No. 20A___

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ET AL.,

Applicants,

v.

SHAWNE ALSTON ET AL.,

Respondents.

APPLICATION TO STAY ISSUANCE OF THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI AND REQUEST FOR AN ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

Applicants (defendants-appellants-cross-appellees in the court of appeals) are the National Collegiate Athletic Association and eleven of its member conferences: the American Athletic Conference; the Atlantic Coast Conference; The Big Ten Conference, Inc.; The Big 12 Conference, Inc.; Conference USA; the Mid-American Conference; the Mountain West Conference; the Pac-12 Conference; the Southeastern Conference; the Sun Belt Conference; and the Western Athletic Conference.

Respondents (plaintiffs-appellees-cross-appellants in the court of appeals) are Shawne Alston; Don Banks; Duane Bennett; John Bohannon; Barry Brunetti; India Chaney; Chris Davenport; Dax Dellenbach; Sharrif Floyd; Kendall Gregory-McGhee; Justine Hartman; Nigel Hayes; Ashley Holliday; Dalenta Jameral Stephens; Alec James; Afure Jemerigbe; Martin Jenkins; Kenyata Johnson; Nicholas Kindler; Alex Lauricella; Johnathan Moore; Kevin Perry; Anfornee Stewart; Chris Stone; Kyle Theret; Michel'le Thomas; Kendall Timmons; and William Tyndall.

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APPLICATION FOR STAY OF THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (OR, IN THE ALTERNATIVE, FOR A STAY OF THE DISTRICT COURT'S INJUNCTION) PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI, AND REQUEST FOR AN ADMINISTRATIVE STAY

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to this Court's Rule 23, applicants—the National Collegiate Athletic Association ("NCAA") and the eleven member conferences listed in footnote 1 (collectively, "defendants")—respectfully apply for a stay of the issuance of the mandate of the United States Court of Appeals for the Ninth Circuit, pending the timely filing and disposition of defendants' forthcoming petition for a writ of certiorari and any further proceedings in this Court. The Ninth Circuit's mandate is currently scheduled to issue on August 11. Alternatively, defendants suggest that the Court treat this application as a petition for a writ of certiorari and grant the writ. *See Nken* v.

Mukasey, 555 U.S. 1042 (2008). Finally, defendants request an administrative stay while the Court considers this application.[1]

INTRODUCTION

In *NCAA* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), this Court recognized that NCAA rules regarding the eligibility of college students to participate in intercollegiate athletics—including the rule that "athletes must not be paid," *id.* at 102—are "entirely consistent" with federal antitrust law because they differentiate college from professional sports, thus "widen[ing] consumer choice," *id.* at 102, 120. This Court thus declared that "[t]here can be no question but that [the NCAA] needs ample latitude to play" its "critical role in the maintenance of a revered tradition of amateurism in college sports." *Id.* at 120. Heeding this Court's admonition, several circuits have concluded that NCAA rules that are designed to preserve the amateur status of NCAA athletes should be upheld against antitrust challenge at the motion-to-dismiss stage. *See, e.g.*, *Deppe* v. *NCAA*, 893 F.3d 498, 503 (7th Cir. 2018); *Smith* v. *NCAA*, 139 F.3d 180, 186-187 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459, 464 n.2 (1999); *McCormack* v. *NCAA*, 845 F.2d 1338, 1343-1345 (5th Cir. 1988).

The Ninth Circuit has taken a starkly different approach. First, it has brushed aside *Board of Regents*' core reasoning as "dicta." Second, it has subjected NCAA rules that are designed to prevent student-athletes from being paid for their intercollegiate

[1] The applicant member conferences are the American Athletic Conference; the Atlantic Coast Conference; The Big Ten Conference, Inc.; The Big 12 Conference, Inc.; Conference USA; the Mid-American Conference; the Mountain West Conference; the Pac-12 Conference; the Southeastern Conference; the Sun Belt Conference; and the Western Athletic Conference.

play to detailed rule-of-reason scrutiny (including a full trial). Third, it has held that the NCAA's longstanding conception of amateurism—the one endorsed in *Board of Regents*—is unnecessarily restrictive because the district court conceived a "narrower" alternative conception. And fourth, it has upheld an injunction that replaced the longstanding conception with that "narrower" one, namely, the wholly invented notion that the *real* difference between college and professional athletes is that only the latter are paid *unlimited* amounts of money unrelated to education, i.e., that college athletes would be amateurs even if they were paid *unlimited* amounts, so long as the payments are somehow (or can be described as somehow) "related to education." The injunction the Ninth Circuit upheld thereby effectively created a pay-for-play system for all student-athletes, allowing them to be paid both "unlimited" amounts for participating in "internships," and an additional $5,600 (or more) each in annual "academic and graduation awards," which student-athletes can receive merely for remaining eligible to play their sport. That is quintessential judicial micromanagement, lacking any sound basis in antitrust law, and will unquestionably turn student-athletes into professionals, ending a century-long tradition of amateurism in college sports.

The Ninth Circuit started down this wrong path five years ago, in *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015). There, a class of football and basketball players claimed that the NCAA's eligibility rules restricting student-athlete compensation violated section 1 of the Sherman Act by preventing the class members from being paid for the use of their names, images, and likenesses. Rejecting the NCAA's reliance on *Board of Regents* and the decisions of other circuits, the Ninth Circuit held that NCAA rules restricting the compensation that student-athletes may receive for their play are

subject to detailed rule-of-reason analysis based on a trial record. *See id.* at 1061-1064. Even so, the court recognized that the NCAA's commitment to amateurism is procompetitive because it differentiates college from professional sports, and that NCAA rules capping payments to student-athletes at the legitimate cost of attending school serve that procompetitive goal. *See id.* at 1072-1079. Antitrust law, the court decreed, "does not require more." *Id.* at 1079.

In this case—brought by classes of student-athletes that substantially overlap with the *O'Bannon* class to challenge the same NCAA rules at issue in *O'Bannon*—the Ninth Circuit intruded much further into the NCAA's "critical role in the maintenance of a revered tradition of amateurism in college sports," *Board of Regents*, 468 U.S. at 120. Jettisoning *O'Bannon*'s rule-of-reason analysis in favor of the new trial record, the court held that the NCAA's longstanding conception of amateurism (that athletes "must not be paid" to play, *id.* at 102) is too restrictive, and replaced it with a new, "much narrower conception …: Not paying student-athletes unlimited payments unrelated to education." *In re National Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litigation ("GIA")*, 958 F.3d 1239, 1258 (9th Cir. 2020). The court thus upheld the district court's permanent injunction, which as noted requires the NCAA to allow *every* student-athlete to be paid unlimited amounts of cash for "internships," as well as $5,600 per year in academic "awards" for nothing more than meeting the general minimum academic eligibility requirements (an amount set by the district court to equal the theoretical limit on the value of awards that the single most outstanding student-athlete could receive in recognition of his or her genuine athletic achievements).

Both the result reached by the Ninth Circuit and the court's approach to evaluating the NCAA's rules restricting student-athlete compensation under the rule of reason—each of which, as noted, departs from decisions of other circuits—will cause immediate, lasting damage to intercollegiate athletics and the millions of people who participate in or enjoy watching them. Allowing schools to pay student-athletes vast sums on the pretense that they are for an "internship" that is somehow "related to education," or that they are "awards" recognizing the supposed academic accomplishment of simply remaining academically eligible to participate will eradicate the distinction between college and professional athletes, causing many consumers to lose interest as college sports are perceived as just another minor league. It will also distort intercollegiate competition and diminish opportunities for participation in inter-collegiate athletics for years to come, even if the decision below is eventually reversed. And the Ninth Circuit's decision will subject the NCAA's amateurism rules to endless demanding antitrust scrutiny, with plaintiffs afforded as many tries as they need to develop a record that persuades a district judge in California and then the Ninth Circuit. *See GIA*, 958 F.3d at 1256 n.13 (endorsing the prospect of "future plaintiffs pursuing essentially the same claim again and again" against defendants). Indeed, a new suit virtually identical to *O'Bannon* has already commenced. Instead of affording the NCAA the wide latitude it needs—and that *Board of Regents* directs lower courts to provide—the Ninth Circuit's decision vests in plaintiffs' lawyers and the courts the power to define (and redefine) the "character and quality" of college sports. 468 U.S. at 102.

The NCAA and the member conferences who are defendants in this case will petition this Court for certiorari to resolve the circuit conflict and correct the Ninth Circuit's errors. But the Ninth Circuit declined to stay the issuance of its mandate pending the filing and disposition of that petition, so a stay from this Court is needed now to prevent the Ninth Circuit's decision from taking effect and inflicting profound, irreparable harm on the important national institution of intercollegiate athletics.

STATEMENT

1. "Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports." *NCAA* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85, 88 (1984) ("*Board of Regents*"). Today, NCAA athletics is a major feature of American life: Each year, nearly half a million student-athletes play two dozen sports on nearly 20,000 teams at about 1,100 NCAA member schools and 100 member conferences in three divisions across the country. NCAA, *What Is The NCAA?*, https://tinyurl.com/y4kpswnl; C.A. ER8. And each year, millions of college students, alumni, faculty, and other fans watch NCAA competitions, including March Madness (the NCAA's annual post-season basketball tournaments) and football bowl games, either in person or through regional and national broadcasts.

For decades, a hallmark of intercollegiate athletics has been what this Court has called "a revered tradition of amateurism," a tradition that "adds richness and diversity to intercollegiate athletics." *Board of Regents*, 468 U.S. at 120. Amateurism is—and has long been—a core component of an effort by the NCAA and its member schools and conferences to "maintain intercollegiate athletics as an integral part of the[ir] educational program[s]." C.A. ER274. As part of this effort, the NCAA has long had a

body of rules specifying not only the terms of competition but also eligibility requirements for participants. These eligibility requirements—which address academic standards, recruiting, scholarships, awards, payments, representation by agents, draft entry, and more, C.A. ER272-273—embody two fundamental principles: Intercollegiate athletes must be *students* at the school for which they play and must be *amateurs*, i.e., not be paid for their athletic play. C.A. ER275-276, ER280-283. This Court has recognized these principles, explaining that "[i]n order to preserve the character and quality of [NCAA athletics], athletes must not be paid, must be required to attend class, and the like." *Board of Regents*, 468 U.S. at 102. By tying college sports to the scholastic experience, amateurism preserves a "clear line of demarcation between intercollegiate athletics and professional sports." C.A. ER274.

Although the principle of amateurism does not permit college athletes to be paid for their athletic play, it has long permitted them to receive reimbursement of their reasonable and necessary academic or athletic-related expenses (tuition, books, uniforms, athletic travel, etc.), i.e., the expenses they incur in order to be student-athletes. *See, e.g.*, C.A. ER284-287, 290-295; C.A. ER638-639; C.A. ER1422-1440. It has also long allowed them to receive limited awards to recognize academic or athletic achievement by themselves or their teams.

As to the former category, the primary (although not complete) measure of legitimate educational expenses is "cost of attendance," or COA, a federally defined standard. *See* 20 U.S.C. §1087kk. COA encompasses tuition and fees (including required supplies and equipment), room and board, books, a computer, transportation,

and miscellaneous expenses. *Id.* §1087*ll*. Each school independently determines the exact cost of attendance for its students. C.A. ER324.

NCAA rules allow student-athletes to receive financial aid from their schools up to COA and (consistent with federal law, *see* 20 U.S.C. §1087tt), allow schools to "adjust[]" COA for student-athletes "on an individual basis." C.A. ER285. This aid may be provided through an athletic scholarship—known as a "grant-in-aid," or GIA—other financial aid, or both. C.A. ER284, 286-287. NCAA rules also allow schools to cover additional, often unexpected, educational expenses of student-athletes (tutoring, clothing, and travel for a family emergency, for example) through two dedicated funds, the Student Assistance Fund, or SAF, and the Academic Enhancement Fund, or AEF. C.A. ER268-269, ER284-285, 294-295. Lastly, NCAA rules permit student-athletes to receive Pell grants, which are given by the federal government to students who have exceptional need. C.A. ER287; U.S. Department of Education, Federal Student Aid Office, *Federal Pell Grants Are Usually Awarded Only to Undergraduate Students*, https://studentaid.gov/understand-aid/types/grants/pell/.

As for awards to recognize achievement by an individual athlete or team, they are limited to modest non-cash amounts for genuine achievement. For example, student-athletes may receive an award valued at $175 or less for being a team's most-improved or most-valuable player; an award valued at $550 or less for participating in an all-star or post-season bowl game; and a trophy valued at $1,500 or less for being a conference's "athlete of the year" or "scholar-athlete of the year." C.A. ER 288-289, ER296-297. Additionally, each school may annually give a $10,000 Senior Scholar Award to two graduating student-athletes to use toward graduate school. C.A. ER289.

The restrictions on awards are designed to ensure that awards do not become vehicles for disguised pay-for-play. C.A. ER170-171; ER158-164; ER229-230.

2. In *Board of Regents*, this Court held that because agreement among the NCAA's member schools and conferences is "essential if [NCAA sports are] to be available at all," NCAA restraints would be evaluated under the rule of reason, rather than deemed illegal per se for purposes of an antitrust claim under section 1 of the Sherman Act. 468 U.S. at 100-101. The rule of reason generally entails the following "three-step, burden-shifting framework": (1) if the plaintiff "prove[s] that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market," then (2) the burden shifts to the defendant to show a procompetitive rationale for the restraint"; if the defendant does so, then (3) "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Ohio* v. *American Express Co.*, 138 S. Ct. 2274, 2284 (2018).

Applying the rule of reason, this Court held in *Board of Regents* that the NCAA television plan challenged in that case was unlawful. 468 U.S. at 104-117. In doing so, the Court expressly distinguished the plan from "most" NCAA rules—which the Court said it is "reasonable to assume … are justifiable means of fostering competition among amateur athletic teams." *Id.* at 117. In particular, the Court explained that the NCAA's "standards of amateurism" and "standards for academic eligibility," *id.* at 88—such as the rules that "athletes must not be paid" and "must be required to attend class," *id.* at 102—preserve the character and quality of" intercollegiate athletics, *id.*, and therefore are "entirely consistent" with antitrust law, *id.* at 120. That is because

the NCAA's eligibility rules "enable[] a product to be marketed which might otherwise be unavailable," thereby "widen[ing] consumer choice—not only the choices available to sports fans but also those available to athletes." *Id.* at 102. As a result, the Court explained, the rules "can be viewed as procompetitive." *Id.*

For decades after *Board of Regents*, the courts of appeals consistently applied that decision to hold that NCAA eligibility rules that require student-athletes to be amateurs, i.e., not to be paid to play, are valid under antitrust law. *See, e.g.*, *Agnew* v. *NCAA*, 683 F.3d 328, 341, 343 n.7 (7th Cir. 2012); *Smith*, 139 F.3d at 186-187; *McCormack*, 845 F.2d at 1343-1345. Indeed, these courts held that such rules—those that "define what it means to be an amateur"—should be sustained "at the motion-to-dismiss stage," i.e., without detailed analysis under the rule of reason. *Agnew*, 683 F.3d at 341, 343; *accord Smith*, 139 F.3d at 186-187 (NCAA eligibility rule "so clearly survives a rule of reason analysis" that the court did "not hesitate" to uphold it on a motion to dismiss).

In 2015, however, the Ninth Circuit began unsettling this profoundly important judicial appreciation of the procompetitive value of the NCAA's commitment to amateurism. In *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015), a class of current and former NCAA Division I football and men's basketball players claimed that NCAA rules restricting student-athlete compensation violated Section 1 of the Sherman Act by precluding student-athletes from being paid for the use of their name, image, or likeness ("NIL"), *see id.* at 1052. After conducting a bench trial, the district court agreed and issued a two-part injunction, requiring the NCAA to allow schools to provide each student-athlete with (1) a "stipend" up to COA to cover the gap between the then-

exiting limit on GIA (i.e., athletic scholarships) and COA (a gap that consisted primarily of "miscellaneous personal expenses," 20 U.S.C. §1087*ll*(2)), and (2) up to $5,000 annually in additional compensation that would be held in trust until after college. *Id.* at 1052-1053, 1054 n.3, 1061; *see also O'Bannon* v. *NCAA*, 7 F. Supp. 3d 955, 974, 977, 982-983, 1005 (N.D. Cal. 2014). As the Ninth Circuit in *O'Bannon* observed, the district court's ruling was "the first by any federal court to hold that any aspect of the NCAA's amateurism rules violate the antitrust laws, let alone to mandate by injunction that the NCAA change its practices." 802 F.3d at 1053.

On appeal, the Ninth Circuit affirmed the first part of the district court's injunction but reversed the second part. Expressly disagreeing with the contrary view just discussed, *see* 802 F.3d at 1064, the court of appeals first held that all NCAA rules, even those facially designed to promote amateurism by barring student-athletes from being paid for their intercollegiate athletic play, are subject to detailed rule-of-reason analysis. 802 F.3d at 1063-1064. And then, in a further departure from other circuits, the court held that such detailed analysis yielded the conclusion that the challenged rules were unlawful in part.

More specifically, the court first agreed with the NCAA that, at step 2 of the rule of reason, NCAA compensation rules are procompetitive because they help "preserv[e] the popularity of the NCAA's product by promoting its current understanding of amateurism." 802 F.3d at 1073. And at step 3, the court (again agreeing with the NCAA) held that the district court had "clearly erred" in requiring the NCAA to allow additional annual payments of $5,000 above COA. *Id.* at 1074, 1076. Such payments, the court explained, were not "*equally* effective in promoting amateurism and preserving

consumer demand" as the NCAA's compensation restrictions. *Id.* at 1076. And the district court had "ignored that not paying student-athletes is *precisely what makes them amateurs*." *Id.* Hence, offering even "small payments" above COA that are unrelated to legitimate expenses, the court concluded, would be "a quantum leap." *Id.* at 1078. But the court upheld the district court's conclusion that the NCAA's restriction on athletic scholarships below COA—i.e., the then-existing gap between GIA and COA—was "*patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives." *Id.* at 1075. That was so, the court stated, because "by the NCAA's own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses," which includes the expenses counted toward COA. *Id.*[2]

Summing up its decision, the court stated that antitrust law "requires that the NCAA permit its schools to provide up to the cost of attendance to their student-athletes. It does not require more." 802 F.3d at 1079.[3]

The NCAA petitioned for certiorari, which this Court denied. *NCAA* v. *O'Bannon*, 137 S. Ct. 277 (2016) (mem.).

3. While *O'Bannon* was pending, NCAA Division I football players and men's and women's basketball players filed this class action—on behalf of classes that largely

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[2] Roughly a year before the Ninth Circuit's decision, the NCAA changed its rules to increase the GIA cap to COA, thereby eliminating the only restraint that *O'Bannon* invalidated.

[3] One member of the panel dissented in part, stating that he would have upheld the district court's judgment in its entirety. *See* 802 F.3d at 1079 (Thomas, C.J., concurring in part and dissenting in part).

overlapped with the *O'Bannon* class—against the NCAA and eleven of its Division I member conferences, seeking "to dismantle the NCAA's entire compensation framework." *GIA*, 958 F.3d at 1247. The case was stayed until *O'Bannon* was resolved, at which point this case resumed before the same district judge who had presided over *O'Bannon*. After concluding on dispositive motions that *O'Bannon* was preclusive as to step 1 of the rule of reason but not steps 2 or 3, *id.* at 1247-1248, the district court set the case for a bench trial on those latter steps, *see id.* at 1248. The court then conducted a ten-day bench trial, at the conclusion of which it held that defendants violated antitrust law.

In particular, although the court "credit[ed] the importance to consumer demand of maintaining a distinction between college sports and professional sports," it held that NCAA rules restricting student-athlete compensation are "procompetitive" "only" to the extent they "prevent[] unlimited cash payments, unrelated to education, similar to those observed in professional sports," and that that effect "can be achieved through less restrictive means" than current NCAA rules. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation*, 375 F. Supp. 3d 1058, 1062, 1082 (N.D. Cal. 2019). Specifically, the court approved "an alternative compensation scheme" under which the NCAA "would generally [be] prohibit[ed] … from limiting education-related benefits." *Id.* at 1062. "The only education-related compensation that the NCAA could limit under this alternative," the court explained, would be academic or graduation awards or incentives, provided in cash or cash-equivalent." *Id.* That limit, however, "could not be less than [the NCAA's] caps on athletics participation awards," *id.*, which the court calculated to be $5,600, *id.* at 1088, 1099.

The district court entered a permanent injunction, providing that:

> The compensation and benefits related to education … that the NCAA may not … limit … are the following: computers, science equipment, musical instruments and other tangible items not included in the cost of attendance calculation but nonetheless related to the pursuit of academic studies; post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; tutoring; expenses related to studying abroad …; and paid post-eligibility internships.

C.A. ER2-3; *see also* C.A. ER61. The injunction states that this list "may be amended" only "on motion of any party," C.A. ER3—in other words, only with the court's pre-approval. The injunction permits the NCAA to "adopt … a definition of … 'related to education'" but requires the NCAA to ask the court to "incorporate that definition" into the injunction. *Id.*

The NCAA and the conferences appealed, and plaintiffs cross-appealed to challenge the district court's refusal to invalidate all of the NCAA's compensation-related restrictions.

4. On May 18, 2020, the Ninth Circuit substantially affirmed the district court's judgment. The court first held that, despite *O'Bannon*'s ruling that student-athletes need not receive more than COA, the district court was free to rule otherwise in this case. That was so, the Ninth Circuit reasoned, because (1) rule-of-reason analysis is case-specific, and (2) some of the evidence at issue in this case arose after the record in *O'Bannon* closed.

Next, the Ninth Circuit adhered to *O'Bannon*'s rejection of defendants' contention (and other circuits' holdings) that NCAA rules restricting student-athlete compensation "are 'valid as a matter of law' under" *Board of Regents*, instead

subjecting those rules to detailed rule-of-reason analysis. *GIA*, 958 F.3d at 1246, 1257-1261. In particular, the court (ostensibly at step 2 of the rule-of-reason analysis), invalidated defendants' longstanding concept of amateurism, i.e., the concept recognized in *Board of Regents* that student-athletes "must not be paid to play," 468 U.S. at 102. The court of appeals acknowledged that "maintaining a distinction between college and professional sports" is procompetitive, *GIA*, 958 F.3d at 1257, but it declared that "[a]lthough both *Board of Regents* and *O'Bannon* … define amateurism to exclude payment for athletic performance, neither purports to immortalize that definition as a matter of law." *Id.* at 1258. And in the court's view, "[t]he record in this case … reflect[ed] no such concrete procompetitive effect of limiting non-cash, education-related benefits. Instead, the record support[ed] a much narrower conception of amateurism," one "that still gives rise to procompetitive effects: Not paying student-athletes unlimited payments unrelated to education." *Id.* In the court's view, that is, student-athletes will still be amateurs rather than professionals even if they are paid huge sums of money—indeed, even unlimited payments related to education—so long as they do not receive "unlimited payments unrelated to education." *Id.*

Ostensibly turning to step 3, the court of appeals held that the district court's alternative regime—"uncapping certain education-related benefits"—would be "virtually as effective" in differentiating college from professional sports and thereby "preserv[ing] consumer demand." *GIA*, 958 F.3d at 1260. The court also rejected defendants' challenges to the injunction, after adopting a narrowing gloss that the court thought would ensure that the allowances the injunction required will not "become

vehicles for payments that are virtually indistinguishable from a professional's salary." *Id.* at 1261.

Finally, the Ninth Circuit rejected plaintiffs' cross-appeal, which requested a broadening of the injunction to enjoin all NCAA compensation limits. *GIA*, 958 F.3d at 1263-1264.

5. Defendants moved the Ninth Circuit to stay issuance of the mandate pending the filing of a certiorari petition. ECF #137, *GIA*, No. 19-15566 (9th Cir. July 6, 2020). The court denied that motion on August 4, 2020. Order (ECF #141), *GIA*.

6. Under this Court's miscellaneous order of March 19, 2020, which extended the deadline for filing all certiorari petitions "to 150 days from the date of the lower court judgment," the deadline for filing a petition in this case is October 15, 2020. This Court would have jurisdiction over defendants' petition under 28 U.S.C. §1254(1).

ARGUMENT

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

Defendants intend to present to this Court the question whether the Ninth Circuit erred in subjecting NCAA rules that restrict student-athlete compensation to detailed rule-of-reason analysis and holding that the rules restricting student-athletes'

receipt of "education-related" compensation are unduly restrictive and therefore violate antitrust law. With respect to that question, the standard for a stay is satisfied.

I. THERE IS A REASONABLE PROBABILITY THAT THE COURT WILL GRANT CERTIORARI

Three circumstances that commonly occasion this Court's review are where the lower court's decision: (1) conflicts with a decision of this Court, (2) conflicts with a decision of another court of appeals, or (3) resolves an important question of federal law. *See* S. Ct. R. 10. The Ninth Circuit's decision implicates all three circumstances.

A. The Decision Below Conflicts With Decisions Of This Court And Other Circuits

Certiorari is at least reasonably probable here because the decision below departs from decisions of other circuits, and of this Court, in holding both that NCAA rules restricting student-athlete compensation must be subjected to detailed rule-of-reason analysis (rather than evaluated at the motion-to-dismiss stage), and that those rules are not entirely valid under the antitrust laws. Certiorari is also at least reasonably probable here because decisions of this Court and other circuits—unlike the decision below—not only accept defendants' no-pay conception of amateurism as a justification for NCAA compensation limits, but also reject any requirement that an antitrust defendant prove that a challenged restraint is the least-restrictive means of accomplishing the procompetitive objective.

1.a. In *Board of Regents*, this Court addressed an antitrust challenge to an NCAA plan that limited how many football games schools could license for telecast. *See* 468 U.S. at 88, 91-94. The Court recognized that although horizontal restraints are "often … held to be unreasonable as a matter of law," i.e., "illegal per se," *id.* at 99-100,

the NCAA's "particular brand" of sports, like other "league sports," "can only be carried out jointly," *id.* at 101. And such joint activity necessarily requires a "myriad of rules …, all [of which] must be agreed upon, and all [of which] restrain the manner in which institutions compete." *Id.* Hence, because "horizontal restraints on competition are essential if the [NCAA's] product is to be available at all," the Court held that the NCAA's restraints should not be deemed illegal per se, but instead should be evaluated under the rule of reason. *Id.* at 100-101.

The Court then examined different types of NCAA rules, explaining that there must be agreement on "rules affecting such matters as the size of the field" and "the number of players on a team." *Board of Regents*, 468 U.S. at 101. But equally essential, the Court continued, are the NCAA's "standards of amateurism" and "standards for academic eligibility," *id.* at 88, such as rules that "athletes must not be paid" and "must be required to attend class," *id.* at 102. These rules, which must be established "by mutual agreement," are designed "to preserve the character and quality of" intercollegiate athletics. *Id.* at 102. Accordingly, the Court expounded, they "differentiate[] college" sports from professional sports (including "minor leagues") and "enable a product to be marketed that might otherwise be unavailable," thus "widening consumer choice." *Id.* at 101-102. Because most NCAA rules are essential to the maintenance of college sports as a distinct enterprise, the Court declared—consistent with its precedent regarding other joint ventures—that it is "reasonable to assume that most … NCAA [rules] are justifiable means of fostering competition among amateur athletic teams, and therefore procompetitive." *Id.* at 117; *see also Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 23 (1979) ("Joint ventures and other cooperative arrangements

are … not usually unlawful … where the agreement … is necessary to market the product at all."). Indeed, the Court added, "the preservation of the student-athlete in higher education … is entirely consistent with the goals of the Sherman Act." *Board of Regents*, 468 U.S. at 120.

The Court, however, distinguished rules that preserve the NCAA's "particular brand of" sports, i.e., amateur college sports, 468 U.S. at 101, from the television plan at issue in the case. Because, the Court held, the plan was not "based on a desire to maintain the integrity of college [sports] as a distinct and attractive product," it did "not … fit into the same mold as do rules defining the conditions of the contest" or "the eligibility of participants." *Board of Regents*, 468 U.S. at 116-117. Consequently, the Court subjected the television plan to a detailed rule-of-reason analysis, which yielded the conclusion that the plan was an unreasonable restraint of trade. *Id.* at 104-117.

In concluding its opinion, this Court stressed that "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports" and that "[t]here can be no question but that [the NCAA] needs ample latitude to play that role." *Board of Regents*, 468 U.S. at 120. And whereas the television plan at issue was invalid because it merely "restrict[ed] output," that latitude would be afforded by upholding NCAA eligibility rules that preserve the amateur status of student-athletes. *Id.* The Court subsequently reiterated this point, explaining that in this context, "the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye.'" *American Needle, Inc.* v. *NFL*, 560 U.S. 183, 203 (2010) (quoting *Board of Regents*, 468 U.S. at 109 n.39); *see also Race Tires America, Inc.* v. *Hoosier*

Racing Tire Corp., 614 F.3d 57, 80 (3d Cir. 2010) ("courts have generally accorded sports organizations a certain degree of deference and freedom to act").

b. The Seventh Circuit has read the foregoing precedent to mean that in an antitrust challenge to an NCAA eligibility rule, the only question is "whether a rule is, on its face, supportive of the 'no payment' … model[]." *Agnew*, 683 F.3d at 343 n.7 (citing *Board of Regents*). If so, the court held, the rule (including rules that "define what it means to be an amateur") should be upheld without further rule-of-reason analysis, i.e., "at the motion-to-dismiss stage." *Id.* at 341, 343 (citing *American Needle*). Applying this framework, the Seventh Circuit—subsequent to *O'Bannon*—affirmed the dismissal of a claim that, because the NCAA allowed certain exceptions and waivers to an NCAA eligibility rule, that rule was "unnecessary to the survival of college football." *Deppe*, 893 F.3d at 503. "This argument is a nonstarter," the court explained, because "scrutinizing the NCAA's bylaws as [plaintiff] suggests conflicts with the … admonition in *Board of Regents* that the NCAA needs 'ample latitude' to preserve the product of college sports." *Id.* In the Seventh Circuit, therefore, "a more searching Rule of Reason analysis" of an NCAA rule is permissible only if the rule is "not directly related to the separation of amateur athletics from pay-for-play athletics." *Agnew*, 683 F.3d at 343, 345.

Two other circuits have taken the same approach. Based on *Board of Regents*, the Fifth Circuit had "little difficulty" rejecting—as a matter of law—a challenge to NCAA eligibility rules. *McCormack*, 845 F.2d at 1343-1345 (5th Cir. 1988). And the Third Circuit, likewise based on *Board of Regents*, held that an NCAA eligibility rule

"so clearly survive[d] a rule of reason analysis" that the court did "not hesitate" to uphold it at the motion-to-dismiss stage. *Smith*, 139 F.3d at 186-187.

c. The Ninth Circuit has rejected its sister circuits' approach. In *O'Bannon*, the court "disagree[d]" with the NCAA's contention that "any Section 1 challenge to its amateurism rules must fail as a matter of law [under] *Board of Regents*." 802 F.3d at 1063. The court dismissed *Board of Regents*' lengthy discussion of amateurism as "dicta," stating that this Court "discussed the NCAA's amateurism rules" simply to explain why NCAA rules, as horizontal restraints, "should be analyzed under the Rule of Reason, rather than held to be illegal per se." *Id.* The court of appeals also brushed aside the Seventh Circuit's reading of *Board of Regents* in *Agnew* as "unpersuasive," "dubious," and likewise "dicta." *Id.* at 1064.

Here, the Ninth Circuit adhered to *O'Bannon*'s departure from the Third, Fifth, and Seventh Circuits. After recounting that *O'Bannon* "rejected the NCAA's threshold argument that its amateurism rules, including those governing compensation, are 'valid as a matter of law' under" *Board of Regents*, *GIA*, 958 F.3d at 1246, the court subjected the amateurism rules challenged here to extensive rule-of-reason analysis, *see id.* at 1257-1261. Indeed, the court sought to reinforce and amplify *O'Bannon*'s conclusion that NCAA amateurism rules are subject to detailed rule-of-reason analysis: Relying on a different portion of *Board of Regents*, the court of appeals asserted that "the NCAA bears a 'heavy burden' of 'competitively justify[ing]' its undisputed 'deviation from the operations of a free market.'" *Id.* at 1257 (alteration in original) (quoting *Board of Regents*, 468 U.S. at 116-117). The court thus failed to recognize what other circuits have, namely, this Court's clear explanation in *Board of Regents* that that burden is

satisfied if the challenged rules "fit into the same mold as do rules defining … the eligibility of participants," including rules "based on a desire to maintain the integrity of college [sports] as a distinct and attractive product." 468 U.S. at 116-117.

Based on its rejection of the NCAA's (and other circuits') reading of *Board of Regents*, the Ninth Circuit subjected the entire body of NCAA eligibility rules relating to student-athlete compensation to detailed rule-of-reason analysis based on the trial record, which included "demand analyses, survey evidence," and both lay and expert testimony. *GIA*, 958 F.3d at 1257. The court then cast aside the NCAA's traditional conception of amateurism (i.e., that amateurs are not paid to play) because, the court said, "the record supports a much narrower conception of amateurism …: Not paying student-athletes unlimited payments unrelated to education." *Id.* at 1258 (quotation marks omitted). Continuing its detailed, record-based scrutiny, the court invalidated NCAA "caps on non-cash, education-related benefits" because it determined that an alternative regime—in which "education-related benefits" are "uncapp[ed]" and "the cap on academic and graduation awards and incentives [is tied] to the cap on aggregate athletic participation awards"—"would be virtually as effective" in "preserv[ing] consumer demand." *Id.* at 1260-1263. There is no way to reconcile that result—or the underlying reasoning—either with *Board of Regents* or with the circuit decisions discussed above.

2. Although the foregoing suffices to establish that defendants' petition for certiorari will present a question on which review is reasonably probable, the decision below also conflicts with this Court's and other circuits' precedent in another way: by engrafting a "least-restrictive-alternative" requirement onto the rule of reason.

Although the Ninth Circuit did not deny that defendants' no-pay conception of amateurism differentiates professional and college sports, it reasoned that the "narrower conception of amateurism" it adopted—"[n]ot paying student-athletes 'unlimited payments unrelated to education'"—"*still* gives rise to procompetitive effects." *GIA*, 958 F.3d at 1258 (emphasis added). The court, in other words, acknowledged that defendants' conception already has such effects. (Indeed, the challenged rules serve even the Ninth Circuit's narrower conception of amateurism, because plainly they prevent student-athletes from receiving unlimited payments unrelated to education.) But the problem, in the court's view, was that defendants failed to prove that the rules' procompetitive effects could not be achieved if those rules were curtailed to reflect the court's "narrower conception of amateurism." The court thus required defendants to prove that "each type of challenged rule" is strictly necessary to achieve the procompetitive benefit of differentiating college sports from professional sports, *id.* at 1258-1259; *see also, e.g.*, *id.* at 1261 ("the NCAA presented no evidence that demand will suffer if schools are free to reimburse education-related expenses of inherently limited value").

This Court and others have taken a different approach. Under the rule of reason, this Court has explained, a restraint need only be "reasonably necessary," *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967) (subsequent history omitted), or "fairly necessary," *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 406 (1911) (subsequent history omitted); *accord NFL* v. *North American Soccer League*, 459 U.S. 1074, 1079 (1982). Indeed, this Court and other circuits have specifically rejected the view that antitrust law requires a restraint to be "the least …

restrictive provision that [the defendant] could have used." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58 n.29 (1977); *see also, e.g.*, *Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853, 860 (1st Cir. 1982); *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1248-1249 (3d Cir. 1975); *McCormack*, 845 F.2d at 1340, 1345; *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 227 (D.C. Cir. 1986).

B. The Question To Be Presented Is Important

The issues just discussed are enormously important, which confirms that it is reasonably probable this Court will grant review.

1. NCAA sports play a central role in American life, involving hundreds of thousands of participants and millions of viewers annually. *See supra* p.6. And the "revered tradition of amateurism," *Board of Regents*, 468 U.S. at 120, is an essential feature of NCAA sports. But the NCAA, *Board of Regents* admonished, "needs ample latitude" to play its "critical role in the maintenance of" this "revered tradition." *Id.* That latitude includes leeway for the NCAA and its members to decide what rules will preserve and promote amateurism. As the Third Circuit put it, "sports-related organizations should have the right to determine for themselves the set of rules that they believe best advance their respective sport (and therefore their own business interests)." *Race Tires*, 614 F.3d at 83. The decision below denies defendants that latitude, subjecting the NCAA's compensation rules—rules that define "the character and quality" of college sports, *Board of Regents*, 468 U.S. at 102—to exacting scrutiny and requiring defendants to prove that the rules are the least restrictive way to maintain the distinction between college and professional sports. The decision thereby leaves the NCAA with little if any flexibility about how best to ensure the preservation

of one of the core characteristics of a prominent institution in modern American society. Whether that deprivation was correct is an important question of federal law.

2. The decision below is also important because it will almost certainly engender perpetual litigation over the NCAA's amateurism rules. Stressing "the inherently fact-dependent nature of a Rule of Reason analysis," *GIA*, 958 F.3d at 1254, the Ninth Circuit ruled that the conduct deemed lawful in *O'Bannon* could be held *un*lawful here, and that *O'Bannon* thus does not limit defendants' exposure to antitrust liability as a matter of stare decisis. Nor, the court held, does *O'Bannon* limit defendants' antitrust exposure as a matter of res judicata because plaintiffs' "claim arose from events that occurred after the *O'Bannon* record closed." *Id.* at 1255 (quotation marks omitted).

Under the decision below, then, virtually any change in the NCAA's compensation rules (whether that change makes the rules more restrictive or less restrictive), or any other change to the factual landscape, opens the door to a new antitrust lawsuit—including detailed rule-of-reason analysis, likely requiring a full trial. In fact, a rule change or other factual development might not even be necessary; the Ninth Circuit here saw no problem with defendants' prediction of "future plaintiffs pursuing essentially the same claim again and again" against defendants, 958 F.3d at 1256 n.13. Not surprisingly, that prediction has already been validated: Less than a month after the decision below, a new lawsuit raising claims very similar to those in *O'Bannon* was filed in the same district as both *O'Bannon* and this case, *see* Compl. (ECF #1), *House* v. *NCAA*, No. 20-cv-3919 (N.D. Cal. June 15, 2020)—and promptly

deemed a related case to this one by the district judge who presided over both this case and *O'Bannon*, Order (ECF #15), *House* (June 23, 2020).

In short, the Ninth Circuit's departures from this Court's and other circuits' precedent create a completely new regime for intercollegiate athletics. The NCAA and its members will no longer have the flexibility to adopt what in their judgment are appropriate and nationally uniform eligibility rules to preserve the traditional amateur character of college sports. Instead, they will either have to freeze their rules in place forever, to the detriment of student-athletes who benefit from rule changes that address evolving circumstances, or face an unending string of litigation that will not only transfer substantial control over intercollegiate athletics away from those with experience and expertise in the field, but also reduce the funds available to provide opportunities and services to student-athletes. Particularly given the role that NCAA sports play in America, these revolutionary changes to the way that NCAA-administered athletics have existed and operated for decades (and other far-reaching consequences) leave no doubt about the importance of the Ninth Circuit's decision and hence that certiorari is reasonably probable.

C. This Court's Denial Of Certiorari In *O'Bannon* Does Not Show That Review Here Is Not Reasonably Probable

In opposing defendants' request to the Ninth Circuit to stay the issuance of its mandate, respondents principally argued that certiorari is not reasonably probable here because this Court denied the NCAA's petition for certiorari in *O'Bannon*. ECF #139-1 at 3-9, *GIA* (July 16, 2020). That argument lacks merit.

Although the NCAA's petition in *O'Bannon* raised issues similar to those discussed above, this case is meaningfully different from *O'Bannon*. To begin with, the immediate stakes in *O'Bannon* may have seemed relatively low at the time because rule changes the NCAA put in place before that appeal even began, *see supra* n.2, implemented the only part of the district court's injunction the Ninth Circuit upheld. *See GIA*, 958 F.3d at 1244. In contrast, the decision below—which, unlike *O'Bannon*, requires the NCAA to allow schools to make payments to student-athletes *beyond* legitimate educational expenses—will have significant consequences for college sports. Indeed, as explained in Part III, the injunction the Ninth Circuit affirmed will inflict irreparable harm on an important American institution.

The Ninth Circuit asserted in *O'Bannon*, moreover, both that its decision did not conflict with either Third Circuit or Fifth Circuit precedent, and that the Seventh Circuit language in *Agnew* that the NCAA relied on was "dicta." 802 F.3d at 1064. While those assertions were incorrect, they may have created uncertainty about whether there was an actual circuit conflict. If so, that uncertainty has been eliminated by the Seventh Circuit's square post-*O'Bannon* holding in *Deppe*, *see* 893 F.3d at 501.

Additionally, this Court may have denied review in *O'Bannon* partly or wholly to see how that decision would be interpreted and applied, including whether it would permit or deter continual antitrust cases challenging NCAA eligibility rules. The answer is now clear: In the Ninth Circuit (where all such future cases will surely be filed), "plaintiffs [can] pursu[e] essentially the same claim again and again." *GIA*, 958 F.3d at 1256 n.13 (quotation marks omitted).

Finally, at the time of *O'Bannon* the Court had only eight members, raising the possibility that at the merits stage the Court would be equally divided, preventing resolution of the questions presented. That issue is of course not present here.

Respondents' opposition below to a stay of the issuance to the mandate cited decades-old, single-Justice opinions that cited a prior denial of certiorari as grounds for concluding that a later certiorari petition was unlikely to be granted. *See Packwood* v. *Senate Select Committee on Ethics*, 510 U.S. 1319, 1321 (1994) (Rehnquist, C.J., in chambers); *Conforte* v. *Commissioner*, 459 U.S. 1309, 1312 (1983) (Rehnquist, J., in chambers); *South Park Independent School District* v. *United States*, 453 U.S. 1301, 1303-1304 (1981) (Powell, J., in chambers). But in none of these instances had the prior denial been made by an eight-member Court. In any event, whatever the Court's practice at the time of the decisions respondents cited, the Court today regularly takes up questions on which it has previously denied review. For example, in *Dutra Group* v. *Batterton*, 139 S. Ct. 2275 (2019), the Court granted review (and reversed) after denying certiorari on the same issue in the prior Term, *see id.* at 2282-2283; *American Triumph LLC* v. *Tabingo*, 138 S. Ct. 648 (2018) (denying certiorari). Similarly, in *Murphy* v. *NCAA*, 138 S. Ct. 1461 (2018), the Court granted review (and reversed) after denying certiorari on the same issue three Terms before, *see id.* at 1471-1473. And in *Hurst* v. *Florida*, 136 S. Ct. 616 (2016), the Court likewise granted review (and reversed) after denying certiorari on the same issue two Terms earlier. *See* Br. in Opp. 16 & n.3, *Hurst*, No. 14-7505 (U.S. Jan. 12, 2015). Other examples abound. *See, e.g.*, Br. in Opp. 35, *Caperton* v. *A.T. Massey Coal Co.*, No. 08-22 (U.S. Sept. 3, 2008) (unsuccessfully urging denial of certiorari based on recent prior denials). In short, the

denial of review in *O'Bannon* provides no basis to conclude that certiorari on the important questions of federal law discussed above—questions that, as explained, have divided the circuits—is not even reasonably probable.[4]

II. THERE IS A FAIR PROSPECT THAT THIS COURT WILL REVERSE THE NINTH CIRCUIT'S DECISION

The foregoing discussion of *Board of Regents* and other relevant precedent of this Court shows that there is—at a bare minimum—a fair prospect that the Court will reverse the Ninth Circuit's judgment. This prediction is confirmed by the fact that the decision below conflicts, as also discussed, with the great weight of circuit precedent. But even if this Court had not already made clear that NCAA rules designed to prevent student-athletes from being paid for their athletic play are valid restraints of trade, there would still be at least a fair prospect that this Court would reach that conclusion here and accordingly reverse the decision below.

"Widen[ing] consumer choice" is "procompetitive." *Board of Regents*, 468 U.S. at 102. And the amateur nature of NCAA sports indisputably distinguishes them from professional sports. Even the Ninth Circuit agreed that "maintaining a distinction between college and professional sports" is procompetitive and that adhering to *some* concept of amateurism serves that goal. *GIA*, 958 F.3d at 1257-1258. Furthermore, it is evident from the face of the challenged NCAA rules that they help preserve the differentiation between amateur college sports and professional sports, by preventing

[4] Respondents' stay opposition below also argued that review is unlikely because the decision below is fact-intensive. ECF #139-1 at 10-11, *GIA*. But as the discussion in Part I makes clear, defendants' petition will challenge the Ninth Circuit's legal rulings.

student-athletes from being paid to play. No further analysis should be needed to sustain the challenged rules under the rule of reason.[5]

The Ninth Circuit, however, deemed the NCAA's concept of amateurism overly restrictive and thus replaced it with "a much narrower conception of amateurism …: Not paying student-athletes unlimited payments unrelated to education." *GIA*, 958 F.3d at 1258 (quotation marks omitted). The court also upheld a requirement that schools be allowed to pay every student-athlete "awards" that, while ostensibly "education-related," require no meaningful threshold of actual achievement, and thus amount to payments for participation in college athletics. Such tinkering with the core definition of the character of defendants' product is beyond the proper power of a federal antitrust court. Antitrust courts, this Court has explained, are "ill-suited" to "act as central planners," *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004), and hence should not "be placed in the position of second-guessing business judgments," rather than leaving such judgments to those with experience and expertise in the relevant fields, *American Motor Inns*, 521 F.2d at 1249.

Likewise indefensible is the Ninth Circuit's adoption of a least-restrictive-alternative (i.e., strict-necessity) standard. As the Third Circuit has explained, a "rigid 'no less restrictive alternative' test" "would place an undue burden on the ordinary

[5] If more were needed (or were appropriate to consider), the record here contains ample support, including a survey finding that about one-third of college-sports fans watch college sports because they "like the fact that college players are amateurs and/or are not paid," C.A. ER233-234, 237-238, 240, and testimony from witnesses with decades of experience in college sports and sports broadcasting that NCAA sports is "a unique property that … resonated with fans because it wasn't professionalized at all," C.A. ER215-216; *see also* C.A. ER172, 178-182, 185-197, 199, 201-207, 216-223.

conduct of business," given that "the imaginations of lawyers" could readily (if not always) "conjure up … a somewhat lesser restriction of trade." *American Motor Inns*, 521 F.2d at 1249. Hence, "courts should [not] calibrate degrees of reasonable necessity," such that the "lawfulness of conduct turns upon judgments of degrees of efficiency." *Rothery,* 792 F.2d at 227-228; *see also* Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & Bus. 369, 377 (2016) ("'Metering' small deviations [in amateurism] is not an appropriate antitrust function….").

The wisdom of this Court's and other circuits' more restrained approach to scrutinizing and second-guessing the business judgments of joint ventures and other enterprises is confirmed by the Ninth Circuit's thorough misapprehension of the record. Contrary to that court's view, the record contained *no* evidence that the traditional concept of amateurism is overly restrictive or that the court's narrower conception would differentiate college from professional sports "just as well as the challenged rules do," *GIA*, 958 F.3d at 1260. The Ninth Circuit's evaluation of the evidence rested on the court's derisive mischaracterization of the NCAA's concept of amateurism as allowing "Not One Penny" over COA. *Id.* at 1258. That ignored the fact that (as explicated in the Statement) defendants' longstanding conception of amateurism permits schools to cover all legitimate educational expenses and allows student-athletes to receive modest recognition awards, even if those expenses and awards exceed the federally defined COA.

Moreover, the crux of the Ninth Circuit's analysis was the premise—first articulated by the district court—that the line of demarcation between college and professional sports is not that professionals are paid to play, but rather that they are

paid "unlimited payments unrelated to education." *GIA*, 958 F.3d at 1258. That core premise is demonstrably false. Professional athletes do not receive "unlimited payments." To the contrary, the National Basketball Association, the National Football League, and Major League Baseball all have salary caps (or the practical equivalent). *E.g.*, C.A. ER200; Diamond, *How MLB's Luxury Tax Has Put a Deep Freeze on Spending*, Wall St. J. (Jan. 11, 2019), https://tinyurl.com/y5g3wtgk. And most minor league players—who this Court recognized in *Board of Regents* are still professionals, *see* 468 U.S. at 102—are typically paid quite little.

The Ninth Circuit sought to salvage this glaring central error with the assertion that "[i]n context"—precisely what context the court of appeals did not specify—"the district court was using the term 'unlimited pay' as shorthand for … *cash* payments *unrelated to education* and *akin to professional salaries*." 958 F.3d at 1260 n.16. That is unavailing. To begin with, defining the line between college and professional sports in terms of what is "akin to professional salaries," *id.*, is entirely tautological. And by its terms the injunction is not limited to non-cash payments; to the contrary, it explicitly permits at least $5,600 per year in cash payments for simply remaining academically eligible, and it prohibits the NCAA from restricting "paid post-eligibility internships." C.A. ER3. That leaves "related to education," *id.*, a term so capacious that it does little if anything to provide meaningful differentiation. As just noted, for example, the injunction requires the NCAA to permit all student-athletes to receive unlimited "paid post-eligibility internships." *Id.* There is simply no sound basis to conclude that college athletes who are paid vast sums of money will remain meaningfully differentiated from professional athletes simply because they will participate in a post-eligibility internship.

Particularly given that the paid internships will be used specifically as a recruitment and retention tool for student-athletes (with the highest paying internships no doubt going to the highest-performing or most-desired athletes), consumers, student-athletes, and everyone else will instead recognize the reality: that the student-athletes, just like professional athletes, are being paid for their play, with the internship the poorly disguised vehicle for funneling those for-play payments. In short, the Ninth Circuit's decision will turn student-athletes into professionals rather than preserving their status as amateurs, eradicating the procompetitive differentiation that this Court and others have recognized as the hallmark of NCAA sports.

III. DEFENDANTS WILL LIKELY SUFFER IRREPARABLE HARM ABSENT A STAY

Absent a stay, the decision below will likely cause lasting irreparable harm, transforming student-athletes into what *O'Bannon* described as "poorly-paid professional collegiate athletes," 802 F.3d at 1076, and thereby eliminating the procompetitive distinction between NCAA sports and professional sports. Consumers will likely come to view NCAA athletics as another form of minor league sports, which are considerably less popular. *See Board of Regents*, 468 U.S. at 102; Gallup, *In Depth: Topics A to Z Sports*, https://news.gallup.com/poll/4735/sports.aspx. Schools that want to remain competitive, meanwhile, will have to spend significant (and unrecoverable) amounts to attract or retain student-athletes. There would also be serious non-economic consequences, such as the severe altering of competition, with schools that choose to offer all the benefits the injunction allows vastly outperforming schools that instead choose to adhere to the traditional amateur model. Finally, there is little doubt that permitting such payments will result in future claims for treble damages against

the NCAA and its members by student-athletes who were not able to receive the payments in the past—the same kind of claim that resulted in a settlement of over $200 million to resolve the damages claims in this action, which were based on the additional COA payments that were permitted by the decision in *O'Bannon*.

The effects of the decision below, moreover, will not be limited to the two sports from which the plaintiff classes here are drawn (football and basketball). Schools that promise student-athletes additional payments under the decision will have to decide where to get that money. Some will get it by cutting funding for other aspects of their football and basketball programs, such as the number of scholarships, the size or quality of their coaching staffs and facilities, or other support, all of which contribute to their student-athletes' overall experience and success not only in athletics but also in the classroom and beyond. Other schools will instead cut funding for other sports programs or eliminate teams altogether. Members of those teams could thereby lose their scholarships, perhaps denying them the opportunity to compete in Division I sports or even the opportunity to attend college.

The harms just discussed could not easily be undone if the decision were later reversed. Even if just one class is recruited with promises of large payments, schools will not be able to rescind their promises or recover any resulting payments, those student-athletes could remain on NCAA teams for years, causing the injunction's effects to linger long after vacatur. Indeed, consumers' perception would likely never revert. The irreparable harm, moreover, would begin to be felt as soon as the injunction takes effect, because schools could then immediately begin making promises to recruit prospective student-athletes or to entice existing student-athletes to remain

(or transfer in from another school). These developments will unquestionably alter consumers' perception of NCAA sports—again, likely irreversibly.

IV. THE BALANCE OF EQUITIES FAVOR A STAY

The foregoing harms far outweigh any harm a stay might cause (by preventing current student-athletes from receiving the benefits allowed by the decision below during the pendency of this appeal). As explained, the decision will fundamentally alter the traditional character and competitive integrity of college sports—an endeavor in which hundreds of thousands of people participate annually and which millions of people enjoy watching. Both defendants and the public have a strong interest in avoiding such harms.

It is hardly clear, moreover, that the decision below is even in student-athletes' best interests. Faced with promises of large payments, some student-athletes will select a school—perhaps the most consequential decision of their life to that point—based not on how they would fit into a school's academic, athletic, and social communities, but based simply on how much money they will be paid, which will undoubtedly diminish the college experience (and post-college prospects) for some such student-athletes. Not all class members can be assumed to appreciate the full implications of a lawsuit formulated and pressed by class counsel. And again, the decision may also deprive student-athletes who are not members of the plaintiff class of athletic and academic opportunities.

In opposing a stay below, plaintiffs asserted that defendants' true concern about the decision below is that it will drive up their costs. ECF #139-1 at 16, *GIA*. That is false. Defendants' commitment to amateurism as a core value has been clear and

constant. The fact that cost is one of many considerations in the NCAA's legislative process does not show otherwise, and certainly does not reveal the rules to be naked restraints of trade. *See Law*, 134 F.3d at 1023 ("[r]educing costs … *without more*" is not a procompetitive justification (emphasis added)). Indeed, if defendants' goal were merely to control costs, their compensation limits would apply *only* to payments by member institutions, not to payments from any source.

V. IF THE NINTH CIRCUIT'S MANDATE ISSUES, THIS COURT SHOULD STAY THE DISTRICT COURT'S INJUNCTION PENDING THE FILING AND DISPOSITION OF DEFENDANTS' PETITION FOR CERTIORARI

In the event the court of appeals' mandate issues before this Court disposes of this application, defendants request—for all the reasons given above—that the Court stay the district court's injunction pending the filing and disposition of defendants' petition for certiorari.

VI. THE COURT SHOULD GRANT AN ADMINISTRATIVE STAY WHILE IT CONSIDERS THIS APPLICATION

Because of the irreparable harms that the decision below will begin to cause immediately upon taking effect, defendants respectfully request that this Court grant an administrative stay of the issuance of the Ninth Circuit's mandate while this Court considers this application. *See Hollingsworth* v. *Perry*, 558 U.S. 1107 (2010). If the court of appeals' mandate issues while this application is pending, defendants similarly request that the Court grant an administrative stay to prevent the injunction from taking effect pending disposition of the application.

CONCLUSION

This Court should stay the issuance of the Ninth Circuit's mandate pending the filing and disposition of a petition for a writ of certiorari. If the mandate issues while this application is pending, the Court should stay the district court's injunction pending the filing and disposition of a petition for a writ of certiorari. Alternatively, defendants suggest that the Court treat this application as a petition for a writ of certiorari and grant the petition. Finally, defendants request an administrative stay while the Court considers this application.

Respectfully submitted,

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AUGUST 5, 2020

CORPORATE DISCLOSURE STATEMENT

The National Collegiate Athletic Association is an unincorporated, non-profit membership association composed of over 1,200 member schools and conferences. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The American Athletic Conference is a D.C. not-for-profit corporation headquartered in Irving, Texas. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The Atlantic Coast Conference is a North Carolina not-for-profit unincorporated association headquartered in Greensboro, North Carolina. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The Big Ten Conference, Inc. is a Delaware not-for-profit corporation with its principal place of business in Rosemont, Illinois. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The Big 12 Conference, Inc. is a Delaware not-for-profit corporation with its principal place of business in Irving, Texas. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

Conference USA is an Illinois not-for-profit corporation with its principal place of business in Dallas, Texas. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

The Mid-American Athletic Conference, Inc. is an Ohio not-for-profit corporation headquartered in Cleveland, Ohio. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The Mountain West Conference is a Colorado not-for-profit corporation headquartered in Colorado Springs, Colorado. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The Pac-12 Conference (Pac-12) is a California not-for-profit unincorporated association headquartered in San Francisco, California. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The Southeastern Conference is an Alabama unincorporated non-profit association headquartered in Birmingham, Alabama. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The Sun Belt Conference is a Louisiana non-profit corporation headquartered in New Orleans, Louisiana. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

The Western Athletic Conference is a Colorado not-for-profit corporation headquartered in Englewood, Colorado. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

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CERTIFICATE OF SERVICE

I, Seth P. Waxman, a member of the bar of this Court, certify that on this 5th day of August, 2020, I caused all parties requiring service in this matter to be served with a copy of the foregoing by email and U.S. first class mail to the addresses below:

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