ASHLEY MOODY
ATTORNEY GENERAL
STATE OF FLORIDA

OFFICE OF THE ATTORNEY GENERAL
Office of Public Records

Nicholas J. Weilhammer
Office of the Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, Florida 32399-1050
Phone: (850) 414-3300
Facsimile: 850-487-1705
Nicholas.weilhammer@myfloridalegal.com

September 23, 2021

VIA E-MAIL

Christine Monahan
American Oversight
(records@americanoversight.org)

Dear Ms. Monahan:

Attached please find documents responsive to your public records requests for the following:

"Florida Attorney General Officials:

i. Ashley Moody, Attorney General, or anyone communicating on that official's behalf (such as an assistant or scheduler)
ii. Anyone serving as Chief of Staff to Attorney General Moody
iii. Amit Agarwal, Solicitor General

External Parties:

i. Kris Kobach (including, but not limited to, at the email addresses kkobach@gmail.com or kris@kriskobach.com)
ii. Lawrence Joseph (including, but not limited to, at the email addresses ljoseph@larryjoseph.com or lj@larryjoseph.com)
iii. Mark Martin (including, but not limited to, at the email address mmartin@regent.edu)

[3] All email communications (including emails, complete email chains, calendar invitations, and attachments thereto) sent by any of the Florida Attorney General officials listed above to any email address ending in .com (excluding email addresses ending in myflorida.com or myfloridalegal.com),4.net, .org, .mail, or .edu, and containing any of the following key terms:

Key Terms:

AMERICAN OVERSIGHT

i. 'Texas v. Pennsylvania'
ii. 'TX v. PA'
iii. '592 U.S.'
iv. separation-of-powers
v. 'separation of powers'
vi. electors
vii. 'Article II'
viii. 'fraud and abuse'
ix. 'non-legislative actors'
x. amicus
xi. amici
xii. unconstitutional
xiii. 'voting by mail'
xiv. 'vote by mail'
xv. Paxton
xvi. 'safe harbor'
xvii. Kobach
xviii. 'Larry Joseph'
xix. 'Lawrence Joseph'
xx. 'Mark Martin'

… American Oversight has limited item 3 of its request to emails sent by the listed custodians. To be clear, however, American Oversight still requests that complete email chains be produced, displaying both sent and received messages. This means, for example, that both Attorney General Moody's response to an email from an external party containing one of the key terms listed above and the initial received message are responsive to this request and should be produced.

For each item of this request, please provide all responsive records from November 3, 2020, through January 20, 2021."

This office did not locate any responsive records to your request for "[2] All text messages or communications on messaging applications similar in form to text messages (including, but not limited to, Signal, WhatsApp, Facebook Messenger, and Twitter direct messages) between (a) any of the Florida Attorney General officials listed above and (b) any of the external parties listed above."

In connection with this response to your public records requests, please note the following:

- Education records, as defined in the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and the federal regulations, are confidential and exempt pursuant to section 1002.221, Florida Statutes; see also *National Collegiate Athletic Association v. Associated Press,* 18 So. 3d 1201, 1211 (Fla. 1st DCA 2009) (recognizing that FERPA does not prohibit the release of records so long as the student's identifying information is redacted), *citing United States v. Miami Univ.,* 294 F.3d 797 (6th Cir.2002); *Ragusa v. Malvern Union Free Sch. Dist.,* 549 F. Supp. 2d 288 (E.D.N.Y.2008); *Osborn v. Board of Regents of University of*

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Wisconsin System, 254 Wis. 2d 266, 647 N.W.2d 158, 168 n. 11 (2002) ("once personally identifiable information is deleted, by definition, a record is no longer an education record since it is no longer directly related to a student"); *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana Univ.,* 787 N.E.2d 893 (Ind. App. 2003) (materials are not "education records" if student identifying information has been redacted); *Bd. of Tr., Cut Bank Pub. Sch. v. Cut Bank Pioneer Press,* 160 P.3d 482 (Mont. 2007) (FERPA does not prohibit disclosure of records that do not reveal personally identifying information).

- The home address, telephone number and photograph of current or former United States attorneys, assistant United States attorneys, judges of the United States Courts of Appeal, United States district judges or United States magistrates is exempt pursuant to section 119.071(5)(i), Florida Statutes.

The attached documents will serve to complete your public records requests to this office. Please do not hesitate to contact me directly at (850) 414-3634 should you have any questions.

Sincerely,

s/ Nicholas J. Weilhammer

Nicholas J. Weilhammer

Attachments: Records

AMERICAN OVERSIGHT

From:	Amit Agarwal
To:	Dan Schweitzer
Cc:	elacour@ago.state.al.us; jeffrey.rupert@atg.wa.gov
Subject:	Re: Amicus Brief in Oklahoma v. Johnson & Johnson (Okla.)
Date:	Thursday, November 12, 2020 10:34:55 AM

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Thursday, November 12, 2020 10:14 AM
To: Dan Schweitzer <dschweitzer@naag.org>
Cc: elacour@ago.state.al.us <elacour@ago.state.al.us>; Jeffrey.Rupert@atg.wa.gov <Jeffrey.Rupert@atg.wa.gov>
Subject: Amicus Brief in Oklahoma v. Johnson & Johnson (Okla.)

To: Civil Amicus Contacts
From: Alabama and Washington AGOs

Attached is a draft amicus brief Alabama and Washington have prepared in support of Oklahoma in *Oklahoma v. Johnson & Johnson Pharmaceuticals, Inc.*, in the Oklahoma Supreme Court.

At issue is the validity of Oklahoma's public nuisance judgment against Johnson & Johnson and the court's abatement remedy related to the company's misleading marketing and promotion of opioids that caused the opioid epidemic in Oklahoma. The amicus brief argues that public nuisance claims are an important tool that state Attorneys General have to protect the health and safety of the public and that the judgment in this case was proper and should be upheld.

Deadline for joining the brief is: COB November 20, 2020

Direct any questions to:

Edmund LaCour
Solicitor General
Office of Alabama Attorney General
Edmund.LaCour@AlabamaAG.gov
(334) 353-2196

Or

Jeff Rupert
Office of Washington Attorney General
Complex Litigation Division
Division Chief
Jeffrey.Rupert@atg.wa.gov
(206) 389-2116

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Wednesday, November 4, 2020 8:26 AM

AMERICAN OVERSIGHT

To: Dan Schweitzer <dschweitzer@naag.org>
Cc: jeffrey.rupert@atg.wa.gov; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>
Subject: Amicus Brief in Oklahoma v. Johnson & Johnson (Okla.)

To: Civil Amicus Contacts
From: Alabama and Washington AGOs

Attached is an Amicus Memo describing the amicus brief Alabama and Washington are preparing in support of Oklahoma in *Oklahoma v. Johnson & Johnson Pharmaceuticals, Inc.*, in the Oklahoma Supreme Court.

At issue is the validity of Oklahoma's public nuisance judgment and abatement award against Johnson & Johnson for the company's misleading marketing and promotion of opioids that caused the opioid epidemic in Oklahoma. The amicus brief will argue that public nuisance claims are one important tool that state Attorneys General have to protect the health and safety of the public and the judgment in this case was proper and should be upheld.

The timeframe is as follows:

Deadline for joining the brief is: November 16, 2020
Draft of Brief will be circulated on or around: November 9, 2020
Brief is due on: November 17, 2020

Direct any questions to:

Edmund LaCour
Solicitor General
Office of Alabama Attorney General
Edmund.LaCour@AlabamaAG.gov
(334) 353-2196

Or

Jeff Rupert
Office of Washington Attorney General
Complex Litigation Division
Division Chief
Jeffrey.Rupert@atg.wa.gov
(206) 389-2116

Confidentiality Notice: The information contained in this email and the documents attached hereto contain confidential information intended only for the use of the intended recipients. If the reader of the message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of the information contained herein is strictly prohibited. If you have received this communication in error, please immediately notify me by reply email.

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Dan Schweitzer
Cc: Jeffrey DeSousa; James Percival; Christopher Baum
Subject: Re: Amicus Briefs
Date: Tuesday, November 24, 2020 4:26:06 PM

Hi Dan. I just heard back from our front office. We gave this matter careful consideration, but unfortunately Florida will not be able to draft the amicus brief in this case. We're tremendously grateful to you for thinking of us and hope you will keep us

---

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Monday, November 23, 2020 3:53 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>; James Percival <James.Percival@myfloridalegal.com>; Christopher Baum <Christopher.Baum@myfloridalegal.com>
Subject: Re: Amicus Briefs

Terrific. No, there's nothing else you'd need to do. But you should expect a call from Mike Field of the Rhode Island AGO. He said his office might be interested as well (because the case arises out of RI). You're under no obligation to accede to RI, but hopefully RI would back off if they see you're already trying to get front office approval.

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Monday, November 23, 2020 3:48 PM
To: Dan Schweitzer <dschweitzer@naag.org>
Cc: Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>; James Percival <James.Percival@myfloridalegal.com>; Christopher Baum <Christopher.Baum@myfloridalegal.com>
Subject: Re: Amicus Briefs

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dan,

Based on our preliminary review, we think this would be a good candidate for a Florida-authored amicus brief. I plan to run this by our front office and would need to get our AG's approval before we make any kind of public announcement. In the meantime, is there anything we need to do to get the ball rolling?

Thanks again for thinking of us. It's much appreciated.

Best,
Amit

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Wednesday, November 18, 2020 2:58 PM

AMERICAN OVERSIGHT

To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Amicus Briefs

Amit, the Court has relisted a Fourth Amendment case in which a state amicus brief would likely be very helpful. The petitioner has top lawyers from Jones Day on the brief; respondent (the police officers and city) has local counsel from Rhode Island. From SCOTUSblog:

Caniglia v. Strom, 20-157

Issue: Whether the "community caretaking" exception to the Fourth Amendment's warrant requirement extends to the home.

****

Dan Schweitzer
Director and Chief Counsel, Center for Supreme Court Advocacy
National Association of Attorneys General
1850 M Street, NW, 12th Floor
Washington, DC 20036
(202) 326-6010
dschweitzer@naag.org
www.naag.org

Visit NAAG's Members-Only COVID-19 Resource Page. AGO staff can request access to the page here.

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Dan Schweitzer
Cc: Jeffrey DeSousa; James Percival; Christopher Baum
Subject: Re: Amicus Briefs
Date: Tuesday, November 24, 2020 4:24:02 PM

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Monday, November 23, 2020 3:53 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>; James Percival <James.Percival@myfloridalegal.com>; Christopher Baum <Christopher.Baum@myfloridalegal.com>
Subject: Re: Amicus Briefs

Terrific. No, there's nothing else you'd need to do. But you should expect a call from Mike Field of the Rhode Island AGO. He said his office might be interested as well (because the case arises out of RI). You're under no obligation to accede to RI, but hopefully RI would back off if they see you're already trying to get front office approval.

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Monday, November 23, 2020 3:48 PM
To: Dan Schweitzer <dschweitzer@naag.org>
Cc: Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>; James Percival <James.Percival@myfloridalegal.com>; Christopher Baum <Christopher.Baum@myfloridalegal.com>
Subject: Re: Amicus Briefs

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Thanks again for thinking of us. It's much appreciated.

Best,
Amit

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Wednesday, November 18, 2020 2:58 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Amicus Briefs

AMERICAN OVERSIGHT

Amit, the Court has relisted a Fourth Amendment case in which a state amicus brief would likely be very helpful. The petitioner has top lawyers from Jones Day on the brief; respondent (the police officers and city) has local counsel from Rhode Island. From SCOTUSblog:

Caniglia v. Strom, 20-157

Issue: Whether the "community caretaking" exception to the Fourth Amendment's warrant requirement extends to the home.

****

Dan Schweitzer
Director and Chief Counsel, Center for Supreme Court Advocacy
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1850 M Street, NW, 12th Floor
Washington, DC 20036
(202) 326-6010
dschweitzer@naag.org
www.naag.org

Visit NAAG's Members-Only COVID-19 Resource Page. AGO staff can request access to the page here.

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Thompson, Will
Subject: Re: Multi-State Amicus Brief re Ballot Order Statutes
Date: Monday, November 30, 2020 2:07:36 PM

From: Thompson, Will <Will.Thompson@oag.texas.gov>
Sent: Tuesday, November 24, 2020 1:52 PM
To: Thompson, Will <Will.Thompson@oag.texas.gov>
Cc: Hawkins, Kyle <Kyle.Hawkins@oag.texas.gov>; Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>
Subject: Multi-State Amicus Brief re Ballot Order Statutes

Friends,

Texas has drafted an amicus brief to support West Virginia's defense of its ballot order statute in *Nelson v. Warner* (4th Cir.). I hope you'll consider joining.

There has been a lot of litigation on this issue recently. In 2020, courts have rejected challenges to similar laws in Florida, Arizona, Texas, Minnesota, and Georgia, but some of those cases are still pending. Each of your States was involved in at least one of those cases, either as a defendant or an amicus, so we thought you might be interested in this case as well.

The brief is due Monday, November 30, so we would appreciate responses by that morning. As always, please feel free to contact me with any questions or suggestions.

I'm sorry that the briefing schedule puts this so close to Thanksgiving. I hope you and your families enjoy the holiday.

Best regards,

Will Thompson
Special Counsel
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-2567

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Shawn Bayern
Subject: Re: Separation of Powers grades
Date: Tuesday, January 5, 2021 9:23:00 AM

From: Shawn Bayern <sbayern@law.fsu.edu>
Sent: Monday, January 4, 2021 1:33 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: RE: Separation of Powers grades

Thanks very much, and happy new year! Hope the emergency resolves itself well.

Shawn

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Monday, January 4, 2021 1:10 PM
To: Shawn Bayern <sbayern@law.fsu.edu>
Subject: Re: Separation of Powers grades

Thanks -- I'm dealing with an emergency right now, but will get you and Anna my grades later tonight or first thing tomorrow. My apologies for the inconvenience.

Happy new year!

--AA

From: Shawn Bayern <sbayern@law.fsu.edu>
Sent: Monday, January 4, 2021 1:08 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Separation of Powers grades

Hi Amit,

Happy new year!

Our registrar, Anna Shum, has asked me to remind you about the Separation of Powers grades. The university wants all our grades by the end of the day; they're strangely strict about grading deadlines for reasons I still don't fully understand. If we can't enter your grades today or very early tomorrow, your students would all be assigned "incomplete" grades and we'd have to change them later; that won't cause them any lasting harm, but it might make some of them a bit anxious.

Thanks,
Shawn

--

AMERICAN OVERSIGHT

Shawn Bayern
Associate Dean for Academic Affairs
Larry & Joyce Beltz Professor of Torts
Florida State University College of Law

AMERICAN OVERSIGHT

From: Amit Agarwal
To: [redacted]
Subject: Re: feedback on Separation of Powers paper
Date: Friday, December 11, 2020 2:31:26 PM

Sorry -- just saw this. I think we were planning for today -- but happy to do it whenever. Just tried to reach you. Feel free to call me on my c

---

From: [redacted]
Sent: Friday, December 11, 2020 1:49 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Re: feedback on Separation of Powers paper

Hi Professor Agarwal,

I have our phone call in my calendar as next Friday at 2:30pm but I couldn't remember if it was this Friday or next. I just didn't want to get my times mixed up.

Best,
[redacted]

> On Nov 30, 2020, at 9:07 AM, Amit Agarwal <Amit.Agarwal@myfloridalegal.com> wrote:
>
> Thanks. Please send me your number and I'll call you then.
>
> ---
>
> **From:** [redacted]
> **Sent:** Monday, November 30, 2020 9:06 AM
> **To:** Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
> **Subject:** Re: feedback on Separation of Powers paper
>
> 2 p.m. on December 8th works great for me. I look forward to speaking with you then.
>
> ---
>
> **From:** Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
> **Date:** Monday, November 30, 2020 at 8:40 AM
> **To:** [redacted]
> **Subject:** Re: feedback on Separation of Powers paper
>
> Sure -- would be glad to talk. How about next Tuesday, December 8, at 2:00 -- or any time that afternoon? If you'd prefer to talk earlier just let me know and we'll find a convenient time.
>
> ---
>
> **From:** [redacted]
> **Sent:** Monday, November 30, 2020 8:15 AM
> **To:** Amit Agarwal <Amit.Agarwal@myfloridalegal.com>

AMERICAN OVERSIGHT

Subject: Re: feedback on Separation of Powers paper

Professor Agarwal,

Thanks so much for your very useful feedback. I will be sure to incorporate it into my final draft. Also, I would love to take you up on your offer for career advice because I am sort of at a cross roads for what do after my clerkship ends. Let me know if you have any time talk over the next two weeks.

Best,
[redacted]

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Date: Wednesday, November 25, 2020 at 5:55 PM
To: [redacted]
Cc: Jenna Hodges <Jenna.Hodges@myfloridalegal.com>
Subject: feedback on Separation of Powers paper

[redacted]

Thanks so much for all your thoughtful comments and participation over the course of the last semester. It was great to have you in the class.

You picked a timely and interesting topic, and I very much enjoyed reading your paper. Below are a few questions and suggestions to take into account as you finalize your draft. Please don't feel the need to address all those points; just wanted to pass along these thoughts in case they're of help as you refine the draft.

Thanks so much, good luck, and stay in touch!

Best,

Professor Agarwal

Feedback:

1. Your opening introduction does a good job of setting up the importance of the discussion to follow, but it might be helpful, if possible, to expand your discussion to explain why you think immunity doctrine is restricting the proper response to COVID in the status quo.
2. Nice job on the citations, your paper is clearly well researched and cited.
3. Be careful making broad statements without authority. For example, it is inevitable that some states will not respond to coronavirus or maybe just likely or possible? Likewise, could Congress set up a nationwide mask mandate under its enumerated powers? I recognize that these are not the core focus of the paper, but it is useful to be exact in legal writing.

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4. Consider discussing the Court's 2019 discussion of immunity in *Franchise Tax Board v. Hyatt* in your discussion of the background of immunity. The Court adopted a broad view of immunity, which you seem to reject, so it might be worth explaining where you think the Court went wrong in its more recent discussions of immunity.
5. You argue that *Katz* has called the Court's abrogation doctrine into doubt (p. 13). You might want to consider *Allen v. Cooper*, which the Supreme Court decided in March of this year, and which expressly considers and rejects that argument. I am not saying that you need to agree with *Allen*, but I think your discussion should consider it, and discuss why you think there is still tension in the law after *Allen*. Likewise, consider whether Congress could make the Article I argument you suggest (p. 14) considering *Allen*.
6. At the start of part III, you have a flag for an introduction, just make sure to insert one before the final draft.
7. On p. 20 and 21 you discuss how Congress has used the spending power to condition funds on a waiver of sovereign immunity. Under this approach does Congress need to abrogate immunity or can it just induce waiver with the condition? If the former, why is there not a problem under the abrogation law you discuss? If the later, what are the implications for your discussion of abrogation, i.e. does Congress even need to concern itself with abrogation or can it just induce waiver? I think you may answer this in footnote 113, but given the length of your discussion of immunity and abrogation, if the answer is that you don't need an abrogation, you might want to talk about why you think immunity is nonetheless constraining policy responses.
8. Try to have a citation for all non-obvious propositions. For example, on p. 23, you say that without the prospect of negligence suits, state hospitals are likely to behave more dangerously, but how much traditional tort law does or does not promote safety is debated by tort scholars.
9. It is not entirely clear to me what policies you think the federal government could propose under the spending clause to combat coronavirus as you suggest in the intro. The two policies you name, a federal mask mandates or a federal shutdown orders, do not appear to require state action, so what funding would the states need? Additionally, if we are dealing with federal mandates, why would the suits target the states as opposed to the federal government? Likewise, if state torts are the enforcement mechanism you envision, are states currently invoking immunity to defend from those torts? Many states have broadly waived immunity for a number of traditional tort claims. Finally, consider whether more granularity on the types of policies you propose would allow you to drill down more into whether the waiver would be coercive under *Dole* and *Sebelius*.
10. Make sure to bluebook and proofread for typos before the final draft.

AMERICAN OVERSIGHT

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com
Office: (850) 414-3688

AMERICAN OVERSIGHT

From:	Amit Agarwal
To:	undefined
Subject:	Florida SG"s office
Date:	Monday, November 30, 2020 4:12:20 PM
Attachments:	Job Opportunities in the Office of the Florida Solicitor General, 11.25.2020.pdf

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Tara,

Hope you and your family had a happy Thanksgiving. Just wanted to let you know that the Florida SG's office is hiring again -- we have two new positions to fill, which will take the office from 5 to 10 attorneys as of January. Would be grateful if you'd pass this on to anyone who might be interested or who could help us spread the word.

Thanks so much, and hope all is well.

Best,
Amit

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com
Office: (850) 414-3688

AMERICAN OVERSIGHT

JOB OPPORTUNITIES IN THE OFFICE OF THE FLORIDA SOLICITOR GENERAL

The Florida Solicitor General's Office is considering applications for the positions of Deputy Solicitor General and Assistant Solicitor General. These new positions are part of a major expansion of the Office and reflect its growing portfolio, particularly in the areas of constitutional and criminal appellate litigation.

The Office of the Solicitor General represents the State of Florida in the U.S. Supreme Court and the Florida Supreme Court, litigates cases of exceptional public importance in federal and state appellate and trial courts, supervises appellate litigation in cases to which the State is a party, provides legal advice and policy guidance to the Attorney General, and coordinates the State's amicus practice as well as its involvement in multistate litigation. Assistant and Deputy SGs, including two Chief Deputies (one on the civil side, and one on the criminal side) assist the Solicitor General with all aspects of the work of the Office.

Attorneys serving in the Office regularly brief and argue high-profile cases, including constitutional challenges to significant state statutes, in the Florida Supreme Court, the U.S. Court of Appeals for the Eleventh Circuit, and lower state and federal trial and appellate courts. In addition, attorneys routinely work on cutting-edge legal issues, interact with the State's leading lawyers and policymakers, and collaborate with top appellate attorneys serving in private practice, other states, and the U.S. Department of Justice.

Applicants for the position of Assistant Solicitor General should have excellent written and oral advocacy skills, outstanding academic credentials, and at least two years of legal experience. Applicants for the position of Deputy Solicitor General should have, in addition to those qualifications, at least five years of legal experience, as well as demonstrated proficiency litigating civil appeals, criminal appeals, or constitutional issues. For both positions, a clerkship on a federal appellate court or the Florida Supreme Court is highly desirable.

If selected, an applicant who is not already a member of the Florida bar must gain such admission within one year of the date of appointment. All new hires are required to make a two-year commitment to the Office.

The Solicitor General's Office is part of the Office of the Attorney General, which has offices in Fort Lauderdale, Jacksonville, Miami, Orlando, Tampa, Tallahassee, and West Palm Beach. Qualified candidates for the Deputy and Assistant positions are welcome to apply if they would be able to work out of any of those offices, but preference will be accorded to candidates who live in, or are willing to relocate to, Tallahassee, where the Office is based.

Applications will be considered on a rolling basis, but should be submitted by December 11, 2020. To avoid unnecessary travel and exposure, the Office plans to conduct interviews by video conference.

To apply for these positions, please visit the website below and fill out an online application per the instructions listed for each position:

https://jobs.myflorida.com/go/Office-of-the-Attorney-General/2818600/

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Candidates may informally express their interest in applying for one or both of the posted vacancies by emailing a resume to the Solicitor General and his assistant; their email addresses are listed below. Such candidates will be considered for the current round of hiring if their resume is received by December 11. However, all candidates will be required to fill out an online application prior to scheduling an interview.

Amit Agarwal
Florida Solicitor General
Amit.Agarwal@myfloridalegal.com

Jenna Hodges
Administrative Assistant to the Solicitor General
Jenna.Hodges@myfloridalegal.com
(850) 414-3807

AMERICAN OVERSIGHT

From:	Amit Agarwal
To:	Hudson, Kian
Cc:	Christopher Baum; James Percival; Jeffrey DeSousa
Subject:	Fw: Amicus Brief in Azar v. Gresham (U.S.) - Deadline COB Monday, January 25, 2021
Date:	Wednesday, January 20, 2021 3:53:15 PM

Kian,

Florida is pleased to join your amicus brief in this case. Our Attorney General's name is Ashley Moody.

If it's not too much trouble, please confirm receipt of this email and send us an electronic copy of the as-filed brief.

Thanks so much, and hope all is well.

Best,
Amit

From: Dan Schweitzer <dschweitzer@naag.org>
Date: Wednesday, January 20, 2021 at 10:29 AM
To: Dan Schweitzer <dschweitzer@naag.org>
Cc: "Kian.Hudson@atg.in.gov" <Kian.Hudson@atg.in.gov>
Subject: Amicus Brief in Azar v. Gresham (U.S.) - Deadline COB Monday, January 25, 2021

To: Civil Amicus Contacts
From: Indiana AGO

Indiana will be filing the attached amicus brief next Tuesday in support of the petitioners in *Azar v. Gresham*, No. 20-37 (U.S.), which involves the extent of the Secretary's authority to approve Medicaid waivers under Section 1115 of the Social Security Act. Section 1115 authorizes the Secretary of Health and Human Services to waive a wide variety of otherwise-applicable federal-law limitations on state Medicaid programs pursuant to "any experimental, pilot, or demonstration project" proposed by a State that, "in the judgment of the Secretary, is likely to assist in promoting the objectives" of the Medicaid statute. 42 U.S.C. 1315(a).

The D.C. Circuit's decision below held that "providing health care coverage" is the *sole* "objective" of the Medicaid statute and that Section 1115 accordingly prohibits the Secretary from "prioritiz[ing] non-statutory objectives to the exclusion of" that single statutory purpose. The rule announced by the D.C. Circuit thus threatens to invalidate the many state Medicaid waivers that in some way reduce Medicaid coverage (such as those authorizing premiums or co-pays or those authorizing waivers of retroactive coverage), for such waivers inevitably prioritize some other objective (such as cost efficiency or beneficiary independence) over objective of providing healthcare coverage.

Indiana's amicus brief explains the extremely serious disruptions to state Medicaid programs the D.C. Circuit's rule would create and argues that the Court can easily avoid these problems by adopting the plain meaning of Section 1115—which leaves the determination of whether a waiver

AMERICAN OVERSIGHT

program will further the objectives of Medicaid to "the judgment of the Secretary," not federal courts.

The amicus brief is due next Tuesday, January 26, 2021, so it would be ideal if we heard from States by **COB Monday, January 25, 2021.**

States that have questions or suggestions are more than welcome to contact me at the information below.

Many thanks,

-Kian

Kian Hudson
Deputy Solicitor General
Office of Attorney General Todd Rokita
302 West Washington Street
IGCS-5th Floor
Indianapolis, IN 46204
p: 317.232.0709 | f: 317.232.7979
kian.hudson@atg.in.gov

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Wednesday, December 16, 2020 2:14 PM
To: Dan Schweitzer <dschweitzer@naag.org>
Cc: Hudson, Kian <Kian.Hudson@atg.in.gov>
Subject: Amicus Memo in Azar v. Gresham (U.S.) - Deadline COB Monday, January 25, 2021

****This is an EXTERNAL email. Exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email.****
To: Civil Amicus Contacts
From: Indiana AGO

The state of Indiana is preparing a merits-stage amicus brief in support of the States of Arkansas and New Hampshire, as well as the federal government, in *Azar v. Gresham*, No. 20-37 (U.S.) and *Arkansas v. Gresham*, No. 20-38 (U.S.), where the Court will decide whether Section 1115 of the Social Security Act permits the federal government to authorize state Medicaid demonstration projects to test requirements that are designed to promote the provision of health-care coverage by means of facilitating the transition of Medicaid beneficiaries to commercial coverage and improving their health.

Section 1115 of the Social Security Act authorizes the Secretary of Health and Human Services to waive a wide variety of otherwise-applicable federal-law limitations on state Medicaid programs pursuant to "any experimental, pilot, or demonstration project" proposed by a State that, "in the

AMERICAN OVERSIGHT

judgment of the Secretary, is likely to assist in promoting the objectives" of the Medicaid Act. 42 U.S.C. 1315(a). Over the last several decades the Secretary has exercised this Section 1115 waiver authority to approve a wide variety of Medicaid demonstration projects, and a full list of current projects is here: https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/index.html. The decision below held that "providing health care coverage" is the primary purpose of the Medicaid Act and that Section 1115 approvals must therefore further that purpose. Indiana's amicus brief will argue that Section 1115 authorizes HHS to consider other objectives as well: The D.C. Circuit's rule is inconsistent with longstanding practice and the underlying purpose of Section 1115, which is to improve social-welfare policy by authorizing creative state experimentation in social welfare programs.

Indiana plans to circulate a draft brief on the afternoon of Monday, January 18, 2021. The amicus brief likely will be due Tuesday, January 26, 2021, so it would be ideal if we heard from States by **COB Monday, January 25, 2021.**

States interested in joining can reach me at the contact information below.

Many thanks,

-Kian

Kian Hudson
Deputy Solicitor General
Office of Attorney General Curtis Hill
302 West Washington Street
IGCS-5th Floor
Indianapolis, IN 46204
p: 317.232.0709 | f: 317.232.7979
kian.hudson@atg.in.gov

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AMERICAN OVERSIGHT

From: Amit Agarwal
To: Loren.AliKhan@dc.gov; jacqueline.bechara@dc.gov
Cc: Christopher Baum; James Percival
Subject: Fw: Amicus Brief in Uzuegbunam v. Preczewski (U.S.)
Date: Friday, November 20, 2020 11:20:51 AM

Loren,

Greetings from Florida. Hope this message finds you well.

Florida is pleased to join your amicus brief in this case. Our Attorney General's name is Ashley Moody.

If it's not too much trouble, please confirm receipt of this email and send us an electronic copy of the final brief after it's filed.

Thanks so much.

Best,
Amit

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Friday, November 13, 2020 6:21 PM
To: Dan Schweitzer <dschweitzer@naag.org>
Cc: Loren.AliKhan@dc.gov <Loren.AliKhan@dc.gov>; Bechara, Jacqueline (OAG) <Jacqueline.Bechara@dc.gov>
Subject: Amicus Brief in Uzuegbunam v. Preczewski (U.S.)

To: Civil Amicus Contacts

Attached is the District of Columbia's draft amicus brief supporting respondents, former officials of Georgia Gwinnett College, in *Uzuegbunam v.* Preczewski, No. 19-968, which is being litigated on the merits in the Supreme Court. The Court granted cert in this case to resolve whether a government's post-filing change of an unconstitutional policy moots claims for nominal damages based on past, completed constitutional violations. Respondents, represented by Georgia's SG, will argue that if a plaintiff's challenge to a repealed law or policy is otherwise moot, a claim solely for nominal damages does not create a live controversy under Article III.

Because of our Supreme Court printer's Thanksgiving schedule, we request joins by **2pm on Friday, November 20**, and substantive edits by COB on Wednesday, November 18. Please email Loren AliKhan (loren.alikhan@dc.gov) and Jackie Bechara (jacqueline.bechara@dc.gov) to join or with any questions.

Best,

Loren L. AliKhan
Solicitor General

AMERICAN OVERSIGHT

Office of the Attorney General for the District of Columbia
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 727-6287 (phone)
(202) 717-1273 (cell)
(202) 730-1864 (fax)
Loren.AliKhan@dc.gov

OAG has moved. Please note our new address.

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Thursday, October 15, 2020 1:24 PM
To: Dan Schweitzer <dschweitzer@naag.org>
Cc: Phillips, Graham (OAG) <Graham.Phillips@dc.gov>; VanZile, Caroline (OAG) <Caroline.VanZile@dc.gov>
Subject: Revised Amicus Memo in Uzuegbunam v. Preczewski (U.S.)

To: Civil Amicus Contacts

Attached is a revised Amicus Memo describing the amicus brief the District of Columbia is preparing supporting respondents, former officials of Georgia Gwinnett College, in *Uzuegbunam v.* Preczewski, No. 19-968 (U.S.). The revised memo reflects a one-month extension respondents received to file their brief (which thereby extended the deadline for the amicus brief).

From: Dan Schweitzer
Sent: Tuesday, August 25, 2020 12:08 PM
To: Dan Schweitzer <dschweitzer@naag.org>
Cc: graham.phillips@dc.gov; Caroline.VanZile@dc.gov
Subject: Amicus Memo and Information Request in Uzuegbunam v. Preczewski (U.S.)

To: Civil Amicus Contacts

The District of Columbia is preparing an amicus brief supporting respondents, former officials of Georgia Gwinnett College, in *Uzuegbunam v.* Preczewski, No. 19-968, which is being litigated on the merits in the Supreme Court. The Supreme Court granted cert in this case to resolve whether a government's post-filing change of an unconstitutional policy moots claims for nominal damages based on past, completed constitutional violations. Respondents will argue that if a plaintiff's challenge to a repealed law or policy is otherwise moot, a claim solely for nominal damages does not create a live controversy under Article III.

Although we are still formulating the precise arguments that our amicus brief will contain, we expect to contend that it is in the interests of States, their agencies, and their officials that plaintiffs not be

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allowed to maintain otherwise moot constitutional challenges when all they seek is nominal damages. Such suits do not yield any prospective benefits—since by hypothesis the relevant law has already been repealed—nor do they provide injured plaintiffs with any real redress—since the very nature of nominal damages is that they are merely symbolic, not compensatory. But such suits do consume States' limited litigation resources and can lead to awards of attorney's fees. They can also allow ideologically driven plaintiffs to pursue harmful precedent even after the relevant law is off the books. Finally, a contrary rule can disincentivize States from reforming or repealing problematic policies: if a State will have to continue litigating the case even if it changes the policy, it may be more inclined to keep the policy and defend it on the merits.

As we craft the brief, **it would be helpful to know the following**, if possible, with citation or link to public records, documents, articles, and/or cases:

- Please let us know of any cases you are aware of in which plaintiffs sought *only* nominal damages based on (alleged) past violations of constitutional rights caused by a since-repealed law or policy. Please include docket numbers or reporter information.

- Please also let us know of instances you are aware of in which state or local governments have repealed constitutionally questionable laws or policies to resolve or preempt litigation. Our goal is to show that state and local governments have a healthy incentive to eliminate questionable policies if doing so will moot litigation.

Please contact graham.phillips@dc.gov with your responses. We will circulate the draft brief on or around **October 20**, in advance of the **October 26 join deadline**. Many thanks for your help.

Sincerely,

Caroline S. Van Zile
Principal Deputy Solicitor General
Office of the Attorney General for the District of Columbia
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(917) 971-0361 (cell)
(202) 724-6609 (phone)
(202) 741-0649 (fax)
caroline.vanzile@dc.gov

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Dan Schweitzer
Subject: Fw: Amicus Memo and Information Request in NCAA v. Alston (U.S.)
Date: Wednesday, January 13, 2021 3:31:58 PM
Attachments: AG-#1238405-v1-NCAA_v__Alston_(U_S__20-512)_Amicus_Memo.DOCX
AG-#1237836-v1-2020_10_15_Cert__Petition.PDF
AG-#1237838-v1-2020_11_09_Respondent_Brief_in_Opposition.PDF
NCAA v. Alston, Conferences" Petition.pdf
NCAA v. Alston, Alston BIO to Conferences.pdf

Dan,

Happy new year -- hope you are doing well.

Just wanted to make sure me and my team are still on your distribution list. I don't seem to have this email in my inbox and the last email I have from you is from December.

Thanks for any help.

--Amit

--Amit

From: Andrew Pinson <APinson@LAW.GA.GOV>
Sent: Wednesday, January 13, 2021 2:59 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Fwd: Amicus Memo and Information Request in NCAA v. Alston (U.S.)

FYI

Andrew

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Friday, January 8, 2021 3:14:46 PM
To: Dan Schweitzer <dschweitzer@naag.org>
Cc: APinson@LAW.GA.GOV <APinson@LAW.GA.GOV>; dwaldbeser@law.ga.gov <dwaldbeser@law.ga.gov>
Subject: Amicus Memo and Information Request in NCAA v. Alston (U.S.)

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From: Georgia SG Andrew Pinson

Colleagues,

Georgia plans to draft a merits-stage Supreme Court amicus brief in support of the NCAA and the Conferences in *National Collegiate Athletic Association v. Alston,* No. 20-512 (memo and briefing attached). This case is the latest antitrust challenge to the

AMERICAN OVERSIGHT

NCAA's amateurism rules. The question presented is whether the Sherman Act authorizes a court to subject the product-defining rules of a joint venture to full Rule of Reason review and to hold those rules unlawful if, in the court's view, they are not the least restrictive means that could have been used to accomplish their procompetitive goal. Effectively concluding the answer is "yes," the district court and the Ninth Circuit enjoined the NCAA from enforcing its amateurism rules to the extent they limit benefits which are even nominally "related to education." Georgia will argue that NCAA amateurism rules should be left to the NCAA and legislatures, and that the decisions below threaten the existence of college sports. We plan to circulate the brief on February 2, 2021. Our brief would be due February 8, 2021.

Finally, we would appreciate any information your office can provide regarding:

- Your state universities' revenue from sports, including any data on whether that revenue offsets the cost of nonrevenue sports or non-athletic activities;
- Any data or examples that might show how schools are likely to respond to uncapping "education-related benefits" for student athletes (i.e., nonrevenue sports will be dropped, or athletics gets less competitive);
- Any examples of how the change to compensation rules might impact Title IX regulations, including any second-order consequences; and
- Any legislative efforts in your state to pass laws regarding student-athlete compensation, including compensation for use of their name, image, and likeness.

Responses to this request by Friday, January 22, would be most helpful.

Please send responses (and any questions) to Andrew Pinson (apinson@law.ga.gov) or Drew Waldbeser (dwaldbeser@law.ga.gov).

Best,
Andrew

AMERICAN OVERSIGHT

AMICUS MEMO

The State of Georgia is preparing a merits-stage amicus brief in support of the petitioners in the Supreme Court case listed below.

PART I—ACTION ITEMS

1. **Draft of brief will be circulated on:** January 29, 2021
   Deadline for joining brief is: 9:00 a.m. Eastern on Friday, February 5, 2021
   Brief will be filed on: Monday, February 8, 2021

2. **To join or request a draft of the brief, contact the following attorneys:**

Andrew A. Pinson
Solicitor General
404-651-9453
apinson@law.ga.gov

Drew F. Waldbeser
Assistant Solicitor General
404-463-0770
dwaldbeser@law.ga.gov

PART II—BASIC CASE INFORMATION

Case in which amicus brief will be submitted: *National Collegiate Athletic Association v. Alston,* No. 20-512 (U.S.)

Decision below: *In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, 958 F.3d 1239 (9th Cir. 2020)

This is the latest antitrust challenge to the NCAA's amateurism rules. This time, the plaintiffs challenge the NCAA's limits on the compensation they may receive in exchange for their athletic services. *Id.* at 1244. The district court found for the plaintiffs, concluding that NCAA limits on "educated-related benefits" are unreasonable restraints of trade. 375 F.Supp.3d 1058, 1109. The governing standard in these cases is called the "rule of reason," a three-step burden-shifting framework. At step one, the plaintiff must show that the challenged practice has anticompetitive effects. Step two requires the defendant to show that the practice has procompetitive virtues. Finally, at step three, the burden shifts back to the plaintiff to prove that the procompetitive benefits can be achieved through less restrictive means.

Under this framework, the court first found that the NCAA's amateurism rules were anticompetitive because they artificially capped student compensation. *Id.* at 1067–69. Next, the district court rejected the NCAA's evidence that amateurism promotes the integration of college athletics and academics for athletes, thereby improving their education, *id.* at 1083–85, but accepted that the

AMERICAN OVERSIGHT

amateurism rules are partially procompetitive because they increase consumer choice by marketing collegiate athletics as an alternative to professional sports, *id.* at 1082. But the district court held that only the limits on benefits *unrelated* to education served that procompetitive purpose—i.e., that limits on education-related benefits did not further the rules' procompetitive effects. *Id.* at 1082–83, 1101–02. Finally, the district court largely rejected the plaintiffs' proposed alternatives to the amateurism rule, instead adopting a "less restrictive alternative" of its own creation, enjoining the NCAA from enforcing "limits on most compensation and benefits that are related to education," and only allowing it to limit graduation awards and incentives to the extent that they "are not lower than its limits on athletic performance awards now or in the future." *Id.* at 1087. Under the injunction, NCAA could impose *no* limits on post-eligibility scholarships, expenses related to tutoring and studying abroad, and, most troublingly, "paid post-eligibility internships." *Id.* at 1088.

The Ninth Circuit affirmed, along the same rationale. 958 F.3d 1239. The NCAA and the Conferences filed petitions for a writ of certiorari on October 15, 2020. The Court granted cert on December 16, 2020.

Amicus brief is supporting: Petitioners NCAA and Conferences.

PART III—DETAILED CASE INFORMATION

Question presented in the Conferences' petition:

Whether the Sherman Act authorizes a court to subject the product-defining rules of a joint venture to full Rule of Reason review, and to hold those rules unlawful if, in the court's view, they are not the least restrictive means that could have been used to accomplish their procompetitive goal.

Arguments the State is supporting:

The amicus brief will support the petitioners in their argument that the courts below misapplied the "rule of reason" analysis. The petitioners contend that the Ninth Circuit's decision shifted the burden of proof by requiring the defendants to show their rule was no more restrictive than necessary—rather than requiring the plaintiffs to show the restriction was not reasonably necessary. They argue the Ninth Circuit's decision is in tension with the Supreme Court's decisions in *NCAA v. Board of Regents*, 468 U.S. 85, 101-102 (1984) and *Broadcast Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 23 (1979), and conflicts with the Third, Fifth, and Seventh Circuits (the only circuits to address similar challenges to the NCAA amateurism rules). Finally, the petitioners argue that the decisions below will have destructive consequences for collegiate sports.

State interests and legal arguments to be made in amicus brief:

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1. The ongoing debate over whether and how college athletes should receive compensation for their efforts should happen in Congress and within the NCAA, not be resolved by a single district court. The NCAA and Conferences are in the process of revising rules related to compensation for athlete name, image, and likeness, and several states have either considered or are considering legislation on that subject. Questions like these should be reserved for those actors.

2. The district court's injunction directly threatens the existence of college athletics, which is defined by its amateurism. The injunction will force state universities to choose between offering ever-increasing benefits (and thus overhauling their athletics operating budgets, including perhaps cutting some sports entirely) or losing out on the best athletes and becoming less competitive on the field. So the injunction threatens both to undermine amateur status and diminish the on-field product. And if interest in collegiate sports decreases, students and states lose out on many benefits: the revenue for schools (including increased value to school intellectual property), tourism and spending surrounding athletic events, the enrichment of the student experience, and the unifying influence of athletics on a student community and alumni. The rulings below also create a high likelihood of severe and unforeseen consequences. Foremost among them are the Title IX implications of the rule, which would require equivalent funding increases for women's sports even if they are revenue-negative. If schools must scale down or close revenue-negative sports in order to free up the funding to equalize the men's and women's sides of the ledger, athletic opportunities for men and women alike will be diminished.

AMERICAN OVERSIGHT

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

JEFFREY A. MISHKIN
KAREN HOFFMAN LENT
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
4 Times Square
New York, N.Y. 10036

BETH A. WILKINSON
WILKINSON WALSH LLP
2001 M St. N.W., 10th Floor
Washington, D.C. 20036

SETH P. WAXMAN
Counsel of Record
LEON B. GREENFIELD
DANIEL S. VOLCHOK
DAVID M. LEHN
DEREK A. WOODMAN
SPENCER L. TODD
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

AMERICAN OVERSIGHT

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.

AMERICAN OVERSIGHT

FL-AG-21-0351-A-000029

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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IN THE

Supreme Court of the United States

No. 20-

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

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.

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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

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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-

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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-

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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-

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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

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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-

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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-

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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

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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-

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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*

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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-

[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.

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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

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> 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

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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.

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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.

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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

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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

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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

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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-

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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-

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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.

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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.

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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-

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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-

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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."

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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

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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-

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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

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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

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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).

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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

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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.

JEFFREY A. MISHKIN
KAREN HOFFMAN LENT
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
4 Times Square
New York, N.Y. 10036

BETH A. WILKINSON
WILKINSON WALSH LLP
2001 M St. N.W., 10th Floor
Washington, D.C. 20036

SETH P. WAXMAN
Counsel of Record
LEON B. GREENFIELD
DANIEL S. VOLCHOK
DAVID M. LEHN
DEREK A. WOODMAN
SPENCER L. TODD
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

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APPENDICES

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Nos. 20-512, 20-520

In the Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,
v.
SHAWNE ALSTON, ET AL.,
Respondents.

AMERICAN ATHLETIC CONFERENCE, ET AL.,
Petitioners,
v.
SHAWNE ALSTON, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

STEVE W. BERMAN
CRAIG R. SPIEGEL
EMILEE N. SISCO
Hagens Berman Sobol Shapiro LLP
1301 Second Ave., Ste. 2000
Seattle, WA 98101

BRUCE L. SIMON
BENJAMIN E. SHIFTAN
Pearson, Simon & Warshaw LLP
350 Sansome St., Ste. 680
San Francisco, CA 94104

JEFFREY L. KESSLER
DAVID G. FEHER
DAVID L. GREENSPAN
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166

LINDA T. COBERLY
Counsel of Record
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600
lcoberly@winston.com

[Additional counsel on inside cover]

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ELIZABETH C. PRITZKER
JONATHAN K. LEVINE
BETHANY L. CARACUZZO
Pritzker Levine LLP
1900 Powell St., Ste. 450
Emeryville, CA 94608

JEANIFER E. PARSIGIAN
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111

Counsel for Respondents

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QUESTION PRESENTED

Whether restraints that competing NCAA member schools have agreed to impose in the name of "amateurism" should be exempt from challenge under the antitrust laws, as Petitioners contend, or whether they are subject to scrutiny under the rule of reason—a fact-based analysis that this Court and the courts of appeals have uniformly applied to agreements restricting competition among NCAA members and that the courts below undertook based on the particular facts established at trial in this case.

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INTRODUCTION

The petitions in this case largely repeat arguments the NCAA made in a petition that this Court denied just a few years ago. In *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015), the Ninth Circuit upheld a district court's application of the Sherman Act's rule of reason to a particular set of facts, invalidating restraints that the NCAA's member schools had agreed to impose on compensation for the use of student-athletes' names, images, and likenesses. Although both sides sought certiorari, this Court denied review. Both petitions in this case discuss *O'Bannon* at length.

This case is even less deserving of the Court's attention. The decision below does not plough any new legal ground; it applies the same, well-established antitrust standards to a different set of facts—here, facts relating to restrictions on benefits relating specifically to the student-athletes' education. As in *O'Bannon*, the courts below faithfully followed this Court's precedents, including *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984), which held that NCAA rules must be analyzed under the rule of reason. As in *O'Bannon*, the NCAA claims a conflict with other circuits, but a careful analysis shows that no conflict exists. As in *O'Bannon*, this case does not concern how antitrust law might apply to "joint ventures"—a structure that neither this Court nor the courts below have found applies to competitor schools within the NCAA. And—critically—since *O'Bannon*, Congress and state legislatures have begun to consider for themselves the question of player compensation and benefits in college sports. This legislative effort makes certiorari especially inappropriate.

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Since *Board of Regents*, this Court's instructions have been clear: NCAA rules are subject to the rule of reason. This sensible rule of antitrust law requires courts to evaluate a restraint in the context of the market as it actually exists at the time. If a complaint does not plausibly allege an antitrust violation in a particular market—or if discovery does not reveal any genuine dispute of material fact—the court may perform the necessary analysis on motions, without a full-blown trial. But nothing in *Board of Regents* requires that a court uphold NCAA rules without discovery or trial, based simply on the NCAA's assertion that those rules are somehow linked to "amateurism." That is what Petitioners seek—a declaration from this Court that such rules must be upheld "without fact-intensive rule-of-reason analysis." NCAA Pet. 19. *Board of Regents* holds otherwise.

Indeed, applying the fact-based rule of reason is even more important today, given how much the facts have changed since *Board of Regents*. In the last 36 years, Division I basketball and Football Bowl Subdivision ("FBS") football have become multi-billion-dollar industries. The NCAA and its member conferences and schools receive billions of dollars every year through the hard work, sweat, and sometimes broken bodies of student-athletes. Coaches, assistant coaches, and athletic directors take millions in salaries. Yet the schools have agreed among themselves to limit what student-athletes may receive for their work in generating these extraordinary revenues. The agreements among these schools represent a classic horizontal restraint of trade—an agreement among competitors to limit how much they will have to expend to compete for talent and labor.

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To be sure, some NCAA rules may be necessary to protect consumer demand for college sports as a distinct "product." But as a factual matter, the restraints in this case are not. The trial record shows that the challenged restraints are cost-cutting measures, plain and simple, and not reasonably necessary to maintain consumer demand for college sports. As a result, the district court found that they constitute unreasonable restraints of trade.

The decisions below are modest in many respects. They apply only to NCAA restrictions on *education-related benefits* that schools may offer Division I basketball and FBS football players—benefits like computers, science equipment, musical instruments, post-graduate scholarships, tutoring, study abroad, academic awards, and internships. In that sense, the injunction is of great consequence to the student-athletes whose work and sacrifice drive the multi-billion-dollar industry that is NCAA Division I football and basketball. But the injunction does not authorize so-called *pay for play*, which Petitioners argue would be the end of "amateur" sports. Nor does it *require* any school to provide these kinds of education-related benefits or prevent an individual conference from restricting such benefits if it chooses. In short, it simply enables individual schools and conferences to compete among themselves. There is no reason to believe that eliminating restraints on education-related benefits will "fundamentally transform the century-old institution of NCAA sports," as Petitioners claim. NCAA Pet. 5. Petitioners' sky-is-falling rhetoric is neither true nor appropriate in the context of a petition for certiorari from a fact-bound application of well-established law.

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In the end, what Petitioners seek is nothing less than antitrust immunity. But they are making that request on the wrong side of First Street. If Congress believed there was a national interest in avoiding antitrust oversight of anticompetitive behavior in college athletics, it would have granted the NCAA's repeated requests for immunity. Yet it has declined to do so. To the contrary, Congress and many state legislatures have either adopted or are now considering proposals to require the NCAA and its members to roll back their restrictions on athlete compensation, recognizing the profound inequity of a system that enables conference executives, athletic directors, coaches, schools, television networks, and a host of others to make billions of dollars on the backs of young, often underprivileged players. One thing is clear, however: antitrust immunity for college sports is a question for the legislatures, not the courts. The current proposals pending in Congress and state legislatures—including the NCAA's latest request for antitrust immunity—provide yet another reason for this Court to decline review.

For these and other reasons, certiorari is even more inappropriate in this case than it was in *O'Bannon*. This Court should deny review.

STATEMENT

A. The Business of College Sports and the NCAA's Ever-Changing Definition of "Amateurism"

The NCAA is a private, membership-based organization that, among other things, seeks to restrain economic competition in the multi-billion-dollar in-

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tercollegiate sports industry.[1] It accomplishes this goal through agreements among its member schools, each of which compete horizontally, both on the field and off. This competition is particularly fierce in the relevant economic markets—the labor markets for Division I men's and women's basketball players and for football players in the FBS, formerly known as Division I-A.[2] In these markets, schools compete for players' services in exchange for packages of compensation and benefits. That competition is restrained by horizontal agreements among NCAA members, restricting the type and amount of compensation and benefits—including education-related benefits—that schools may offer in these markets.

Division I basketball and FBS football have become particularly lucrative enterprises, generating billions of dollars in annual revenue. For example, the total value of the NCAA's current "March Madness" basketball broadcasting contract, which extends through 2032, is $19.6 billion, while the FBS football conferences' current multi-year deal with ESPN for the College Football Playoff is worth $5.64 billion. NCAA Pet. App. 68a. At the same time, each confer-

[1] In addition to their NCAA membership, most schools are also members of one of the conferences, which serve as additional regulators and organizers of intercollegiate athletics. The conferences have authority in areas that overlap with NCAA rules, such as schedules and rules of the game, and in areas in which the NCAA does not have a role, such as the sale of the member schools' combined media rights for the regular seasons.

[2] The FBS represents the highest level of college football, consisting of the largest and most competitive NCAA programs. There are ten conferences and approximately 130 schools in the FBS. Eleven conferences are among Petitioners in this case; all but the Western Athletic Conference participate in FBS football.

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ence negotiates its own regular-season football and basketball contracts with broadcasters, with the largest conferences generating over $500 million in annual revenue. *Id.* at 68–69a (explaining that the Southeastern Conference "made more than $409 million in revenues from television contracts alone in 2017, with its total conference revenues exceeding $650 million that year"). These massive sums allow schools to spend lavishly, including on "seven-figure coaches' salaries" and "palatial athletic facilities." *Id.* at 17a. Yet the elite athletes in these sports—the ones whose talent and labor make it all possible—receive almost none of this revenue.

Although college athletics can be an avocation that complements and enhances student-athletes' educational experiences, that could not be further from the truth in the multi-billion-dollar businesses that are today's Division I and FBS football. With so much money at stake, "coaches and others in the Division 1 ecosystem make sure that Student-Athletes put athletics first, which makes it difficult for them to compete for academic success with students more focused on academics. They are often forced to miss class, to neglect their studies, and to forego courses whose schedules conflict with the sports in which they participate." *Id.* at 53a (Smith, J., concurring). Indeed, the district court in this case affirmatively found that athletes in these markets face significant barriers that prevent their full integration into the educational experiences and campus life of other students. *Id.* at 109a–115a.

While FBS football and Division I basketball mirror their professional counterparts in nearly all respects—including by paying coaches and executives seven-figure salaries and playing games for television

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audiences in the midst of a pandemic—the NCAA continues to cling to the pretext of "amateurism," insisting that the compensation and benefits available to student-athletes must be severely constrained to avoid "eliminating the procompetitive distinction between college and professional sports"—which, it claims, would hamper consumer demand. NCAA Pet. 33. Yet the district court found—based on testimony by Petitioners' own witnesses, among other evidence—that the critical factor that "drives demand" for college sports today is not the lack of compensation but rather the athletes' status as *students* at a particular school. NCAA Pet. App. 21a. As the district court explained, "[d]efense lay witnesses * * * testified that consumer demand for Division I basketball and FBS football is driven by consumers' perception that student-athletes are, in fact, students." *Id.* at 107a.[3]

Despite this, NCAA members have adopted detailed compensation and benefit restraints that have nothing to do with requiring that athletes remain students. In fact, the district court found, as a factual matter, that the specific restraints at issue here—limits on benefits related to education—"do not appear to be set * * * based on considerations of consumer demand." *Id.* at 145a. Instead, the NCAA's own representatives testified that the rules are based on "cost considerations." Ct. App. ER641.

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[3] Critically, the student-athletes here do not challenge Petitioners' academic eligibility requirements. Further, the injunction concerns only the rules restricting competition for education-related benefits that schools may offer Division I basketball and FBS football players—benefits that actually *enhance* the athletes' status and experience as students. NCAA Pet. App. 121a.

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The rest of the trial record confirms this. Over the years, the compensation and benefits available to student-athletes in Division I basketball and FBS football have changed and increased, reflecting fundamental shifts in the NCAA's view of "amateurism"—and yet there has been no negative impact on demand for college sports. Quite the opposite. This incongruence led the lower courts to find, as a factual matter, that in the present day, the NCAA's rules "'do not follow any coherent definition of amateurism.'" *Id*. at 19a (quoting district court).

This case does not represent the first time that the NCAA has defended its rules as essential to "amateurism" and preserving college sports, only to find that even without such rules, consumer demand remains as strong as ever. In *Board of Regents*, for example, the NCAA warned that competition among schools to sell their broadcast rights would pose an existential threat to amateurism and consumer demand.[4] Today such competition flourishes and, as a result, college athletics generates billions in broadcast revenue, without any negative impact on demand. In *Law* v. *NCAA*, the NCAA resisted allowing unrestrained competition among schools to compensate assistant basketball coaches, contending that it was contrary to the collegiate model.[5] Today such competition is permitted, with assistant coaches often

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[4] 468 U.S. at 119 (rejecting NCAA argument that restricting sale of broadcast rights was necessary "to preserve amateurism").

[5] 134 F.3d 1010, 1021–24 (10th Cir. 1998) (rejecting NCAA's proposed procompetitive justifications for restricting assistant coach salaries).

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earning millions,[6] and demand still thrives. In *White* v. *NCAA*, the NCAA opposed allowing schools to compete with one another by offering full cost-of-attendance scholarships, calling such compensation "pay for play."[7] Today such competition is permitted; cost-of-attendance scholarships and even compensation *above* the cost of attendance are pervasive, and demand still thrives. NCAA Pet. App. 19a–20a. And in *O'Bannon*, the NCAA decried payments to student-athletes in exchange for the use of their names, images, and likenesses as "anathema to amateurism" and warned that such payments would "blur the clear line between amateur college sports and their professional counterparts."[8] Today the NCAA—under pressure from state legislatures and Congress—has decided that such payments are consistent with its amateurism model and should be permitted.[9]

As this history and the factual record make clear, "amateurism" is a moving goalpost; it is whatever Petitioners say it is at any given time. In Division I basketball and FBS football, it is little more than a pretext. It is certainly not a Sherman Act concept, much less a get-out-of-jail-free card that insulates any particular set of NCAA restraints from scrutiny.

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[6] Between 2009 and 2015, for example, the salaries of assistant men's basketball coaches increased by nearly 40%. C.A. ER701.

[7] NCAA Mem. P. & A. in Supp. Summ. J. at 28, *White* v. *NCAA*, No. 06-cv-999 (C.D. Cal. Oct. 22, 2007), ECF No. 220.

[8] Br. for NCAA at 57, *O'Bannon* v. *NCAA*, No. 14-16601 (9th Cir. Nov. 14, 2014), ECF No. 13-1.

[9] *See* NCAA Board of Governors Federal and State Legislation Working Group, Final Report and Recommendations (Apr. 17, 2020), https://tinyurl.com/yxq8rtd9.

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B. District Court Proceedings

Recognizing the immense economic disparity between the NCAA's ever-growing FBS football and Division I basketball enterprises and the student-athletes who drive them, a group of football players and men's and women's basketball players filed this suit against the NCAA and its largest athletic conferences, challenging the rules that restrict student-athlete compensation. The student-athletes contended that without these restrictions, they would be compensated at a level more commensurate with the value they confer on their schools, conferences, and the NCAA.

While the case was pending, the Ninth Circuit issued its decision in *O'Bannon*—an antitrust challenge brought against the NCAA (but not the conferences) by a class of current and former football and men's (but not women's) basketball players. These players challenged NCAA rules that prohibited compensation for the use of their names, images, and likenesses in game footage or videogames. As relevant here, *O'Bannon* reaffirmed what this Court and many others had held—that the NCAA's rules *are* subject to antitrust challenge. Based on a careful review of the factual record in that case, the Ninth Circuit affirmed an injunction permitting schools to use revenues generated from the use of athletes' names, images, and likenesses to increase the NCAA's scholarship limit and fund athletes' full cost of attendance—a federally defined measure of a student's cost to attend school.

The *O'Bannon* parties each filed petitions for writ of certiorari, with the NCAA's petition resting on virtually identical grounds as the petitions here. *See*,

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e.g., Pet. for a Writ of Certiorari, *NCAA* v. *O'Bannon*, No. 15-1388, 2016 WL 2866087, at 10 (U.S. May 13, 2016) ("*O'Bannon* Pet.") ("the Ninth Circuit disregarded *Board of Regents*"); *id.* at 10–11 ("the Ninth Circuit set aside the restraint because it was not the *least* restrictive one possible") (emphasis in original); *id.* at 15–16 ("*American Needle*—citing *Board of Regents*—reaffirmed that restraints essential to a joint-venture product" should be upheld); *id.* at 16–18 (contending that the Ninth Circuit's decision "departs from other circuits' precedent," which holds that "NCAA amateurism rules should be upheld without detailed rule-of-reason analysis (let alone a trial)"); *id.* at 26 ("The decision below will only increase the frequency of [antitrust] challenges" faced by the NCAA); *id.* at 27 ("The need for review is particularly strong given the nationwide scope and importance of college athletics"). Both parties' petitions were denied. 137 S. Ct. 277 (2016).

Following the Ninth Circuit's *O'Bannon* decision, Petitioners here moved for judgment on the pleadings, arguing that *O'Bannon* foreclosed the claims in this case as a matter of *res judicata*. The district court denied the motion because, among other things, this case involves a different set of horizontal compensation restraints, and the factual record on competition in the relevant markets had changed substantially since *O'Bannon*. The petitions here do not challenge that ruling.

After discovery, the parties cross-moved for summary judgment. The district court again rejected Petitioners' preclusion arguments. On the merits, the court granted summary judgment in favor of the players in part, finding no genuine issue of fact as to whether the challenged rules substantially restricted

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competition in the relevant markets. In rendering that decision, the court adopted—at the request of *both* parties—a market definition consisting of the national markets for athletes' labor in Division I basketball and FBS football. NCAA Pet. App. 75a–76a. (On appeal, Petitioners did not—and do not now—contest the court's findings relating to anticompetitive effect and the relevant market.) As for the rest of the motion, the court found that triable issues remained at the second and third steps of the rule of reason.

After a ten-day bench trial—reflecting a starkly different factual record from any prior antitrust case concerning NCAA rules—the district court entered judgment in favor of the plaintiff classes. The court held that the limits on education-related benefits did not serve any procompetitive purpose, including the NCAA's professed purpose of preserving the distinction between college and professional sports. *Id.* at 109a. Specifically, the court found that the NCAA has defined its product as distinct from professional sports by ensuring that student-athletes are not allowed to receive unlimited, non-education-related cash compensation like professional athletes and that they maintain "student" status. *Id.* at 121a. Yet the NCAA continues to impose caps and prohibitions on education-related benefits that do not serve that purpose and do not preserve consumer demand—benefits like computers, science equipment, musical instruments, post-graduate scholarships, tutoring, study abroad, academic awards, and internships. Indeed, the court found as a factual matter that market competition to provide the best package of education-related benefits will only reinforce the perception

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that student-athletes are students—which, again, is the critical driver of consumer demand. *Ibid.*

Still, the court found that there "may" be a limited pro-competitive justification for "some" of the challenged restraints, to the extent they preserve the distinction between college and professional sports by preventing unlimited payments that are unrelated to education. *Id.* at 147a. But the court went on to find that the students had proven a less restrictive alternative to achieve that goal—a system in which the restrictions on education-related benefits are eliminated, leaving individual conferences to decide whether and to what degree any demand-enhancing limitations on educational benefits are warranted at the conference level. *Id.* at 151a–159a.

As a remedy, the district court enjoined the NCAA from maintaining national rules capping education-related compensation and benefits, while otherwise leaving the NCAA as the legislator of its own rulebook. The injunction permits the NCAA to establish its own definition of "related to education" and allows individual conferences to impose their own, more stringent education-related compensation caps. *Id.* at 168a. It also requires the NCAA to permit schools and conferences to offer academic and graduation incentive awards, with any cap on such awards set no lower than the amount the NCAA allows for athletics-based awards. *Id.* at 168a–169a.

Following the decision, NCAA President Mark Emmert publicly lauded the injunction as "'an inherently good thing'" and not in any way fundamentally inconsistent with the NCAA's principles, as it would foster competition among conferences and schools "'over who can provide the best educational experi-

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ence.'" *Id.* at 42a (Ninth Circuit decision, quoting Associated Press, *Emmert: Ruling reinforced fundamentals of NCAA*, ESPN (Apr. 4, 2019)).

C. The Ninth Circuit's Opinion

Reviewing the trial record in its entirety, the Ninth Circuit panel unanimously affirmed the district court's findings and injunction.

The court began by noting that "[a]ntitrust decisions are particularly-fact-bound" and affirmed the district court's holding that *O'Bannon* had no preclusive effect on this case, which involved a fundamentally different factual record. NCAA Pet. App. 27a.

Next, the Ninth Circuit described the traditional rule of reason "three-step framework":

> (1) [the] Student-Athletes bear the initial burden of showing that the restraint produces significant anticompetitive effects within the relevant market; (2) if they carry that burden, the NCAA must come forward with evidence of the restraint's procompetitive effects; and (3) [the] Student-Athletes must then show that any legitimate objectives can be achieved in a substantially less restrictive matter.

Id. at 33a (citations and quotations omitted).

The Ninth Circuit found the district court's factual and legal conclusions to be well-grounded at every step. At step one, it held that the "district court properly concluded that the Student-Athletes carried their burden" to show significant anticompetitive effects, noting that the district court's findings "have substantial support in the record." *Id.* at 33a–34a (citations and quotations omitted). At step two, the Ninth Circuit held that the district court "properly

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'credit[ed] the importance to consumer demand of maintaining a distinction between college and professional sports,'" while also finding that while "*some* of the challenged rules" may serve a procompetitive purpose, the limits on "'non-cash education-related benefits'" do not. *Id.* at 34a–35a (quoting district court, emphasis in original). Finally, at step three, the Ninth Circuit confirmed that "it [w]as the Student-Athletes' burden to make a strong evidentiary showing that their proposed [less restrictive alternatives] to the challenged scheme are viable"—that is, "virtually as effective as the challenged rules in achieving the only procompetitive effect" that Petitioners had shown. *Id.* at 40a, 66a. The district court had correctly allocated the burden of proof on this issue, rejecting two of the student-athletes' three proffered "less restrictive alternatives." *Id.* at 22a; *see also id.* at 46a ("The [district] court's findings at step three are supported by the record, and certainly not clearly erroneous."). As the Ninth Circuit explained, its assessment of the entire record led it to hold that "the district court properly applied the Rule of Reason in determining that the enjoined rules are unlawful restraints of trade." *Id.* at 7a.

Two days before the mandate was set to issue, Petitioners moved the Ninth Circuit for a stay, claiming they would be irreparably harmed if they were required to permit additional education-related benefits. After the Ninth Circuit summarily denied the motion, Petitioners unsuccessfully sought a stay from this Court, based on the same arguments. The mandate issued on August 12, 2020.

Despite their claimed irreparable injury, Petitioners waited until October 15—a full two months after

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the mandate, and the last possible day under the Court's rules—to file their petitions.

REASONS FOR DENYING THE PETITIONS

I. The decision below is entirely consistent with this Court's precedents.

As in the NCAA's petition in *O'Bannon*, Petitioners here incorrectly contend that *Board of Regents* prohibits a court from conducting a fact-based rule-of-reason inquiry for any rule they adopt in the name of "amateurism." *Compare* AAC Pet. 20–21 *and* NCAA Pet. 17–18 *with O'Bannon* Pet., 2016 WL 2866087, at *17 ("*Board of Regents* and *American Needle* [v. *NFL*, 560 U.S. 183 (2010)] mean that NCAA rules that define what it means to be an amateur or a student-athlete should be sustained in the twinkling of an eye—that is, at the motion-to-dismiss stage") (citation and quotation omitted). According to Petitioners, *Board of Regents* established this rule to preserve their "'ample latitude'" to oversee college sports. *Compare* NCAA Pet. 19 *with O'Bannon* Pet., 2016 WL 2866087, at *11.

This Court's cases say no such thing. To the contrary, the *Board of Regents* Court squarely held that NCAA rules *are* subject to antitrust scrutiny under the rule of reason. 468 U.S. at 103–04. Even Petitioners themselves describe *Board of Regents* that way, stating that "[i]n 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." NCAA Pet. 9; *see id.* at 17 ("This Court held in *Board of Regents* that NCAA rules

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would be evaluated under the rule of reason * * * ."). Applying the rule of reason, the *Board of Regents* Court ultimately ruled *against* the NCAA, holding that the restraint at issue was unreasonable in light of the specific facts found at trial. 468 U.S. at 120.

The district court here faithfully followed *Board of Regents* and applied the rule of reason to the facts. After holding that the complaint sufficiently stated a claim, the court supervised discovery, compiled an evidentiary record, evaluated the parties' motions for summary judgment, found genuine issues of material fact, and held a two-week trial. Then the court issued a 102-page decision applying the rule of reason to the facts presented, finding that the challenged rules were anticompetitive and unlawful. The Ninth Circuit appropriately reviewed this factual conclusion deferentially, finding no clear error. Again, this is precisely what happened in *Board of Regents* itself, in which this Court reviewed a lower court's application of the rule of reason to a set of NCAA rules after a trial and affirmed an order enjoining them.

To be sure, *Board of Regents* also discussed the NCAA generally, commenting that the NCAA was perceived to play a "critical role in the maintenance of a revered tradition of amateurism in college sports." 468 U.S. at 120. The Court also observed—notably, in an entirely different era in college sports—that it was "reasonable to assume that most * * * NCAA [rules] are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive." *Id*. at 117. But nothing in *Board of Regents* indicates that the Court intended this observation to function as binding legal doctrine and to prevent judges decades into the future from evaluating whether such an "assum[ption]" remained "reasona-

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ble," no matter how much the factual circumstances changed.

And changed they have. The facts in the relevant markets bear no resemblance to what the *Board of Regents* Court understood at that time about the NCAA and the tradition of "amateurism." As discussed above, the business of Division I basketball and elite football has grown exponentially in the last three decades, becoming a massive, multi-billion dollar industry on the backs of unpaid students who would obtain far more compensation for their labor in a competitive market. Moreover, the trial record below established that in the years since *Board of Regents*, the NCAA has abandoned "any coherent definition" or tradition of amateurism in Division I basketball and FBS football, allowing significant changes in the compensation that schools are allowed to provide. NCAA Pet. App. 92a; *see also id.* at 144a ("amateurism, and amounts of permissible student-athlete compensation have changed materially over time").

Petitioners' position gains no more support from *American Needle*—a case that also formed the basis of their unsuccessful petition in *O'Bannon*. *Compare* NCAA Pet. 17 (quoting *American Needle*, 560 U.S. at 203) *with O'Bannon* Pet., 2016 WL 2866087, at *12 (same). In *American Needle*, a unanimous Court rejected the NFL's argument for antitrust immunity and held that the challenged acts were concerted activity subject to the rule of reason. 560 U.S. at 203. The Court explained that "[w]hen 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason." *Id.* (quoting *Board of Re-*

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gents, 468 U.S. at 101). That is precisely what the courts did in this case.

To be sure, *Board of Regents* and *American Needle* observe that the rule of reason "'can sometimes be applied in the twinkling of an eye'"—that is, without a "detailed analysis"—depending on "the concerted activity in question." *American Needle*, 560 U.S. at 203 (quoting *Board of Regents*, 468 U.S. at 109 n.39). But this is far from a substantive presumption in the NCAA's favor. In *Board of Regents*, the Court used the phrase "twinkling of an eye" to explain that some restraints may be so obviously *anti*-competitive that they can be summarily *struck down*. 468 U.S. at 109 n.39. And when the Court repeated that phrase in *American Needle*, it also specifically rejected the NFL's plea for antitrust immunity, declining to prescribe a "twinkling of an eye" approach to the restrictions in that case and instead remanding for a rule-of-reason analysis, with the observation that competition for "playing personnel" is an area where horizontal agreements must be subject to the rule of reason. 560 U.S. at 203. Neither of these cases establishes a presumption in a sports league's favor, and neither suggests that it would ever be error to apply the rule of reason on a full factual record, as the district court did here.

In any event, the Ninth Circuit here was not asked to (and did not) address any legal question about "presumptions" under *Board of Regents* or *American Needle*. Instead, it followed this Court's direction and reviewed the district court's factual application of the rule of reason for clear error, finding none. Petitioners may disagree with the courts' factual conclusions, but their disagreement does not warrant this Court's review.

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II. The decision below does not implicate any conflict among the Courts of Appeals.

Petitioners similarly regurgitate the same arguments about the same alleged conflict of circuit authority that they raised in their unsuccessful *O'Bannon* petition. All but one of the decisions Petitioners cite for the purported split occurred before the *O'Bannon* petition and were cited there too. *Compare* NCAA Pet. 19–23 *and* AAC Pet. 23–25 *with* *O'Bannon* Pet., 2016 WL 2866087, at *16–18 (citing *Agnew* v. *NCAA*, 683 F.3d 328 (7th Cir. 2012); *McCormack* v. *NCAA*, 845 F.2d 1338 (5th Cir. 1998); *Smith* v. *NCAA*, 139 F.3d 180 (3d Cir. 1998)). The one exception is *Deppe* v. *NCAA*, 893 F.3d 498 (7th Cir. 2018), which, as discussed below, applied the rule articulated in *Agnew* and is thus a post-*O'Bannon* decision that applied pre-*O'Bannon* law. And, in any event, none of the cases relied upon by Petitioners presents any conflict with the Ninth Circuit's decision here.

In *Smith*, a case from the 1980s, the Third Circuit considered an NCAA rule that involved an athlete's status as a student at the institution—a very different kind of rule than the ones at issue here. *See* 139 F.3d at 183 n.2 (quoting challenged NCAA rule). The court held that the rule did not "relate[] to the NCAA's commercial or business activities" and thus it did not fall under the Sherman Act in the first place. *Id.* at 185–86. And—critically—the court confirmed that if the Sherman Act did apply, it "would analyze [the rule] under the rule of reason." *Id.* at 186. Although the court proceeded to cite this Court's then-recent observations in *Board of Regents*, it did not hold that *Board of Regents* controlled the disposition as a matter of law; it simply concluded that "the by-

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law [in question] so clearly survives a rule of reason analysis" that the claim could be resolved on a motion to dismiss. *Id.* at 187.

McCormack—the only decision in another circuit that addressed limits on compensation to players—also applied the rule of reason to a particular set of factual allegations. 845 F.2d at 1343. But the Fifth Circuit did not read *Board of Regents* to immunize the rule from antitrust scrutiny or to establish a presumption in favor of any particular NCAA rule. It noted the NCAA's argument on that point but found that it "need not address" the issue because of the sparsity of the plaintiffs' allegations, which could not support a claim under the rule of reason. *Ibid.*

In *Agnew*, the Seventh Circuit theorized that there may be a presumption under *Board of Regents* that certain classes of NCAA rules are lawful, but it declined to apply any presumption to the NCAA rules before it, which limited the number and length of athletic scholarships. 683 F.3d at 343–44. The court reasoned that such rules "are not inherently or obviously necessary for the preservation of amateurism, the student-athlete, or the general product of college football." *Id.* at 344. While the NCAA argued that such rules are necessary for parity between more wealthy and less wealthy schools, the court rejected that argument, noting that the claim was "weakened" by the then-recent genesis of those rules and the fact that they were recently rescinded. *Ibid.* In the court's assessment, the challenged rules—like the ones at issue here—"seem[ed] to be aimed at containing university costs, not preserving the product of college football." *Ibid.* Thus, the court declined to apply any presumption of lawfulness at the pleading stage, explaining that the NCAA's argument was "far too

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great a leap to make without evidentiary proof at the full Rule of Reason stage." *Ibid*.

The only post-*O'Bannon* case cited by Petitioners is *Deppe*, in which the Seventh Circuit explicitly applied the rule it had previously set out in *Agnew*. 893 F.3d at 503–04. Thus, while the decision in *Deppe* is new, the Seventh Circuit's approach is not. And, critically, the kinds of NCAA rules at issue in *Deppe* were even further afield from the rules challenged here than the rules in *Agnew* were. *Compare Deppe*, 493 F.3d at 502 (rule requiring athlete to spend a year enrolled at institution before being eligible to participate in athletics) *with Agnew*, 683 F.3d at 344 (rules limiting number and extent of scholarships). Because the eligibility rule in *Deppe* was academics-driven, the Seventh Circuit applied the presumption of lawfulness it had outlined in *Agnew* but had declined to apply in that case. 893 F.3d at 502.

Still, it is wrong to say that this case "would have come out differently if decided by the Seventh Circuit." AAC Pet. 24. The rules at issue here are far more like the ones at issue in *Agnew*, which related to scholarships—an education–related benefit that conferences or schools may choose to provide. Further, as in *Agnew*, the rules here "seem to be aimed at containing university costs, not preserving the product of college football." 683 F.3d at 344; *see* NCAA Pet. App. 145a, 148a–149a n.42 (challenged rules were based not on consumer demand but on cost). Thus, there is every reason to believe that the Seventh Circuit would agree with the Ninth that the rules in this case are subject to a full, rigorous analysis under the rule of reason. Indeed, these are exactly the type of anti-competitive agreements for which no procompetitive presumption would ever be proper. *See* P. Areeda &

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H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 1902a (4th ed. 2018) (explaining that "[h]orizontal agreements are antitrust's most 'suspect' classification, which as a class provoke harder looks than any other arrangement," and referring to "naked price fixing" as one of "the most threatening circumstances" to free competition).

Nor is there any inconsistency between the decision below and the Third Circuit's decision in *Race Tires America, Inc.* v. *Hoosier Racing Tire Corp.*, 614 F.3d 57 (3d Cir. 2010), *cited in* NCAA Pet. 3–4. The *Race Tires* decision does not suggest antitrust immunity, as Petitioners suggest; instead, it confirms that sports sanctioning bodies are required to prove "good faith, sufficient pro-competitive or business justifications" for their rules, based on the facts of the case. *Id.* at 81. Moreover, the Third Circuit explicitly warned against "establish[ing] an overly broad rule detached from the specific facts" because of the "highly fact-specific nature of the antitrust standards." *Id.* at 80. This is the opposite of establishing some kind of presumption.

Finally, even if there were some tension among the circuits—and there is none—this case would be a poor vehicle for resolving it. The Ninth Circuit was never asked to rule on whether the rules challenged here should have been afforded a presumption of lawfulness rather than analyzed under the rule of reason. And, again, the rules in this case are far more like *Agnew*'s limits on scholarships—to which the Seventh Circuit refused to apply any presumption—than they are like *Deppe*'s year-in-residence rule. Thus, if there is any real disagreement between the Seventh Circuit and the Ninth—and the cases thus

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far do not reflect one—that disagreement would not make a difference in this case.

III. The decision below faithfully applied the rule of reason framework.

Contrary to Petitioners' assertions (*e.g.*, AAC Pet. 15–19), the Ninth Circuit carefully applied the traditional rule of reason framework based on well-established precedent. As this Court recently reaffirmed, the rule of reason involves a "three-step, burden shifting framework":

> [T]he plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing then 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) (citations omitted).

Petitioners' only *legal* objection to the Ninth Circuit's analysis is their suggestion that it "effectively requir[ed] defendants to prove that they had adopted the *least* restrictive alternative that would preserve college sports." AAC Pet. 15. But the Ninth Circuit did no such thing. Instead, it held unequivocally that it was the "*Student-Athletes'* burden to make a strong evidentiary showing" on less restrictive alternatives. NCAA Pet. App. 40a (emphasis added, quotation omitted). It further held that a court may "invalidate a restraint and replace it with [a less restrictive al-

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ternative] only if the restraint is '*patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives'"—and that Plaintiffs bore the burden to demonstrate that a significantly less restrictive alternative was available. *Id.* at 33a (citation and quotation omitted).

Applying the traditional standard, the court held that "the district court reasonably concluded that market competition in connection with education-related benefits will only reinforce consumers' perception of student-athletes as students, thereby preserving demand." *Id.* at 43a. That conclusion was based on the district court's detailed factual findings, including that the "NCAA's 'own witnesses' testified that 'consumer demand for [D1] basketball and FBS football is driven largely by consumers' perception that student-athletes are, in fact, students.'" *Ibid.* (alteration in original).

Again, the Ninth Circuit did not establish any new legal principle; this is the same test that the court applied in *O'Bannon* and that this Court reaffirmed in *Ohio* v. *American Express* just two years ago. None of this presents any unsettled legal question that requires this Court's review.

IV. The decision below turns on fact-bound conclusions after a lengthy bench trial.

The nature of the Ninth Circuit's decision further undermines Petitioners' request for certiorari. The decision does not set forth any new or remarkable principles of law. Instead, the only significant issues of law before the court had to do with Petitioners' unsuccessful argument that the claims in this case were precluded by *O'Bannon* under principles of *stare decisis* and *res judicata*—issues that Petitioners have de-

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clined to raise here. *See* AAC Pet. 13 n.4.

With respect to the petitions, then, all that is at issue is the Ninth Circuit's appropriately deferential review of the district court's application of the rule of reason, based on the trial record in its entirety. This is an inherently fact-specific analysis. *See Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 899 (2007) (discussing the "case-by-case adjudication contemplated by the rule of reason"); *Maple Flooring Mfrs.' Ass'n* v. *United States*, 268 U.S. 563, 579 (1925) ("[E]ach case arising under the Sherman Act must be determined upon the particular facts disclosed by the record"). The facts may change over time, requiring a new evaluation. *Leegin*, 551 U.S. at 899 (Sherman Act's prohibitions on restraints of trade "evolve to meet the dynamics of present economic conditions"); Areeda & Hovenkamp, *supra*, ¶ 1205c3 ("[C]ontinuing contracts in restraint of trade * * * are typically subject to continuing reexamination," and "even a judicial holding that a particular agreement is lawful does not immunize it from later suit or preclude its reexamination as circumstances change.").

On its face, the Ninth Circuit's decision expressly turned on "deferen[ce]" to specific factual findings and an "examin[ation of] the record 'in its entirety." NCAA Pet. App. 44a (citation omitted). This was entirely appropriate—and, in any event, involves fact-based decisionmaking not appropriate for this Court's review.

V. The decision below has no implications for joint ventures.

Petitioners insist that absent review by this Court, the decision below "endors[es] an antitrust

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standard that puts at risk many legitimate and pro-competitive joint ventures." AAC Pet. 27; s*ee also* NCAA Pet. 29 (the decision below "will have sweeping detrimental consequences for college sports and joint ventures more generally"). Not so. Far from being a "joint venture," Petitioners and their member schools are direct, horizontal *competitors* in the relevant markets at issue in this case—the labor markets in Division I basketball and FBS football.

The relevant antitrust markets in this case were identified based on undisputed evidence at the summary judgment phase and left unchallenged by Petitioners on appeal. They are the "national markets for Plaintiffs' labor in the form of athletic services in men's and women's Division I basketball and FBS football, wherein each class member participates in his or her sport-specific market." NCAA Pet. App. 137a. "In these markets, the class-member recruits sell their athletic services to the schools that participate in Division I basketball and FBS football in exchange for grants-in-aid and other compensation and benefits." *Id* at 137a–138a.

In these markets, the NCAA's members are competitors, not joint venturers producing a common product. Petitioners point to no findings in the record establishing that the NCAA's thousands of disparate and diverse members comprise a joint venture in the relevant labor markets. Indeed, the term "joint venture" cannot be found in either the district court's or Ninth Circuit's decisions.

As this Court observed about the NFL in *American Needle*,

> [t]he fact that [NCAA schools] share an interest in making the entire league successful and

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> profitable, and that they must cooperate in the production of scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case [that is, agreements to constrain horizontal competition] is still concerted activity under the Sherman Act that is subject to § 1 analysis.

560 U.S. at 202–03; *see also Board of Regents*, 468 U.S. at 113–14 (rejecting NCAA's proffered justification "that its television plan constitutes a cooperative 'joint venture' which assists in the marketing of broadcast rights and hence is procompetitive"); *Law*, 134 F.3d at 1018 n.10 (rejecting NCAA's proffered "joint venture" defense in antitrust challenge to NCAA rules capping compensation for assistant coaches).

Further, even if the decision below somehow did relate to the antitrust treatment of joint ventures, the NCAA's concern about it is misplaced. It is already well established that joint venture agreements are susceptible to antitrust challenge and must be analyzed under the rule of reason. As this Court has explained, because "[j]oint ventures * * * are [] not usually unlawful," these agreements should not be held *per se* illegal but rather "should be subjected to a more discriminating examination under the rule of reason." *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 23–24 (1979) (noting the agreements "may not ultimately survive that attack").

Finally, and again, the NCAA raised these same supposed joint venture concerns in its unsuccessful *O'Bannon* petition. *E.g.*, 2016 WL 2866087, at *3 ("The Ninth Circuit's ruling jeopardizes the vitality of

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not only the NCAA and other amateur sports leagues, but also joint ventures more generally"). They are no more worthy of this Court's review today.

VI. The ongoing legislative efforts in this area make this case particularly unsuitable for review.

Finally, even if there were some need for clarification in the antitrust laws as they apply to NCAA rules, this would be the wrong time for the Court to weigh in, given the ongoing legislative efforts in this area. In recent months, federal and state legislatures have either enacted or considered laws that would allow student-athletes to be paid for the use of their names, images, and likenesses. Five states have already passed such laws, with Florida's scheduled to go into effect on July 1, 2021. And numerous other states have considered or are considering similar bills. Congress is also heavily involved, with bills currently pending in both the House and the Senate, and hearings on student-athlete compensation held by two Senate committees in just the past several months.

Petitioners are actively participating in this legislative process—even proposing their own legislation. *See* Ltr. from Power Five Comm'rs to Cong. Leadership at 1 (May 23, 2020)[10] ("We share the view that federal legislation should be enacted to permit Division I student-athletes to pursue payment from third parties for NIL licensing."); R. Dellenger, *NCAA Presents Congress with Bold Proposal for NIL Legisla-*

[10] https://assets.documentcloud.org/documents/6933292/Power-Five-letter-to-Congress.pdf.

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tion, SPORTS ILLUSTRATED (July 31, 2020)[11] (discussing the NCAA's proposed Intercollegiate Amateur Sports Act of 2020). Indeed, despite their strenuous opposition in *O'Bannon* to compensation for the use of players' names, images, and likenesses, Petitioners have now reversed course and embraced such compensation and are expected to permit it as soon this winter. With the definition of "amateurism" in a state of flux and the legislative branch already actively engaged, certiorari would be particularly inappropriate.

Petitioners' legislative proposals also advocate for effectively the same antitrust immunity that they seek from this Court. *See* May 23 Ltr. at 1 (proposing that federal legislation include "protection from potential legal liability under antitrust and other laws"). One currently pending Senate bill has a safe harbor for the NCAA and its members. *See* Fairness in Collegiate Athletics Act, S.4004, § 4(b) (2020) (except for enforcement by the Federal Trade Commission, "no cause of action shall lie or be maintained in any court against any intercollegiate athletic association, or any institution of higher education which is a member of such association for the adoption or enforcement of a policy, rule, or program established under" the proposed legislation).

In the end, whether through changes by the NCAA's members, by Congress, or by state legislatures, the "amateurism" model is once again in the midst of a paradigm shift. Even if certiorari were

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[11] https://www.si.com/college/2020/07/31/ncaa-sends-congress-nil-legislation-proposal.

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otherwise warranted, this would be the wrong time for the Court to intervene.

CONCLUSION

The courts below applied the well-established rule of reason to a particular set of facts, finding—based on a full trial record—that the agreement of NCAA members to restrict education-related benefits is an unreasonable restraint of trade. Petitioners' argument essentially seeks antitrust immunity—a request that should be directed to Congress, not to this Court. The writ should be denied.

Respectfully submitted.

STEVE W. BERMAN
CRAIG R. SPIEGEL
EMILEE N. SISCO
Hagens Berman Sobol Shapiro LLP
1301 Second Ave., Ste. 2000
Seattle, WA 98101

BRUCE L. SIMON
BENJAMIN E. SHIFTAN
Pearson, Simon & Warshaw LLP
350 Sansome St., Ste. 680
San Francisco, CA 94104

ELIZABETH C. PRITZKER
JONATHAN K. LEVINE
BETHANY L. CARACUZZO
Pritzker Levine LLP
1900 Powell St., Ste. 450
Emeryville, CA 94608

JEFFREY L. KESSLER
DAVID G. FEHER
DAVID L. GREENSPAN
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166

LINDA T. COBERLY
Counsel of Record
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600
lcoberly@winston.com

JEANIFER E. PARSIGIAN
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111

NOVEMBER 9, 2020

AMERICAN OVERSIGHT

No.

In the Supreme Court of the United States

AMERICAN ATHLETIC CONFERENCE, THE ATLANTIC COAST CONFERENCE, THE BIG TEN CONFERENCE, INC., THE BIG 12 CONFERENCE, INC., CONFERENCE USA, MID-AMERICAN CONFERENCE, MOUNTAIN WEST CONFERENCE, PAC-12 CONFERENCE, SOUTHEASTERN CONFERENCE, SUNBELT CONFERENCE, AND WESTERN ATHLETIC CONFERENCE,

Petitioners,

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

BRITT M. MILLER
ANDREW S. ROSENMAN
JED W. GLICKSTEIN
Mayer Brown LLP
71 South Wacker Dr.
Chicago, IL 60606
(312) 782-0600

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner The Big Ten Conference, Inc.

[Additional counsel on inside cover]

AMERICAN OVERSIGHT

ROBERT W. FULLER, III
LAWRENCE C. MOORE, III
PEARLYNN G. HOUCK
ERIK R. ZIMMERMAN
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon St., Suite 1900
Charlotte, N.C. 28246

MARK SEIFERT
Seifert Law Firm
50 California St., Suite 1500
San Francisco, CA 94111

Counsel for Southeastern Conference

BENJAMIN C. BLOCK
Covington & Burling LLP
One CityCenter
850 Tenth St. N.W.
Washington, D.C. 20001

Counsel for the American Athletic Conference

LEANE K. CAPPS
CAITLIN J. MORGAN
Polsinelli PC
2950 North Harwood St., Suite 2100
Dallas, TX 75201

AMY D. FITTS
Polsinelli PC
900 West 48th Pl., Suite 900
Kansas City, MO 64112

Counsel for The Big 12 Conference, Inc. & Conference USA

BART H. WILLIAMS
SCOTT P. COOPER
KYLE A. CASAZZA
JENNIFER L. JONES
SHAWN S. LEDINGHAM, JR.
Proskauer Rose LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067

Counsel for Pac-12 Conference

AMERICAN OVERSIGHT

R. TODD HUNT
BENJAMIN G. CHOJNACKI
Walter Haverfield LLP
The Tower at Erieview
1301 East 9th St.,
Suite 3500
Cleveland, OH 44114

Counsel for Mid-American Conference

MERYL MACKLIN
Bryan Cave Leighton Paisner LLP
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111

RICHARD YOUNG
BRENT E. RYCHENER
Bryan Cave Leighton Paisner LLP
90 South Cascade Ave.,
Suite 1300
Colorado Springs, CO 80903

Counsel for Mountain West Conference

JON BRADLEY
Bradley Devitt Haas & Watkins, P.C
2201 Ford Street
Golden, CO 80401

Counsel for Western Athletic Conference

MARK A. CUNNINGHAM
Jones Walker LLP
201 St. Charles Ave.
50th Floor
New Orleans, LA 70170

Counsel for Sun Belt Conference

D. ERIK ALBRIGHT
GREGORY G. HOLLAND
Fox Rothschild LLP
230 North Elm St.,
Suite 1200
Greensboro, N.C. 27401

JONATHAN P. HEYL
Fox Rothschild LLP
101 North Tryon St.,
Suite 1300
Charlotte, N.C. 28246

Counsel for Atlantic Coast Conference

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QUESTION PRESENTED

The National Collegiate Athletic Association (NCAA) is a nonprofit association that sets the rules governing college athletics, including the rules limiting the payments that colleges may make to student-athletes. As this Court has explained, "the NCAA seeks to market a particular brand of [sports]—college [sports]. The identification of this 'product' with an academic tradition differentiates college [sports] from and makes it more popular than professional sports to which it might otherwise be comparable," and "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like." *NCAA* v. *Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101-102 (1984).

In this case, however, the district court held that the NCAA student-athlete payment limits violate the Sherman Act. It imposed a detailed injunction prescribing the types of payments that colleges must be permitted to make to student-athletes, retained jurisdiction, and directed the parties to seek guidance from the court before making certain future changes to NCAA rules. The Ninth Circuit affirmed, holding that the NCAA could have used less restrictive rules to achieve its procompetitive goal.

The question presented is:

Whether the Sherman Act authorizes a court to subject the product-defining rules of a joint venture to full Rule of Reason review, and to hold those rules unlawful if, in the court's view, they are not the least restrictive means that could have been used to accomplish their procompetitive goal.

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PARTIES TO THE PROCEEDINGS

Petitioners, defendants-appellants below, are American Athletic Conference; Atlantic Coast Conference; The Big Ten Conference, Inc.; The Big 12 Conference, Inc.; Conference USA; Mid-American Conference; Mountain West Conference, Inc.; Pac-12 Conference; Southeastern Conference; Sun Belt Conference; and Western Athletic Conference. The National Collegiate Athletic Association also was a defendant-appellant below.

Respondents, plaintiffs-appellees below, are class representatives Shawne Alston; Don Banks; Duane Bennett; John Bohannon; Barry Brunetti; India Chaney; Chris Daven-port; 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.

CORPORATE DISCLOSURE STATEMENT

The American Athletic Conference is a D.C. not-for-profit corporation head-quartered 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,

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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 Conference 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 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 not-for-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 not-for-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.

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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.

RELATED PROCEEDINGS

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

1. *House, et al.* v. *NCAA, et al.*, No. 4:20-cv-3919 (pending).

2. *Oliver, et al.* v. *NCAA, et al.*, No. 4:20-cv-04527 (pending).

3. *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

American Athletic Conference; Atlantic Coast Conference; The Big Ten Conference, Inc.; The Big 12 Conference, Inc.; Conference USA; Mid-American Conference; Mountain West Conference, Inc.; Pac-12 Conference; Southeastern Conference; Sun Belt Conference; and Western Athletic Conference respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 958 F.3d 1239. The relevant opinion of the district court (Pet. App. 103a-206a) is reported at 375 F. Supp. 3d 1058. The district court's permanent injunction (Pet. App. 207a-210a) is reported at 2019 WL 1593939.

JURISDICTION

The court of appeals 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."

STATEMENT

The district court below held that NCAA rules prohibiting colleges from paying student-athletes to play are, in substantial part, inconsistent with the

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Sherman Act. The court remedied that supposed violation by composing a detailed list of payments that schools must be permitted to make to student-athletes, and by retaining jurisdiction to approve proposed future changes in the payment rules—seemingly in perpetuity. The Ninth Circuit affirmed that decision, holding that, because the NCAA student-athlete payment rules could have been drawn in a more permissive manner without eliminating college athletics as a discrete "product," the rules *must* be drawn in that manner.

For several reasons, the Ninth Circuit's decision should not stand.

First, the decision below misunderstood the controlling Sherman Act principles, in a manner that departs from this Court's holdings and solidifies an acknowledged conflict in the circuits. The Ninth Circuit improperly shifted onto defendants the plaintiffs' heavy burden to show the availability of a less restrictive alternative, effectively requiring a joint venture to prove that its rules are the *least* restrictive ones possible; this Court and other courts of appeals have rejected that impossible standard as an invitation to endless litigation. At the same time, the court below departed from holdings of other circuits that, in closely analogous circumstances, give the NCAA much greater deference in the design of its "product": These courts have recognized that "most NCAA eligibility rules are entitled to [a] procompetitive presumption" and that "a full rule-of-reason analysis is unnecessary" to uphold such rules under the Sherman Act. *Deppe* v. *NCAA,* 893 F.3d 498, 502, 503-504 (7th Cir. 2018).

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Second, the Ninth Circuit's ruling gives a single judge ongoing, czar-like authority over college sports nationwide. This is an inappropriate role for a court to assume under any circumstance: This Court and other courts of appeals have long warned against close judicial management of ongoing enterprises under the guise of an antitrust judgment. See, *e.g.*, *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (antitrust courts are "ill-suited" to "act as central planners"). The manner in which the courts below overreached is especially apparent in the current environment, where Congress and many individual States—as well as the NCAA and the affected schools themselves—are even now deeply engaged in determining whether (and if so, how) college athletes should receive compensation. Resolution of that question is properly addressed through the political process, not through distorted application of the antitrust laws.

Third, the immediate practical consequences of the decision below are immense, and pernicious. Even as Congress and the States are considering the issue of acceptable payments to student-athletes, the decision below will alter the practices of the more than one thousand NCAA-member educational institutions and the lives of hundreds of thousands of students. The decision may fundamentally change college sports, a pastime of consuming interest to millions of people across the Nation. And it will trigger unending litigation against, and likely impose enormous liability on, nonprofit institutions, even as they are suffering from the effects of the Covid-19 pandemic—a parade of new lawsuits that already has started. Review by this Court therefore is warranted.

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A. The NCAA and college athletics

As this Court has recognized, NCAA college athletics, like all sports leagues, is an endeavor "in which horizontal restraints on competition are essential if the product is to be available at all." *Board of Regents*, 468 U.S. at 101. In particular, college sports is maintained as a discrete form of competition by the NCAA, a nonprofit educational association whose membership includes more than one thousand public and private colleges and universities, and more than 100 nonprofit athletic conferences and other organizations. See *What Is The NCAA?,* https://tinyurl.com/y4kpswnl; Pet. App. 10a. Since it was formed "in 1905 in response to a public outcry concerning abuses in intercollegiate athletics" (*Board of Regents*, 468 U.S. at 121 (White, J., dissenting)), the NCAA "has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs." *Board of Regents*, 468 U.S. at 88 (majority opinion).

This Court has characterized "[w]hat the NCAA and its member institutions market * * * [a]s competition itself—contests between competing institutions." *Board of Regents*, 468 U.S. at 101. The Court added that "this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed." *Ibid*. Because "the NCAA seeks to market a particular brand of [sports]—college [sports]"—"[t]he identification of this 'product' with an academic tradition differentiates college [sports] from and makes it more popular than professional sports to which it might otherwise be comparable[.]" *Id.* at 101-102. And, the Court continued, "[i]n order to preserve the character and

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quality of the 'product,' athletes must not be paid, must be required to attend class, and the like." *Id.* at 102.

Today, nearly half a million student-athletes participate in NCAA-administered athletics each year, playing two dozen sports. *What Is The NCAA*?, https://tinyurl.com/y4kpswnl. Although certain teams at some schools generate large revenues, the vast majority are subsidized by their schools, with any available income from the higher-revenue sports used to subsidize sports that are not self-sufficient. C.A. ER 154, 155 (Trial Tr. (Hatch)); C.A. ER 263-264 (JEX 17: NCAA Research, *Revenues and Expenses*, 2004–2016)). Meanwhile, the schools' "primary mission" remains "educating [their] students" (C.A. ER 153-154) (Trial Tr. (Hatch)), with intercollegiate athletics offered as "an important part of the educational experience." C.A. ER 213 (Trial Tr. (Blank)). Or, as Justice White put it 35 years ago, the NCAA "'exist[s] primarily to enhance the contribution made by amateur athletic competition to the process of higher education.'" *Board of Regents*, 468 U.S. at 122 (White, J., dissenting).

B. Amateurism and the NCAA's eligibility rules

From its inception, a defining feature of NCAA sports has been amateurism, the principle that student-athletes are not professionals and "must not be paid" to play. *Board of Regents*, 468 U.S. at 102; see *id.* at 118 (NCAA rules "are justifiable means of fostering competition among amateur athletic teams"). This no-pay amateurism principle has long been thought central to "preserv[ing] the character and quality of the [college sport] 'product.'" *Ibid.*

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In *Board of Regents*, the Court held that NCAA limits on football television broadcasts were subject to challenge under the Sherman Act. 468 U.S. at 113-120. At the same time, however, the Court explained in detail that "a certain degree of cooperation is necessary if the type of competition that [the NCAA] and its member institutions seek to market is to be preserved." *Id.* at 117. The Court continued:

> It 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 because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

Ibid.

Given this understanding, the NCAA consistently has maintained a body of eligibility rules designed to prohibit student-athletes from being paid for their play, while allowing schools to reimburse student-athletes for their reasonable and necessary academic and athletic expenses. See*, e.g.*, C.A. ER 284-287 (JEX 24, NCAA Bylaws), 290-295 (JEX 24, NCAA Bylaws), 1422-1440 (JEX 25, NCAA Bylaws); see also Pet. App. 11a (quoting NCAA "'Amateurism Rule,' which strips student-athletes of eligibility for intercollegiate competition if they '[u]se[] [their] athletics skill (directly or indirectly) for pay in any form in [their] sport,'"

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with "'[p]ay" * * * defined as the 'receipt of funds, awards or benefits not permitted by governing legislation'"). The rules also permit student-athletes to receive limited awards to recognize special academic or athletic achievement. See C.A. ER 288-289, 296-297 (JEX 24, NCAA Bylaws).

The principal quantum of education expenses is "cost of attendance" (COA), a term defined by federal law and the measure used to determine the financial assistance students may receive to attend school. 20 U.S.C. § 1087kk. COA includes tuition and fees (including "any [required] equipment, materials, or supplies"), room and board, books, a computer, transportation, and other "miscellaneous personal expenses." *Id.* § 1087*ll*. Each school independently determines "the appropriate and reasonable amounts" for its students. C.A. ER 324 (JEX 1517, Federal Student Aid Handbook); see also 20 U.S.C. § 1087kk.

NCAA rules permit student-athletes to receive financial aid up to COA, and also permit schools to "adjust[]" COA for student-athletes "on an individual basis." C.A. ER 285 (JEX 24, NCAA Bylaws). Financial aid may be provided through an athletic scholarship—called a "grant-in-aid" (GIA)—other financial aid, or both. C.A. ER 284, 286-287 (same). Schools may also use specialized funds to cover student-athletes' additional legitimate expenses. See C.A. ER 268-269 (JEX 21, 2018 Division I Revenue Distribution Plan), 284-285, 294-295 (JEX 24, NCAA Bylaws). And student-athletes who demonstrate exceptional financial need may receive Pell grants from the federal government. C.A. ER 287.

Finally, NCAA rules allow schools to provide limited tokens of achievement to recognize exceptional

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athletic performance by individual student-athletes or teams. The value of these awards, which include trophies and plaques, ranges from $175 for a team's most-improved or most-valuable player to $1,500 for a conference's athlete (or scholar-athlete) of the year. C.A. ER 288-289, 296-297 (JEX 24, NCAA Bylaws). Additionally, schools may annually give a $10,000 Senior School Award for graduate school to two graduating student-athletes. C.A. ER 289 (JEX 24, NCAA Bylaws). The limits are designed to ensure that awards do not become vehicles for disguised pay-for-play. C.A. ER 170-171 (Trial Tr. (Lennon)).

C. The Ninth Circuit's prior decision on NCAA eligibility rules

In *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015), cert. denied, 137 S. Ct. 277 (2016), a class of former NCAA football and men's basketball players brought suit under the Sherman Act, challenging NCAA rules that limit permissible payments to student-athletes for their names, images, and likenesses (NILs). The *O'Bannon* district court, in what appears to have been "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" (*id.* at 1053), held that the NCAA acted unlawfully by (1) not permitting schools to pay student-athletes full COA (the prior rule had limited payments for certain living expenses included in COA) and (2) not permitting colleges to make deferred cash payments to student-athletes of up to $5000 per year in school. See *id.* at 1060-61.

On appeal, the Ninth Circuit dismissed what it termed this Court's "long encomium to amateurism"

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rules in *Board of Regents* as "impressive-sounding" but "dicta." 802 F.3d at 1063. The court of appeals then upheld the *O'Bannon* district court's ruling authorizing COA payments (*id.* at 1074-76),[1] but set aside the requirement that schools be permitted to make deferred $5000 annual cash payments to student-athletes. *Id.* at 1076-79. As the Ninth Circuit noted in reaching this latter conclusion, "not paying student-athletes is *precisely what makes them amateurs*." *Id.* at 1076.

D. The district court's decision

While *O'Bannon* was still pending, individuals suing as representatives of several classes of NCAA Division I football and basketball players—classes that largely overlap the *O'Bannon* class—filed a new antitrust action against petitioners (eleven collegiate conferences) and the NCAA. Plaintiffs maintained that the NCAA student-athlete payment limits are an anticompetitive restraint of trade and sought to "dismantle the NCAA's entire compensation framework." Pet. App. 17a. The cases were assigned to the same district judge who presided over *O'Bannon*.

The district court purported to apply the Rule of Reason's three-step burden-shifting approach in assessing this claim, under which (1) the plaintiffs must establish that the defendants restrained trade; (2) the burden then shifts to the defendants to show that the

[1] By the time the Ninth Circuit ruled, the NCAA itself had set aside the bar on payment of COA, agreeing that "giving student-athletes scholarships up to their full costs of attendance would not violate the NCAA's principles of amateurism because all the money given to students would be going to cover their 'legitimate costs' to attend school." 802 F.3d at 1075.

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restraint had procompetitive effects; and (3) the burden then shifts back to the plaintiffs to demonstrate that substantially less restrictive alternatives are available that would be virtually as effective as the challenged restraints at achieving those procompetitive effects. Pet. App. 115a-166a. See also *Ohio* v. *Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). Because the court determined at the first step that the challenged NCAA rules restrain trade (Pet. App. 113a-115a), a conclusion that is not now in dispute, the focus at the 10-day trial was on the remaining two elements of the test.

On these points, the district court first found that, because the NCAA rules permit schools to make limited, defined payments of various sorts to college athletes, the NCAA's traditional focus on amateurism and not paying for play is illusory. Pet. App. 180a-189a. But the court also determined that the preservation of *some* distinction between college and professional sports does have procompetitive value because it maintains a discrete college sport product that is valued by consumers. Adopting a test that had not been proposed by either party, the court then held 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." *Id.* at 147a-148a.[2]

[2] The court of appeals subsequently opined that, "[i]n context, the district court was using the term 'unlimited pay' as shorthand for payments that run the risk of eroding consumer perception of student-athletes as students—that is, *cash* payments *unrelated to education* and *akin to professional salaries*." Pet. App. 43a n.16.

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From this starting point, the court concluded that "[r]ules that prevent unlimited payments such as those observed in professional sports leagues * * * are procompetitive when compared to having no such restrictions." Pet. App. 148a. These permissible rules, in the court's view, are those that limit payments to student-athletes that are "unrelated to education" or that cap payments at education-related costs. *Id.* at 157a.

The court then turned to the Rule of Reason's third burden-shifting step, holding that the current NCAA rules "are more restrictive than necessary to prevent demand-reducing unlimited compensation indistinguishable from that observed in professional sports." Pet. App. 155a. In the court's view, the NCAA payment limits could be modified by requiring use of an alternative approach that would allow for larger payments to student-athletes while still adequately preserving college sports as a distinct product. Among other things, the court sought to accomplish this goal by:

(a) Invalidating most NCAA limits on payments "related to education," including those that the NCAA "currently prohibits or limits in some fashion." Pet. App. 158a. These include payments for computers; scientific equipment; musical instruments and other tangible items not currently included in the cost of attendance but "related to the pursuit of various academic studies"; post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; expenses for pre- and post-eligibility tutoring; expenses related to study abroad; and paid post-eligibility internships. *Ibid.*

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(b) Requiring the NCAA to permit cash payments to student-athletes in the form of graduation awards or "academic incentives" with no minimum academic achievement thresholds—while allowing the NCAA to cap such payments at an annual amount not lower than the "maximum amount of compensation that an individual student-athlete could receive in an academic school year in participation, championship, or special achievement awards (combined)." Pet. App. 159a.

As drawn by the court, this element of its ruling requires the NCAA to permit schools to pay *all* student-athletes in the plaintiff classes annual cash "academic incentives" in an amount equal to the largest sum that *any* student-athlete theoretically could be paid in combined athletics participation, championship, and special achievement awards. The court evidently believed this amount to be $5600 (see Pet. App. 187a), although there is no evidence that any student ever actually has received awards of these types with a value anywhere close to that amount. Pet. App. 47a.[3]

(c) Allowing individual conferences "to set or maintain limits on education-related benefits that the NCAA will not be allowed to cap" and to "set limits on academic awards and incentives." Pet. App. 160a.

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[3] Respondents maintain that the aggregate amount is $15,000 or more. See Pl. Response to Def. Mot. for Clarification of Permanent Injunction, *In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.*, No. 4:14-md-02541-CW (N.D. Cal. Oct. 6, 2020), Dkt. 1305. As noted below (at page 27), that question is now back before the district court on defendants' motion for clarification.

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The court incorporated these limits in a permanent injunction. Pet. App. 209a. In so doing, it provided that its list of permissible compensation and benefits "related to education" may be amended on the motion of any party, and that the NCAA may adopt a definition of benefits "related to education"—but only with the court's permission. *Id.* at 210a.

E. The Ninth Circuit's decision

The Ninth Circuit affirmed. Pet. App. 1a-66a.[4] Insofar as is relevant here, the court began by observing that "the NCAA bears a 'heavy burden' of 'competitively justify[ing]' its undisputed 'deviation from the operations of a free market.'" *Id.* at 36a-37a (quoting *Board of Regents*, 468 U.S. at 113). From there, the court of appeals concluded that the district court correctly conducted a detailed factual analysis of whether the NCAA's eligibility rules have a "demand-preserving effect." *Id.* at 38a. And as it had in *O'Bannon*, the Ninth Circuit dismissed this Court's "discussion of amateurism [in *Board of Regents* as] 'dicta.'" *Id.* at 39a-40a.

At the second step of the Rule of Reason test, the court of appeals accepted the district court's conclusion "that the NCAA 'sufficiently show[ed] a procompetitive effect of some aspects of the challenged compensation scheme,' but not all." Pet. App. 42a (emphasis omitted). "In short," the Ninth Circuit concluded, "NCAA compensation limits preserve demand to the extent they prevent unlimited cash payments akin to

[4] The Ninth Circuit rejected the argument that principles of res judicata and stare decisis flowing from its prior holding in *O'Bannon* dictated a ruling for defendants. Pet. App. 28a-35a. Those issues are not presented here.

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professional salaries, but not insofar as they restrict certain education-related benefits." *Id.* at 42a-43a.

Turning to the third step of the Rule of Reason inquiry, the Ninth Circuit then held that "[t]he district court reasonably concluded that uncapping certain education-related benefits would preserve consumer demand for college athletics just as well as the challenged rules do." Pet. App. 44a. In the court of appeals' view, "'[s]uch benefits are easily distinguishable from professional salaries, as they are "connect[ed] to education'; 'their value is inherently limited to their actual costs'; and 'they can be provided in kind, not in cash.'" *Ibid.*

In particular, the court found it crucial that "the NCAA presented no evidence that demand will suffer if schools are free to reimburse education-related expenses of inherently limited value." Pet. App. 45a. The court of appeals also opined that academic achievement awards up to the $5600 annual payments approved by the district court would not affect consumer demand. *Id.* at 48a. Accordingly, the Ninth Circuit approved the district court's rewrite of the NCAA rules so that, in the appellate court's view, the judge-devised standards would allow for payments that "would preserve consumer demand for college athletics just as well as the challenged rules do." *Id.* at 44a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision will have wide-ranging and destructive effects. It conflicts with the decisions of other courts of appeals. It distorts antitrust law. It damages college athletics. And it gives a federal court a wholly inappropriate supervisory role over the activities of a nationwide joint venture. This Court should review, and set aside, that decision.

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I. The Ninth Circuit's decision conflicts with the holdings of other courts of appeals and of this Court.

The Ninth Circuit's ruling creates two conflicts with the holdings of other courts of appeals and of this Court. In its practical operation, the Ninth Circuit's standard requires a joint venture to operate with an impossible level of precision, on pain of antitrust liability if a reviewing court finds that the defendants' rules could have been made marginally more permissive—an approach that has been rejected by other courts. At the same time, the court below refused to treat NCAA eligibility rules as presumptively procompetitive, departing from the Rule of Reason analysis used by other courts of appeals and expressly rejecting the contrary approach of the Seventh Circuit. This Court should resolve those conflicts, which derive in significant part from disagreement about the meaning of the Court's decisions.

A. The Ninth Circuit's decision shifted the burden of proof, effectively adopting a *least* restrictive alternative standard and departing from the rulings of other courts of appeals and of this Court.

At the outset, the Ninth Circuit erred by effectively requiring defendants to prove that they had adopted the *least* restrictive alternative that would preserve college sports, an approach that departs from principles announced by this Court and other courts of appeals. Once it is found that a related body of restrictive organizational rules have significant procompetitive effects because they are essential if a desirable product is to be marketed at all (as unquestionably is true of the NCAA amateurism rules), judges should not be empowered to rewrite those rules to make them

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marginally less restrictive, or—what is the same thing in practice—to require that the rules be the least restrictive ones possible. The Ninth Circuit's contrary conclusion is wrong.

1. As noted above, the courts below used the Rule of Reason's "three-step, burden-shifting framework." *Am. Express Co.*, 138 S. Ct. at 2284. In the circumstances here, there is no doubt that, at the second step, defendants demonstrated a "procompetitive rationale" for their amateurism rules. *Ibid.* This Court explained in *Board of Regents* that preventing pay-for-play distinguishes college athletes from their professional counterparts in a manner that is desired by consumers, and the Ninth Circuit itself recognized in this case that it *is* procompetitive to preserve a discrete college sport product that is characterized by limits on student compensation—albeit only after that court embraced what it called a "narrower conception of amateurism." Pet. App. 40a.

Despite concluding that the NCAA's amateurism rules serve legitimate procompetitive interests, however, the Ninth Circuit placed the burden on defendants at the second step of the Rule of Reason inquiry to prove that "each type of challenged rule" (Pet. App. 42a) is essential to differentiate college from professional sports. The Ninth Circuit then held that a host of adjustments to the NCAA's rules would be "virtually as effective" as the current rules: (a) "uncapping certain education-related benefits," including not only "computers, science equipment, and musical instruments" but also "post-eligibility scholarships," "study-abroad expenses," and "paid post-eligibility internships"; (b) permitting schools to make academic or graduation payments with no minimum standards of

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academic achievement at least up to the maximum theoretical amount a single student-athlete could receive in athletic participation awards; and (c) permitting individual conferences to set limits on education-related benefits. Pet. App. 25a-26a.

The inevitable consequence of this approach is a "least restrictive alternative" standard. If antitrust defendants must prove that each element of their restrictive rules is as procompetitive as can be, all that will be left, once the rules that fail to make the grade are rejected, will be those regarded by the court as strictly necessary—that is, the least restrictive rules needed to achieve the procompetitive goal. In essence, the Ninth Circuit required defendants to demonstrate not that the NCAA amateurism rules reasonably promote a distinction between college and professional sports, but that every restrictive element of those rules is *necessary* to achieve the procompetitive benefits of amateurism.

2. As then-Justice Rehnquist long ago recognized, the antitrust laws "impose a standard of reasonableness, not a standard of absolute necessity." *Nat'l Football League* v. *N. Am. Soccer League*, 459 U.S. 1074, 1079 (1982) (dissenting from denial of certiorari). See *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967) (restraint need only be "reasonably necessary" to meet competitive purpose). Unsurprisingly, then, the Ninth Circuit's mode of analysis conflicts with the approach of other circuits.

The Third Circuit, for example, in one of the leading decisions on the point, held that "[i]n a rule of reason case, the test is not whether the defendant deployed the least restrictive alternative" but "whether

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the restriction actually implemented is 'fairly necessary'" to achieve the procompetitive objective. *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1248 (3d Cir. 1975). Similarly, the First Circuit held that a business is "not required to adopt the least restrictive means of stopping [a competitor] from selling abroad, but merely means reasonably suited to that purpose." *Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853, 860 (1st Cir. 1984). The Fifth Circuit, in this very context, rejected an antitrust challenge to NCAA eligibility rules because those rules "reasonably further [the NCAA's] goal." *McCormack* v. *NCAA*, 845 F.2d 1338, 1345 (5th Cir. 1988).

And Judge Bork, writing for the D.C. Circuit, explained that, when a defendant imposes restraints that are "reasonably necessary to the business it is authorized to conduct," courts are not to "calibrate degrees of reasonable necessity." *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 227 (D.C. Cir. 1986). "Once it is clear that restraints can only be intended to enhance efficiency rather than to restrict output, the degree of restraint is a matter of business rather than legal judgment." *Id*. at 229 n.11.

These decisions are consistent with the broad consensus among courts and commentators on how to assess, at the third step of the Rule of Reason inquiry, whether there is a less restrictive alternative to the challenged rules. In these circuits, antitrust plaintiffs cannot prevail simply by showing that the defendants could have achieved their permitted goals by using a different restraint with a marginally less restrictive impact. Rather, the plaintiffs must show that "any legitimate objectives can be achieved in a *substantially*

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less restrictive manner." *Nat'l Hockey League* v. *Plymouth Whalers Hockey*, 325 F.3d 712, 719 (6th Cir. 2003) (emphasis added).[5]

After all, "one can frequently conceive of a less restrictive approach. Yet, to require the very least restrictive choice might interfere with the legitimate objectives at issue without, at the margin, adding that much to competition." Philip Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1505b (4th ed. 2020 cum. supp.). See also *In re Beltone Elecs. Corp.*, 100 F.T.C. 68, 95 (1982) ("[a] comparison of alternatives may be useful in particular cases, but the emphasis appropriately belongs on the overall reasonableness of the challenged restraint, not whether some hypothetically less restrictive scheme could be devised").

Other courts therefore would reject the Ninth Circuit's result here: They would overturn the NCAA's rules only if plaintiffs demonstrated that the NCAA's differentiated product could be achieved with substantially reduced restrictions. The Ninth Circuit, in contrast, shifted the burden and applied the wrong standard, requiring defendants to prove that every element of the NCAA rules is necessary to achieve the rules' procompetitive objective.

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[5] See, *e.g.*, *Law* v. *NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) (plaintiff must prove "the challenged conduct is not reasonably necessary to achieve the legitimate objectives"); *Flegel* v. *Christian Hosp., Ne.-Nw.*, 4 F.3d 682, 688 (8th Cir. 1993) (similar).

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B. The Ninth Circuit's decision departs from the holdings of this Court and other courts of appeals that joint venture rules defining a product are reviewed deferentially.

In addition, the Ninth Circuit's approach exacerbates an acknowledged conflict in the circuits on a recurring issue of great practical importance: the level of scrutiny that is appropriate when a joint venture's rules in general, and the NCAA's rules in particular, are challenged under the Sherman Act.

1. This Court has recognized that, when joint action is necessary if a product is to be marketed at all, "the agreement is likely to survive the Rule of Reason." *American Needle, Inc.* v. *NFL*, 560 U.S. 183, 203 (2010). Thus, the Court has observed 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.'" *Ibid.* (quoting *Board of Regents*, 468 U.S. at 110 n.39). In the joint venture context, this "twinkling of an eye" standard reinforces the courts' hostility to the form of judicial second-guessing inherent in a least-restrictive alternative requirement. The impropriety of determining whether already reasonable rules could be made marginally less restrictive is an important reason that "detailed analysis" of such rules is unnecessary. See *Texaco, Inc.* v. *Dagher*, 547 U.S. 1, 7 (2006) (collaborations have more leeway to impose restraints that are "ancillary to the legitimate and competitive purposes of the business association"); *Broadcast Music, Inc.* v. *CBS, Inc.* (*BMI*), 441 U.S. 1, 23 (1979) ("[j]oint ventures and other cooperative arrangements" are "not usually unlawful * * * where the agreement * * * is necessary to market the product at all").

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Board of Regents adds significantly to the strength of this principle, supporting the conclusion that judicial over-involvement in real-world decisions would be particularly harmful in the context of college athletics because the college sport "product" must be defined by joint action. The Court there recognized that "the integrity of the 'product' cannot be preserved except by mutual agreement[.]" 468 U.S. at 102. "Thus, the NCAA plays a vital role in enabling college [sports] to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable." *Ibid*. That is the paradigm of the type of agreement that is "not usually unlawful" because the producers of the product *must* cooperate. *BMI*, 441 U.S. at 23.

In this setting, where the jointly devised restrictions define the product, the Court added: "It 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 because they enhance public interest in intercollegiate athletics." 468 U.S. at 117. And it concluded with the observation that "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." *Id*. at 120.

The Ninth Circuit acknowledged in its decision below that *Board of Regents* accepted the NCAA's definition of "amateurism to exclude payment for athletic

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performance." Pet. App. 39a-40a. But the court of appeals opined that *Board of Regents* does not grant "perpetual blanket approval for the NCAA's compensation rules," and dismissed *Board of Regents*' "discussion of amateurism [as] 'dicta.'" *Id.* at 15a, 40a. The court of appeals thus doubled down on its prior dismissal of *Board of Regents* in *O'Bannon*.

In fact, however, this Court's elaborate discussion of amateurism in *Board of Regents* was a key element of its explanation why NCAA rules on television broadcasts—which lack the essential character of the eligibility rules—*were* open to antitrust challenge; the amateurism discussion therefore was *not* dicta. And in any event, the *Board of Regents* amateurism analysis was lengthy and well-considered, and was embraced by Justices White and Rehnquist in their *Board of Regents* dissent. *See* 468 U.S. at 101-103, 117 (majority opinion); *id.* at 121-23 (White, J., dissenting). In such circumstances, the court of appeals' cavalier dismissal of what it derisively labeled this Court's "encomium to amateurism" was inappropriate. If that discussion is to be set aside, this Court, and not the Ninth Circuit, should be the one to take the step.

2. That is especially so because other courts of appeals have read *Board of Regents* quite differently from the Ninth Circuit: Its decision contributes to a conflict on the proper legal standard to apply when resolving challenges to NCAA eligibility rules. That division stems from disagreement regarding this Court's decision in *Board of Regents* and will lead to nationally applicable NCAA rules being treated differently in different parts of the country—despite the fact that a national sports association cannot operate

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effectively without uniform standards applicable nationwide. That disarray can be resolved only by this Court's review.

Most notably, other courts of appeals have taken a very different approach than the Ninth Circuit in addressing challenges to NCAA eligibility rules. Although the Ninth Circuit in this case purported to disclaim judicial micromanagement of the NCAA (Pet. App. 139a-140), it largely dismissed *Board of Regents*' endorsement of the amateurism principle and (like the district court) engaged in a close review of the record in search of support for the procompetitive value of particular NCAA compensation limits, looking to "demand analyses, survey evidence, and NCAA testimony." See *id.* at 38a-39a; 140a-143a. Other courts, however, expressly have taken a very different tack, finding that NCAA eligibility rules should be upheld without detailed factual inquiry.

a. The Seventh Circuit, in *Deppe* v. *NCAA,* 893 F.3d 498 (7th Cir. 2018), recently upheld the NCAA's year-in-residence eligibility rule. Pointing to *Board of Regents*, the court declared that the "'first—and possibly only—question to be answered when NCAA bylaws are challenged is whether the NCAA regulations at issue are of the type that have been blessed by the Supreme Court [in *Board of Regents*], making them presumptively procompetitive.'" *Id.* at 501 (quoting *Agnew* v. *NCAA*, 683 F.3d 328, 341 (7th Cir. 2012)). The Seventh Circuit added 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." *Ibid.* (citations and internal quotation marks omitted). Thus, "most

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NCAA eligibility rules are entitled to the procompetitive presumption announced in *Board of Regents* because they define what it means to be a student-athlete and thus preserve the tradition and amateur character of college athletics." *Id.* at 502.

Accordingly, the court affirmed dismissal of the suit on the pleadings, with no specific evidentiary showing that the year-in-residence rule was necessary to preserve consumer interest in college sport. This approach is settled in the Seventh Circuit; *Deppe* faithfully applied the standard previously articulated in *Agnew*. See *Agnew*, 683 F.3d at 343 n.7 (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").

This case therefore would have come out differently if decided by the Seventh Circuit: Limits on payments to student-athletes, even more than the year-in-residence rule upheld in *Deppe*, are meant to preserve "the tradition and amateur character of college athletics." There is no doubt about the existence of this conflict: In *O'Bannon*, the Ninth Circuit expressly recognized the disagreement, refusing to adopt the Seventh Circuit's "*Agnew* presumption" and "doubt[ing] that was the [Supreme] Court's intent." 802 F.3d at 1064.

b. Similarly, in *Smith* v. *NCAA*, 139 F.3d 180, 186-187 (3d Cir. 1998), vacated on other grounds, 525 U.S. 459, 464 n.2 (1999), the Third Circuit, in an alternative holding, upheld NCAA limits on post-graduate eligibility. Also relying on *Board of Regents*, the court did not look to specific evidence supporting the procompetitive value of the rule; instead, it presumed

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that, "in general, the NCAA's eligibility rules allow for the survival of the product, amateur sports, and allow for an even playing field. * * * Likewise, the bylaw at issue here is a reasonable restraint which furthers the NCAA's goal of fair competition and the survival of intercollegiate athletics and is thus procompetitive." *Id.* at 187. After reciting a number of policies that could be furthered by the rule, the court concluded: "[W]e think that the bylaw so clearly survives a rule of reason analysis that we do not hesitate upholding it by affirming an order granting a motion to dismiss Smith's antitrust count for failure to state a claim on which relief can be granted." *Ibid.*

c. In *McCormack* v. *NCAA*, 845 F.2d 1338 (5th Cir. 1988), the Fifth Circuit upheld penalties that the NCAA imposed on Southern Methodist University for exceeding compensation limits. Also invoking *Board of Regents*, the court concluded that it need not examine the details of the particular rules and payments involved. Instead, it held: "That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable. We therefore conclude that the plaintiffs *cannot prove any set of facts* that would carry their antitrust claim and that the motion to dismiss was properly granted." *Id.* at 1345 (emphasis added).

d. Moreover, although those decisions are the ones most directly on point here, courts addressing challenges to sports league rules outside the college setting also "have generally accorded sports organizations a certain degree of deference and freedom to act in similar circumstances," so long as the organization "offers" a "justification" for its rules that is not "in bad

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faith or * * * otherwise nonsensical." *Race Tires America, Inc*. v. *Hoosier Racing Tire Corp*., 614 F.3d 57, 80, 81 (3d Cir. 2010). These courts have recognized that sports sanctioning bodies and similar entities "deserve a bright-line rule to follow so they can avoid potential antitrust liability as well as time-consuming and expensive antitrust litigation," and that, "[c]ontrary to the pro-competitive purposes of antitrust law, this [liability and litigation] expense may have a very real anti-competitive effect." *Id*. at 80. "[S]ports-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 and juries." *Id*. at 83.

In sum, other courts of appeals have used a very different analysis in addressing challenges to NCAA eligibility rules than did the Ninth Circuit in this case—and these differing approaches led to different results. These differences follow in substantial part from divergent understandings of this Court's decision in *Board of Regents*. This Court should address that disagreement so as to settle the meaning of its own prior ruling.

II. The legal errors committed below will have destructive and enormously important national consequences.

The need for review is especially acute because the issues in this case have significant practical importance—for educational institutions, college athletics, and joint ventures generally. The district court's injunction will prompt fundamental changes in the nature of college sports. The Ninth Circuit's decision affirming that injunction makes the district court the

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long-term supervisor of college athletics as conducted across the Nation. That holding also empowers antitrust courts to become policymakers in this area, even as Congress and the States are deciding whether to exercise supervision over the rules governing college sports. And the decisions below necessarily will lead to an avalanche of litigation, imposing significant costs on already-stretched educational institutions. Moreover, the significance of the Ninth Circuit's decision transcends college sports, endorsing an antitrust standard that puts at risk many legitimate and procompetitive joint ventures.

First, under the decisions below, the district court's supervision of the rules it has imposed on college sports will be ongoing and never-ending. The Ninth Circuit's holding places a single district court in continuing charge of college athletics nationwide. Every rule change affecting eligibility will produce a court fight; the court's approval must be sought if the NCAA seeks to modify the court's definition of "related to education," and either side may seek an order modifying the injunction. This prospect is not theoretical; the defendants *already* have been forced to seek clarification of the annual amount that the court believes schools must be permitted to pay all student-athletes in the plaintiff classes in graduation or "academic achievement" cash awards, in a proceeding where plaintiffs insist that amount to be at least $15,000. See note 3, *supra*.

Second, and similarly, the Ninth Circuit's holding invites an unending stream of litigation challenging NCAA amateurism rules. That will be very costly simply in terms of litigation expense—the Court repeatedly has noted the extremely burdensome nature

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of antitrust lawsuits (see, *e.g.*, *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 558-59 (2007))—and could involve significant damages claims as well.

Prior to the Ninth Circuit's decision in *O'Bannon*, such antitrust suits against the NCAA uniformly had been rejected. See page 8, *supra*. But the danger of strike-suit litigation is greatly exacerbated by a Ninth Circuit ruling that can be expected to encourage additional such challenges. This prospect also is not theoretical; just weeks after the decision below, national classes of student-athletes brought suit seeking treble damages from the NCAA and some conferences based on antitrust claims that are substantially identical to those advanced in this case and in *O'Bannon*. See Class Action Complaint, *House* v. *NCAA*, No. 20-cv-3919 (N.D. Cal. June 15, 2020), ECF No. 1. The judge who decided both this case and *O'Bannon* then deemed the new suit a related case and assigned it to herself. Related Case Order, *House* (June 23, 2020), ECF No. 15. Indeed, in its decision below, the Ninth Circuit specifically noted, with evident approval, the possibility of "future plaintiffs pursuing essentially the same claim again and again" against the defendants here. Pet. App. 33a n.13.

Third, the Ninth Circuit's approach turns the NCAA's authority to design its product into a one-way ratchet. Any change (or even public consideration of change) will lead to (1) claims for damages for the period prior to the change on the theory that the prior rules violated the Sherman Act: the change will be said to show that those rules had not been necessary to preserve consumer demand; and (2) challenges to other rules on the ground that the change shows that they are no longer necessary and therefore violate the

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antitrust laws. And every judicial modification of the rules that increases permissible cash payments to student-athletes will inevitably be followed by a class action seeking hundreds of millions of dollars in damages—as occurred in the now-settled portion of this action, when defendants paid over $200 million based on the modest increase in scholarship limits implemented during the *O'Bannon* case. Thus, the Ninth Circuit's approach will, paradoxically, tend to freeze existing student-athlete compensation limits in place, discouraging innovation and loosening of the standards.

Fourth, the rules governing a national institution like the NCAA, whose members compete for recruits on a national basis and compete on the field for national championships, must be nationally uniform. That reality calls for this Court's review. Insofar as the circuits use different standards in assessing challenges to NCAA eligibility rules—as they now expressly do—inconsistent holdings regarding the validity of those rules in different parts of the country are inevitable. Alternatively, plaintiffs' lawyers will invoke the antitrust laws' liberal venue provisions to bring all future suits involving nationwide classes of student-athletes in the Ninth Circuit (see 15 U.S.C. §§ 15, 22), where they will be governed by the standard announced in this case. The last word on this important subject should be spoken by this Court, rather than the Ninth Circuit.

And that is especially so because this case arises in a factual setting that itself is important and of great popular interest. College athletics is a significant American institution, the rules of which directly affect hundreds of thousands of college athletes and more

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than a thousand NCAA-member educational institutions, and are of intense interest to untold millions of additional people across the Nation. In *Board of Regents*, the Court thus described amateur college athletics as "an important American tradition" (468 U.S. at 101 n.23) that is "revered." *Id.* at 120. The standards used to assess the legality of the rules governing that tradition should be clear and settled.

Fifth, the decisions below will change the nature of college sports in very significant ways. The injunction in this case provides, for example, that schools must be permitted to offer student-athletes paid internships, with no limits on pay. This means that paid post-eligibility internships, uncapped in amount, may now be given by boosters to student-athletes attending their favored school—boosters who understand the effect that a pattern of such internships will have on recruiting.

And so long as NCAA rules permit athletic participation awards at the current level, the injunction requires that schools be permitted to make annual "academic achievement" cash payments of at least $5600 to every student-athlete in the affected classes who meets minimum NCAA academic eligibility standards—which is to say, to every student who is eligible to play. This is a naked regime of pay-for-play, resting solely on the ipse dixit of the courts below that the maximum value of plaques, trophies, and other awards presented to a few students for the most exceptional performance will be identical in their effects to much larger awards that are made available to *all students* regardless of their performance. Given the prior recognition that, "[i]n order to preserve the character and quality of the 'product,' [college] athletes

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must not be paid" (*Board of Regents*, 468 U.S. at 102), a change of this magnitude should be considered by this Court.

Sixth, and more broadly, allowing the sort of challenge endorsed by the Ninth Circuit here would permit plaintiffs to contest individual parts of *any* package of related restraints that could succeed equally well if made marginally less restrictive, allowing targeted antitrust suits directed at small parts of many large enterprises. Although the focus here necessarily is on the NCAA, the antitrust rules at issue have important implications for all business joint ventures. The concern that plaintiffs will embrace the Ninth Circuit's approach by seeking to chip away at joint venture rules is not unrealistic; after all, a "skilled lawyer would have little difficulty imagining possible less restrictive alternatives to most joint arrangements." Philip Areeda & Herbert Hovenkamp, 11 *Fundamentals of Antitrust Law* ¶1913b (4th ed. 2020).

And as this Court itself 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 Med. Soc'y*, 457 U.S. 332, 343 (1982); see also Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 8-9 (1984) ("[I]t is impossible to determine the difference in efficiency between a known practice and some hypothetical alternative."). A system in which district judges act as central planners reviewing and revising business judgments after the fact therefore will discourage many kinds of useful cooperative decision-making and undermine the purposes the antitrust laws are meant to serve.

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Finally, we recognize that there currently is an intense policy debate ongoing about the claimed exploitation of student-athletes and the possible liberalization of the NCAA's NIL rules. See, *e.g.*, NCAA Board of Governors Federal and State Legislation Working Group, *Final Report and Recommendations* (Apr. 17, 2020), https://tinyurl.com/yxq8rtd9. But these policy questions are not the subject of the antitrust laws, which focus narrowly on competition and take no account of broader questions of fairness, or of educational and athletic policy. See *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978).

Indeed, Congress is actively considering whether and, if so, how to reform college athletics[6]; some States have enacted laws in this area and other States are considering legislation[7]; and the NCAA is itself addressing these questions. The Ninth Circuit's expansive view of antitrust authority—and the district court's continuing control over NCAA eligibility rules—will only interfere with that process. The future structure of college sports is appropriately resolved by policymakers, not antitrust courts.

III. The Ninth Circuit's decision is wrong.

The decision below does not only confuse the law and create significant practical difficulties; for reasons already touched upon, it also is wrong, making errors that will undermine key purposes of the antitrust laws.

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[6] See U.S. Sen. Comm. on Health, Educ., Labor & Pensions, *Compensating College Athletes: Examining the Potential Impact on Athletes and Institutions* (Sept. 15, 2020), https://tinyurl.com/yyqcfhub.

[7] *See, e.g.*, Cal. S.B. 206 (Sept. 30, 2019) and Cal. Educ. Code § 67456; Fla. S.B. 646 (June 12, 2020), Fla. Stat. § 1006.74.

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1. As we have explained, once antitrust plaintiffs show that restraints have a substantial anticompetitive effect, it becomes the defendants' burden to come forward with a "procompetitive rationale" for the restraints; if that is done, the burden shifts back to the plaintiffs to demonstrate that any procompetitive benefits can be "reasonably achieved through less anticompetitive means." *Am. Express Co.*, 138 S. Ct. at 2284. Here, the courts below acknowledged that defendants *did* establish a procompetitive rationale for rules that distinguish college from professional sports. Pet. App. 15a-16a, 20a-24a. They could hardly have found otherwise. This Court expressly reached that conclusion in *Board of Regents*, and other courts, most recently the Seventh Circuit, have held that NCAA eligibility rules "are entitled to the procompetitive presumption announced in *Board of Regents* because they define what it means to be a student-athlete and thus preserve the tradition and amateur character of college athletics." *Deppe*, 893 F.3d at 502.

And once it is determined that the defendants' joint action is "reasonably necessary" to create a desirable product (*Rothery Storage & Van Co.*, 792 F.2d at 228), the Sherman Act does not empower courts to find that plaintiffs prevail at the third step of the Rule of Reason inquiry simply by concluding that the lines could have been drawn elsewhere. If that result were permissible, as Prof. Hovenkamp and other leading antitrust scholars argued as *amici* supporting the NCAA before the Ninth Circuit in *O'Bannon*, "restraints reasonably necessary to achieving valid business objectives could be subject to antitrust condemnation—including exposure to treble damages—based solely on the creativity of antitrust lawyers imagining

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marginally less restrictive approaches." Br. for Antitrust Scholars in Support of Appellant at 15, *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015) (Nos. 14-16601, 14-17068), ECF No. 17.

As these scholars continued, pointing to examples of actual litigation:

> With only a modest extrapolation from the reasoning of the [Ninth Circuit], a court could have decided that obstetricians really only need 30 months of residency training to perform C-sections rather than 36, and therefore condemned the credentialing requirements [that required the longer residency period.] A court likewise could have decided that * * * five-year transportation assignments * * * should instead have been four years. * * * The possibilities are limited only by the imagination of the antitrust bar and the willingness of the bench to indulge it.

Ibid. See also Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J. L. & Bus. 369, 377 (2016) (criticizing *O'Bannon*, "'[m]etering' small deviations [in amateurism] is not an appropriate antitrust function").

The factual context here illustrates this point forcefully. Acknowledging that the plaintiffs are challenging the totality of the NCAA's pay-for-play rules, the Ninth Circuit found it appropriate to identify those rules that it thought are, and those that it thought are not, sufficiently procompetitive. See Pet. App. 42a (considering "the procompetitive effects achieved by each type of challenged [NCAA] rule"). But under such an approach, no limit ever would be sustainable; plaintiffs always could show that a mod-

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erate tweak in existing rules would preserve public interest in the product. (Why permit two scholarships rather than three? If computers are provided, why not monitors, or printers, or ink? If black ink is provided, why not also red?) In a sort of Zeno's paradox, plaintiffs always could advance by stages towards the complete elimination of useful and procompetitive restrictions. The joint design and marketing of products would be subject to perpetual judicial second-guessing, resulting in uncertainty and unwarranted limits on procompetitive joint conduct—both of which the Court has said are disfavored by the antitrust laws.

2. In addition, proper application of the "twinkling-of-an-eye" standard also would have led to a different result here. As the Seventh Circuit has explained, NCAA rules that are "clearly meant to help maintain the 'revered tradition of amateurism in college sports'" should be "presumed procompetitive." *Agnew*, 683 F.3d at 342-343. Absent good reason to treat the eligibility restrictions challenged in this case as the "rare exception to this general principle" (*Deppe*, 893 F.3d at 502), that should be the end of the inquiry—not, as the Ninth Circuit concluded, a prelude to judicial red-penciling of the rules. *Id.* at 503. And no such rare exception applies here: The pay-to-play limit is the central, long-standing component of the amateurism standard that historically has differentiated college from professional sports.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted.

BRITT M. MILLER
ANDREW S. ROSENMAN
JED W. GLICKSTEIN
Mayer Brown LLP
71 South Wacker Dr.
Chicago, IL 60606
(312) 782-0600

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for The Big Ten Conference, Inc.

[Additional counsel on following pages]

OCTOBER 2020

AMERICAN OVERSIGHT

ROBERT W. FULLER, III
LAWRENCE C. MOORE, III
PEARLYNN G. HOUCK
ERIK R. ZIMMERMAN
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon St., Suite 1900
Charlotte, N.C. 28246

MARK SEIFERT
Seifert Law Firm
50 California St., Suite 1500
San Francisco, CA 94111

Counsel for Southeastern Conference

BENJAMIN C. BLOCK
Covington & Burling LLP
One CityCenter
850 Tenth St. N.W.
Washington, D.C. 20001

Counsel for the American Athletic Conference

LEANE K. CAPPS
CAITLIN J. MORGAN
Polsinelli PC
2950 North Harwood St., Suite 2100
Dallas, TX 75201

AMY D. FITTS
Polsinelli PC
900 West 48th Pl., Suite 900
Kansas City, MO 64112

Counsel for The Big 12 Conference, Inc. & Conference USA

BART H. WILLIAMS
SCOTT P. COOPER
KYLE A. CASAZZA
JENNIFER L. JONES
SHAWN S. LEDINGHAM, JR.
Proskauer Rose LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067

Counsel for Pac-12 Conference

AMERICAN OVERSIGHT

R. TODD HUNT
BENJAMIN G. CHOJNACKI
Walter Haverfield LLP
The Tower at Erieview
1301 East 9th St.,
Suite 3500
Cleveland, OH 44114

Counsel for Mid-American Conference

MERYL MACKLIN
Bryan Cave Leighton Paisner LLP
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111

RICHARD YOUNG
BRENT E. RYCHENER
Bryan Cave Leighton Paisner LLP
90 South Cascade Ave.,
Suite 1300
Colorado Springs, CO 80903

Counsel for Mountain West Conference

JON BRADLEY
Bradley Devitt Haas & Watkins, P.C
2201 Ford Street
Golden, CO 80401

Counsel for Western Athletic Conference

MARK A. CUNNINGHAM
Jones Walker LLP
201 St. Charles Ave.
50th Floor
New Orleans, LA 70170

Counsel for Sun Belt Conference

D. ERIK ALBRIGHT
GREGORY G. HOLLAND
Fox Rothschild LLP
230 North Elm St.,
Suite 1200
Greensboro, N.C. 27401

JONATHAN P. HEYL
Fox Rothschild LLP
101 North Tryon St.,
Suite 1300
Charlotte, N.C. 28246

Counsel for Atlantic Coast Conference

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Nos. 20-512, 20-520

In the Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,
v.
SHAWNE ALSTON, ET AL.,
Respondents.

AMERICAN ATHLETIC CONFERENCE, ET AL.,
Petitioners,
v.
SHAWNE ALSTON, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

STEVE W. BERMAN
CRAIG R. SPIEGEL
EMILEE N. SISCO
Hagens Berman Sobol Shapiro LLP
1301 Second Ave., Ste. 2000
Seattle, WA 98101

BRUCE L. SIMON
BENJAMIN E. SHIFTAN
Pearson, Simon & Warshaw LLP
350 Sansome St., Ste. 680
San Francisco, CA 94104

JEFFREY L. KESSLER
DAVID G. FEHER
DAVID L. GREENSPAN
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166

LINDA T. COBERLY
Counsel of Record
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600
lcoberly@winston.com

[Additional counsel on inside cover]

AMERICAN OVERSIGHT

ELIZABETH C. PRITZKER
JONATHAN K. LEVINE
BETHANY L. CARACUZZO
Pritzker Levine LLP
1900 Powell St., Ste. 450
Emeryville, CA 94608

JEANIFER E. PARSIGIAN
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111

Counsel for Respondents

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QUESTION PRESENTED

Whether restraints that competing NCAA member schools have agreed to impose in the name of "amateurism" should be exempt from challenge under the antitrust laws, as Petitioners contend, or whether they are subject to scrutiny under the rule of reason—a fact-based analysis that this Court and the courts of appeals have uniformly applied to agreements restricting competition among NCAA members and that the courts below undertook based on the particular facts established at trial in this case.

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INTRODUCTION

The petitions in this case largely repeat arguments the NCAA made in a petition that this Court denied just a few years ago. In *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015), the Ninth Circuit upheld a district court's application of the Sherman Act's rule of reason to a particular set of facts, invalidating restraints that the NCAA's member schools had agreed to impose on compensation for the use of student-athletes' names, images, and likenesses. Although both sides sought certiorari, this Court denied review. Both petitions in this case discuss *O'Bannon* at length.

This case is even less deserving of the Court's attention. The decision below does not plough any new legal ground; it applies the same, well-established antitrust standards to a different set of facts—here, facts relating to restrictions on benefits relating specifically to the student-athletes' education. As in *O'Bannon*, the courts below faithfully followed this Court's precedents, including *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984), which held that NCAA rules must be analyzed under the rule of reason. As in *O'Bannon*, the NCAA claims a conflict with other circuits, but a careful analysis shows that no conflict exists. As in *O'Bannon*, this case does not concern how antitrust law might apply to "joint ventures"—a structure that neither this Court nor the courts below have found applies to competitor schools within the NCAA. And—critically—since *O'Bannon*, Congress and state legislatures have begun to consider for themselves the question of player compensation and benefits in college sports. This legislative effort makes certiorari especially inappropriate.

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Since *Board of Regents*, this Court's instructions have been clear: NCAA rules are subject to the rule of reason. This sensible rule of antitrust law requires courts to evaluate a restraint in the context of the market as it actually exists at the time. If a complaint does not plausibly allege an antitrust violation in a particular market—or if discovery does not reveal any genuine dispute of material fact—the court may perform the necessary analysis on motions, without a full-blown trial. But nothing in *Board of Regents* requires that a court uphold NCAA rules without discovery or trial, based simply on the NCAA's assertion that those rules are somehow linked to "amateurism." That is what Petitioners seek—a declaration from this Court that such rules must be upheld "without fact-intensive rule-of-reason analysis." NCAA Pet. 19. *Board of Regents* holds otherwise.

Indeed, applying the fact-based rule of reason is even more important today, given how much the facts have changed since *Board of Regents*. In the last 36 years, Division I basketball and Football Bowl Subdivision ("FBS") football have become multi-billion-dollar industries. The NCAA and its member conferences and schools receive billions of dollars every year through the hard work, sweat, and sometimes broken bodies of student-athletes. Coaches, assistant coaches, and athletic directors take millions in salaries. Yet the schools have agreed among themselves to limit what student-athletes may receive for their work in generating these extraordinary revenues. The agreements among these schools represent a classic horizontal restraint of trade—an agreement among competitors to limit how much they will have to expend to compete for talent and labor.

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To be sure, some NCAA rules may be necessary to protect consumer demand for college sports as a distinct "product." But as a factual matter, the restraints in this case are not. The trial record shows that the challenged restraints are cost-cutting measures, plain and simple, and not reasonably necessary to maintain consumer demand for college sports. As a result, the district court found that they constitute unreasonable restraints of trade.

The decisions below are modest in many respects. They apply only to NCAA restrictions on *education-related benefits* that schools may offer Division I basketball and FBS football players—benefits like computers, science equipment, musical instruments, post-graduate scholarships, tutoring, study abroad, academic awards, and internships. In that sense, the injunction is of great consequence to the student-athletes whose work and sacrifice drive the multi-billion-dollar industry that is NCAA Division I football and basketball. But the injunction does not authorize so-called *pay for play*, which Petitioners argue would be the end of "amateur" sports. Nor does it *require* any school to provide these kinds of education-related benefits or prevent an individual conference from restricting such benefits if it chooses. In short, it simply enables individual schools and conferences to compete among themselves. There is no reason to believe that eliminating restraints on education-related benefits will "fundamentally transform the century-old institution of NCAA sports," as Petitioners claim. NCAA Pet. 5. Petitioners' sky-is-falling rhetoric is neither true nor appropriate in the context of a petition for certiorari from a fact-bound application of well-established law.

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In the end, what Petitioners seek is nothing less than antitrust immunity. But they are making that request on the wrong side of First Street. If Congress believed there was a national interest in avoiding antitrust oversight of anticompetitive behavior in college athletics, it would have granted the NCAA's repeated requests for immunity. Yet it has declined to do so. To the contrary, Congress and many state legislatures have either adopted or are now considering proposals to require the NCAA and its members to roll back their restrictions on athlete compensation, recognizing the profound inequity of a system that enables conference executives, athletic directors, coaches, schools, television networks, and a host of others to make billions of dollars on the backs of young, often underprivileged players. One thing is clear, however: antitrust immunity for college sports is a question for the legislatures, not the courts. The current proposals pending in Congress and state legislatures—including the NCAA's latest request for antitrust immunity—provide yet another reason for this Court to decline review.

For these and other reasons, certiorari is even more inappropriate in this case than it was in *O'Bannon*. This Court should deny review.

STATEMENT

A. The Business of College Sports and the NCAA's Ever-Changing Definition of "Amateurism"

The NCAA is a private, membership-based organization that, among other things, seeks to restrain economic competition in the multi-billion-dollar in-

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tercollegiate sports industry.[1] It accomplishes this goal through agreements among its member schools, each of which compete horizontally, both on the field and off. This competition is particularly fierce in the relevant economic markets—the labor markets for Division I men's and women's basketball players and for football players in the FBS, formerly known as Division I-A.[2] In these markets, schools compete for players' services in exchange for packages of compensation and benefits. That competition is restrained by horizontal agreements among NCAA members, restricting the type and amount of compensation and benefits—including education-related benefits—that schools may offer in these markets.

Division I basketball and FBS football have become particularly lucrative enterprises, generating billions of dollars in annual revenue. For example, the total value of the NCAA's current "March Madness" basketball broadcasting contract, which extends through 2032, is $19.6 billion, while the FBS football conferences' current multi-year deal with ESPN for the College Football Playoff is worth $5.64 billion. NCAA Pet. App. 68a. At the same time, each confer-

[1] In addition to their NCAA membership, most schools are also members of one of the conferences, which serve as additional regulators and organizers of intercollegiate athletics. The conferences have authority in areas that overlap with NCAA rules, such as schedules and rules of the game, and in areas in which the NCAA does not have a role, such as the sale of the member schools' combined media rights for the regular seasons.

[2] The FBS represents the highest level of college football, consisting of the largest and most competitive NCAA programs. There are ten conferences and approximately 130 schools in the FBS. Eleven conferences are among Petitioners in this case; all but the Western Athletic Conference participate in FBS football.

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ence negotiates its own regular-season football and basketball contracts with broadcasters, with the largest conferences generating over $500 million in annual revenue. *Id.* at 68–69a (explaining that the Southeastern Conference "made more than $409 million in revenues from television contracts alone in 2017, with its total conference revenues exceeding $650 million that year"). These massive sums allow schools to spend lavishly, including on "seven-figure coaches' salaries" and "palatial athletic facilities." *Id.* at 17a. Yet the elite athletes in these sports—the ones whose talent and labor make it all possible—receive almost none of this revenue.

Although college athletics can be an avocation that complements and enhances student-athletes' educational experiences, that could not be further from the truth in the multi-billion-dollar businesses that are today's Division I and FBS football. With so much money at stake, "coaches and others in the Division 1 ecosystem make sure that Student-Athletes put athletics first, which makes it difficult for them to compete for academic success with students more focused on academics. They are often forced to miss class, to neglect their studies, and to forego courses whose schedules conflict with the sports in which they participate." *Id.* at 53a (Smith, J., concurring). Indeed, the district court in this case affirmatively found that athletes in these markets face significant barriers that prevent their full integration into the educational experiences and campus life of other students. *Id.* at 109a–115a.

While FBS football and Division I basketball mirror their professional counterparts in nearly all respects—including by paying coaches and executives seven-figure salaries and playing games for television

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audiences in the midst of a pandemic—the NCAA continues to cling to the pretext of "amateurism," insisting that the compensation and benefits available to student-athletes must be severely constrained to avoid "eliminating the procompetitive distinction between college and professional sports"—which, it claims, would hamper consumer demand. NCAA Pet. 33. Yet the district court found—based on testimony by Petitioners' own witnesses, among other evidence—that the critical factor that "drives demand" for college sports today is not the lack of compensation but rather the athletes' status as *students* at a particular school. NCAA Pet. App. 21a. As the district court explained, "[d]efense lay witnesses * * * testified that consumer demand for Division I basketball and FBS football is driven by consumers' perception that student-athletes are, in fact, students." *Id.* at 107a.[3]

Despite this, NCAA members have adopted detailed compensation and benefit restraints that have nothing to do with requiring that athletes remain students. In fact, the district court found, as a factual matter, that the specific restraints at issue here—limits on benefits related to education—"do not appear to be set * * * based on considerations of consumer demand." *Id.* at 145a. Instead, the NCAA's own representatives testified that the rules are based on "cost considerations." Ct. App. ER641.

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[3] Critically, the student-athletes here do not challenge Petitioners' academic eligibility requirements. Further, the injunction concerns only the rules restricting competition for education-related benefits that schools may offer Division I basketball and FBS football players—benefits that actually *enhance* the athletes' status and experience as students. NCAA Pet. App. 121a.

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The rest of the trial record confirms this. Over the years, the compensation and benefits available to student-athletes in Division I basketball and FBS football have changed and increased, reflecting fundamental shifts in the NCAA's view of "amateurism"—and yet there has been no negative impact on demand for college sports. Quite the opposite. This incongruence led the lower courts to find, as a factual matter, that in the present day, the NCAA's rules "'do not follow any coherent definition of amateurism.'" *Id*. at 19a (quoting district court).

This case does not represent the first time that the NCAA has defended its rules as essential to "amateurism" and preserving college sports, only to find that even without such rules, consumer demand remains as strong as ever. In *Board of Regents*, for example, the NCAA warned that competition among schools to sell their broadcast rights would pose an existential threat to amateurism and consumer demand.[4] Today such competition flourishes and, as a result, college athletics generates billions in broadcast revenue, without any negative impact on demand. In *Law* v. *NCAA*, the NCAA resisted allowing unrestrained competition among schools to compensate assistant basketball coaches, contending that it was contrary to the collegiate model.[5] Today such competition is permitted, with assistant coaches often

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[4] 468 U.S. at 119 (rejecting NCAA argument that restricting sale of broadcast rights was necessary "to preserve amateurism").

[5] 134 F.3d 1010, 1021–24 (10th Cir. 1998) (rejecting NCAA's proposed procompetitive justifications for restricting assistant coach salaries).

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earning millions,[6] and demand still thrives. In *White* v. *NCAA*, the NCAA opposed allowing schools to compete with one another by offering full cost-of-attendance scholarships, calling such compensation "pay for play."[7] Today such competition is permitted; cost-of-attendance scholarships and even compensation *above* the cost of attendance are pervasive, and demand still thrives. NCAA Pet. App. 19a–20a. And in *O'Bannon*, the NCAA decried payments to student-athletes in exchange for the use of their names, images, and likenesses as "anathema to amateurism" and warned that such payments would "blur the clear line between amateur college sports and their professional counterparts."[8] Today the NCAA—under pressure from state legislatures and Congress—has decided that such payments are consistent with its amateurism model and should be permitted.[9]

As this history and the factual record make clear, "amateurism" is a moving goalpost; it is whatever Petitioners say it is at any given time. In Division I basketball and FBS football, it is little more than a pretext. It is certainly not a Sherman Act concept, much less a get-out-of-jail-free card that insulates any particular set of NCAA restraints from scrutiny.

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[6] Between 2009 and 2015, for example, the salaries of assistant men's basketball coaches increased by nearly 40%. C.A. ER701.

[7] NCAA Mem. P. & A. in Supp. Summ. J. at 28, *White* v. *NCAA*, No. 06-cv-999 (C.D. Cal. Oct. 22, 2007), ECF No. 220.

[8] Br. for NCAA at 57, *O'Bannon* v. *NCAA*, No. 14-16601 (9th Cir. Nov. 14, 2014), ECF No. 13-1.

[9] *See* NCAA Board of Governors Federal and State Legislation Working Group, Final Report and Recommendations (Apr. 17, 2020), https://tinyurl.com/yxq8rtd9.

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B. District Court Proceedings

Recognizing the immense economic disparity between the NCAA's ever-growing FBS football and Division I basketball enterprises and the student-athletes who drive them, a group of football players and men's and women's basketball players filed this suit against the NCAA and its largest athletic conferences, challenging the rules that restrict student-athlete compensation. The student-athletes contended that without these restrictions, they would be compensated at a level more commensurate with the value they confer on their schools, conferences, and the NCAA.

While the case was pending, the Ninth Circuit issued its decision in *O'Bannon*—an antitrust challenge brought against the NCAA (but not the conferences) by a class of current and former football and men's (but not women's) basketball players. These players challenged NCAA rules that prohibited compensation for the use of their names, images, and likenesses in game footage or videogames. As relevant here, *O'Bannon* reaffirmed what this Court and many others had held—that the NCAA's rules *are* subject to antitrust challenge. Based on a careful review of the factual record in that case, the Ninth Circuit affirmed an injunction permitting schools to use revenues generated from the use of athletes' names, images, and likenesses to increase the NCAA's scholarship limit and fund athletes' full cost of attendance—a federally defined measure of a student's cost to attend school.

The *O'Bannon* parties each filed petitions for writ of certiorari, with the NCAA's petition resting on virtually identical grounds as the petitions here. *See*,

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e.g., Pet. for a Writ of Certiorari, *NCAA* v. *O'Bannon*, No. 15-1388, 2016 WL 2866087, at 10 (U.S. May 13, 2016) ("*O'Bannon* Pet.") ("the Ninth Circuit disregarded *Board of Regents*"); *id.* at 10–11 ("the Ninth Circuit set aside the restraint because it was not the *least* restrictive one possible") (emphasis in original); *id.* at 15–16 ("*American Needle*—citing *Board of Regents*—reaffirmed that restraints essential to a joint-venture product" should be upheld); *id.* at 16–18 (contending that the Ninth Circuit's decision "departs from other circuits' precedent," which holds that "NCAA amateurism rules should be upheld without detailed rule-of-reason analysis (let alone a trial)"); *id.* at 26 ("The decision below will only increase the frequency of [antitrust] challenges" faced by the NCAA); *id.* at 27 ("The need for review is particularly strong given the nationwide scope and importance of college athletics"). Both parties' petitions were denied. 137 S. Ct. 277 (2016).

Following the Ninth Circuit's *O'Bannon* decision, Petitioners here moved for judgment on the pleadings, arguing that *O'Bannon* foreclosed the claims in this case as a matter of *res judicata*. The district court denied the motion because, among other things, this case involves a different set of horizontal compensation restraints, and the factual record on competition in the relevant markets had changed substantially since *O'Bannon*. The petitions here do not challenge that ruling.

After discovery, the parties cross-moved for summary judgment. The district court again rejected Petitioners' preclusion arguments. On the merits, the court granted summary judgment in favor of the players in part, finding no genuine issue of fact as to whether the challenged rules substantially restricted

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competition in the relevant markets. In rendering that decision, the court adopted—at the request of *both* parties—a market definition consisting of the national markets for athletes' labor in Division I basketball and FBS football. NCAA Pet. App. 75a–76a. (On appeal, Petitioners did not—and do not now—contest the court's findings relating to anticompetitive effect and the relevant market.) As for the rest of the motion, the court found that triable issues remained at the second and third steps of the rule of reason.

After a ten-day bench trial—reflecting a starkly different factual record from any prior antitrust case concerning NCAA rules—the district court entered judgment in favor of the plaintiff classes. The court held that the limits on education-related benefits did not serve any procompetitive purpose, including the NCAA's professed purpose of preserving the distinction between college and professional sports. *Id.* at 109a. Specifically, the court found that the NCAA has defined its product as distinct from professional sports by ensuring that student-athletes are not allowed to receive unlimited, non-education-related cash compensation like professional athletes and that they maintain "student" status. *Id.* at 121a. Yet the NCAA continues to impose caps and prohibitions on education-related benefits that do not serve that purpose and do not preserve consumer demand—benefits like computers, science equipment, musical instruments, post-graduate scholarships, tutoring, study abroad, academic awards, and internships. Indeed, the court found as a factual matter that market competition to provide the best package of education-related benefits will only reinforce the perception

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that student-athletes are students—which, again, is the critical driver of consumer demand. *Ibid.*

Still, the court found that there "may" be a limited pro-competitive justification for "some" of the challenged restraints, to the extent they preserve the distinction between college and professional sports by preventing unlimited payments that are unrelated to education. *Id.* at 147a. But the court went on to find that the students had proven a less restrictive alternative to achieve that goal—a system in which the restrictions on education-related benefits are eliminated, leaving individual conferences to decide whether and to what degree any demand-enhancing limitations on educational benefits are warranted at the conference level. *Id.* at 151a–159a.

As a remedy, the district court enjoined the NCAA from maintaining national rules capping education-related compensation and benefits, while otherwise leaving the NCAA as the legislator of its own rulebook. The injunction permits the NCAA to establish its own definition of "related to education" and allows individual conferences to impose their own, more stringent education-related compensation caps. *Id.* at 168a. It also requires the NCAA to permit schools and conferences to offer academic and graduation incentive awards, with any cap on such awards set no lower than the amount the NCAA allows for athletics-based awards. *Id.* at 168a–169a.

Following the decision, NCAA President Mark Emmert publicly lauded the injunction as "'an inherently good thing'" and not in any way fundamentally inconsistent with the NCAA's principles, as it would foster competition among conferences and schools "'over who can provide the best educational experi-

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ence.'" *Id.* at 42a (Ninth Circuit decision, quoting Associated Press, *Emmert: Ruling reinforced fundamentals of NCAA*, ESPN (Apr. 4, 2019)).

C. The Ninth Circuit's Opinion

Reviewing the trial record in its entirety, the Ninth Circuit panel unanimously affirmed the district court's findings and injunction.

The court began by noting that "[a]ntitrust decisions are particularly-fact-bound" and affirmed the district court's holding that *O'Bannon* had no preclusive effect on this case, which involved a fundamentally different factual record. NCAA Pet. App. 27a.

Next, the Ninth Circuit described the traditional rule of reason "three-step framework":

> (1) [the] Student-Athletes bear the initial burden of showing that the restraint produces significant anticompetitive effects within the relevant market; (2) if they carry that burden, the NCAA must come forward with evidence of the restraint's procompetitive effects; and (3) [the] Student-Athletes must then show that any legitimate objectives can be achieved in a substantially less restrictive matter.

Id. at 33a (citations and quotations omitted).

The Ninth Circuit found the district court's factual and legal conclusions to be well-grounded at every step. At step one, it held that the "district court properly concluded that the Student-Athletes carried their burden" to show significant anticompetitive effects, noting that the district court's findings "have substantial support in the record." *Id.* at 33a–34a (citations and quotations omitted). At step two, the Ninth Circuit held that the district court "properly

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'credit[ed] the importance to consumer demand of maintaining a distinction between college and professional sports,'" while also finding that while "*some* of the challenged rules" may serve a procompetitive purpose, the limits on "'non-cash education-related benefits'" do not. *Id.* at 34a–35a (quoting district court, emphasis in original). Finally, at step three, the Ninth Circuit confirmed that "it [w]as the Student-Athletes' burden to make a strong evidentiary showing that their proposed [less restrictive alternatives] to the challenged scheme are viable"—that is, "virtually as effective as the challenged rules in achieving the only procompetitive effect" that Petitioners had shown. *Id.* at 40a, 66a. The district court had correctly allocated the burden of proof on this issue, rejecting two of the student-athletes' three proffered "less restrictive alternatives." *Id.* at 22a; *see also id.* at 46a ("The [district] court's findings at step three are supported by the record, and certainly not clearly erroneous."). As the Ninth Circuit explained, its assessment of the entire record led it to hold that "the district court properly applied the Rule of Reason in determining that the enjoined rules are unlawful restraints of trade." *Id.* at 7a.

Two days before the mandate was set to issue, Petitioners moved the Ninth Circuit for a stay, claiming they would be irreparably harmed if they were required to permit additional education-related benefits. After the Ninth Circuit summarily denied the motion, Petitioners unsuccessfully sought a stay from this Court, based on the same arguments. The mandate issued on August 12, 2020.

Despite their claimed irreparable injury, Petitioners waited until October 15—a full two months after

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the mandate, and the last possible day under the Court's rules—to file their petitions.

REASONS FOR DENYING THE PETITIONS

I. The decision below is entirely consistent with this Court's precedents.

As in the NCAA's petition in *O'Bannon*, Petitioners here incorrectly contend that *Board of Regents* prohibits a court from conducting a fact-based rule-of-reason inquiry for any rule they adopt in the name of "amateurism." *Compare* AAC Pet. 20–21 *and* NCAA Pet. 17–18 *with O'Bannon* Pet., 2016 WL 2866087, at *17 ("*Board of Regents* and *American Needle* [v. *NFL*, 560 U.S. 183 (2010)] mean that NCAA rules that define what it means to be an amateur or a student-athlete should be sustained in the twinkling of an eye—that is, at the motion-to-dismiss stage") (citation and quotation omitted). According to Petitioners, *Board of Regents* established this rule to preserve their "'ample latitude'" to oversee college sports. *Compare* NCAA Pet. 19 *with O'Bannon* Pet., 2016 WL 2866087, at *11.

This Court's cases say no such thing. To the contrary, the *Board of Regents* Court squarely held that NCAA rules *are* subject to antitrust scrutiny under the rule of reason. 468 U.S. at 103–04. Even Petitioners themselves describe *Board of Regents* that way, stating that "[i]n 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." NCAA Pet. 9; *see id.* at 17 ("This Court held in *Board of Regents* that NCAA rules

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would be evaluated under the rule of reason * * * ."). Applying the rule of reason, the *Board of Regents* Court ultimately ruled *against* the NCAA, holding that the restraint at issue was unreasonable in light of the specific facts found at trial. 468 U.S. at 120.

The district court here faithfully followed *Board of Regents* and applied the rule of reason to the facts. After holding that the complaint sufficiently stated a claim, the court supervised discovery, compiled an evidentiary record, evaluated the parties' motions for summary judgment, found genuine issues of material fact, and held a two-week trial. Then the court issued a 102-page decision applying the rule of reason to the facts presented, finding that the challenged rules were anticompetitive and unlawful. The Ninth Circuit appropriately reviewed this factual conclusion deferentially, finding no clear error. Again, this is precisely what happened in *Board of Regents* itself, in which this Court reviewed a lower court's application of the rule of reason to a set of NCAA rules after a trial and affirmed an order enjoining them.

To be sure, *Board of Regents* also discussed the NCAA generally, commenting that the NCAA was perceived to play a "critical role in the maintenance of a revered tradition of amateurism in college sports." 468 U.S. at 120. The Court also observed—notably, in an entirely different era in college sports—that it was "reasonable to assume that most * * * NCAA [rules] are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive." *Id*. at 117. But nothing in *Board of Regents* indicates that the Court intended this observation to function as binding legal doctrine and to prevent judges decades into the future from evaluating whether such an "assum[ption]" remained "reasona-

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ble," no matter how much the factual circumstances changed.

And changed they have. The facts in the relevant markets bear no resemblance to what the *Board of Regents* Court understood at that time about the NCAA and the tradition of "amateurism." As discussed above, the business of Division I basketball and elite football has grown exponentially in the last three decades, becoming a massive, multi-billion dollar industry on the backs of unpaid students who would obtain far more compensation for their labor in a competitive market. Moreover, the trial record below established that in the years since *Board of Regents*, the NCAA has abandoned "any coherent definition" or tradition of amateurism in Division I basketball and FBS football, allowing significant changes in the compensation that schools are allowed to provide. NCAA Pet. App. 92a; *see also id.* at 144a ("amateurism, and amounts of permissible student-athlete compensation have changed materially over time").

Petitioners' position gains no more support from *American Needle*—a case that also formed the basis of their unsuccessful petition in *O'Bannon*. *Compare* NCAA Pet. 17 (quoting *American Needle*, 560 U.S. at 203) *with O'Bannon* Pet., 2016 WL 2866087, at *12 (same). In *American Needle*, a unanimous Court rejected the NFL's argument for antitrust immunity and held that the challenged acts were concerted activity subject to the rule of reason. 560 U.S. at 203. The Court explained that "[w]hen 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason." *Id.* (quoting *Board of Re-*

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gents, 468 U.S. at 101). That is precisely what the courts did in this case.

To be sure, *Board of Regents* and *American Needle* observe that the rule of reason "'can sometimes be applied in the twinkling of an eye'"—that is, without a "detailed analysis"—depending on "the concerted activity in question." *American Needle*, 560 U.S. at 203 (quoting *Board of Regents*, 468 U.S. at 109 n.39). But this is far from a substantive presumption in the NCAA's favor. In *Board of Regents*, the Court used the phrase "twinkling of an eye" to explain that some restraints may be so obviously *anti*-competitive that they can be summarily *struck down*. 468 U.S. at 109 n.39. And when the Court repeated that phrase in *American Needle*, it also specifically rejected the NFL's plea for antitrust immunity, declining to prescribe a "twinkling of an eye" approach to the restrictions in that case and instead remanding for a rule-of-reason analysis, with the observation that competition for "playing personnel" is an area where horizontal agreements must be subject to the rule of reason. 560 U.S. at 203. Neither of these cases establishes a presumption in a sports league's favor, and neither suggests that it would ever be error to apply the rule of reason on a full factual record, as the district court did here.

In any event, the Ninth Circuit here was not asked to (and did not) address any legal question about "presumptions" under *Board of Regents* or *American Needle*. Instead, it followed this Court's direction and reviewed the district court's factual application of the rule of reason for clear error, finding none. Petitioners may disagree with the courts' factual conclusions, but their disagreement does not warrant this Court's review.

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II. The decision below does not implicate any conflict among the Courts of Appeals.

Petitioners similarly regurgitate the same arguments about the same alleged conflict of circuit authority that they raised in their unsuccessful *O'Bannon* petition. All but one of the decisions Petitioners cite for the purported split occurred before the *O'Bannon* petition and were cited there too. *Compare* NCAA Pet. 19–23 *and* AAC Pet. 23–25 *with* *O'Bannon* Pet., 2016 WL 2866087, at *16–18 (citing *Agnew* v. *NCAA*, 683 F.3d 328 (7th Cir. 2012); *McCormack* v. *NCAA*, 845 F.2d 1338 (5th Cir. 1998); *Smith* v. *NCAA*, 139 F.3d 180 (3d Cir. 1998)). The one exception is *Deppe* v. *NCAA*, 893 F.3d 498 (7th Cir. 2018), which, as discussed below, applied the rule articulated in *Agnew* and is thus a post-*O'Bannon* decision that applied pre-*O'Bannon* law. And, in any event, none of the cases relied upon by Petitioners presents any conflict with the Ninth Circuit's decision here.

In *Smith*, a case from the 1980s, the Third Circuit considered an NCAA rule that involved an athlete's status as a student at the institution—a very different kind of rule than the ones at issue here. *See* 139 F.3d at 183 n.2 (quoting challenged NCAA rule). The court held that the rule did not "relate[] to the NCAA's commercial or business activities" and thus it did not fall under the Sherman Act in the first place. *Id.* at 185–86. And—critically—the court confirmed that if the Sherman Act did apply, it "would analyze [the rule] under the rule of reason." *Id.* at 186. Although the court proceeded to cite this Court's then-recent observations in *Board of Regents*, it did not hold that *Board of Regents* controlled the disposition as a matter of law; it simply concluded that "the by-

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law [in question] so clearly survives a rule of reason analysis" that the claim could be resolved on a motion to dismiss. *Id.* at 187.

McCormack—the only decision in another circuit that addressed limits on compensation to players—also applied the rule of reason to a particular set of factual allegations. 845 F.2d at 1343. But the Fifth Circuit did not read *Board of Regents* to immunize the rule from antitrust scrutiny or to establish a presumption in favor of any particular NCAA rule. It noted the NCAA's argument on that point but found that it "need not address" the issue because of the sparsity of the plaintiffs' allegations, which could not support a claim under the rule of reason. *Ibid.*

In *Agnew*, the Seventh Circuit theorized that there may be a presumption under *Board of Regents* that certain classes of NCAA rules are lawful, but it declined to apply any presumption to the NCAA rules before it, which limited the number and length of athletic scholarships. 683 F.3d at 343–44. The court reasoned that such rules "are not inherently or obviously necessary for the preservation of amateurism, the student-athlete, or the general product of college football." *Id.* at 344. While the NCAA argued that such rules are necessary for parity between more wealthy and less wealthy schools, the court rejected that argument, noting that the claim was "weakened" by the then-recent genesis of those rules and the fact that they were recently rescinded. *Ibid.* In the court's assessment, the challenged rules—like the ones at issue here—"seem[ed] to be aimed at containing university costs, not preserving the product of college football." *Ibid.* Thus, the court declined to apply any presumption of lawfulness at the pleading stage, explaining that the NCAA's argument was "far too

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great a leap to make without evidentiary proof at the full Rule of Reason stage." *Ibid*.

The only post-*O'Bannon* case cited by Petitioners is *Deppe*, in which the Seventh Circuit explicitly applied the rule it had previously set out in *Agnew*. 893 F.3d at 503–04. Thus, while the decision in *Deppe* is new, the Seventh Circuit's approach is not. And, critically, the kinds of NCAA rules at issue in *Deppe* were even further afield from the rules challenged here than the rules in *Agnew* were. *Compare Deppe*, 493 F.3d at 502 (rule requiring athlete to spend a year enrolled at institution before being eligible to participate in athletics) *with Agnew*, 683 F.3d at 344 (rules limiting number and extent of scholarships). Because the eligibility rule in *Deppe* was academics-driven, the Seventh Circuit applied the presumption of lawfulness it had outlined in *Agnew* but had declined to apply in that case. 893 F.3d at 502.

Still, it is wrong to say that this case "would have come out differently if decided by the Seventh Circuit." AAC Pet. 24. The rules at issue here are far more like the ones at issue in *Agnew*, which related to scholarships—an education–related benefit that conferences or schools may choose to provide. Further, as in *Agnew*, the rules here "seem to be aimed at containing university costs, not preserving the product of college football." 683 F.3d at 344; *see* NCAA Pet. App. 145a, 148a–149a n.42 (challenged rules were based not on consumer demand but on cost). Thus, there is every reason to believe that the Seventh Circuit would agree with the Ninth that the rules in this case are subject to a full, rigorous analysis under the rule of reason. Indeed, these are exactly the type of anti-competitive agreements for which no procompetitive presumption would ever be proper. *See* P. Areeda &

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H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 1902a (4th ed. 2018) (explaining that "[h]orizontal agreements are antitrust's most 'suspect' classification, which as a class provoke harder looks than any other arrangement," and referring to "naked price fixing" as one of "the most threatening circumstances" to free competition).

Nor is there any inconsistency between the decision below and the Third Circuit's decision in *Race Tires America, Inc.* v. *Hoosier Racing Tire Corp.*, 614 F.3d 57 (3d Cir. 2010), *cited in* NCAA Pet. 3–4. The *Race Tires* decision does not suggest antitrust immunity, as Petitioners suggest; instead, it confirms that sports sanctioning bodies are required to prove "good faith, sufficient pro-competitive or business justifications" for their rules, based on the facts of the case. *Id.* at 81. Moreover, the Third Circuit explicitly warned against "establish[ing] an overly broad rule detached from the specific facts" because of the "highly fact-specific nature of the antitrust standards." *Id.* at 80. This is the opposite of establishing some kind of presumption.

Finally, even if there were some tension among the circuits—and there is none—this case would be a poor vehicle for resolving it. The Ninth Circuit was never asked to rule on whether the rules challenged here should have been afforded a presumption of lawfulness rather than analyzed under the rule of reason. And, again, the rules in this case are far more like *Agnew*'s limits on scholarships—to which the Seventh Circuit refused to apply any presumption—than they are like *Deppe*'s year-in-residence rule. Thus, if there is any real disagreement between the Seventh Circuit and the Ninth—and the cases thus

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far do not reflect one—that disagreement would not make a difference in this case.

III. The decision below faithfully applied the rule of reason framework.

Contrary to Petitioners' assertions (*e.g.*, AAC Pet. 15–19), the Ninth Circuit carefully applied the traditional rule of reason framework based on well-established precedent. As this Court recently reaffirmed, the rule of reason involves a "three-step, burden shifting framework":

> [T]he plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing then 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) (citations omitted).

Petitioners' only *legal* objection to the Ninth Circuit's analysis is their suggestion that it "effectively requir[ed] defendants to prove that they had adopted the *least* restrictive alternative that would preserve college sports." AAC Pet. 15. But the Ninth Circuit did no such thing. Instead, it held unequivocally that it was the "*Student-Athletes'* burden to make a strong evidentiary showing" on less restrictive alternatives. NCAA Pet. App. 40a (emphasis added, quotation omitted). It further held that a court may "invalidate a restraint and replace it with [a less restrictive al-

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ternative] only if the restraint is '*patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives'"—and that Plaintiffs bore the burden to demonstrate that a significantly less restrictive alternative was available. *Id.* at 33a (citation and quotation omitted).

Applying the traditional standard, the court held that "the district court reasonably concluded that market competition in connection with education-related benefits will only reinforce consumers' perception of student-athletes as students, thereby preserving demand." *Id.* at 43a. That conclusion was based on the district court's detailed factual findings, including that the "NCAA's 'own witnesses' testified that 'consumer demand for [D1] basketball and FBS football is driven largely by consumers' perception that student-athletes are, in fact, students.'" *Ibid.* (alteration in original).

Again, the Ninth Circuit did not establish any new legal principle; this is the same test that the court applied in *O'Bannon* and that this Court reaffirmed in *Ohio* v. *American Express* just two years ago. None of this presents any unsettled legal question that requires this Court's review.

IV. The decision below turns on fact-bound conclusions after a lengthy bench trial.

The nature of the Ninth Circuit's decision further undermines Petitioners' request for certiorari. The decision does not set forth any new or remarkable principles of law. Instead, the only significant issues of law before the court had to do with Petitioners' unsuccessful argument that the claims in this case were precluded by *O'Bannon* under principles of *stare decisis* and *res judicata*—issues that Petitioners have de-

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clined to raise here. *See* AAC Pet. 13 n.4.

With respect to the petitions, then, all that is at issue is the Ninth Circuit's appropriately deferential review of the district court's application of the rule of reason, based on the trial record in its entirety. This is an inherently fact-specific analysis. *See Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 899 (2007) (discussing the "case-by-case adjudication contemplated by the rule of reason"); *Maple Flooring Mfrs.' Ass'n* v. *United States*, 268 U.S. 563, 579 (1925) ("[E]ach case arising under the Sherman Act must be determined upon the particular facts disclosed by the record"). The facts may change over time, requiring a new evaluation. *Leegin*, 551 U.S. at 899 (Sherman Act's prohibitions on restraints of trade "evolve to meet the dynamics of present economic conditions"); Areeda & Hovenkamp, *supra*, ¶ 1205c3 ("[C]ontinuing contracts in restraint of trade * * * are typically subject to continuing reexamination," and "even a judicial holding that a particular agreement is lawful does not immunize it from later suit or preclude its reexamination as circumstances change.").

On its face, the Ninth Circuit's decision expressly turned on "deferen[ce]" to specific factual findings and an "examin[ation of] the record 'in its entirety." NCAA Pet. App. 44a (citation omitted). This was entirely appropriate—and, in any event, involves fact-based decisionmaking not appropriate for this Court's review.

V. The decision below has no implications for joint ventures.

Petitioners insist that absent review by this Court, the decision below "endors[es] an antitrust

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standard that puts at risk many legitimate and pro-competitive joint ventures." AAC Pet. 27; s*ee also* NCAA Pet. 29 (the decision below "will have sweeping detrimental consequences for college sports and joint ventures more generally"). Not so. Far from being a "joint venture," Petitioners and their member schools are direct, horizontal *competitors* in the relevant markets at issue in this case—the labor markets in Division I basketball and FBS football.

The relevant antitrust markets in this case were identified based on undisputed evidence at the summary judgment phase and left unchallenged by Petitioners on appeal. They are the "national markets for Plaintiffs' labor in the form of athletic services in men's and women's Division I basketball and FBS football, wherein each class member participates in his or her sport-specific market." NCAA Pet. App. 137a. "In these markets, the class-member recruits sell their athletic services to the schools that participate in Division I basketball and FBS football in exchange for grants-in-aid and other compensation and benefits." *Id* at 137a–138a.

In these markets, the NCAA's members are competitors, not joint venturers producing a common product. Petitioners point to no findings in the record establishing that the NCAA's thousands of disparate and diverse members comprise a joint venture in the relevant labor markets. Indeed, the term "joint venture" cannot be found in either the district court's or Ninth Circuit's decisions.

As this Court observed about the NFL in *American Needle*,

> [t]he fact that [NCAA schools] share an interest in making the entire league successful and

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> profitable, and that they must cooperate in the production of scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case [that is, agreements to constrain horizontal competition] is still concerted activity under the Sherman Act that is subject to § 1 analysis.

560 U.S. at 202–03; *see also Board of Regents*, 468 U.S. at 113–14 (rejecting NCAA's proffered justification "that its television plan constitutes a cooperative 'joint venture' which assists in the marketing of broadcast rights and hence is procompetitive"); *Law*, 134 F.3d at 1018 n.10 (rejecting NCAA's proffered "joint venture" defense in antitrust challenge to NCAA rules capping compensation for assistant coaches).

Further, even if the decision below somehow did relate to the antitrust treatment of joint ventures, the NCAA's concern about it is misplaced. It is already well established that joint venture agreements are susceptible to antitrust challenge and must be analyzed under the rule of reason. As this Court has explained, because "[j]oint ventures * * * are [] not usually unlawful," these agreements should not be held *per se* illegal but rather "should be subjected to a more discriminating examination under the rule of reason." *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 23–24 (1979) (noting the agreements "may not ultimately survive that attack").

Finally, and again, the NCAA raised these same supposed joint venture concerns in its unsuccessful *O'Bannon* petition. *E.g.*, 2016 WL 2866087, at *3 ("The Ninth Circuit's ruling jeopardizes the vitality of

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not only the NCAA and other amateur sports leagues, but also joint ventures more generally"). They are no more worthy of this Court's review today.

VI. The ongoing legislative efforts in this area make this case particularly unsuitable for review.

Finally, even if there were some need for clarification in the antitrust laws as they apply to NCAA rules, this would be the wrong time for the Court to weigh in, given the ongoing legislative efforts in this area. In recent months, federal and state legislatures have either enacted or considered laws that would allow student-athletes to be paid for the use of their names, images, and likenesses. Five states have already passed such laws, with Florida's scheduled to go into effect on July 1, 2021. And numerous other states have considered or are considering similar bills. Congress is also heavily involved, with bills currently pending in both the House and the Senate, and hearings on student-athlete compensation held by two Senate committees in just the past several months.

Petitioners are actively participating in this legislative process—even proposing their own legislation. *See* Ltr. from Power Five Comm'rs to Cong. Leadership at 1 (May 23, 2020)[10] ("We share the view that federal legislation should be enacted to permit Division I student-athletes to pursue payment from third parties for NIL licensing."); R. Dellenger, *NCAA Presents Congress with Bold Proposal for NIL Legisla-*

[10] https://assets.documentcloud.org/documents/6933292/Power-Five-letter-to-Congress.pdf.

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tion, SPORTS ILLUSTRATED (July 31, 2020)[11] (discussing the NCAA's proposed Intercollegiate Amateur Sports Act of 2020). Indeed, despite their strenuous opposition in *O'Bannon* to compensation for the use of players' names, images, and likenesses, Petitioners have now reversed course and embraced such compensation and are expected to permit it as soon this winter. With the definition of "amateurism" in a state of flux and the legislative branch already actively engaged, certiorari would be particularly inappropriate.

Petitioners' legislative proposals also advocate for effectively the same antitrust immunity that they seek from this Court. *See* May 23 Ltr. at 1 (proposing that federal legislation include "protection from potential legal liability under antitrust and other laws"). One currently pending Senate bill has a safe harbor for the NCAA and its members. *See* Fairness in Collegiate Athletics Act, S.4004, § 4(b) (2020) (except for enforcement by the Federal Trade Commission, "no cause of action shall lie or be maintained in any court against any intercollegiate athletic association, or any institution of higher education which is a member of such association for the adoption or enforcement of a policy, rule, or program established under" the proposed legislation).

In the end, whether through changes by the NCAA's members, by Congress, or by state legislatures, the "amateurism" model is once again in the midst of a paradigm shift. Even if certiorari were

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[11] https://www.si.com/college/2020/07/31/ncaa-sends-congress-nil-legislation-proposal.

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otherwise warranted, this would be the wrong time for the Court to intervene.

CONCLUSION

The courts below applied the well-established rule of reason to a particular set of facts, finding—based on a full trial record—that the agreement of NCAA members to restrict education-related benefits is an unreasonable restraint of trade. Petitioners' argument essentially seeks antitrust immunity—a request that should be directed to Congress, not to this Court. The writ should be denied.

Respectfully submitted.

STEVE W. BERMAN
CRAIG R. SPIEGEL
EMILEE N. SISCO
Hagens Berman Sobol Shapiro LLP
1301 Second Ave., Ste. 2000
Seattle, WA 98101

BRUCE L. SIMON
BENJAMIN E. SHIFTAN
Pearson, Simon & Warshaw LLP
350 Sansome St., Ste. 680
San Francisco, CA 94104

ELIZABETH C. PRITZKER
JONATHAN K. LEVINE
BETHANY L. CARACUZZO
Pritzker Levine LLP
1900 Powell St., Ste. 450
Emeryville, CA 94608

JEFFREY L. KESSLER
DAVID G. FEHER
DAVID L. GREENSPAN
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166

LINDA T. COBERLY
Counsel of Record
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600
lcoberly@winston.com

JEANIFER E. PARSIGIAN
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111

NOVEMBER 9, 2020

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Benjamin M Flowers (Benjamin.Flowers@ohioattorneygeneral.gov)
Cc: Christopher Baum; James Percival; Jeffrey DeSousa
Subject: Fw: Amicus Memo in Lange v. California (U.S.) -- supporting affirmance
Date: Monday, January 11, 2021 1:27:35 PM
Attachments: Lange Amicus Memo.pdf

Ben,

Would you please send us a draft of this brief when it's ready for circulation? We'd appreciate having a chance to review.

Thanks so much, happy new year, and hope all is well.

Best,
Amit

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Monday, December 14, 2020 3:09 PM
To: Dan Schweitzer <dschweitzer@naag.org>
Cc: Benjamin Flowers <Benjamin.Flowers@ohioattorneygeneral.gov>
Subject: Amicus Memo in Lange v. California (U.S.) -- supporting affirmance

To: Criminal Amicus Contacts'
From: Ohio SG Unit

> In *Lange v. California*, No. 20-18, the Supreme Court will consider the following question: May police officers engaged in hot pursuit, and with probable cause to believe a fleeing suspect has committed at least a misdemeanor, pursue a suspect into a home without a warrant? Ohio plans to file an *amicus* brief arguing that the answer is "yes." In other words, Ohio will argue that an officer engaged in a hot pursuit may follow a fleeing suspect into his home without a warrant, and that the officer may do so *without regard* to the seriousness of the offense for which he attempted to make a seizure. The deadline to join will be **January 14, 2021** at **Noon Eastern.** To join or request more information, please contact Ben Flowers at bflowers@ohioattorneygeneral.gov.

[Dan: Please note that IL, DC, IA, MD, MI, NV, OR, and VA joined an amicus brief agreeing with Lange and California that the answer is "no," at least not as a categorical matter]

AMERICAN OVERSIGHT

AMICUS MEMO – AT THE MERITS STAGE

This memo addresses an *amicus* brief that Ohio plans to file in support of the California Court of Appeal's holding in *Lange v. California*, No. 20-18.

PART I -- ACTION ITEMS

1. **Deadline for joining the brief is:** January 14, 2021, Noon Eastern
   Ohio will circulate a brief no later than: January 7, 2021
   Ohio will file its brief no later than: January 15, 2021.

2. **To join or request drafts of the brief, contact the following individuals:**

   Ben Flowers
   Solicitor General
   Office of the Ohio Attorney General
   614.728.7511
   benjamin.flowers@ohioattorneygeneral.gov

   please cc:

   Joshua Richardson
   Executive Assistant
   Office of the Ohio Attorney General
   joshua.richardson@ohioattorneygeneral.gov

PART II -- BASIC CASE INFORMATION

3. **Court:** United States Supreme Court

4. **Case in which amicus brief will be submitted**: *Lange v. California*, No. 20-18.

5. **Decision below:** *People v. Lange*, A157169, 2019 Cal. App. Unpub. LEXIS 7266 (Cal. 1st Dist. Oct. 30, 2019).

6. **Amicus brief is supporting:** Affirmance of lower court's holding in favor of the State (position now advocated for by court-appointed *amicus*)

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PART III -- DETAILED CASE INFORMATION

7. Question Presented:

This case presents the following Fourth Amendment question: May police officers—engaged in hot pursuit and with probable cause to believe a fleeing suspect has committed at least a misdemeanor—pursue a suspect into a home without a warrant?

8. Arguments of parties:

The parties raise competing arguments concerning how the hot-pursuit doctrine (as described in *United States v. Santana*, 427 U.S. 38 (1976)) applies when police officers pursue a person whom they have probable cause to believe has committed a misdemeanor.

Lange seeks to exclude evidence that he was driving under the influence. He argues that police officers violated his Fourth Amendment rights by following him into his garage, notwithstanding the fact that he failed to yield to a police car's flashing lights while still in a public place. (The failure to obey a police officer's instruction is a misdemeanor under California law.) Under Lange's proposed rule, hot pursuit is not enough to justify warrantless entry in the misdemeanor context; the government must instead make a separate case-specific showing of exigency on top of hot pursuit.

An *amicus* appointed by the Court will argue in support of the California Court of Appeal's holding below. More precisely, counsel will (presumably) argue that hot pursuit is a standalone category of exigency justifying warrantless entry into the home. Moreover, counsel will (presumably) argue that the legality of a warrantless entry performed after a hot pursuit does not depend on the classification of the underlying offense that gives rise to the chase.

9. Interests of the States and legal arguments to be made by the state amicus brief:

Ohio's brief will support Court-appointed counsel's position that, under the Fourth Amendment, hot pursuit itself justifies warrantless entry into the home regardless of whether the inciting offense is a felony or misdemeanor.

First, Ohio plans to emphasize that the balance of state interests and privacy concerns militates in favor of a bright-line rule permitting warrantless entry into a home during a hot pursuit. On the state-interest side, a suspect's act of fleeing from police raises commonsense inferences that something more serious than a minor offense has occurred. *See*

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Illinois v. Wardlow, 528 U. S. 119, 124–25 (2000). Thus, a suspect's choice to flee from police suggests that the public safety requires his arrest. On the privacy-expectations side, a suspect cannot manufacture an otherwise-nonexistent privacy interest by voluntarily fleeing from a public encounter with police into the home. *See Santana*, 427 U.S. at 42–43.

All told, viewing both sides of the Fourth Amendment reasonableness balance, the reasonableness of pursuing a fleeing suspect does not depend on the classification of the underlying offense (which sparks the chase).

Second, Ohio plans to argue that Lange's proposed case-by-case approach to misdemeanor hot pursuits lacks support on several fronts. For one thing, although Lange appeals to the Fourth Amendment's original meaning, that original meaning requires affirmance, not reversal. For another thing, requiring police officers to distinguish between misdemeanors and felonies mid-chase, and then conduct some sort of case-specific exigency analysis mid-chase, is unworkable in practice. In addition, such a rule would improperly reward drunk drivers and other suspects who choose to flee from police. Finally, Ohio plans to emphasize an important virtue of federalism: if State and local governments think it wise policy to restrict when police officers may chase suspects, they are free to impose their own restrictions. They do not need the Court to tell them what to do.

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Robert_Luck@ca11.uscourts.gov
Subject: Fw: job opportunities in the Office of the Florida Solicitor General
Date: Monday, November 23, 2020 5:06:07 PM
Attachments: Job Opportunities in the Office of the Florida Solicitor General, November 2020.pdf

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Judge Luck,

It was great to chat with you just now. Thanks so much for taking the time to talk.

Our vacancy announcement is attached. Please feel free to pass this on to anyone who might be interested, or who might help us spread the word.

Hope you and your family have a Happy Thanksgiving!

Best,
Amit

From: Amit Agarwal
Sent: Friday, November 20, 2020 3:29 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Jenna Hodges <Jenna.Hodges@myfloridalegal.com>
Subject: job opportunities in the Office of the Florida Solicitor General

Dear Friends,

The Florida SG's office is considering applications for the positions of Deputy Solicitor General and Assistant Solicitor General. Please see the attached vacancy announcement for information about those positions and how to apply. The current application deadline is November 30; if it's not convenient to fill out a formal online application by then, interested candidates can get the ball rolling by emailing a resume and short note or cover letter to me and my assistant (Jenna Hodges, copied here).

I'd be immensely grateful if you would help us to circulate this announcement as widely as possible. Please feel free to drop me a line if you have any questions, know anyone who might be interested, or would like more information about the current vacancies or other potential opportunities within the office. I'd be more than glad to chat.

My apologies for the mass email, and thanks so much for taking the time to consider this. I hope you and your families are safe and well.

Best,
Amit

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol

AMERICAN OVERSIGHT

Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com

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Florida Solicitor General
Amit.Agarwal@myfloridalegal.com

Jenna Hodges
Administrative Assistant to the Solicitor General
Jenna.Hodges@myfloridalegal.com
(850) 414-3807

AMERICAN OVERSIGHT

From: Amit Agarwal
To: fedsoctlh@gmail.com
Subject: Fw: job opportunities in the Office of the Florida Solicitor General
Date: Friday, November 20, 2020 5:09:01 PM
Attachments: Job Opportunities in the Office of the Florida Solicitor General, November 2020.pdf

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John,

It was great to talk with you just now. Our vacancy announcement is attached. If it's not too much trouble, I'd be immensely grateful if you would help us circulate this posting to the national Fed Soc membership, including especially folks in the DC area and Florida.

Happy to discuss if you have any questions or would like some more information. Thanks so much for your time and help!

Best,
Amit

From: Amit Agarwal
Sent: Friday, November 20, 2020 3:29 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Jenna Hodges <Jenna.Hodges@myfloridalegal.com>
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Best,
Amit

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Office of the Attorney General
Solicitor General
PL-01, The Capitol

AMERICAN OVERSIGHT

Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com

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Jenna Hodges
Administrative Assistant to the Solicitor General
Jenna.Hodges@myfloridalegal.com
(850) 414-3807

AMERICAN OVERSIGHT

From:	Amit Agarwal
To:	neomirao@gmail.com
Subject:	Fw: job opportunities in the Office of the Florida Solicitor General
Date:	Friday, November 20, 2020 4:52:22 PM
Attachments:	Job Opportunities in the Office of the Florida Solicitor General, November 2020.pdf

Dear Judge Rao,

Greetings from Tallahassee. I hope this message finds you well.

I'm writing to let you know that the Florida SG's office is considering applications for the positions of Deputy Solicitor General and Assistant Solicitor General. The attached vacancy announcement includes some information about the office and how to apply. Our application deadline is November 30. If it's not convenient to fill out a formal online application by then, interested candidates can get the ball rolling by emailing me a resume.

If it's not too much trouble, I would be immensely grateful if you would consider forwarding this message to any of your former or current law clerks who might be interested in the work of the SG's office. Please don't hesitate to let me know if you have any questions or would like more information about the current vacancies or other potential opportunities within the office. I'd be more than glad to chat.

I know how busy you are and hope you won't mind my sending this to you. Thanks so much for taking the time to consider this.

Best,
Amit

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com
Office: (850) 414-3688

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Jenna Hodges
Administrative Assistant to the Solicitor General
Jenna.Hodges@myfloridalegal.com
(850) 414-3807

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Shelly Blincoe
Subject: Fw: job opportunities in the Office of the Florida Solicitor General
Date: Monday, November 9, 2020 5:13:35 PM
Attachments: Job Opportunities in the Office of the Florida Solicitor General, November 2020.pdf

---

Shelly,

Greetings from Florida! Hope you and your family are safe and well.

Am writing to let you know that the Florida SG's office is considering applications for the positions of Deputy Solicitor General and Assistant Solicitor General. Our vacancy announcement is attached. If it's not too much trouble, I'd be very grateful if you could help us spread the word. If you know of anyone who might be interested, I'd of course be glad to chat about the current vacancies or other potential opportunities in the office.

Thanks so much!

Best,
Amit

From: Amit Agarwal
Sent: Monday, November 9, 2020 1:43 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Jenna Hodges <Jenna.Hodges@myfloridalegal.com>
Subject: job opportunities in the Office of the Florida Solicitor General

Dear Friends,

The Florida SG's office is considering applications for the positions of Deputy Solicitor General and Assistant Solicitor General. Please see the attached vacancy announcement for information about those positions and how to apply. The current application deadline is November 30. If it's not convenient to fill out a formal online application by then, interested candidates can get the ball rolling by emailing a resume and short note or cover letter to me and my assistant (Jenna Hodges, copied here).

I'd be immensely grateful if you would help us to circulate this announcement as widely as possible. Please feel free to drop me a line if you have any questions, know anyone who might be interested, or would like more information about the current vacancies or other potential opportunities within the office. I'd be more than glad to chat.

Thanks so much for taking the time to consider this. I hope you and your families are safe and well.

Best,
Amit

Amit Agarwal

AMERICAN OVERSIGHT

Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com

AMERICAN OVERSIGHT

JOB OPPORTUNITIES IN THE OFFICE OF THE FLORIDA SOLICITOR GENERAL

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Amit.Agarwal@myfloridalegal.com

Jenna Hodges
Administrative Assistant to the Solicitor General
Jenna.Hodges@myfloridalegal.com
(850) 414-3807

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Dan Schweitzer
Subject: Fw: job opportunities in the Office of the Florida Solicitor General
Date: Monday, November 9, 2020 4:49:55 PM
Attachments: Job Opportunities in the Office of the Florida Solicitor General, November 2020.pdf

---

Dan,

Greetings from Florida, and hope this message finds you well.

The SG's office is considering applications for Deputy Solicitor General and Assistant Solicitor General. Our vacancy announcement is attached. Would be very grateful if you would help us spread the word.

Thanks so much.

Best,
Amit

From: Amit Agarwal
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To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Jenna Hodges <Jenna.Hodges@myfloridalegal.com>
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Office of the Attorney General
Solicitor General

AMERICAN OVERSIGHT

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Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com

AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

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Jenna Hodges
Administrative Assistant to the Solicitor General
Jenna.Hodges@myfloridalegal.com
(850) 414-3807

AMERICAN OVERSIGHT

From: Amit Agarwal
To: John.MacIver@myfloridacfo.com
Subject: Fw: job opportunities in the Office of the Florida Solicitor General
Date: Monday, November 30, 2020 2:54:00 PM
Attachments: Job Opportunities in the Office of the Florida Solicitor General, 11.25.2020.pdf

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John,

Hope you and your family had a Happy Thanksgiving. Just wanted to send you an updated version of our vacancy announcement, which extends our application deadline to Friday, December 11. If it's not too much trouble, would you please forward this on to anyone who might be interested or who could help us spread the word, including your TLH Fed Soc membership list? Also, do you think you could put me in touch with someone from the national organization who might help us spread the word to national Fed Soc members?

I know how busy you are and am very sorry to bother you with this. Thanks so much for any help.

Best,
Amit

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Friday, November 20, 2020 5:09 PM
To: fedsoctlh@gmail.com <fedsoctlh@gmail.com>
Subject: Fw: job opportunities in the Office of the Florida Solicitor General

John,

It was great to talk with you just now. Our vacancy announcement is attached. If it's not too much trouble, I'd be immensely grateful if you would help us circulate this posting to the national Fed Soc membership, including especially folks in the DC area and Florida.

Happy to discuss if you have any questions or would like some more information. Thanks so much for your time and help!

Best,
Amit

From: Amit Agarwal
Sent: Friday, November 20, 2020 3:29 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Jenna Hodges <Jenna.Hodges@myfloridalegal.com>
Subject: job opportunities in the Office of the Florida Solicitor General

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AMERICAN OVERSIGHT

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My apologies for the mass email, and thanks so much for taking the time to consider this. I hope you and your families are safe and well.

Best,
Amit

Amit Agarwal
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PL-01, The Capitol
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AMERICAN OVERSIGHT

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Amit.Agarwal@myfloridalegal.com

Jenna Hodges
Administrative Assistant to the Solicitor General
Jenna.Hodges@myfloridalegal.com
(850) 414-3807

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Andree S. Blumstein
Subject: Re: Amicus Brief for SmileDirectClub, LLC v. Battle (11th Cir.) (en banc)
Date: Monday, January 4, 2021 1:48:26 PM

Great -- thanks so much!

From: Andree S. Blumstein <Andree.Blumstein@ag.tn.gov>
Sent: Monday, January 4, 2021 1:46 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Sarah K. Campbell <Sarah.Campbell@ag.tn.gov>; Clark Hildabrand <Clark.Hildabrand@ag.tn.gov>; Christopher Baum <Christopher.Baum@myfloridalegal.com>; James Percival <James.Percival@myfloridalegal.com>; Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>; Evan Ezray <Evan.Ezray@myfloridalegal.com>
Subject: RE: Amicus Brief for SmileDirectClub, LLC v. Battle (11th Cir.) (en banc)

Thanks! We are pleased to confirm receipt of your email and to add Florida. We will send you a copy of the as-filed brief. Happy new year!

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Monday, January 4, 2021 12:44 PM
To: Andree S. Blumstein <Andree.Blumstein@ag.tn.gov>
Cc: Sarah K. Campbell <Sarah.Campbell@ag.tn.gov>; Clark Hildabrand <Clark.Hildabrand@ag.tn.gov>; Christopher Baum <Christopher.Baum@myfloridalegal.com>; James Percival <James.Percival@myfloridalegal.com>; Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>; Evan Ezray <Evan.Ezray@myfloridalegal.com>
Subject: Re: Amicus Brief for SmileDirectClub, LLC v. Battle (11th Cir.) (en banc)

Florida is pleased to join your amicus brief in this case. Our Attorney General's name is Ashley Moody.

If it's not too much trouble, please confirm receipt of this email and send us a copy of the final as-filed brief when you get a chance.

Thanks so much, and happy new year!

Best,
Amit

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Wednesday, December 23, 2020 4:57 PM
To: Dan Schweitzer <dschweitzer@naag.org>
Cc: Andree.Blumstein@ag.tn.gov <Andree.Blumstein@ag.tn.gov>; Sarah.Campbell@ag.tn.gov <Sarah.Campbell@ag.tn.gov>; Clark.Hildabrand@ag.tn.gov <Clark.Hildabrand@ag.tn.gov>
Subject: Amicus Brief for SmileDirectClub, LLC v. Battle (11th Cir.) (en banc)

AMERICAN OVERSIGHT

To: Civil Amicus Contacts
From: Tennessee AGO

Attached is Tennessee's draft amicus brief in *SmileDirectClub, LLC v. Battle*, No. 19-1227 (11th Cir.) (en banc). The brief argues that interlocutory orders denying state-action immunity to public entities in antitrust actions are immediately appealable under the collateral-order doctrine. The sign-on deadline is Monday, January 4, 2021 by noon central time. To join, please contact the following attorneys:

Andrée Blumstein
Solicitor General
615-741-3492
Andree.Blumstein@ag.tn.gov

Sarah Campbell
Associate Solicitor General
615-532-6026
Sarah.Campbell@ag.tn.gov

Clark Hildabrand
Assistant Solicitor General
615-253-5642
Clark.Hildabrand@ag.tn.gov

Also attached is the amicus memo circulated yesterday.

AMERICAN OVERSIGHT

From:	Amit Agarwal
To:	Andree.Blumstein@ag.tn.gov
Cc:	Sarah.Campbell@ag.tn.gov; Clark.Hildabrand@ag.tn.gov; Christopher Baum; James Percival; Jeffrey DeSousa; Evan Ezray
Subject:	Re: Amicus Brief for SmileDirectClub, LLC v. Battle (11th Cir.) (en banc)
Date:	Monday, January 4, 2021 1:44:18 PM

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Subject: Amicus Brief for SmileDirectClub, LLC v. Battle (11th Cir.) (en banc)

To: Civil Amicus Contacts
From: Tennessee AGO

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Cc:	Andree S. Blumstein; Sarah K. Campbell; Christopher Baum; James Percival; Jeffrey DeSousa; Evan Ezray
Subject:	Re: Amicus Brief for SmileDirectClub, LLC v. Battle (11th Cir.) (en banc)
Date:	Monday, January 4, 2021 5:56:15 PM

Thanks -- much appreciated!

Best,
Amit

From: Clark Hildabrand <Clark.Hildabrand@ag.tn.gov>
Sent: Monday, January 4, 2021 5:54 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Andree S. Blumstein <Andree.Blumstein@ag.tn.gov>; Sarah K. Campbell <Sarah.Campbell@ag.tn.gov>; Christopher Baum <Christopher.Baum@myfloridalegal.com>; James Percival <James.Percival@myfloridalegal.com>; Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>; Evan Ezray <Evan.Ezray@myfloridalegal.com>
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Amit,

Thanks again to Florida for joining our amicus brief in *SmileDirectClub, LLC v. Battle*. Attached for your records is a copy of the brief, which we filed this afternoon.

Best,
Clark

Clark L. Hildabrand
Assistant Solicitor General
Office of Tennessee Attorney General
PO Box 20207
Nashville, TN 37202-0207
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Clark.Hildabrand@ag.tn.gov

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Clark Hildabrand
Assistant Solicitor General
615-253-5642
Clark.Hildabrand@ag.tn.gov

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From:	Amit Agarwal
To:	Bechara, Jacqueline (OAG); AliKhan, Loren (OAG)
Cc:	Christopher Baum; James Percival
Subject:	Re: Amicus Brief in Uzuegbunam v. Preczewski (U.S.)
Date:	Friday, November 20, 2020 11:24:28 AM

Thank you, and great job on the brief!

From: Bechara, Jacqueline (OAG) <Jacqueline.Bechara@dc.gov>
Sent: Friday, November 20, 2020 11:22 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>; AliKhan, Loren (OAG) <loren.alikhan@dc.gov>
Cc: Christopher Baum <Christopher.Baum@myfloridalegal.com>; James Percival <James.Percival@myfloridalegal.com>
Subject: RE: Amicus Brief in Uzuegbunam v. Preczewski (U.S.)

Thank you, Amit! We are so pleased to have Florida on board, and we'll send you a PDF of the as-filed brief.

Thanks again,
Jackie

Jacqueline R. Bechara
Assistant Attorney General
Office of the Solicitor General
Office of the Attorney General for the District of Columbia
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 255-3681 (cell)
(202) 788-2076 (office)
(202) 730-1499 (fax)
jacqueline.bechara@dc.gov

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Friday, November 20, 2020 11:21 AM
To: AliKhan, Loren (OAG) <loren.alikhan@dc.gov>; Bechara, Jacqueline (OAG) <Jacqueline.Bechara@dc.gov>
Cc: Christopher Baum <Christopher.Baum@myfloridalegal.com>; James Percival <James.Percival@myfloridalegal.com>
Subject: Fw: Amicus Brief in Uzuegbunam v. Preczewski (U.S.)

CAUTION: This email originated from outside of the DC Government. Do not click on links or open attachments unless you recognize the sender and know that the content is safe. If you believe that this email is suspicious, please forward to phishing@dc.gov for additional analysis by OCTO Security Operations Center (SOC).

Loren,

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Greetings from Florida. Hope this message finds you well.

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Subject: Amicus Brief in Uzuegbunam v. Preczewski (U.S.)

To: Civil Amicus Contacts

Attached is the District of Columbia's draft amicus brief supporting respondents, former officials of Georgia Gwinnett College, in *Uzuegbunam v.* Preczewski, No. 19-968, which is being litigated on the merits in the Supreme Court. The Court granted cert in this case to resolve whether a government's post-filing change of an unconstitutional policy moots claims for nominal damages based on past, completed constitutional violations. Respondents, represented by Georgia's SG, will argue that if a plaintiff's challenge to a repealed law or policy is otherwise moot, a claim solely for nominal damages does not create a live controversy under Article III.

Because of our Supreme Court printer's Thanksgiving schedule, we request joins by **2pm on Friday, November 20**, and substantive edits by COB on Wednesday, November 18. Please email Loren AliKhan (loren.alikhan@dc.gov) and Jackie Bechara (jacqueline.bechara@dc.gov) to join or with any questions.

Best,

Loren L. AliKhan
Solicitor General
Office of the Attorney General for the District of Columbia
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 727-6287 (phone)
(202) 717-1273 (cell)
(202) 730-1864 (fax)

AMERICAN OVERSIGHT

Loren.AliKhan@dc.gov

OAG has moved. Please note our new address.

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Thursday, October 15, 2020 1:24 PM
To: Dan Schweitzer <dschweitzer@naag.org>
Cc: Phillips, Graham (OAG) <Graham.Phillips@dc.gov>; VanZile, Caroline (OAG) <Caroline.VanZile@dc.gov>
Subject: Revised Amicus Memo in Uzuegbunam v. Preczewski (U.S.)

To: Civil Amicus Contacts

Attached is a revised Amicus Memo describing the amicus brief the District of Columbia is preparing supporting respondents, former officials of Georgia Gwinnett College, in *Uzuegbunam v.* Preczewski, No. 19-968 (U.S.). The revised memo reflects a one-month extension respondents received to file their brief (which thereby extended the deadline for the amicus brief).

From: Dan Schweitzer
Sent: Tuesday, August 25, 2020 12:08 PM
To: Dan Schweitzer <dschweitzer@naag.org>
Cc: graham.phillips@dc.gov; Caroline.VanZile@dc.gov
Subject: Amicus Memo and Information Request in Uzuegbunam v. Preczewski (U.S.)

To: Civil Amicus Contacts

The District of Columbia is preparing an amicus brief supporting respondents, former officials of Georgia Gwinnett College, in *Uzuegbunam v.* Preczewski, No. 19-968, which is being litigated on the merits in the Supreme Court. The Supreme Court granted cert in this case to resolve whether a government's post-filing change of an unconstitutional policy moots claims for nominal damages based on past, completed constitutional violations. Respondents will argue that if a plaintiff's challenge to a repealed law or policy is otherwise moot, a claim solely for nominal damages does not create a live controversy under Article III.

Although we are still formulating the precise arguments that our amicus brief will contain, we expect to contend that it is in the interests of States, their agencies, and their officials that plaintiffs not be allowed to maintain otherwise moot constitutional challenges when all they seek is nominal damages. Such suits do not yield any prospective benefits—since by hypothesis the relevant law has already been repealed—nor do they provide injured plaintiffs with any real redress—since the very nature of nominal damages is that they are merely symbolic, not compensatory. But such suits do consume States' limited litigation resources and can lead to awards of attorney's fees. They can also allow ideologically driven plaintiffs to pursue harmful precedent even after the relevant law is off the

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books. Finally, a contrary rule can disincentivize States from reforming or repealing problematic policies: if a State will have to continue litigating the case even if it changes the policy, it may be more inclined to keep the policy and defend it on the merits.

As we craft the brief, **it would be helpful to know the following**, if possible, with citation or link to public records, documents, articles, and/or cases:

- Please let us know of any cases you are aware of in which plaintiffs sought *only* nominal damages based on (alleged) past violations of constitutional rights caused by a since-repealed law or policy. Please include docket numbers or reporter information.

- Please also let us know of instances you are aware of in which state or local governments have repealed constitutionally questionable laws or policies to resolve or preempt litigation. Our goal is to show that state and local governments have a healthy incentive to eliminate questionable policies if doing so will moot litigation.

Please contact graham.phillips@dc.gov with your responses. We will circulate the draft brief on or around **October 20**, in advance of the **October 26 join deadline**. Many thanks for your help.

Sincerely,

Caroline S. Van Zile
Principal Deputy Solicitor General
Office of the Attorney General for the District of Columbia
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(917) 971-0361 (cell)
(202) 724-6609 (phone)
(202) 741-0649 (fax)
caroline.vanzile@dc.gov

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Dan Schweitzer
Cc: Jeffrey DeSousa; James Percival; Christopher Baum
Subject: Re: Amicus Briefs
Date: Monday, November 23, 2020 3:48:34 PM

Dan,

Based on our preliminary review, we think this would be a good candidate for a Florida-authored amicus brief. I plan to run this by our front office and would need to get our AG's approval before we make any kind of public announcement. In the meantime, is there anything we need to do to get the ball rolling?

Thanks again for thinking of us. It's much appreciated.

Best,
Amit

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Wednesday, November 18, 2020 2:58 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Amicus Briefs

Amit, the Court has relisted a Fourth Amendment case in which a state amicus brief would likely be very helpful. The petitioner has top lawyers from Jones Day on the brief; respondent (the police officers and city) has local counsel from Rhode Island. From SCOTUSblog:

Caniglia v. Strom, 20-157

Issue: Whether the "community caretaking" exception to the Fourth Amendment's warrant requirement extends to the home.

****

Dan Schweitzer
Director and Chief Counsel, Center for Supreme Court Advocacy
National Association of Attorneys General
1850 M Street, NW, 12th Floor
Washington, DC 20036
(202) 326-6010
dschweitzer@naag.org
www.naag.org

Visit NAAG's Members-Only COVID-19 Resource Page. AGO staff can request access to the page here.

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Dan Schweitzer
Subject: Re: Amicus Briefs
Date: Wednesday, November 18, 2020 3:01:04 PM

Thanks Dan -- sounds interesting, and very much appreciate your thinking of us.

We'll take a look and get back to you with any thoughts.

Best,
Amit

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Wednesday, November 18, 2020 2:58 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Amicus Briefs

Amit, the Court has relisted a Fourth Amendment case in which a state amicus brief would likely be very helpful. The petitioner has top lawyers from Jones Day on the brief; respondent (the police officers and city) has local counsel from Rhode Island. From SCOTUSblog:

Caniglia v. Strom, 20-157

Issue: Whether the "community caretaking" exception to the Fourth Amendment's warrant requirement extends to the home.

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Dan Schweitzer
Director and Chief Counsel, Center for Supreme Court Advocacy
National Association of Attorneys General
1850 M Street, NW, 12th Floor
Washington, DC 20036
(202) 326-6010
dschweitzer@naag.org
www.naag.org

Visit NAAG's Members-Only COVID-19 Resource Page. AGO staff can request access to the page here.

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Dan Schweitzer
Cc: Jeffrey DeSousa; James Percival; Christopher Baum
Subject: Re: Amicus Briefs
Date: Tuesday, November 24, 2020 4:36:22 PM

Dan,

I just heard back from our front office. We gave the matter careful consideration, but unfortunately Florida will not be able to take the lead on drafting an amicus brief in this case. I'm sorry this one didn't work out, but we are tremendously grateful to you for letting us know about this opportunity and hope you will keep us in mind for future amicus opportunities.

I had a chance to talk with Mike and he was very understanding. He may be in touch with you soon to discuss next steps.

Hope you and your family have a Happy Thanksgiving.

Best,
Amit

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Monday, November 23, 2020 3:53 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>; James Percival <James.Percival@myfloridalegal.com>; Christopher Baum <Christopher.Baum@myfloridalegal.com>
Subject: Re: Amicus Briefs

Terrific. No, there's nothing else you'd need to do. But you should expect a call from Mike Field of the Rhode Island AGO. He said his office might be interested as well (because the case arises out of RI). You're under no obligation to accede to RI, but hopefully RI would back off if they see you're already trying to get front office approval.

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Monday, November 23, 2020 3:48 PM
To: Dan Schweitzer <dschweitzer@naag.org>
Cc: Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>; James Percival <James.Percival@myfloridalegal.com>; Christopher Baum <Christopher.Baum@myfloridalegal.com>
Subject: Re: Amicus Briefs

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dan,

Based on our preliminary review, we think this would be a good candidate for a Florida-

AMERICAN OVERSIGHT

authored amicus brief. I plan to run this by our front office and would need to get our AG's approval before we make any kind of public announcement. In the meantime, is there anything we need to do to get the ball rolling?

Thanks again for thinking of us. It's much appreciated.

Best,
Amit

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Wednesday, November 18, 2020 2:58 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Amicus Briefs

Amit, the Court has relisted a Fourth Amendment case in which a state amicus brief would likely be very helpful. The petitioner has top lawyers from Jones Day on the brief; respondent (the police officers and city) has local counsel from Rhode Island. From SCOTUSblog:

Caniglia v. Strom, 20-157

Issue: Whether the "community caretaking" exception to the Fourth Amendment's warrant requirement extends to the home.

****

Dan Schweitzer
Director and Chief Counsel, Center for Supreme Court Advocacy
National Association of Attorneys General
1850 M Street, NW, 12th Floor
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(202) 326-6010
dschweitzer@naag.org
www.naag.org

Visit NAAG's Members-Only COVID-19 Resource Page. AGO staff can request access to the page here.

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Benjamin Flowers
Cc: Christopher Baum; James Percival; Jeffrey DeSousa
Subject: Re: Amicus Memo in Lange v. California (U.S.) -- supporting affirmance
Date: Monday, January 11, 2021 1:49:03 PM

Thanks Ben -- much appreciated.

From: Benjamin Flowers <Benjamin.Flowers@ohioattorneygeneral.gov>
Sent: Monday, January 11, 2021 1:39 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Christopher Baum <Christopher.Baum@myfloridalegal.com>; James Percival <James.Percival@myfloridalegal.com>; Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>
Subject: RE: Amicus Memo in Lange v. California (U.S.) -- supporting affirmance

Amit,

I've attached the current draft, which I hope is final. The current list of States who've signed on is: Alabama, Idaho, Kansas, and Louisiana.

Ben Flowers
Ohio Solicitor General
Office of Ohio Attorney General Dave Yost
Office number: (614) 728-7511
benjamin.flowers@ohioattorneygeneral.gov

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Monday, January 11, 2021 1:28 PM
To: Benjamin Flowers <Benjamin.Flowers@ohioattorneygeneral.gov>
Cc: Christopher Baum <Christopher.Baum@myfloridalegal.com>; James Percival <James.Percival@myfloridalegal.com>; Jeffrey DeSousa <Jeffrey.DeSousa@myfloridalegal.com>
Subject: Fw: Amicus Memo in Lange v. California (U.S.) -- supporting affirmance

Ben,

Would you please send us a draft of this brief when it's ready for circulation? We'd appreciate having a chance to review.

Thanks so much, happy new year, and hope all is well.

Best,
Amit

From: Dan Schweitzer <dschweitzer@naag.org>
Sent: Monday, December 14, 2020 3:09 PM

AMERICAN OVERSIGHT

To: Dan Schweitzer <dschweitzer@naag.org>
Cc: Benjamin Flowers <Benjamin.Flowers@ohioattorneygeneral.gov>
Subject: Amicus Memo in Lange v. California (U.S.) -- supporting affirmance

To: Criminal Amicus Contacts'
From: Ohio SG Unit

> In *Lange v. California*, No. 20-18, the Supreme Court will consider the following question: May police officers engaged in hot pursuit, and with probable cause to believe a fleeing suspect has committed at least a misdemeanor, pursue a suspect into a home without a warrant? Ohio plans to file an *amicus* brief arguing that the answer is "yes." In other words, Ohio will argue that an officer engaged in a hot pursuit may follow a fleeing suspect into his home without a warrant, and that the officer may do so *without regard* to the seriousness of the offense for which he attempted to make a seizure. The deadline to join will be **January 14, 2021** at **Noon Eastern.** To join or request more information, please contact Ben Flowers at bflowers@ohioattorneygeneral.gov.

[Dan: Please note that IL, DC, IA, MD, MI, NV, OR, and VA joined an amicus brief agreeing with Lange and California that the answer is "no," at least not as a categorical matter]

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Michael Field
Subject: Re: Caniglia v. Strom
Date: Tuesday, November 24, 2020 12:29:58 PM

Of course -- would be glad to chat.

Sorry for delay in responding -- have been out of the office for the last day and didn't get your voicemail till just now.

Will call you shortly from my cell [redacted] and look forward to talking.

Best,
Amit

From: Michael Field <MField@riag.ri.gov>
Sent: Tuesday, November 24, 2020 12:21 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Caniglia v. Strom

Hi Amit:

I left you a voice mail the other day, but not sure if you are checking those messages so I'm following up through this email.

I was talking to Dan Schweitzer the other day about this case and he indicated Florida may have interest in writing an amicus. Rhode Island also has at least some interest.

Do you have a couple minutes to talk about whether Florida is going to write an amicus and what role, if any, Rhode Island might have? Best way to reach me is on my cell phone 401-487-0896.

Thank you.

Michael Field

Michael W. Field | **Assistant Attorney General, Civil Division**
The State of Rhode Island | Office of the Attorney General

AMERICAN OVERSIGHT

150 South Main Street | Providence, Rhode Island - 02903
Office: +1 401 274 4400 | Ext:2380
mfield@riag.ri.gov| www.riag.ri.gov |

CONFIDENTIALITY NOTE:
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AMERICAN OVERSIGHT

From: Amit Agarwal
To: Tallahassee FedSoc
Subject: Re: Fw: job opportunities in the Office of the Florida Solicitor General
Date: Tuesday, December 1, 2020 10:20:56 AM
Attachments: Job Opportunities in the Office of the Florida Solicitor General, 11.25.2020.pdf

---

Thank you so much! I know how busy you are and can't tell you how grateful we are for your time and help.

If it's not too much trouble please make sure to circulate the latest vacancy announcement attached to yesterday's email (and attached here as well), as that includes our updated application deadline of December 11.

From: Tallahassee FedSoc <fedsoctlh@gmail.com>
Sent: Tuesday, December 1, 2020 10:16 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Re: Fw: job opportunities in the Office of the Florida Solicitor General

Hi Amit,

Going out in 2 batches to our Tallahassee list (Today and Tomorrow). I also forwarded to Lisa in the DC office to spread the word nationally and especially in DC. I will follow up as soon as I hear back.

Thanks,
jm

On Fri, Nov 20, 2020 at 5:32 PM Amit Agarwal <Amit.Agarwal@myfloridalegal.com> wrote:

> John,
>
> It was great to talk with you just now. Our vacancy announcement is attached. If it's not too much trouble, I'd be immensely grateful if you would help us circulate this posting to the national Fed Soc membership, including especially folks in the DC area and Florida.
>
> Happy to discuss if you have any questions or would like some more information. Thanks so much for your time and help!
>
> Best,
> Amit
>
> ---
>
> **From:** Amit Agarwal
> **Sent:** Friday, November 20, 2020 3:29 PM
> **To:** Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
> **Cc:** Jenna Hodges <Jenna.Hodges@myfloridalegal.com>

AMERICAN OVERSIGHT

Subject: job opportunities in the Office of the Florida Solicitor General

Dear Friends,

The Florida SG's office is considering applications for the positions of Deputy Solicitor General and Assistant Solicitor General. Please see the attached vacancy announcement for information about those positions and how to apply. The current application deadline is November 30; if it's not convenient to fill out a formal online application by then, interested candidates can get the ball rolling by emailing a resume and short note or cover letter to me and my assistant (Jenna Hodges, copied here).

I'd be immensely grateful if you would help us to circulate this announcement as widely as possible. Please feel free to drop me a line if you have any questions, know anyone who might be interested, or would like more information about the current vacancies or other potential opportunities within the office. I'd be more than glad to chat.

My apologies for the mass email, and thanks so much for taking the time to consider this. I hope you and your families are safe and well.

Best,
Amit

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com

AMERICAN OVERSIGHT

JOB OPPORTUNITIES IN THE OFFICE OF THE FLORIDA SOLICITOR GENERAL

The Florida Solicitor General's Office is considering applications for the positions of Deputy Solicitor General and Assistant Solicitor General. These new positions are part of a major expansion of the Office and reflect its growing portfolio, particularly in the areas of constitutional and criminal appellate litigation.

The Office of the Solicitor General represents the State of Florida in the U.S. Supreme Court and the Florida Supreme Court, litigates cases of exceptional public importance in federal and state appellate and trial courts, supervises appellate litigation in cases to which the State is a party, provides legal advice and policy guidance to the Attorney General, and coordinates the State's amicus practice as well as its involvement in multistate litigation. Assistant and Deputy SGs, including two Chief Deputies (one on the civil side, and one on the criminal side) assist the Solicitor General with all aspects of the work of the Office.

Attorneys serving in the Office regularly brief and argue high-profile cases, including constitutional challenges to significant state statutes, in the Florida Supreme Court, the U.S. Court of Appeals for the Eleventh Circuit, and lower state and federal trial and appellate courts. In addition, attorneys routinely work on cutting-edge legal issues, interact with the State's leading lawyers and policymakers, and collaborate with top appellate attorneys serving in private practice, other states, and the U.S. Department of Justice.

Applicants for the position of Assistant Solicitor General should have excellent written and oral advocacy skills, outstanding academic credentials, and at least two years of legal experience. Applicants for the position of Deputy Solicitor General should have, in addition to those qualifications, at least five years of legal experience, as well as demonstrated proficiency litigating civil appeals, criminal appeals, or constitutional issues. For both positions, a clerkship on a federal appellate court or the Florida Supreme Court is highly desirable.

If selected, an applicant who is not already a member of the Florida bar must gain such admission within one year of the date of appointment. All new hires are required to make a two-year commitment to the Office.

The Solicitor General's Office is part of the Office of the Attorney General, which has offices in Fort Lauderdale, Jacksonville, Miami, Orlando, Tampa, Tallahassee, and West Palm Beach. Qualified candidates for the Deputy and Assistant positions are welcome to apply if they would be able to work out of any of those offices, but preference will be accorded to candidates who live in, or are willing to relocate to, Tallahassee, where the Office is based.

Applications will be considered on a rolling basis, but should be submitted by December 11, 2020. To avoid unnecessary travel and exposure, the Office plans to conduct interviews by video conference.

To apply for these positions, please visit the website below and fill out an online application per the instructions listed for each position:

https://jobs.myflorida.com/go/Office-of-the-Attorney-General/2818600/

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Candidates may informally express their interest in applying for one or both of the posted vacancies by emailing a resume to the Solicitor General and his assistant; their email addresses are listed below. Such candidates will be considered for the current round of hiring if their resume is received by December 11. However, all candidates will be required to fill out an online application prior to scheduling an interview.

Amit Agarwal
Florida Solicitor General
Amit.Agarwal@myfloridalegal.com

Jenna Hodges
Administrative Assistant to the Solicitor General
Jenna.Hodges@myfloridalegal.com
(850) 414-3807

AMERICAN OVERSIGHT

From:	Amit Agarwal
To:	Zack Smith
Cc:	Phipps, Alexander
Subject:	Re: Heritage Moot-Texas v. New Mexico 2pm ET, Tuesday, Sept. 29th
Date:	Wednesday, December 2, 2020 9:04:42 AM
Attachments:	Job Opportunities in the Office of the Florida Solicitor General, 11.25.2020.pdf

Thanks so much! Our vacancy announcement is attached. Would be immensely grateful if you'd send it out to your Supreme Court Alert network as well as the Heritage Job Bank email list.

I'd be glad to be on a future panel -- please do keep me in mind.

Thanks also for offering to host a moot on *Florida v. Georgia*. Greg Garre is representing us in that case and will be presenting argument. Not sure if he already has moots lined up, but will pass on the kind offer and put you in touch directly.

Hope all is well.

Best,
Amit

From: Zack Smith <Zack.Smith@heritage.org>
Sent: Wednesday, December 2, 2020 8:31 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Phipps, Alexander <Alexander.Phipps@heritage.org>
Subject: RE: Heritage Moot-Texas v. New Mexico 2pm ET, Tuesday, Sept. 29th

Amit,

Thanks so much for being part of the panel! Your questions and comments were very helpful, and we would love to have you as a panelist again.

If you will send the vacancy announcement to Alex and me, we'll send it out to our Supreme Court Alert network. I'll also see if we can send it out through our Heritage Job Bank email list.

In an unrelated topic, would you be interested in Heritage hosting a moot for the Florida v. Georgia case? I know argument is set to be held "in due course," but we would be happy to host one for you (or help in any other way).

I hope you and your family had a very happy Thanksgiving too!

Best,
Zack

Zack Smith
Legal Fellow
Institute for Constitutional Government
The Heritage Foundation

AMERICAN OVERSIGHT

214 Massachusetts Avenue, NE
Washington, DC 20002
202-608-6049
heritage.org

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Monday, November 30, 2020 3:18 PM
To: Zack Smith <Zack.Smith@heritage.org>
Cc: Phipps, Alexander <Alexander.Phipps@heritage.org>
Subject: Re: Heritage Moot-Texas v. New Mexico 2pm ET, Tuesday, Sept. 29th

Zack,

Thanks again for inviting me to participate in this moot. I learned a lot and was glad to be a part of it.

Quick question: The Florida SG's office is hiring (we have two new positions to fill, as part of a recent project to double the size of our office). If it's not too much trouble, could I send our vacancy announcement to someone in Heritage who might help us spread the word?

Sorry to bother you with this, and thanks for any help. Hope you and your family are well and had a happy Thanksgiving!

Best,
Amit

From: Zack Smith <Zack.Smith@heritage.org>
Sent: Tuesday, September 29, 2020 4:24 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Phipps, Alexander <Alexander.Phipps@heritage.org>; Jenna Hodges <Jenna.Hodges@myfloridalegal.com>
Subject: RE: Heritage Moot-Texas v. New Mexico 2pm ET, Tuesday, Sept. 29th

Fantastic! We'll send you a formal invitation with links to the briefs, etc.

Looking forward to it. Thanks!

Zack

Zack Smith
Legal Fellow
Institute for Constitutional Government
The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
202-608-6049
heritage.org

AMERICAN OVERSIGHT

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Tuesday, September 29, 2020 2:53 PM
To: Zack Smith <Zack.Smith@heritage.org>
Cc: Phipps, Alexander <Alexander.Phipps@heritage.org>; Jenna Hodges <Jenna.Hodges@myfloridalegal.com>
Subject: Re: Heritage Moot-Texas v. New Mexico 2pm ET, Tuesday, Sept. 29th

Zack,

Thanks for thinking of me. I'd be happy to participate.

Am copying my assistant, Jenna Hodges, and look forward to the moot!

Best,
Amit (cell: [redacted]

From: Zack Smith <Zack.Smith@heritage.org>
Sent: Tuesday, September 29, 2020 2:49 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Phipps, Alexander <Alexander.Phipps@heritage.org>
Subject: RE: Heritage Moot-Texas v. New Mexico 2pm ET, Tuesday, Sept. 29th

Amit,

We are hosting a moot on October 23rd at 10AM ET for the MS SG's office in Jones v. Mississippi. The issue is whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole.

If you're available and willing, I think you would be a great fit for this panel. Thanks for considering!

Best,
Zack

Zack Smith
Legal Fellow
Institute for Constitutional Government
The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
202-608-6049
heritage.org

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Thursday, September 24, 2020 3:07 PM
To: Zack Smith <Zack.Smith@heritage.org>

AMERICAN OVERSIGHT

Cc: Phipps, Alexander <Alexander.Phipps@heritage.org>
Subject: RE: Heritage Moot-Texas v. New Mexico 2pm ET, Tuesday, Sept. 29th

Thanks -- much appreciated and look forward to participating in a future event.

Best,
Amit

From: Zack Smith <Zack.Smith@heritage.org>
Sent: Thursday, September 24, 2020 2:45 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Phipps, Alexander <Alexander.Phipps@heritage.org>
Subject: RE: Heritage Moot-Texas v. New Mexico 2pm ET, Tuesday, Sept. 29th

Amit,

No problem at all. I'll certainly keep you in mind for future moots. We should finalize shortly the moots we'll host for the cases the Court will hear in November and December. If any of those will work with your schedule, we'd love to have you on the panel. I'll let you know once we have them finalized.

Also, if we can help host any moots for you, even for significant circuit court cases, happy to do it.

I look forward to staying in touch as well.

Best,
Zack

Zack Smith
Legal Fellow
Institute for Constitutional Government
The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
202-608-6049
heritage.org

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Thursday, September 24, 2020 12:15 AM
To: Zack Smith <Zack.Smith@heritage.org>
Cc: Phipps, Alexander <Alexander.Phipps@heritage.org>
Subject: Re: Heritage Moot-Texas v. New Mexico 2pm ET, Tuesday, Sept. 29th

Zack,

AMERICAN OVERSIGHT

Thanks so much for the kind invitation. And please accept my sincere apology for the delay in responding -- the last two days have been unusually busy and I'm just now catching up with email.

I was very much hoping to do this, but unfortunately I won't be able to participate in a moot next week. But I'm grateful to you for thinking of me, and would love to be on a future moot if possible.

Hope you are well, and look forward to staying in touch.

Best,
Amit

From: Zack Smith <Zack.Smith@heritage.org>
Sent: Tuesday, September 22, 2020 11:03 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Phipps, Alexander <Alexander.Phipps@heritage.org>
Subject: Heritage Moot-Texas v. New Mexico 2pm ET, Tuesday, Sept. 29th

Amit,

I hope you're doing well. Heritage is hosting a moot next Tuesday, Sept. 29th at 2pm ET for Kyle Hawkins, the Texas SG, in the case of Texas v. New Mexico. If you're available and willing to serve as a judge in the moot, I think you would be a great addition to the panel. I mentioned it to Jimmy Percival in your office, and he said you might be interested.

Since the Supreme Court will be hearing arguments telephonically, we plan to hold our moot telephonically as well with feedback/comments delivered via videoconference afterwards.

If you're available, either Alex or I will send you a formal invitation with case details and the case materials. I look forward to being in touch, and I appreciate you considering the invitation.

Best,
Zack

Zack Smith
Legal Fellow
Institute for Constitutional Government
The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
202-608-6049
heritage.org

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JOB OPPORTUNITIES IN THE OFFICE OF THE FLORIDA SOLICITOR GENERAL

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https://jobs.myflorida.com/go/Office-of-the-Attorney-General/2818600/

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Amit Agarwal
Florida Solicitor General
Amit.Agarwal@myfloridalegal.com

Jenna Hodges
Administrative Assistant to the Solicitor General
Jenna.Hodges@myfloridalegal.com
(850) 414-3807

AMERICAN OVERSIGHT

From:	Amit Agarwal
To:	Thompson, Will
Cc:	Hawkins, Kyle; Sweeten, Patrick; Disher, Todd; Christopher Baum; James Percival
Subject:	Re: Multi-State Amicus Brief re Ballot Order Statutes
Date:	Monday, November 30, 2020 2:09:25 PM

Will,

If it's not too late, Florida would like to join your amicus brief in this case. Our Attorney General's name is Ashley Moody.

Please let me know if you have any questions or need any additional information.

Thanks so much, and hope you had a happy Thanksgiving.

Best,
Amit (cell: [redacted]

From: Thompson, Will <Will.Thompson@oag.texas.gov>
Sent: Tuesday, November 24, 2020 1:52 PM
To: Thompson, Will <Will.Thompson@oag.texas.gov>
Cc: Hawkins, Kyle <Kyle.Hawkins@oag.texas.gov>; Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>
Subject: Multi-State Amicus Brief re Ballot Order Statutes

Friends,

Texas has drafted an amicus brief to support West Virginia's defense of its ballot order statute in *Nelson v. Warner* (4th Cir.). I hope you'll consider joining.

There has been a lot of litigation on this issue recently. In 2020, courts have rejected challenges to similar laws in Florida, Arizona, Texas, Minnesota, and Georgia, but some of those cases are still pending. Each of your States was involved in at least one of those cases, either as a defendant or an amicus, so we thought you might be interested in this case as well.

The brief is due Monday, November 30, so we would appreciate responses by that morning. As always, please feel free to contact me with any questions or suggestions.

I'm sorry that the briefing schedule puts this so close to Thanksgiving. I hope you and your families enjoy the holiday.

Best regards,

Will Thompson
Special Counsel
Office of the Attorney General
P.O. Box 12548

AMERICAN OVERSIGHT

Austin, Texas 78711-2548
(512) 936-2567

AMERICAN OVERSIGHT

From: Amit Agarwal
To: [redacted]
Cc: Jenna Hodges
Subject: Re: Separation Of Powers - Paper 1st Draft
Date: Monday, November 16, 2020 9:18:02 AM

Thanks[redacted] -- we'll provide feedback on your most recent draft.

At some point, maybe after end of classes, would be interested to hear about your experience in the Air Force. I appreciate your sharing that fact with me, and thank you for your service.

From: [redacted]
Sent: Saturday, November 14, 2020 5:31 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Jenna Hodges <Jenna.Hodges@myfloridalegal.com>
Subject: Fw: Separation Of Powers - Paper 1st Draft

Prof Agarwal,

If you haven't looked at the draft I sent you on Thursday yet, I'd request you throw that one out and review the attached instead.

I spent the last few day cleaning it up, fixing references, working on organization, and drafting the conclusion. It's still a work in progress, but a far better starting point for feedback than the original draft I provided.

Thanks.

[redacted]

From: [redacted]
Sent: Thursday, November 12, 2020 6:49 PM
To: amit.agarwal@myfloridalegal.com <amit.agarwal@myfloridalegal.com>
Cc: Jenna Hodges <Jenna.Hodges@myfloridalegal.com>
Subject: Separation Of Powers - Paper 1st Draft

Professor Agarwal,

Hi sir. Attached is my initial "rough draft" for my paper; emphasis on the word "rough." (organizationally, it's a hot mess)

I've got most of the raw material included; still needs a lot of editing, and I haven't included a conclusion because it's not drafted yet. Also, please ignore the references/footnotes, they

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also require a lot of cleaning up.

But most of the raw data is included, and I think this gives a good sense of where I'm going. Looking forward to your feedback.

Also, fun fact for you about today's class; that wasn't just history to me, I lived it. From '96-99 I was on active duty in the Air Force, as an MC-130 pilot stationed in the U.K. I spent most of that time forward deployed, flying missions in support of operations in both Bosnia & Kosovo.

Enjoyed the class. Thanks.

[redacted]

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Shawn Bayern
Subject: Re: Separation of Powers grades
Date: Monday, January 4, 2021 1:10:30 PM

Thanks -- I'm dealing with an emergency right now, but will get you and Anna my grades later tonight or first thing tomorrow. My apologies for the inconvenience.

Happy new year!

--AA

From: Shawn Bayern <sbayern@law.fsu.edu>
Sent: Monday, January 4, 2021 1:08 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Separation of Powers grades

Hi Amit,

Happy new year!

Our registrar, Anna Shum, has asked me to remind you about the Separation of Powers grades. The university wants all our grades by the end of the day; they're strangely strict about grading deadlines for reasons I still don't fully understand. If we can't enter your grades today or very early tomorrow, your students would all be assigned "incomplete" grades and we'd have to change them later; that won't cause them any lasting harm, but it might make some of them a bit anxious.

Thanks,
Shawn

--
Shawn Bayern
Associate Dean for Academic Affairs
Larry & Joyce Beltz Professor of Torts
Florida State University College of Law

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Kathleen Meell
Cc: Jenna Hodges
Subject: Re: Separation of Powers seminar
Date: Friday, January 8, 2021 2:25:16 PM

Kathleen,

Is there an updated roster?

Thanks.

--Amit

From: Kathleen Meell <kmeell@law.fsu.edu>
Sent: Tuesday, January 5, 2021 11:49 AM
To: Shawn Bayern <sbayern@law.fsu.edu>; Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Anna Shum <ashum@law.fsu.edu>; Jenna Hodges <Jenna.Hodges@myfloridalegal.com>; Maria Ayn Jella Roxas <jroxas@law.fsu.edu>; Michelle Dobin <mdobin@law.fsu.edu>
Subject: Re: Separation of Powers seminar

Hello!

Please find attached your photo roster, it may have been originally sent to your FSU email so apologies for that!

And yes, you are already set up on your course Canvas site, so you should be all good to go there! Please let me know if there's anything else I can do for you!

Best,
Kathleen

Kathleen Meell | Faculty Support Assistant| Online Systems Coordinator
Florida State University College of Law | 425 W. Jefferson Street | Room R201 | Tallahassee, FL 32306-1601
T: 850.644.7275| **F:** 850.644.7527 | **E:** kmeell@law.fsu.edu | **W:** www.law.fsu.edu

---

From: Shawn Bayern <sbayern@law.fsu.edu>
Date: Tuesday, January 5, 2021 at 11:46 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Anna Shum <ashum@law.fsu.edu>, Jenna Hodges <jenna.hodges@myfloridalegal.com>, Maria Ayn Jella Roxas <jroxas@law.fsu.edu>, Kathleen Meell <kmeell@law.fsu.edu>, Michelle Dobin <mdobin@law.fsu.edu>
Subject: RE: Separation of Powers seminar

Hi Amit,

AMERICAN OVERSIGHT

Thanks again for submitting the grades!

We do have you scheduled to teach a course; I've copied a few people from Faculty Support, who can send you the class roster if you haven't received it. (I'm not sure why it wouldn't have gone out.) Your Canvas site should be set up, and the class is scheduled to meet online from 3:30 to 5:25 p.m. on Thursdays as you requested. I'm glad you checked, because classes start this week!

Thanks again,

Shawn

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Tuesday, January 5, 2021 9:28 AM
To: Shawn Bayern <sbayern@law.fsu.edu>
Cc: Anna Shum <ashum@law.fsu.edu>; Jenna Hodges <jenna.hodges@myfloridalegal.com>
Subject: Separation of Powers seminar

Shawn,

Thanks again for your email yesterday. My grades have been submitted.

Am I scheduled to teach a class this semester? I don't seem to have any notification or class roster in my inbox, although things have been hectic and I may have missed it.

No worries if not. Just wanted to make plans for the next few months.

Thanks.

Best,
Amit

AMERICAN OVERSIGHT

From:	Amit Agarwal
To:	Kathleen Meell; Shawn Bayern
Cc:	Anna Shum; Jenna Hodges; Maria Ayn Jella Roxas; Michelle Dobin
Subject:	Re: Separation of Powers seminar
Date:	Wednesday, January 6, 2021 11:24:54 AM

Thanks -- much appreciated.

Best,
Amit

From: Kathleen Meell <kmeell@law.fsu.edu>
Sent: Tuesday, January 5, 2021 11:49 AM
To: Shawn Bayern <sbayern@law.fsu.edu>; Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Anna Shum <ashum@law.fsu.edu>; Jenna Hodges <Jenna.Hodges@myfloridalegal.com>; Maria Ayn Jella Roxas <jroxas@law.fsu.edu>; Michelle Dobin <mdobin@law.fsu.edu>
Subject: Re: Separation of Powers seminar

Hello!

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And yes, you are already set up on your course Canvas site, so you should be all good to go there! Please let me know if there's anything else I can do for you!

Best,
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---

From: Shawn Bayern <sbayern@law.fsu.edu>
Date: Tuesday, January 5, 2021 at 11:46 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Anna Shum <ashum@law.fsu.edu>, Jenna Hodges <jenna.hodges@myfloridalegal.com>, Maria Ayn Jella Roxas <jroxas@law.fsu.edu>, Kathleen Meell <kmeell@law.fsu.edu>, Michelle Dobin <mdobin@law.fsu.edu>
Subject: RE: Separation of Powers seminar

Hi Amit,

Thanks again for submitting the grades!

AMERICAN OVERSIGHT

We do have you scheduled to teach a course; I've copied a few people from Faculty Support, who can send you the class roster if you haven't received it. (I'm not sure why it wouldn't have gone out.) Your Canvas site should be set up, and the class is scheduled to meet online from 3:30 to 5:25 p.m. on Thursdays as you requested. I'm glad you checked, because classes start this week!

Thanks again,

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Cc: Anna Shum <ashum@law.fsu.edu>; Jenna Hodges <jenna.hodges@myfloridalegal.com>
Subject: Separation of Powers seminar

Shawn,

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No worries if not. Just wanted to make plans for the next few months.

Thanks.

Best,
Amit

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Kathleen Meell
Cc: Jenna Hodges; Michelle Dobin
Subject: Re: Separation of Powers seminar
Date: Friday, January 8, 2021 2:44:21 PM

Thank you! If it's not too much trouble please copy Jenna Hodges on any course-related correspondence, as she helps me to stay on top of things.

Hope you have a good weekend.

Best,
Amit

From: Kathleen Meell <kmeell@law.fsu.edu>
Sent: Friday, January 8, 2021 2:33 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Jenna Hodges <Jenna.Hodges@myfloridalegal.com>; Michelle Dobin <mdobin@law.fsu.edu>
Subject: RE: Separation of Powers seminar

Hello!

Please find your photo roster attached as of today, we will be sending out final photo rosters next week after add/drop, so be on the lookout for that email, which will most likely come from my colleague Michelle Dobin (Copied here)! Thanks!

Best,
Kathleen

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From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Friday, January 8, 2021 2:25 PM
To: Kathleen Meell <kmeell@law.fsu.edu>
Cc: Jenna Hodges <jenna.hodges@myfloridalegal.com>
Subject: Re: Separation of Powers seminar

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Is there an updated roster?

Thanks.

--Amit

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Amit

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Phipps, Alexander
Subject: Re: Supreme Court Alert: Florida SG"s Office Is Hiring
Date: Wednesday, December 2, 2020 10:41:05 AM
Attachments: image001.png

Thank you so much for sending this out -- that's very kind and much appreciated!

Best,
Amit

From: Phipps, Alexander <Alexander.Phipps@heritage.org>
Sent: Wednesday, December 2, 2020 9:54 AM
Subject: Supreme Court Alert: Florida SG"s Office Is Hiring

EDWIN MEESE III CENTER FOR LEGAL AND JUDICIAL STUDIES

LEGAL STRATEGY NETWORK'S SUPREME COURT ALERT

TO: Legal Strategy Network

FROM: The Heritage Foundation

DATE: December 2, 2020

RE: JOB OPPORTUNITIES IN THE OFFICE OF THE FLORIDA SOLICITOR GENERAL

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Alexander Phipps
Administrative and Research Assistant
Institute for Constitutional Government
The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
202-608-6053
heritage.org

AMERICAN OVERSIGHT

Alexander Phipps

Administrative and Research Assistant

Institute for Constitutional Government

The Heritage Foundation
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Washington, DC 20002

202-608-6053

heritage.org

AMERICAN OVERSIGHT

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Alexander Phipps

Administrative and Research Assistant

Institute for Constitutional Government

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002

202-608-6053

heritage.org

AMERICAN OVERSIGHT

Point of Contacts:

Amit Agarwal, Florida Solicitor General, Amit.Agarwal@myfloridalegal.com

Jenna Hodges, Administrative Assistant to the Solicitor General,
Jenna.Hodges@myfloridalegal.com, (850) 414-3807

As a reminder, please alert us to any cert. petitions that we should track, with the case name and docket number.

Alexander Phipps

Administrative and Research Assistant

Institute for Constitutional Government

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
202-608-6053

heritage.org

AMERICAN OVERSIGHT

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EDWIN MEESE III CENTER FOR LEGAL AND JUDICIAL STUDIES

FL-AG-21-0351-A-000273

From: Amit Agarwal
To: Zack Smith
Cc: Phipps, Alexander
Subject: Re: Supreme Court Alert: Florida SG"s Office Is Hiring
Date: Wednesday, December 2, 2020 12:08:04 PM
Attachments: image001.png

Thank you -- am sure you have a lot on your plate and very much appreciate your taking the time to do all that!

Best,
Amit

From: Zack Smith <Zack.Smith@heritage.org>
Sent: Wednesday, December 2, 2020 11:54 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Phipps, Alexander <Alexander.Phipps@heritage.org>
Subject: FW: Supreme Court Alert: Florida SG"s Office Is Hiring

Amit,

Here's the notice we sent out to the Supreme Court Alert network. I'll keep checking on the Job Bank to see if we can get it posted there too. I hope fantastic candidates apply!

Zack

Zack Smith
Legal Fellow
Institute for Constitutional Government
The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
202-608-6049
heritage.org

From: Phipps, Alexander <Alexander.Phipps@heritage.org>
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Subject: Supreme Court Alert: Florida SG"s Office Is Hiring

EDWIN MEESE III CENTER FOR LEGAL AND JUDICIAL STUDIES

LEGAL STRATEGY NETWORK'S SUPREME COURT ALERT

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AMERICAN OVERSIGHT

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DATE: December 2, 2020

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Applicants for the position of Assistant Solicitor General should have excellent written and oral advocacy skills, outstanding academic credentials, and at least two years of legal experience. Applicants for the position of Deputy Solicitor General should have, in addition to those qualifications, at least five years of legal experience, as well as demonstrated proficiency litigating civil appeals, criminal appeals, or constitutional issues. For both positions, a clerkship on a federal appellate court or the Florida Supreme Court is highly desirable.

If selected, an applicant who is not already a member of the Florida bar must gain such admission within one year of the date of appointment. All new hires are required to make a two-year commitment to the Office.

The Solicitor General's Office is part of the Office of the Attorney General, which has offices in Fort Lauderdale, Jacksonville, Miami, Orlando, Tampa, Tallahassee, and West Palm Beach. Qualified candidates for the Deputy and Assistant positions are welcome to apply if they would be able to work out of any of those offices, but preference will be accorded to candidates who live in, or are willing to relocate to, Tallahassee, where the Office is based.

Applications will be considered on a rolling basis, but should be submitted by December 11, 2020. To avoid unnecessary travel and exposure, the Office plans to conduct interviews by video conference.

To apply for these positions, please visit the website below and fill out an online application per the instructions listed for each position:
https://jobs.myflorida.com/go/Office-of-the-Attorney-General/2818600/

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Alexander Phipps
Administrative and Research Assistant
Institute for Constitutional Government
x6053

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Candidates may informally express their interest in applying for one or both of the posted vacancies by emailing a resume to the Solicitor General and his assistant; their email addresses are listed below. Such candidates will be considered for the current round of hiring if their resume is received by December 11. However, all candidates will be required to fill out an online application prior to scheduling an interview.

Alexander Phipps
Administrative and Research Assistant
Institute for Constitutional Government
x6053

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Point of Contacts:

Amit Agarwal, Florida Solicitor General, Amit.Agarwal@myfloridalegal.com

Jenna Hodges, Administrative Assistant to the Solicitor General,
Jenna.Hodges@myfloridalegal.com, (850) 414-3807

As a reminder, please alert us to any cert. petitions that we should track, with the case name and docket number.

Alexander Phipps
Administrative and Research Assistant
Institute for Constitutional Government
x6053

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EDWIN MEESE III CENTER FOR LEGAL AND JUDICIAL STUDIES

FL-AG-21-0351-A-000279

From: Amit Agarwal
To: Murrill, Elizabeth
Subject: Re: TX dismemberment Amicus
Date: Tuesday, December 8, 2020 12:53:29 PM
Attachments: image001.png

Liz,

Is COB today a hard deadline? Will do my best to get back to you by then, but please let me know if it might be possible to get back to you tomorrow morning.

Thanks.

--Amit

From: Murrill, Elizabeth <MurrillE@ag.louisiana.gov>
Sent: Thursday, December 3, 2020 5:44 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>; Nicholas Bronni <nicholas.bronni@arkansasag.gov>; Andrew Pinson <APinson@LAW.GA.GOV>; tom.fisher@atg.in.gov <tom.fisher@atg.in.gov>; brian.kane@ag.idaho.gov <brian.kane@ag.idaho.gov>; teri.nealis@ag.idaho.gov <teri.nealis@ag.idaho.gov>; Jeff Chanay <jeff.chanay@ag.ks.gov>; Dwight.Carswell@ag.ks.gov <Dwight.Carswell@ag.ks.gov>; Julie.Blake@ago.mo.gov <Julie.Blake@ago.mo.gov>; Jim.Campbell@nebraska.gov <Jim.Campbell@nebraska.gov>; james.smith@nebraska.gov <james.smith@nebraska.gov>; eric.murphy@ohioattorneygeneral.gov <eric.murphy@ohioattorneygeneral.gov>; Frederick Nelson <frederick.nelson@ohioattorneygeneral.gov>; Emory Smith <ESmith@scag.gov>; Parkin Hunter <phunter@scag.gov>; Sherri.Wald@state.sd.us <Sherri.Wald@state.sd.us>; Lynell.Erickson@state.sd.us <Lynell.Erickson@state.sd.us>; Kyle.Hawkins@oag.texas.gov <Kyle.Hawkins@oag.texas.gov>; Kristi Johnson <Kristi.Johnson@ago.ms.gov>; Krissy Nobile <KRISSY.NOBILE@ago.ms.gov>; Lindsay S. See <Lindsay.S.See@wvago.gov>; Stenehjem, Wayne K. <wstenehjem@nd.gov>; Melissa Holyoak <melissaholyoak@agutah.gov>; Mithun Mansinghani <mithun.mansinghani@oag.ok.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; ed.sniffen@alaska.gov <ed.sniffen@alaska.gov>; beau.roysden@azag.gov <Beau.roysden@azag.gov>; Chad Meredith <chad.meredith@ky.gov>; toby.crouse@ag.ks.gov <toby.crouse@ag.ks.gov>; john.sauer@ago.mo.gov <john.sauer@ago.mo.gov>; Payne, Julia <Julia.Payne@atg.in.gov>; Benjamin.flowers@ohioattorneygeneral.gov <Benjamin.flowers@ohioattorneygeneral.gov>; masagsve@nd.gov <masagsve@nd.gov>; Andree Blumstein <andree.blumstein@ag.tn.gov>; Sarah K. Campbell <Sarah.Campbell@ag.tn.gov>; Lindsay S. See <Lindsay.S.See@wvago.gov>; 'bridget.hill@wyo.gov' <bridget.hill@wyo.gov>
Subject: RE: TX dismemberment Amicus

Friends:

Attached is the draft of the en banc amicus brief in the Texas dismemberment ban. I'm still cleaning up – and I welcome your thoughts (especially on the section related to the actual procedure).

AMERICAN OVERSIGHT

The reasons we included that is because it is not in the TX record, but we have developed that in the defense of our case which is also in litigation. I am open to taking it out.

We may need to slim it down some on word limits but I wanted to get this out for your review. We have a very short turn around (deadline is Dec. 9) so I would appreciate a response as soon as possible, but in any event by Tuesday Dec. 8, COB.

Thanks,
Liz

Elizabeth B. Murrill
Solicitor General
Office of Attorney General Jeff Landry
Direct: (225) 326-6766 Cell: (225) 456-7544
murrille@ag.louisiana.gov
www.AGJeffLandry.com

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AMERICAN OVERSIGHT

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

From: Amit Agarwal
To: Murrill, Elizabeth
Cc: James Percival; Jeffrey DeSousa; Christopher Baum
Subject: Re: TX dismemberment Amicus
Date: Tuesday, December 8, 2020 5:57:38 PM
Attachments: image001.png

Thanks Liz. Florida is pleased to join your amicus brief in this case. Our Attorney General's name is Ashley Moody.

If it's not too much trouble, please confirm that you got this and send us a copy of the final version after it's filed.

Best,
Amit

From: Murrill, Elizabeth <MurrillE@ag.louisiana.gov>
Sent: Tuesday, December 8, 2020 1:08 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: RE: TX dismemberment Amicus

Filing deadline is tomorrow and I would like to have as many as possible, so I can give you that time.

I am certain that SC, OH and WVa also will join and ND and UT just did. So current list: AK, AL, AR, AZ, GA, IN, KY, KS, (LA), MO, MS, NE, ND, OK, UT

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Tuesday, December 08, 2020 11:53 AM
To: Murrill, Elizabeth <MurrillE@ag.louisiana.gov>
Subject: Re: TX dismemberment Amicus

CAUTION: *This email originated outside of Louisiana Department of Justice. Do not click links or open attachments unless you recognize the sender and know the content is safe.*

Liz,

Is COB today a hard deadline? Will do my best to get back to you by then, but please let me know if it might be possible to get back to you tomorrow morning.

Thanks.

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From: Murrill, Elizabeth <MurrillE@ag.louisiana.gov>
Sent: Thursday, December 3, 2020 5:44 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>; Nicholas Bronni <nicholas.bronni@arkansasag.gov>; Andrew Pinson <APinson@LAW.GA.GOV>; tom.fisher@atg.in.gov <tom.fisher@atg.in.gov>; brian.kane@ag.idaho.gov <brian.kane@ag.idaho.gov>; teri.nealis@ag.idaho.gov <teri.nealis@ag.idaho.gov>; Jeff Chanay

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<jeff.chanay@ag.ks.gov>; Dwight.Carswell@ag.ks.gov <Dwight.Carswell@ag.ks.gov>; Julie.Blake@ago.mo.gov <Julie.Blake@ago.mo.gov>; Jim.Campbell@nebraska.gov <Jim.Campbell@nebraska.gov>; james.smith@nebraska.gov <james.smith@nebraska.gov>; eric.murphy@ohioattorneygeneral.gov <eric.murphy@ohioattorneygeneral.gov>; Frederick Nelson <frederick.nelson@ohioattorneygeneral.gov>; Emory Smith <ESmith@scag.gov>; Parkin Hunter <phunter@scag.gov>; Sherri.Wald@state.sd.us <Sherri.Wald@state.sd.us>; Lynell.Erickson@state.sd.us <Lynell.Erickson@state.sd.us>; Kyle.Hawkins@oag.texas.gov <Kyle.Hawkins@oag.texas.gov>; Kristi Johnson <Kristi.Johnson@ago.ms.gov>; Krissy Nobile <KRISSY.NOBILE@ago.ms.gov>; Lindsay S. See <Lindsay.S.See@wvago.gov>; Stenehjem, Wayne K. <wstenehjem@nd.gov>; Melissa Holyoak <melissaholyoak@agutah.gov>; Mithun Mansinghani <mithun.mansinghani@oag.ok.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; ed.sniffen@alaska.gov <ed.sniffen@alaska.gov>; beau.roysden@azag.gov <Beau.roysden@azag.gov>; Chad Meredith <chad.meredith@ky.gov>; toby.crouse@ag.ks.gov <toby.crouse@ag.ks.gov>; john.sauer@ago.mo.gov <john.sauer@ago.mo.gov>; Payne, Julia <Julia.Payne@atg.in.gov>; Benjamin.flowers@ohioattorneygeneral.gov <Benjamin.flowers@ohioattorneygeneral.gov>; masagsve@nd.gov <masagsve@nd.gov>; Andree Blumstein <andree.blumstein@ag.tn.gov>; Sarah K. Campbell <Sarah.Campbell@ag.tn.gov>; Lindsay S. See <Lindsay.S.See@wvago.gov>; 'bridget.hill@wyo.gov' <bridget.hill@wyo.gov>
Subject: RE: TX dismemberment Amicus

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Thanks,
Liz

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AMERICAN OVERSIGHT

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

From: Amit Agarwal
To: Anna Shum
Cc: Jenna Hodges
Subject: Re: Urgent: Fall 2020 Grades Due!
Date: Tuesday, January 5, 2021 9:09:33 AM

Anna,

Can someone please send me what student names correspond to the numbers appearing in the name column of the online grading spreadsheet? I'm trying to put grades in now, but we don't have exams and students submit their final papers under their own names, not the numbers on the spreadsheet.

Thanks for any help.

--Amit

From: Anna Shum <ashum@law.fsu.edu>
Sent: Saturday, January 2, 2021 1:18 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Urgent: Fall 2020 Grades Due!

Good afternoon,

I am writing to follow-up on your grades for LAW7930-24, Separation of Powers. We need your grades immediately as they still need to be approved and then posted by main campus. I will re-share the online grade excel with you. The instructions for submitting your grades are available below. Please let me know if you have any questions.

Best,

Anna Shum | Registrar & Director of Academic Programs
Florida State University | College of Law
425 W. Jefferson Street, Tallahassee, FL 32306-1601
T: (850)-645-0925 | E: ashum@law.fsu.edu

Please note: Florida has very broad public records laws. Most written communications to or from state/university employees and students are public records and available to the public and media upon request. Your e-mail communications may therefore be subject to public disclosure.

Welcome to the fall 2020 grading season.

As always, we are here to help you so please do not hesitate to reach out if you have any questions. In order to make the process as easy as possible, we want to make you aware of a few things. By the end of today, you will receive an email with a link to retrieve your Grading Spreadsheet. *Note:* The email will have the following subject line: Anna Shum shared "Course Name_Course Code_Section_Email"**. Your grades are due 14 days after you receive your exam papers.** For classes that DO NOT have an exam, your grades are due on Dec 15, 2020 with the exception of seminar classes that are due on Dec 26, 2020.

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I. Instructions for Using the Grading Spreadsheet

Accessing grading spreadsheet

- Click the green "Open" link in the body of the email (Anna Shum shared "Course Name_Course Code_Section_Email" with you).
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Using the grading spreadsheet

- Insert the appropriate grades, by simply typing in the grade under the "GRADE" column.
- Select a book award recipient (if any). The book award recipient should be given to the student who performed the best in the class. If you do not want to give out a book award, please state "NIL".

Saving the grades

- The system will save your changes as you work on the grading spreadsheet. Thus, you may exit your spreadsheet, and login later to continue the grade input process.
- Note: Your spreadsheet will only automatically save any updated information if you are connected to a reliable and secure internet source.

II. Submitting your final grades

- Complete the Grade Submission Confirmation form, once you've finalized your grades and wish to submit them. Your grades will be deemed final and ready to process once we receive the form. A confirmation email will be automatically generated and sent to you. You can complete the form **HERE** or refer to the link on your "Grade" spreadsheet.

III. Deadline for submitting grades

- For classes with exams, your grades are due 14 days after you receive your exam papers. For classes that DO NOT have an exam, your grades are due on Dec 15, 2020 with the exception of seminar classes that are due on Dec 26, 2020.

You **DO NOT** need to forward the updated spreadsheet back to the Law School Registrar's Office, as our staff will have access to view the changes that you make. **If you require the assistance of another party, please kindly let us know and we'd be more than happy to share the spreadsheet with them.**

Though we've worked to make this process as seamless as possible, we understand that issues may

AMERICAN OVERSIGHT

arise or you may have questions regarding the grade submission process. Should you have any questions or concerns, please contact me at ashum@law.fsu.edu or 850-645-0945. You may also contact Shawn Bayern, Associate Dean for Academic Affairs at sbayern@law.fsu.edu or 850.644.4759, if you have any questions.

Best regards,

Anna Shum | Registrar & Director of Academic Programs
Florida State University | College of Law
425 W. Jefferson Street, Tallahassee, FL 32306-1601
T: (850)-645-0925 | E: ashum@law.fsu.edu

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Anna Shum
Subject: Re: Urgent: Fall 2020 Grades Due!
Date: Sunday, January 3, 2021 10:53:34 PM

Anna,

Thanks so much for your message, and I'm so sorry for not turning in my grades yet.

I'm dealing with multiple emergencies right now and things are pretty crazy, but I should be able to get these to you by Tuesday morning. Hope that will be okay, and please accept my sincere apology for any inconvenience.

Happy new year, and hope you are well.

Best,
Amit

From: Anna Shum <ashum@law.fsu.edu>
Sent: Saturday, January 2, 2021 1:18 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Urgent: Fall 2020 Grades Due!

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Florida State University | College of Law
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AMERICAN OVERSIGHT

From: Amit Agarwal
To: Anna Shum
Cc: Jenna Hodges
Subject: Re: Urgent: Fall 2020 Grades Due!
Date: Tuesday, January 5, 2021 9:22:15 AM

Thanks. I just filled out the spreadsheet and the certification form. If you need anything else please let me know.

Sorry for the delay in sending these over.

--Amit

From: Anna Shum <ashum@law.fsu.edu>
Sent: Tuesday, January 5, 2021 9:13 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Cc: Jenna Hodges <Jenna.Hodges@myfloridalegal.com>
Subject: RE: Urgent: Fall 2020 Grades Due!

Hi Prof. Agarwal,

Thanks for letting me know. I've just changed the numbers to names on the online grade excel. Let me know if you need anything else.

Best,

Anna Shum | Registrar & Director of Academic Programs
Florida State University | College of Law
425 W. Jefferson Street, Tallahassee, FL 32306-1601
T: (850)-645-0925 | E: ashum@law.fsu.edu

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From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Tuesday, January 5, 2021 9:10 AM
To: Anna Shum <ashum@law.fsu.edu>
Cc: Jenna Hodges <jenna.hodges@myfloridalegal.com>
Subject: Re: Urgent: Fall 2020 Grades Due!

Anna,

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AMERICAN OVERSIGHT

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From: Amit Agarwal
To: [redacted]
Subject: Re: feedback on Separation of Powers paper
Date: Monday, November 30, 2020 8:40:38 AM

Sure -- would be glad to talk. How about next Tuesday, December 8, at 2:00 -- or any time that afternoon? If you'd prefer to talk earlier just let me know and we'll find a convenient time.

From: [redacted]
Sent: Monday, November 30, 2020 8:15 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Re: feedback on Separation of Powers paper

Professor Agarwal,

Thanks so much for your very useful feedback. I will be sure to incorporate it into my final draft. Also, I would love to take you up on your offer for career advice because I am sort of at a cross roads for what do after my clerkship ends. Let me know if you have any time talk over the next two weeks.

Best,
[redacted]

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Date: Wednesday, November 25, 2020 at 5:55 PM
To: [redacted]
Cc: Jenna Hodges <Jenna.Hodges@myfloridalegal.com>
Subject: feedback on Separation of Powers paper

Jake,

Thanks so much for all your thoughtful comments and participation over the course of the last semester. It was great to have you in the class.

You picked a timely and interesting topic, and I very much enjoyed reading your paper. Below are a few questions and suggestions to take into account as you finalize your draft. Please don't feel the need to address all those points; just wanted to pass along these thoughts in case they're of help as you refine the draft.

Thanks so much, good luck, and stay in touch!

Best,

Professor Agarwal

Feedback:

1. Your opening introduction does a good job of setting up the importance of the discussion to follow, but it might be helpful, if possible, to expand your discussion to explain why

AMERICAN OVERSIGHT

you think immunity doctrine is restricting the proper response to COVID in the status quo.

2. Nice job on the citations, your paper is clearly well researched and cited.
3. Be careful making broad statements without authority. For example, it is inevitable that some states will not respond to coronavirus or maybe just likely or possible? Likewise, could Congress set up a nationwide mask mandate under its enumerated powers? I recognize that these are not the core focus of the paper, but it is useful to be exact in legal writing.
4. Consider discussing the Court's 2019 discussion of immunity in *Franchise Tax Board v. Hyatt* in your discussion of the background of immunity. The Court adopted a broad view of immunity, which you seem to reject, so it might be worth explaining where you think the Court went wrong in its more recent discussions of immunity.
5. You argue that *Katz* has called the Court's abrogation doctrine into doubt (p. 13). You might want to consider *Allen v. Cooper*, which the Supreme Court decided in March of this year, and which expressly considers and rejects that argument. I am not saying that you need to agree with *Allen*, but I think your discussion should consider it, and discuss why you think there is still tension in the law after *Allen*. Likewise, consider whether Congress could make the Article I argument you suggest (p. 14) considering *Allen*.
6. At the start of part III, you have a flag for an introduction, just make sure to insert one before the final draft.
7. On p. 20 and 21 you discuss how Congress has used the spending power to condition funds on a waiver of sovereign immunity. Under this approach does Congress need to abrogate immunity or can it just induce waiver with the condition? If the former, why is there not a problem under the abrogation law you discuss? If the later, what are the implications for your discussion of abrogation, i.e. does Congress even need to concern itself with abrogation or can it just induce waiver? I think you may answer this in footnote 113, but given the length of your discussion of immunity and abrogation, if the answer is that you don't need an abrogation, you might want to talk about why you think immunity is nonetheless constraining policy responses.
8. Try to have a citation for all non-obvious propositions. For example, on p. 23, you say that without the prospect of negligence suits, state hospitals are likely to behave more dangerously, but how much traditional tort law does or does not promote safety is debated by tort scholars.
9. It is not entirely clear to me what policies you think the federal government could propose under the spending clause to combat coronavirus as you suggest in the intro. The two policies you name, a federal mask mandates or a federal shutdown orders, do not appear to require state action, so what funding would the states need? Additionally, if we are dealing with federal mandates, why would the suits target the states as opposed to the federal government? Likewise, if state torts are the enforcement mechanism you envision, are states currently invoking immunity to defend from those torts? Many states have broadly waived immunity for a number of traditional tort claims. Finally, consider whether more granularity on the types of policies you propose would allow you to drill down more into whether the waiver would be coercive under *Dole* and *Sebelius*.
10. Make sure to bluebook and proofread for typos before the final draft.

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Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com
Office: (850) 414-3688

AMERICAN OVERSIGHT

From: Amit Agarwal
To: [redacted]
Subject: Re: feedback on Separation of Powers paper
Date: Friday, November 27, 2020 6:39:35 AM

Thanks so much for your kind note. Hope you had a Happy Thanksgiving!

From: [redacted]
Sent: Thursday, November 26, 2020 5:34 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Re: feedback on Separation of Powers paper

Prof Agarwal,

Thanks for the thorough feedback; appreciate the time you put into it. Hopefully it'll help me craft a better final product.

I enjoyed the class this semester; it was good to have time to really go into the cases in depth, whereas most classes we go through a case pretty quickly, to get down to the basic rule to derive from it. Here, we had a lot of time to look at the nuances of each decision; I enjoyed that, and think it helped.

Thanks for everything, and hope enjoy the holiday weekend.

[redacted]

[redacted]

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Wednesday, November 25, 2020 4:53 PM
To: [redacted]
Cc: Jenna Hodges <Jenna.Hodges@myfloridalegal.com>
Subject: feedback on Separation of Powers paper

[redacted]

Thanks so much for all your thoughtful comments and participation over the course of the last semester. It was great to have you in the class.

You picked a timely and interesting topic, and I very much enjoyed reading your paper. Below are a few questions and suggestions to take into account as you finalize your draft. Please don't feel the need to address all those points; just wanted to pass along these thoughts in case

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they're of help as you refine the draft.

Thanks so much, good luck, and stay in touch!

Best,

Professor Agarwal

Feedback:

1. This is a timely topic. Given that, it may aid your introduction and refine the questions you present to make the dispute more concrete by discussing contemporary examples of impoundment and reallocation at the outset, even if it just serves to lay a foundation for the importance of the question. You get there in the discussion of the border wall at page 17, but front loading some of the discussion may help anchor the nature of the questions you discuss and present them with more refinement.
2. At the outset, it might be helpful to discuss why your two questions are analytically distinct. As a constitutional matter, why is impounding funds different than re-allocating them? That would set the stage for your larger discussion and may help you frame the lessons you draw from question 1 as answers to question 2.
3. You do a good job canvassing the historical record for impoundments. Is there a similar historical record on re-allocation? If not, does that suggest a constitutional difference?
4. Consider providing additional context to the discussion of *Chada* and *New Haven* on page 12. It is not clear why *Chada* impacts the Impoundment Control Act or what the status of the Act is after *Chada*.
5. In your discussion of *Train* it may be worth exploring what the implications of a narrow statutory ruling are. As I understand your discussion, the Court ruled that the statute in question precluded impoundment. If that is true, what impact does that have on the constitutional question? Can Congress limit the President's authority to take care that the law is executed statutorily? If so, are there any limits?
6. In your discussion of the constitutional question, it might be fruitful to expand the discussion to include not just express authority on impoundment but also discussion of how Congressional powers interact with the Take Care clause more generally? Are there other areas where the Constitution's division of labor leads to similar conflicts? Can those shed light on your questions?
7. Consider expanding the analysis of Article II on page 25. Why does the President need a power more specific than the Take Care clause here?
8. Consider whether discussing the issue in the context of a delegation (p. 26) assumes away the constitutional question you pose. It is one thing to ask whether the President can withhold money pursuant to some grant of Congressional authority, but as I think you recognize, it is another to ask whether the President can do so in the face of Congressional authority. It seems to me that you posed the second, harder question in your intro, but then ultimately answer the former question.
9. You conclude that the President likely has authority to fund the wall's construction under the National Emergencies Act, but you might want to spend a little more time explaining why you reach that conclusion as a matter of statutory and constitutional text. You say that courts are unlikely to intervene, but didn't the Ninth Circuit do exactly that?
10. A couple of small stylistic notes:

    a. When you turn in the final paper, try to conform the citations to bluebook style.

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a. Id. has a period.

a. Pay attention to smart quotation marks and apostrophes, you alternate between smart (curved) marks and straight marks.

a. Pay attention to tense when describing opinions. For example, on page 22 you jump between past and present tense in describing the Ninth Circuit's opinion in the wall case.

a. Try to be consistent on punctuation at the end of footnotes, sometimes you have a period, sometimes you do not.

a. Pay attention to possessives. They are easy to miss because we do not usually speak them when talking (especially for words ending in s), but they are key to clarity. As an example, you need possessives on page 5 when you talk about Congress' power.

a. Try to stay consistent with capitalizations i.e. on page 7 you capitalize legislative but not executive branch.

a. Make sure you have consistent font sizes throughout the paper, i.e. on page 12 some of your quotations are in a bigger font.

b. Finally, make sure to proofread your draft for typos before turning in the final draft.

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com
Office: (850) 414-3688

AMERICAN OVERSIGHT

From: Amit Agarwal
To: [redacted]
Subject: Re: feedback on Separation of Powers paper
Date: Thursday, November 26, 2020 8:12:35 AM
Attachments: Outlook-xsclxljd.png

[redacted]

I certainly understand waiting to draft the introduction until you have a clearer idea of the paper's structure. As for your question, the answer turns on your ultimate position on this topic. Your draft suggests that you contend, after all is said, that the President can unilaterally recede from a treaty. If that's so, it may make sense to lead with your appointment argument and any other sources supporting this position. The *Goldwater* and Supremacy Clause discussions could then be counterpoints for you to unknot and discredit after you have presented your affirmative position.

Another way to frame these legal sources could be to introduce them more objectively in separate sections without discussing your conclusion (*e.g.*, the case for Presidential power to recede vs. the case against). Then, in your final sections, you can analyze each source and take a final position.

I hope that helps. Look forward to reading the finished product, and Happy Thanksgiving!

Best,

Professor Agarwal

From: [redacted]
Sent: Wednesday, November 25, 2020 6:52 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Re: feedback on Separation of Powers paper

Professor Agarwal,

Thank you so much, Professor, for all the time you devoted to our class this semester. I cannot express how grateful I am for your insight and wisdom. I love the separation of powers topic, and I often found myself reassessing my understanding of the critical issues in the cases we covered as we analyzed them. I really enjoyed our class and thank you again for everything.

Thank you for your feedback! I apologize for the unpolished nature of the paper in the lack of correct footnotes and proofreading errors, I will have those cleaned up by the time the final deadline arrives. However, an area where I am struggling a bit is with the organization of the paper itself. Part of the reason I have so far avoided writing my introduction is because the introduction usually sets the organizational order of the paper, and I'm just not sure yet what generates the best flow. In fact, one of the reasons the "iv" subheading is misplaced is because I had just moved it to a different section the night before submitting it to you.

Specifically, should I lead with the appointment argument? Or would it be more prudent to

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lead with the analysis on executive overreading of *Goldwater*? I had an idea about more directly distinguishing executive agreements (NAFTA and the USMCA trade agreement) since they are so often mistaken for treaties, but I'm not sure if that really brings anything to the table in terms of my analysis.

Any advice you have on the organizational problem I'm having would be greatly appreciated! I could create a zoom link or give you a call next week if you would prefer to speak in person and have any availability, or email is perfectly fine as well.

Thank you again for everything this semester. Have a wonderful holiday!

[redacted]
Juris Doctor Candidate, Class of 2021
Florida State University College of Law
[redacted]
FLORIDA STATE UNIVERSITY
COLLEGE OF LAW
[redacted]

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Wednesday, November 25, 2020 5:59 PM
To: [redacted]
Subject: feedback on Separation of Powers paper

[redacted]

Thanks so much for all your thoughtful comments and participation over the course of the last semester. It was great to have you in the class.

You picked an interesting and timely topic. I very much enjoyed reading your paper. Below are a few questions and suggestions to take into account as you finalize your draft. Please don't feel the need to address all those points; just wanted to pass along these thoughts in case they're of help as you refine the draft.

Thanks so much, good luck, and stay in touch!

Best,

Professor Agarwal

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1. You do an excellent job of varying your transitions throughout the draft. By alternating between dependent clauses and more standard sentence openings, you keep the reader engaged and moving at a quick pace.
2. I understand that you have not yet pieced together your introduction, which will certainly make your premise clear from the start. But in your final draft, be sure to place your position at the front, and then logically stagger your headings to support that position. If you are not sure whether your headings are clear, take a step back from the piece for a little while, and then come back to read it fresh. If at any point you become lost in the logical train, rewrite your headings and topic sentences to guide your reader along.
3. On a similar note, you do a nice job of breaking the paper into chunks, but is there a way to get more out of your current headings and topic sentences? Indeed, your first analytical heading is titled "The Modern President and Major Treaties," but that tells your reader little about your analytical position. Headings present an opportunity to prime your reader for your argument. So is there a way to shape your headings and topic sentences so that they give your reader guidance about what it is you will soon argue? Also, be sure that your subheadings are consistent (for example, your first analytical subheading is labelled subheading (iv), even though it is the first subheading in the analysis segment).
4. Try to keep consistent in how you use terms throughout the paper. For instance, on page 3, you use lowercase for the term "president." But a few lines later, you capitalize the term in the sentence, "The President would be a monarch . . . ." Though it's been said that "a foolish consistency is the hobgoblin of little minds," when it comes to legal writing, this sort of consistency will rarely be foolish.
5. You make an interesting argument that *Myers* applies in full force to the executive's treaty power, but *Humphrey's Executor* does not. Can you find more support to bolster the textual argument you provide? Has this argument been considered elsewhere? Since you are transposing cases from the appointment context into the treaty context, you may want to rest on more than out-of-context text to support the idea that it is "far more likely that all treaties can be eliminated unilaterally by the executive" than not. Of course, you recognize that David Scott has discussed a similar point. But was that article discussing the President's ability to "unsign" treaties that the Senate already approved?
6. Is it true that Congress always repeals laws by replacing them with other laws? Can Congress repeal a law with no replacement? And if so, does the distinction you make on page 21 still make sense?
7. There is a great deal of novel and interesting analysis in this piece. The piece would be even stronger with citation to more case law and scholarly works as support. As an example, on page 23, you describe how different Justices have analyzed an issue, but there are few citations to the case in which they did so. Secure the reader's trust with cites to authority.
8. Circling back to some structural feedback, you may want to review your footnotes to ensure that your citations are correct, both substantively and structurally. As an example of a structural error, in footnote 6, you list the date that you accessed a website in a parenthetical, but you place an unneeded space at the start of the parenthetical: "(last accessed October 20th, 2020)." Or in footnote 5, you fully capitalize "THE ATLANTIC," rather than use small caps. These are just two examples of quick fixes you will no doubt catch on review.
9. Consider how you describe entities. For example, you refer to the Senate as "they" or "their." But the Senate is a single deliberative body, meaning that it is more properly referred to as "it." Check for these kinds of issues throughout the paper.

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10. You should also be sure to conduct a thorough proofreading on your final review for typos, grammar errors, typeface, and so on. For instance, in footnote 23, you spell ordinance, "ordiance." Again, these are quick fixes once you go through your review. But you of course don't want errors like these to distract from your strong substantive points. I also recommend that you adhere to standard writing conventions for scholarly papers. For citations, I'd suggest following the rules for "law review footnotes" in the Bluebook (the inside cover has a "quick reference" section that you may find particularly helpful). You could use any prominent law review as a model; their notes and articles are available online. Here are a few specific points to keep in mind as you finalize your draft: Paragraphs should be indented; case names should be underlined or italicized; internal quotations (quotes within quotes) should use single rather than double quotation marks; quotations should omit internal HN numbers inserted by Westlaw or Lexis; insert page numbers at the bottom of each page; don't begin textual (as opposed to citation) sentences with the section symbol (§); and use standard capitalization (not all caps) for the titles of law review articles, even if the titles appear in all caps on a database like Westlaw or Lexis.

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com
Office: (850) 414-3688

AMERICAN OVERSIGHT

FLORIDA STATE UNIVERSITY

COLLEGE OF LAW

FL-AG-21-0351-A-000307

AMERICAN OVERSIGHT

From: Amit Agarwal
To: [redacted]
Subject: Re: feedback on Separation of Powers paper
Date: Monday, November 30, 2020 10:07:27 AM

Thanks. Please send me your number and I'll call you then.

From: [redacted]
Sent: Monday, November 30, 2020 9:06 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Re: feedback on Separation of Powers paper

2 p.m. on December 8th works great for me. I look forward to speaking with you then.

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Date: Monday, November 30, 2020 at 8:40 AM
To: [redacted]
Subject: Re: feedback on Separation of Powers paper

Sure -- would be glad to talk. How about next Tuesday, December 8, at 2:00 -- or any time that afternoon? If you'd prefer to talk earlier just let me know and we'll find a convenient time.

From: [redacted]
Sent: Monday, November 30, 2020 8:15 AM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Re: feedback on Separation of Powers paper

Professor Agarwal,

Thanks so much for your very useful feedback. I will be sure to incorporate it into my final draft. Also, I would love to take you up on your offer for career advice because I am sort of at a cross roads for what do after my clerkship ends. Let me know if you have any time talk over the next two weeks.

Best,
[redacted]

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Date: Wednesday, November 25, 2020 at 5:55 PM
To: [redacted]
Cc: Jenna Hodges <Jenna.Hodges@myfloridalegal.com>
Subject: feedback on Separation of Powers paper

[redacted]

Thanks so much for all your thoughtful comments and participation over the course of the last

AMERICAN OVERSIGHT

semester. It was great to have you in the class.

You picked a timely and interesting topic, and I very much enjoyed reading your paper. Below are a few questions and suggestions to take into account as you finalize your draft. Please don't feel the need to address all those points; just wanted to pass along these thoughts in case they're of help as you refine the draft.

Thanks so much, good luck, and stay in touch!

Best,

Professor Agarwal

Feedback:

1. Your opening introduction does a good job of setting up the importance of the discussion to follow, but it might be helpful, if possible, to expand your discussion to explain why you think immunity doctrine is restricting the proper response to COVID in the status quo.
2. Nice job on the citations, your paper is clearly well researched and cited.
3. Be careful making broad statements without authority. For example, it is inevitable that some states will not respond to coronavirus or maybe just likely or possible? Likewise, could Congress set up a nationwide mask mandate under its enumerated powers? I recognize that these are not the core focus of the paper, but it is useful to be exact in legal writing.
4. Consider discussing the Court's 2019 discussion of immunity in *Franchise Tax Board v. Hyatt* in your discussion of the background of immunity. The Court adopted a broad view of immunity, which you seem to reject, so it might be worth explaining where you think the Court went wrong in its more recent discussions of immunity.
5. You argue that *Katz* has called the Court's abrogation doctrine into doubt (p. 13). You might want to consider *Allen v. Cooper*, which the Supreme Court decided in March of this year, and which expressly considers and rejects that argument. I am not saying that you need to agree with *Allen*, but I think your discussion should consider it, and discuss why you think there is still tension in the law after *Allen*. Likewise, consider whether Congress could make the Article I argument you suggest (p. 14) considering *Allen*.
6. At the start of part III, you have a flag for an introduction, just make sure to insert one before the final draft.
7. On p. 20 and 21 you discuss how Congress has used the spending power to condition funds on a waiver of sovereign immunity. Under this approach does Congress need to abrogate immunity or can it just induce waiver with the condition? If the former, why is there not a problem under the abrogation law you discuss? If the later, what are the implications for your discussion of abrogation, i.e. does Congress even need to concern itself with abrogation or can it just induce waiver? I think you may answer this in footnote 113, but given the length of your discussion of immunity and abrogation, if the answer is that you don't need an abrogation, you might want to talk about why you think immunity is nonetheless constraining policy responses.
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dangerously, but how much traditional tort law does or does not promote safety is debated by tort scholars.

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10. Make sure to bluebook and proofread for typos before the final draft.

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Office of the Attorney General
Solicitor General
PL-01, The Capitol
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Amit.Agarwal@myfloridalegal.com
Office: (850) 414-3688

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Karen Richardson; grollini@stearnsweaver.com
Subject: Re: job opportunities at the Office of the Florida Solicitor General (NAWL)
Date: Tuesday, December 8, 2020 6:09:09 PM
Attachments: Job Opportunities in the Office of the Florida Solicitor General, December 2020.pdf

---

Thanks so much to you both!

Am attaching an updated copy of our vacancy announcement, which extends our application deadline to December 21.

Please feel free to drop me a line if you have any questions or would like to discuss. I'd be more than glad to chat.

Best,
Amit

From: Karen Richardson <krichardson@nawl.org>
Sent: Tuesday, December 8, 2020 5:59 PM
To: grollini@stearnsweaver.com <grollini@stearnsweaver.com>
Cc: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Re: job opportunities at the Office of the Florida Solicitor General (NAWL)

Thank you, Gigi and Amit.

We will get this posted to our membership- looking forward to helping with this and future openings.

KAREN M. RICHARDSON | Executive Director
National Association of Women Lawyers
krichardson@nawl.org | 312.988.6196
she/her

On Dec 8, 2020, at 5:51 PM, Gigi Rollini <grollini@stearnsweaver.com> wrote:

Amit,
Thank you for reaching out to let NAWL members know about upcoming opportunities for employment with the Florida Office of the Solicitor General! I am happy to connect you, and NAWL welcomes the opportunity to share this information with its members.

By this email, I am introducing you to Karen Richardson, NAWL's Executive Director.

Karen,
Please meet Amit Agarwal, Florida's Solicitor General. He would like to work with NAWL to advertise openings in his office, both now and in the future. Please let us know if you

AMERICAN OVERSIGHT

or other NAWL staff would be the best contact. I suspect we might just have some NAWL members who would love get out of that cold weather and come work with an incredible group of appellate attorneys down here in Florida.

Let me know if you need anything else from me, and thanks to you both!

Gigi

Gigi Rollini, Esq.
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.
106 E. College Avenue, Suite 700
Tallahassee, FL 32301
Direct: 850.329.4877
Main: 850.580.7200
Email: grollini@stearnsweaver.com
Web: http://www.stearnsweaver.com/attorneys/gigi-rollini/

From: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Sent: Friday, December 4, 2020 4:05 PM
To: Gigi Rollini <grollini@stearnsweaver.com>
Subject: job opportunities at the Office of the Florida Solicitor General

Dear Ms. Rollini,

I'm writing to ask if you could put me in touch with someone who could help us let NAWL members know about current and future job opportunities in the Office of the Florida Solicitor General. We do nationwide recruitment, are looking to fill two new attorney positions, will likely have additional vacancies in the next year, and would like to do everything we can to encourage applications from a broad and diverse pool of candidates.

Our current vacancy announcement is attached and includes information about the work of the SG's office, our two current vacancies, and how to apply.

I'm sure you have a lot on your plate and hope you won't mind my reaching out. Hannah Monroe was kind enough to pass on your email address.

Thanks so much for considering this, and hope you are well!

Best,
Amit

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050

AMERICAN OVERSIGHT

Amit.Agarwal@myfloridalegal.com

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<Job Opportunities in the Office of the Florida Solicitor General, 11.25.2020.pdf>

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JOB OPPORTUNITIES IN THE OFFICE OF THE FLORIDA SOLICITOR GENERAL

The Florida Solicitor General's Office is considering applications for the positions of Deputy Solicitor General and Assistant Solicitor General. These new positions are part of a major expansion of the Office and reflect its growing portfolio, particularly in the areas of constitutional and criminal appellate litigation.

The Office of the Solicitor General represents the State of Florida in the U.S. Supreme Court and the Florida Supreme Court, litigates cases of exceptional public importance in federal and state appellate and trial courts, supervises appellate litigation in cases to which the State is a party, provides legal advice and policy guidance to the Attorney General, and coordinates the State's amicus practice as well as its involvement in multistate litigation. Assistant and Deputy SGs, including two Chief Deputies (one on the civil side, and one on the criminal side) assist the Solicitor General with all aspects of the work of the Office.

Attorneys serving in the Office regularly brief and argue high-profile cases, including constitutional challenges to significant state statutes, in the Florida Supreme Court, the U.S. Court of Appeals for the Eleventh Circuit, and lower state and federal trial and appellate courts. In addition, attorneys routinely work on cutting-edge legal issues, interact with the State's leading lawyers and policymakers, and collaborate with top appellate attorneys serving in private practice, other states, and the U.S. Department of Justice.

Applicants for the position of Assistant Solicitor General should have excellent written and oral advocacy skills, outstanding academic credentials, and at least two years of legal experience. Applicants for the position of Deputy Solicitor General should have, in addition to those qualifications, at least five years of legal experience, as well as demonstrated proficiency litigating civil appeals, criminal appeals, or constitutional issues. For both positions, a clerkship on a federal appellate court or the Florida Supreme Court is highly desirable.

If selected, an applicant who is not already a member of the Florida bar must gain such admission within one year of the date of appointment. All new hires are required to make a two-year commitment to the Office.

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https://jobs.myflorida.com/go/Office-of-the-Attorney-General/2818600/

AMERICAN OVERSIGHT

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Amit Agarwal
Florida Solicitor General
Amit.Agarwal@myfloridalegal.com

Jenna Hodges
Administrative Assistant to the Solicitor General
Jenna.Hodges@myfloridalegal.com
(850) 414-3807

AMERICAN OVERSIGHT

From: Amit Agarwal
To: William Pryor
Subject: Re: job opportunities in the Office of the Florida Solicitor General
Date: Friday, November 13, 2020 4:59:45 PM
Attachments: Job Opportunities in the Office of the Florida Solicitor General, November 2020.pdf

---

My apologies -- am resending my email below with the vacancy announcement attached.

Best,
Amit

From: Amit Agarwal
Sent: Friday, November 13, 2020 4:41 PM
To: William Pryor <WHP@ca11.uscourts.gov>
Subject: job opportunities in the Office of the Florida Solicitor General

Dear Chief Judge Pryor,

Greetings from Tallahassee. I hope this message finds you well.

I'm writing to let you know that the Florida SG's office is considering applications for the positions of Deputy Solicitor General and Assistant Solicitor General. The attached vacancy announcement includes some information about the office and how to apply. Our application deadline is November 30. If it's not convenient to fill out a formal online application by then, interested candidates can get the ball rolling by emailing me a resume.

If it's not too much trouble, we would be immensely grateful if you would consider forwarding this message to any past or current law clerks who might be interested in the work of the SG's office. Please don't hesitate to let me know if you have any questions or would like more information about the current vacancies or other potential opportunities within the office. I'd be more than glad to chat.

We know how busy you are and hope you won't mind our sending this to you. Thanks so much for taking the time to consider this.

Best,
Amit

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com
Office: (850) 414-3688

AMERICAN OVERSIGHT

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JOB OPPORTUNITIES IN THE OFFICE OF THE FLORIDA SOLICITOR GENERAL

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AMERICAN OVERSIGHT

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(850) 414-3807

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Allen Winsor
Subject: Re: job opportunities in the Office of the Florida Solicitor General
Date: Tuesday, December 1, 2020 10:37:11 AM
Attachments: Job Opportunities in the Office of the Florida Solicitor General, 11.25.2020.pdf

---

Thanks so much for taking the time to talk yesterday -- was great to catch up.

Am attaching an updated version of our vacancy announcement, listing our new application deadline of December 11.

Also, if it's not too much trouble, could you please send me a chambers email address for Judge Ed Carnes? I thought I had it but can't seem to find it.

Thanks so much!

--Amit

From: Allen Winsor <allenwinsor@yahoo.com>
Sent: Friday, November 20, 2020 3:34 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Re: job opportunities in the Office of the Florida Solicitor General

Hi Amit- thanks for the email. I hope all is well with you and your family. Have a great thanksgiving. -Allen

> On Nov 20, 2020, at 3:31 PM, Amit Agarwal <Amit.Agarwal@myfloridalegal.com> wrote:
>
> Dear Friends,
>
> The Florida SG's office is considering applications for the positions of Deputy Solicitor General and Assistant Solicitor General. Please see the attached vacancy announcement for information about those positions and how to apply. The current application deadline is November 30; if it's not convenient to fill out a formal online application by then, interested candidates can get the ball rolling by emailing a resume and short note or cover letter to me and my assistant (Jenna Hodges, copied here).
>
> I'd be immensely grateful if you would help us to circulate this announcement as widely as possible. Please feel free to drop me a line if you have any questions, know anyone who might be interested, or would like more information about the current vacancies or other potential opportunities within the office. I'd be more than glad to chat.

AMERICAN OVERSIGHT

My apologies for the mass email, and thanks so much for taking the time to consider this. I hope you and your families are safe and well.

Best,
Amit

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com

<Job Opportunities in the Office of the Florida Solicitor General, November 2020.pdf>

AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

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Jenna Hodges
Administrative Assistant to the Solicitor General
Jenna.Hodges@myfloridalegal.com
(850) 414-3807

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Jack Goldsmith
Subject: Re: reference for Rachel Siegel
Date: Tuesday, December 22, 2020 3:38:55 PM

Thanks so much for responding. We plan to extend offers by tomorrow, so would be ideal if we could talk before then. But no problem if that's not convenient; she gave us some other references as well and we can rely on those.

Either way, hope to have a chance to talk at some point when you're not too busy.

Best,
Amit

From: Jack Goldsmith <goldsmith.jack@gmail.com>
Sent: Tuesday, December 22, 2020 12:41 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Re: reference for Rachel Siegel

Hi! Can I call next week or is that too late?

On Mon, Dec 21, 2020 at 7:05 PM Amit Agarwal <Amit.Agarwal@myfloridalegal.com> wrote:

> Dear Professor Goldsmith,
>
> Rachel Siegel (HLS Class of 2015, resume attached) listed you as a reference in support of her application to the Florida SG's office, and she was kind enough to pass along your contact information. If it's not too much trouble, I'd be grateful if we could talk by phone for a few minutes whenever it's convenient for you.
>
> The best way to reach me is on my cell: [redacted] Please feel free to call any time. I'd also happy to schedule an appointment by email if that's more convenient.
>
> By the way: *The Terror Presidency* is required reading for students in my Separation of Powers seminar, and I used to work at OLC, so I was glad to have this excuse to reach out to you!
>
> Thanks so much.
>
> Best,
> Amit
>
> Amit Agarwal
> Office of the Attorney General
> Solicitor General
> PL-01, The Capitol
> Tallahassee, FL 32399-1050
> Amit.Agarwal@myfloridalegal.com

AMERICAN OVERSIGHT

--
Jack Goldsmith
Learned Hand Professor of Law
Harvard Law School - Areeda 233
1563 Massachusetts Ave
Cambridge, MA 02138

http://www.jackgoldsmith.org/
@jacklgoldsmith

AMERICAN OVERSIGHT

From: Amit Agarwal
To: Jack Goldsmith
Subject: Re: reference for Rachel Siegel
Date: Tuesday, December 22, 2020 3:49:32 PM

5:15 would be perfect. My cell is [redacted] Am sorry to bother you during the holidays, and thanks so much for taking the time to talk.

From: Jack Goldsmith <goldsmith.jack@gmail.com>
Sent: Tuesday, December 22, 2020 3:46 PM
To: Amit Agarwal <Amit.Agarwal@myfloridalegal.com>
Subject: Re: reference for Rachel Siegel

She is excellent. BUt it was a long time ago. I can call around 515 pm if that is not too late.

On Tue, Dec 22, 2020 at 3:38 PM Amit Agarwal <Amit.Agarwal@myfloridalegal.com> wrote:

> Thanks so much for responding. We plan to extend offers by tomorrow, so would be ideal if we could talk before then. But no problem if that's not convenient; she gave us some other references as well and we can rely on those.
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> Either way, hope to have a chance to talk at some point when you're not too busy.
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Sent: Tuesday, December 22, 2020 12:41 PM
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AMERICAN OVERSIGHT

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--
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Learned Hand Professor of Law
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1563 Massachusetts Ave
Cambridge, MA 02138

http://www.jackgoldsmith.org/
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AMERICAN OVERSIGHT

From: Amit Agarwal
To: Shawn Bayern
Cc: Anna Shum; Jenna Hodges
Subject: Separation of Powers seminar
Date: Tuesday, January 5, 2021 9:28:00 AM

Shawn,

Thanks again for your email yesterday. My grades have been submitted.

Am I scheduled to teach a class this semester? I don't seem to have any notification or class roster in my inbox, although things have been hectic and I may have missed it.

No worries if not. Just wanted to make plans for the next few months.

Thanks.

Best,
Amit

AMERICAN OVERSIGHT

From:	Amit Agarwal
To:	grollini@stearnsweaver.com
Subject:	job opportunities at the Office of the Florida Solicitor General
Date:	Friday, December 4, 2020 4:05:17 PM
Attachments:	Job Opportunities in the Office of the Florida Solicitor General, 11.25.2020.pdf

Dear Ms. Rollini,

I'm writing to ask if you could put me in touch with someone who could help us let NAWL members know about current and future job opportunities in the Office of the Florida Solicitor General. We do nationwide recruitment, are looking to fill two new attorney positions, will likely have additional vacancies in the next year, and would like to do everything we can to encourage applications from a broad and diverse pool of candidates.

Our current vacancy announcement is attached and includes information about the work of the SG's office, our two current vacancies, and how to apply.

I'm sure you have a lot on your plate and hope you won't mind my reaching out. Hannah Monroe was kind enough to pass on your email address.

Thanks so much for considering this, and hope you are well!

Best,
Amit

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AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

From:	Amit Agarwal
To:	ajordan@ca11.uscourts.gov
Subject:	job opportunities in the Office of the Florida Solicitor General
Date:	Friday, November 20, 2020 4:45:39 PM
Attachments:	Job Opportunities in the Office of the Florida Solicitor General, November 2020.pdf

Dear Judge Jordan,

Greetings from Tallahassee. I hope this message finds you well.

I'm writing to let you know that the Florida SG's office is considering applications for the positions of Deputy Solicitor General and Assistant Solicitor General. The attached vacancy announcement includes some information about the office and how to apply. Our application deadline is November 30. If it's not convenient to fill out a formal online application by then, interested candidates can get the ball rolling by emailing me a resume.

If it's not too much trouble, we would be immensely grateful if you would consider forwarding this message to any past or current law clerks who might be interested in the work of the SG's office. Please don't hesitate to let me know if you have any questions or would like more information about the current vacancies or other potential opportunities within the office. I'd be more than glad to chat.

We know how busy you are and hope you won't mind our sending this to you. Thanks so much for taking the time to consider this.

Best,
Amit

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AMERICAN OVERSIGHT

From:	Amit Agarwal
To:	Kevin Newsom
Subject:	job opportunities in the Office of the Florida Solicitor General
Date:	Friday, November 13, 2020 5:01:24 PM
Attachments:	Job Opportunities in the Office of the Florida Solicitor General, November 2020.pdf

Dear Judge Newsom,

Greetings from Tallahassee. I hope this message finds you well.

I'm writing to let you know that the Florida SG's office is considering applications for the positions of Deputy Solicitor General and Assistant Solicitor General. The attached vacancy announcement includes some information about the office and how to apply. Our application deadline is November 30. If it's not convenient to fill out a formal online application by then, interested candidates can get the ball rolling by emailing me a resume.

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Best,
Amit

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To apply for these positions, please visit the website below and fill out an online application per the instructions listed for each position:

https://jobs.myflorida.com/go/Office-of-the-Attorney-General/2818600/

AMERICAN OVERSIGHT

Candidates may informally express their interest in applying for one or both of the posted vacancies by emailing a resume to the Solicitor General and his assistant; their email addresses are listed below. Such candidates will be considered for the current round of hiring if their resume is received by November 30. However, all candidates will be required to fill out an online application prior to scheduling an interview.

Amit Agarwal
Florida Solicitor General
Amit.Agarwal@myfloridalegal.com

Jenna Hodges
Administrative Assistant to the Solicitor General
Jenna.Hodges@myfloridalegal.com
(850) 414-3807

AMERICAN OVERSIGHT

From:	Amit Agarwal
To:	brett_kavanaugh@hotmail.com
Cc:	ERoney@supremecourt.gov
Subject:	job opportunities in the Office of the Florida Solicitor General
Date:	Friday, November 13, 2020 4:24:11 PM
Attachments:	Job Opportunities in the Office of the Florida Solicitor General, November 2020.pdf

Dear Justice Kavanaugh,

Greetings from Florida -- hope this message finds you well. I'm writing to let you know that the Florida SG's office is considering applications for the positions of Deputy SG and Assistant SG. We'd be grateful if Eva could help us spread the word to the clerk network. The attached vacancy announcement includes some information about our two current vacancies. I'm of course happy to talk about those positions as well as other potential opportunities within the office.

Thanks so much for taking the time to consider this. Hope you and your family are well.

Best,
Amit

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Amit.Agarwal@myfloridalegal.com

AMERICAN OVERSIGHT

JOB OPPORTUNITIES IN THE OFFICE OF THE FLORIDA SOLICITOR GENERAL

The Florida Solicitor General's Office is considering applications for the positions of Deputy Solicitor General and Assistant Solicitor General. These new positions are part of a major expansion of the Office and reflect its growing portfolio, particularly in the areas of constitutional and criminal appellate litigation.

The Office of the Solicitor General represents the State of Florida in the U.S. Supreme Court and the Florida Supreme Court, litigates cases of exceptional public importance in federal and state appellate and trial courts, supervises appellate litigation in cases to which the State is a party, provides legal advice and policy guidance to the Attorney General, and coordinates the State's amicus practice as well as its involvement in multistate litigation. Assistant and Deputy SGs, including two Chief Deputies (one on the civil side, and one on the criminal side) assist the Solicitor General with all aspects of the work of the Office.

Attorneys serving in the Office regularly brief and argue high-profile cases, including constitutional challenges to significant state statutes, in the Florida Supreme Court, the U.S. Court of Appeals for the Eleventh Circuit, and lower state and federal trial and appellate courts. In addition, attorneys routinely work on cutting-edge legal issues, interact with the State's leading lawyers and policymakers, and collaborate with top appellate attorneys serving in private practice, other states, and the U.S. Department of Justice.

Applicants for the position of Assistant Solicitor General should have excellent written and oral advocacy skills, outstanding academic credentials, and at least two years of legal experience. Applicants for the position of Deputy Solicitor General should have, in addition to those qualifications, at least five years of legal experience, as well as demonstrated proficiency litigating civil appeals, criminal appeals, or constitutional issues. For both positions, a clerkship on a federal appellate court or the Florida Supreme Court is highly desirable.

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AMERICAN OVERSIGHT

From:	Amit Agarwal
To:	Jeffrey Sutton
Subject:	job opportunities in the Office of the Florida Solicitor General
Date:	Friday, November 20, 2020 4:48:05 PM
Attachments:	Job Opportunities in the Office of the Florida Solicitor General, November 2020.pdf

Dear Judge Sutton,

Greetings from Tallahassee. I hope this message finds you well.

I'm writing to let you know that the Florida SG's office is considering applications for the positions of Deputy Solicitor General and Assistant Solicitor General. The attached vacancy announcement includes some information about the office and how to apply. Our application deadline is November 30. If it's not convenient to fill out a formal online application by then, interested candidates can get the ball rolling by emailing me a resume.

If it's not too much trouble, we would be immensely grateful if you would consider forwarding this message to any past or current law clerks who might be interested in the work of the SG's office. Please don't hesitate to let me know if you have any questions or would like more information about the current vacancies or other potential opportunities within the office. I'd be more than glad to chat.

We know how busy you are and hope you won't mind our sending this to you. Thanks so much for taking the time to consider this.

Best,
Amit

Amit Agarwal
Office of the Attorney General
Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399-1050
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Office: (850) 414-3688

AMERICAN OVERSIGHT

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AMERICAN OVERSIGHT

From: Richard Martin
To: Kaplan,Mark E
Subject: Re: Discuss a SCOTUS case?
Date: Thursday, December 31, 2020 4:38:47 PM

Mark, Sure. Let me get with our Solicitor General and let you know of availability. What is the case?

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From: Kaplan,Mark E <mark.kaplan@ufl.edu>
Sent: Thursday, December 31, 2020 9:03:51 AM
To: Richard Martin <Richard.Martin@myfloridalegal.com>
Subject: Discuss a SCOTUS case?

Dear Richard,

I hope that the holidays have been treating you well.

The US Supreme Court is scheduled to hear a case this spring that is of interest to some of the universities and athletic conferences and may also implicate issues that might be of amicus interest to General Moody.

Is there any chance we can schedule a call to discuss when folks are back in the office next week? Thank you for considering.

Happy New Year

Mark

Mark Kaplan
VP, Government & Community Relations
University of Florida
111 Tigert Hall, PO Box 113157
Gainesville, FL 32611-3157
O: 352–392–4574 | C: 850–322–6237
mark.kaplan@ufl.edu

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