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.         )
- - - - - - - - - - - - - - - - - -
AMERICAN ATHLETIC CONFERENCE,     )
ET AL.,                           )
             Petitioners,         )
           v.                     ) No. 20-520
SHAWNE ALSTON, ET AL.,            )
            Respondents.          )
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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 NATIONAL COLLEGIATE ATHLETIC)
4 ASSOCIATION,)
5 Petitioner,)
6 v.) No. 20-512
7 SHAWNE ALSTON, ET AL.,)
8 Respondents.)
9 - - - - - - - - - - - - - - - - - -
10 AMERICAN ATHLETIC CONFERENCE,)
11 ET AL.,)
12 Petitioners,)
13 v.) No. 20-520
14 SHAWNE ALSTON, ET AL.,)
15 Respondents.)
16 - - - - - - - - - - - - - - - - - -
17 Washington, D.C.
18 Wednesday, March 31, 2021
19
20 The above-entitled matter came on
21 for oral argument before the Supreme Court of the
22 United States at 10:00 a.m.
23
24
25

1 APPEARANCES:

2

3 SETH P. WAXMAN, ESQUIRE, Washington, D.C.,

4 on behalf of the Petitioners.

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6 on behalf of the Respondents.

7 ELIZABETH B. PRELOGAR, Acting Solicitor General,

8 Department of Justice, Washington, D.C.;

9 for the United States, as amicus curiae,

10 supporting the Respondents.

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1 C O N T E N T S

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1 P R O C E E D I N G S
2 (10:00 a.m.)
3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 20-512, National
5 Collegiate Athletic Association versus Alston,
6 and the consolidated case.
7 Mr. Waxman.
8 ORAL ARGUMENT OF SETH P. WAXMAN
9 ON BEHALF OF THE PETITIONERS
10 MR. WAXMAN: Good morning, Mr. Chief
11 Justice, and may it please the Court:
12 For more than a hundred years, the
13 distinct character of college sports has been
14 that it's played by students who are amateurs,
15 which is to say that they are not paid for their
16 play. Maintaining that distinct character is
17 both procompetitive, because it differentiates
18 the NCAA's product from professional sports, and
19 can be achieved only through agreement.
20 The lower courts agreed that the
21 NCAA's conception of amateurism is
22 procompetitive, but, in striking down several of
23 the rules, they made two fundamental errors.
24 First, they defined their own "much narrower"
25 conception of amateurism to mean only that

1 athletes not be paid unlimited amounts unrelated
2 to education. And they then imposed a regime
3 that permits athletes to be paid thousands of
4 dollars each year just for playing on a team and
5 unlimited cash for "post-eligibility
6 internships."
7 That manifestly preserves neither the
8 NCAA's demarcation between college and
9 professional sports, nor even the lower courts',
10 because whatever their labels, these new
11 allowances are akin to professional salaries,
12 especially given the truly unique history here.
13 A rule that is reasonably designed to
14 preserve amateurism as the NCAA has defined it
15 should be upheld. Ruse -- rules that do not
16 enforce the amateur status of athletes, by
17 contrast, may be subject to detailed scrutiny.
18 Decades of judicial experience show
19 that that distinction is both sensible and
20 administrable. And the alternative is perpetual
21 litigation and judicial superintendence, as the
22 past 12 years in the Ninth Circuit so vividly
23 illustrate and portend.
24 Thank you.
25 CHIEF JUSTICE ROBERTS: Mr. Waxman,

1 you want us to apply the so-called quick look
2 approach in evaluating these restrictions, is
3 that right?
4 MR. WAXMAN: That's right in this
5 sense. And let me just say, Mr. Chief Justice,
6 first of all, look, we understand that there's
7 been a trial here, and we -- we are perfectly
8 prepared to explain, as we tried to in our
9 briefs, why, notwithstanding the trial, reversal
10 is required and the antitrust laws do not permit
11 the Court to impose the decree that it did.
12 But we think that in order to avoid
13 the situation that we currently have, where we
14 have endless line-drawing and judicial
15 supervision, pocket -- punctuated by requests
16 for treble damages, it's important for the Court
17 to speak clearly here.
18 And I will say that given that we have
19 what the -- what the government acknowledges is
20 a truly unique situation in which we have a
21 product that is defined by the restraint on
22 competition, it is perfectly appropriate and
23 necessary for the Court to examine in whatever
24 detail is necessary whether the product that's
25 produced really is procompetitive.

1 CHIEF JUSTICE ROBERTS: Well, but your
2 --
3 MR. WAXMAN: And it is.
4 CHIEF JUSTICE ROBERTS: -- your friend
5 on the other side says we've never used the
6 Quick Look Doctrine to uphold restrictions, only
7 to strike them down.
8 MR. WAXMAN: Well, look, Quick Look is
9 a particular phrase. We haven't used it. But
10 this Court has made clear that the rule of
11 reason represents a continuum of scrutiny. As
12 the Court explained in Cal Dental, the Court
13 needs to determine the inquiry mete for the
14 circumstances.
15 This Court recognized the fact that in
16 -- in American -- Section 6 of American Needle,
17 that a form of quick look or abbreviated review
18 may well be appropriate to uphold the very kind
19 of rules that are at issue here.
20 And more broadly, Mr. Chief Justice,
21 in antitrust cases, like Brooke Group and
22 Trinko, the Court has adopted clear standards
23 that a plaintiff must meet in order to overcome
24 dismissal, and the rationale for the approach
25 that we advocate -- advocate is similar to what

1 prompted the Court in those other circumstances
2 to impose such a deferential review.
3 And I will say --
4 CHIEF JUSTICE ROBERTS: I -- I --
5 MR. WAXMAN: -- that --
6 CHIEF JUSTICE ROBERTS: -- I -- I
7 think maybe, Mr. Waxman, the one limitation that
8 is the most troublesome is -- or -- or lack of
9 limitation, I guess, that schools can pay up to
10 $50,000 for a $10 million insurance policy to
11 protect student-athletes for future earnings.
12 Now that sounds very much like pay for
13 play. You know, you're -- you're paying the
14 insurance premium so that they will play at
15 college and not in the pros. Doesn't that
16 undermine the amateur status theory you have?
17 MR. WAXMAN: Well, I'll say two
18 things, Mr. Chief Justice.
19 First of all, one can dispute whether
20 one particular line or not is drawn in the right
21 place. But the notion that this particular rule
22 -- and I'll explain its rationale in a minute --
23 which allows --
24 CHIEF JUSTICE ROBERTS: Well, less
25 than -- you'll explain it in less than a minute.

1 MR. WAXMAN: I'll explain it in less
2 than a minute.
3 Loss-of-value insurance, which has
4 been provided in a few instances by some schools
5 administering their student activity fund, is a
6 form of insurance against injury, just like
7 disability insurance and extended medical
8 insurance. It is a cost of participating in
9 athletics that permits athletes who want to
10 receive an education instead of pay for their
11 play can continue to do so.
12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.
14 Justice Thomas.
15 MR. WAXMAN: Thank you.
16 JUSTICE THOMAS: Thank you, Mr. Chief
17 Justice.
18 Mr. Waxman, just a little bit -- a
19 matter of curiosity to me. You put a lot of
20 weight on -- focus on amateurism. Is there a
21 similar -- and -- and you look at the
22 limitations of the benefits or pay to players.
23 But is there a similar focus on the
24 compensation to coaches to maintain that
25 distinction between amateur coaches, coaches in

1 the amateur ranks, as opposed to coaches in the
2 pro ranks?
3 MR. WAXMAN: Thank you, Justice
4 Thomas. So the NCAA previously had a rule that
5 limited the amount of compensation that coaches
6 could receive. It was challenged in the Tenth
7 Circuit in a case called Law versus NCAA.
8 The NCAA sought to defend that rule on
9 the amateurism principle, and what the Tenth
10 Circuit said was, look, rules that are
11 reasonably designed to protect the amateur
12 status of student-athletes should be upheld in
13 the twinkling of an eye.
14 But coaches are not student-athletes.
15 They are professionals, just like professors and
16 presidents, and, therefore, the Court applied
17 full rule of reason review and struck down the
18 limitation on coaches. So the NCAA is no longer
19 permitted, under the antitrust laws, from in any
20 way restraining the salaries of coaches and
21 other professionals.
22 JUSTICE THOMAS: Well, it just strikes
23 me as odd that the coaches' salaries have
24 ballooned and they're in the amateur ranks, as
25 are the players.

1 But be that as it may, in Board of
2 Regents, at least as I read it, the -- where the
3 NCAA also defended its -- or the amateurism
4 interest, we -- did we conduct a deferential
5 quick look review?
6 MR. WAXMAN: Well, the -- Mr. Chief
7 Justice, the -- the amateurism rules --
8 JUSTICE THOMAS: Thank you for --
9 MR. WAXMAN: -- that the eligibility
10 --
11 JUSTICE THOMAS: -- the promotion, by
12 the way.
13 MR. WAXMAN: I -- I'm sorry, but I'm
14 sure you would be terrific at that, Justice
15 Thomas. Let me just say that --
16 CHIEF JUSTICE ROBERTS: There's no --
17 there's no opening, Mr. Waxman.
18 MR. WAXMAN: I -- there's nothing more
19 I can say that will not get me into trouble, so
20 let me answer Justice Thomas's question.
21 The -- the rules that were challenged
22 in Board of Regents were a particular restraint
23 on the -- the number of televised games that the
24 NCAA would allow its teams to hold. And what
25 the Court said is, number one, because this is

1 an industry in which agreement is necessary for
2 the product to exist at all, we will apply the
3 rule of reason, and we will apply a full rule of
4 reason inquiry into the procompetitive benefits
5 of the television rule because they do not fit
6 the mold of the core rules that define the
7 product itself, that is, the rule -- the
8 eligibility rules that require that contestants
9 be students and amateurs.
10 And it's from that that both we and
11 this Court in Section 6 of American Needle
12 derive the principle that when a rule on its
13 face is shown to advance the principle of
14 amateur athletic competition, it should be
15 withheld in the twink -- in the so-called
16 twinkling of an eye.
17 JUSTICE THOMAS: Thank you.
18 CHIEF JUSTICE ROBERTS: Justice
19 Breyer.
20 JUSTICE BREYER: I have two questions.
21 The first one is, what is it precisely that you
22 are complaining about in this Court? From much
23 of what has been argued, I thought it was the
24 injunction part on page -- pages 119a, 47a, and
25 208a. And -- and the injunction and the court

1 of appeals seem to say, NCAA, you cannot limit
2 giving them musical instruments, computers, et
3 cetera, and then they add the cost of
4 post-eligibility internships, vocational
5 schools -- does that mean, like, law school --
6 and there are a few -- couple other things.
7 MR. WAXMAN: So --
8 JUSTICE BREYER: Is it that you just
9 think these -- you know what the latter things
10 are. They're -- they're in your mind, okay.
11 That could be hundreds of thousands of dollars.
12 I mean, law school is expensive. I don't know
13 if it's a vocational school, but they could --
14 they -- they could be. They could be very, very
15 expensive.
16 So that limit may come close to
17 saying, NCAA, you can let these schools get away
18 with murder in terms of what they give the
19 athletes and you have to. Or --
20 MR. WAXMAN: So --
21 JUSTICE BREYER: -- it might be some
22 minor thing. But is that what you're attacking?
23 Are you attacking other things as well or what?
24 MR. WAXMAN: Justice Breyer, let me
25 start with the general and proceed to the

1 particular. Your first question is, what is it
2 that you're complaining about.
3 JUSTICE BREYER: Yep.
4 MR. WAXMAN: We think that -- we think
5 that antitrust courts lack the authority to
6 redefine the central differentiating feature of
7 the NCAA's procompetitive product, particularly
8 where the history and context show so plainly --
9 JUSTICE BREYER: Yeah, yeah.
10 MR. WAXMAN: -- that the --
11 JUSTICE BREYER: I understand that.
12 But I say it has to end up in something, so the
13 telling you to do something you don't want to do
14 --
15 MR. WAXMAN: And --
16 JUSTICE BREYER: -- is that thing
17 they're telling you.
18 MR. WAXMAN: -- what they're -- they
19 have imposed in this decree, which is on page
20 167a to 170a of the appendix to our petition --
21 JUSTICE BREYER: Mm-hmm.
22 MR. WAXMAN: -- they have imposed a
23 regime in which student-athletes can be paid
24 large sums of money on account of their athletic
25 performance, which does not distinguish college

1 from professional sports, much less as --
2 JUSTICE BREYER: Okay. Which -- which
3 --
4 MR. WAXMAN: -- effectively --
5 JUSTICE BREYER: -- which --
6 MR. WAXMAN: -- as the challenged
7 rules.
8 JUSTICE BREYER: -- which one allows
9 you to do it? What's the line, what's the
10 sentence that allows you to do that? Because I
11 felt the court -- the court of appeals was
12 saying --
13 MR. WAXMAN: Let --
14 JUSTICE BREYER: -- no, it doesn't let
15 them do it, it doesn't do that.
16 MR. WAXMAN: I'll -- I'll give you
17 three examples if I have the time.
18 Number one, the Court now says that we
19 cannot pro -- we cannot restrain schools from
20 awarding to every Division I athlete, just for
21 being on the team, $5,980 per year, God help us.
22 That is nothing but pay for play.
23 JUSTICE BREYER: Okay.
24 MR. WAXMAN: Number two, that we have
25 to -- we cannot restrain, put in any way any

1 limit on the number of post-eligibility paid
2 internships that student-athletes can receive.
3 JUSTICE BREYER: Thank you.
4 MR. WAXMAN: And with respect to the
5 long laundry list that is reflected in paragraph
6 2, what the court has said is we cannot place
7 any limits on anything that can be deemed an
8 educational comp -- educate -- that's "related
9 to education" when, in the present world, as the
10 district court recognized, we permit
11 student-athletes to receive the actual and
12 necessary educational expenses, including every
13 single one of these things provided that they
14 are actually necessary and reasonably limited.
15 And the court said, no, you can't place any
16 limit on that.
17 And we can put labels aside. That
18 con -- that permits school to allow pay for
19 play. And the -- and the reason why we need to
20 allow the NCAA to continue to enforce the
21 amateurism principle, which is well understood,
22 is, in fact, illustrated by Justice Thomas's
23 point about the college coaches. We know what
24 happened to college coaches' salaries when the
25 court struck down the NCAA's rules limiting

1 those salaries. They went through the roof.
2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.
4 Justice Alito.
5 JUSTICE ALITO: Mr. Waxman, let me put
6 on the table some of what is said by those who
7 challenge your idea of amateurism.
8 The briefs that are supported -- that
9 are submitted in support of the Respondents
10 paint a pretty stark picture, and they argue
11 that colleges with powerhouse football and
12 basketball programs are really exploiting the
13 students that they recruit. They have programs
14 that bring in billions of dollars. As Justice
15 Thomas mentioned, the -- this money funds
16 enormous salaries for coaches and others in huge
17 athletic departments.
18 But the athletes themselves have a
19 pretty hard life. They face training
20 requirements that leave little time or energy
21 for study, constant pressure to put sports above
22 study, pressure to drop out of hard majors and
23 hard classes, really shockingly low graduation
24 rates. Only a tiny percentage ever go on to
25 make any money in professional sports.

1 So the argument is they are recruited,
2 they're used up, and then they're cast aside
3 without even a college degree. So they say, how
4 can this be defended in the name of amateurism?
5 MR. WAXMAN: Well, let me -- let me
6 respond. I mean, the -- there -- there is a
7 healthy debate going on in legislatures around
8 the country over whether college athletes
9 should, as a matter of principle, be paid.
10 Our view -- and -- and that is not an
11 antitrust question. Our own view is, if you
12 allow them to be paid, they will be spending
13 even more time on their athletics and -- and
14 devoting even less attention to academics.
15 But the -- the NCAA has rules limiting
16 to 35 hours a week the number of hours that a
17 Division I athlete can spend, and this applies
18 to all Division I athletes, just not in the two
19 sports in a few schools that happen to make
20 money.
21 You say that the schools are making
22 billions of dollars on this. There are 1100
23 schools that belong to the NCAA. Twenty-four
24 or, in some years, 25 schools make money on
25 their athletic programs. The rest of the

1 programs are subsidized by general revenue,
2 student fees, and tuition. And the notion that
3 they graduate at lower rates and they have post
4 outcomes is contrary to the evidence in this
5 case.
6 JUSTICE ALITO: Well, no, I --
7 MR. WAXMAN: The evidence in the --
8 JUSTICE ALITO: -- what you say is --
9 what you say is true of -- of the thousands and
10 thousands of real student-athletes, but what's
11 the graduation rate for football players in the
12 power conferences?
13 MR. WAXMAN: You know, I can't cite
14 you the -- from memory, the statistics.
15 Professor Heckman, who was one of the witnesses
16 at trial, testified, and all I can remember is
17 that what he said -- and there is support for
18 this in independent studies in some of the
19 amicus briefs supporting us -- are that Division
20 I athletes graduate at higher rates than
21 students who are not athletes --
22 JUSTICE ALITO: Yeah, the -- the --
23 the athletes --
24 MR. WAXMAN: -- and have better
25 outcomes following graduation.

1 JUSTICE ALITO: Yeah, the athletes on
2 the crew and -- and fencing, but, for the -- the
3 powerhouse basketball and football programs,
4 it's different.
5 Let me -- let me squeeze in one more
6 question, which seems -- goes to the heart of
7 what I'm wrestling with. You say that what's
8 distinctive about your product is that your
9 players are not paid. And that was true a
10 hundred years ago.
11 But, in fact, they are paid. They get
12 lower admission standards. They get tuition,
13 room and board, and other things. That's a form
14 of pay. So the distinction is not whether
15 they're going to be paid. It's the form in
16 which they're going to be paid and how much
17 they're going to be paid, isn't that right?
18 MR. WAXMAN: It is not right. The
19 principle -- the NCAA, for decades, has defined
20 "pay" to mean compensation in ex of -- in excess
21 of two things: Number one, allowances for
22 educational expenses, and educational can
23 include both academic and athletic, that is, the
24 reasonable and necessary expenses to obtain an
25 education; and, number two, certain sort of

1 token prizes and awards for exceptional
2 performance that are characteristic of amateur
3 leagues and --
4 JUSTICE ALITO: Thank you, Mr. Waxman.
5 My time is up.
6 MR. WAXMAN: Thank you, Justice Alito.
7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor.
9 JUSTICE SOTOMAYOR: I thought,
10 Mr. Waxman, that the district court's injunction
11 only prohibits the NCAA from limiting
12 education-related expenses. It does not
13 prohibit the conference from doing so.
14 So, if your priority is maintaining
15 amateurism in college athletics and you and your
16 members think that increasing education-related
17 benefits will undermine the spirit of
18 amateurism, why don't the conferences impose
19 those limits?
20 MR. WAXMAN: I mean, I think this
21 Court gave the answer to that question, Justice
22 Sotomayor, in Board of Regents, which is this is
23 a classic example of a prisoner -- prisoner's
24 dilemma in which national agreement is the only
25 solution. There is no doubt that what has

1 happened with respect to the pay of college
2 coaches and other professionals will happen if
3 conferences or individual schools are permitted
4 to remove these restrictions.
5 JUSTICE SOTOMAYOR: Well --
6 MR. WAXMAN: And --
7 JUSTICE SOTOMAYOR: I'm sorry.
8 Continue.
9 MR. WAXMAN: No, I'm sorry. I -- that
10 -- that -- I believe that's a sufficient answer
11 to your question.
12 JUSTICE SOTOMAYOR: So it --
13 MR. WAXMAN: Maybe it's not sufficient
14 --
15 JUSTICE SOTOMAYOR: -- it didn't seem
16 to me --
17 MR. WAXMAN: -- but it's my answer to
18 your question.
19 JUSTICE SOTOMAYOR: -- it didn't seem
20 to me that either the Ninth Circuit or the
21 district court prohibits the NCAA from limit --
22 limiting educational-related expenses to those
23 that are reasonable. So --
24 MR. WAXMAN: So --
25 JUSTICE SOTOMAYOR: -- all of your

1 parade of horribles, the government says, are
2 taken care of by that limitation. If you think
3 that internships should be related in some way
4 to the educational experience, you could pass
5 rules to that effect. So why doesn't that take
6 care of your parade of horribles?
7 MR. WAXMAN: Justice Sotomayor, you
8 keep saying reasonable educational expenses.
9 What the decree says is that we may not limit in
10 any way compensation or benefits that are in any
11 way "related to education," and includes -- and
12 no one disputes this -- the fact that we may --
13 that school -- under her decree, schools may
14 provide $5,980 per year to every Division I
15 athlete just for being on a team. And once a
16 court gets into draw -- line-drawing in this
17 respect, the litigation and level of judicial
18 superintendence is inevitable.
19 And so why $5,980? If this Court were
20 to affirm, within a month there will be another
21 lawsuit, in addition to the two that are already
22 now working their way through the district court
23 in Oakland, which will say, number one, well, we
24 have an expert who says that we don't think that
25 consumers would be that bothered if it were

1 $8,000 a year, and so we want $8,000 a year to
2 be imposed, and, by the way, we also want treble
3 damages for the fact that, for all these years,
4 we haven't been getting our $5,980.
5 The district court says no limits
6 whatsoever on a postgraduate internship. The
7 next lawsuit says we want treble damages because
8 we weren't given unlimited postgraduate
9 internships. And then there's another lawsuit
10 that says, well, why does it have to be just
11 postgraduate --
12 JUSTICE SOTOMAYOR: I get your point
13 --
14 MR. WAXMAN: -- internships?
15 JUSTICE SOTOMAYOR: -- counsel, but --
16 MR. WAXMAN: Thank you.
17 CHIEF JUSTICE ROBERTS: Justice Kagan.
18 JUSTICE KAGAN: Mr. Waxman, the way
19 you talk about amateurism, it -- it sounds
20 awfully high-minded. But there's another way to
21 think about what's going on here, and that's
22 that schools that are naturally competitors as
23 to athletes have all gotten together in an
24 organization, an organization that has
25 undisputed market power, and they use that power

1 to fix athletic salaries at extremely low
2 levels, far lower than what the market would set
3 if it were allowed to operate.
4 So why shouldn't we think of it in
5 just that kind of way, that these are
6 competitors, all getting together with total
7 market power, fixing prices?
8 MR. WAXMAN: Well, I think the first
9 answer I would give you is this is not some
10 product, some differentiated product that has
11 just been created and we're now testing whether
12 or not it was adopted in good faith.
13 We're talking about a product that was
14 created 116 years ago in response to abuses that
15 were occurring as a result of instances of
16 professionalism in athletics in order to restore
17 integrity and the social value of college
18 athletics. Almost a hundred years ago, Justice
19 Brandeis in the Chicago --
20 JUSTICE KAGAN: Well, you can only
21 ride on the history, I think, Mr. Waxman, for so
22 long. I mean, a great deal has changed since a
23 hundred years ago in the way that
24 student-athletes are treated. And, you know,
25 I'll take you back to Justice Alito's question

1 and the kind of payments that they're given.
2 You know, a great deal has changed even since
3 Board of Regents, let alone a hundred years ago.
4 So I guess it doesn't move me all that
5 much that there's a history to this if what is
6 going on now is that competitors as to labor are
7 combining to fix prices.
8 MR. WAXMAN: So, look, the -- their --
9 the -- the -- the way that the rule of -- the
10 rule of reason applies here, this Court has
11 said, because sports leagues produce a product
12 that can't be reduce -- produced without
13 agreement. And this is, as your question points
14 out --
15 JUSTICE KAGAN: Well, for sure --
16 MR. WAXMAN: -- an --
17 JUSTICE KAGAN: -- that's true about
18 some things. I mean, you know, sports leagues
19 have to get together to figure out the rules of
20 the game, how many people are going to be on --
21 on the court at any one time. So, of course,
22 there are things that there needs to be
23 cooperation for. But why does there -- there --
24 why does there need to be cooperation on the
25 cost of labor?

1 MR. WAXMAN: Because the cost of labor
2 in this unique instance is what is the
3 differentiating feature that provides a
4 procompetitive product.
5 JUSTICE KAGAN: So I think --
6 MR. WAXMAN: And when you have --
7 JUSTICE KAGAN: -- if that were true,
8 Mr. Waxman, you would have an argument. But, as
9 I understand what the trial court did here, it
10 basically took a lot of evidence as to that
11 question, as to whether the lack of pay to play
12 was anything that consumers wanted, and what it
13 found was that consumers didn't really care
14 about that. The -- the -- the other side's
15 experts found on the basis of survey evidence
16 and so forth that payments of $10,000 or more
17 would not affect demand.
18 Your expert failed to show anything to
19 the contrary. Essentially, you're saying that
20 the differentiating feature is the lack of pay
21 to play. But the evidence in this trial
22 suggested exactly the opposite.
23 MR. WAXMAN: So the evidence in this
24 trial very much did not suggest exactly the
25 opposite. And just to take one example, when

1 the -- when their survey expert tested people's
2 reactions to giving them a -- you know, a
3 $10,000 academic award, something like 10
4 percent of the respondents said that they would
5 be less interested and would watch less if
6 that's the case.
7 The question -- the fact that -- the
8 procompetitive differentiation is not
9 necessarily measured by net consumer demand.
10 They're -- the independent value of preserving
11 consumer choice is not the value of maximizing
12 consumer interest.
13 JUSTICE KAGAN: Thank you, Mr. Waxman.
14 MR. WAXMAN: Otherwise, you wouldn't
15 have specialized products, and the only --
16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch.
18 JUSTICE GORSUCH: Mr. Waxman, it seems
19 to me you -- you start in a place that I -- I
20 can readily sign up to, which is that joint
21 ventures often need to have agreements that
22 would otherwise look anticompetitive, whether
23 they're territorial allocations or price
24 agreements, in order to create a product that
25 wouldn't otherwise exist. And we usually give

1 that a pretty quick look, maybe even a twinkling
2 of the eye.
3 So that all -- that all makes sense to
4 me, and we certainly don't want to go back to
5 the bad old days of reviewing any joint venture
6 agreement that restricts competition through per
7 se analysis or -- or something that looks like a
8 strict scrutiny analysis, which I understand you
9 condemn the -- the Ninth Circuit for doing.
10 So I understand all of that. I think
11 the trick comes for me at least sort of where
12 Justice Kagan was alluding to, which is, here,
13 the agreement that's really at the center of the
14 case is an agreement among competitors to fix
15 price with the labor market, where you have
16 monopsony control, and that's unusual.
17 The normal joint venture is -- is in a
18 competitive market. But, here, the NCAA has
19 monopsony control over labor price. There
20 aren't other leagues which might compete with
21 the NCAA that might allow payments, and you
22 could test consumer demand that way. So why --
23 why isn't the -- the monopsony control over the
24 labor market at least an appropriate basis for a
25 more -- more searching rule of reason analysis?

1 MR. WAXMAN: Thank you, Justice
2 Gorsuch. So let me be -- let me be very clear.
3 Given that this is the rare product that is
4 defined by the restriction on competition --
5 compensation, it is -- we're not saying that
6 it's not appropriate for a court to examine in
7 whatever detail is necessary whether the product
8 really is procompetitive, but, if it is -- and
9 in this case, there is an agreement that the
10 inquiry at step 2, is our product
11 differentiating and procompetitive, everyone
12 agrees that the answer is yes.
13 Once that is a given, where there is
14 no plausible argument that the challenged rules
15 aren't reasonably related to the amateur status
16 of student-athletes, which is the
17 differentiating feature, we think that
18 abbreviated review is all that's necessary.
19 And that's a principle that the Ten --
20 the Fifth Circuit in McCormack, the Third
21 Circuit in Smith, and the Seventh Circuit in
22 Deppe applied, and we think that was -- was
23 blessed by this Court in American Needle and
24 looking to and quoting the relevant language
25 from Board of Regents.

1 JUSTICE GORSUCH: I -- I -- I -- I
2 guess I'm not sure I -- I heard a direct
3 response to my question.
4 MR. WAXMAN: In that case, I
5 apologize.
6 JUSTICE GORSUCH: No, no, no, no, no,
7 no apologies. Let's just -- just drill down a
8 little bit further. I -- I guess what I'm
9 trying to ask you, and maybe I did so
10 inartfully, is whether the fact that the NCAA
11 has monopsony control over the labor market, it
12 is a sole purchaser of the labor -- does that
13 make a difference in our rule -- what would
14 otherwise be a forgiving rule of reason analysis
15 to a joint venture?
16 MR. WAXMAN: I see. I see. So it
17 makes all the difference in the world for
18 purposes of step 1 of the rule of reason, which
19 is that, as this case comes to this Court,
20 there's no dispute that the -- the
21 no-pay-for-play rule imposes a significant
22 restraint on a relevant antitrust market,
23 absolutely, just as -- and as this case comes to
24 this Court, there is no dispute that those
25 restraints have a substantial procompetitive

1 benefit.

2 And so the inquiry -- the level -- the

3 question of what level of inquiry is appropriate

4 in applying the rule of reason rests in this

5 case on step 3.

6 JUSTICE GORSUCH: Thank you.

7 MR. WAXMAN: I hope that answered your

8 question.

9 JUSTICE GORSUCH: Good -- good enough.

10 CHIEF JUSTICE ROBERTS: Justice

11 Kavanaugh.

12 JUSTICE GORSUCH: Thank you very much.

13 My time's expired.

14 JUSTICE KAVANAUGH: Thank you, Chief

15 Justice.

16 And good morning, Mr. Waxman. I want

17 to pick up from Justice Kagan and Justice

18 Gorsuch and identify some issues of concern to

19 me as I look at this.

20 I start from the idea that the

21 antitrust laws should not be a cover for

22 exploitation of the student-athletes, so that is

23 a concern, a overarching concern here.

24 I see your rhetoric and tradition and

25 history argument being very similar to the

1 arguments that were made for exempting baseball
2 from the antitrust laws, Flood v. Kuhn, Federal
3 -- Federal Baseball, and that -- that exemption
4 has not been replicated in other sports in other
5 cases.
6 And then, in Regents, as Justice Kagan
7 said, that really was from a different era, it
8 -- it was dicta, not sure it was fully
9 considered dicta, and, in any event, from a
10 different era.
11 So then we get to regular antitrust
12 law, rule of reason, and I just want to drill
13 down on your asserted procompetitive
14 justification and how you say the product is
15 differentiated.
16 It does seem, as Justice Kagan and
17 Justice Gorsuch suggested, Justice Alito, that
18 schools are conspiring with competitors,
19 agreeing with competitors, I'll say that, to pay
20 no salaries to the workers who are making the
21 schools billions of dollars on the theory that
22 consumers want the schools to pay their workers
23 nothing. And that just seems entirely circular
24 and even somewhat disturbing.
25 And then, as Justice Kagan says, it's

1 not even factually supported in the record in
2 this case. It seems to blend back to the
3 tradition argument, and all things circle back
4 to this idea, well, it should just -- just don't
5 worry about it, college athletics is different,
6 just like baseball.
7 So those are the concerns I have
8 initially. Interested in your response.
9 MR. WAXMAN: Well, those are -- those
10 are a lot of concerns. I hope I can remember
11 them all and address them all.
12 The -- the notion that these
13 amateurism rules were imposed or constitute a
14 cover for exploitation of athletes is, A, wrong
15 and, B, not an antitrust issue. It may very
16 well be a policy issue that policymakers, like
17 legislatures, can address about whether they --
18 whether they think an amateur -- the amateurism
19 model that is -- as the economists supporting us
20 say is -- has produced perhaps the most
21 procompetitive product in American industrial
22 history, is worth it.
23 We are not asking for an exemption
24 from the rule of reason. There is no question
25 that, as the Court said in Board of Regents,

1 because this is a product that can't exist
2 without agreement, the rule of reason applies.
3 And our position is -- and this, I
4 think, goes to your -- well, let me just say
5 that we think that -- I -- Board of Regents is
6 80 -- is 37 years old, but we think that the
7 observation that the Court made in Board of
8 Regents about the value that consumers place on
9 the tradition of amateur intercollegiate
10 athletics is just as true today.
11 And, again, adverting, as you did, to
12 Justice Kagan's point, even assuming that the
13 evidence in this case supported a conclusion
14 that consumers would be just as happy if
15 athletes were paid or athletes were paid $10,000
16 a year for just being on the team, that doesn't
17 defeat the fact -- the procompetitive benefit
18 that we provide. The --
19 JUSTICE KAVANAUGH: But, if the
20 consumers don't care -- I mean, you said earlier
21 this would allow the players to receive $6,000 a
22 year, as if that were some exorbitant amount
23 when the TV contracts are in the billions. Six
24 thousand a year is not -- not a lot given the
25 time and the injuries and the inability to go to

1 class or to major in the thing they want to or
2 to do summer jobs. I mean, you're talking about
3 $6,000 as if it's some exorbitant amount.
4 MR. WAXMAN: Look, we -- we -- we have
5 rules and there is a very, very clear and stable
6 line that defines the feature of our product.
7 The -- the amount of hours spent and what majors
8 they pick and all that sort of stuff reflects --
9 applies to every Division I athlete in all 24
10 NCAA division sports. And if there is a problem
11 with the NCAA enforcing its hours restrictions
12 or in some way disadvantaging students who
13 happen to be athletes, that's not an antitrust
14 issue. That may be an issue with --
15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.
17 Justice Barrett.
18 JUSTICE BARRETT: Good morning,
19 Mr. Waxman. I want to --
20 MR. WAXMAN: Good morning, Justice
21 Barrett.
22 JUSTICE BARRETT: I'd like to return
23 to Justice Alito's questions to you in which he
24 said that tuition and all of these educational
25 in-kind benefits really are a form of pay --

1 MR. WAXMAN: Mm-hmm.
2 JUSTICE BARRETT: -- when you answered
3 and you said it's not pay because the NCAA has
4 defined "pay" as the reasonable and necessary
5 expenses to obtain education.
6 But I'm wondering, why does the NCAA
7 get to define what pay is? And I think, you
8 know, this is based on experience, but there are
9 certainly plenty of parents and students -- I
10 mean, some people want to play in college for
11 the love of the game. Some people think they'll
12 be able to go pro. A lot of people do it
13 because they want to be able to afford college
14 educations or -- or, you know, get the in-kind
15 benefit equal to, you know, say, 30- or 40,000
16 dollars worth of -- of tuition. So why do you
17 get to define what pay is?
18 MR. WAXMAN: Well, I think there's a
19 -- the general principle, Justice Barrett, is --
20 and I think this is -- this is simply received
21 wisdom for antitrust law purposes -- is
22 producers get to define their product. They get
23 to define the features of their product.
24 We have long defined our product to
25 exclude from pay the reasonable and necessary

1 expenses of obtaining an education. We give
2 scholarships and we have student assistance
3 funds for all kinds of students, whether they're
4 athletes or not.
5 Our definition, which has been stable
6 over decades, long predating Board of Regents,
7 is that it is -- you're not being paid to play
8 if you receive an allowance for the actual and
9 necessary expenses of your education, whether
10 those expenses be --
11 JUSTICE BARRETT: And is that how you
12 would define an amateur, as someone who is
13 unpaid? Because I think that gets back to the
14 point of, is it a procompetitive or a legitimate
15 procompetitive justification to say that
16 consumers love watching unpaid -- unpaid people
17 play sports?
18 MR. WAXMAN: Yes, indeed. In fact, in
19 Board of Regents and, in fact, even in the
20 majority opinion in O'Bannon, the -- the -- the
21 Court said that the principle of amateurism is
22 well understood and it means, in both cases,
23 they said, you are not paid for play, but you
24 may receive the expenses of obtaining an
25 education.

1 And, in fact, in O'Bannon, the reason
2 that the Court struck down a -- a since
3 abandoned rule of the NCAA that prohibited
4 schools from paying -- making athletic
5 scholarships up to the full amount of the cost
6 of attendance was that the -- the Ninth Circuit
7 said, well, even the NCAA admits that that is
8 not a rule that distinguishes amateurs from
9 professionalism because the cost of attendance
10 is the cost -- the expense of an education.
11 So, yes, that is our line.
12 JUSTICE BARRETT: I want to shift
13 gears, Mr. Waxman, and ask you about the effects
14 that ruling against you might have. So, you
15 know, you told Justice Thomas that the
16 ballooning of coaches' salaries is attributable
17 to the -- the ruling in the Tenth Circuit that
18 they can't be capped under the antitrust laws.
19 So, if we rule against you, what's the impact of
20 the decision on Title IX and women's sports?
21 MR. WAXMAN: Well, Title IX is an
22 independent mandate, and, you know, the schools
23 have to -- obviously, have to adhere to the
24 Title IX mandate.
25 The evidence in the case showed that

1 if schools were, in fact, required to make the
2 kind of payments that the district judge imposed
3 in her final decree, schools would -- I mean,
4 they have to come up with the money somewhere,
5 the -- you know, the -- the $6,000 a year
6 amounts to seven -- $735 million per year that
7 schools have to come up with in addition to the
8 -- the retrospective treble damages awards.
9 And the -- the evidence was that
10 schools would, per force, reduce the number of
11 "non-revenue sports," men's and women's sports,
12 thus reducing the advantages and offerings
13 available to student-athletes in those other
14 sports.
15 I mean, I think my point about what
16 the consequences are is I -- I think we can see
17 in the Ninth Circuit what the consequences of
18 allowing district judges to hear evidence in
19 successive cases, well, people don't care about
20 this or people don't care about that, and so
21 raise the line up and up --
22 JUSTICE BARRETT: I'm sorry,
23 Mr. Waxman. My time expired.
24 MR. WAXMAN: Oh, I'm -- I'm so sorry.
25 CHIEF JUSTICE ROBERTS: A minute to

1 wrap up, Mr. Waxman.
2 MR. WAXMAN: Thank you, Mr. Chief
3 Justice.
4 For over a hundred years, the NCAA has
5 administered procompetitive amateurism rules
6 needing to account for multiple constituencies
7 and changing circumstances, as the questions
8 today illustrate.
9 It offends the antitrust laws for a
10 court to appoint itself as a superintendent to
11 second-guess those judgments, blurring the
12 distinction between college and professional
13 sports, and facilitating successive lawsuits and
14 treble damages award, all based on supposed
15 evidence that an alternative regime of the
16 court's devising wouldn't diminish net viewer
17 interest.
18 This is the one and only case in the
19 history of the Sherman Act ever to strike down
20 restraints that are what differentiates the
21 product, and particularly in the unique
22 circumstances here, it was manifest error to do
23 so.
24 Thank you.
25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.
2 Mr. Kessler.
3 ORAL ARGUMENT OF JEFFREY L. KESSLER
4 ON BEHALF OF THE RESPONDENTS
5 MR. KESSLER: Good morning, Mr. Chief
6 Justice, and may it please the Court:
7 The naked horizontal monopsony
8 restraints that the competing NCAA schools have
9 adopted in these labor markets would be per se
10 unlawful in any other context. But, under Board
11 of Regents and American Needle, the need for the
12 NCAA schools to cooperate leads to the
13 conclusion that the rule of reason applies.
14 The courts below recognized this, and,
15 as a result, Petitioners had ample latitude to
16 prove a procompetitive justification for all
17 their restraints. Petitioners' complaint is not
18 a legal one. It's that they lost on the facts.
19 But that is not a basis for appealing to this
20 Court.
21 For five decades, the NCAA has argued
22 that economic competition among its member
23 schools would destroy consumer demand for
24 college sports. In Board of Regents, it was
25 competition for TV broadcast. In the Law case,

1 it was competition not for all coaches' but for
2 assistant coaches' salaries. In O'Bannon, it
3 was name, image, and likenesses.
4 Each time, the Court struck down the
5 restraints under the rule of reason, and history
6 has proven the courts were correct. Demand for
7 college sports has continued to flourish.
8 And, by the way, this has never been
9 stable. As recently as 2015, the NCAA said you
10 couldn't provide even the most basic cost of
11 attendance for the athletes. This case is more
12 of the same. It is just the latest iteration of
13 the repeatedly debunked claims that competition
14 will destroy consumer demand for college sports
15 and that the NCAA should have a judicially
16 created antitrust exemption because of an
17 imaginary revered tradition that they argue for.
18 CHIEF JUSTICE ROBERTS: Now, Mr.
19 Kessler, the --
20 MR. KESSLER: This should cause --
21 CHIEF JUSTICE ROBERTS: -- the thing
22 that concerns me about your approach that was
23 adopted by the court below, the NCAA has a
24 number of limitations that are designed to
25 ensure that its product is amateur athletic

1 competition.
2 And you look at and the district court
3 looks at one rule, and let's say it's a limit of
4 $2,000 for something, and you say we can make
5 that less restrictive. Let's make it $2,500,
6 and that's fine, and that doesn't alter the
7 public perception of what's going on.
8 But then you go on to another rule and
9 fiddle with that in the same way and another one
10 and another one, and -- and it's like a game of
11 Jenga. You've got this nice solid block that
12 protects the sort of product the schools want to
13 provide, and you pull out one log and then
14 another and everything's fine, then another and
15 another and all of a sudden the whole thing's
16 come -- comes crashing down.
17 What -- what's your answer to that way
18 of looking at it?
19 MR. KESSLER: I do not believe that is
20 what the district court did here under the
21 prevailing law. What the district court did is
22 it tested factually whether the NCAA could prove
23 a procompetitive justification for all of its
24 rules together and found that it failed.
25 It then looked and said, can it

1 justify some categories of its rules, and it
2 found that it succeeded.
3 Then, at step 3, we had the burden to
4 show it was patently and inexplicably stricter
5 than necessary so that there was substantially
6 less restrictive alternatives available.
7 And the basic alternative the Court
8 imposed was not to micromanage. It was a
9 general rule that there's no justification for
10 limiting education-related benefits because,
11 after all, what the consumers and others care
12 about is they be students.
13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.
15 MR. KESSLER: And they wanted --
16 CHIEF JUSTICE ROBERTS: Justice
17 Thomas.
18 JUSTICE THOMAS: Thank you, Mr. Chief
19 Justice.
20 Briefly, Mr. Kessler, the -- just
21 following up on what you just said, what if you
22 have a consumer survey that suggests tomorrow
23 that the consumers think it's fine for amateur
24 athletes to make $20,000 a year? Would we be
25 back in court with litigation suggest -- about

1 that rather -- as opposed to the $6,000 a year?
2 MR. KESSLER: I do not believe that is
3 correct for two reasons.
4 First, the step 3 burden is to show
5 that the rules are patently and inexplicably
6 stricter than necessary and that it has to be a
7 substantially less restrictive alternative.
8 That type of small versions are never going to
9 pass that test.
10 But, more importantly, here, the court
11 did not set this $5,980 limit. The NCAA did.
12 What the court found is the NCAA allows those
13 types of payments for athletes for performing on
14 the field, pay for play. And since the NCAA did
15 not see any damage to its product by allowing a
16 star player to make that for winning a ball
17 game, for being an MP -- MVP --
18 JUSTICE THOMAS: You know, that -- I'm
19 sorry to cut you off, Mr. Kessler, but that --
20 that sounds fine for the upper-level schools,
21 whether it's, you know -- you know, Alabama,
22 Ohio State, and Nebraska, but it doesn't -- for
23 the schools that have more modest circumstances,
24 it would seem that they would begin to -- the --
25 the bigger schools would begin to cherry-pick

1 with the transfer portal the athletes from the
2 lower schools simply because they're able to
3 afford this income that you're talking about.
4 So have you considered that as a
5 problem in an environment where you're trying to
6 remain -- maintain competitiveness and amateur
7 status?
8 MR. KESSLER: So there's a reason,
9 Your Honor, that the NCAA doesn't assert
10 competitive balance as a defense in this case,
11 and that's because those schools don't compete
12 now.
13 Now Alabama pays its weight coaches
14 $700,000 a year. None of those small schools
15 can do that. They build palaces.
16 What these competition restraints do
17 is they divert the big schools' money to these
18 other areas to compete, but it doesn't change
19 the competition. And, remember, this injunction
20 doesn't require one school to pay anything. It
21 simply said the NCAA can't prohibit it, but the
22 conferences can. So, for example, the Patriot
23 League doesn't even allow their schools to pay
24 athletic scholarships. Conferences can adapt
25 for the smaller schools.

1 CHIEF JUSTICE ROBERTS: Justice --
2 JUSTICE THOMAS: Thank you.
3 CHIEF JUSTICE ROBERTS: -- Justice
4 Breyer.
5 JUSTICE BREYER: I think, if we really
6 have a case here, it's a tough case for me, and
7 the reason it's so tough is -- for me is because
8 this is not an ordinary product. This is an
9 effort to bring into the world something that's
10 brought joy and all kinds of things to -- to
11 millions and millions of people, and it's only
12 partly economic. Okay?
13 So I worry a lot about judges getting
14 into the business of deciding how amateur sports
15 should be run. And I can think of ways around
16 that. First, you could just say it's a
17 different kind of product. This is what you
18 would lose on it.
19 Second, you could say that consumer
20 demand is not at all the only criteria. You
21 could have a purple widget joint venture and you
22 say nobody can make red widgets and, I'm sorry,
23 they can't, even if consumers would just as much
24 like red widgets, because it's a purple widget
25 joint venture.

1 Or you could say this is a rule of
2 reason, take into account other things. Take
3 into account administrative problems in working
4 out these rules for the NCAA and the fact
5 that -- that nobody can work with 40,000
6 professors in schools and everybody thinking
7 something different. You're going to obviously
8 end up with something of a mess. And it's a
9 tough problem for them.
10 Now, having thought of four or five
11 different ways by means of which you lose, I
12 also think I'm very worried about my ways,
13 because how do I do it? If I say these things,
14 I might be also affecting the real economic
15 joint venture, like for technology companies.
16 Now I'm telling you my real thoughts,
17 and I'd like to hear your and also Mr. Wackman
18 -- Waxman's response.
19 MR. KESSLER: Your Honor, first, I
20 would say that I do believe, under the rule of
21 reason and the antitrust laws, the
22 procompetitive justifications must be
23 competition-enhancing. That's what Board of
24 Regents says. That's what the unanimous
25 decision in American Needle says. That's what

1 Professional Engineers says.
2 Every case has said that. And the
3 reason is, if there's something special about
4 the NCAA that deserves not to be subject to the
5 antitrust laws, that's a congressional policy
6 determination. It's not something this Court
7 has the ability to weigh against the competition
8 mandate that's under the rule of reason.
9 I would also say, Your Honor, we have
10 looked at these claims from the NCAA over and
11 over again that each loss was going to hurt
12 college sports and destroy this revered
13 tradition. It's never happened. We --
14 CHIEF JUSTICE ROBERTS: Justice Alito.
15 JUSTICE ALITO: Do you think that the
16 product that is produced by the top football and
17 basketball schools has a distinctive character?
18 And, if so, what is that characteristic?
19 MR. KESSLER: I think it is -- what
20 the court found is that students play in the
21 games, which is a distinction from professional
22 sports. I think that's what all their witnesses
23 in the NCAA testified to. That's what the
24 survey evidence suggests. So I believe that is
25 the distinction. And, of course, we're not

1 challenging any restrictions or rules regarding
2 that they have to be students. And, in fact,
3 the education-related benefits here would help
4 them to succeed as students.
5 JUSTICE ALITO: Do you think there's
6 any -- that the NCAA could put any limitation on
7 educational benefits for which athletes could
8 bargain?
9 MR. KESSLER: I think the injunction
10 allows the NCAA -- and this was alluded to -- to
11 set reasonable rules to define what the
12 education benefits are and how they are related
13 to education. They also were given the right,
14 under the injunction, for rules as to how the
15 benefits would be provided.
16 So I think the court gave a lot of
17 discretion to the NCAA in a way that will still
18 allow for there -- there to be competition in
19 making a better education experience for the
20 athletes, which Mark Emmert, the President of
21 the NCAA, publicly declared, after we won, that
22 this was a good thing.
23 JUSTICE ALITO: Do you think that what
24 the district court allowed here and the Ninth
25 Circuit sustained as the outer limit could --

1 would the antitrust laws allow applicants,
2 student -- recruited athletes to bargain for,
3 let's say, a guarantee not to lose a scholarship
4 if they're injured, a guarantee of tuition, room
5 and board for a certain number of years after
6 eligibility so that they would be able to
7 graduate, the provision of tuition, room and
8 board for graduate studies? Is there a limit?
9 MR. KESSLER: So I believe what the
10 antitrust laws do is prohibit the NCAA from
11 having restrictions that can't be justified
12 under the rule of reason. If they had a
13 restriction, for example, that said colleges
14 could not provide a -- a four-year or five-year
15 guarantee that their scholarship would stay in
16 place, I believe that might not survive rule of
17 reason scrutiny.
18 JUSTICE ALITO: I see.
19 MR. KESSLER: But the antitrust laws
20 don't compel schools to do anything. The idea
21 is allow the markets to decide what schools have
22 the choice to provide.
23 JUSTICE ALITO: All right. Thank you.
24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor.

1 JUSTICE SOTOMAYOR: Counsel, you
2 declined to cross-petition the judgment below,
3 correct?
4 MR. KESSLER: Yes.
5 JUSTICE SOTOMAYOR: So, for purposes
6 of this Court's review, you are not asking for
7 any broader relief than that already provided by
8 the district court, correct?
9 MR. KESSLER: That is correct, Your
10 Honor.
11 JUSTICE SOTOMAYOR: You're not asking
12 us to address the issues that Justice Alito or
13 others, including Justice Kavanaugh, have raised
14 on whether or not there should be any limits,
15 educational or noneducational? You're happy
16 with the injunction you got?
17 MR. KESSLER: We are not asking for
18 broader relief than affirming the rulings below.
19 JUSTICE SOTOMAYOR: All right. Number
20 two, generally speaking, antitrust courts do not
21 get into the business of price administration.
22 Why are the -- the limits of the injunction
23 below of academic achievement awards at a fixed
24 price of $5980 not a de facto price setting?
25 MR. KESSLER: So the entity who set

1 that price was the NCAA. What the court simply
2 said is that, whatever the NCAA rules allow to
3 give to athletes now in a pay for play, if you
4 win a ball game, if you're the MVP, if you have
5 some other achievement, they allow you to get
6 $5,980. The court said then you can't, NCAA,
7 use your monopsony power in a labor market to
8 prevent the schools and conferences from giving
9 as much, not more, as -- as much as they already
10 allow.
11 So this is not judicial price-fixing.
12 This is just taking the NCAA's determinations
13 and saying you can't justify a restraint on
14 education achievement. And I also would note
15 it's not just for being on a team. With all due
16 respect to -- to my colleague, it has to be for
17 academic achievement. And the conferences, for
18 example, could individually say, it has to be a
19 3.0 or you have to make progress to get your
20 degree or other things. It's not just for being
21 on a team.
22 CHIEF JUSTICE ROBERTS: Justice --
23 JUSTICE SOTOMAYOR: Does that
24 award make --
25 CHIEF JUSTICE ROBERTS: -- Justice

1 Kagan.
2 JUSTICE KAGAN: Mr. Kessler, I
3 recognize that you didn't cross-petition, but I
4 can't believe that you think that this $5980
5 award was the limit of where the district court
6 could have gone. So I just thought, you know,
7 on this record -- here's the question: On this
8 record, how high could the district court have
9 gone before compromising consumer demand for
10 college sports?
11 MR. KESSLER: So Your Honor is
12 correct, we advocated for broader relief below.
13 We advocated the NCAA should not impose the
14 restriction. It should be left to the
15 individual conferences who don't have market
16 power, they don't have monopsony, to decide if
17 any rules were needed.
18 But, secondarily, we put in consumer
19 survey evidence that, at a minimum, showed that
20 consumers said they were perfectly fine, they
21 would keep watching sports, if they got a
22 $10,000 award for academic achievement --
23 JUSTICE KAGAN: Do you think that the
24 evidence that you put in allowed a $10,000 award
25 -- award --

1 MR. KESSLER: Absolutely, Your Honor.
2 That was --
3 JUSTICE KAGAN: Did -- did it allow
4 more than that, or would you have -- would you
5 say that that was all the evidence indicated?
6 If I had said 15,000, does the evidence support
7 going up to 15,000?
8 MR. KESSLER: We did not put in survey
9 evidence for more than 10,000, but what we did
10 put in is that the schools already do, like,
11 $50,000 for protection against lost professional
12 earnings, and that's had no impact on consumer
13 demand. Their ex --
14 JUSTICE KAGAN: Well, that does raise
15 two --
16 MR. KESSLER: -- their corporate
17 witness --
18 JUSTICE KAGAN: I mean, your answers
19 here raise two questions, Mr. Kessler, and the
20 first is -- is what you've heard before from
21 some of my colleagues, a kind of floodgates
22 argument, like what's next? It's just going to
23 go up and up and up, and pretty soon it will
24 just be a regular labor market.
25 And the second is, isn't there some

1 kind -- some kind of arbitrariness about this
2 $5980 award that we should react badly to?
3 MR. KESSLER: I don't believe so, Your
4 Honor, because it is -- if you review it, the
5 award doesn't even mention the dollar number.
6 It simply says the NCAA cannot set a limit on
7 academic achievement awards that is lower than
8 what it allows for the greatest example of pay
9 for play --
10 JUSTICE KAGAN: Thank you,
11 Mr. Kessler.
12 MR. KESSLER: -- which is giving cash
13 awards.
14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch.
16 JUSTICE GORSUCH: Mr. Kessler, I'd
17 just like to talk about antitrust law generally
18 for a moment and pick up on where I left off
19 with your opponent.
20 Normally, in joint venture law, this
21 Court has come to recognize that we shouldn't be
22 flyspecking individual aspects of covenants not
23 to compete amongst joint venture participants
24 because they're creating a new product that
25 wouldn't otherwise be available in a market and

1 that the rule of reason should be pretty light
2 and that plaintiff bears a heavy burden to show
3 that a covenant not to compete violates the
4 Sherman Act. This case, the -- the Ninth
5 Circuit, the district court, applied a pretty
6 searching inquiry on covenants, each and
7 individual aspect of them.
8 What, in your view, as a matter of law
9 -- forget about the facts for a moment -- makes
10 that kind of searching inquiry appropriate?
11 MR. KESSLER: So I believe, Your
12 Honor, that the Court has been very consistent
13 in every joint venture case, whether it is
14 American Needle or whether it is Dagher or
15 whether it is Broadcast Music, that the remedy
16 for joint ventures is the traditional rule of
17 reason, even when they're doing things that
18 would otherwise be subject to per se rules or
19 quick look rules or something like that.
20 And the rule of reason, we have found,
21 can accommodate that. That's been a hundred
22 years of jurisprudence.
23 JUSTICE GORSUCH: Let me -- let me
24 just stop you there. Does it have something to
25 do with the fact that this product market,

1 there's only one and that the NCAA has monopoly
2 control over the labor market? We call it
3 monopsony control. You've referred to it a few
4 times. What -- what role does that play or
5 influence should it have in how we view the rule
6 of reason's application in this circumstance?
7 MR. KESSLER: I believe it has a great
8 deal to do with it, Your Honor, because what it
9 means is, unlike any other joint venture, okay,
10 we have a complete monopsony control over this
11 market, so there's no way for competition to
12 show if the NCAA's ever-shifting decisions, not
13 stable decisions, on what constitutes pay for
14 play is procompetitive or not procompetitive.
15 It just could impose its will.
16 And under rule of reason, we do
17 balance things together. Ultimately, it's a
18 balancing analysis, and the greater the market
19 power collectively, and this is not a single
20 firm case, the collective market power in this
21 labor market, I do believe that justifies at
22 least the application of the traditional rule of
23 reason, which is all that was applied here.
24 And in particular, Your Honor, I think
25 Footnote 6 of -- of American Needle direct --

1 directly -- 7, I'm sorry, Footnote 7, of
2 American Needle directly addresses this, where
3 the NFL said, well, we have to define our
4 product as NFL football, and the Court said, of
5 course, you have to define your product as NFL
6 football, but that doesn't entitle you not to be
7 subject to the normal rule of reason --
8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.
10 MR. KESSLER: -- which is that that --
11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh.
13 JUSTICE KAVANAUGH: Thank you, Chief
14 Justice.
15 Good morning, Mr. Kessler.
16 First, you agree that the NCAA can
17 require that the athletes be enrolled students
18 in good standing, correct?
19 MR. KESSLER: Yes, I do, Your Honor.
20 JUSTICE KAVANAUGH: Okay. As Justice
21 Sotomayor and Justice Kagan raised, I think we
22 need to think about what the next case would
23 look like if we rule in your favor in this case.
24 As Justice Sotomayor correctly pointed out,
25 you're asking for a narrow ruling here, but the

1 rationale behind that ruling could generate
2 follow-on litigation.
3 What in your view is the endgame of
4 this litigation if you -- not this particular
5 litigation but of future litigation. Is the
6 endgame collective bargaining? Is the endgame
7 legislation? I think this picks up on Justice
8 Breyer's questions as well.
9 MR. KESSLER: So, Your Honor, it's
10 difficult for me to predict legislation or
11 collective bargaining, but I would talk about
12 antitrust endgame. In the antitrust endgame,
13 it's simply to apply the rule of reason, which
14 the NCAA has been subject to for at least 37
15 years, which all the sports leagues are subject
16 to --
17 JUSTICE KAVANAUGH: But if the --
18 MR. KESSLER: -- and --
19 JUSTICE KAVANAUGH: -- sorry to
20 interrupt, but your position, I think, in the
21 district court was that all the compensation
22 limits are contrary to the rule of reason,
23 correct?
24 MR. KESSLER: Yes, and I lost that as
25 a matter of fact. And they've now won on that

1 issue twice as a matter of fact under the rule
2 of reason. And facts would probably have to
3 change further for a different result to happen.
4 If there are new material facts in the
5 future, then we know under antitrust law the
6 rule of reason could come out differently at a
7 future date. But I have no reason to think that
8 I would win today on facts that I just lost on
9 yesterday.
10 JUSTICE KAVANAUGH: Thank you.
11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett.
13 JUSTICE BARRETT: Mr. Kessler, the
14 tenor to me when I read it of both the district
15 court and Ninth Circuit opinions is that they
16 were trying not to do too much. And -- and
17 this, I think, goes back to Justice Breyer's
18 description of, you know, this is a delicate
19 area. On the one hand, there's concern about
20 blowing up the NCAA and something that people
21 have, as Justice Breyer -- Justice Breyer put
22 it, gotten so much joy out of but then, you
23 know, messing up general antitrust law.
24 So it seemed to me that the lower
25 court opinions were kind of saying, like, the

1 educational expenses weren't that big of a deal.
2 The cash, you know, it wasn't that high an
3 amount. You yourself described the injunction
4 as narrow and an effort by the court to give the
5 NCAA as much leeway as possible, is how you put
6 it in your brief.
7 So, given all of that, how are -- how
8 is the injunction a substantially less
9 restrictive alternative, or do you disagree that
10 it had to be substantially less restrictive and
11 just had to be less restrictive?
12 MR. KESSLER: Oh, I believe it was
13 substantially less restrictive, Your Honor,
14 because it allowed the NCAA to continue to
15 impose all of its restraints on compensation not
16 related to education, and it said that what it
17 can't justify, what it can't do, is just
18 education-related restraint, but the reason we
19 know it's substantially less restrictive is
20 because there are life-changing benefits for
21 these athletes that will be provided.
22 The vocational schools we're talking
23 about is, if you don't graduate, as many of
24 these athletes don't, then maybe they can go to
25 a blue-collar vocational school and at least

1 have a career after earning all of these
2 billions of dollars. The NCAA won't allow that.
3 It's life-changing if you can get a
4 local internship, which every other student can
5 get on campus, except for these athletes, who
6 work 50 hours a week before they attend a
7 certain class. So, Your Honor, I think it is
8 substantially less restrictive. It will be
9 life-changing for these athletes. And, most
10 importantly, it's what the facts led to under
11 normal traditional rule of reason analysis.
12 JUSTICE BARRETT: Thank you, Mr.
13 Kessler.
14 CHIEF JUSTICE ROBERTS: A minute to
15 wrap up, Mr. Kessler.
16 MR. KESSLER: Thank you.
17 The district court here found as a
18 matter of fact that the NCAA's restraints on
19 education-related benefits cannot be justified
20 as reasonable, necessary -- reasonably necessary
21 to maintain demand for college sports or define
22 the NCAA's product.
23 This Court should not create a special
24 judicial antitrust exemption based on any claims
25 that the NCAA is somehow special. That is for

1 Congress, not the courts. The rule of reason
2 already provides ample latitude to joint
3 ventures, to organizations like this, to sports
4 leagues, to assert what you need to assert to
5 justify the restraints you need.
6 And Twombly allows the dismissal of
7 claims at the outset so there'll be no parade of
8 horribles if someone were to challenge a rule
9 that clearly was procompetitive on its face and
10 did not cause anticompetitive effects.
11 Finally, Your Honor, as Footnote 15 of
12 Board of Regents says, when you have
13 fact-findings of a district court approved by a
14 court of appeals, this Court should not
15 second-guess those findings, and, here, this was
16 found to be an unreasonable restraint of trade.
17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.
19 MR. KESSLER: Thank you very much.
20 CHIEF JUSTICE ROBERTS: General
21 Prelogar.
22 ORAL ARGUMENT OF ELIZABETH B. PRELOGAR
23 FOR THE UNITED STATES, AS AMICUS CURIAE,
24 SUPPORTING THE RESPONDENTS
25 GENERAL PRELOGAR: Thank you,

1 Mr. Chief Justice, and may it please the Court:
2 The rule of reason is the traditional
3 standard for assessing antitrust liability, and
4 the lower courts properly applied that framework
5 to the facts found by the district court.
6 Usually a per se rule would prevent
7 competitors from arguing that their horizontal
8 agreements not to pay their workforce are
9 procompetitive. But the lower courts here,
10 following Board of Regents, correctly gave the
11 NCAA the opportunity to show that its
12 compensation rules fuel consumer interest in
13 college sports as a distinct product. And the
14 courts ultimately upheld most of the challenged
15 restrictions under the rule of reason.
16 Petitioners now seek to avoid that
17 analysis altogether. They ask this Court to
18 uphold the restraints on educational benefits
19 only under what they call a quick look or
20 deferential review.
21 But this Court has never upheld
22 restraints that have severe anticompetitive
23 effects without traditional rule of reason
24 analysis, and this case, involving horizontal
25 price-fixing in the market for student-athlete

1 labor, where the NCAA has monopsony power, would
2 not be the place to start.
3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel -- or thank you, General. The -- you
5 frequently emphasize that the restrictions
6 imposed by the court below were modest ones, but
7 I don't think the principle was. And when you
8 go through, as I was mentioning to your -- your
9 friend, there will be a wide number of rules
10 that are subject to challenge, if not in this
11 litigation, in subsequent cases.
12 And the effect it seems to me is to
13 substitute the Court's view for the business
14 judgment of the people responsible for a joint
15 venture that we have upheld as procompetitive.
16 And I just don't know if the judge is the best
17 person to assess the competitive effect of the
18 rules or the people managing the joint venture.
19 Do you have any thoughts about that?
20 GENERAL PRELOGAR: So I think,
21 Mr. Chief Justice, that the legal standards
22 themselves guard against having courts come in
23 and micromanage the rules of the NCAA, and --
24 and there are really two aspects to that.
25 The first is the fact that the rule of

1 reason applies in the first place. So
2 Plaintiffs here aren't going to be able to
3 benefit -- benefit from any kind of per se or
4 categorical rule. They'll have to meet their
5 step 1 burden to show a substantial
6 anticompetitive effect. And -- and that's an
7 important check, because Plaintiffs won't be
8 able to show that with respect to each and every
9 challenged rule.
10 And then the second part of the legal
11 analysis that I'd emphasize is the step 3
12 inquiry into a less restrictive alternative.
13 The lower courts here were very clear that they
14 were not seeking to impose marginal rule changes
15 on the NCAA. They said that this was a patently
16 and inexplicably more restrictive set of rules
17 than was necessary.
18 So I think applying those legal
19 standards is not going to lead the courts
20 rushing into trying to dismantle the NCAA's
21 framework rule by rule.
22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.
24 Justice Thomas.
25 JUSTICE THOMAS: Yes, thank you,

1 Mr. Chief Justice.
2 General, the -- I'm still a bit
3 perplexed as to how the NCAA would be able to
4 preserve what it thinks is an important
5 distinction between student-athletes and
6 professional athletes without constantly being
7 involved in litigation.
8 What's your reaction to that and
9 how -- I mean, how do we resolve that part of
10 the future problems that I see down the road?
11 GENERAL PRELOGAR: So I think that the
12 way that that's resolved is by giving credence
13 to the procompetitive justification that was
14 asserted here, the idea that these rules really
15 do help to differentiate the product in the eyes
16 of consumers.
17 And, ultimately, applying that
18 standard here, the district court upheld most of
19 the compensation rules. So it found that, in
20 fact, with respect to all of the limits on
21 compensation that are unrelated to education,
22 consumers actually pay attention to that in
23 thinking of college sports as something distinct
24 and different.
25 But I think where the NCAA goes wrong

1 is in suggesting that the analysis should be
2 based on its own perspective of what it thinks
3 supports amateurism, because amateurism is not
4 its own free-floating ideal under the antitrust
5 laws. It's not something that the competition
6 laws focus on to aspire to in and of its own
7 right. It's -- it's only relevant to the extent
8 that it actually connects up to that
9 procompetitive purpose of differentiating the
10 product for consumers themselves.
11 JUSTICE THOMAS: Well, you know,
12 that's -- as we've seen, the world has changed
13 in sports, and it could change dramatically
14 again, and the next survey or at least the
15 impression that the public has about amateur
16 athletics could suggest that, well, 10- or
17 20,000 dollars cash is fine, and still preserve
18 the amateur status.
19 So wouldn't that lead to future
20 litigation?
21 GENERAL PRELOGAR: Well, certainly, if
22 the -- if the facts change and if plaintiffs
23 could make that showing, which they weren't able
24 to make here -- ultimately, the district court
25 rejected that argument -- but, if they were able

1 to make that showing, then I think it's very
2 much properly assessed by an antitrust court to
3 see whether the significant anticompetitive
4 effects are justified. And, ultimately, if
5 they're not justified, and that means that there
6 has to be greater competition, there's nothing
7 inherently wrong with that. That's the
8 overriding purpose and aim of the Sherman Act.
9 JUSTICE THOMAS: Thank you.
10 CHIEF JUSTICE ROBERTS: Justice
11 Breyer.
12 JUSTICE BREYER: What's your instant
13 reaction, and I wonder what Mr. Waxman's is, to
14 the following? Which you will disagree with.
15 One, a joint venture sometimes can
16 have a noneconomic, sometimes, as well as an
17 economic objective.
18 Two, the word "reason" means reason.
19 And when you consider whether a rule
20 is unreasonable because there is a less
21 restrictive alternative, take into account that
22 noneconomic reason, the impossibility of
23 measuring everything against consumer demand or
24 the undesirability where there is that
25 noneconomic reason, the difficulty of measuring

1 each mini rule against something called consumer
2 demand.
3 And, four, the difficulty of
4 administering a system that has thousands of
5 members. Okay?
6 Now suppose I were to write that.
7 What would be your instant reaction of why
8 that's totally wrong?
9 GENERAL PRELOGAR: The reason I think
10 that would be wrong, Justice Breyer, is because
11 this Court has said over and over again that
12 those types of noneconomic interests are not
13 cognizable under the antitrust laws, that courts
14 shouldn't be in the business of trying to
15 evaluate whether there are other socially
16 important ideals to be promoted or -- or other
17 things to consider that don't go to effects on
18 competition.
19 That's obviously something Congress
20 could consider. If there are special rules that
21 are needed in this context to take account of
22 those kinds of noneconomic interests, then
23 Congress is well positioned to assess it and --
24 and draw the right line.
25 But to actually try to incorporate

1 that into Sherman Act analysis would be at odds
2 with precedent, and I think it would open up the
3 door to having to balance a -- a host of
4 considerations that aren't properly assessed
5 when you're looking at whether or not something
6 is, on balance, anticompetitive.
7 JUSTICE BREYER: Thank you.
8 CHIEF JUSTICE ROBERTS: Justice Alito.
9 JUSTICE ALITO: What do you think is
10 the distinctive characteristic of the NCA's --
11 the NCAA's product? Could you define it as
12 precisely as possible?
13 GENERAL PRELOGAR: So I think that,
14 based on the district court's factual findings
15 here, the things that the court said defined the
16 product were principally the fact that the
17 students are bona fide students at the school
18 and also that they're not paid to play in the
19 form of receiving compensation that's unrelated
20 to education.
21 I don't think it has a fixed
22 definition, Justice Alito. I think that it's
23 going to turn on this actual factual inquiry
24 into what consumers think about when they're
25 differentiating college sports from professional

1 sports. But at least based on the evidence that
2 the district court received, those were the
3 factual findings it reached.
4 JUSTICE ALITO: Does your analysis of
5 this case depend on the NCAA's having monopsony
6 power?
7 GENERAL PRELOGAR: I think it is a
8 critical fact here for a couple of different
9 reasons, and the principal one is that it shows
10 the severe anticompetitive effects that were
11 observed at step 1 of the rule of reason.
12 That is, ordinarily, in the typical
13 antitrust case, a -- a burden that plaintiffs
14 sometimes can't meet, but, here, it was
15 essentially undisputed. The district court
16 found at summary judgment that
17 Petitioners weren't meaningfully disputing that
18 these restrictions have enormous consequences in
19 the market for student-athlete labor.
20 And I think that actually shows why
21 the rule that Petitioners are asking for, this
22 idea of quick look review, would be so anomalous
23 given the nature of these restraints and the
24 severe anticompetitive effects that they --
25 JUSTICE ALITO: Let me give you this

1 example: There are a lot of old-time
2 sports fans who are turned off by the enormous
3 salaries that are earned by professional
4 athletes. So suppose a group said we want to
5 take advantage of this unmet demand. We're
6 going to organize a new professional league, but
7 we are going to cap the salaries of all of our
8 players at 1955 levels, corrected for inflation.
9 Would that get a quick look? Would it
10 be analyzed under the rule of reason? Would it
11 be per se a violation of the Sherman Act?
12 GENERAL PRELOGAR: So I think the rule
13 of reason would properly apply to that
14 hypothetical, but there would be a serious first
15 question about market power and whether that
16 kind of league that organizes to try to create a
17 -- a distinct product is actually exercising the
18 kind of power that can produce the substantial
19 anticompetitive effect that satisfies the burden
20 at step 1.
21 JUSTICE ALITO: Thank you.
22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor.
24 JUSTICE SOTOMAYOR: I'm not sure that
25 you have given me comfort on some of the

1 questions that my -- that the Chief Justice
2 asked, which is, how do we know that we're not
3 just destroying the game as it exists? Meaning
4 we're being told by Mr. Waxman that all of these
5 education-related payments can become
6 extravagant and, as a result, be viewed by the
7 public as pay for play.
8 Any fix would come after the fact,
9 after the game has been -- after amateurism has
10 been destroyed in college sports. How do we
11 ensure that doesn't happen?
12 GENERAL PRELOGAR: So I think that
13 this in -- interpretation of the injunction that
14 Mr. Waxman offered is overly broad and doesn't
15 accord with the district court's factual
16 findings or what it actually ordered in this
17 case. I recognize the concern about destroying
18 college sports, and it is at odds with the legal
19 standards the court applied and its ultimate
20 conclusions here. It upheld most of the
21 challenged restraints. It said that the NCAA
22 could continue to cap compensation that's
23 entirely unrelated to education.
24 And, with respect to the scope of the
25 injunction itself, the court was focused on

1 legitimate educational expenses. That is what
2 the Ninth Circuit said, and I think it accords
3 with the factual findings that from the
4 perspective of consumers, with respect to that
5 narrow category of benefits, it doesn't play any
6 role whosoever in defining the product of
7 college sports. So there's no reason to prevent
8 the students from obtaining those benefits.
9 JUSTICE SOTOMAYOR: What position do
10 you take with respect to that $5980 limitation
11 on educational expenses? Why should educational
12 expenses be limited in any way -- awards be
13 limited in any way?
14 GENERAL PRELOGAR: Well, the district
15 court made a factual finding, Justice Sotomayor,
16 that having unlimited cash payments for
17 education, even if they were in the form of
18 academic awards, could start to blur the
19 distinction between college and professional
20 sports. And -- and no one's seeking to
21 challenge that as clearly erroneous.
22 With respect to the actual amount,
23 it's, I think, critical to recognize that the
24 court was focused on the fact that the students
25 are already eligible for athletic awards in --

1 in that same amount. So the court, as Mr.
2 Kessler said, wasn't setting a specific price;
3 it was saying, hey, the students can already get
4 athletic awards, and it's not suppressing
5 demand, it's not suggesting that college sports
6 is losing its distinctive character. There's no
7 reason to prevent them from getting academic
8 awards that are of equal value.
9 JUSTICE SOTOMAYOR: Thank you,
10 counsel.
11 CHIEF JUSTICE ROBERTS: Justice Kagan.
12 JUSTICE KAGAN: General, would I be
13 wrong to think that this $5980 was essentially
14 taken out of thin air, that it's arbitrary? I
15 mean, you mentioned that it was designed to
16 match these athletic awards. But, as far as I
17 know, there's no evidence that any single player
18 has ever received that amount in athletic
19 awards. Wasn't the court just looking for any
20 old number to, you know, hang its hat on, but
21 the -- the one it came up with was essentially
22 arbitrary?
23 GENERAL PRELOGAR: I don't think it's
24 right to characterize it as arbitrary, and --
25 and I think the key here is to recognize that

1 this is just making the students eligible for
2 awards up to that amount, and -- and there's no
3 suggestion in the district court's injunction
4 that every student automatically can receive one
5 of these awards just for playing on a team.
6 That -- that's the gloss that Mr.
7 Waxman attempted to put on it, but there's
8 nothing in the injunction that prevents the NCAA
9 from enforcing criteria, for example, on whether
10 there should be actual benchmarks, certain GPAs,
11 to make sure that these awards actually reward
12 academic achievement and aren't used as
13 disguised pay-for-play payments.
14 So I think that it's well grounded in
15 the factual findings. And, importantly, no
16 one's seeking to challenge those here. It -- it
17 doesn't show that there's any problem with the
18 legal analysis that the court applied.
19 JUSTICE KAGAN: I -- I asked Mr.
20 Kessler this same question I'll ask you. Do you
21 think on this record the district court could
22 have gone further?
23 GENERAL PRELOGAR: I think
24 potentially, based on the evidence that came in,
25 the district court could have made a factual

1 finding that higher payments wouldn't blur the
2 distinction between professional and college
3 sports.
4 But -- but what seemed key to the
5 district court's conclusions here was the
6 difference between educational and
7 noneducational benefits, and I think that was a
8 principled line to draw based on the fact that
9 the district court found them.
10 JUSTICE KAGAN: Thank you, General.
11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch.
13 JUSTICE GORSUCH: General, see -- see
14 if you disagree with any of this and, if so,
15 please tell me why, that normally this Court has
16 come to recognize that ancillary restraints in
17 joint ventures, including price restraints,
18 territorial restraints, are procompetitive and
19 deserve a very light look from courts because a
20 joint venture creates a new product that
21 wouldn't otherwise exist and that is
22 procompetitive.
23 We recognize, though, that that's
24 assuming a competitive market. And what
25 differentiates this case is that the NCAA is the

1 market for student-athlete labor. It has
2 monopsony control. And so that -- that unique
3 feature is what justifies the more searching
4 inquiry that took place in this case and that it
5 might be a very different case if there were
6 multiple leagues or, here, conferences that had
7 restrictions on price that are paid to
8 student-athletes and that some -- some
9 conferences without market power, for example,
10 might be able to do that, fully compliant with
11 the antitrust laws. It's just that you can't
12 set one rule for the whole market.
13 GENERAL PRELOGAR: I think I agree
14 with -- with almost everything you said, Justice
15 Gorsuch, with one small modification, which is
16 that I don't think it's quite accurate to say
17 that joint ventures get a light look.
18 But I think what normally happens is
19 that a plaintiff seeking to challenge a joint
20 venture under the rule of reason might not be
21 able to show the kind of market power that --
22 that demonstrates that there is a substantial
23 anticompetitive effect.
24 So I think that keys in to exactly
25 what you identified, which is that the monopsony

1 power here that the NCAA exercises for the
2 entire market for student-athlete labor is part
3 of what triggers the significant anticompetitive
4 effects that were essentially undisputed below.
5 JUSTICE GORSUCH: And it would be very
6 different if there were a more competitive
7 market and that it would be a very different
8 case if, for example, one individual or a number
9 of individual conferences had restrictions like
10 this. It's just that it impacts the whole of
11 the market.
12 GENERAL PRELOGAR: That's exactly
13 right. And, in fact, the district court's
14 injunction permits the conferences to set their
15 own limits in recognition that the conferences
16 can tailor compensation limits or educational
17 benefits, and a student who's unhappy with what
18 he or she can get from one conference can go and
19 seek out competition from another conference.
20 So I do think that that would
21 dramatically change the nature of the case at
22 all steps of the rule of reason.
23 JUSTICE GORSUCH: And consumers could
24 also choose between which teams they -- they --
25 they choose to -- to follow as a result.

1 GENERAL PRELOGAR: That's right.
2 JUSTICE GORSUCH: Thank you.
3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh.
5 JUSTICE KAVANAUGH: Thank you, Chief
6 Justice.
7 And welcome, General Prelogar. The
8 label of education-related benefits I think Mr.
9 Waxman would say is being stretched here and
10 that this is really going to turn into very
11 quickly just an automatic payment to
12 student-athletes, and, thus, it's a mistake, I
13 think he would say, to call it
14 education-related.
15 What's your response to that?
16 GENERAL PRELOGAR: So the Ninth
17 Circuit considered this argument expressly and
18 said that interpreting the injunction to
19 authorize sham payments or illegitimate benefits
20 is -- is -- is not an accurate representation.
21 The district court here was clearly
22 focused on legitimate educational benefits. It
23 said these benefits are normally confined to
24 their actual value. They're usually provided in
25 kind. And so things like the $500,000 paid

1 internship to a sneaker internship wouldn't
2 qualify, wouldn't fall within the scope of the
3 injunction at the outset.
4 But, in any event, if there's any
5 confusion on this score, if there is ambiguity,
6 the district court specifically invited the NCAA
7 to define what benefits are reasonably related
8 to education. And there is no reason to think
9 that the district court would reject a
10 definition that -- that codifies this idea that
11 the benefits have to be legitimate.
12 JUSTICE KAVANAUGH: On this record, do
13 you think a district court could have set limits
14 that were significantly higher than the limits
15 that were set by the district court here?
16 GENERAL PRELOGAR: Well, it would have
17 been difficult to -- to set limits on some of
18 these educational benefits that aren't tied to
19 their actual value. So I -- I think that that's
20 kind of an inherent constraining feature of this
21 injunction.
22 It's certainly true that some of these
23 benefits, like graduate scholarships and so
24 forth, might be worth quite a lot to the
25 student, but they are inherently limited by

1 actual value, which is part of what the court
2 said fueled this acceptance that this wasn't
3 going to become a vehicle for pay for play.
4 JUSTICE KAVANAUGH: Thank you,
5 General.
6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett.
8 JUSTICE BARRETT: Good morning,
9 General Prelogar. I have a question about
10 the cross-market analysis that the court
11 performed at step 2. So it balanced the
12 competition in the labor market against the
13 market for college sports. And I understand
14 that that's the way the case came to us because
15 that's the framework the lower courts used and
16 the one on which the parties agreed.
17 But some of the amici have criticized
18 it. So I'm wondering if you think it is, you
19 know, performing any kind of distorting effect
20 that would influence the way we think about this
21 case in a bad way?
22 GENERAL PRELOGAR: So this issue of
23 cross-market balancing raises complex questions
24 under the antitrust laws. And, ultimately, as
25 you've identified, Justice Barrett, the -- the

1 parties haven't briefed it, the lower courts
2 didn't consider it, and we think that the Court
3 should take the market definitions as a given
4 here and not try to more broadly consider when
5 and under what circumstances cross-market
6 balancing can be considered.
7 I -- I'd note too that I think the
8 parties took their lead from Board of Regents
9 because, there, the Court did clearly
10 contemplate that a procompetitive justification
11 could be based on the idea of preserving college
12 sports as a distinct product and seemed to think
13 that that would justify restraints in this
14 market.
15 So, for that reason, I'd urge the
16 Court to -- to leave for another day any broader
17 questions about how cross-market balancing
18 should be conducted.
19 JUSTICE BARRETT: Thank you, General.
20 CHIEF JUSTICE ROBERTS: A minute to
21 wrap up, General.
22 GENERAL PRELOGAR: Thank you,
23 Mr. Chief Justice.
24 If I could just leave the Court with
25 one overarching thought, it's -- it's this:

1 Petitioners are wrong to argue that any
2 restrictions related to their conception of
3 amateurism, including their horizontal
4 price-fixing agreements, must be upheld without
5 analysis rather than applying the rule of
6 reason. That would be an extraordinary
7 departure from traditional antitrust principles.
8 Amateurism's relevant here only insofar as
9 Petitioners can actually show that it increases
10 consumer choice by distinguishing college sports
11 from professional sports.
12 And they made the showing with respect
13 to most of their compensation rules, but, as a
14 factual matter, they couldn't make the showing
15 with respect to educational benefits.
16 So there is no procompetitive
17 justification to deprive student-athletes of the
18 opportunity to obtain those educational benefits
19 through ordinary market competition. We,
20 therefore, urge the Court to affirm.
21 CHIEF JUSTICE ROBERTS: Thank you.
22 Rebuttal, Mr. Waxman.
23 REBUTTAL ARGUMENT OF SETH P. WAXMAN
24 IN SUPPORT OF PETITIONERS
25 MR. WAXMAN: Thank you, Mr. Chief

1 Justice.

2 Justice Gorsuch, monopsony power does
3 not take away the producer's right to define the
4 product any more for the NCAA than, for example,
5 for the Little League, which eight years ago got
6 $80 million for its television contract.

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

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

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

1 which the -- the challenged restraint is the
2 procompetitive differentiating feature of the
3 product.
4 Net consumer demand is not the test.
5 The -- even if the Court's less restrictive
6 alternative would preserve a distinction, it
7 clearly reduces the distinction, and, therefore,
8 it's not as effective in preserving the benefits
9 of our conception of amateurism. Otherwise,
10 courts can use less restrictive alternatives to
11 chip away at a joint venture's business
12 judgments until eventually the differentiation
13 is barely discernible.
14 At -- at step 3, the question has to
15 be whether there is a less restrictive
16 alternative that's as effective in preserving
17 the NCAA's conception, not one that's as
18 effective in preserving some kind of
19 differentiation between the NCAA and pro sports.
20 Just focusing on differentiation as an
21 abstract conception would allow courts to
22 completely replace a business's product with one
23 of the court's own making as long as it was
24 still differentiated.
25 At step 3, the less restrictive

1 alternative has to preserve the same type and
2 degree of benefit shown at step 3. And so, once
3 it's determined that no-pay amateurism
4 differentiates and is, therefore,
5 procompetitive, antitrust law doesn't require a
6 producer to adopt an alternative that reduces
7 the differentiation or replaces it with a
8 different differentiation altogether.
9 Once carts -- courts start drawing
10 their own lines -- and according to the
11 government here, everything is factual and
12 depends on the record -- perpetual litigation
13 and judicial superintendence are inevitable.
14 Just the $5980 that has so captured the Court's
15 imagination this morning required months of
16 posttrial litigation in front of this judicial
17 superintendent just to figure out what that
18 number is for the time being.
19 Thank you.
20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. The case is submitted.
22 (Whereupon, at 11:34 a.m., the case
23 was submitted.)
24
25

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