No. 15-1388

In The Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Petitioner,

vs.

EDWARD J. O'BANNON, JR., *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The National Federation of State High School Associations ("NFHS") is the national service and administrative organization of high school athletics. Founded in 1920, and headquartered in Indianapolis, the NFHS is composed of one high school athletic or activities association in each of the fifty states and the District of Columbia. Approximately 90 percent of the high schools in the United States are members of state high school athletic or activities associations that are in turn members of the NFHS.

The NFHS's mission is to provide leadership and national coordination for the administration of interscholastic activities, including athletics. The NFHS works to enhance the educational experiences of high school students through their participation in interscholastic athletics and activities. It strives to promote participation and sportsmanship in athletics, to develop good citizens through this participation, and to enrich the educational experience of students. The NFHS also seeks to protect the role that interscholastic athletics plays in education and to develop solutions to problems related to high school athletics.

The NFHS, along with its state association members, believes strongly that amateurism is not

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[1] Counsel for the parties have been given 10-day notice and have consented to the filing of this brief. No counsel for a party authored any portion of this brief, and no person other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

only valuable for its own sake, but is a key component of a well-rounded education at both the college and high school levels. It is concerned that the Ninth Circuit's opinion gives insufficient weight both to amateurism in educational settings and to the NCAA's efforts to protect it.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision undervalues amateurism both for its own sake and as a key part of college education. It misconstrues the NCAA's role in setting the definitional limits of amateurism – and in enforcing those limits – as a condition for participating in college athletics. By applying a detailed Rule of Reason analysis to this core activity, it hinders the NCAA's future ability to set the rules for college athletics, thereby threatening not just the NCAA's ability to maintain amateurism in American colleges, but the integrity of high school sports as well. And in the process, it departs from this Court's reasoning in its 1984 *Board of Regents* opinion.

The Court should grant the petition and address the Ninth Circuit's misapplication of antitrust law to the NCAA's legitimate efforts to maintain college athletics as a non-professional vocation.

ARGUMENT

I. The Ninth Circuit's Opinion Misconstrues The Definitional Nature Of The NCAA's Regulation, Misapplies The Rule Of Reason, And Departs From This Court's Ruling In *NCAA v. Board of Regents of The University of Oklahoma*.

The Ninth Circuit's opinion threatens the future of college amateur sports, even as it misapplies antitrust law. Subjecting the NCAA's "amateurism" rules – rules that essentially define college athletics by establishing ground rules for student-athletes' participation – to an extended and rigorous Rule of Reason analysis will make it more difficult for the NCAA to maintain college athletics as an amateur endeavor. It likely will further erode the distinction between amateur and professional athletes, with negative implications for college and high school sports generally. And it will muddy antitrust enforcement by ignoring this Court's view that some conduct – particularly joint agreements that make possible products that would not otherwise exist – should be subject to only the most general antitrust scrutiny before being readily upheld.

A. Amateurism Has Inherent Worth, Particularly In Educational Settings, And The American Public Recognizes And Appreciates The Amateur-Professional Distinction.

The NCAA's detailed rules on how athletes can maintain their amateur eligibility – and thus compete in college sports – are essential to creating a distinct product that consumers appreciate and value.

Amateur sports competition has a long and distinguished history. Watching individuals compete for the love of their sport rather than for direct monetary gain is part of what sets college sports apart. Allowing college athletes to receive compensation in any form not tied to their college education not only would threaten the unique nature of college athletics, and thus much of its appeal, but also would diminish the ideal of amateurism that has endured for so many generations.

The NFHS's own experience with high school sports informs this view. Along with Ivy League and Division III college athletics – where athletic scholarships are forbidden – the approximately 19,000 American high schools, with close to eight million student-athletes, may be the places where the tradition of amateurism has most firmly taken hold. *See Sports Participation Increases Again, Tops 7.8 Million for First Time*, High School Today Mag., September 2015, at 22-23, http://www.nfhs.org/uploadedfiles/3dissue/HSToday/2015issues/september2015/index.html (stating, based on data from NFHS member organizations,

that in 2014-15, some 7,807,047 student-athletes participated in high school athletics at more than 19,000 American high schools). At the high school level, student-athletes are most clearly "part of the school." They have pride of place, as do their non-athlete peers, in large part because of their schools' athletic programs. Studies show – and the NFHS's experience confirms – that student-athletes outperform their peers academically. *See The Case for High School Activities*, Nat'l Fed. State High School Ass'ns, https://www.nfhs.org/articles/the-case-for-high-school-activities/#chapter1 (last visited June 13, 2016) (citing supporting studies and concluding that "[s]tudents who compete in high school activity programs have better educational outcomes, including higher grades, higher achievement test scores, and higher educational expectations beyond high school"). Student-athletes are ambassadors for their schools and help foster a sense of school community. They are part of the student body in ways that paid athletes could never be.

While commercialism has inevitably intruded on college sports, particularly in popular Division I sports like football and basketball, the NCAA's careful attempts to preserve the spirit of amateurism at the college level still yield important benefits. College athletes enjoy a measure of the same school identity that was present during their high school years. Preserving the direct link between education and college athletics promotes this identity, which benefits students, student-athletes, and the popularity of college

sports. Requiring athletic achievement to be linked directly to education helps the public distinguish college athletics from minor league sports, where, as this Court has already observed, the level of competition may be similar, but the public's perception may be markedly different. *See NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 101-02 (1984). Directly linking athletics and education promotes pride of school, and thus consumer interest, not to mention educational benefits for the athletes themselves.

All these benefits depend significantly on the NCAA's ability to continue to define and maintain amateurism at American colleges. The NFHS sees these same benefits at the high school level, and thus fully supports the NCAA's efforts to limit the spread of professionalism. Any undue limitations placed on the NCAA's ability to regulate amateurism at the college level could similarly threaten amateurism as a guiding principle in American high school athletics.

The Ninth Circuit recognized below the procompetitive benefits of keeping amateurism at the forefront of college athletics. *See O'Bannon v. NCAA*, 802 F.3d 1049, 1073 (9th Cir. 2015) ("We therefore conclude that the NCAA's compensation rules serve the two procompetitive purposes identified by the district court: integrating academics with athletics, and 'preserving the popularity of the NCAA's product by promoting its current understanding of amateurism.'") (quoting *O'Bannon v. NCAA*, 7 F.Supp.3d 955, 1005 (N.D. Cal. 2014)). And this Court has stressed the key role the NCAA plays in defining the essential nature of college

athletics by keeping amateurism alive. *See Board of Regents*, 468 U.S. at 102 ("Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable").

Having recognized the procompetitive nature of the NCAA's efforts to promote and define amateurism, however, the Ninth Circuit then subjected those same efforts to a detailed Rule of Reason analysis, finding some of the NCAA's past rules to have been unreasonable restraints even though these rules went to the definition of amateurism itself. This level of micromanagement threatens to subject the NCAA to extended, costly litigation, in which every aspect of its rules preserving amateurism would be subject to a full-scale antitrust challenge. This Court should grant the NCAA's petition to clarify the scope of the Rule of Reason, particularly as it applies to the NCAA's core ability to define and meaningfully preserve amateurism at American colleges.

B. The Ninth Circuit's Flawed Antitrust Analysis Threatens The Future Of Amateurism In College Sports.

The Ninth Circuit went awry in requiring the NCAA to provide a detailed justification under the Rule of Reason for the particular boundaries it chooses to define amateurism. The NCAA's chosen definition is part of the "rules of the game," necessary for amateur competition to exist in the first instance, *see Board of*

Regents, 468 U.S. at 101-02, and second-guessing that definition as part of an extended antitrust analysis would imperil the NCAA's efforts to promote and sustain amateurism in the future. The opinion below also contravenes this Court's antitrust decisions, particularly its explanation in *Board of Regents* of the NCAA's need for "ample latitude" as it exercises its core responsibility for preserving amateurism as an essential part of college athletics. *See* 468 U.S. at 120.

1. The NCAA, As The Guardian Of Amateurism At The College Athletic Level, Needs Leeway In Defining And Regulating Amateur Status.

This case presents a classic example of a restraint this Court has already acknowledged as legitimate – one that is "essential if the product is to be available at all." *Board of Regents*, 468 U.S. at 101. For college athletics to retain its unique appeal as a haven for "amateurism," it is necessary for a governing body – here the NCAA – to define that term. How the NCAA does so should not be subject to an extended antitrust analysis when its obvious purpose is to create and maintain the very product at issue.

This Court has already addressed the key role the NCAA plays in preserving amateurism, and has stressed the need for latitude as it does so:

> 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.

468 U.S. at 120.

Here, far from providing latitude, the Ninth Circuit subjected the NCAA's amateurism rules to overly detailed scrutiny. Its extended inquiry in turn led to a puzzling conclusion – a holding that under the Rule of Reason, a rule that allowed college athletes to receive full tuition and the full cost of room and board was an impermissible restraint of trade, while the same rule with a relatively minor adjustment to allow reimbursement for the "full cost of attendance" was not. *See generally* 802 F.3d at 1074-78. The Ninth Circuit's own decision acknowledges the considerable flexibility that must be accorded to joint efforts that make competitive products possible in the first instance. *See id.* But even as the Ninth Circuit purported to forgo any detailed meddling in the NCAA's choice of ground rules for college athletics, it engaged in precisely the sort of "micromanagement" it was trying to avoid.

Not every alleged antitrust violation should be examined under a full Rule of Reason inquiry. As this Court has suggested, some – particularly the sort of restraint alleged here – can be affirmed with only a minimal analysis. *See American Needle, Inc. v. NFL*, 560 U.S. 183, 203 (2010); *Board of Regents*, 468 U.S. at 101 (noting that college athletics is "an industry where horizontal restraints on competition are essential if the

product is to be available at all"). Just as some Rule of Reason inquires can conclude after a "quick look" that conduct is anticompetitive, so too should others be able to find conduct procompetitive after a similarly minimal inquiry, especially when the challenged conduct is in fact necessary for competition even to exist.

This Court in *American Needle* emphasized that the Rule of Reason is "flexible," and that joint sport ventures should not be "trapped by antitrust law." 560 U.S. at 202-03. It specifically recognized that the Rule of Reason does not always require a detailed inquiry:

> [D]epending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it "can sometimes be applied in the twinkling of an eye."

560 U.S. at 203 (quoting *Board of Regents*, 468 U.S. at 109 n. 39). As part of this same discussion of minimal Rule of Reason inquiry, the Court alluded to the exact situation presented here, noting that "[j]oint ventures and other cooperative arrangements are also not usually unlawful . . . where the agreement . . . is necessary to market the product at all." 560 U.S. at 203 (quoting *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 23 (1979)).

Setting the precise limits of "amateurism" is essential for amateur college athletics to exist. Adopting the Ninth Circuit's decision – rejecting the NCAA's previous determination that reimbursement for the full cost of attendance threatened amateurism, and instead finding that decision to have been an antitrust

violation after a lengthy Rule of Reason inquiry – will necessarily hinder the NCAA's future attempts to set and maintain the essential, amateur nature of college sports. It will deprive the NCAA of the reasonable latitude it needs to protect the very existence of a product with acknowledged procompetitive benefits.

2. The Ninth Circuit Has Misconstrued *NCAA v. Board of Regents*.

Contrary to the Ninth Circuit's decision, this Court's analysis and holding in *Board of Regents* actually fully support the NCAA's position. Because the restraint here was a definitional one – effectively creating the product (amateur college athletics) now at issue rather than restricting price or output in some unrelated area – a detailed Rule of Reason analysis is unnecessary, and in fact counter-productive. Requiring such scrutiny in future cases would make college athletics more vulnerable to attacks on amateurism, thereby threatening in turn the NFHS's concern with American high school athletics.

The conduct at issue in *Board of Regents* was not definitional, nor was it even closely related to the NCAA's rules defining amateurism. The Court in *Board of Regents* in fact repeatedly emphasized the importance of amateurism to the NCAA's core product, and expressly recognized the reasonableness of adopting restraints to create and maintain it. Had the challenged restraint in *Board of Regents* been directly related to the NCAA's preservation of amateurism at

the college level, there is little question that it would have been quickly upheld. *See* 468 U.S. at 117 (contrasting "most of the regulatory controls of the NCAA," including "eligibility of the participants," which the Court stated were "justifiable" and "procompetitive," with "specific restraints on football telecasts"). The Court struck down the restraint in *Board of Regents* because it determined it was *not* necessary to defining what constitutes an amateur athlete; it instead was a classic restriction on output that harmed rather than promoted consumer choice. 468 U.S. at 119. Requiring colleges to limit television coverage had no direct link to creating or defining the product itself – amateur college athletics – which the Court had separately recognized was part of the NCAA's core (and procompetitive) function.

The Ninth Circuit misunderstood this concept. It concluded, without significant analysis, that "[w]e are not bound by *Board of Regents* to conclude that every NCAA rule that somehow relates to amateurism is automatically valid." 802 F.3d at 1063. But the NCAA's choice of a particular amateurism definition is not just a rule that "somehow" relates to amateurism; it is part of the defining rule itself. And no one here is claiming "automatic" validity for the NCAA's rules. This Court has already expressly recognized a place for a less stringent antitrust inquiry in some settings, including the present one, where joint actors impose restraints that are essential for the very existence of a product that provides acknowledged procompetitive benefits. *See*, *e.g.*, *American Needle*, 560 U.S. at 203.

The Ninth Circuit seemed to believe that there were just two rigid forms of antitrust scrutiny, "per se illegal" and "Rule of Reason." *See* 802 F.3d at 1063. It found the procompetitive nature of the NCAA's amateurism relevant only to choosing between what it saw as these two extremes. *Id.* But as noted, this Court has suggested that not all Rule of Reason cases are the same, and that in some cases, challenged conduct can – and should – be approved after only minimal inquiry.

This is such a case. The inherent value of amateurism, and the appeal it brings to college sports as a product, justify a quick antitrust affirmance of the NCAA's efforts to protect it. Subjecting these efforts to a full-scale Rule of Reason analysis, instead of allowing a summary resolution, and concluding, as the Ninth Circuit has done, that the NCAA's amateurism rules *must* allow schools to reimburse the "full cost of attendance," misperceives this Court's views on different levels of scrutiny within the Rule of Reason. Insisting on such a detailed and costly antitrust inquiry, one directed at the core function of defining "amateurism" itself, promises to hinder the NCAA's future efforts to halt the encroachment of professionalism, with negative consequences for amateur athletics in colleges, and beyond.

CONCLUSION

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

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