SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL COLLEGIATE ATHLETIC)
ASSOCIATION,)
Petitioner,)
v.) No. 20-512
SHAWNE ALSTON, ET AL.,)
Respondents.)

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AMERICAN ATHLETIC CONFERENCE,)
ET AL.,)
Petitioners,)
v.) No. 20-520
SHAWNE ALSTON, ET AL.,)
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Washington, D.C.

Wednesday, March 31, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

SETH P. WAXMAN, ESQUIRE, Washington, D.C.,
on behalf of the Petitioners.
JEFFREY L. KESSLER, ESQUIRE, New York, New York;
on behalf of the Respondents.
ELIZABETH B. PRELOGAR, Acting Solicitor General,
Department of Justice, Washington, D.C.;
for the United States, as amicus curiae,
supporting the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 20-512, National Collegiate Athletic Association versus Alston, and the consolidated case.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONERS

MR. WAXMAN: Good morning, Mr. Chief Justice, and may it please the court.

For more than a hundred years, the distinct character of college sports has been that it's played by students who are amateurs, which is to say that they are not paid for their play. Maintaining that distinct character is both procompetitive, because it differentiates the NCAA's product from professional sports, and can be achieved only through agreement.

The lower courts agreed that the NCAA's conception of amateurism is procompetitive, but, in striking down several of the rules, they made two fundamental errors. First, they defined their own "much narrower" conception of amateurism to mean only that

athletes not be paid unlimited amounts unrelated to education. And they then imposed a regime that permits athletes to be paid thousands of dollars each year just for playing on a team and unlimited cash for "post-eligibility internships."

That manifestly preserves neither the NCAA's demarcation between college and professional sports, nor even the lower courts', because whatever their labels, these new allowances are akin to professional salaries, especially given the truly unique history here.

A rule that is reasonably designed to preserve amateurism as the NCAA has defined it should be upheld. Ruse -- rules that do not enforce the amateur status of athletes, by contrast, may be subject to detailed scrutiny.

Decades of judicial experience show that that distinction is both sensible and administrable, and the alternative is perpetual litigation and judicial superintendence, as the past 12 years in the Ninth Circuit so vividly illustrate and portend.

Thank you.

CHIEF JUSTICE ROBERTS: Mr. Waxman, do

you want us to apply the so-called quick look approach in evaluating these restrictions? Is that right?

MR. WAXMAN: That's right in this sense. And let me just say, Mr. Chief Justice, first of all, look, we understand that there's been a trial here, and we -- we are perfectly prepared to explain, as we tried to in our briefs, why, notwithstanding the trial, reversal is required, and the antitrust laws do not permit the Court to impose the decree that it did.

But we think that in order to avoid the situation that we currently have where we have endless line-drawing and judicial supervision, pocket -- punctuated by requests for treble damages, it's important for the Court to speak clearly here.

And I will say that given that we have what the -- what the government acknowledges is a truly unique situation in which we have a product that is defined by the restraint on competition, it is perfectly appropriate and necessary for the Court to examine in whatever detail is necessary whether the product that's

produced really is procompetitive.

CHIEF JUSTICE ROBERTS: Well, but your --

MR. WAXMAN: And it is.

CHIEF JUSTICE ROBERTS: -- your friend on the other side says we've never used the Quick Look Doctrine to uphold restrictions, only to strike them down.

MR. WAXMAN: Well, look, Quick Look is a particular phrase. We haven't used it. But this Court has made Clear that the Rule of Reason represents a continuum of scrutiny. As the Court explained in Cal Dental, the Court needs to determine the inquiry mete for the circumstances.

This Court recognized the fact that in -- in American -- Section 6 of American Needle, that a form of Quick Look or abbreviated review may well be appropriate to uphold the very kind of rules that are at issue here.

And more broadly, Mr. Chief Justice, in antitrust cases like Brooke Group and Trinko, the Court has adopted clear standards that a plaintiff must meet in order to overcome dismissal.

And the rationale for the approach that we advocate -- advocate is similar to what prompted the Court in those other circumstances to impose such a deferential review. And I will say --

CHIEF JUSTICE ROBERTS: I -- I --

MR. WAXMAN: -- that --

CHIEF JUSTICE ROBERTS: -- I -- I think maybe, Mr. Waxman, the one limitation that is the most troublesome is -- or -- or lack of limitation, I guess, that schools can pay up to $50,000 for a $10 million insurance policy to protect student-athletes for future earnings.

Now that sounds very much like pay for play. You know, you're -- you're paying the insurance premium so that they will play at college and not in the pros. Doesn't that undermine the amateur status theory you have?

MR. WAXMAN: Well, I'll say two things, Mr. Chief Justice.

First of all, one can dispute whether one particular line or not is drawn in the right place. But the notion that this particular rule -- and I'll explain its rationale in a minute -- which allows --

CHIEF JUSTICE ROBERTS: Well, less than -- you'll explain it in less than a minute.

MR. WAXMAN: I'll explain it in less than a minute. Loss-of-value insurance, which has been provided in a few instances by some schools administering their student activity fund, is a form of insurance against injury, just like disability insurance and extended medical insurance. It is a cost of participating in athletics that permits athletes who want to receive an education instead of pay for their play can continue to do so.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas.

MR. WAXMAN: Thank you.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

Mr. Waxman, just a little bit -- a matter of curiosity to me. You put a lot of weight on -- focus on amateurism. Is there a similar -- and -- and you look at the limitations of the benefits or pay to players.

But is there a similar focus on the compensation to coaches to maintain that

distinction between amateur coaches, coaches in the amateur ranks, as opposed to coaches in the pro ranks?

MR. WAXMAN: Thank you, Justice Thomas. So the NCAA previously had a rule that limited the amount of compensation that coaches could receive. It was challenged in the Tenth Circuit in a case called Law versus NCAA.

The NCAA sought to defend that rule on the amateurism principle. And what the Tenth Circuit said was, look, rules that are reasonably designed to protect the amateur status of student-athletes should be upheld in the twinkling of an eye.

But coaches are not student-athletes. They are professionals, just like professors and presidents, and, therefore, the Court applied full Rule of Reason review and struck down the limitation on coaches. So the NCAA is no longer permitted under the antitrust laws from in any way restraining the salaries of coaches and other professionals.

JUSTICE THOMAS: Well, it just strikes me as odd that the coaches' salaries have ballooned and they're in the amateur ranks, as

are the players.

But be that as it may, in Board of Regents, at least as I read it, the -- where the NCAA also defended its -- or the amateurism interest, we -- did we conduct a deferential Quick Look review?

MR. WAXMAN: Well, the -- Mr. Chief Justice, the -- the amateurism rules --

JUSTICE THOMAS: Thank you for --

MR. WAXMAN: -- that the eligibility --

JUSTICE THOMAS: -- the promotion, by the way.

MR. WAXMAN: I -- I'm sorry, but I'm sure you would be terrific at that, Justice Thomas. Let me just say that --

CHIEF JUSTICE ROBERTS: There's no -- there's no opening, Mr. Waxman.

MR. WAXMAN: I -- there's nothing more I can say that will not get me into trouble, so let me answer Justice Thomas's question.

The -- the rules that were challenged in Board of Regents were a particular restraint on the -- the number of televised games that the NCAA would allow its teams to hold. And what

the Court said is, number one, because this is an industry in which agreement is necessary for the product to exist at all, we will apply the Rule of Reason, and we will apply a full Rule of Reason inquiry into the procompetitive benefits of the television rule because they do not fit the mold of the core rules that define the product itself, that is, the rule -- the eligibility rules that require that contestants be students and amateurs.

And it's from that that both we and this Court in Section 6 of American Needle derive the principle that when a rule on its face is shown to advance the principle of amateur athletic competition, it should be withheld in the twink -- in the so-called twinkling of an eye.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: I have two questions. The first one is, what is it precisely that you are complaining about in this Court? From much of what has been argued, I thought it was the injunction part on page -- pages 119a, 47a, and

208a.

And -- and the injunction and the court of appeals seem to say, NCAA, you cannot limit giving them musical instruments, computers, et cetera, and then they add the cost of post-eligibility internships, vocational schools -- does that mean, like, law school -- and there are a few couple other things.

MR. WAXMAN: So --

JUSTICE BREYER: Is it that you just think these -- you know what the latter things are. They're -- they're in your mind, okay. That could be hundreds of thousands of dollars. I mean, law school is expensive. I don't know if it's a vocational school, but they -- they -- they could be. They could be very, very expensive.

So that limit may come close to saying, NCAA, you can let these schools get away with murder in terms of what they give the athletes and you have to. Or --

MR. WAXMAN: So --

JUSTICE BREYER: -- it might be some minor thing. But is that what you're attacking, or you're attacking other things as well or

what?

MR. WAXMAN: Justice Breyer, let me start with the general and proceed to the particular. Your first question is, what is it that you're complaining about.

JUSTICE BREYER: Yep.

MR. WAXMAN: We think that -- we think that antitrust courts lack the authority to redefine the central differentiating feature of the NCAA's procompetitive product, particularly where the history and context show so plainly --

JUSTICE BREYER: Yeah, yeah.

MR. WAXMAN: -- that the --

JUSTICE BREYER: I understand that. But I say it has to end up in something so that telling you to do something you don't want to do --

MR. WAXMAN: And --

JUSTICE BREYER: -- is that thing they're telling you.

MR. WAXMAN: -- what they're -- they have imposed in this decree, which is on page 167a to 170a of the appendix to our petition --

JUSTICE BREYER: Mm-hmm.

MR. WAXMAN: -- they have imposed a

regime in which student-athletes can be paid large sums of money on account of their athletic performance, which does not distinguish college from professional sports, much less as --

JUSTICE BREYER: Okay. Which -- which --

MR. WAXMAN: -- effectively --

JUSTICE BREYER: -- which --

MR. WAXMAN: -- as the challenged rule.

JUSTICE BREYER: -- which one allows you to do it? What's the line, what's the sentence that allows you to do that? Because I felt the court -- the court of appeals was saying, no, it doesn't let them do it, it doesn't do that.

MR. WAXMAN: I'll -- I'll give you three examples if I have the time.

Number one, the Court now says that we cannot pro -- we cannot restrain schools from awarding to every Division I athlete, just for being on the team, $5,980 per year, God help us. That is nothing but pay for play.

JUSTICE BREYER: Okay.

MR. WAXMAN: Number two, that we have

to -- we cannot restrain, put in any way any limit on the number of post-eligibility paid internships that student-athletes can receive.

JUSTICE BREYER: Thank you.

MR. WAXMAN: And with respect to the long laundry list that is reflected in paragraph 2, what the court has said is we cannot place any limits on anything that can be deemed an educational -- educational -- "related to education," when, in the present world, as the district court recognized, we permit student-athletes to receive the actual and necessary educational expenses, including every single one of these things provided that they are actually necessary and reasonably limited. And the court said, no, you can't place any limit on that.

And we can put labels aside. That con -- that permits school to allow pay for play. And the -- and the reason why we need to allow the NCAA to continue to enforce the amateurism principle, which is well understood, is, in fact, illustrated by Justice Thomas's point about the college coaches. We know what happened to college coaches' salaries when the

court struck down the NCAA's rules limiting those salaries. They went through the roof.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Alito.

JUSTICE ALITO: Mr. Waxman, let me put on the table some of what is said by those who challenge your idea of amateurism. The briefs that are supported -- that are submitted in support of the Respondents paint a pretty stark picture, and they argue that colleges with powerhouse football and basketball programs are really exploiting the students that they recruit. They have programs that bring in billions of dollars. As Justice Thomas mentioned, the -- this money funds enormous salaries for coaches and others in huge athletic departments. But the athletes themselves have a pretty hard life. They face training requirements that leave little time or energy for study, constant pressure to put sports above study, pressure to drop out of hard majors and hard classes, really shockingly low graduation rates. Only a tiny percentage ever go on to make any money in professional sports. So the

argument is they are recruited, they're used up, and then they're cast aside without even a college degree. So they say, how can this be defended in the name of amateurism?

MR. WAXMAN: Well, let me -- let me respond. I mean, there -- there is a healthy debate going on in legislatures around the country over whether college athletes should, as a matter of principle, be paid. Our view -- and -- and that is not an antitrust question. Our own view is, if you allow them to be paid, they will be spending even more time on their athletics and -- and devoting even less attention to academics.

But the NCAA has rules limiting to 35 hours a week the number of hours that a Division I athlete can spend, and this applies to all Division I athletes, just not in the two sports in a few schools that happen to make money.

You say that the schools are making billions of dollars on this. There are 1100 schools that belong to the NCAA. Twenty-four or, in some years, 25 schools make money on their athletic programs. The rest of the programs are subsidized by general revenue,

student fees, and tuition. And the notion that they graduate at lower rates and they have post outcomes is contrary to the evidence in this case.

JUSTICE ALITO: Well, no, I --

MR. WAXMAN: The evidence in the --

JUSTICE ALITO: -- what you say is -- what you say is true of -- of the thousands and thousands of real student-athletes, but what's the graduation rate for football players in the power conferences?

MR. WAXMAN: You know, I can't cite you the -- from memory, the statistics. Professor Heckman, who was one of the witnesses at trial, testified, and all I can remember is that what he said -- and there is support for this in independent studies in some of the amicus briefs supporting us -- are that Division I athletes graduate at higher rates than students who are not athletes --

JUSTICE ALITO: Yeah, the -- the -- the athletes --

MR. WAXMAN: -- and have better outcomes following graduation.

JUSTICE ALITO: Yeah, the athletes on

the crew and -- and fencing, but, for the -- the powerhouse basketball and football programs, it's different.

Let me -- let me squeeze in one more question, which seems -- goes to the heart of what I'm wrestling with. You say that what's distinctive about your product is that your players are not paid. And that was true a hundred years ago.

But, in fact, they are paid. They get lower admission standards. They get tuition, room and board, and other things. That's a form of pay. So the distinction is not whether they're going to be paid. It's the form in which they're going to be paid and how much they're going to be paid, isn't that right?

MR. WAXMAN: It is not right. The principle -- the NCAA for decades has defined "pay" to mean compensation in ex of -- in excess of two things: Number one, allowances for educational expenses, and educational can include both academic and athletic. That is the reasonable and necessary expenses to obtain an education. And, number two, certain sort of token prizes and awards for exceptional

performance that are characteristic of amateur leagues and --

JUSTICE ALITO: Thank you, Mr. Waxman. My time is up.

MR. WAXMAN: Thank you, Justice Alito.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

JUSTICE SOTOMAYOR: I thought, Mr. Waxman, that the district court's injunction only prohibits the NCAA from limiting education-related expenses. It does not prohibit the conference from doing so.

So, if your priority is maintaining amateurism in college athletics and you and your members think that increasing education-related benefits will undermine the spirit of amateurism, why don't the conferences impose those limits?

MR. WAXMAN: I mean, I think this Court gave the answer to that question, Justice Sotomayor, in Board of Regents, which is this is a classic example of a prisoner -- prisoner's dilemma in which national agreement is the only solution. There is no doubt that what has happened with respect to the pay of college

coaches and other professionals will happen if conferences or individual schools are permitted to remove these restrictions.

JUSTICE SOTOMAYOR: Well --

MR. WAXMAN: And --

JUSTICE SOTOMAYOR: I'm sorry. Continue.

MR. WAXMAN: No, I'm sorry. I -- that -- that -- I believe that's a sufficient answer to your question.

JUSTICE SOTOMAYOR: So it --

MR. WAXMAN: Maybe it's not sufficient --

JUSTICE SOTOMAYOR: -- it didn't seem to me --

MR. WAXMAN: -- but it's my answer to your question.

JUSTICE SOTOMAYOR: -- it didn't seem to me that either the Ninth Circuit or the district court prohibits the NCAA from limit -- limiting educational-related expenses to those that are reasonable. So --

MR. WAXMAN: So --

JUSTICE SOTOMAYOR: -- all of your parade of horribles, the government says, are

taken care of by that limitation. If you think that internships should be related in some way to the educational experience, you could pass rules to that effect. So why doesn't that take care of your parade of horribles?

MR. WAXMAN: Justice Sotomayor, you keep saying reasonable educational expenses. What the decree says is that we may not limit in any way compensation or benefits that are in any way "related to education," and includes -- and no one disputes this -- the fact that we may -- that school -- under her decree, schools may provide $5,980 per year to every Division I athlete just for being on a team. And once a court gets into line-drawing in this respect, the litigation and level of judicial superintendence is inevitable.

And so why $5,980? If this Court were to affirm, within a month there will be another lawsuit, in addition to the two that are already now working their way through the district court in Oakland, which will say, number one, well, we have an expert who says that we don't think that consumers would be that bothered if it were $8,000 a year, and so we want $8,000 a year to

be imposed, and, by the way, we also want treble damages for the fact that, for all these years, we haven't been getting our $5,980.

The district court says no limits whatsoever on a postgraduate internship. The next lawsuit says we want treble damages because we weren't given unlimited postgraduate internships. And then there's another lawsuit that says, well, why does it have to be just postgraduate --

JUSTICE SOTOMAYOR: I get your point --

MR. WAXMAN: -- internships.

JUSTICE SOTOMAYOR: -- counsel, but --

MR. WAXMAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan.

JUSTICE KAGAN: Mr. Waxman, the way you talk about amateurism, it -- it sounds awfully high-minded. But there's another way to think about what's going on here, and that's that schools that are naturally competitors as to athletes have all gotten together in an organization, an organization that has undisputed market power, and they use that power to fix athletic salaries at extremely low

levels, far lower than what the market would set if it were allowed to operate.

So why shouldn't we think of it in just that kind of way, that these are competitors, all getting together with total market power, fixing prices?

MR. WAXMAN: Well, I think, the first answer I would give you is this is not some product, some differentiated product that has just been created and we're now testing whether or not it was adopted in good faith.

We're talking about a product that was created 116 years ago in response to abuses that were occurring as a result of instances of professionalism in athletics in order to restore integrity and the social value of college athletics. Almost a hundred years ago, Justice Brandeis in the Chicago --

JUSTICE KAGAN: Well, you can only ride on the history, I think, Mr. Waxman, for so long. I mean, a great deal has changed since a hundred years ago in the way that student-athletes are treated. And, you know, I'll take you back to Justice Alito's question and the kind of payments that they're given.

You know, a great deal has changed even since Board of Regents, let alone a hundred years ago.

So I guess it doesn't move me all that much that there's a history to this if what is going on now is that competitors as to labor are combining to fix prices.

MR. WAXMAN: So, look, the -- their -- the -- the -- the way that the Rule of -- the Rule of Reason applies here, this Court has said, because sports leagues produce a product that can't be reduce -- produced without agreement. And this is, as your question points out --

JUSTICE KAGAN: Well, for sure --

MR. WAXMAN: -- that an --

JUSTICE KAGAN: -- that's true about some things. I mean, you know, sports leagues have to get together to figure out the rules of the game, how many people are going to be on -- on the court at any one time. So, of course, there are things that there needs to be cooperation for. But why does there -- there -- why does there need to be cooperation on the cost of labor?

MR. WAXMAN: Because the cost of labor

in this unique instance is what is the differentiating feature that provides a procompetitive product.

JUSTICE KAGAN: So I think --

MR. WAXMAN: And when you have --

JUSTICE KAGAN: -- if that were true, Mr. Waxman, you would have an argument. But, as I understand what the trial court did here, it basically took a lot of evidence as to that question, as to whether the lack of pay to play was anything that consumers wanted, and what it found was that consumers didn't really care about that. The -- the -- the other side's experts found on the basis of survey evidence and so forth that payments of $10,000 or more would not affect demand.

Your expert failed to show anything to the contrary. Essentially, you're saying that the differentiating feature is the lack of pay to play. But the evidence in this trial suggested exactly the opposite.

MR. WAXMAN: So the evidence in this trial very much did not suggest exactly the opposite. And just to take one example, when the -- when their survey expert tested people's

reactions to giving them a -- you know, a $10,000 academic award, something like 10 percent of the respondents said that they would be less interested and would watch less if that's the case.

The question -- the fact that -- the procompetitive differentiation is not necessarily measured by net consumer demand. They're -- the independent value of preserving consumer choice is not the value of maximizing consumer interest.

JUSTICE KAGAN: Thank you, Mr. Waxman.

MR. WAXMAN: Otherwise, you wouldn't have specialized products, and the only --

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

JUSTICE GORSUCH: Mr. Waxman, it seems to me you -- you start in a place that I -- I can readily sign up to, which is that joint ventures often need to have agreements that would otherwise look anticompetitive, whether they're territorial allocations or price agreements, in order to create a product that wouldn't otherwise exist. And we usually give that a pretty quick look, maybe even a twinkling

of the eye.

So that all -- that all makes sense to me, and we certainly don't want to go back to the bad old days of reviewing any joint venture agreement that restricts competition through per se analysis or -- or something that looks like a strict scrutiny analysis, which I understand you condemn the -- the Ninth Circuit for doing.

So I understand all of that. I think the trick comes for me at least sort of where Justice Kagan was alluding to, which is, here, the agreement that's really at the center of the case is an agreement among competitors to fix price with the labor market, where you have monopsony control, and that's unusual.

The normal joint venture is -- is in a competitive market. But, here, the NCAA has monopsony control over labor price. There aren't other leagues which might compete with the NCAA that might allow payments, and you could test consumer demand that way. So why -- why isn't the -- the monopsony control over the labor market at least an appropriate basis for a more -- more searching Rule of Reason analysis?

MR. WAXMAN: Thank you, Justice

Gorsuch. So let me be -- let me be very clear. Given that this is the rare product that is defined by the restriction on competition -- compensation, it is -- we're not saying that it's not appropriate for a court to examine in whatever detail is necessary whether the product really is procompetitive, but, if it is -- and in this case, there is an agreement that the inquiry at step 2, is our product differentiating and procompetitive, everyone agrees that the answer is yes.

Once that is a given, where there is no plausible argument that the challenged rules aren't reasonably related to the amateur status of student-athletes, which is the differentiating feature, we think that abbreviated review is all that's necessary. And that's a principle that the Fifth Circuit in McCormack, the Third Circuit in Smith, and the Seventh Circuit in Deppe applied, and we think that was -- was blessed by this Court in American Needle and looking to and quoting the relevant language from Board of Regents.

JUSTICE GORSUCH: I -- I -- I -- I guess I'm not sure I -- I heard a direct

response to my question.

MR. WAXMAN: In that case, I apologize.

JUSTICE GORSUCH: No, no, no, no, no, no apologies. Let's just -- just drill down a little bit further. I -- I guess what I'm trying to ask you, and maybe I did so inartfully, is whether the fact that the NCAA has monopsony control over the labor market, it is a sole purchaser of the labor -- does that make a difference in our Rule -- what would otherwise be a forgiving Rule of Reason analysis to a joint venture?

MR. WAXMAN: I see. I see. So it makes all the difference in the world for purposes of step 1 of the Rule of Reason, which is, that as this case comes to this Court, there's no dispute that the -- the no-pay-for-play rule imposes a significant restraint on a relevant antitrust market, absolutely, just as -- and as this case comes to this Court, there is no dispute that those restraints have a substantial procompetitive benefit.

And so the inquiry -- the level -- the

question of what level of inquiry is appropriate in applying the Rule of Reason rests in this case on step 3.

JUSTICE GORSUCH: Thank you.

MR. WAXMAN: I hope that answered your question.

JUSTICE GORSUCH: Good -- good enough.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE GORSUCH: Thank you very much. My time's expired.

JUSTICE KAVANAUGH: Thank you, Chief Justice.

And good morning, Mr. Waxman. I want to pick up from Justice Kagan and Justice Gorsuch and identify some issues of concern to me as I look at this.

I start from the idea that the antitrust laws should not be a cover for exploitation of the student-athletes, so that is a concern, an overarching concern here.

I see your rhetoric in tradition and history argument being very similar to the arguments that were made for exempting baseball from the antitrust laws, Flood v. Kuhn, federal

-- federal baseball, and -- and that -- that exemption has not been replicated in other sports in other cases.

And then, in Regents, as Justice Kagan said, that really was from a different era, it -- it was dicta, not sure it was fully considered dicta, and in any event, from a different era.

So then we get to regular antitrust law, Rule of Reason, and I just want to drill down on your asserted procompetitive justification and how you say the product is differentiated.

It does seem, as Justice Kagan and Justice Gorsuch suggested, Justice Alito, that schools are conspiring with competitors, agreeing with competitors, I'll say that, to pay no salaries to the workers who are making the schools billions of dollars on the theory that consumers want the schools to pay their workers nothing. And that just seems entirely circular and even somewhat disturbing.

And then, as Justice Kagan says, it's not even factually supported in the record in this case. It seems to blend back to the

tradition argument, and all things circle back to this idea, well, it should just -- just don't worry about it, college athletics is different, just like baseball.

So those are the concerns I have initially. Interested in your response.

MR. WAXMAN: Well, those are -- those are a lot of concerns. I hope I can remember them all and address them all.

The -- the notion that these amateurism rules were imposed or constitute a cover for exploitation of athletes is, A, wrong and, B, not an antitrust issue. It may very well be a policy issue that policymakers, like legislatures, can address about whether they -- whether they think an amateur -- the amateurism model that is -- as the economists supporting us say is -- has produced perhaps the most procompetitive product in American industrial history, is worth it.

We are not asking for an exemption from the Rule of Reason. There is no question that, as the Court said in Board of Regents, because this is a product that can't exist without agreement, the Rule of Reason applies.

And our position is -- and this, I think, goes to your -- let me just say that we think that -- I -- Board of Regents is 80 -- is 37 years old, but we think that the observation that the Court made in Board of Regents about the value that consumers place on the tradition of amateur intercollegiate athletics is just as true today.

And, again, adverting, as you did, to Justice Kagan's point, even assuming that the evidence in this case supported a conclusion that consumers would be just as happy if athletes were paid or athletes were paid $10,000 a year for just being on the team, that doesn't defeat the fact -- the procompetitive benefit that we provide. The --

JUSTICE KAVANAUGH: But, if the consumers don't care -- I mean, you said earlier this would allow the players to receive $6,000 a year, as if that were some exorbitant amount when the TV contracts are in the billions. Six thousand a year is not -- not a lot given the time and the injuries and the inability to go to class or to major in the thing they want to or to do summer jobs. I mean, you're talking about

$6,000 as if it's some exorbitant amount.

MR. WAXMAN: Look, we -- we -- we have rules and there is a very, very clear and stable line that defines the feature of our product. The -- the amount of hours spent and what majors they pick and all that sort of stuff reflects -- applies to every Division I athlete in all 24 NCAA division sports. And if there is a problem with the NCAA enforcing its hours restrictions or in some way disadvantaging students who happen to be athletes, that's not an antitrust issue. That may be an issue with --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Barrett.

JUSTICE BARRETT: Good morning, Mr. Waxman. I want to --

MR. WAXMAN: Good morning, Justice Barrett.

JUSTICE BARRETT: I'd like to return to Justice Alito's questions to you in which he said that tuition and all of these educational in-kind benefits really are a form of pay --

MR. WAXMAN: Mm-hmm.

JUSTICE BARRETT: -- when you answered

and you said it's not pay because the NCAA has defined "pay" as the reasonable and necessary expenses to obtain education.

But I'm wondering, why does the NCAA get to define what pay is? And I think, you know, this is based on experience, but there are certainly plenty of parents and students -- I mean, some people want to play in college for the love of the game. Some people think they'll be able to go pro. A lot of people do it because they want to be able to afford college educations or -- or, you know, get the in-kind benefit equal to, you know, say, 30- or 40,000 dollars worth of -- of tuition. So why do you get to define what pay is?

MR. WAXMAN: Well, I think there's a -- the general principle, Justice Barrett, is -- and I think this is -- this is simply received wisdom for antitrust law purposes -- is producers get to define their product. They get to define the features of their product.

We have long defined our product to exclude from pay the reasonable and necessary expenses of obtaining an education. We give scholarships and we have student assistance

funds for all kinds of students, whether they're athletes or not.

Our definition, which has been stable over decades, long predating Board of Regents, is that it is -- you're not being paid to play if you receive an allowance for the actual and necessary expenses of your education, whether those expenses be --

JUSTICE BARRETT: And is that how you would define an amateur, as someone who is unpaid? Because I think that gets back to the point of is it a procompetitive or a legitimate procompetitive justification to say that consumers love watching unpaid -- unpaid people play sports?

MR. WAXMAN: Yes, indeed. In fact, in Board of Regents and, in fact, even in the majority opinion in O'Bannon, the -- the -- the Court said that the principle of amateurism is well understood and it means, in both cases, they said, you are not paid for play, but you may receive the expenses of obtaining an education.

And, in fact, in O'Bannon, the reason that the Court struck down a -- a since

abandoned rule of the NCAA that prohibited schools from paying -- making athletic scholarships up to the full amount of the cost of attendance was that the -- the Ninth Circuit said, well, even the NCAA admits that that is not a rule that distinguishes amateurs from professionalism because the cost of attendance is the cost -- the expense of an education.

So, yes, that is our line.

JUSTICE BARRETT: I want to shift gears, Mr. Waxman, and ask you about the effects that ruling against you might have.

So, you know, you told Justice Thomas that the ballooning of coaches' salaries is attributable to the -- the ruling in the Tenth Circuit that they can't be capped under the antitrust laws. So, if we rule against you, what's the impact of the decision on Title IX in women's sports?

MR. WAXMAN: Well, Title IX is an independent mandate, and, you know, the schools have to -- obviously, have to adhere to the Title IX mandate.

The evidence in the case showed that if schools were, in fact, required to make the

kind of payments that the district judge imposed in her final decree, schools would -- I mean, they have to come up with the money somewhere, the -- you know, the -- the $6,000 a year amounts to seven -- $735 million per year that schools have to come up with in addition to the -- the retrospective treble damages awards.

And the -- the evidence was that schools would, per force, reduce the number of "non-revenue sports," men's and women's sports, thus reducing the advantages and offerings available to student-athletes in those other sports.

I mean, I think my point about what the consequences are is I -- I think we can see in the Ninth Circuit what the consequences of allowing district judges to hear evidence in successive cases, well, people don't care about this or people don't care about that, and so raise the line up and up --

JUSTICE BARRETT: I'm sorry, Mr. Waxman. My time expired.

MR. WAXMAN: Oh, I'm -- I'm so sorry.

CHIEF JUSTICE ROBERTS: A minute to wrap up, Mr. Waxman.

MR. WAXMAN: Thank you, Mr. Chief Justice.

For over a hundred years, the NCAA has administered procompetitive amateurism rules needing to account for multiple constituencies and changing circumstances, as the questions today illustrate. It offends the antitrust laws for a court to appoint itself as a superintendent to second-guess those judgments, blurring the distinction between college and professional sports, and facilitating successive lawsuits and treble damages award, all based on supposed evidence that an alternative regime of the court's devising wouldn't diminish net viewer interest.

This is the one and only case in the history of the Sherman Act ever to strike down restraints that are what differentiates the product, and particularly in the unique circumstances here, it was manifest error to do so.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Kessler.

ORAL ARGUMENT OF JEFFREY L. KESSLER

ON BEHALF OF THE RESPONDENTS

MR. KESSLER: Good morning, Mr. Chief Justice, and may it please the Court:

The naked horizontal monopsony restraints that the competing NCAA schools have adopted in these labor markets would be per se unlawful in any other context. But, under Board of Regents and American Needle, the need for the NCAA schools to cooperate leads to the conclusion that the Rule of Reason applies.

The courts below recognized this, and, as a result, Petitioners had ample latitude to prove a procompetitive justification for all their restraints. Petitioners' complaint is not a legal one. It's that they lost on the facts. But that is not a basis for appealing to this Court.

For five decades, the NCAA has argued that economic competition among its member schools would destroy consumer demand for college sports. In Board of Regents, it was competition for TV broadcast. In the Law case, it was competition not for all coaches' but for assistant coaches' salaries. In O'Bannon, it

was name, image, and likenesses.

Each time, the Court struck down the restraints under the Rule of Reason, and history has proven the courts were correct. Demand for college sports has continued to flourish.

And, by the way, this has never been stable. As recently as 2015, the NCAA said you couldn't provide even the most basic cost of attendance for the athletes. This case is more of the same. It is just the latest iteration of the repeatedly debunked claims that competition will destroy consumer demand for college sports and that the NCAA should have a judicially created antitrust exemption because of an imaginary revered tradition that they argue for.

CHIEF JUSTICE ROBERTS: Now, Mr. Kessler, the --

MR. KESSLER: This should cause --

CHIEF JUSTICE ROBERTS: -- the thing that concerns me about your approach that was adopted by the court below, the NCAA has a number of limitations that are designed to ensure that its product is amateur athletic competition.

And you look at and the district court

looks at one rule, and let's say it's a limit of $2,000 for something, and you say we can make that less restrictive. Let's make it $2,500, and that's fine, and that doesn't alter the public perception of what's going on.

But then you go on to another rule and fiddle with that in the same way and another one and another one, and -- and it's like a game of Jenga. You've got this nice solid block that protects the sort of product the schools want to provide, and you pull out one log and then another and everything's fine, then another and another and all of a sudden the whole thing's come -- comes crashing down.

What -- what's your answer to that way of looking at it?

MR. KESSLER: I do not believe that is what the district court did here under the prevailing law. What the district court did is it tested factually whether the NCAA could prove a procompetitive justification for all of its rules together and found that it failed.

It then looked and said, can it justify some categories of its rules, and it found that it succeeded. Then, at step 3, we

had the burden to show it was patently and inexplicably stricter than necessary so that there was substantially less restrictive alternatives available.

And the basic alternative the Court imposed was not to micromanage. It was a general rule that there's no justification for limiting education-related benefits because, after all, what the consumers and others care about is they be students.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. KESSLER: And they wanted --

CHIEF JUSTICE ROBERTS: Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

Briefly, Mr. Kessler, the -- just following up on what you just said, what if you have a consumer survey that suggests tomorrow that the consumers think it's fine for amateur athletes to make $20,000 a year? Would we be back in court with litigation suggest -- about that rather -- as opposed to the $6,000 a year?

MR. KESSLER: I do not believe that is

correct for two reasons.

First, the step 3 burden is to show that the rules are patently and inexplicably stricter than necessary and that it has to be a substantially less restrictive alternative. That type of small versions are never going to pass that test.

But, more importantly, here, the court did not set this $5,980 limit. The NCAA did. What the court found is the NCAA allows those types of payments for athletes for performing on the field, pay for play. And since the NCAA did not see any damage to its product by allowing a star player to make that for winning a ball game, for being an MP -- MVP --

JUSTICE THOMAS: You know, that -- I'm sorry to cut you off, Mr. Kessler, but that -- that sounds fine for the upper-level schools, whether it's, you know -- you know, Alabama, Ohio State, and Nebraska, but it doesn't -- for the schools that have more modest circumstances, it would seem that they would begin to -- the -- the bigger schools would begin to cherry-pick with the transfer portal the athletes from the lower schools simply because they're able to

afford this income that you're talking about.

So have you considered that as a problem in an environment where you're trying to remain -- maintain competitiveness and amateur status?

MR. KESSLER: So there's a reason, Your Honor, that the NCAA doesn't assert competitive balance as a defense in this case, and that's because those schools don't compete now.

Now Alabama pays its weight coaches $700,000 a year. None of those small schools can do that. They build palaces.

What these competition restraints do is they divert the big schools' money to these other areas to compete, but it doesn't change the competition. And, remember, this injunction doesn't require one school to pay anything. It simply said the NCAA can't prohibit it, but the conferences can. So, for example, the Patriot League doesn't even allow their schools to pay athletic scholarships. Conferences can adapt for the smaller schools.

CHIEF JUSTICE ROBERTS: Justice --

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: -- Justice Breyer.

JUSTICE BREYER: I think, if we really have a case here, it's a tough case for me, and the reason it's so tough is -- for me is because this is not an ordinary product. This is an effort to bring into the world something that's brought joy and all kinds of things to -- to millions and millions of people, and it's only partly economic. Okay?

So I worry a lot about judges getting into the business of deciding how amateur sports should be run. And I can think of ways around that. First, you could just say it's a different kind of product. This is what you would lose on it.

Second, you could say that consumer demand is not at all the only criteria. You could have a purple widget joint venture and you say nobody can make red widgets and, I'm sorry, they can't, even if consumers would just as much like red widgets because it's a purple widget joint venture.

Or you could say this is a Rule of Reason, take into account other things. Take

into account administrative problems in working out these rules for the NCAA and the fact that -- that nobody can work with 40,000 professors in schools and everybody thinking something different. You're going to obviously end up with something of a mess. And it's a tough problem for them.

Now, having thought of four or five different ways by means of which you lose, I also think I'm very worried about my ways, because how do I do it? If I say these things, I might be also affecting the real economic joint venture, like for technology companies.

Now I'm telling you my real thoughts, and I'd like to hear your and also Mr. Wackman -- Waxman's response.

MR. KESSLER: Your Honor, first, I would say that I do believe, under the Rule of Reason and the antitrust laws, the procompetitive justification must be competition-enhancing. That's what Board of Regents says. That's what the unanimous decision in American Needle says. That's what Professional Engineer says.

Every case has said that. And the

reason is, if there's something special about the NCAA that deserves not to be subject to the antitrust laws, that's a congressional policy determination. It's not something this Court has the ability to weigh against the competition mandate that's under the Rule of Reason.

I would also say, Your Honor, we have looked at these claims from the NCAA over and over again that each loss was going to hurt college sports and destroy this revered tradition. It's never happened. We --

CHIEF JUSTICE ROBERTS: Justice Alito.

JUSTICE ALITO: Do you think that the product that is produced by the top football and basketball schools has a distinctive character? And, if so, what is that characteristic?

MR. KESSLER: I think it is what the court found is that students play in the games, which is a distinction from professional sports. I think that's what all their witnesses in the NCAA testified to. That's what the survey evidence suggests. So I believe that is the distinction. And, of course, we're not challenging any restrictions or rules regarding that they have to be students. And, in fact,

the education-related benefits here would help them to succeed as students.

JUSTICE ALITO: Do you think there's any -- that the NCAA could put any limitation on educational benefits for which athletes could bargain?

MR. KESSLER: I think the injunction allows the NCAA -- and this was alluded to -- to set reasonable rules to define what the education benefits are and how they are related to education. They also were given the right, under the injunction, for rules as to how the benefits would be provided. So I think the court gave a lot of discretion to the NCAA in a way that will still allow for there -- there to be competition in making a better education experience for the athletes, which Mark Emmert, the president of the NCAA, publicly declared, after we won, that this was a good thing.

JUSTICE ALITO: Do you think that what the district court allowed here and the Ninth Circuit sustained as the outer limit could -- would the antitrust laws allow applicants, student -- recruited athletes to bargain for, let's say, a guarantee not to lose a scholarship

if they're injured, a guarantee of tuition, room and board for a certain number of years after eligibility so that they would be able to graduate, the provision of tuition, room and board for graduate studies? Is there a limit?

MR. KESSLER: So I believe what the antitrust laws do is prohibit the NCAA from having restrictions that can't be justified under the rule of reason. If they had a restriction, for example, that said colleges could not provide a -- a four-year or five-year guarantee that their scholarship would stay in place, I believe that might not survive the rule of reason scrutiny.

JUSTICE ALITO: I see.

MR. KESSLER: But the antitrust laws don't compel schools to do anything. The idea is allow the markets to decide what schools have the choice to provide.

JUSTICE ALITO: All right. Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

JUSTICE SOTOMAYOR: Counsel, you declined to cross-petition the judgment below, correct?

MR. KESSLER: Yes.

JUSTICE SOTOMAYOR: So for purposes of this Court's review, you are not asking for any broader relief than that already provided by the district court, correct?

MR. KESSLER: That is correct, Your Honor.

JUSTICE SOTOMAYOR: You're not asking us to address the issues that Justice Alito or others, including Justice Kavanaugh, have raised on whether or not there should be any limits, educational or noneducational? You're happy with the injunction you got?

MR. KESSLER: We are not asking for broader relief than affirming the rulings below.

JUSTICE SOTOMAYOR: All right. Number two, generally speaking, antitrust courts do not get into the business of price administration. Why are the -- the limits of the injunction below of academic achievement awards at a fixed price of $5,980 not a de facto price setting?

MR. KESSLER: So the entity who set that price was the NCAA. What the court simply said is that, whatever the NCAA rules allow to give to athletes now in a pay for play, if you

win a ball game, if you're the MVP, if you have some other achievement, they allow you to get $5980. The court said then you can't, NCAA, use your monopsony power in a labor market to prevent the schools and conferences from giving as much, not more, as -- as much as they already allow.

So this is not judicial price fixing. This is just taking the NCAA's determinations and saying you can't justify a restraint on education achievement. And I also would note it's not just for being on a team. With all due respect to -- to my colleague, it has to be for academic achievement. And the conferences, for example, could individually say, it has to be a 3.0 or you have to make progress to get your degree or other things. It's not just for being on the team.

JUSTICE SOTOMAYOR: Does that award make --

CHIEF JUSTICE ROBERTS: Justice Kagan.

JUSTICE KAGAN: Mr. Kessler, I recognize that you didn't cross-petition, but I can't believe that you think that this $5980 award was the limit of where the district court

could have gone. So I just thought, you know, on this record -- here's the question: On this record, how high could the district court have gone before compromising consumer demand for college sports?

MR. KESSLER: So Your Honor is correct, we advocated for broader relief below. We advocated the NCAA should not impose the restriction. It should be left to the individual conferences who don't have market power. They don't have monopsony to decide if any rules were needed.

But, secondarily, we put in consumer survey evidence that, at a minimum, showed that consumers said they were perfectly fine, they would keep watching sports, if they got a $10,000 award for academic achievement --

JUSTICE KAGAN: Do you think that the evidence that you put in allowed a $10,000 award -- award --

MR. KESSLER: Absolutely, Your Honor. That was --

JUSTICE KAGAN: Did -- did it allow more than that, or would you have -- would you say that was all the evidence indicated? If I

had said 15,000, does the evidence support going up to 15,000?

MR. KESSLER: We did not put in survey evidence for more than 10,000, but what we did put in is that the schools already do like $50,000 for protection against lost professional earnings, and that's had no impact on consumer demand. Their -- their expert --

JUSTICE KAGAN: Well, that seems to raise two --

MR. KESSLER: Their corporate witness --

JUSTICE KAGAN: I mean, your answers here raise two questions, Mr. Kessler. And the first is -- is what you've heard before from some of my colleagues, a kind of floodgates argument, like what's next? It's just going to go up and up and up, and pretty soon it will just be a regular labor market.

And the second is, isn't there some -- some kind of arbitrariness about this $5980 award that we should react badly to?

MR. KESSLER: I don't believe so, Your Honor, because it is -- if you review it, the award doesn't even mention the dollar number.

It simply says the NCAA cannot set a limit on academic achievement awards that is lower than what it allows for the greatest example of pay for play --

JUSTICE KAGAN: Thank you, Mr. Kessler.

MR. KESSLER: -- which is giving cash awards.

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

JUSTICE GORSUCH: Mr. Kessler, I'd just like to talk about antitrust law generally for a moment and pick up on where I left off with your opponent.

Normally, in joint venture law, this Court has come to recognize that we shouldn't be flyspecking individual aspects of covenants not to compete amongst joint venture participants because they're creating a new product that wouldn't otherwise be available in a market, and the rule of reason should be pretty light and that plaintiff bears a heavy burden to show that a covenant not to compete violates the Sherman Act. This case, the -- the Ninth Circuit, the district court, applied a pretty searching

inquiry on covenants, each and individual aspect of them.

What, in your view, as a matter of law -- forget about the facts for a moment -- makes that kind of searching inquiry appropriate?

MR. KESSLER: So I believe, Your Honor, that the Court has been very consistent in every joint venture case, whether it is American Needle or whether it is Dagher or whether it is Broadcast Music, that the remedy for joint ventures is the traditional rule of reason, even when they're doing things that would otherwise be subject to per se rules or quick look rules or something like that.

And the rule of reason, we have found, can accommodate that. That has been a hundred years of jurisprudence.

JUSTICE GORSUCH: Let me -- let me just stop you there. Does it have something to do with the fact that this product market, there's only one and that the NCAA has monopoly control over the labor market? You called it monopsony control. You've referred to it a few times. What -- what role does that play or influence should it have in how we view the rule

of reason's application in this circumstance?

MR. KESSLER: I believe it has a great deal to do with it, Your Honor, because what it means is, unlike any other joint venture, okay, we have a complete monopsony control over this market, so there's no way for competition to show if the NCAA's ever-shifting decisions, not stable decisions, on what constitutes pay for play is procompetitive or not procompetitive. It just could impose its will.

And under Rule of Reason, we do balance things together. Ultimately, it's a balancing analysis, and the greater the market power collectively, and this is not a single firm case, the collective market power in this labor market, I do believe that justifies at least the application of the traditional Rule of Reason, which is all that was applied here.

And in particular, Your Honor, I think Footnote 6 of -- of American Needle direct -- directly -- 7, I'm sorry, Footnote 7, of American Needle directly addresses this, where the NFL said, well, we have to define our product as NFL football, and the Court said, of course, you have to define your product as NFL

football, but that doesn't entitle you not to be subject to the normal Rule of Reason --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. KESSLER: -- which is that that --

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Thank you, Chief Justice.

Good morning, Mr. Kessler.

First, you agree that the NCAA can require that the athletes be enrolled students in good standing, correct?

MR. KESSLER: Yes, I do, Your Honor.

JUSTICE KAVANAUGH: As Justice Sotomayor and Justice Kagan raised, I think we need to think about what the next case would look like if we rule in your favor in this case. As Justice Sotomayor correctly pointed out, you're asking for a narrow ruling here, but the rationale behind that ruling could generate follow-on litigation.

What in your view is the endgame of this litigation if you -- not this particular litigation but of future litigation. Is the

endgame collective bargaining? Is the endgame legislation? I think this picks up on Justice Breyer's questions as well.

MR. KESSLER: So, Your Honor, it's difficult for me to predict legislation or collective bargaining, but I would talk about antitrust endgame. In the antitrust endgame, it's simply to apply the Rule of Reason, which the NCAA has been subject to for at least 37 years, which all the sports leagues are subject to --

JUSTICE KAVANAUGH: But if the --

MR. KESSLER: -- and --

JUSTICE KAVANAUGH: -- sorry to interrupt, but your position, I think, in the district court was that all the compensation limits are contrary to the Rule of Reason, correct?

MR. KESSLER: Yes, and I lost that as a matter of fact. And they've now won on that issue twice, as a matter of fact, under the Rule of Reason. And facts would probably have to change further for a different result to happen.

If there are new material facts in the future, then we know under antitrust law the

Rule of Reason could come out differently at a future date. But I have no reason to think that I would win today on facts that I just lost on yesterday.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett.

JUSTICE BARRETT: Mr. Kessler, the tenor to me when I read it of both the district court and Ninth Circuit opinions is that they were trying not to do too much. And -- and this, I think, goes back to Justice Breyer's description of, you know, this is a delicate area. On the one hand, there's concern about blowing up the NCAA and something that people have, as Justice Breyer -- Justice Breyer put it, gotten so much joy out of but then, you know, messing up general antitrust law.

So it seemed to me that the lower court opinions were kind of saying, like, the educational expenses weren't that big of a deal. The cash, you know, it wasn't that high an amount. You yourself described the injunction as narrow and an effort by the court to give the NCAA as much leeway as possible, is how you put

it in your brief.

So given all of that, how are -- how is the injunction a substantially less restrictive alternative, or do you disagree that it had to be substantially less restrictive and just had to be less restrictive?

MR. KESSLER: Oh, I believe it was substantially less restrictive, Your Honor, because it allowed the NCAA to continue to impose all of its restraints on compensation not related to education, and it said that what it can't justify, what it can't do, is just education-related restraint, but the reason we know it's substantially less restrictive is because there are life-changing benefits for these athletes that will be provided.

The vocational schools we're talking about is, if you don't graduate, as many of these athletes don't, then maybe they can go to a blue-collar vocational school and at least have a career after earning all of these billions of dollars. The NCAA won't allow that.

It's life-changing. If you can get a local internship, which every other student can get on campus, except for these athletes, who

work 50 hours a week before they attend a certain class. So, Your Honor, I think it is substantially less restrictive. It will be life-changing for these athletes. And most importantly, it's what the facts led to under normal traditional Rule of Reason analysis.

JUSTICE BARRETT: Thank you, Mr. Kessler.

CHIEF JUSTICE ROBERTS: A minute to wrap up, Mr. Kessler.

MR. KESSLER: Thank you.

The district court here found, as a matter of fact, that the NCAA's restraints on education-related benefits cannot be justified as reasonable, necessary -- reasonably necessary to maintain demand for college sports or define the NCAA's product.

This Court should not create a special judicial antitrust exemption based on any claims that the NCAA is somehow special. That is for Congress, not the courts. The Rule of Reason already provides ample latitude to joint ventures, to organizations like this, to sports leagues, to assert what you need to assert to justify the restraints you need.

And Twombly allows the dismissal of claims at the outset so there'll be no parade of horribles if someone were to challenge a rule that clearly was procompetitive on its face and did not cause anticompetitive effects.

Finally, Your Honor, as Footnote 15 of Board of Regents says, when you have fact-findings of a district court approved by a court of appeals, this Court should not second-guess those findings, and, here, this was found to be an unreasonable restraint of trade.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. KESSLER: Thank you very much.

CHIEF JUSTICE ROBERTS: General Prelogar.

ORAL ARGUMENT OF ELIZABETH B. PRELOGAR
FOR THE UNITED STATES, AS AMICUS CURIAE,
SUPPORTING THE RESPONDENTS

GENERAL PRELOGAR: Thank you, Mr. Chief Justice, and may it please the Court:

The Rule of Reason is the traditional standard for assessing antitrust liability, and the lower courts properly applied that framework to the facts found by the district court.

Usually a per se rule would prevent competitors from arguing that their horizontal agreements not to pay their workforce are procompetitive. But the lower courts here, following Board of Regents, correctly gave the NCAA the opportunity to show that its compensation rules fuel consumer interest in college sports as a distinct product. And the courts ultimately upheld most of the challenged restrictions under the Rule of Reason.

Petitioners now seek to avoid that analysis altogether. They ask this Court to uphold the restraints on educational benefits only under what they call a Quick Look or deferential review.

But this Court has never upheld restraints that have severe anticompetitive effects without traditional Rule of Reason analysis, and this case, involving horizontal price-fixing in the market for student-athlete labor, where the NCAA has monopsony power, would not be the place to start.

CHIEF JUSTICE ROBERTS: Thank you, counsel -- or thank you, General. The -- you frequently emphasize that the restrictions

imposed by the court below were modest ones, but I don't think the principle was. And when you go through, as I was mentioning to your -- your friend, there will be a wide number of rules that are subject to challenge, if not in this litigation, in subsequent cases.

And the effect it seems to me is to substitute the Court's view for the business judgment of the people responsible for a joint venture that we have upheld as procompetitive. And I just don't know if the judge is the best person to assess the competitive effect of the rules or the people managing the joint venture.

Do you have any thoughts about that?

GENERAL PRELOGAR: So I think, Mr. Chief Justice, that the legal standards themselves guard against having courts come in and micromanage the rules of the NCAA, and -- and there are really two aspects to that.

The first is the fact that the Rule of Reason applies in the first place. So Plaintiffs here aren't going to be able to benefit -- benefit from any kind of per se or categorical rule. They'll have to meet their step 1 burden to show a substantial

anticompetitive effect. And -- and that's an important check, because Plaintiffs won't be able to show that with respect to each and every challenged rule.

And the -- the second part of the legal analysis that I emphasized is the step 3 inquiry into a less restrictive alternative. The lower courts here were very clear that they were not seeking to impose marginal rule changes on the NCAA. They said that this was a patently and inexplicably more restrictive set of rules than was necessary.

So I think applying those legal standards is not going to lead the courts rushing into trying to dismantle the NCAA's framework rule by rule.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas.

JUSTICE THOMAS: Yes, thank you, Mr. Chief Justice.

General, the -- I'm still a bit perplexed as to how the NCAA would be able to preserve what it thinks is an important distinction between student-athletes and

professional athletes without constantly being involved in litigation.

What's your reaction to that and how -- I mean, how do we resolve that part of the future problems that I see down the road?

GENERAL PRELOGAR: So I think that the way that that's resolved is by giving credence to the procompetitive justification that was asserted here, the idea that these rules really do help to differentiate the product in the eyes of consumers. And, ultimately, applying that standard here, the district court upheld most of the compensation rules. So it found that, in fact, with respect to all of the limits on compensation that are unrelated to education, consumers actually pay attention to that in thinking of college sports as something distinct and different.

But I think where the NCAA goes wrong is in suggesting that the analysis should be based on its own perspective of what it thinks supports amateurism, because amateurism is not its own free-floating ideal under the antitrust laws. It's not something that the competition laws focus on to aspire to in and of its own

right. It's -- it's only relevant to the extent that it actually connects up to that procompetitive purpose of differentiating the product for consumers themselves.

JUSTICE THOMAS: Well, you know, that's -- as we've seen, the world has changed in sports, and it could change dramatically again, and the next survey or at least the impression that the public has about amateur athletics could suggest that, well, 10- or 20,000 dollars cash is fine, and still preserve the amateur status.

So wouldn't that lead to future litigation?

GENERAL PRELOGAR: Well, certainly, if the -- if the facts change and if plaintiffs could make that showing, which they weren't able to make here -- ultimately, the district court rejected that argument -- but, if they were able to make that showing, then I think it's very much properly assessed by an antitrust court to see whether the significant anticompetitive effects are justified. And, ultimately, if they're not justified, and that means that there has to be greater competition, there's nothing

inherently wrong with that. That's the overriding purpose and aim of the Sherman Act.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: What's your instant reaction, and I wonder what Mr. Waxman's is, to the following? Which you will disagree with.

One, a joint venture sometimes can have a noneconomic, sometimes, as well as an economic objective.

Two, the word "reason" means reason.

And when you consider whether a rule is unreasonable because there is a less restrictive alternative, take into account that noneconomic reason, the impossibility of measuring everything against consumer demand or the undesirability where there is that noneconomic reason, the difficulty of measuring each mini rule against something called consumer demand.

And, four, the difficulty of administering a system that has thousands of members. Okay?

Now suppose I were to write that.

What would be your instant reaction of why that's totally wrong?

GENERAL PRELOGAR: The reason I think that would be wrong, Justice Breyer, is because this Court has said over and over again that those types of noneconomic interests are not cognizable under the antitrust laws, that courts shouldn't be in the business of trying to evaluate whether there are other socially important ideals to be promoted or -- or other things to consider that don't go to effects on competition.

That's obviously something Congress could consider. If there are special rules that are needed in this context to take account of those kinds of noneconomic interests, then Congress is well positioned to assess it and -- and draw the right line.

But to actually try to incorporate that into Sherman Act analysis would be at odds with precedent, and I think it would open up the door to having to balance a -- a host of considerations that aren't properly assessed when you're looking at whether or not something is, on balance, anticompetitive.

JUSTICE BREYER: Thank you.

CHIEF JUSTICE ROBERTS: Justice Alito.

JUSTICE ALITO: What do you think is the distinctive characteristic of the NCA's -- the NCAA's product? Could you define it as precisely as possible?

GENERAL PRELOGAR: So I think that, based on the district court's factual findings here, the things that the court said defined the product were principally the fact that the students are bona fide students at the school and also that they're not paid to play in the form of receiving compensation that's unrelated to education.

I don't think it has a fixed definition, Justice Alito. I think that it's going to turn on this actual factual inquiry into what consumers think about when they're differentiating college sports from professional sports. But at least based on the evidence that the district court received, those were the factual findings it reached.

JUSTICE ALITO: Does your analysis of this case depend on the NCAA's having monopsony power?

GENERAL PRELOGAR: I think it is a critical fact here for a couple of different reasons, and the principal one is that it shows the severe anticompetitive effects that were observed at step 1 of the Rule of Reason. That is ordinarily, in the typical antitrust case, a -- a burden that plaintiffs sometimes can't meet, but, here, it was essentially undisputed. The district court found at summary judgment that Petitioners weren't meaningfully disputing that these restrictions have enormous consequences in the market for student-athlete labor.

And I think that actually shows why the rule that Petitioners are asking for, this idea of Quick Look review, would be so anomalous given the nature of these restraints and the severe anticompetitive effects that they --

JUSTICE ALITO: Let me give you this example: There are a lot of old-time sports fans who are turned off by the enormous salaries that are earned by professional athletes. So suppose a group said we want to take advantage of this unmet demand. We're going to organize a new professional league, but

we are going to cap the salaries of all of our players at 1955 levels, corrected for inflation.

Would that get a quick look? Would it be analyzed under the Rule of Reason? Would it be per se a violation of the Sherman Act?

GENERAL PRELOGAR: So I think the Rule of Reason would properly apply to that hypothetical, but there would be a serious first question about market power and whether that kind of league that organizes to try to create a -- a distinct product is actually exercising the kind of power that can produce the substantial anticompetitive effect that satisfies the burden at step 1.

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

JUSTICE SOTOMAYOR: I'm not sure that you have given me comfort on some of the questions that my -- that the Chief Justice asked, which is, how do we know that we're not just destroying the game as it exists? Meaning we're being told by Mr. Waxman that all of these education-related payments can become extravagant and, as a result, be viewed by the

public as pay for play.

Any fix would come after the fact, after the game has been -- after amateurism has been destroyed in college sports. How do we ensure that doesn't happen?

GENERAL PRELOGAR: So I think that this in -- interpretation of the injunction that Mr. Waxman offered is overly broad and doesn't accord with the district court's factual findings or what it actually ordered in this case. I recognize the concern about destroying college sports, and it is at odds with the legal standards the court applied and its ultimate conclusions here. It upheld most of the challenged restraints. It said that the NCAA could continue to cap compensation that's entirely unrelated to education.

And, with respect to the scope of the injunction itself, the court was focused on legitimate educational expenses. That is what the Ninth Circuit said, and I think it accords with the factual findings that from the perspective of consumers, with respect to that narrow category of benefits, it doesn't play any role whosoever in defining the product of

college sports. So there's no reason to prevent the students from obtaining those benefits.

JUSTICE SOTOMAYOR: What position do you take with respect to that $5980 limitation on educational expenses? Why should educational expenses be limited in any way -- awards be limited in any way?

GENERAL PRELOGAR: Well, the district court made a factual finding, Justice Sotomayor, that having unlimited cash payments for education, even if they were in the form of academic awards, could start to blur the distinction between college and professional sports. And -- and no one's seeking to challenge that as clearly erroneous.

With respect to the actual amount, it's, I think, critical to recognize that the court was focused on the fact that the students are already eligible for athletic awards in -- in that same amount. So the court, as Mr. Kessler said, wasn't setting a specific price; it was saying, hey, the students can already get athletic awards, and it's not suppressing demand, it's not suggesting that college sports is losing its distinctive character. There's no

reason to prevent them from getting academic awards that are of equal value.

JUSTICE SOTOMAYOR: Thank you, counsel.

CHIEF JUSTICE ROBERTS: Justice Kagan.

JUSTICE KAGAN: General, would I be wrong to think that this $5980 was essentially taken out of thin air, that it's arbitrary? I mean, you mentioned that it was designed to match these athletic awards. But, as far as I know, there's no evidence that any single player has ever received that amount in athletic awards. Wasn't the court just looking for any old number to, you know, hang its hat on, but the -- the one it came up with was essentially arbitrary?

GENERAL PRELOGAR: I don't think it's right to characterize it as arbitrary, and -- and I think the key here is to recognize that this is just making the students eligible for awards up to that amount, and -- and there's no suggestion in the district court's injunction that every student automatically can receive one of these awards just for playing on a team.

That -- that's the gloss that Mr.

Waxman attempted to put on it, but there's nothing in the injunction that prevents the NCAA from enforcing criteria, for example, on whether there should be actual benchmarks, certain GPAs, to make sure that these awards actually reward academic achievement and aren't used as disguised pay-for-play payments.

So I think that it's well grounded in the factual findings. And, importantly, no one's seeking to challenge those here. It -- it doesn't show that there's any problem with the legal analysis that the court applied.

JUSTICE KAGAN: I -- I asked Mr. Kessler this same question.

Do you think on this record the district court could have gone further.

GENERAL PRELOGAR: I think potentially based on the evidence that came in, the district court could have made a factual finding that higher payments wouldn't blur the distinction between professional and college sports.

But -- but what seemed key to the district court's conclusions here was the difference between educational and noneducational benefits. And I think that was a

principal line to draw based on the fact that the district court found them.

JUSTICE KAGAN: Thank you, General.

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

JUSTICE GORSUCH: General, see -- see if you disagree with any of this and, if so, please tell me why, that normally this Court has come to recognize that ancillary restraints in joint ventures, including price restraints, territorial restraints, are procompetitive and deserve a very light look from courts because the joint venture creates a new product that wouldn't otherwise exist and that is procompetitive.

We recognize, though, that that's assuming a competitive market. And what differentiates this case is that the NCAA is the market for student-athlete labor. It has monopsony control.

And so that, that unique feature is what justifies the more searching inquiry that took place in this case. And that it might be a very different case if there were multiple leagues or here conferences that had

restrictions on price that are paid to student-athletes.

And that some, some conferences without market power, for example, might be able to do that, fully compliant with the antitrust laws. It's just that you can't set one rule for the whole market.

GENERAL PRELOGAR: I think I agree with -- with almost everything you said, Justice Gorsuch, with one small modification, which was that I don't think it's quite accurate to say that joint ventures get a light look.

But I think what normally happens is that a plaintiff seeking to challenge a joint venture under the rule of reason might not be able to show the kinds of market power that -- that demonstrates that there is a substantial anticompetitive effect.

So I think that keys in to exactly what you identified, which is that the monopsony power here that the NCAA exercises for the entire market for student-athlete labor is part of what triggers the significant anticompetitive effects that were essentially undisputed below.

JUSTICE GORSUCH: And it would be very

different if there were a more competitive market, and that it would be a very different case if, for example, one individual or a number of individual conferences had restrictions like this. It's just that it impacts the whole of the market.

GENERAL PRELOGAR: That's exactly right and, in fact, the district court's injunction permits the conferences to set their own limits in recognition that the conferences can tailor compensation limits or educational benefits.

And a student who is unhappy with what he or she can get from one conference, can go and seek out competition from another conference.

So I do think that that would dramatically change the nature of the case at all steps of the rule of reason.

JUSTICE GORSUCH: And consumers could also choose between which teams they -- they -- they choose to -- to follow as a result.

GENERAL PRELOGAR: That's right.

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice

Kavanaugh.

JUSTICE KAVANAUGH: Thank you, Chief Justice, and welcome, General Prelogar.

The label of education-related benefits I think Mr. Waxman would say is being stretched here, and that this is really going to turn into very quickly just an automatic payment to student-athletes and, thus, it's a mistake, I think you would say, to call it education related.

What's your response to that?

GENERAL PRELOGAR: So the Ninth Circuit considered this argument expressly and said that interpreting the injunction to authorize sham payments or illegitimate benefits is -- is -- is not an accurate representation.

The district court here was clearly focused on legitimate educational benefits. It said these benefits are normally confined to their actual value. They're usually provided in kind. And so things like the $500,000 paid internship, to a speaker internship, wouldn't qualify, wouldn't fall within the scope of the injunction at the outset.

But, in any event, if there is any

confusion on this score, if there is ambiguity the district court specifically invited the NCAA to define what benefits are reasonably related to education.

And there is no reason to think that the district court would reject the definition that -- that codifies this idea that the benefits have to be legitimate.

JUSTICE KAVANAUGH: On this record do you think a district court could have set limits that were significantly higher than the limits that were set by the district court here?

GENERAL PRELOGAR: So it would have been difficult to -- to set limits on some of these educational benefits that aren't tied to their actual value. So I -- I think that that's kind of an inherent constraining feature of this injunction.

It's certainly true that some of these benefits, like graduate scholarships and so forth, might be worth quite a lot to the student, but they are inherently limited by actual value, which is part of what the court said fueled this acceptance that this wasn't going to become a vehicle for pay-per-play.

JUSTICE KAVANAUGH: Thank you, General.

CHIEF JUSTICE ROBERTS: Justice Barrett.

JUSTICE BARRETT: Good morning, Justice Prelogar. I have a question about the cross-market analysis that the court performed at step 2. So it balanced the competition in the labor market against the market for college sports.

And I understand that that's the way the case came to us because that's the framework the lower courts used and the one on which the parties agreed.

But some of the amici have criticized it. So I'm wondering if you think it is, you know, performing any kind of distorting effect that would influence the way we think about this case in a bad way?

GENERAL PRELOGAR: So this issue of cross-market balancing raises complex questions under the antitrust laws.

And ultimately, as you've identified, Justice Barrett, the -- the parties haven't briefed it, the lower courts didn't consider it,

and we think that the courts should take the market definitions as a given here and not try to more broadly consider when and under what circumstances cross-market balancing can be considered.

I -- I'd note, too, that I think the parties took their lead from Board of Regents because there the court did clearly contemplate that a procompetitive justification could be based on the idea of preserving college sports as a distinct product and seemed to think that that would justify restraints in this market.

So for that reason I'd urge the Court to -- to leave for another day any broader questions about how cross-market balancing should be conducted.

JUSTICE BARRETT: Thank you, General.

CHIEF JUSTICE ROBERTS: A minute to wrap up, General.

GENERAL PRELOGAR: Thank you, Mr. Chief Justice.

If I could just leave the Court with one overarching thought, it's -- it's this: Petitioners are wrong to argue that any restrictions related to their conception of

amateurism, including their horizontal price fixing agreements, must be upheld without analysis rather than applying the rule of reason.

That would be an extraordinary departure from traditional antitrust principles. Amateurism's relevant here only insofar as Petitioners can actually show that it increases consumer choice by distinguishing college sports from professional sports.

And they made the showing with respect to most of their compensation rules, but as a factual matter they couldn't make this showing with respect to educational benefits.

So there is no procompetitive justification to deprive student-athletes of the opportunity to obtain those educational benefits through ordinary market competition.

We, therefore, urge the Court to affirm.

CHIEF JUSTICE ROBERTS: Thank you.

Rebuttal, Mr. Waxman.

REBUTTAL ARGUMENT OF SETH P. WAXMAN

IN SUPPORT OF PETITIONERS

MR. WAXMAN: Thank you, Mr. Chief

Justice.

Justice Gorsuch, monopsony power does not take away the producer's right to define the product any more for the NCAA than, for example, for the Little League, which eight years ago got $80 million for its television contract.

There is no argument here that the rule of reason shouldn't be applied. Our point is that the rule of reason requires that these restraints be accepted because they -- the product is clearly procompetitive and the -- the court's -- the -- the court's decree essentially remakes the procompetitive feature of the product itself.

And so, Justice Breyer, this is not an ordinary product or an ordinary market. This is education. And cases like Klars and Goldfarb make clear that, where actors are not purely economic but are also attempting to achieve other purposes, certain rules and restrictions are applied differently than to pure commercial enterprises.

And the restraint here, you're worried about technology cases and everything, this is as the government acknowledges the rare case in

which the challenged restraint is the procompetitive differentiating feature of the product.

Net consumer demand is not the test. The -- even if the Court's less restrictive alternative would preserve a distinction, it clearly reduces the distinction and, therefore, it's not as effective in preserving the benefits of our conception of amateurism. Otherwise, courts can use less restrictive alternatives to chip away at a joint venture's business judgments until eventually the differentiation is barely discernible.

At -- at step 3, the question has to be whether there is a less restrictive alternative that's as effective in preserving the NCAA's conception, not one that's as effective in preserving some kind of differentiation between the NCAA and pro sports. Just focusing on differentiation as an abstract conception would allow courts to completely replace a business's product with one of the court's own making as long as it was still differentiated.

At step 3, the less restrictive

alternative has to preserve the same type and degree of benefit shown at step 3, and so, once it's determined that no-pay amateurism differentiates and is, therefore, procompetitive, antitrust law doesn't require a producer to adopt an alternative that reduces the differentiation or replaces it with a different differentiation altogether.

Once carts -- courts start drawing their own lines, and according to the government here everything is factual and depends on the record, perpetual litigation and judicial superintendence are inevitable. Just $5980 that has so captured the Court's imagination this morning require months of post-trial litigation in front of this judicial superintendent just to figure out what that number is for the time being.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:34 a.m., the case was submitted.)