No. 20-

IN THE

Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

SHAWNE ALSTON, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erroneously held, in conflict with decisions of other circuits and general antitrust principles, that the National Collegiate Athletic Association eligibility rules regarding compensation of student-athletes violate federal antitrust law.

PARTIES TO THE PROCEEDINGS

Petitioner, defendant-appellant below, is the National Collegiate Athletic Association.

Respondents, plaintiffs-appellees below, 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.

Other defendants-appellants below were 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.

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.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

A. *House et al.* v. *NCAA et al.*, No. 4:20-cv-3919.

B. *Jenkins et al.* v. *National Collegiate Athletic Association et al.*, No. 4:14-cv-2758 (dismissed).

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PETITION FOR A WRIT OF CERTIORARI

The National Collegiate Athletic Association ("NCAA") respectfully petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion (App. 1a-63a) is published at 958 F.3d 1239. The district court's opinion (App. 65a-165a) is published at 375 F. Supp. 3d 1058; its permanent injunction (App. 167a-170a) is unpublished.

JURISDICTION

The Ninth Circuit entered judgment on May 18, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in relevant 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."

INTRODUCTION

At issue in this case is whether the nationwide rules that define who is eligible to participate in NCAA sports will henceforth be set by the NCAA or by one federal judge in California, assisted by the imagination of plaintiffs' lawyers and subject only to deferential Ninth Circuit review. More broadly, the question here is whether sports organizations and other joint ventures will have the ability to define the character of their own products.

Fundamental principles of antitrust law, as reflected in this Court's precedent, make clear that the NCAA, not a single jurist, should set the rules for college sports. As this Court recognized in *NCAA* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), the essential "character and quality" of NCAA sports—what "differentiates" NCAA sports from professional ones—has long been that participants in NCAA sports are both amateurs and students at the schools for which they play, i.e., that they "must not be paid[and] must … attend class," *id.* at 102. *Board of Regents* further instructed that "the preservation of

the student-athlete in higher education … is entirely *consistent* with the goals of the Sherman Act." *Id.* at 120. Accordingly, this Court explained, rules that limit "eligibility" to enrolled students who are not paid to play "are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive" for purposes of antitrust challenges. *Id.* at 117. And a sports association's procompetitive rules, this Court later emphasized, can be sustained under antitrust law's rule of reason "'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).

Following this Court's teachings, the Third, Fifth, and Seventh Circuits have rejected antitrust challenges to NCAA amateurism rules—and did so at the motion-to-dismiss stage, examining the rules on their face rather than requiring a trial or even discovery. *See Deppe* v. *NCAA*, 893 F.3d 498, 499-504 (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).

These decisions, like *Board of Regents* itself, accord with how this Court and others treat both other organizations that administer sports competitions, and joint ventures more generally. This Court has explained, for example, that "[j]oint ventures and other cooperative arrangements are … not usually unlawful … where the agreement … is necessary to market the product at all." *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 23 (1979). And in upholding a racing organization's rule on summary judgment, the Third Circuit observed that where "sports-related organizations" "possess good faith justifications," they "should have the right to determine for themselves the set of rules that they be-

lieve best advance their respective sport (and therefore their own business interests), without undue and costly interference on the part of courts and juries." *Race Tires Am., Inc.* v. *Hoosier Racing Tire Corp.*, 614 F.3d 57, 83 (3d Cir. 2010).

The Ninth Circuit has taken a starkly different approach, first in *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015), and now here. In each case—after the same district judge required a bench trial and then invalidated NCAA rules that restrict student-athlete compensation—the Ninth Circuit brushed aside key parts of *Board of Regents* as dicta, declared other circuits' approach "unpersuasive," and held that NCAA amateurism rules are subject to strict rule-of-reason scrutiny after trial. *Id.* at 1064; App. 12a, 37a.

In this case, the Ninth Circuit, going far beyond *O'Bannon*, held that virtually all NCAA rules limiting so-called "education-related benefits" are invalid. App. 34a-46a. That holding rested on the court's assertion that what differentiates college and professional athletes is *not*, as *Board of Regents* explained, that amateur college athletes "must not be paid" to play, 468 U.S. at 102. Rather, the Ninth Circuit opined, what differentiates college and professional athletes is that only professionals receive "unlimited payments unrelated to education," App. 37a—a notion the lower courts invented out of thin air. Applying that invented notion, the Ninth Circuit also held that many NCAA rules are not needed to preserve the procompetitive distinction between college and professional athletes because student-athletes would not be professionals even if they were paid *unlimited* amounts of money to play, as long as the payments could somehow be regarded as "related to education." Finally, the Ninth Circuit approved an injunction that specifies the "compensation and ben-

efits related to education … that the NCAA may not limit," and requires the NCAA to seek judicial pre-approval to alter the list or to define the term "related to education." App. 167a-168a.

The consequences of the Ninth Circuit's approach confirm the need for this Court's review. The decision below deprives the NCAA of the leeway that sports-governing bodies and joint ventures ordinarily have under antitrust law, leeway that this Court and others have recognized the NCAA needs to administer intercollegiate athletics. Instead, the decision below vests nationwide supervision of eligibility to participate in intercollegiate athletics in one district judge, with authority to be exercised through an endless string of antitrust lawsuits challenging NCAA rules—even if those rules have been upheld in prior cases. Such judicial micromanagement is improper: As this Court has explained, antitrust courts 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), or to "second-guess[] business judgments," *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975); *see also Chicago Professional Sports Ltd. P'ship* v. *NBA*, 95 F.3d 593, 597 (7th Cir. 1996) ("[T]he antitrust laws do not deputize district judges as one-man regulatory agencies.").

The rule changes that the Ninth Circuit's decision requires, moreover, will fundamentally transform the century-old institution of NCAA sports, blurring the traditional line between college and professional athletes (one this Court, again, has long recognized). That, too, is not a proper role for the courts. Public debate about how best to regulate college sports for the benefit of student-athletes, academic institutions, and fans is entirely appropriate. And such debate, which has ex-

isted throughout most of the NCAA's existence, continues today—including in Congress, which is considering (with petitioner's active involvement) whether to adopt federal legislation regarding student-athlete compensation. But under the guise of applying the rule of reason, the Ninth Circuit has made itself a tool of one viewpoint in the debate: that student-athletes should have increasing and ultimately unbounded freedom to negotiate their compensation for playing college sports. Antitrust litigation is wholly unsuited to resolving such debates.

Preventing these far-reaching harms (not only to the NCAA but also to joint ventures more generally), and resolving the circuit conflict noted above, warrants this Court's review.

STATEMENT

A. The NCAA And Amateurism In College Sports

1. The NCAA administers intercollegiate athletics as an integral component of higher education

a. For over a century, student-athletes throughout the country have enjoyed the many benefits of participating in intercollegiate athletics as part of their education, benefits such as opportunities for leadership, teamwork, camaraderie, time management, discipline, and coping with success and failure. C.A. ER155. And "[s]ince its inception in 1905, the NCAA has played an important role in the regulation of … collegiate sports." *Board of Regents*, 468 U.S. at 88.

Today, nearly half a million student-athletes participate in NCAA-administered athletics each year, playing two dozen sports at about 1,100 NCAA member

schools. What Is The NCAA?, https://tinyurl.com/y4kpswnl (all web pages cited herein visited October 15, 2020); C.A. ER8. And millions of fellow students, alumni, faculty, and other fans watch NCAA competitions in person and on television. Indeed, college athletics have long been "more popular than [comparable] professional sports." *Board of Regents*, 468 U.S. at 102; *see also* C.A. ER215-216; Gallup, *In Depth: Topics A to Z Sports*, https://news.gallup.com/poll/4735/sports.aspx.

Although a few NCAA teams generate enough revenue to cover their expenses—most are subsidized by their schools, C.A. ER154, 155; C.A. ER263-264—all schools' "primary mission" remains "educating [their] students," C.A. ER153-154, with intercollegiate athletics "an important part of the educational experience," C.A. ER213.

b. For many decades, a hallmark of NCAA sports has been amateurism, the principle that student-athletes are not professionals. *E.g.*, *Board of Regents*, 468 U.S. at 88. The NCAA has thus long had a body of eligibility rules designed to establish a "clear line of demarcation between intercollegiate athletics and professional sports." C.A. ER274. The NCAA's "tradition of amateurism," this Court has observed, "adds richness and diversity to intercollegiate athletics." *Board of Regents*, 468 U.S. at 120.

Consistent with the large number of sports, schools, and student-athletes involved, the NCAA's eligibility rules address many topics. *See* C.A. ER272-273. As relevant here, the rules prohibit student-athletes from being paid for their play, while allowing schools to reimburse student-athletes for reasonable and necessary academic and athletic expenses. *See* C.A. ER284-287, 1422-1440. The rules also permit stu-

dent-athletes to receive limited awards to recognize academic or athletic achievement. *See* C.A. ER288-289, 296-297.

The principal measure of legitimate academic expenses is "cost of attendance," or COA, a term enshrined in federal law and used to determine the financial assistance students may receive to attend school. 20 U.S.C. §1087kk. COA includes tuition and fees (including required "equipment, materials, or supplies"), room and board, books, a computer, transportation, and "miscellaneous personal expenses." *Id.* §1087*ll*. Each school independently determines "the appropriate and reasonable amounts" for its students. C.A. ER324; *see also* 20 U.S.C. §1087kk.

NCAA rules permit student-athletes to receive financial aid up to COA, and also (consistent with financial-aid rules for all students) let schools "adjust[]" COA "on an individual basis," C.A. ER285. Financial aid may be provided through an athletic scholarship—called a "grant-in-aid"—other financial aid, or both. C.A. ER284, 286-287. Schools may also cover student-athletes' additional educational expenses using two funds: the Student Assistance Fund and the Academic Enhancement Fund. C.A. ER268-269, 284-285, 294-295. And student-athletes who demonstrate exceptional financial need can receive Pell grants from the federal government. 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/.

Finally, NCAA rules allow schools to provide limited awards to recognize genuine achievement by individual athletes or teams. The value limits range from $175 for being a team's most-improved or most-

valuable player to $1,500 for being a conference's athlete (or scholar-athlete) of the year. C.A. ER288-289, 296-297. Additionally, schools may annually give a Senior Scholar Award (providing $10,000 for graduate school) to two graduating student-athletes. C.A. ER289. The award limits are designed to ensure that awards do not become vehicles for disguised pay-for-play. C.A. ER170-171.

2. ***Board of Regents***

For decades, there was a judicial consensus that, for purposes of section 1 of the Sherman Act, NCAA eligibility rules designed to ensure that student-athletes are not paid to play their sport should be upheld against antitrust challenge without trial and detailed analysis. This consensus was founded on *Board of Regents*.

In that case, this Court explained that because league sports are "an industry in which horizontal restraints on competition are essential if the product is to be available at all," NCAA rules should be evaluated for antitrust purposes under the rule of reason, rather than deemed illegal per se. 468 U.S. at 100-101. The rule of reason entails a "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 defendant must "show a procompetitive rationale for the restraint," and if it 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). This Court has clarified, however, that "the Rule of Reason may not require a detailed analysis; it 'can

sometimes be applied in the twinkling of an eye'" to uphold a challenged restraint. *American Needle*, 560 U.S. at 203 (quoting *Board of Regents*, 468 U.S. at 109 n.39).

Board of Regents also recognized important differences, for antitrust purposes, between different types of NCAA rules. The Court explained that NCAA "standards of amateurism" and "academic eligibility," 468 U.S. at 88, "preserve the character and quality of" intercollegiate athletics, defining the "particular brand" of sports the NCAA offers, and thereby "widen consumer choice—not only the choices available to sports fans but also those available to athletes," *id.* at 101-102. Consequently, rules implementing these eligibility standards, such as the rules that "athletes must not be paid" and "must be required to attend class," "can be viewed as procompetitive." *Id.* at 102. In fact, the Court concluded, 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.

In contrast, *Board of Regents* held, the NCAA television-licensing plan challenged there did not "fit into the same mold as do rules defining … the eligibility of participants," because it was not based "on a desire to maintain the integrity of college football as a distinct and attractive product." 468 U.S. at 116-117. The Court therefore conducted a detailed rule-of-reason analysis, concluding that the plan was unlawful. *Id.* at 104-117.

3. ***O'Bannon***

For three decades, courts of appeals applying *Board of Regents* uniformly held that NCAA eligibility rules requiring student-athletes to be amateurs are val-

id under antitrust law. *See supra* p.3 (citing cases). Indeed, these courts held that rules "defin[ing] what it means to be an amateur" should be sustained "at the motion-to-dismiss stage," that is, without detailed rule-of-reason analysis. *Agnew* v. *NCAA*, 683 F.3d 328, 341, 343 (7th Cir. 2012); *see infra* pp.19-21.

In 2015, however, the Ninth Circuit disrupted this judicial consensus. In *O'Bannon*, former NCAA football and men's basketball players claimed that the NCAA rules restricting compensation for student-athletes violated antitrust law by precluding student-athletes from being paid for the use of their names, images, or likenesses. After a bench trial and detailed rule-of-reason analysis, the district court declared the rules unlawful. This was "the first [decision] by any federal court to hold that any aspect of the NCAA's amateurism rules violate[s] the antitrust laws, let alone to mandate … that the NCAA change its practices." *O'Bannon*, 802 F.3d at 1053.

On appeal, the Ninth Circuit concluded—contrary to the *Board-of-Regents*-based consensus noted above—that all NCAA rules, even those designed to promote amateurism, are subject to trial and detailed rule-of-reason analysis. *O'Bannon*, 802 F.3d at 1063-1064. The court then affirmed the district court's holding that a below-COA cap on athletic scholarships (a cap the NCAA had changed before the appeal began) was "*patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives" and therefore invalid. *Id.* at 1075. But the Ninth Circuit also held the district court "clearly erred" in requiring the NCAA to allow schools to give student-athletes deferred compensation of up to $5,000 per year above COA. *Id.* at 1074, 1076. The court explained that "not paying student-athletes is *precisely what makes*

them amateurs," and that it was thus "self-evident … that paying students … will vitiate their amateur status." *Id.* at 1076, 1077. Given that, the court held, antitrust law "requires that the NCAA permit its schools to provide up to the cost of attendance to their student-athletes," but "does not require more." *Id.* at 1079.[1]

B. Procedural History

1. District Court

While *O'Bannon* was pending, several classes of Division I football and basketball players—classes that largely overlap with the *O'Bannon* class—filed antitrust actions against petitioner, seeking to "dismantle the NCAA's entire compensation framework." App. 14a. The cases were assigned to the district judge presiding over *O'Bannon* and (with one exception) consolidated. Following the Ninth Circuit's decision in *O'Bannon*, the district court ruled that that decision was preclusive here as to step 1 of the rule of reason (which favored respondents) but not step 2 or 3 (which would have favored petitioner), and set the case for a bench trial on those latter steps. App. 15a-16a. After trial, the court concluded that the challenged eligibility rules violated antitrust law.

At step 2 of its rule-of-reason analysis, the court acknowledged that "maintaining a distinction between college sports and professional sports" is procompetitive. C.A. ER49. But it rejected petitioner's (and *Board of Regents*') conception of amateurism—that ath-

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[1] Chief Judge Thomas (who authored the decision below) concurred in part and dissented in part in *O'Bannon*, stating that he would have upheld the district court's judgment in its entirety. *See* 802 F.3d at 1079.

letes not be paid to play—in favor of one the court invented, namely, that "the distinction between college and professional sports arises because student-athletes do not receive unlimited payments unrelated to education, akin to salaries seen in professional sports leagues." C.A. ER50. Having adopted this conception, the court concluded that the challenged rules were "more restrictive than necessary to" maintain the distinction between college and professional sports. C.A. ER51.

The district court then found, at rule-of-reason step 3, that there is a less-restrictive alternative—one the court created to track its new conception of amateurism. Under this alternative, the NCAA could continue to limit benefits unrelated to education but would be "prohibit[ed] … from limiting education-related benefits," except that the NCAA "could limit … academic or graduation awards or incentives, provided in cash or cash-equivalent," at the "current or future cap[] on athletics participation awards." C.A. ER7. (The court calculated the current cap as $5,600, C.A. ER85, while respondents maintain it is $15,000 or more, C.A. ER1444-1445.)

The district court then entered a permanent injunction tracking its alternative scheme:

> 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.… Notwithstanding the foregoing …, the NCAA may agree … to fix or limit academic or graduation awards or incentives that may be made available from conferences or schools[,] provided that the limit [is] never less than the athletics participation awards limit.

App. 167a-169a. The injunction further states that this list "may be amended" only "on motion of any party," App. 168a—in other words, only with the district court's pre-approval. And 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.*

2. Ninth Circuit

The court of appeals affirmed. It first held that although NCAA rules permit athletic scholarships up to COA, respondents' claim was not foreclosed by *O'Bannon*'s conclusion that antitrust law "does not require more" than that, 802 F.3d at 1079. The panel reasoned that (1) rule-of-reason analysis is case-specific, and (2) some of the evidence here arose after the *O'Bannon* record closed. App. 26a-32a. The panel also reaffirmed *O'Bannon*'s rejection of petitioner's contention (and other circuits' holding) that NCAA rules restricting student-athlete compensation "are 'valid as a matter of law' under" *Board of Regents*, instead subjecting them again to detailed rule-of-reason analysis. App. 12a-13a, 34a-45a.

In applying that analysis, the Ninth Circuit did not deny that "maintaining a distinction between college and professional sports" is procompetitive, App. 34a-35a, or

that petitioner's (and *Board of Regents*') conception of amateurism helps preserve that distinction. The court nevertheless invalidated that conception, declaring 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." App. 37a. "Instead," the court said, "the record supports a much narrower conception of amateurism that still gives rise to procompetitive effects: Not paying student-athletes unlimited payments unrelated to education." *Id.* In other words, student-athletes would not be professionals even if they were paid huge sums of money, so long as they did not receive "unlimited payments unrelated to education." *Id.* The court reasoned that even unlimited "education-related benefits … could not be confused with a professional athlete's salary." App. 35a. The court also deemed it "doubtful that a consumer could mistake a post-eligibility internship"—for which the injunction allows student-athletes to be paid unlimited amounts in cash—"for a professional athlete's salary." App. 44a.

Next, the Ninth Circuit held that the district court's alternative scheme would be "virtually as effective" as the NCAA's rules in differentiating college from professional sports and thereby in "preserv[ing] consumer demand." App. 41a-45a. In response to petitioner's argument that the "uncapped benefits" the injunction allows would become "vehicles for unlimited cash payments," the court adopted a narrowing gloss, limiting the injunction's allowance of "non-cash education-related benefits" to "*legitimate* education-related costs." App. 43a-44a. The court adopted no such gloss, however, on the court-ordered allowances that could be paid in cash, i.e., the paid post-eligibility internships and the academic and graduation awards and incentives.

Finally, the court determined that the injunction did not improperly aggrandize the district court's power, App. 47a-48a, and it rejected respondents' cross-appeal, which requested a broadening of the injunction to enjoin all NCAA limits on student-athlete compensation, App. 47a-51a.

REASONS FOR GRANTING THE PETITION

This Court's review is warranted because the decision below implicates an established circuit conflict, reflects improper judicial meddling and misuse of antitrust law, and would have far-reaching deleterious effects not only for the American institution of NCAA sports but also for joint ventures more generally.

I. THE NINTH CIRCUIT'S DECISION IMPLICATES AN ESTABLISHED AND ACKNOWLEDGED CIRCUIT CONFLICT

This Court made clear in *Board of Regents* that NCAA amateurism rules are procompetitive and hence justifiable for antitrust purposes. Other circuits have understood this, holding that NCAA rules that facially serve to maintain college athletes' amateur status should be upheld without trial and detailed rule-of-reason analysis. The Ninth Circuit disagrees, subjecting NCAA amateurism rules to precisely such burdensome and intrusive analysis—and invalidating some of those rules. The decision below thus entrenches an acknowledged circuit conflict on the important and recurring issue of how the rule of reason applies to NCAA eligibility rules. The Ninth Circuit also rejected the traditional no-pay conception of amateurism as a sufficient justification for NCAA compensation limits, again contrary to the view of this Court and other circuits.

A. Consistent With This Court's Broader Joint-Venture Law, *Board Of Regents* Recognized That NCAA Amateurism Rules Are Presumptively Procompetitive And That The NCAA Needs Leeway To Adopt Such Rules

This Court held in *Board of Regents* that NCAA rules would be evaluated under the rule of reason, rather than deemed illegal per se, because "[w]hat the NCAA and its member institutions market … is competition itself—contests … between competing institutions," and "this would be completely ineffective if there were no rules … defin[ing] the competition to be marketed." 468 U.S. at 101. The Court then explained why, although the television plan at issue was subject to detailed rule-of-reason analysis (and ultimately unlawful), "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams, and therefore procompetitive." *Id.* at 117; *see supra* p.9. *Board of Regents* emphasized, moreover, that "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports" and that it "needs ample latitude to play that role." 468 U.S. at 120.

In *American Needle* v. *NFL*, this Court reiterated that antitrust law must be applied in a way that affords sports leagues latitude to offer their unique products. The "special characteristics of this industry," the Court explained, "may provide a justification for many kinds of agreements," 560 U.S. at 202 (quotation marks omitted), and that "[w]hen 'restraints on competition are essential if the product is to be available at all,'" they are "likely to survive the Rule of Reason," *id.* at 203 (quoting *Board of Regents*, 468 U.S. at 101); *see also id.* at 202 ("teams that need to cooperate are not trapped

by antitrust law"). In fact, the Court—again drawing on *Board of Regents*—added that "depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye'" to uphold a challenged restraint. *Id.* at 203 (quoting *Board of Regents*, 468 U.S. at 109 n.39).

Both *Board of Regents* and *American Needle* are consistent with this Court's broader joint-venture precedent, which recognizes that antitrust laws must take account of joint ventures' need to cooperate to offer their distinctive products. For example, the Court has explained that "[j]oint ventures and other cooperative arrangements are … not usually unlawful … where the agreement … is necessary to market the product at all." *Broadcast Music*, 441 U.S. at 23.

Relatedly, "courts have generally accorded sports organizations a certain degree of deference and freedom to" define their "basic rules and guidelines," as long as the organization "offers" a "justification" for its rules that is not "in bad faith or … otherwise nonsensical." *Race Tires*, 614 F.3d at 80-82. And courts recognize that sports "sanctioning bodies, as well as similar organizations in other sports, deserve a bright-line rule to follow so they can avoid potential antitrust liability as well as time-consuming and expensive antitrust litigation." *Id.* at 80. Hence, the Third Circuit upheld at summary judgment a rule that, according to a racing organization's "good faith" explanation, promoted racing competition. *Id.* at 82-83. Observing that the antitrust challenge "constitute[d] an attack on the very *raison d'etre* of the sanctioning bodies," the court held that "sports-related organizations should have the right to determine for themselves the … rules that they believe

best advance their respective sport …, without undue and costly interference on the part of courts." *Id.*

B. Most Circuits Have Understood *Board Of Regents* And *American Needle* To Require That NCAA Amateurism Rules Be Upheld Without Fact-Intensive Rule-Of-Reason Analysis

The Third, Fifth, and Seventh Circuits have properly read this Court's precedent to mean that NCAA rules designed to prevent student-athletes from being paid to play receive deference under the rule of reason and should be upheld without trial and fact-intensive analysis.

For example, the Seventh Circuit has repeatedly held that "an NCAA bylaw is presumptively procompetitive when it is 'clearly meant to help maintain the revered tradition of amateurism in college sports or the preservation of the student-athlete in higher education.'" *Deppe*, 893 F.3d at 501 (quoting *Agnew*, 683 F.3d at 342-343) (quotation marks omitted). Further, once this presumption applies, "a full rule-of-reason analysis is unnecessary" and the claim "should be dismissed on the pleadings." *Id.* at 501, 503-504. Because such rules are "essential to the very existence of the product of college" sports, and "scrutinizing [them] conflicts with the Supreme Court's admonition in *Board of Regents* that the NCAA needs 'ample latitude' to preserve the product of college sports," *id.* at 502-503, they should not be evaluated "on a case-by-case basis," *Agnew*, 683 F.3d at 343 n.7. Accordingly, in the Seventh Circuit, the only question is "whether a rule is, on its face, supportive of the 'no payment' and 'student-athlete' models, not whether 'no payment' rules are themselves procompetitive—under *Board of Regents*, they clearly are." *Id.*; *accord Deppe*, 893 F.3d at 502. If a rule fits

that description, it should be sustained "in the twinkling of an eye—that is, at the motion-to-dismiss stage." *Agnew*, 683 F.3d at 341, 343 (citing *American Needle*, 560 U.S. at 203) (quotation marks and citation omitted). A "more searching Rule of Reason analysis will be necessary," the court said, only if the rule is "not directly related to the separation of amateur athletics from pay-for-play athletics." *Id.* at 343, 345.

Applying this framework, the Seventh Circuit recently affirmed the dismissal of an antitrust challenge to the NCAA's "'year in residence' [eligibility] rule, which requires student-athletes who transfer to a Division I college to wait one full academic year before … play[ing] for their new school." *Deppe*, 893 F.3d at 499. The plaintiff argued that the availability of waivers showed the rule was "unnecessary to the survival of college football," an argument the Seventh Circuit deemed "a nonstarter." *Id.* at 503. The "test," the court explained, "is not whether college athletics could survive without this bylaw, but rather whether the rule is clearly meant to help preserve the amateurism of college sports." *Id.* And analyzing the rule on its face (no factual record existed), the court concluded that the rule was meant to help preserve amateurism, because its purpose was to "guard[] against th[e] risk" that "[u]ninhibited transfers" would "sever[] the athletic and academic aspects of college sports." *Id.*

Similarly, the Fifth Circuit in *McCormack* v. *NCAA* had "little difficulty" dismissing a complaint challenging NCAA rules restricting student-athlete compensation. 845 F.2d at 1343-1345. There, the NCAA had suspended a university's football program for violating such restrictions. Student-athletes and alumni challenged the suspension, arguing (as respondents do) that the NCAA violated antitrust law by en-

forcing rules "restricting the benefits that may be awarded student athletes." *Id.* at 1340. Disagreeing, the court concluded that NCAA "eligibility rules create the product and allow its survival." *Id.* at 1344-1345. The court further held that although "the NCAA permits some compensation through scholarships," that did "not undermine the rationality of the eligibility requirements" or render the NCAA's conception of amateurism "unreasonable." *Id.* at 1345.

The Third Circuit, too, has upheld NCAA eligibility rules as procompetitive at the motion-to-dismiss stage. In *Smith* v. *NCAA*, student-athletes challenged an NCAA rule prohibiting participation in intercollegiate sports by student-athletes attending graduate schools at institutions other than those where they earned their undergraduate degrees. *See* 139 F.3d at 186-187. After observing that "in general, the NCAA's eligibility rules allow for the survival of the product, amateur sports," the court declared the challenged rule "a reasonable restraint which furthers … fair competition and the survival of intercollegiate athletics and is thus procompetitive." *Id.* at 187. Because the rule "so clearly survives a rule of reason analysis," the court did "not hesitate" to uphold it at the motion-to-dismiss stage. *Id.*

Finally, although the Tenth Circuit has not opined on whether NCAA eligibility rules may be upheld at the motion-to-dismiss stage, it has stated that *Board of Regents* "recognized that [NCAA rules defining] the eligibility of participants[] are justifiable under the antitrust laws because they are necessary to create the product of competitive college sports." *Law* v. *NCAA*, 134 F.3d 1010, 1021 (10th Cir. 1998). The Tenth Circuit has also recognized that "courts should afford the NCAA plenty of room under the antitrust laws to pre-

serve the amateur character of intercollegiate athletics." *Id.* at 1022 n.14.

C. The Ninth Circuit Takes A Starkly Different Approach

Unlike other circuits, the Ninth Circuit holds that NCAA eligibility rules, including those restricting student-athlete compensation, are subject to trial and demanding rule-of-reason scrutiny. And applying such scrutiny—including relying on evidence absent from all the sports-related precedents cited above and not ordinarily relied on in antitrust cases—it has held some eligibility rules unlawful despite the NCAA's good-faith procompetitive justifications.

In *O'Bannon*, the Ninth Circuit dismissed *Board of Regents*' lengthy "discuss[ion of] the NCAA's amateurism rules" as "dicta," offered simply to explain why NCAA rules "should be analyzed under the Rule of Reason, rather than held … illegal per se." 802 F.3d at 1063. And it similarly dismissed the Seventh Circuit's reading of *Board of Regents* in *Agnew* as "unpersuasive," "dubious," and "dicta." *Id.* at 1064.[2]

Here, the Ninth Circuit deepened the conflict *O'Bannon* created, invalidating NCAA compensation rules under a fact-intensive rule-of-reason analysis. Recounting that *O'Bannon* "rejected the … argument that [NCAA] amateurism rules … are 'valid as a matter of law' under" *Board of Regents*, App. 12a, the court

[2] *O'Bannon* wrongly asserted that its approach accorded with Third and Fifth Circuit precedent because those courts "subjected the NCAA's rules to Rule of Reason scrutiny." 802 F.3d at 1064. As explained, those courts upheld the challenged NCAA rules *at the motion-to-dismiss stage*, without fact-intensive analysis.

amplified its view that such rules are subject to detailed rule-of-reason scrutiny. Quoting a separate discussion in *Board of Regents*, the Ninth Circuit asserted that "the NCAA bears a 'heavy burden' of 'competitively justify[ing]' its undisputed 'deviation from the operations of a free market,'" App. 34a. Unlike other circuits, however, the Ninth Circuit ignored *Board of Regents*' explanation that this burden is satisfied if the challenged rules "fit into the same mold as do rules defining … the eligibility of participants," i.e., rules "based on a desire to maintain the integrity of college [sports] as a distinct and attractive product." 468 U.S. at 116-117, *quoted in part in Agnew*, 683 F.3d at 339.

The Ninth Circuit thus subjected the entire body of NCAA eligibility rules regarding student-athlete compensation to intensive scrutiny based on the trial record, which included "demand analyses, survey evidence," and lay and expert testimony. App. 36a. And citing that record—which amply showed the NCAA's good-faith justification for the challenged rules—the court cast aside the NCAA's traditional conception of amateurism (that amateurs are not paid to play), replacing it with the "narrower conception" the district court invented. App. 37a. Applying that narrower conception, the court held that the district court's alternative, which allows unlimited payments to student-athletes so long as they can be labeled "education related," "would be virtually as effective" at maintaining the distinction between college and professional athletes. App. 40a-45a. Both that result and the underlying reasoning directly conflict with the other circuit decisions discussed above, which rejected similar challenges to NCAA amateurism rules.

II. THE DECISION BELOW IS WRONG

The Ninth Circuit erred in holding that NCAA amateurism rules receive fact-intensive rule of reason scrutiny, and that some of those rules violate antitrust law.

A.1. As discussed, *Board of Regents* teaches that NCAA rules reasonably designed to preserve the amateur nature of college sports should be upheld under the rule of reason without detailed analysis because they are "entirely consistent with the goals of the Sherman Act," and the NCAA needs "ample latitude" to maintain amateurism in college athletics. 468 U.S. at 120. It is "procompetitive," this Court explained, to "widen consumer choice." *Id.* at 102. And as even the Ninth Circuit agreed here, "maintaining a distinction between college and professional sports" widens consumer choice. App. 34a-35a. The Ninth Circuit's conclusion that NCAA rules that preserve the amateur nature of college sports nonetheless violate antitrust law cannot be reconciled with *Board of Regents*.

The Ninth Circuit dismissed these portions of *Board of Regents* as dicta provided to explain why NCAA rules "should be analyzed under the Rule of Reason, rather than held … illegal per se." *O'Bannon*, 802 F.3d at 1064. That is incorrect. This Court's extended discussion of NCAA amateurism rules—and the difference, for antitrust purposes, between those rules and the television plan at issue—was unnecessary (and unhelpful) to explain why NCAA rules are not illegal per se. The Court's explanation for *that* was simple, and given separately: "[T]his case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." 468 U.S. at 100-101. But as discussed, this Court went further, ex-

plicating the difference between the television plan and NCAA eligibility rules. And contrary to *O'Bannon*'s assertion, that explanation was central to this Court's holding that the television plan was subject to detailed rule-of-reason analysis. It is thus binding precedent. *See Seminole Tribe* v. *Florida*, 517 U.S. 44, 66-67 (1996).

Even if *Board of Regents*' discussion of the pro-competitive nature of NCAA amateurism rules were dicta, the Ninth Circuit erred in dismissing it because it is correct. Indeed, the flawed analysis that (as discussed below) the Ninth Circuit had to embrace to invalidate those rules confirms that this Court was right to conclude, in dicta or not, that amateurism is essential to the "particular brand" of sports the NCAA offers, 468 U.S. at 101, such that amateurism rules should be sustained "in the twinkling of an eye," *id.* at 109 n.39.

2. More generally, the Ninth Circuit's test improperly "place[s] the courts in the awkward position of routinely second-guessing business decisions," ABA Antitrust Section-Monograph No. 23, *The Rule of Reason* 123 (1999), threatening to "interfere with the legitimate objectives at issue without … adding that much to competition," 7 Areeda & Hovenkamp, *Antitrust Law* ¶1505b (3d ed. 2015). Such a test encourages litigation premised on nothing more than "the imaginations of lawyers" in "conjur[ing] up" some marginally less-restrictive alternative. *American Motor*, 521 F.2d at 1249. And such litigation would be rampant—for the NCAA, other sports leagues, and joint ventures more generally—because a "skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements." 11 *Antitrust Law* ¶1913b.

It is no answer to say that the decision below applies only to the NCAA. The Ninth Circuit gave no in-

dication of such a limit, and there is no sound basis to relegate the NCAA to second-class status by adopting a unique set of unfavorable antitrust rules.

B. The flaws in the Ninth Circuit's rule-of-reason analysis starkly illustrate the infirmity of the court's holding that NCAA amateurism rules violate antitrust law.

As an initial matter, the court resorted to mischaracterization, derisively claiming that petitioner's conception of amateurism is that student-athletes can receive "Not One Penny" over COA, App. 37a. But COA has never been petitioner's line of demarcation. As explained, NCAA rules have long permitted student-athletes to receive modest recognition awards and payment of legitimate educational expenses, even above the federally defined COA.

The core of the lower courts' analysis, moreover, was their redefinition of the distinction between amateurs and professionals. That distinction, the courts asserted, is not that only professionals are paid to play. *Contra Board of Regents*, 468 U.S. at 102 ("[T]o preserve the character and quality of the NCAA's 'product,' athletes must not be paid …."). Rather, they divined, the distinction is that only professionals receive "unlimited payments unrelated to education." App. 37a. In the courts' view, therefore, student-athletes would be amateurs even if they were paid *unlimited* amounts for "post-eligibility internships," plus thousands of dollars annually in "academic [and] graduation awards [and] incentives"—because all these benefits are somehow "related to education." App. 41a-45a.

Redefining a core characteristic of defendants' product in this way was clear judicial overreach. Antitrust courts are "ill-suited" to "act as central planners."

Trinko, 540 U.S. at 408; *see also Chicago Professional Sports*, 95 F.3d at 597 ("[T]he antitrust laws do not deputize district judges as one-man regulatory agencies."). They should not "be … second-guessing business judgments," but rather should leave such judgments to those with experience and expertise in the relevant field. *American Motor*, 521 F.2d at 1249.

In any event, the lower courts' new definition of the amateur-professional distinction—one that respondents never urged—is patently false and unsupported by anything in the record. Professional athletes do *not* receive unlimited pay unrelated to education. To the contrary, the NBA, NHL, NFL, MLB, and Major League Soccer all have caps (or something similar) that preclude unlimited payments. *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 many professional athletes (particularly in minor leagues) are paid very modest amounts, sometimes "as little as $100 a game," *Minor League Basketball Teams Offer Some the Chance to Play, to Keep Their NBA Dreams Alive*, Fox News (July 3, 2013), https://tinyurl.com/y48nlz69. Indeed, no witness testimony, no document—*nothing* in the record—suggests that professional athletes receive "unlimited" pay.

The Ninth Circuit sought to cure the district court's re-definitional error by asserting that "the district court was using the term 'unlimited pay' as shorthand for … cash payments unrelated to education and akin to professional salaries." App. 40a n.16. That is unavailing for several reasons.

First, defining the line between amateur and professional sports in terms of what is "akin to professional salaries" is tautological. Second, it is self-evident that

the payments to student-athletes allowed by the decision below—including, again, unlimited cash payments for participating in "post-eligibility internships" and thousands of dollars in "awards and incentives" per year—are not different from professional salaries in any meaningful sense. And third, a requirement that payments to student-athletes be "[]related to education" does not meaningfully separate those payments from professional salaries, because that qualification is too capacious to filter out disguised pay-for-play. As explained, for instance, the decision below permits schools to use highly paid internships to recruit and retain student-athletes (with the highest paying internships surely going to the highest-performing or most-desired athletes). It would be easy for schools to label such internships "related to education," even if (for example) a star athlete majoring in sports management was given a six-month "internship" at Nike that paid $500,000. But consumers, student-athletes, and everyone else would recognize the reality: that student-athletes were actually paid large amounts in cash for their athletic play—with the "internships" a poorly disguised vehicle for funneling them quintessentially professional salaries. That is the antithesis of amateurism.

In short, the lower courts created a fictional distinction between amateurs and professionals. And this re-definition was essential to the Ninth Circuit's invalidation of the challenged rules: Under the actual distinction between amateurs and professionals—that amateurs are "not … paid," *Board of Regents*, 468 U.S. at 102—the Ninth Circuit could not possibly have concluded that allowing student-athletes to be paid unlimited amounts "related to" education would preserve the amateur-professional distinction "just as well as the challenged rules do," App. 41a. Because that *is* the ac-

tual distinction, the Ninth Circuit's decision will turn student-athletes into professionals, eradicating the pro-competitive differentiation that this Court and others have recognized as the decades-long hallmark of NCAA sports. The decision also improperly empowers antitrust law to resolve important ongoing public debates about how the NCAA can best serve the student-athletes, schools, fans, and others that collectively constitute the century-old institution of college sports.

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT

Whether NCAA rules that prevent student-athletes from being paid to play violate antitrust law is a recurring question; as the cases cited above make clear, the NCAA has faced many antitrust challenges to its eligibility and other rules over the years, and new cases are already on the horizon. The question is also enormously important. In particular, the Ninth Circuit's answer will have sweeping detrimental consequences for college sports and joint ventures more generally.

To begin with, the decision below engenders—indeed, endorses—perpetual antitrust re-litigation of NCAA amateurism rules, with plaintiffs' lawyers continually refining their arguments until they succeed in "dismantl[ing] the NCAA's entire compensation framework," App. 14a—while the NCAA incurs massive award after award of treble damages and attorney's fees. The Ninth Circuit accomplished this by declaring that any prior decisions upholding the NCAA's compensation rules have no stare-decisis or res-judicata effect because rule-of-reason analysis is "inherently fact-dependent." App. 28a. Thus, the court allowed this case to go forward even though just a few years earlier the same court held that the "Rule of

Reason … does not require" the NCAA to permit student-athletes to receive "more" than it already does permit. *O'Bannon*, 802 F.3d at 1079; *see* App. 26a-32a.

Under the decision below, then, virtually any change in the NCAA's compensation rules (whether it makes the rules more or less restrictive), or any other change to the factual landscape, opens the door to a new antitrust lawsuit, likely requiring a trial and exposing petitioner to treble damages and attorney's fees. In fact, even changes might be unnecessary; the Ninth Circuit saw no problem with petitioner's prediction of "future plaintiffs pursuing essentially the same claim again and again" against petitioner. App. 32a n.13. And that prediction has already been validated: Less than one 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. (Dkt. #1), *House* v. *NCAA*, No. 4:20-cv-3919 (N.D. Cal. June 15, 2020)—and promptly deemed a related case to this one by the judge who presided over both, Order (Dkt. #15), *House* (June 23, 2020).

Consequently, the decision below means the NCAA will either have to freeze its rules in place (to the detriment of student-athletes who benefit from rule changes that address evolving circumstances) or face an unending string of financially burdensome litigation that will not only transfer even more 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.

Combined with the Ninth Circuit's approach to applying the rule of reason, the decision's invitation to perpetual antitrust suits—which plaintiffs' lawyers will

eagerly accept—in effect installs a single judge in California as the superintendent of college sports eligibility, subject only to deferential review by the Ninth Circuit. Instead of according the NCAA the deference that sports organizations generally receive and the "ample latitude" that the NCAA in particular "needs" to "play[] [its] critical role in the maintenance of … amateurism in college sports," *Board of Regents*, 468 U.S. at 120, the decision below aggrandizes the judiciary's power to impose its own business judgments. It does this by: brushing aside the obvious, good-faith connection between the challenged NCAA rules and the maintenance of an essential distinction between college and professional athletes; subjecting the rules to trial and detailed, fact-intensive rule-of-reason analysis; redefining the basic character of NCAA athletics; and requiring the NCAA to obtain judicial approval anytime it wants to modify its rules or interpret the injunction issued here. This concentration of power, moreover, will govern *all* future antitrust challenges to the NCAA's amateurism rules: because those rules must be uniform across the country, the Ninth Circuit will set the floor for what the NCAA must permit nationally.[3]

This is not how antitrust law should work, and especially for the NCAA. As this Court has recognized, federal judges "often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition." *Arizona* v. *Maricopa County Medical Society*, 457 U.S.

[3] Petitioner has already had to ask the district court to clarify the floor it set on "academic or graduation awards or incentives," C.A. ER7-8, after respondents asserted that the floor was three times higher than the district court and Ninth Circuit said. *See* Dist. Ct. Dkt. #1302 (Sept. 22, 2020).

332, 343 (1982); *see also supra* pp.26-27. That lack of expert understanding is a particular problem when it comes to the NCAA. The NCAA's amateurism rules reflect its effort to balance the interests of student-athletes, school administrators, coaches, faculty, student bodies, alumni, broadcasters, and fans, while accounting for the ever-evolving circumstances in which intercollegiate athletics occur. For example, as part of an important and healthy public debate (in which Congress and several state legislatures have taken an interest), the NCAA has recently been examining how it might amend its rules to allow student-athletes to earn income from their publicity rights consistent with the principle of amateurism. *See* NCAA Board of Governors Federal and State Legislation Working Group, *Final Report and Recommendations* (Apr. 17, 2020), https://tinyurl.com/yxq8rtd9. The decision below, however, seeks to use antitrust law to resolve that debate. As other courts have recognized, that is improper; antitrust litigation should not replace the ability of the NCAA to make the critical judgments about the sports league that they created and administer.

Even if the decision below did not have such significant consequences for future litigation against the NCAA—and joint ventures more broadly—certiorari would still be needed. NCAA sports are a major feature of American life, with hundreds of thousands of participants and millions of viewers annually. *Supra* pp.6-7. And a hallmark of NCAA sports has for decades been the "tradition of amateurism," a tradition that "adds richness and diversity to intercollegiate athletics." *Board of Regents*, 468 U.S. at 120. The decision below erases this distinct character of NCAA sports: As discussed, the decision allows unlimited payments to student-athletes, so long as payments like uncapped

internships can somehow be described as "related to education." *See supra* pp.13-15, 26-29. By permitting such payments for student-athletes' play, the decision will transform student-athletes into professionals, eliminating the procompetitive distinction between college and professional sports. Consumers will likely come to view NCAA athletics as just another form of minor-league sports.

These revolutionary changes to the way NCAA-administered athletics have existed and operated for decades—and other far-reaching consequences, including for other sports leagues and joint ventures—warrant the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2020

APPENDICES