

Nos. 20-512, 20-520

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IN THE  
**Supreme Court of the United States**

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NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,  
*Petitioner,*

v.

SHAWNE ALSTON, ET AL.,  
*Respondents.*

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AMERICAN ATHLETIC CONFERENCE, ET AL.,  
*Petitioners,*

v.

SHAWNE ALSTON, ET AL.,  
*Respondents.*

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**On Writs of Certiorari to the United States  
Court of Appeals for the Ninth Circuit**

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**BRIEF FOR THE PLAYERS ASSOCIATIONS OF  
THE NATIONAL FOOTBALL LEAGUE,  
THE NATIONAL BASKETBALL ASSOCIATION,  
THE WOMEN'S NATIONAL BASKETBALL  
ASSOCIATION, THE NATIONAL WOMEN'S  
SOCCER LEAGUE, AND NATIONAL COLLEGIATE  
PLAYERS AS *AMICI CURIAE*  
IN SUPPORT OF RESPONDENTS**

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### Cases

<i>Broad. Music, Inc. v. Columbia Broad. Sys., Inc.</i> , 441 U.S. 1 (1979).....	22
<i>FTC v. Ind. Fed'n of Dentists</i> , 476 U.S. 447 (1986).....	25
<i>FTC v. Super. Ct. Trial Lawyers Ass'n</i> , 493 U.S. 411 (1990).....	25
<i>Law v. NCAA</i> , 134 F.3d 1010 (10th Cir. 1998).....	25
<i>Nat'l Soc'y of Profl Eng'rs v. United States</i> , 435 U.S. 679 (1978).....	21, 31
<i>NCAA v. Bd. of Regents of Univ. of Okla.</i> , 468 U.S. 85 (1984).....	3, 15, 16, 22, 24, 25
<i>Standard Oil Co. v. FTC</i> , 340 U.S. 231 (1951).....	2, 31
<i>United States v. Socony-Vacuum Oil Co.</i> , 310 U.S. 150 (1940).....	3
<i>United States v. Virginia</i> , 518 U.S. 515 (1996).....	27
<b>Constitutional Provisions</b>	
U.S. Const. pmb1.....	30

### Other Authorities

- 2020-21 NCAA Division I Manual,  
<https://bit.ly/3vcl0Hy>..... 10, 18, 19
- Alex Scarborough, *Bama Boosters Pay Off Saban’s Home* (Oct. 27, 2014),  
<https://es.pn/2BSG5MJ> ..... 18
- Andy Staples, *What Has the NCAA—or Anyone—Learned from the College Basketball Black Market’s Time on Trial?*, *Sports Illustrated* (May 9, 2019), <https://bit.ly/32yR3CJ> ..... 30
- Anthony P. Carnevale et al., *Learning While Earning: The New Normal*, Georgetown Univ. Ctr. for Educ. & the Workforce (2015),  
<https://bit.ly/3szv4sc>..... 12
- Brent Schrotenboer, *Colleges Still Have Millions to Fire Football Coaches Despite Claiming Financial Trouble from Coronavirus*, *USA Today* (Dec. 17, 2020), <https://bit.ly/3uFWcrp>..... 26
- Brian Rosenberg, *How the N.C.A.A. Cheats Student Athletes*, *N.Y. Times* (Oct. 3, 2017),  
<https://nyti.ms/2xR9VhV> ..... 10
- Bureau of Labor Statistics, Table B-2 *Average Weekly Hours and Overtime of All Employees on Private Nonfarm Payrolls by Industry Sector, Seasonally Adjusted* (Mar. 5, 2021),  
<https://bit.ly/2ZMeJDS>..... 5

Chad W. Pekron, <i>The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges</i> , 24 Hamline L. Rev. 24 (2000) .....	21
Charles Robinson, <i>Renegade Miami Football Booster Spells Out Illicit Benefits to Players</i> , Yahoo! Sports (Aug. 16, 2011), <a href="https://yhoo.it/2BC1D0V">https://yhoo.it/2BC1D0V</a> .....	30
Cheri D. Mah et al., <i>Poor Sleep Quality and Insufficient Sleep of a Collegiate Student-Athlete Population</i> , 4 Sleep Health 251 (2018), <a href="https://bit.ly/2B2xHtR">https://bit.ly/2B2xHtR</a> .....	8
Chris Knoester & B. David Ridpath, <i>Should College Athletes Be Allowed to Be Paid? A Public Opinion Analysis</i> , Soc. of Sport J. 8 (2020) .....	23
Christian Dennie, <i>Amateurism Stifles a Student-Athlete's Dream</i> , 12 Sports Law J. 221 (2005).....	9
Christopher A. Callanan, <i>Advice for the Next Jeremy Bloom: An Elite Athlete's Guide to NCAA Amateurism Regulations</i> , 56 Case Western Reserve L. Rev. 687 (2006) .....	10
Daniel E. Lazaroff, <i>The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?</i> , 86 Or. L. Rev. 329 (2007).....	16

- Daniel Libit & Michael McCann, *Pro-NCAA Athletes Petitioning SCOTUS Struggle to Stay on Message*, Sportico (Mar. 2, 2021), <https://bit.ly/2NPbhX4> ..... 13
- David A. Grenardo, *The Continued Exploitation of the College Athlete: Confessions of a Former College Athlete Turned Law Professor*, 95 Or. L. Rev. 101 (2017) ..... 13
- Derek Volner, *More than 3.8 Million Viewers for the NCAA Women's Basketball National Championship*, ESPN Press Room (Apr. 4, 2017), <https://bit.ly/3qqofaW> ..... 28
- Duke University, *Finding On-Campus Employment*, <https://bit.ly/3r2UCgN> ..... 12
- Elisia J.P. Gatmen, *Academic Exploitation: The Adverse Impact of College Athletics on the Educational Success of Minority Student-Athletes*, 10 Seattle J. for Social Justice 509 (2011), <https://bit.ly/3riQ46g> ..... 7
- Gabe Feldman, *A Modest Proposal for Taming the Antitrust Beast*, 41 Pepp. L. Rev. 249 (2014) ..... 16
- Gregory Wilson & Mary Pritchard, *Comparing Sources of Stress in College Student Athletes and Non-Athletes*, 7 Athletic Insight 1 (2005), <https://bit.ly/2Mcp9XD> ..... 8

Howard J. Savage et al., <i>American College Athletics</i> , Carnegie Found. for the Advancement of Teaching (1929) .....	18, 23
Jake New, <i>NCAA Confirms Escort Allegations at Louisville</i> , Inside Higher Ed (Oct. 21, 2016), <a href="https://bit.ly/3kNmGCH">https://bit.ly/3kNmGCH</a> .....	30
James Madison, <i>Speech in Virginia Convention</i> (Dec. 2, 1829) .....	30
Janet E. Simon & Carrie L. Docherty, <i>Current Health-Related Quality of Life Is Lower in Former Division I Collegiate Athletes than in Non-Collegiate Athletes</i> , Am. J. Sports Medicine (2013), <a href="https://bit.ly/335vpWU">https://bit.ly/335vpWU</a> .....	9
Jasmine Harris, <i>It's Naive to Think College Athletes Have Time for School</i> , The Conversation (Oct. 9, 2018), <a href="https://bit.ly/3qrO4Hu">https://bit.ly/3qrO4Hu</a> .....	6
John Locke, <i>Second Treatise of Government</i> (T. Peardon ed., 1952) .....	30
Julia Mullaney, <i>These Are the Highest Paid NFL Coaches in 2018 (Plus, How They Compare to College Football Coaches' Salaries)</i> , Sports casting (Nov. 9, 2018), <a href="https://bit.ly/2W9rS7w">https://bit.ly/2W9rS7w</a> .....	17

- Katelyn Ohashi, *Opinion: Everyone Made Money Off My N.C.A.A. Career, Except Me*, N.Y. Times (Oct. 9, 2019), <https://nyti.ms/2NYcyug> ..... 14
- Kimberly Elchlepp, *ESPN's Women's College World Series, Super Regional, Regular Season Softball Viewership Surges*, ESPN Press Room (June 6, 2019), <https://bit.ly/2MTKvMv> ..... 28
- Laine Higgins, *Attendance at Women's College Basketball Games Is Surging*, Wall St. J. (Mar. 5, 2020), <https://on.wsj.com/38izagA> ..... 27
- Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play*, 65 Notre Dame L. Rev. 206 (1990) ..... 21
- Lev Akabas & Daniel Libit, *Saban and Day Contracts Reveal Money on the Line in Championship Game: Data Viz*, Sportico (Jan. 11, 2021), <https://bit.ly/3b2EIh6> ..... 22
- Lindsay Gibbs, *Ending the Sham of NCAA Amateurism Will Not End Title IX*, ThinkProgress (Mar. 30, 2018), <https://bit.ly/37Sxv13> ..... 29
- Lindsay Gibbs, *It's Time to View Ending NCAA Amateurism as a Women's Rights Issue, Too*, Power Plays (Nov. 1, 2019), <https://bit.ly/2O2vVCG> ..... 28

Marc Edelman, <i>Don't Feed (or Shelter) the Athletes: The Absurdity of NCAA Amateurism in 2015</i> , Forbes SportsMoney (Feb. 28, 2015), <a href="https://bit.ly/3dGGYvZ">https://bit.ly/3dGGYvZ</a> .....	13
Michael T. Maloney & Robert E. McCormick, <i>An Examination of the Role that Intercollegiate Athletic Participation Plays in Academic Achievement</i> , 28 J. Hum. Resources 555 (1993), <a href="https://bit.ly/2MMmdkJ">https://bit.ly/2MMmdkJ</a> .....	6
Milton Friedman, <i>Capitalism and Freedom</i> (1962).....	29
NCAA, <i>Estimated Probability of Competing in Professional Athletics</i> (Apr. 8, 2020), <a href="https://bit.ly/3qQVdSJ">https://bit.ly/3qQVdSJ</a> .....	14
NCAA, <i>Questions and Answers on Name, Image and Likeness</i> (Jan. 2021), <a href="https://bit.ly/2PoyIXH">https://bit.ly/2PoyIXH</a> .....	14
Nick Martin, <i>College Football Coaches Are Making Millions Off A Useless Metric</i> , Deadspin (Dec. 10, 2015), <a href="https://bit.ly/3uB9OUB">https://bit.ly/3uB9OUB</a> .....	20
Non Profit Light, <i>American Athletic Conference</i> (June 3, 2020), <a href="https://bit.ly/3b2gzXR">https://bit.ly/3b2gzXR</a> .....	22
Patrick Hruby, <i>Amateurism Isn't Educational: Debunking the NCAA's Dumbest Lie</i> , Vice (June 14, 2017), <a href="https://bit.ly/3uxrpgq">https://bit.ly/3uxrpgq</a> .....	11, 13

- Patrick Hruby, *The NCAA Says Paying Athletes Hurts Their Education. That's Laughable.*, Wash. Post (Sept. 20, 2018), <https://wapo.st/3aXOoZZ> ..... 12
- Paul Kennedy, *Crowd Count: UCLA-USC Breaks Women's College Attendance Record*, SoccerAmerica (Nov. 4, 2017), <https://bit.ly/2Orr2TU> ..... 27
- Phillip E. Areeda, *Antitrust Law* (1986)..... 3, 25
- Ramogi Huma et al., *How the NCAA's Empire Robs Predominantly Black Athletes of Billions in Generational Wealth* (July 31, 2020), <https://bit.ly/3qP2nXI>..... 17, 22
- Sally Jenkins, *The College Football Playoff Won't Pay Athletes, While Its Selection Committee Stays at the Ritz*, Wash. Post (Aug. 22, 2019), <https://wapo.st/2NzDgr3> ..... 17
- Sen. Chris Murphy, *Madness, Inc.: How Everyone Is Getting Rich Off College Sports – Except the Players* (Mar. 28, 2019), <https://bit.ly/3qhK648> ..... 26
- Shaun R. Harper, *Black Male Student-Athletes and Racial Inequities in NCAA Division I College Sports: 2018 edition*, Univ. of S. Calif., Race & Equity Ctr. (2018), <https://bit.ly/3c1hW8D> ..... 7

- Steve Berkovitz et al., *Top NCAAF Assistant Coach Pay*, USA Today (Dec. 16, 2020), <https://bit.ly/2PmGrDy> ..... 18
- Steve Berkovitz et al., *Top NCAAF Coach Pay*, USA Today (Nov. 17, 2020), <https://bit.ly/2pPIHs5> ..... 17
- Steve Berkovitz et al., *Top NCAAF Strength Coach Pay*, USA Today (Dec. 16, 2020), <https://bit.ly/33JLD8g> ..... 18
- Tara Sullivan, *In Punishing UMass for a \$252 Violation, the NCAA's Hypocrisy Is on Full Display*, Boston Globe (Oct. 24, 2020), <https://bit.ly/3kmGvk2> ..... 20
- Theo Francis, *Many S&P 500 CEOs Got a Raise in 2018 That Lifted Their Pay to \$1 Million a Month*, Wall St. J. (Mar. 17, 2019), <https://on.wsj.com/2WfhBGT> ..... 17
- Tom Green, *Auburn's New Football Facility Estimated to Cost \$91.9 Million*, Ala. Media Grp. (Jan. 27, 2021), <https://bit.ly/3qR5Xk0> ..... 19
- University of Notre Dame, *Student Jobs*, <https://bit.ly/3bL5d9O> ..... 11
- Walter Byers & Charles H. Hammer, *Unsportsmanlike Conduct* (1995) ..... 18

Whitney Medworth, *Nike Finally Made Sabrina Ionescu Jerseys, and They Sold Out in Hours*, SB Nation (Nov. 13, 2019), <https://bit.ly/2MTJXpV> ..... 28

Will Hobson & Steven Rich, *Colleges Spend Fortunes on Lavish Athletic Facilities*, Chi. Tribune (Dec. 23, 2015), <https://bit.ly/2otXwQS> ..... 19

## INTEREST OF AMICI CURIAE<sup>1</sup>

The National Football League Players Association, the National Basketball Players Association, the Women’s National Basketball Players Association, and the National Women’s Soccer League Players Association (collectively, the “Professional Associations”) are the exclusive collective bargaining representatives of players in the National Football League, the National Basketball Association, the Women’s National Basketball Association, and the National Women’s Soccer League. Most of the Professional Associations’ members are (like the class members in this case) former Division I athletes. The National Collegiate Players Association is a 501(c)(3) nonprofit advocacy group that serves as the only independent voice for college athletes across the nation. The Associations share a strong interest in ensuring that members receive enriching educational and athletic experiences during college. The Associations also have unique insights into the impact of the NCAA’s amateurism rules on the lives of college athletes, and, in particular, into the economic, social, and professional harms the NCAA’s rules exact.

### INTRODUCTION AND SUMMARY OF ARGUMENT

**A.** College sports are a multi-billion dollar business. The NCAA’s amateurism rules ensure that *everyone* can benefit financially *except* the “student athletes” who produce the product in the first place. For

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief’s preparation. The parties have consented to the filing of this brief.

college athletes who will never play professional sports—which is all but a handful of them—the NCAA’s amateurism rules deprive them of their only opportunity *in life* to receive any economic benefits or enhanced education-related opportunities for their athletic talent and hard work. It makes college sports one of the very few sectors of American society where adults are unable to monetize their labor and talents *at all*.

The sins of amateurism also run much deeper. The NCAA’s amateurism rules restrict athletes’ opportunities for *intellectual, social, and personal* growth—in ways both big and small. As the NCAA has acknowledged, its amateurism rules discourage athletes from graduating. They isolate athletes on campus and away from friends and family. They deter any athlete from starting a business or writing a book. In short, the NCAA’s amateurism rules impede the *human flourishing* of the men and women they ostensibly protect.

**B.** While the antitrust laws embody “faith in the value of competition,” *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951), the NCAA’s amateurism rules abhor it. The NCAA admits that its Division I Manual prescribes horizontal agreements to eliminate competition. These rules fix the benefits any school may offer to a college athlete at NCAA-defined “legitimate educational expenses and modest achievement awards.” NCAA Br. 37; *see also id.* at 7, 27, 29, 46 n.4.

Amateurism is not a sufficiently concrete or intelligible justification for this horizontal price fixing. To the extent it has any practical meaning, amateurism defines “college sports” as “sports subject to price fixing.” As the NCAA says repeatedly, for college sports

to be different than professional sports “athletes must not be paid.” NCAA Br. 3, 6, 27, 34, 38, 45–46, 49. But as a matter of basic antitrust doctrine, a product cannot be defined to include “price fixing” as an essential element. Moreover, as the district court found, college sports are differentiated from professional sports because the athletes are *students*—not because they are uncompensated.

This Court’s decision in *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), does not save the NCAA. *Board of Regents* invalidated rules restricting competition for television rights to NCAA games as unreasonable restraints of trade. The Court’s dicta describing student-athletes as unpaid does not immunize all limitations on education-related compensation from antitrust scrutiny.

The NCAA’s plea for “latitude” in light of its “educational mission” is equally unavailing. Even if amateurism rules *did* foster educational enrichment (they do the exact opposite), courts should “not inquire whether the restraint promotes the ‘public interest’ but only whether it increases competition.” Phillip E. Areeda, *Antitrust Law*, ¶ 1504, at 381 (1986). Finally, the NCAA’s speculative arguments about the harms that might arise from market forces in college athletics are nothing more than “the age-old cry of ruinous competition,” which this Court has consistently held is *never* a defense to price-fixing conspiracies. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221–22 (1940).

\* \* \*

While the NCAA relies on deference and dicta, the players rely on well-supported factual findings on a

full-blown trial record. That record demonstrates that that “amateurism” is not a valid justification for denying college athletes the same right to earn as every other American. The judgment of the court of appeals should be affirmed.

## ARGUMENT

### **I. College Athletes Work Extraordinarily Hard At Their Sports At Deep Personal Sacrifice**

Division I college athletics are intense and demanding. The day begins at dawn with early morning film sessions, followed by five hours of class, nearly five hours of team meetings and practice, and another hour or two of tutoring or study sessions before the day ends. Alec James Depo., ECF No. 1116-13 at 245 (describing daily routine for University of Wisconsin football player); Trial Tr. (Jenkins), ECF No. 1041 at 747–51 (describing daily routine for Clemson football player).<sup>2</sup> Division I football players spend *on average* over 40 hours per week on athletic activities during the football season, while Division I men’s and women’s basketball players average nearly 35 hours per week. ER674.<sup>3</sup> At many schools and for many athletes, the demands can be even more onerous. Jt. Trial Ex. 0014-0006 (Pac-12 report finding that athletes averaged 50 hours a week on athletics during seasons).

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<sup>2</sup> “ECF No.” cites refer to the electronic docket in *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 4:14-md-2541 (N.D. Cal.) (Wilken, J.).

<sup>3</sup> “ER” citations are to the excerpts of the record filed with the Ninth Circuit.

When combined with academic duties, college athletes end up working 75-to-80 hour weeks, on average, *every week* during their months-long seasons. ER677. That is more than double the average workweek for the typical American worker (35 hours). *See* Bureau of Labor Statistics, Table B-2 *Average Weekly Hours and Overtime of All Employees on Private Nonfarm Payrolls by Industry Sector, Seasonally Adjusted* (Mar. 5, 2021), <https://bit.ly/2ZMeJDS>.

The offseason is no better for most athletes. NCAA data show that more than two-thirds of Division I football players and Division I men's basketball players report spending as much or more time on athletic activities in the offseason. ER678. Almost 60% of Division I women's basketball players report the same. *Id.*

The consequences of repeatedly spending upwards of 40 hours per week on athletics, including many hours of intense physical exertion, are unsurprising. In pursuit of their sport, college athletes frequently sacrifice (1) their academic goals, (2) their extracurricular pursuits, and (3) their own mental and physical health.

*First*, for many college athletes, academics necessarily takes a backseat to athletics. The demands of Division I athletics all but guarantee that outcome. Whereas attending practice, games, and meetings is almost always either officially or practically mandatory, athletes have more flexibility in choosing, attending, and studying for classes. It is only natural for the discretionary to give way to the obligatory, particularly when athletes are told by their coaches and others that their "primary focus" should be athletics. Trial Tr. (Shawne Alston) 670:12–21. The primacy of

athletics inevitably leads to “academic sacrifices.” Jt. Trial Ex. 0014-0016 (Pac-12 report); Jasmine Harris, *It’s Naïve to Think College Athletes Have Time for School*, *The Conversation* (Oct. 9, 2018), <https://bit.ly/3qrO4Hu> (Division I football and men’s basketball players spend three times as many hours per week on athletics as on academics). For example, plaintiff Justine Hartman, a former basketball player at U.C. Berkeley, testified at trial that because of her six-hours-per-day practice routine, she would often “literally have to run to make it to class,” and that “sometimes it would be pointless” because class would have “another 20 minutes left, and I hadn’t showered or eaten.” Trial Tr. 797:20–23.

More poignantly, college athletes are often forced to sacrifice their preferred majors and classes based on their athletic obligations. NCAA data reveal that athletic commitments prevented 51% of Division I women’s basketball players, 50% of Division I Football Bowl Subdivision (“FBS”) football players, and 34% of Division I men’s basketball players from enrolling in the classes they wanted. Pls.’ Trial Ex. 0059-0006 (NCAA GOALS study). A Pac-12 report found that athletes are “discouraged from taking certain majors from the outset [of college] due to their athletic demands” and often “change their majors ... either because they cannot schedule the classes and other requirements they need, or they cannot keep up with their academic demands due to their sport’s time demands.” Jt. Trial Ex. 0014-0016.

It is no surprise, then, that studies consistently have found a negative relationship between athletic participation and academic performance, particularly in revenue-producing college sports. *See, e.g.*, Michael

T. Maloney & Robert E. McCormick, *An Examination of the Role that Intercollegiate Athletic Participation Plays in Academic Achievement*, 28 J. Hum. Resources 555 (1993), <https://bit.ly/2MMmdkJ>; Elisia J.P. Gatmen, *Academic Exploitation: The Adverse Impact of College Athletics on the Educational Success of Minority Student-Athletes*, 10 Seattle J. for Social Justice 509 (2011), <https://bit.ly/3riQ46g>; Shaun R. Harper, *Black Male Student-Athletes and Racial Inequities in NCAA Division I College Sports: 2018 edition*, Univ. of S. Calif., Race & Equity Ctr. (2018), <https://bit.ly/3c1hW8D>.

*Second*, the athletic demands placed upon college athletes significantly limit their opportunities outside the classroom. Most athletes, for example, “don’t have the time” to get part-time jobs. Trial Tr. (Hartman) 810:15. Studies show that part-time employment is something many athletes want. Jt. Trial Ex. 0014-0006 (Pac-12 report). The Pac-12 found that time commitments make it “very difficult” for athletes to participate in internships. Jt. Trial Ex. 0014-0016. The story is the same for student clubs and organizations. Plaintiff Martin Jenkins testified that “football time requirements” prevented him from remaining a part of Clemson’s entrepreneurship club. *See* Trial Tr. 791:3–20; *see also* Trial Tr. (Hartman) 810:12–13.

*Third*, the rigors of college athletics can cause athletes’ health to suffer, both during and after college. Division I football and basketball players average less than 6.2 hours of sleep per night, with Division I football players getting *less than 5.7 hours a night*. Pls.’ Trial Ex. 0059-0025 (NCAA GOALS study). As a result, almost half of Division I football and basketball players are so tired from the physical demands of their

sports that they “struggle to find energy to do other things.” *Id.* at 0044; *see also* Cheri D. Mah et al., *Poor Sleep Quality and Insufficient Sleep of a Collegiate Student-Athlete Population*, 4 *Sleep Health* 251 (2018), <https://bit.ly/2B2xHtR> (“Collegiate athletes frequently experience poor sleep quality, regularly obtain insufficient sleep, and commonly exhibit daytime sleepiness.”).

Sleep deprivation, combined with extreme time pressure, can adversely affect athletes’ mental health. According to NCAA data, more than a third of Division I men’s basketball and football players experience intense stress, feeling that “difficulties were piling up so high that [they] could not overcome them.” Pls.’ Trial Ex. 0059-0043 (NCAA GOALS study). Other studies have found that college athletes report more stress than non-athletes across a “wide variety of variables,” including “having a lot of responsibilities,” “not getting enough time for sleep,” and “having heavy demands from extracurricular activities.” Gregory Wilson & Mary Pritchard, *Comparing Sources of Stress in College Student Athletes and Non-Athletes*, 7 *Athletic Insight* 1, 4 (2005), <https://bit.ly/2Mcp9XD>.

Athletes’ physical health is also consistently, and unavoidably, at risk. The grueling physical activity required to be a Division I athlete leads to high rates of injuries—some of which can be career ending and permanently life altering. According to one study of hundreds of former Division I athletes between ages 40 and 65, more than twice as many athletes reported sustaining major injuries and experiencing chronic injuries compared to non-athletes. *See* Janet E. Simon & Carrie L. Docherty, *Current Health-Related Quality*

*of Life Is Lower in Former Division I Collegiate Athletes than in Non-Collegiate Athletes*, Am. J. Sports Medicine (2013), <https://bit.ly/335vpWU>.

College athletes unavoidably carry the heavy consequences of their labor in their bodies and minds—and will do so for the rest of their lives. And due to the NCAA’s amateurism rules, notwithstanding these sacrifices, they are precluded from receiving *any* enhanced educational opportunities or economic benefits during their college years, unlike all other students (and nearly all other American adults).

## **II. The NCAA’s Amateurism Rules Harm the Lives of College Athletes**

### **A. The NCAA’s Amateurism Rules Deprive College Athletes of Educational Opportunities**

The NCAA claims that its “core mission” is “to facilitate intercollegiate sports as an important component of the educational opportunities offered by its members schools.” NCAA Br. 15. But the NCAA’s amateurism rules *impair* these opportunities—to a nearly farcical degree.

Take Division I bylaw 12.5.2.1, which prohibits athletes from receiving money for promoting any “commercial product.” The NCAA has interpreted that bylaw to prohibit a University of Oklahoma baseball player from promoting his own book about overcoming brain cancer and losing his father to leukemia. *See* Christian Dennie, *Amateurism Stifles a Student-Athlete’s Dream*, 12 Sports Law J. 221, 235–37 (2005). The NCAA has also tried to use the bylaw to bar a Northwestern University football player—and theater major—from appearing in a feature film. *See*

Christopher A. Callanan, *Advice for the Next Jeremy Bloom: An Elite Athlete's Guide to NCAA Amateurism Regulations*, 56 Case Western Reserve L. Rev. 687, 691–92 (2006). Or consider Division I bylaw 12.4.4, which prohibits college athletes who start a business from using their “name, photograph, appearance or athletics reputation” to promote the business. Athletes who have been caught in the crosshairs of this rule include two swimmers from the University of Iowa who started a T-shirt screening business, and a cross-country runner at Texas A&M who started a water bottle company. See Brian Rosenberg, *How the N.C.A.A. Cheats Student Athletes*, N.Y. Times (Oct. 3, 2017), <https://nyti.ms/2xR9VhV>.

Normally, colleges and universities would laud and *encourage* exceptional extracurricular accomplishments such as these; the NCAA responds instead with threats of athletic ineligibility. None of this is lost on college athletes, who, stripped completely of economic opportunities by the NCAA, can only marvel as they pass by the school bookstore with their jersey number hanging for sale in the window. Meanwhile, multiple NCAA bylaws authorize the NCAA and its member institutions to use athletes to endorse school-owned products and activities in a wide variety of circumstances. See NCAA Division I Manual § 12.5.1. “Amateurism” can have no integrity in the eyes of athletes whose earning potential has been taken from them in a context so laden with contradictions.

Most disturbingly, the NCAA’s amateurism rules also hamper academic achievement. The graduation rate of football players in top conferences is 20% lower than that of non-athletes; for men’s basketball play-

ers, the graduation rate is more than 30% lower. Patrick Hruby, *Amateurism Isn't Educational: Debunking the NCAA's Dumbest Lie*, Vice (June 14, 2017), <https://bit.ly/3uxrpgq>. The NCAA admitted *in this case* that voiding its amateurism rules and increasing athlete compensation would *increase* graduation rates. See Defs.' Opp'n to Pls.' Am. Joint Mot. for Class Cert. at 11, ECF No. 216. The NCAA conceded that "many of those student-athletes who now leave college to play professional football or basketball would, if they were paid to play college sports, *stay in school longer*." *Id.* (emphasis added). Antitrust doctrine has gone topsy-turvy when the amateurism rationale for price-fixing *also* works to the detriment of students' *academic* lives.

The NCAA suggests that permitting colleges to offer certain education-related benefits to athletes would have "serious negative effects on the educational experience of many student-athletes." NCAA Br. 49; *see also* Br. of Former Student-Athletes as Amici Curiae in Support of Pet'rs ("Former Athletes Br.") 31–35. But there is no record evidence—let alone a reason—to believe that compensating athletes (or providing them enhanced educational benefits) would have any adverse effect on their studies.

Neither the NCAA nor any of its member schools prohibits *non-athletes* from earning money while pursuing their academic studies out of concern for their educational well-being. Most colleges offer students on-campus job opportunities, as lab assistants, teaching assistants, campus tour guides, and so on. *See, e.g.,* University of Notre Dame, *Student Jobs*, <https://bit.ly/3bL5d90> ("In addition to earning money, student employees may develop professional skills,

experience, and networks that lead to success in work and life after graduation.”); Duke University, *Finding On-Campus Employment*, <https://bit.ly/3r2UCgN> (“Many students work during their time at Duke, holding jobs in a wide range of locations and environments. Finding campus employment is an important part of your professional development as you prepare to launch your career[.]”).

College students balance paid labor and academic studies *all the time*. Between 70 and 80 percent of undergraduate students are employed, and about 40 percent of undergraduates work at least 30 hours per week. Anthony P. Carnevale et al., *Learning While Earning: The New Normal*, Georgetown Univ. Ctr. for Educ. & the Workforce 21 (2015), <https://bit.ly/3szv4sc>. It insults college athletes to suggest that they alone, unlike the rest of their peers, could not achieve this balance. If a budding Hollywood movie star can work on a Star Wars film while enrolled at Harvard without jeopardizing her education, the dedicated men and women who play college sports can do the same. Patrick Hruby, *The NCAA Says Paying Athletes Hurts Their Education. That’s Laughable.*, Wash. Post (Sept. 20, 2018), <https://wapo.st/3aXOoZZ> (referring to Natalie Portman’s movie work).

### **B. The NCAA’s Amateurism Rules Deprive College Athletes of Financial Security**

The NCAA’s amateurism rules also undermine college athletes’ financial well-being. Unable to monetize their athletic talent and lacking time to work a paying job, the athletes who form the backbone of a billion-dollar business often find themselves unable to

purchase basic necessities—including food. David A. Grenardo, *The Continued Exploitation of the College Athlete: Confessions of a Former College Athlete Turned Law Professor*, 95 Or. L. Rev. 101, 106 & n.20 (2017). More than 40% of Division I football and men’s basketball players report not having “enough money to buy the things I need (e.g. groceries).” Pls.’ Trial Ex. 0059-0041 (NCAA GOALS study) (emphasis omitted). Retired NFL running back Darren McFadden—one of the former student athletes identified in the brief filed by college players supporting the NCAA—was unable to afford a \$50 parking ticket. Daniel Libit & Michael McCann, *Pro-NCAA Athletes Petitioning SCOTUS Struggle to Stay on Message*, Sportico (Mar. 2, 2021), <https://bit.ly/2NPbhX4>. Students who turn elsewhere for food and shelter risk being declared ineligible for college sports. Marc Edelman, *Don’t Feed (or Shelter) the Athletes: The Absurdity of NCAA Amateurism in 2015*, Forbes SportsMoney (Feb. 28, 2015), <https://bit.ly/3dGGYvZ> (describing a formerly homeless Baylor University running back removed from the roster after accepting housing from an acquaintance).

Even for those athletes who can afford necessities, the NCAA’s amateurism rules prevent them from earning income that could be used to participate in normal social activities like eating out with friends or going on dates—basic economic freedoms that their fellow students are afforded, but that athletes are denied. Hruby, *Amateurism Isn’t Educational*, *supra*.<sup>4</sup>

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<sup>4</sup> *Amici* suggest that athletes’ ability to be compensated for the commercial use of their name, image, and likeness are a separate issue not implicated here. Former Athletes Br. 9 n.5. Not so. Even as the NCAA considers whether to loosen its restrictions on

Depriving athletes of compensation while in college is particularly problematic because, for most athletes, college sports provide their *only opportunity in life* to monetize their athletic talents. In 2019, just over 4% of draft-eligible Division I men’s basketball players were selected in the NBA draft; less than 4% of draft-eligible Division I football players were selected in the NFL draft; and less than 3% of draft-eligible Division I women’s basketball players were selected in the WNBA draft. See NCAA, *Estimated Probability of Competing in Professional Athletics* (Apr. 8, 2020), <https://bit.ly/3qQVdSJ>.

The challenges are even greater for athletes in sports with limited or no professional opportunities beyond college. In women’s gymnastics, for example, athletes generate sizeable followings, sell out arenas, and garner enormous viewing numbers on YouTube, but they have no professional path to follow after college. Katelyn Ohashi, *Opinion: Everyone Made Money Off My N.C.A.A. Career, Except Me*, N.Y. Times (Oct. 9, 2019), <https://nyti.ms/2NYcyug>.

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athletes benefiting from their name, image, and likeness, it continues to insist any changes must not “undermin[e] the NCAA’s model of amateur intercollegiate athletics.” NCAA, *Questions and Answers on Name, Image and Likeness* (Jan. 2021), <https://bit.ly/2PoyIXH>. This undoubtedly falls within the scope of rules setting the “standards of amateurism” that the NCAA believes should be held procompetitive as a matter of law and exempt from detailed rule-of-reason analysis. NCAA Br. 27. After all, the NCAA’s view in this Court is that “student-athletes are not paid to play at all.” *Id.* at 36; see also *id.* at 46 (“not paying student-athletes is precisely what makes them amateurs”) (citation and emphasis omitted).

### III. The NCAA's Concept of "Amateurism" Cannot Justify Price Fixing

The NCAA's entire rationale for eliminating competition among colleges is the inherent value of "amateurism"—the idea that college athletes *should* be unpaid. That empty concept cannot justify the NCAA's price fixing and nothing this Court has said suggests otherwise.

#### A. *Board of Regents* Does Not Support the NCAA

For decades, the NCAA has defended its anticompetitive restrictions by relying on dicta from the Court's decision in *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 101 (1984). *Board of Regents* does not immunize the NCAA's amateurism rules from scrutiny.

*Board of Regents* held that the NCAA's restrictions on the number of annually televised college football games violated the antitrust laws. 468 U.S. at 105–13. The Court stated that the NCAA's restraint was subject to rule-of-reason analysis, rather than per se illegality, because NCAA rules "enable[] a product to be marketed which might otherwise be unavailable . . . and hence *can be viewed* as procompetitive." *Id.* at 102 (emphasis added). The Court cited a "myriad of rules" that "must be agreed upon" to enable competition, including "such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed." *Id.* at 101. The Court then discussed other NCAA rules that appeared to help the NCAA preserve the identity of college sports, the defining feature of which the Court understood to be the sports' identification "with an academic tradition." *Id.* To preserve

that product, the Court said, “*athletes must not be paid*, must be required to attend class, and the like.” *Id.* at 102 (emphasis added). It is this last observation that has formed the entire foundation for the NCAA’s amateurism defense in the decades since.

That passing observation simply cannot bear the legal and factual weight the NCAA has placed upon it. This Court did not deem NCAA’s amateurism rules “procompetitive as a matter of law” or hold they must be “upheld without a trial or ‘detailed’ rule-of-reason analysis[.]” *Contra* NCAA Br. 26–27. Rather, the Court held that because the NCAA’s rules “*can be viewed*” as procompetitive, they should not be struck down without a rule-of-reason analysis. 468 U.S. at 102 (emphasis added). The Court said nothing at all about any potential procompetitive benefits of the NCAA’s compensation caps. The NCAA’s attempt to turn that dictum into a holding that forecloses Respondents’ claims is not credible.<sup>5</sup>

### **B. Amateurism Is An Empty And Arbitrary Rationale**

The NCAA and its member institutions proclaim that the “‘tradition of amateurism’ ‘adds richness and diversity to intercollegiate athletics.’” NCAA Br. 6. They deride critics for suggesting the NCAA’s “adherence to its conception of amateurism is a sham.” *Id.*

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<sup>5</sup> The dicta from *Board of Regents* has been “criticized frequently and consistently,” over the ensuing decades. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 Or. L. Rev. 329, 353 (2007) (collecting sources); see also Gabe Feldman, *A Modest Proposal for Taming the Antitrust Beast*, 41 Pepp. L. Rev. 249, 251 (2014).

at 29. But it is not the NCAA's *adherence* to amateurism that is a "sham." The "sham" is claiming as pro-competitive a rule that *everyone* who touches college athletics may profit handsomely from the sport *except* for the athletes who produce it.

The disparities are well documented but forceful and startling. College athletes often struggle to get by, but the NCAA, college administrators, and coaches live comfortable lives—if not lives of luxury. Sally Jenkins, *The College Football Playoff Won't Pay Athletes, While Its Selection Committee Stays at the Ritz*, Wash. Post (Aug. 22, 2019), <https://wapo.st/2NzDgr3>.

Mark Emmert, the president of the NCAA, earns nearly \$4 million in salary each year. The salaries of the commissioners of top athletic conferences range from \$2 million to \$5 million. Even college athletic directors average more \$1 million in annual salary. Ramogi Huma et al., *How the NCAA's Empire Robs Predominantly Black Athletes of Billions in Generational Wealth* 4 (July 31, 2020), <https://bit.ly/3qP2nXI>. Total annual pay for Division I college football head coaches can approach \$11 million per year—more than most NFL head coaches and nearly as much as the average CEO at an S&P 500 company;<sup>6</sup> assistant

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<sup>6</sup> Steve Berkovitz et al., *Top NCAAF Coach Pay*, USA Today (Nov. 17, 2020), <https://bit.ly/2pPIHs5>; Julia Mullaney, *These Are the Highest Paid NFL Coaches in 2018 (Plus, How They Compare to College Football Coaches' Salaries)*, Sportscasting (Nov. 9, 2018), <https://bit.ly/2W9rS7w> (estimating that only one NFL coach makes more than \$10 million); Theo Francis, *Many S&P 500 CEOs Got a Raise in 2018 That Lifted Their Pay to \$1 Million a Month*, Wall St. J. (Mar. 17, 2019), <https://on.wsj.com/2WfhBGT>.

coaches' salaries now top \$2.5 million per year,<sup>7</sup> and even strength coaches make almost \$750,000.<sup>8</sup> Boosters often supplement these salaries by providing millions more in direct cash payment to the coaches.<sup>9</sup> Meanwhile, the athletes whose hard work pays for these salaries are told to find fulfillment from the “physical, mental and social benefits to be derived” from athletics. NCAA Division I Manual § 2.9.<sup>10</sup>

Amateurism is arbitrary because the concept is undefined and malleable. The term does not appear anywhere in the NCAA's 600-plus page bylaws, and NCAA officials have no idea what it means. ER25 (former SEC Commissioner: “I've never been clear on ... what is really meant by amateurism.”). The best

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<sup>7</sup> Steve Berkovitz et al., *Top NCAAF Assistant Coach Pay*, USA Today (Dec. 16, 2020), <https://bit.ly/2PmGrDy>.

<sup>8</sup> Steve Berkovitz et al., *Top NCAAF Strength Coach Pay*, USA Today (Dec. 16, 2020), <https://bit.ly/33JLD8g>.

<sup>9</sup> See Alex Scarborough, *Bama Boosters Pay Off Saban's Home*, ESPN.com (Oct. 27, 2014), <https://es.pn/2BSG5MJ> (“the Crimson Tide Foundation paid off [head coach Nick] Saban's \$3.1 million home in January 2013”).

<sup>10</sup> For almost a century, the NCAA has perpetuated amateurism, not out of reverence for any Olympic ideal, but instead, as the NCAA's own former Executive Director put it, as “a transparent excuse for monopoly operations that benefit [non-athletes].” Walter Byers & Charles H. Hammer, *Unsportsmanlike Conduct* 388 (1995). That much was clear at least as far back as 1929, when a comprehensive report on college athletics described “the university of the present day” as “eagerly” embracing amateur football because it “wants popularity, but above all it wants money and always more money. The athlete is the most available publicity material the college has.” Howard J. Savage et al., *American College Athletics*, Carnegie Found. for the Advancement of Teaching xv (1929) (“Carnegie Report”).

the NCAA can offer is to define amateurism “by reference to what they say it is not: namely, amateurism is not ‘pay for play.’” *Id.* But even that is not entirely accurate—athletes may receive *some* compensation in exchange for their services. NCAA Br. 29 (acknowledging that athletes may receive cost of attendance, “legitimate expenses” and “modest achievement awards”). Amateurism provides no discernible or intelligible principle for determining whether the magic line of “professionalism” is crossed at two post-eligibility scholarships or twenty (ER32); whether athletic-performance awards should be capped at \$5,000 or \$100,000 (ER27–28); or whether schools should be allowed to pay for athletes’ loss-of-value insurance premiums (ER30).

The result is that arbitrariness is part of the NCAA’s DNA. Under NCAA rules, tennis players may accept up to \$10,000 in prize money prior to collegiate enrollment; football, basketball, and soccer players may not. NCAA Division I Manual § 12.1.2.4. Auburn University is free to lure recruits with a \$91 million football facility featuring “a players lounge, barber-shop, two recording studios, [and] a flight simulator” without threatening amateurism. Tom Green, *Auburn’s New Football Facility Estimated to Cost \$91.9 Million*, Ala. Media Grp. (Jan. 27, 2021), <https://bit.ly/3qR5Xk0>; *see also* Will Hobson & Steven Rich, *Colleges Spend Fortunes on Lavish Athletic Facilities*, Chi. Tribune (Dec. 23, 2015), <https://bit.ly/2otXwQS> (describing “city-state”-like facilities with “sand volleyball courts, laser tag, movie theater, bowling lanes, barber shop and other amenities”). But the University of Massachusetts’s inadvertent reimbursement of a \$252 telephone jack in two players’ apartment required vacating three years’

of victories for every member of the school's women's tennis team. Tara Sullivan, *In Punishing UMass for a \$252 Violation, the NCAA's Hypocrisy Is on Full Display*, Boston Globe (Oct. 24, 2020), <https://bit.ly/3kmGvk2>. The NCAA has no problem with athletes receiving the cost of college attendance, plus “books” and “a computer,” NCAA Br. 7—but insists that permitting schools to offer musical instruments to college athletes would “entirely eviscerate the procompetitive distinction between college and professional athletes,” *id.* at 49. The NCAA has no problem with college athletes' *coaches* receiving hundreds of thousands of dollars in compensation for *the athletes'* academic performance, Nick Martin, *College Football Coaches Are Making Millions Off A Useless Metric*, Deadspin (Dec. 10, 2015), <https://bit.ly/3uB9OUB> (describing NCAA coaches' bonuses based on athletes' GPA and graduation rates), but laments that “academic or graduation awards and incentives” for the athletes themselves would be “the very definition of a professional salary,” NCAA Br. 47–48, and would “fundamentally change the nature of college sports,” College Conferences Br. 43.

The NCAA tries to wave off these profound and amoral inconsistencies as merely “a disagreement about how to implement the principle of amateurism on the margins.” NCAA Br. 29. But the arbitrariness of the NCAA's rules demonstrates that amateurism does no real analytical work and is meaningless as a rationale—it is a malleable and continuously evolving target whose only consistent function is to serve as a pretext for price fixing.

**C. The NCAA Cannot Justify Its Rules  
By Defining College Sports As a  
Price-Fixed Product**

According to the NCAA, the “standards of amateurism” and “the mold” for college sports is that “athletes must not be paid.” NCAA Br. 27. Of course, preserving amateurism for its own sake cannot justify the NCAA’s compensation rules. It is self-evident (and settled law) that price fixing cannot be self-justifying. *See Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 696 (1978) (“[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.”).

It would make “a mockery of the antitrust laws” to allow the NCAA to incorporate amateurism (*i.e.*, price fixing) as an essential element of its “product.” Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play*, 65 *Notre Dame L. Rev.* 206, 236 (1990). This is obvious in any other context. A group of private law firms could not conspire to fix associate salaries on the theory that clients prefer lawyers who practice for the “love of the law.” Nor could concert venues justify an agreement to limit payments to non-headliner bands on the ground that they are creating a new product of “amateur” concerts. *See id.* A group of beef producers could not justify an agreement to fix an inflated price for “premium” beef on the ground that the price restraint helps distinguish premium beef from regular beef. *See Chad W. Pekron, The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 *Hamline L. Rev.* 24, 66 (2000). The NCAA’s amateurism-as-a-product argument is specious.

While this Court has held that price fixing *might* be justifiable where “the agreement on price is *necessary* to market the product *at all*,” *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) (emphases added), that is manifestly not the case here. Even *Board of Regents* recognized that “[t]he identification of [college sports] *with an academic tradition* differentiates college [sports] from and makes it more popular than professional sports to which it might otherwise be comparable[.]” 468 U.S. at 101–02 (emphasis added).

Given the opportunity at trial, the NCAA failed to establish that its compensation rules define a unique product or spur consumer demand. *See Bd. of Regents*, 468 U.S. at 113 (defendant faces “a heavy burden of establishing an affirmative defense” to restraint on trade). All the NCAA could offer is a made-for-litigation survey (discredited by the district and appellate courts) and anecdotal hearsay about the connection between amateurism and consumer demand. ER41–42. The NCAA now points to lay testimony from Pac-12 Commissioner Larry Scott (salary: \$5.2 million<sup>11</sup>), American Athletic Conference Commissioner Michael Aresco (salary: \$1.9 million<sup>12</sup>), and the Ohio State University athletics director Eugene Scott (salary: \$1.55 million<sup>13</sup>) to support its claim that only amateurism can ensure consumer demand for college sports. NCAA Br. 43–44. But the district

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<sup>11</sup> Huma, *supra*, at 4.

<sup>12</sup> Non Profit Light, *American Athletic Conference* (June 3, 2020), <https://bit.ly/3b2gzXR>.

<sup>13</sup> Lev Akabas & Daniel Libit, *Saban and Day Contracts Reveal Money on the Line in Championship Game: Data Viz*, Sportico (Jan. 11, 2021), <https://bit.ly/3b2Eih6>.

court did not credit that testimony and made factual findings to the contrary—factual findings which the NCAA does not contest on appeal.

To the contrary, the district court correctly found that eliminating restrictions on education-related benefits would “only reinforce consumers’ perception of student-athletes as students, thereby preserving demand.” Pet. App. 43a. Consumer demand did not wane after the NCAA itself loosened restrictions on other education-related benefits. *Id.* at 20a, 36a. And the latest research reveals that a majority of American adults support allowing college athletes to be paid and that “support appears to be highest among passionate sports fans.” Chris Knoester & B. David Ridpath, *Should College Athletes Be Allowed to Be Paid? A Public Opinion Analysis*, Soc. of Sport J. 8, 11 (2020).

In other words, college sports are distinct because “student-athletes are, in fact, students,” not because they are unpaid. ER48. Student-athletes “would continue to be students in the absence of the challenged rules”—indeed, even absent the NCAA. ER49. College sports played by students *flourished for decades* before the NCAA came into existence and continued to grow explosively up until the early 1950s when the NCAA first enforced its compensation rules. *See Carnegie Report* at 13–33.

The NCAA claims that any loosening of its rules “will vitiate the distinction between college and professional sports.” NCAA Br. 4. But no one could sincerely believe that Alabama versus Auburn at Bryant-Denny Stadium in November will suddenly become indistinguishable from an NFL game because a few players received a musical instrument or a graduate

school scholarship. Nor would an upset win by a 16<sup>th</sup> seed or a Cinderella run during March Madness become indistinguishable from NBA games because a basketball player was promised a future internship with his or her conference or school. Contrary to the NCAA’s view (NCAA Br. 6), the *true* “hallmark[]” of college sports—what gives it “richness and diversity” (*Bd. of Regents*, 468 U.S. at 113, 120)—is that the players are *students enrolled in the college*, playing in a multi-generational ecosystem of rabid fans, including students and alums and their families—not that the athletes play the games “unpaid.”<sup>14</sup>

Moreover, if, as the NCAA claims, consumers *actually prefer* to watch unpaid athletes, then a rule prohibiting compensation would be unnecessary. Freed from the NCAA’s unnecessary restrictions, colleges would compete to pay student-athletes as *little* as possible to serve this “consumer demand” for a “differentiated product.” NCAA Br. 43–44. But no one—including the NCAA—thinks this way, because no one—including the NCAA—believes it to be true.

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<sup>14</sup> Even if it were true, as the NCAA suggests (NCAA Br. 47), that “Consumers would . . . understand that cash payments for internships were part of the compensation for student-athletes’ athletic play,” that is a distinct question from the antitrust analysis, which is whether the restraints in place now are essential to preserve college athletics as a product separate from professional sports. The answer to that question—as found at trial—is no.

**D. The NCAA's Appeal To Its Educational Mission Cannot Justify Price Fixing**

The NCAA also claims that its actions are justified because it imposes them “as part of serving a societally important non-commercial objective: higher education.” NCAA Br. 3. But the NCAA’s ostensible interest in higher education does not relax the requirements of the Sherman Act.

This Court has consistently rejected the suggestion that price fixing can be justified because it purportedly serves broader societal values. *See FTC v. Super. Ct. Trial Lawyers Ass’n*, 493 U.S. 411, 423–24 (1990) (rejecting argument by trial lawyers that boycott of court-appointed work was justified to promote the social value of increasing the quality of representation); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 462–64 (1986) (refusing to consider ethical policy of insuring proper dental care as a valid procompetitive end). Rather, antitrust is concerned with whether the challenged restraint promotes competition. *Bd. of Regents*, 468 U.S. at 117 (rejecting justifications offered to support a challenged restraint that do not promote competition as “inconsistent with the basic policy of the Sherman Act”); *see also* Phillip E. Areeda, *Anti-trust Law*, ¶ 1504, at 381 (1986).

For this reason, the Tenth Circuit has rejected the NCAA’s claim that restricting assistant coaches’ salaries is justified on the ground that doing so preserves “entry-level coaching position[s].” *Law v. NCAA*, 134 F.3d 1010, 1021 (10th Cir. 1998). *Law* held that the rule of reason does not take into account the professed “social value” from maintaining coaching positions for younger people. *Id.* at 1021–22. The NCAA’s “give us

a pass because we mean well” argument is just as unpersuasive here as it was in *Law*.

In any event, the NCAA’s restrictions on education-related compensation do nothing to further its academic mission. To the contrary, as explained in Section II.A., these rules *thwart* the intellectual development of college athletes.

**E. The NCAA’s Parade of Horribles Is Unfounded and Contrary to the Trial Record**

Bereft of economic argument, record evidence, and doctrinal support, the NCAA trots out a list of anxieties about what might happen if its amateurism rules are invalidated.

The NCAA and its *amici* suggest that schools would rather defund or eliminate their athletic programs than compensate their athletes. Former Athletes Br. 24–30; Br. of Ga. et al. (“States Br.”) 33–34. That is absurd. Colleges spend hundreds of millions on athletic facilities and salaries, and the NCAA does not explain *why* that would change. Sen. Chris Murphy, *Madness, Inc.: How Everyone Is Getting Rich Off College Sports – Except the Players* 7 (Mar. 28, 2019), <https://bit.ly/3qhK648> (a larger share of Power Five revenue is spent on salaries for 4,400 coaches than on student aid for 45,000 athletes). Colleges currently pay millions of dollars to *former* coaches. In 2020 alone, public colleges with major football programs “committed . . . to more than \$107.5 million in buyout-related payments . . . for head coaches, assistants and strength coaches[.]” Brent Schrottenboer, *Colleges Still Have Millions to Fire Football Coaches Despite Claiming Financial Trouble from Coronavirus, USA*

Today (Dec. 17, 2020), <https://bit.ly/3uFWcrp>. Eliminating the NCAA’s amateurism rules would simply enable colleges to redirect that spending towards the individuals who actually generate that revenue.

The NCAA and its *amici* also complain that if schools are permitted to offer compensation or education-related benefits to *male* athletes, they might be required to do the same for *women* athletes. NCAA Br. 32; States Br. 31–33. The NCAA invidiously implies that women’s sports might suffer if market forces are introduced to college athletics. That argument wrongly assumes that women’s sports have no economic value to colleges, and it is also old-fashioned stereotyping. *United States v. Virginia*, 518 U.S. 515, 533, 542 n.12 (1996) (Ginsburg, J.) (“[O]verbroad generalizations” about the “talents, capacities, or preferences” of women, “have . . . impeded[] women’s progress toward full citizenship stature throughout our Nation’s history.”).

Women athletes have “equal opportunity to aspire, achieve, participate in and contribute to” their schools “based on their individual talents and capacities.” *Id.* at 532. Attendance figures and ticket prices for women’s basketball games exceeds that of men’s games at many schools. Laine Higgins, *Attendance at Women’s College Basketball Games Is Surging*, Wall St. J. (Mar. 5, 2020), <https://on.wsj.com/38izagA>. Some women’s college soccer games are just as well-attended as Major League Soccer games. Paul Kennedy, *Crowd Count: UCLA-USC Breaks Women’s College Attendance Record*, SoccerAmerica (Nov. 4, 2017), <https://bit.ly/2Orr2TU> (nearly 12,000 fans in attendance). Jerseys for top female college athletes sell out

instantly. Whitney Medworth, *Nike Finally Made Sabrina Ionescu Jerseys, and They Sold Out in Hours*, SB Nation (Nov. 13, 2019), <https://bit.ly/2MTJXpV>. Millions of viewers tune in to watch the finals of women's March Madness and the College Softball World Series. Derek Volner, *More than 3.8 Million Viewers for the NCAA Women's Basketball National Championship*, ESPN Press Room (Apr. 4, 2017), <https://bit.ly/3qqofaW>; Kimberly Elchlepp, *ESPN's Women's College World Series, Super Regional, Regular Season Softball Viewership Surges*, ESPN Press Room (June 6, 2019), <https://bit.ly/2MTKvMv>. Allowing competition will greatly *increase* the benefits available to women players as colleges compete with one another to build the best women's sports programs.

Indeed, the NCAA's rules have a more profoundly negative effect on female athletes than on male athletes, primarily because women at this point in history generally have fewer opportunities in athletics after their college careers end. There are fewer roster spots available in the professional ranks for elite women athletes: the WNBA has 12 professional teams and the NWSL has 10, compared to 30 NBA teams and 27 MLS teams. This foists impossible decisions on talented women athletes. Olympic champions like Katie Ledecky and Kyla Ross have been forced to choose between capitalizing on their success or pursuing their college careers—they ended up forfeiting *years* of their highest earning potential. Lindsay Gibbs, *It's Time to View Ending NCAA Amateurism as a Women's Rights Issue, Too*, Power Plays (Nov. 1, 2019), <https://bit.ly/2O2vVCG>. Permitting, if not requiring pursuant to Title IX, colleges to compensate female athletes will incentivize them to invest in women's

sports and to create additional avenues for continued growth. Lindsay Gibbs, *Ending the Sham of NCAA Amateurism Will Not End Title IX*, ThinkProgress (Mar. 30, 2018), <https://bit.ly/37Sxv13>.

The NCAA and its *amici* also warn that non-revenue sports will be jeopardized if its amateurism rules are lifted, but again there is no record evidence or sound argument to support this speculation. *See, e.g.*, NCAA Br. 32; Former Athletes Br. 28; States Br. 31–34. Many schools already maintain their athletic programs even if their athletic departments do not make a profit. Former Athletes Br. 25. And if profits were required for schools to maintain their athletic programs, Divisions II and III of the NCAA would have long since been eliminated. *See id.* at 26. So too for drama societies, school newspapers, intramural flag football, and the chess club.

The NCAA next warns that permitting schools to offer educational benefits, such as post-eligibility internships, will simply allow them to funnel *de facto* salaries to players as a recruiting tool. NCAA Br. 37–38. But colleges already spend lavishly to lure top athletes to their programs through, for example, the construction of luxurious athletic facilities. Eliminating amateurism would permit colleges to compete with books instead of buildings and to reward athletes instead of administrators.

The bottom line is that the NCAA’s parade of horrors is all speculative. And as with “most arguments against the free market,” these arguments reflect “a lack of belief in freedom itself.” Milton Friedman, *Capitalism and Freedom* 15 (1962). Free markets have elevated the well-being of mankind for centuries. While the introduction of limited market forces may

change the status quo in ways that are uncomfortable for the NCAA, there is every reason in law and in history to trust that the elimination of anticompetitive constraints will lead to the betterment of collegiate sports and “promote the General Welfare.” U.S. Const. pmbl.

Moreover, the NCAA’s current regime is not a model of ethics and integrity. By trying to smother market forces, the NCAA has driven them underground and witnessed seemingly endless scandals proliferate under its purview. *See, e.g.*, Andy Staples, *What Has the NCAA—or Anyone—Learned from the College Basketball Black Market’s Time on Trial?*, *Sports Illustrated* (May 9, 2019), <https://bit.ly/32yR3CJ> (reviewing fallout of federal government’s investigation into college basketball bribery scandal); Jake New, *NCAA Confirms Escort Allegations at Louisville*, *Inside Higher Ed* (Oct. 21, 2016), <https://bit.ly/3kNmGCH> (describing use of parties with dancers and escorts to lure basketball program recruits); Charles Robinson, *Renegade Miami Football Booster Spells Out Illicit Benefits to Players*, *Yahoo! Sports* (Aug. 16, 2011), <https://yhoo.it/2BC1D0V> (University of Miami booster “provided thousands of impermissible benefits to at least 72 athletes from 2002 through 2010”).

College athletes deserve better. They possess and deserve the opportunity to realize their right to employ their talents and to reap the fruits of their labors. *See* John Locke, *Second Treatise of Government* 17 (T. Peardon ed., 1952) (“The labour of his body, and the work of his hands, we may say, are properly his.”); *see also* James Madison, *Speech in Virginia Convention* (Dec. 2, 1829) (the “personal right to acquire property

... is a natural right”). And notwithstanding the queasy-making hypotheticals the NCAA will wave around, antitrust law puts *its* faith in freedom and in the long run:

‘The heart of our national economic policy long has been faith in the value of competition.’ *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951). The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

*Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 695.

## CONCLUSION

The NCAA’s amateurism rules demand that college athletes sacrifice their minds and bodies for their schools and for their love of the game while every penny of economic benefit flows to someone else. Nothing in this Court’s precedent compels the Court to condone this system, which is anathema to modern antitrust law and deeply rooted American values. This Court should reject amateurism as a justification for price fixing under the antitrust laws and put college athletes on the same footing as every other American adult. The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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