuit paid only lip service to that factor.

The NCAA's attempt to reconcile cases in other circuits (*see* Pet. 17-19) is also unavailing. The NCAA contends that *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998), "reached the same conclusion as the Ninth Circuit here." BIO 14. That is incorrect. *Law* held that an NCAA rule limiting coaches' annual compensation was unlawful under the Rule of Reason and affirmed an injunction. The Tenth Circuit did not truncate the remedy by appealing to "amateurism" or any other interest linked to the suppression of competition. Instead, the Tenth Circuit opined that "the NCAA cannot argue that competition for coaches is an evil because the Sherman Act 'precludes inquiry into the question whether competition is good or bad.'" 134 F.3d at 1022-23 (quoting *Nat'l Society of Prof'l Engineers v. United States*, 435 U.S. 679, 695 (1978)).

The NCAA points to the Tenth Circuit's reference to "rules such as those forbidding payments to athletes" (BIO 14 (quoting 134 F.3d at 1018)), but the NCAA fails to quote the next sentence: "Because some horizontal restraints serve the procompetitive purpose of making college sports available, the Supreme Court subjected even the price and output restrictions at issue in *Board of Regents* to a rule of reason analysis." Thus, the Tenth Circuit indicated that even no-compensation rules would be subject to

Rule of Reason analysis, rather than enjoy the virtual immunity that the NCAA seeks.

II. This Court Should Grant The Second Question Presented.

The NCAA complains of "judicial micromanagement" (BIO 6), but the real issue here is *appellate* micromanagement of trial court remedial discretion. The Ninth Circuit created a new legal standard importing a heightened version of the less-restrictive-alternatives test into the remedial phase. The Court of Appeals would subject antitrust plaintiffs to not one but two rounds of Rule of Reason analysis — once at the liability stage and again at remedy. Nothing in this Court's precedent authorizes such redundancy.

A. Petitioners Correctly Characterize The Decision Below.

The NCAA contends that the Ninth Circuit's holding pertains only to liability rather than remedy. BIO 15. That is not correct.

The District Court imposed its trust-fund remedy in Part VI of its opinion, entitled "Remedy," after Part V of its opinion, entitled "Summary of Liability Determinations," in which it concluded that "the NCAA's challenged rules unreasonably restrain trade in violation of § 1." Pet. App. 176a.

The Ninth Circuit agreed that "the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism." *Id.* at 63a. The Court of Appeals explained that it was

overturning one of the District Court's *remedies* and otherwise affirming the liability determination:

> We conclude that the district court's decision was largely correct. . . . Applying the Rule of Reason, we conclude that the district court correctly identified one proper alternative to the current NCAA compensation rules — *i.e.,* allowing NCAA members to give scholarships up to the full cost of attendance—but that the district court's *other remedy*, allowing students to be paid cash compensation of up to $5,000 per year, was erroneous.

Id. at 2a (emphasis added).

In its own Petition, the NCAA forthrightly acknowledges that the Ninth Circuit affirmed the District Court's liability determination. *E.g.*, NCAA Pet. 23 (Ninth Circuit stated "in summarizing its opinion that the challenged rules were unlawful because they were . . . 'more restrictive than necessary'") (citation omitted).

Further, the NCAA's argument that striking the trust-fund remedy was part of a liability determination makes little sense. As the District Court explained (Pet. App. 96a-98a), the restraint Plaintiffs challenged was the prohibition on compensating athletes for NIL use, not some phantom prohibition on deferred compensation of up to $5,000 per year. The Ninth Circuit assessed only whether the real-world restraint triggered antitrust

liability, not some hypothetical agreement that Plaintiffs never challenged.

Even if striking the trust-fund remedy had been a liability determination, the Ninth Circuit's decision would warrant review because it refused to engage in an essential part of the Rule of Reason: balancing anticompetitive harms against procompetitive effects. *See Continental T. V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 49 (1977) (citing need to "weigh[] all of the circumstances of a case"). Such balancing is required even if a plaintiff cannot identify a less restrictive alternative. *See* Michael A. Carrier, "How Not to Apply the Rule of Reason: The *O'Bannon* Case" (2015), http://michiganlawreview.org/the-obannon-case/ (explaining that one of the Ninth Circuit's errors "was to completely ignore the balancing stage of the analysis. My review of more than 700 cases spanning a 30-year period—from 1977 to May 2009—led to the unmistakable conclusion that courts applying the Rule of Reason engage in" balancing even in the absence of a less restrictive alternative, and "[i]n neglecting balancing, the Ninth Circuit's ruling . . . ignored controlling precedent in exactly the same Rule-of-Reason posture.").

B. There Was No Waiver.

The NCAA contends that Petitioners waived their argument because they never argued below that the entire injunction could stand even if part of the District Court's liability determination were infirm. BIO 16-17. This contention misstates

Petitioners' argument and the posture of the case. The Ninth Circuit did not find the District Court's liability determination infirm; it affirmed that determination while truncating part of the remedy.

In any event, there could be no waiver because the Ninth Circuit itself created the certworthy issue by announcing its novel remedial standard after briefing and argument. Petitioners were not required to anticipate the court's ruling in advance. *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 528-30 (2002). The "pressed or passed on" rule is satisfied because the Ninth Circuit "passed on" the new legal standard it articulated.

The NCAA also cites two of Plaintiffs' briefs below (BIO 23-24) addressing the less-restrictive-alternatives test, but those discussions pertain to *liability* not *remedy*. Plaintiffs never acquiesced in the Ninth Circuit's misapplication of the less-restrictive-alternatives test in the remedial context, which it had no way to foresee.

C. The Ninth Circuit's Decision Conflicts With Decisions of This Court and Other Courts.

In antitrust cases, this Court has vested trial courts with broad discretion to fashion remedies necessary to prevent future unlawful conduct. The Ninth Circuit's limits on the District Court's exercise of remedial authority is inconsistent with this Court's precedent and with decisions of other courts. *See* Pet. 25-33.

The NCAA fails to address *United States v. Parke, Davis & Co.*, 362 U.S. 29, 48 (1960), *Zenith*

Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 131 (1969), and *United States v. Philadelphia National Bank*, 374 U.S. 321, 370 (1963), and in fact endorses *United States v. United States Gypsum Co.*, 340 U.S. 76, 88-89, 90 (1950) (cited at BIO 18).

The NCAA attempts to distinguish *Int'l Salt Co. v. United States*, 332 U.S. 392, 400-01 (1947), *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006), and *Nat'l Society of Prof'l Engineers v. United States*, 435 U.S. 679, 694-95 (1978), as involving a "situation where an adjudged antitrust violator returns to court seeking to modify an existing injunction." BIO 22. This characterization misreads the cases, which instead imposed on proven antitrust violators the burden of establishing that limits on their future conduct were unreasonable.

International Salt was a direct appeal of an order granting summary judgment to the government and entering injunctive relief against the defendant. 332 U.S. at 393. This Court first affirmed the liability determination, *id.* at 396-97, and then turned to the defendant's "strong[] object[ion]" to the scope of the injunction. *Id.* at 399-400. The Court affirmed the injunction, explaining that the facts "established that the appellant already has wedged itself into this salt market by methods forbidden by law." *Id.* at 400. The Court reasoned that it was incumbent on the "proven transgressor" to justify limits on injunctive relief. *Id.*

Nat'l Society of Prof'l Engineers is to the same effect. As in *International Salt*, this Court affirmed a substantive antitrust violation, then turned to the defendant's challenge to the scope of the injunctive relief. 435 U.S. at 696-97. Deferring to the district court's authority to "fashion appropriate restraints on the Society's future activities," this Court concluded the defendant had not overcome the strong presumption that the injunction was a "reasonable method of eliminating the consequences of the illegal conduct." *Id.* at 697-98. So too here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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