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 *AMICI CURIAE* ANTITRUST SCHOLARS IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are twelve professors of antitrust law at leading U.S. universities whose names, titles, and academic affiliations are listed in Appendix A. They have an interest in the proper development of antitrust jurisprudence, and they agree that the court below misapplied the "less restrictive alternative" prong of the rule of reason inquiry for assessing the legality of restraints of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1. They are concerned that the Ninth Circuit's approach to the antitrust rule of reason, if not corrected by this Court, would grant undue authority to antitrust courts to regulate the details of organizational rules, and would also undermine the NCAA's goal of amateurism in collegiate athletics, a goal that courts have recognized universally as valid and important—and in which the undersigned, as academics themselves, are deeply interested.

SUMMARY OF ARGUMENT

The NCAA seeks review, *inter alia*, of the Ninth Circuit's holding that the NCAA's prior caps

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person other than the *amici* and their counsel made a financial contribution for the preparation or submission of this brief. Supreme Court Rule 37(2)(a)'s notice requirement is satisfied because the parties to the case were notified of *amici*'s intent to file more than 10 days prior to the filing of this brief. All parties have consented to the filing of this brief.

on student-athlete compensation violated the antitrust laws because the courts below thought that the cap should be higher. *See* Pet. at 18-26. *Amici* agree that the Ninth Circuit's holding on this point fails to follow the precedents of this Court, conflicts with the holdings of other courts of appeals, and presents serious policy concerns that merit this Court's review.

The courts below found that the NCAA student-athlete compensation restrictions at issue here furthered two important goals of the organization. But rather than uphold the restrictions, the Ninth Circuit announced that the NCAA violated the Sherman Act because the court believed modestly higher payment caps were appropriate. App. 70a. This approach conflicts with the holdings of this Court and of other circuits, and expands the "less restrictive alternative" prong of the antitrust rule of reason well beyond any appropriate boundaries. It installs the federal judiciary in the Ninth Circuit as a regulatory agency for collegiate athletics, precisely the sort of venture this Court has cautioned against. *See NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984) (noting need for "ample latitude" for sports leagues to organize their affairs). *See generally Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (courts "ill-suited" to role of regulators). This Court's review is desperately needed to prevent such a massive

expansion of federal judicial power over amateur athletics.

Amici take as their point of departure that the Ninth Circuit upheld the district court's findings that restrictions on payments to players bear a reasonable relationship to 1) increasing consumer demand for amateur sports—here, Football Bowl Subdivision (FBS) football and Division I basketball—and 2) integration of student-athletes into their campuses' academic communities. *See* App. 117a-149a. Because the Ninth Circuit accepted that the NCAA met its burden of establishing a link between the restrictions on player compensation at issue here and the proffered procompetitive justifications, the core issue in this appeal from the perspective of antitrust law is how to analyze the plaintiff class's proffered less restrictive alternatives.

The court below took an excessively broad view of its authority under the Sherman Act to invalidate a restraint based on the possibility that a less restrictive approach could be taken. App. 48a. Once the court found that restricting payments to students was reasonably necessary to the amateurism/integration justifications, it should not have condemned the restraints solely because it thought a different level of athlete compensation was preferable to the level chosen by the NCAA. App. 49a-51a.

But that is just what the Ninth Circuit did. The panel upheld the district court's finding that raising the grant-in-aid cap would be a less restrictive alternative (though it noted that the district court clearly erred in finding that students should be financially compensation for their names, images, and likenesses). In other words, the court below rested a finding of antitrust liability on the court's disagreement with the details of the restraint's implementation rather than a finding that the restraint itself was unreasonable. Absent a showing by the plaintiff class that an approach other than restriction of student-athlete compensation would have achieved the valid justifications with equal efficacy, the restraints should have been upheld.

The Ninth Circuit's decision reads very much like a "least restrictive alternative" approach to the rule of reason, a standard that this Court has disapproved since the 1970s. *See Cont'l TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 n.29 (1977).[2] If accepted, that approach would authorize courts to substitute their judgments regarding the details of a restraint for the judgments made by the actual market participants seeking to achieve admittedly procompetitive goals. This goes well beyond judicial

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[2] *Accord* Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 12 (1977) (noting *Sylvania*'s rejection of "least-restrictive-alternative standard").

enforcement of Section 1 of the Sherman Act and instead imbues courts with rate-setting and other powers analogous to those of regulatory agencies, but without the benefit of detailed statutory guidance and without the institutional expertise of such bodies. This Court should clarify that courts do not possess such regulatory authority by granting the petition for *certiorari* and reversing the judgment below.

ARGUMENT

I. THE NINTH CIRCUIT'S LESS RESTRICTIVE ALTERNATIVE HOLDING DEVIATES FROM SETTLED ANTITRUST PRINCIPLES DEVELOPED BY THIS COURT AND OTHER CIRCUITS

A. The less restrictive alternative element of the antitrust rule of reason requires identification of an alternative that is substantially less restrictive, effective at achieving the same valid business goal, and no costlier than the existing restraint.

Sherman Act Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States[.]" 15 U.S.C. § 1. It is hornbook antitrust law that, in enacting this provision, "'Congress intended to outlaw only *unreasonable* restraints.'" *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)). *See also* 8 PHILLIP E. AREEDA &

HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1500, at 379-80 (3d ed. 2010) (hereinafter, "Areeda & Hovenkamp"). While some restraints like horizontal price-fixing or market allocation are subject to condemnation under a *per se* rule or other truncated analysis due to their overwhelming tendency to harm competition, this Court's recent jurisprudence has made clear that those approaches are disfavored in other contexts. *See F.T.C. v. Actavis, Inc.*, 133 S. Ct. 2223, 2237 (2013) (rejecting "quick look" approach to "reverse payment" patent settlements); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 885-87 (2007) (describing strict limits on applicability of *per se* rules).

In particular, this Court has held that "[w]hen 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason." *Am. Needle, Inc. v. N.F.L.*, 560 U.S. 183, 203 (2010) (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 101 (1984)). *See also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20-24 (1979); 7 Areeda & Hovenkamp ¶¶ 1504c, at 404 & 1511d, at 473-74. Offering amateur sports as a distinct product plainly requires some agreement between the competing teams on standards for amateurism and other eligibility requirements, so the rule of reason necessarily applies to decide the lawfulness of the

restrictions needed to make the product available at all. *See Dagher*, 547 U.S. at 8.

The importance of the less restrictive alternative inquiry as part of the antitrust rule of reason is well-established. *See* 7 AREEDA & HOVENKAMP ¶ 1505b, at 417-19. Merely approving a restraint with some connection to a valid business purpose without asking whether alternative approaches could achieve the same result would improperly truncate the reasonableness inquiry. *See id.* at 419.

But the inquiry must also respect the institutional limitations of the courts. As the Third Circuit has observed:

> In a rule of reason case, the test is not whether the defendant deployed the least restrictive alternative. Rather the issue is whether the restriction actually implemented is "fairly necessary" in the circumstances of the particular case, or whether the restriction "exceed[s] the outer limits of restraint reasonably necessary to protect the defendant." . . . Application of the rigid "no less restrictive alternative" test in cases such as this one would place an undue burden on the ordinary conduct of business. Entrepreneurs . . . would then be made guarantors that the imaginations of lawyers could not conjure up some method of achieving

> the business purpose in question which would result in a somewhat lesser restriction of trade. And courts would be placed in the position of second-guessing business judgments as to what arrangements would or would not provide "adequate" protection for legitimate commercial interests.

Am. Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1248-50 (3d Cir. 1975) (citations omitted). *Accord* 11 Areeda & Hovenkamp ¶ 1913b, at 375 ("A skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements.").[3]

In assessing a proffered less restrictive alternative, a court should therefore ask whether the plaintiff has truly identified a "substantially less restrictive manner" of achieving the valid goals of the restraint as effectively as the chosen provision. *See Major League Baseball Props. v. Salvino, Inc.*, 542 F.3d 290, 341 (2d Cir. 2008) (Sotomayor, J., concurring). Simply identifying alternatives that could somewhat reduce the identified anticompetitive

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[3] Notably, moreover, some recent scholarship has argued that the uncabined use of the less restrictive alternative inquiry does more harm than good in rule of reason analysis. *See, e.g.*, Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & BUS. 369, 376 (2016) ("The [*O'Bannon*] district court's 'less restrictive alternative,' which permitted students to receive deferred compensation in a trust fund of up to $5000 per student per year of eligibility, was really nothing more than disguised price administration.").

effects or that essentially amount to tweaking the restraint should not suffice to expose a defendant to antitrust liability for a restraint that is reasonably necessary to achieving a valid business purpose. *See* 7 Areeda & Hovenkamp ¶ 1505b, at 419 ("[T]o require the very least restrictive choice might interfere with the legitimate objectives at issue without, at the margin, adding that much to competition.").[4] A less restrictive alternative should also achieve the valid business purpose with comparable efficacy and without adding costs, complexity, or enforcement difficulties. *See id.* 10 ¶ 1760d, at 387 ("[T]he rule of reason plaintiff bears the burden of persuading the tribunal that an alternative is substantially less restrictive and is virtually as effective in serving the legitimate objective without significantly increased cost.").[5]

Courts should therefore search for alternatives that would truly result in substantially less restraint of the market while preserving the efficiencies of the existing restraint and avoiding imposition of

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[4] *See also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.2 (2000) (proffered alternative must be a "practical, significantly less restrictive means" of achieving the procompetitive aim).

[5] Although paragraph 1760 of the Areeda & Hovenkamp treatise is specifically concerned with tying practices, paragraph 1760d pertains to the less restrictive alternative inquiry under the rule of reason more broadly. *See* 10 Areeda & Hovenkamp ¶ 1760d, at 385 ("[W]e recall briefly how claims of justification fare under the reasonableness test.").

additional costs. If the proffered alternative is simply to refine existing restraints (by, for example, changing the level of a price cap), that strongly suggests that the court is being asked to second-guess the reasoned judgment of industry participants rather than to enforce the Sherman Act's prohibition on unreasonable restraints of trade. *See Sylvania*, 433 U.S. at 58 n.29 ("We are unable to perceive significant social gain from channeling transactions into one form or another."); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227-28 (D.C. Cir. 1986) (Bork, J.) ("We do not believe, however, that . . . the Supreme Court intended that lower courts should calibrate degrees of reasonable necessity. That would make the lawfulness of conduct turn upon judgments of degrees of efficiency. There is no reason in logic why the question of degree should be important.").

B. The Ninth Circuit's approach to the less restrictive alternative standard conflicts with this previously settled law.

The approach taken by the Ninth Circuit does not fit the principles described above. The Ninth Circuit employed a least restrictive alternative standard. The court did not identify a different *method* for achieving the procompetitive justifications it accepted. Rather, the court simply chose a different cap for student-athlete compensation out of revenues generated by the use of athlete images and likenesses. While increasing

allowable payments to students from full grant-in-aid to cost of attendance may be a fairer policy, that is not a judgment the antitrust laws authorize courts to make.

The Ninth Circuit's rule is essentially the same basic approach taken by the current NCAA rules (capping payments to student athletes) and simply adds additional costs. This Court should therefore reverse the Ninth Circuit's liability finding and hold that a defendant may not be held liable under Section 1 of the Sherman Act simply by virtue of the fact that a federal district court can conceive of a better way to implement a restraint that has been found reasonably necessary to a valid business purpose. Given that preserving amateurism in college sports and promoting integration of student athletes with their academic communities are at the core of the NCAA's mission, and that the plaintiff class has failed to identify a substantially less restrictive alternative to capping payments to players for promoting those aims, the court should have concluded that the procompetitive benefits outweigh any alleged competitive harms. *See generally McCormack v. NCAA*, 845 F.2d 1338, 1344-45 (5th Cir. 1988) ("The NCAA markets college football as a product distinct from professional football. The eligibility rules create the product and allow its survival in the face of commercializing pressures. The goal of the NCAA is to integrate

athletics with academics. Its requirements reasonably further this goal.”).

In light of the admitted importance of the NCAA’s compensation restrictions to its mission as an amateur athletics organization, application of this Court’s precedents and the well-recognized antitrust principles articulated by, at a minimum, the Second, Third, Fifth, and D.C. Circuits should have led to a holding that the restrictions did not violate the antitrust laws. The Ninth Circuit’s condemnation of those restrictions creates massive uncertainty about the scope of the less restrictive alternative test and the degree to which courts may condemn organizational rules based on a finding that minor changes could be fairer. This Court should review the Ninth Circuit’s holding to eliminate the confusion that the decision below has caused.

II. THIS COURT’S REVIEW IS NECESSARY TO PREVENT FEDERAL COURTS FROM MICROMANAGING ORGANIZATIONAL RULES

This Court has cautioned that antitrust courts are “ill-suited” to “act as central planners, identifying the proper price, quantity, and other terms of dealing” in place of the judgments of industry participants. *See Trinko*, 540 U.S. at 408. *See also Chicago Prof. Sports Ltd. P’ship v. NBA*, 95 F.3d 593, 597 (7th Cir. 1996) (Easterbrook, J.) (“[T]he antitrust laws do not deputize district judges as one-man regulatory agencies.”). But the decision below allows

antitrust courts to do just that by imposing their own views as to optimal organizational policy.

That holding has profound and sweeping implications for antitrust enforcement. Any number of amateur sports leagues, amateur arts or performance organizations, or other organizations could be open to suit. For example, a court could easily follow the reasoning below to require compensation for Little League baseball players at a level deemed "fair" by a district judge. Similarly, a kennel club could be required to alter its breed standard if a breeder claims to have been excluded because their dogs are an inch or two shorter than the adopted standard. *Cf. Jack Russell Terrier Network v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1038 n.5 (9th Cir. 2005) (noting height requirements in Jack Russell Terrier standards). Courts would have free rein to rewrite any rule adopted by an organization plausibly found to have restrained a relevant market if they can identify modest changes that may (or may not) be fairer.

And the approach below raises the broader concern noted by *American Motor Inns* that restraints reasonably necessary to achieving valid business objectives could be subject to antitrust condemnation—including exposure to treble damages—based solely on the creativity of antitrust lawyers imagining marginally less restrictive approaches. With only a modest extrapolation from the reasoning of the decision below, a court could

decide that it may alter a hospital's residency training requirements for performing procedures if it believes a shorter training period would suffice. *Cf. Cnty. of Tuolumne v. Sonora Community Hosp.*, 236 F.3d 1148, 1152 (9th Cir. 2001) (upholding hospital's 36-month residency training requirement for physicians to perform C-sections). A court could even determine that the price for a joint-venture's products set by the parties to the venture should be set at a different level. *Cf. Dagher*, 547 U.S. at 6-7. The possibilities are only limited by the imagination of the antitrust bar and the willingness of the bench to indulge it.

This Court should not tolerate the massive uncertainty created by the decision below. It should therefore grant the NCAA's petition for *certiorari*, reverse the judgment below, and hold that a defendant cannot be subject to antitrust liability merely because a court can identify potential improvements to a restraint that is conceded to be reasonably necessary to a valid business purpose.

CONCLUSION

The petition for a writ of *certiorari* should be granted and the judgment of the Court of Appeals should be reversed.

Respectfully Submitted,

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