No. 15-

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit affirmed the judgment of the District Court that rules of the National Collegiate Athletic Association ("NCAA") prohibiting college athletes from being paid for the use of their names, images, and likenesses ("NILs") were an unlawful restraint of trade in violation of Section 1 of the Sherman Antitrust Act. However, the Ninth Circuit rejected part of the remedy ordered by the District Court: injunctive relief barring the NCAA from prohibiting its member schools from providing college athletes (as part of their scholarships) up to $5,000 per year in deferred compensation, to be held in trust for college athletes until after they leave college. The questions presented by the Ninth Circuit's rejection of this aspect of the District Court's remedy are:

1. Whether, in determining an appropriate remedy for a violation of Section 1 of the Sherman Act under the "Rule of Reason," a court may treat the restraint itself – here, the agreement among the NCAA and its members prohibiting college athlete compensation, or what the NCAA calls "amateurism" – as a legitimate procompetitive effect.

2. Whether, after finding a violation of Section 1 of the Sherman Act under the Rule of Reason, a court is restricted to awarding relief that the plaintiff proves is "virtually as effective" as the restraint in serving its alleged purposes, "without significantly increased cost."

PARTIES TO THE PROCEEDING

Petitioners are Edward O'Bannon, Oscar Robertson, William Russell, Harry Flournoy, Thad Jaracz, David Lattin, Bob Tallent, Alex Gilbert, Eric Riley, Patrick Maynor, Tyrone Prothro, Sam Jacobson, Damien Rhodes, Danny Wimprine, Ray Ellis, Jake Fischer, Jake Smith, Darius Robinson, Moses Alipate, and Chase Garnham, on behalf of themselves and all others similarly situated.

Respondent is the National Collegiate Athletic Association ("NCAA").

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Edward C. O'Bannon, Jr., et al., on behalf of themselves and all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (Pet. App. 1a) is published at 802 F.3d 1049 (2015). The opinion of the United States District Court, Northern District of California (Pet. App. 76a) is published at *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

JURISDICTION

The District Court had federal question jurisdiction over Petitioners' federal antitrust claims pursuant to 28 U.S.C. § 1331. The Court of Appeals denied Petitioners' timely petition for rehearing en banc on December 16, 2015. Pet. App. 185a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

STATEMENT

This case presents fundamental questions of federal antitrust law in an important context: the multi-billion-dollar business of college athletics. In

this case, the Ninth Circuit unanimously affirmed the judgment of the District Court that rules of the National Collegiate Athletic Association ("NCAA") prohibiting college athletes from being paid for the use of their names, images, and likenesses ("NILs") were an unlawful restraint of trade in violation of Section 1 of the Sherman Antitrust Act. The Ninth Circuit properly rejected the NCAA's threshold arguments that it is entitled to blanket antitrust immunity under *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984); that the challenged restraint is not commercial; and that the athletes do not suffer injury-in-fact.

However, the Ninth Circuit departed from this Court's decisions and from decisions in other circuits in rejecting a portion of the remedy ordered by the District Court. The District Court had permanently enjoined the NCAA from prohibiting its member schools from giving college athletes scholarships (i) up to the full cost of attendance at their respective schools and (ii) up to $5,000 per year in deferred compensation, to be held in trust for college athletes until they leave college. Pet. App. 182a-184a. The Ninth Circuit incorrectly held that the District Court erred in imposing the second part of this remedy — despite the District Court's detailed findings, based in large part on the NCAA's own evidence and admissions during five years of litigation and a three-week bench trial, that voluntary payments of up to $5,000 (held in trust) "*would not harm consumer demand for the NCAA's product*" and are a less restrictive alternative to the restraint. Pet. App. 123a (emphasis added).

The Ninth Circuit's decision creates two points of conflict with precedent of this Court and other courts. First, in eliminating a portion of the District Court's remedy, the Ninth Circuit improperly credited as a procompetitive benefit the NCAA's conception of "amateurism," which the NCAA defined as the prohibition on college athlete compensation. So defined, "amateurism" is not an "effect" of the restraint at all, much less a procompetitive effect. It is simply another way of describing the restraint itself. In truncating the District Court's remedy, the Ninth Circuit thus impermissibly turned Rule of Reason analysis into a tautology and allowed the NCAA to recharacterize the suppression of competition in compensating college athletes for their NILs as an alleged "procompetitive benefit."

Second, the Ninth Circuit formulated a remedial standard for antitrust violations that is inconsistent with this Court's precedent and decisions in other circuits. The Ninth Circuit incorrectly held that an antitrust plaintiff seeking a remedy for a defendant's violation of Section 1 of the Sherman Act bears the burden of making a "strong evidentiary showing" that the remedy for the defendant's restraint of trade is "viable" and "virtually as effective" in serving the alleged purposes of the restraint, "without significantly increased cost." Pet. App. 51a. The Ninth Circuit was wrong to put the burden on the plaintiff rather than the defendants. Moreover, the Ninth Circuit improperly cabined the authority of district courts by engrafting onto the determination of proper antitrust *remedies* a "less restrictive alternative" test that is applicable only to determinations of *liability* under the Rule of Reason.

This Court has made clear that the antitrust statutes vest the district courts with broad remedial power, with no requirement that the courts make the kinds of findings on which the Ninth Circuit insisted (e.g., that a remedy is "virtually as effective" as the restraint in serving its alleged purposes, "without significantly increased cost"). *Id.* The Ninth Circuit would put an unlawful straitjacket on federal judicial authority and create a standard for antitrust remedies that is at odds with decisions of this Court and other circuits.

This Court's plenary review is amply warranted.

1. ***Introduction.*** College athletics is indisputably big business. Division I football and men's basketball command billions of dollars each year, with NCAA executives, conference commissioners, coaches, and athletic directors earning eye-popping salaries. But the athletes — 98% of whom will never go pro —cannot receive *any* payments whatsoever, by fiat. NCAA rules prohibit current college athletes from receiving compensation, from any source, for, among other things, the use and licensing of their names, images, and likenesses ("NILs") in live game telecasts, videogames, and game re-broadcasts (uses for which professional athletes in the same sports are compensated).

In 2009, Petitioner O'Bannon sued the NCAA, Collegiate Licensing Company ("CLC"), and (later) Electronic Arts, Inc. ("EA") after seeing an unauthorized depiction of himself — a playable "avatar" with matching physical characteristics and his jersey number — in an NCAA college basketball videogame. Pet. App. 7a. O'Bannon and his fellow

class representatives alleged that the NCAA, its member schools, and their co-conspirators have agreed to fix at zero the compensation for the commercial use of Plaintiffs' NILs, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Five years of pre-trial proceedings yielded extensive discovery, a $40 million settlement releasing EA and CLC, the District Court's certification of an injunctive class of current and former Football Bowl Subdivision ("FBS") football players and Division I men's basketball players, and a partial victory for Plaintiffs at summary judgment.

2. ***The District Court's decision.*** In June 2014, the District Court held a bench trial that featured 25 witnesses, most of whom were sponsored by the NCAA. Over three weeks, the District Court had ample opportunity to assess the witnesses' credibility and frequently posed questions to witnesses. Following extensive post-trial briefing, the District Court issued 99 pages of detailed findings of fact and conclusions of law, entered judgment for Plaintiffs, and issued a permanent injunction. Pet. App. 76a-181a, 182a-184a.

The District Court identified two relevant antitrust markets: (1) the college education market, in which schools compete to recruit high school athletes by offering bundles of goods and services that include scholarships, facilities, and other incentives; and (2) the group-licensing market, in which college athletes would license their collective NILs on a group basis for use in television media and videogames absent the restraint. Pet. App. 83a-96a. Proceeding under the Rule of Reason, the District Court turned to the competitive effects of the

restraint. Backed by overwhelming evidence, it found significant anticompetitive effects in the college-education market (but not the group-licensing market) because, absent the restraint, schools would offer compensation for the use of college athletes' NILs that exceeds current scholarship levels and even the true costs of attendance. *Id.* at 129a-158a.

The NCAA acknowledged the restraint — its chief economic expert, Daniel Rubinfeld, presented a case study on the NCAA as a "cartel" in his textbook — but countered at trial that the restraint serves procompetitive purposes by preserving "amateurism" (and, in turn, consumer demand for college sports), maintaining competitive balance among the schools, promoting the "integration of academics and athletics," and increasing output. Pet. App. 100a-121a. The District Court made extensive findings rejecting nearly all of these proposed procompetitive effects,[1] and on appeal the NCAA abandoned all but "amateurism." *Id.* at 158a-170a; Pet. App. 46a.

At trial, the NCAA defined "amateurism" as the prohibition on compensation for college athletes. The District Court, however, found that the NCAA's adherence to its conception of "amateurism" had been inconsistent and that the history of "amateurism" has been fluid and manipulable. Pet. App. 160a-161a. In any event, the District Court

[1] The Court found that restrictions on *large* amounts of NIL compensation "may" help integrate college athletes into their academic communities, but there was no justification for the current rule mandating no NIL payments at all. Pet. App. 168a.

recognized that amateurism was material only to the extent it promoted consumer demand, and it found no evidence to support the NCAA's claim that its prohibition on pay was essential to the popularity of college athletics or that small payments to college athletes would reduce their popularity. In fact, the NCAA's own witnesses acknowledged that consumer demand falls along a continuum, and that modest payments to athletes would be consistent with NCAA interpretations of "amateurism." *Id.* at 162a. Neal Pilson, a former president of CBS Sports and the NCAA's expert on consumer interest, testified that "a million dollars would trouble me and $5000 wouldn't, but that's a pretty good range." SER180. Bernard Muir of Stanford testified that while payments of six or seven figures per athlete would be too high, some lesser sum would not undermine "amateurism." SER365.

Ultimately, the District Court found that the "driving force" behind the popularity of college sports is not any prohibition on pay but rather school loyalty and geography. Pet. App. 110a-111a. The District Court cited a wealth of evidence in support of this conclusion, and noted that, by contrast, there was no credible evidence to support the NCAA's claim that the prohibition on compensation has contributed to the popularity of college athletics. *Id.* at 162a-163a. At various junctures, the District Court found the NCAA's evidence "unpersuasive," "not sufficient," "flaw[ed]," and "not credible." *Id.* at 101a, 104a, 107a, 119a, 160a, 162a, 164a, 165a, 166a.

Although the District Court rejected the claim that the NCAA's flat ban on NIL compensation

served to promote consumer demand for college sports, it nevertheless found that preventing schools from paying college athletes "***large*** sums of money while they are enrolled in school ***may*** serve to increase consumer demand for its product." *Id.* at 170a (emphasis added). Notably, such a restraint (one that bars only "large" NIL payments above the cost of attendance) went far beyond the absolute ban on NIL pay for athletes that the NCAA had adopted and the plaintiffs had challenged.

Moreover, the District Court found that, even if the challenged restraint could be justified by its effect on consumer demand, two readily identifiable alternatives existed:

> First, the NCAA could permit FBS football and Division I basketball schools to award stipends to student-athletes up to the full cost of attendance, as that term is defined in the NCAA's bylaws, to make up for any shortfall in its grants-in-aid. Second, the NCAA could permit its schools to hold in trust limited and equal shares of its licensing revenue to be distributed to its student-athletes after they leave college or their eligibility expires. The NCAA could also prohibit schools from funding the stipends or payments held in trust with anything other than revenue generated from the use of the student-athletes' own names, images, and likenesses. . . . Neither of these practices would undermine consumer demand for the NCAA's products nor hinder its member schools' efforts to educate student-athletes.

Pet. App. 173a, 177a.

After entering judgment for Plaintiffs, the District Court permanently enjoined the NCAA from prohibiting its member schools from awarding scholarships up to the full cost of attendance or providing up to $5,000 per year in deferred payments to student athletes. Pet App. 182a-184a.

3. ***The Decision Below.*** The Ninth Circuit (per Bybee, J., and Quist, J. (sitting by designation), with Thomas, C.J., concurring in part and dissenting in part) affirmed in part and reversed in part. First, the Ninth Circuit unanimously affirmed the NCAA's antitrust liability for fixing the price that college athletes pay to attend college and properly rejected the NCAA's claim to immunity under *Board of Regents*. Pet. App. 22a-29a. The Ninth Circuit recognized that the NCAA's conduct imposed a "significant anticompetitive effect on the college education market." *Id.* at 46a. The Court found the requirement that NCAA members "value the athletes' NILs at zero" constituted a "price fixing agreement" governing "one component of an overall price." *Id.* at 43a, 45a. The Court of Appeals opined that the harm suffered by college athletes subject to this price fixing agreement "satisfied the plaintiffs' initial burden under the Rule of Reason." *Id.* at 44a.

The Ninth Circuit next explained that the NCAA's procompetitive justification focused solely on the supposed benefits of "the promotion of amateurism." *Id.* at 46a. The Court of Appeals rejected the claim that amateurism increased choice available to student-athletes." *Id.* at 47a-48a. And it deemed "irrelevant" the NCAA's "historical commitment to amateurism." *Id.* at 47a, 49a. Accordingly, the Ninth Circuit correctly affirmed the

District Court's injunction allowing NCAA schools to award scholarships, or "grants-in-aid," that cover the full cost of attending college, rather than simply tuition, room, board and books. *Id.* at 52a-55a.

However, the Ninth Circuit improperly rejected the second part of the relief ordered by the District Court: the portion of the injunction allowing NCAA schools to pay college athletes up to $5,000 in deferred compensation for their NILs. In overturning that part of the remedy, the Ninth Circuit embraced the tautology proposed by the NCAA – that "amateurism" justified the non-payment of college athletes because "not paying student athletes is *precisely* what makes them amateurs." *Id.* at 56a (emphasis in original); *id.* at 57a n.20 ("[I]f you're paid for performance, you're not an amateur."). Thus, despite paying lip service to the point that "amateurism" was relevant only because of its effect on consumer demand (*id.* at 56a n.20), the Ninth Circuit accepted the prohibition on athlete compensation as a procompetitive effect of the restraint and, in so doing, validated a (supposedly) procompetitive effect that was *identical* to the restraint.

Following from its embrace of the NCAA's tautology, the Court of Appeals framed the relevant question regarding the trust fund remedy as "[w]hether the alternative of allowing students to be paid NIL compensation unrelated to their educational expenses is 'virtually as effective' in preserving amateurism as *not* allowing compensation." *Id.* at 55a-56a (emphasis added). This formulation removed the critical question — the effect on consumers — from the analysis, making

"amateurism," or the prohibition on college athlete compensation, an end in itself. The result was to accept as a legitimate "procompetitive" interest the *suppression* of competition in the compensation of college athletes for their NILs.

The Ninth Circuit next departed from this Court's precedent by requiring Petitioners to carry the burden of justifying, as a remedy for the NCAA's violation of the Sherman Act, the trust fund alternative to the restraint that the trial court devised. Pet. App. at 57a-62a. The Ninth Circuit explained: "We think that plaintiffs must make a strong evidentiary showing that its alternatives are viable here. Not only do plaintiffs bear the burden at this step, but the Supreme Court has admonished that we must generally afford the NCAA 'ample latitude' to superintend college athletics." *Id.* at 51a (*quoting Bd. of Regents*, 468 U.S. at 120). The Court of Appeals also restricted the discretion of the District Court to impose a remedy for the NCAA's violation of the Sherman Act, declaring that the plaintiffs were required to prove that any alternative to the challenged NCAA rules, including the trust fund remedy, must be "virtually as effective" in serving the alleged purposes of the restraint "without significantly increased cost." *Id*. The Court of Appeals further instructed that its decision "should be taken to establish only that where . . . a restraint is *patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it replaced with a less restrictive alternative." *Id.* at 54a.

Thus, the Ninth Circuit both improperly imposed on the plaintiffs the burden of proof for establishing a proper remedy and straightjacketed the remedial authority of the district courts.

Chief Judge Thomas concurred in part and dissented in part. He agreed with the majority's decision to affirm the District Court's finding of an antitrust violation under the Rule of Reason. But he disagreed with the majority both as to the significance of "amateurism" as an end in itself and as to the standard of review of the District Court's remedy. "Plaintiffs are not required, as the majority suggests, to show that the proposed alternatives are 'virtually as effective' at preserving the concept of amateurism as the NCAA chooses to define it." Pet. App. 73a. Rather, the Chief Judge stated, the proper inquiry is to "determine whether allowing student-athletes compensation for their NILs is 'virtually as effective' in preserving *popular demand for college sports* as not allowing compensation." *Id.* at 69a-70a (emphasis in original). Thus, he observed that consumer demand, *not* "amateurism," is the concern of antitrust: "[i]n terms of antitrust analysis, the concept of amateurism is relevant only insofar as it relates to consumer interest." *Id.* at 70a. The Chief Judge added, "we are not tasked with deciding what makes an amateur an amateur."; "[T]he 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.29-73a n.30.

Examining the District Court's findings regarding the impact of the trust fund remedy on consumer demand, Chief Judge Thomas would have upheld the remedy in its entirety, noting that

"[t]here was sufficient evidence in the record to support the award" of injunctive relief. *Id.* at 66a. He cited "testimony from at least four experts – including three experts presented by the NCAA – that providing student-athletes with small amounts of compensation above their cost of attendance most likely would not have a significant impact on consumer interest in college sports." *Id.* at 66a.

On rehearing, Chief Judge Thomas voted to grant plaintiffs' petition for hearing en banc. Pet. App. 185a-186a.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Embrace of "Amateurism" as a Valid Procompetitive Interest for the Purpose of Determining a Proper Remedy Is Inconsistent with Supreme Court Precedent and Conflicts with Cases in Other Circuits.

In reviewing the District Court's deferred compensation remedy, the Ninth Circuit improperly accepted the NCAA's asserted interest in "amateurism" as a legitimate procompetitive justification. Defined by the NCAA as the prohibition on pay, "amateurism" is the same thing as the restraint. The Ninth Circuit's reasoning was entirely tautological: the prohibition on athlete compensation for NIL use (i.e., the restraint) is necessary to preserve the prohibition on compensation (i.e., "amateurism"). By crediting an asserted procompetitive effect that merely replicated the challenged restraint, the Ninth Circuit departed from the decisions of this Court and the appellate

courts that reject the suppression of competition as a procompetitive effect.

Further, by removing consumer interest from the framework, the Ninth Circuit departed from this Court's instruction that the antitrust laws turn on competition, not ill-defined and manipulable interests such as "amateurism." As Chief Judge Thomas observed, "[i]n terms of antitrust analysis, the concept of amateurism is relevant only insofar as it relates to consumer interest." Pet. App. 70a.

A. The Ninth Circuit's Decision Conflicts with This Court's Precedent.

In contrast to the Ninth Circuit, this Court has stressed the central role of competition in Rule of Reason analysis: "In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951).

The Ninth Circuit's tautological approach in evaluating the District Court's trust fund remedy conflicts with a century of this Court's precedent because it allowed the NCAA to identify the avoidance of competition in the payment of college athletes — or "amateurism" — as a legitimate procompetitive interest. In *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897), this Court opined that the antitrust laws do not permit a

defendant to establish a legally cognizable interest in the suppression of competition: "These considerations are, however, not for us. If the act ought to read as contended for by defendants, congress is the body to amend it, and not this court, by a process of judicial legislation wholly unjustifiable." *Id.* at 340. Similarly, in *United States v. Joint Traffic Assn.*, 171 U.S. 505 (1898), this Court rejected a defendant's attempt to define its interest as the elimination of competition. *Id.* at 576 ("It is stated that the only resort open to railroads to save themselves from the effects of a ruinous competition is that of agreements among themselves to check and control it.").

And this Court observed in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), that "restraints of trade within the purview of the statute . . . [can]not be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts, or the wisdom or want of wisdom of the statute which prohibited their being made." *Id.* at 65; *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-21 (1940) ("The elimination of so-called competitive evils is no legal justification for" the challenged conduct. "Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing.").

The Ninth Circuit's decision likewise conflicts with *National Soc. of Prof'l Engineers v. United States*, 435 U.S. 679 (1978), which rejected an organization's attempt to defend a restraint of trade on the ground that "competitive pressure to offer engineering services at the lowest possible price

would adversely affect the quality of engineering" and harm public safety. *Id.* at 685. This Court characterized the defendant's claim that price competition posed a "potential threat . . . to the public safety and the ethics of its profession" as "nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.* at 695. Because the legislative judgment at the heart of the Sherman Act is "that competition is the best method of allocating resources in a free market, . . . the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.* at 695-96.

Similarly, in *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 448 (1986), this Court rejected a dental association's attempt to defend its refusal to submit x-rays to dental insurers for use in benefit determinations. The defendants claimed their refusal improved quality of care because insurance determinations based on x-rays, rather than a full diagnostic evaluation, were more likely to be wrong. *Id.* at 462. The Court rejected this defense as "illegitimate" because it depended on the premise that "an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices." *Id.* at 463. Consequently, "noncompetitive quality-of-service justifications" are not cognizable to support a restraint under the Rule of Reason. *Id.* at 463. *See also F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990) (holding agreement of private attorneys to refuse to accept criminal appointments was an unlawful restraint under the Sherman Act; rejecting claim that improved "quality

of representation" justified "an otherwise unlawful restraint of trade").

The Ninth Circuit improperly credited the NCAA's asserted interest in the suppression of competition in the payment of college athletes for use of their NILs (i.e., "amateurism") as a legitimate procompetitive justification. It thereby eliminated, or assumed away, the core question of the impact of suppressing such competition on consumer interest in college sports. The Ninth Circuit's decision conflicts with this Court's precedent.

B. The Ninth Circuit's Judgment Conflicts with Decisions in Other Circuits.

The Ninth Circuit's decision is firmly in conflict with Tenth Circuit precedent and with cases in other circuits.

In *Board of Regents of Univ. of Oklahoma v. Nat'l Collegiate Athletic Ass'n*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984), the Tenth Circuit relied on *Nat'l Society of Prof'l Engineers* to reject the NCAA's argument that restraints on television rights promote athletically balanced competition and support "amateurism." The Tenth Circuit explained that "[t]he Sherman Act will not countenance an argument that the nature of a product or an industry structure is such that something other than competition is desirable." *Id.* at 1154. In a subsequent case, the Tenth Circuit reaffirmed that, in evaluating the lawfulness of a restraint, the only relevant "public interest" is "the effects of the alleged restraint on competition." *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 974 (10th Cir. 1990).

In *Law v. Nat'l Collegiate Athletic Ass'n*, the Tenth Circuit applied these principles under the Rule of Reason to invalidate an NCAA rule that "limit[ed] annual compensation of certain Division I entry-level coaches to $16,000." 134 F.3d 1010, 1012 (10th Cir. 1998). The Tenth Circuit recognized that the NCAA rule had anticompetitive effects because it was "a naked, effective restraint on market price." *Id.* at 1019. Although the NCAA asserted certain purported procompetitive interests – such as "retaining entry-level coaching positions [and] reducing costs," *id.* at 1021 – the Tenth Circuit rejected these justifications as inconsistent with this Court's decisions in *Nat'l Society of Prof'l Engineers* and *Indiana Federation of Dentists*. The Tenth Circuit flatly rejected the argument that "open[ing] up coaching to younger people" was a cognizable justification, noting that even if this consequence "may have social value apart from its effect on competition, we may not consider such values unless they impact upon competition." *Id.* at 1021-22.

Similarly, the Tenth Circuit held that the NCAA's interest in cost reduction could not justify the restraint. "Cost-cutting by itself is not a valid pro-competitive justification." *Id.* at 1022. Relying on *Nat'l Society of Prof'l Engineers*, 435 U.S. at 695, the court held:

> The NCAA adopted the REC Rule because without it competition would lead to higher prices. The REC Rule was proposed as a way to prevent Division I schools from engaging in behavior the association termed "keeping up with the Joneses," i.e., competing. However, 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.

Law, 134 F.3d at 1022-23.

The Ninth Circuit's acceptance of the NCAA's inconsistent and malleable conception of "amateurism" as procompetitive is squarely in conflict with this Tenth Circuit precedent. It also conflicts with decisions in other circuits. For example, in *United States v. Capitol Serv., Inc.*, 756 F.2d 502 (7th Cir. 1985), the Seventh Circuit held that motion picture "split" agreements between exhibitors were per se illegal under the Sherman Act and upheld a nationwide injunction against them. Relying on *Professional Engineers*, the Seventh Circuit explained that "any supposed benefits from the restriction of competition were irrelevant under the appropriate Rule of Reason analysis." *Id.* at 505. In *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992), the Seventh Circuit reaffirmed that "[a]greements limiting to whom, and how much, a firm may sell are the defining characteristics of cartels and may not be invoked as justifications of a cutback in output."

The Ninth Circuit departed from these decisions by accepting as a valid procompetitive benefit a conception of "amateurism" that is synonymous with the restraint itself.

C. *Board of Regents* Does Not Support the Ninth Circuit's Decision.

This Court's decision in *Board of Regents* does not support the Ninth Circuit's reliance on "amateurism" to invalidate the District Court's trust

fund remedy either. In that case, this Court held that the NCAA's plan for televising college football games was a horizontal agreement in restraint of trade and invalid under the Rule of Reason. The Court explained that its decision to apply Rule of Reason rather than per se invalidity was "not based . . . on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics." *Id.* at 100-01. Indeed, the Court observed that it is "well settled that good motives will not validate an otherwise anticompetitive practice" and cited a long line of venerable antitrust precedents condemning private self-regulation schemes under the Sherman Act, even when they purported to achieve a positive social outcome. *Id.* at 101 n.23.

Thus, *Board of Regents* applied the Rule of Reason to find an antitrust *violation*, not to uphold an anticompetitive restraint under the rubric of "amateurism." This Court explained that "the NCAA's historic role in . . . amateur athletics" did not water down the applicable antitrust standard. *Id.* at 101. Instead, this Court emphasized the role of consumer demand in the Rule of Reason analysis. *Id.* at 119-20.

Board of Regents does not support the Ninth Circuit's decision in this case.

II. The Ninth Circuit's Decision to Require Plaintiffs to Justify Remedies for Antitrust Violations and Restrict the Remedial Power of District Courts Is Inconsistent with Supreme Court Precedent and Conflicts with Cases in Other Circuits.

The Ninth Circuit required plaintiffs to carry the burden of justifying, as a remedy for the NCAA's violation of the Sherman Act, the trust fund alternative to the restraint that the trial court devised. Pet. App. 51a. The Court of Appeals opined: "We think that plaintiffs must make a strong evidentiary showing that its alternatives are viable here." *Id*.

The Ninth Circuit also restricted the discretion of district courts to remedy violations of the Sherman Act, by grafting a "less restrictive alternatives" test (which is part of the Rule of Reason for determining antitrust *liability*) onto the standard for reviewing the District Court's *remedy*. Invoking the "less restrictive alternatives" test, the Ninth Circuit specifically held that, "to be viable under the Rule of Reason," the District Court's remedy "must be 'virtually as effective' in serving the procompetitive purposes of the NCAA's current rules, and 'without significantly increased cost.'" *Id.*

Under its new legal standard, the Ninth Circuit reversed the District Court's detailed findings, after five years of litigation and a three-week bench trial, that voluntary payments of up to $5,000 held in trust "would not harm consumer demand for the NCAA's product." Pet. App. 123a. As Chief Judge Thomas recognized, "[t]here was sufficient evidence in the record [numerous undisputed facts and the

testimony of 'at least four experts'] to support the award" of injunctive relief. Pet. App. 66a.

The Ninth Circuit's decision warrants review because it conflicts with this Court's precedent in two respects. First, the Ninth Circuit assigned the burden of proof to the wrong party. This Court has made clear the defendant bears the burden of proving that a remedy for an antitrust violation is unrelated to a legitimate purpose of antitrust law, or addresses a legitimate goal in an unreasonable way. Here, the Ninth Circuit improperly put the burden on the plaintiffs to justify the District Court's selection of a remedy.

Next, the *substance* of the legal test created by the Ninth Circuit improperly restricts the authority of district courts to remedy antitrust violations, and the ability of plaintiffs to secure relief. The Ninth Circuit's standard improperly would limit antitrust relief to injunctions that qualify as "less restrictive alternatives" under the Rule of Reason. The Court of Appeals then confined district courts' remedial discretion even further by instructing that "an antitrust court can and should invalidate [a restraint] and order it replaced with a less restrictive alternative" only where it "is *patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives." *Id.* at 54a (emphasis in original).

A. The Ninth Circuit's Decision to Require Plaintiffs to Carry the Burden of Proof for Justifying Antitrust Remedies Conflicts with Precedent In This Court and Other Circuits.

The Ninth Circuit's judgment creates a conflict with this Court's precedent and the decisions of other circuits by putting the burden on the plaintiffs, rather than the defendant NCAA, with respect to the District Court's trust fund remedy for the NCAA's violation of the Sherman Act. As Chief Judge Thomas observed, "Plaintiffs are not required, as the majority suggests, to show that the proposed alternatives are 'virtually as effective' at preserving the concept of amateurism as the NCAA chooses to define it." Pet. App. 73a.

This Court has made clear that, once an antitrust violation is found, district courts enjoy broad authority to fashion prospective remedies to protect the public from anticompetitive harm. This Court has held that "[c]ourts have an obligation, once a violation of the antitrust laws has been established, to protect the public from a continuation of the harmful and unlawful activities." *United States v. Parke, Davis & Co.*, 362 U.S. 29, 48 (1960).

As part of the remedial process, it is the *defendant* that bears the burden of proving the district court's injunctive order exceeded its discretion and was unreasonable. *See 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). In *International Salt*, the district court found that the defendant violated Section 1 of the Sherman Act by requiring

purchasers of the defendant's patented machines to also purchase raw materials from the defendant for use in the machines. 332 U.S. at 396-97. As a remedy, the trial court issued a mandatory injunction requiring the defendant in all future contracts to offer the use of its patented technology "to any applicant on non-discriminatory terms and conditions." *Id.* at 398 n.7. The defendant challenged the injunction on appeal as broader than necessary to cure the violation. *Id.* at 400. This Court affirmed the district court's remedy, specifically noting the burden borne by the defendant:

> When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the *burden put upon him to bring any proper claims for relief to the court's attention*.

Id. at 400-01 (emphasis added).

This Court followed the same rule in *Nat'l Society of Prof'l Engineers*, where the defendant unsuccessfully challenged the scope of the district court's remedial injunction. There, the defendant's liability arose from an ethical rule that prohibited the defendant's members from competitive bidding for jobs. 435 U.S. at 694-95. As a remedy, the district court enjoined "the Society from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical." *Id.* at 697. The defendant challenged the injunction as an overly broad infringement on its First

Amendment rights. *Id.* This Court rejected that argument, explaining that "having found the Society guilty of a violation of the Sherman Act, the District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences." *Id.* This Court reaffirmed the holding of *International Salt* that "the standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct," and "that the burden is upon the proved transgressor . . . to bring any proper claims for relief to the court's attention." *Id.* at 698.

Other circuits follow this Court's standard and require the proven antitrust violator to bear the burden of challenging a remedial injunction. In *Trabert & Hoeffer, Inc. v. Piaget Watch Corp.*, 633 F.2d 477, 486 (7th Cir. 1980), for example, the Seventh Circuit placed the burden on the defendant to overcome the district court's injunctive remedy. There, the defendants were found liable for price fixing. The trial court awarded damages and "permanently enjoined defendants from refusing to deal with the plaintiff on the same terms and conditions (i. e., availability, price, credit, service, advertising coverage) enjoyed by other Chicago area retailers supplied by the defendants." *Id.* at 479. The defendants challenged the scope of the injunction on appeal. *Id.* In particular, the defendants noted that they had a general "right" to do business with "whomever [they] please[d]." *Id.* at 485. They claimed the injunction interfered with this "right" and "therefore it was an abuse of the lower court's

discretion to enjoin defendants from doing anything more than conspiring to fix prices." *Id.*

In rejecting this claim, the Seventh Circuit explained that "once a Sherman Act violation is proven," the district court has broad discretion to structure injunctive relief that will "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *Id.* at 485 (quoting *United States v. Ward Baking Co.*, 376 U.S. 327, 330 (1964) (*quoting United States v. United States Gypsum Co.*, 340 U.S. 76, 88-89, 90 (1950)). The court recognized that such relief, "to be effective[,] must go beyond the narrow limits of the proven violation." *Id.* In response to the defendants' argument that they were "saddled with an excessive burden of proof to overcome the decree," the Seventh Circuit held that "the burden [must be] put upon" a defendant to prove the remedy exceeded the district court's authority because, as a "proven transgressor" of the antitrust law, the defendant properly bears the burden of showing that a narrower remedial prohibition is sufficient to cure its violations and prevent a recurrence. *Id.* at 486 (quoting *Int'l Salt*, 332 U.S. at 400). Because the defendants failed to meet their burden, the court affirmed the injunction. *Id.*

Even under the "less restrictive alternative" test that is applied to determine antitrust liability (and that the Ninth Circuit improperly applied to the question of remedy, *see infra* Part II-B), the Second, Seventh and D.C. Circuits have all held that the defendant bears the burden of showing its anticompetitive restraint is the least restrictive

means necessary to achieve pro-competitive benefits under Section 1 of the Sherman Act.

In *North American Soccer League v. Nat'l Football League*, 670 F.2d 1249 (2d Cir. 1982), for example, the plaintiff challenged the defendant football league's ban on its members owning teams in competing sports leagues. The Second Circuit recognized the anticompetitive effects of the rule and acknowledged the defendant's procompetitive justifications had "some merit." The court discounted these procompetitive effects, however, because the defendant had failed to meet its burden "to come forward with proof that any legitimate purposes could not be achieved through less restrictive means." *Id.* at 1261. In light of the defendant's failure to prove its ownership ban was the least restrictive means to achieve its pro-competitive benefits, the court concluded that the "procompetitive effects are not substantial and are clearly outweighed by its anticompetitive purpose and effect." *Id.*; *see also Wilk v. Am. Med. Ass'n*, 719 F.2d 207, 227 (7th Cir. 1983) ("[T]he burden of persuasion is on the defendants to show: . . . that this concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition.").

The D.C. Circuit likewise has recognized that the defendant, not the plaintiff, bears the burden under the less restrictive alternative test of proving that the challenged conduct is the *least* restrictive means to meet its pro-competitive goals. In *Kreuzer v. Am. Acad. of Periodontology*, the defendant dental trade groups argued that the conduct challenged as violating Section 1 "had a procompetitive effect and

worked to increase the quality of patient care." 735 F.2d 1479, 1494 (D.C. Cir. 1984). The court dismissed the alleged procompetitive benefits of the restraint because "even if evidence existed in the record to support the asserted justification . . . it must be shown that the means chosen to achieve that end are the least restrictive available," and the defendant "ha[d] failed to demonstrate that the limited practice requirement is the least restrictive method available to achieve the asserted goal." *Id.* at 1494-95.

The Ninth Circuit's decision requiring Plaintiffs not only to bear the burden of justifying the District Court's trust fund remedy, but also to satisfy an unprecedented "strong evidentiary showing" standard that resembles a clear-and-convincing evidence test, cannot be squared with this Court's precedent or cases in other circuits. [2]

[2] The Ninth Circuit's reference to *Board of Regents* to support its reasoning was erroneous and represents an unwarranted extension of that decision, which further supports this Court's review. Pet. App. at 51a, 62a. This Court's comment about the NCAA's "ample latitude" to govern college athletics, 468 U.S. at 120, does not elevate Petitioners' burden in establishing a less restrictive alternative or an appropriate remedy. That dicta is not a thumb on the scales at this late stage of the antitrust analysis.

B. The Ninth Circuit's Restriction of the Remedial Power of Antitrust Courts Conflicts with Decisions of This Court and Other Courts.

The legal standard created by the Ninth Circuit for assessing the validity of the District Court's trust fund remedy conflicts with this Court's precedent and with decisions in other circuits. First, the Ninth Circuit established a "less restrictive alternatives" test to resolve the question of remedy, requiring that any injunction "must be 'virtually as effective' in serving the procompetitive purposes of the NCAA's current rules, and 'without significantly increased cost.'" Pet. App. 51a (citation omitted). The less restrictive alternatives test was designed for antitrust *liability* determinations under the Rule of Reason, rather than questions of *remedy*. Further, making the standard even more stringent, the Court of Appeals instructed that its decision "should be taken to establish only that where … a restraint is *patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives, an antitrust court can and should invalidate it and order it replaced with a less restrictive alternative." *Id.* at 54a (emphases in original). Finally, by precluding relief unless a restraint is clearly stricter than necessary to accomplish "*all* of [the restraint's] procompetitive objectives" (*id.* (emphasis added)), the Ninth Circuit created a test allowing a remedy to be defeated by a single asserted procompetitive objective, even a trivial one that is massively outweighed by its anticompetitive effects.

This Court has never suggested that federal remedial authority under the antitrust laws is

confined to injunctions that would qualify as "less restrictive alternatives" under the Rule of Reason, or is limited in any of these other significant ways. Instead, this Court has taken a much broader view of judicial remedial authority under the antitrust laws. And it certainly has not adopted the Ninth Circuit's rule that injunctive relief must narrowly track the violation and replace only those aspects of the defendants' unlawful conduct that are "patently and inexplicably stricter than necessary to accomplish all of its procompetitive purposes." Pet. App. at 54a.

To the contrary, this Court has emphasized the wide discretion enjoyed by district courts to structure injunctive relief that will remedy an antitrust violation and prevent its recurrence. A court-ordered remedy is primarily intended to "assure the public freedom from" continued violations. *United States v. U.S. Gypsum Co.*, 340 U.S. 76, 88 (1950). It should also be designed "to avoid a recurrence of the violation and to eliminate its consequences." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 697. This Court has stressed that "[t]he framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case." *Int'l Salt*, 332 at 400-01.

In *United States Gypsum Co.*, for example, this Court affirmed that "relief, to be effective, must go beyond the narrow limits of the proven violation." 340 U.S. at 90. In that case, the defendant's liability was based on its misuse of patent licenses to fix prices. The injunction that the government

requested and the Court approved, however, limited the defendant's conduct with respect to all of its products, rather than just the patented licenses at issue in the litigation. *Id.* The defendant objected that it had procompetitive interests in "enforc[ing] legitimate license agreements and [the license agreements] were not calculated steps in conspiracy or monopoly." *Id.* at 91. This Court rejected that objection, concluding that the extension of the injunction to all of defendant's products was "reasonable." *Id.*

In addition, the Ninth Circuit's decision conflicts with *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). In that case, the court of appeals had held an injunction improper because the plaintiff had suffered no injury. But this Court reversed the appellate court, reinstated the district court's injunction, and held that the evidence of a violation of the antitrust law and the threat of potential injury were sufficient to support the relief. *Id.* at 130. This Court explained:

> [T]he remedy [the antitrust law] affords, like other equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' Its availability should be 'conditioned by the necessities of the public interest which Congress has sought to protect.'

Id. at 131 (*quoting Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944)). The Ninth Circuit's holding that only remedies "virtually as effective" in serving the purposes of the restraint are permissible, and

that only "patently and inexplicably" overly broad restrictions may be enjoined, cannot be reconciled with this Court's affirmance of an injunction against conduct that created only potential harm.

The Ninth Circuit's decision is also inconsistent with *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). There, defendant banks offered as an "affirmative justification" in defense of their merger that it enabled them to "follow their customers to the suburbs and retain their business." *Id.* at 370. This Court rejected the justification because the banks could meet the same objective "by opening new offices rather than acquiring existing ones." *Id.* The court accepted this hypothetical alternative to the alleged anticompetitive conduct without requiring any evidentiary showing that the alternative was either "viable" or "equally effective" as the restraint.

The Ninth Circuit's requirement that plaintiffs prove an alternative is "equally effective" or "virtually as effective" as the challenged conduct also puts the Ninth Circuit in conflict with the Seventh Circuit. In *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 669 (7th Cir. 1992), a professional basketball franchise challenged a rule imposed by the National Basketball Association ("NBA") limiting each team to broadcasting no more than 20 nationally televised games. The NBA justified its rule as necessary to prevent "free riders;" that is, the NBA claimed the franchise was taking advantage of the NBA's advertising and investment to siphon viewership from other teams. *Id.* at 675. The Seventh Circuit rejected this justification – affirming a judgment against the NBA

– because there was a viable alternative to the 20-game rule: a tax imposed on the plaintiff for each nationally-televised game it permitted. The court acknowledged that it would be difficult for the NBA to set the tax precisely enough to duplicate the effect of 20-game rule, but it nevertheless found the availability of this alternative sufficient to refute the defendant's pro-competitive justification, and support liability against the NBA. *Id.* at 675-76.

Similarly, the Third Circuit has held that a remedy for an antitrust violation need not be equally effective as the restraint at advancing pro-competitive justifications. Rather, to be a viable remedy, it need only offer "comparable benefits" with fewer anti-competitive consequences. *United States v. Brown Univ. in Providence in State of R.I.*, 5 F.3d 658, 679 (3d Cir. 1993) (quoting 7 P. Areeda, Antitrust Law ¶ 1505, at 388 (1986)).

The Ninth Circuit's heightened requirements for imposing remedies for antitrust violations is thus inconsistent with this Court's precedent. The Ninth Circuit both improperly limited the remedial authority of the federal courts in antitrust cases and created a new standard that will operate as a substantial burden to enforcement of the antitrust laws. This Court's review is amply warranted.

CONCLUSION

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

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