Nos. 20-512, 20-520

IN THE
Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Petitioner,

v.

SHAWNE ALSTON, ET AL.,

Respondents.

AMERICAN ATHLETIC CONFERENCE, ET AL.,

Petitioners,

v.

SHAWNE ALSTON, ET AL.,

Respondents.

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

BRIEF OF AMERICAN COUNCIL ON EDUCATION AND TEN OTHER HIGHER EDUCATION ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

PETER G. MCDONOUGH
AMERICAN COUNCIL ON EDUCATION
One Dupont Circle
Washington, DC 20036
(202) 939-9300

JESSICA L. ELLSWORTH
Counsel of Record
STEPHANIE J. GOLD
JOEL D. BUCKMAN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5886
jessica.ellsworth@hoganlovells.com

Counsel for Amici Curiae American Council on Education and Ten Other Higher Education Associations

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF INTEREST[1]

Intercollegiate sports in this country have a long history, dating back to a regatta between Harvard and Yale in 1852.[2] The first self-regulating collaborative structure began to take form in 1895, when then-Purdue president James H. Smart and leaders from the University of Chicago, University of Illinois, University of Michigan, University of Minnesota, Northwestern University and University of Wisconsin met to develop principles for the regulation of intercollegiate athletics. The initial action taken by this group, now known as the Big Ten Conference, "restricted eligibility for athletics to bona fide, full-time students who were not delinquent in their studies."[3] Since 1906, the NCAA (or its predecessor) has set rules and regulations for college sports and college athletes for member institutions and conferences.

At their core, those rules and regulations have sought to ensure a commitment to fair competition,

---

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for party, or person other than *amici curiae* or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] *Harvard-Yale Boat Race Turns 150*, Harv. Mag., May-June 2002, *available at* https://harvardmagazine.com/2002/05/harvard-yale-boat-race-t.html ("Intercollegiate sports in this country, from the bowl games to the NCAA's 'Final Four,' were born when crews from Harvard and Yale tested each other on Lake Winnipesaukee in New Hampshire on August 3, 1852.").

[3] *Big Ten History*, BigTen.org, https://bigten.org/sports/2018/6/6/trads-big10-trads-html.aspx (last updated July 2020).

integrity, student-athlete well-being, academic standards, and maintaining a distinction between college sports and professional sports. As the NCAA explains, its basic purpose "is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."[4]

Amici are eleven associations of colleges, universities, educators, trustees, and other representatives of several thousand institutions of higher education in the United States. *Amici* represent public, independent, large, small, urban, rural, denominational, nondenominational, graduate, and undergraduate institutions and faculty. *Amici*'s college and university members tremendously value intercollegiate athletics as an educational endeavor and an integral part of many students' higher education. Intercollegiate athletics build teamwork, persistence, and discipline; lead to improved academic outcomes; and contribute to a sense of unity and pride. In short, intercollegiate athletics complement and support the academic missions of higher education—and can have a transformative positive impact on students' academic achievement, citizenship, and growth as leaders and role models.

Amicus **American Council on Education (ACE)** is the major coordinating body for American higher education. ACE's more than 1,700 members reflect the extraordinary breadth and contributions of four-

---

[4] NCAA, *2020-21 Division I Manual* § 1.3.1 (Aug. 1, 2020) (hereinafter "*Division I Manual*"), *available at* https://web3.ncaa.org/lsdbi/reports/getReport/90008.

year, two-year, public and private colleges and universities. ACE members educate two out of every three students in accredited, degree-granting U.S. institutions. ACE participates as *amicus curiae* on occasions such as this where a case presents issues of substantial importance to higher education in the United States.

ACE is joined in this brief by the following ten associations:

The **American Association of Community Colleges (AACC)** is the primary advocacy organization for the nation's community colleges. It represents more than 1,000 regionally accredited, associate degree-granting institutions.

The **Association of American Universities (AAU)** is a nonprofit organization, founded in 1900 to advance the international standing of United States research universities. AAU's mission is to shape policy for higher education, science, and innovation; promote best practices in undergraduate and graduate education; and strengthen the contributions of research universities to society. Its members include 63 public and private research universities in the United States and two in Canada.

The **Association of Catholic Colleges and Universities (ACCU)** serves as the collective voice of U.S. Catholic higher education. Through programs and services, ACCU strengthens and promotes the Catholic identity and mission of its member institutions so that all associated with Catholic higher education can contribute to the greater good of the world and the Church.

The **Association of Governing Boards of Universities and Colleges (AGB)** is the premier membership organization that strengthens higher education governing boards and the strategic roles they serve within their organizations. Through AGB's vast library of resources, educational events, and consulting services, and with 100 years of experience, 40,000 AGB members from more than 2,000 institutions, systems, and foundations are empowered to navigate complex issues, implement leading practices, streamline operations, and govern with confidence. AGB is the trusted resource for board members, chief executives, and key administrators on higher education governance and leadership. For more information, visit www.AGB.org.

The **Association of Public and Land-grant Universities (APLU)** is a research, policy, and advocacy organization dedicated to strengthening and advancing the work of public universities in the U.S., Canada, and Mexico. With a membership of 244 public research universities, land-grant institutions, state university systems, and affiliated organizations, APLU's agenda is built on the three pillars of increasing degree completion and academic success, advancing scientific research, and expanding engagement. Annually, its 201 U.S. member campuses enroll 4.2 million undergraduates and 1.2 million graduate students, award 1.2 million degrees, employ 1.1 million faculty and staff, and conduct $46.8 billion in university-based research.

The **College and University Professional Association for Human Resources (CUPA-HR)**, the voice of human resources in higher education, repre-

sents more than 31,000 human resources professionals at over 2,000 colleges and universities. Its membership includes 93 percent of all United States doctoral institutions, 79 percent of all master's institutions, 57 percent of all bachelor's institutions, and nearly 600 two-year and specialized institutions.

The **Council for Christian Colleges & Universities (CCCU)** is a higher education association of more than 180 Christian institutions around the world, representing 445,000 current students and over 3.5 million alumni. The CCCU's mission is to advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth.

The **National Association of College and University Business Officers (NACUBO)**, founded in 1962, is a nonprofit professional organization representing chief administrative and financial officers at more than 1,700 colleges and universities across the country. NACUBO works to advance the economic vitality, business practices, and support of higher education institutions in pursuit of their missions.

NASPA – Student Affairs Administrators in Higher Education is the leading voice of student affairs, driving innovation and evidence-based, student-centered practice throughout higher education, nationally and globally.

Established in 1987, the **Thurgood Marshall College Fund (TMCF)** is the nation's largest organization exclusively representing the Black College Community. TMCF's 47 member-schools include both publicly-supported Historically Black Colleges and Uni-

versities (HBCUs) and Predominantly Black Institutions (PBIs). Publicly-funded HBCUs enroll over 80% of all students attending HBCUs.

Collectively, *amici* are concerned about the failure of the courts below to recognize that colleges and universities first and foremost have an educational mission—not a profit motive. The NCAA rules are a self-governance structure with which NCAA member institutions and conferences agree to comply in an effort to advance that educational mission. This Court should reverse the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *NCAA* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), this Court recognized that "the preservation of the student-athlete in higher education * * * is entirely consistent with the goals of the Sherman Act." *Id.* at 120. And it further explained that rules limiting "eligibility" to enrolled students who are not paid to play "are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive" for purposes of antitrust challenges. *Id.* at 117. Although nearly four decades have passed since *Board of Regents*, its premise remains just as valid. Colleges and universities differ from professional sports franchises in critical ways—most notably, in being educational institutions first and foremost—and intercollegiate athletics differs from professional sports leagues—most notably, because athletics is an integral aspect of many students' education and institutions do not pay athletes a salary for participating on a team.

Nearly a half million student-athletes compete in 24 sports every year at the NCAA's roughly 1,100 member schools and conferences. A small percentage of these student-athletes compete on teams that generate significant self-funding revenue (such as Division I Football Bowl Subdivision football and men's basketball teams at some schools), though the vast majority's intercollegiate athletics experience is on teams that require charitable donations and institutional financial support to survive (such as field hockey, cross-country, softball, wrestling, and swimming). The NCAA sets the rules that define who is eligible to participate in those sports based on input from its members—within a context of attentiveness to the student-athlete educational experience, including academic success, opportunities to integrate into the campus community, and obtaining the ultimate aim of this college experience, graduation. *Amici* are concerned that the Ninth Circuit's decision threatens an unwarranted transformation of intercollegiate athletics that is unwanted by their member institutions, and shows insufficient regard for the overarching mission of our Nation's colleges and universities: providing a high-quality education.

First and foremost, universities are not commercial, profit-seeking entities. Any analysis that views the NCAA's (and the Conferences') decisions about financial constraints on student-athletes in purely revenue-maximizing terms—as courts below did—is misplaced. Schools have additional interests at play for their athletic programs, such as keeping academics central, providing a diverse array of athletics opportunities, and compliance with gender equity obligations under Title IX. Educational institutions cannot properly function in a world where decisions about

rules for intercollegiate sports get tested against standards that might apply to purely commercial endeavors. There are too many potential divergent stakeholder interests for which institutions must account.

Second, judicial micromanagement of gradations of educational benefit is not authorized by the Sherman Act and is unworkable and inconsistent with the educational mission that undergirds collegiate athletics. The Ninth Circuit has anointed a single judge in California as the arbiter of what counts as legitimate educational costs and payments, overriding the NCAA's considerable knowledge of the context and input from its member schools and conferences. The NCAA has crafted its rules on financial support for students with an eye toward precluding payments that are disguised "pay for play" rewards. The NCAA's goal has been to permit colleges and universities to support an athlete's full participation as a student in the academic community while also making judgments about circumstances where monies may be improperly funneled to players as a disguised financial reward akin to a professional athlete's salary. If the Ninth Circuit's decision stands, every rule change the NCAA makes with regard to financial aid and assistance for student-athletes will subject the Association (and its conferences and institutions) to litigation and potential treble-damages liability under the Sherman Act. More resources spent on litigation means less resources for education.

Third, the NCAA puts the responsibility on each member institution to run its intercollegiate athletics program in compliance with the rules and regulations of the Association. This principle of self-governance is

a cornerstone of higher education. The vast majority of intercollegiate athletic programs aspire, first and foremost, to provide education through athletics, and higher education institutions are better positioned than the courts to inform decision-making in that regard. In this context, NCAA member institutions, via representation in and control of conferences and the NCAA as an ultimate governing body, are far better suited than the courts to assess and collectively decide, for instance, whether to encourage, discourage, or take a neutral view on specific practices. The degree to which sports fans will continue to watch college athletics are, at best, one aspect of the assessment, and, from the perspective of institutions' primary missions and obligations to their student-athletes, not the most important.

ARGUMENT

I. TO VIEW RESTRICTIONS ON STUDENT-ATHLETES IN PURELY PROFIT-MAXIMIZING TERMS IS MISPLACED.

The opinion below hinges on a view of intercollegiate athletics at odds with the educational mission that is the reason colleges and universities exist. While there may be some variation in how each school formulates its educational mission, colleges and universities at a basic level seek to help students learn about themselves and the world around them, develop the skills and knowledge they will need to be good citizens, navigate their careers, and contribute to our country's democracy and economy. Sports play a role in the college experience for many athletically talented students and for many campus communities as a whole, but colleges and universities are not in the business of sports.

The thousand-plus college and universities that adhere to the NCAA's rules for intercollegiate athletics are not for-profit entities. They have no owner or shareholders, and they do not exercise territorial rights like a professional sports franchise. Nor is their primary goal making money from fans or maximizing revenue. To the contrary, these colleges and universities seek to educate students and maximize diverse learning opportunities. Athletics are a piece of this broader educational mission. Participation on an athletic team is one of the many ways that students can develop as individuals, build strategic and analytical thinking, and develop leadership potential. And supporting athletic teams is one of the many ways that schools can build a sense of community—on campus and among alumni alike.

Absent financial aid, student-athletes, like other students, pay tuition and fees for those experiences. They pay for the opportunity to work hard—in the classroom and laboratory, the student government meeting room, and, yes, on the sports field—because they recognize the value of an education that will prepare them for life. Intercollegiate athletics is not a commercial activity typical of Sherman Act cases.

A. Colleges' and Universities' Mission Is Education, Not Sports.

From field hockey to football, bowling to basketball, and swimming to softball, about 1,100 colleges and universities across NCAA divisions I, II, and III offer competitive opportunities for nearly half a million student-athletes. They have offered athletics for more than a century, because, at its best, intercollegiate athletics is a key component of the higher education experience for many students, who leave school better

prepared for life because they competed.[5] Student-athletes learn, for example, time management and organization; the value of hard work and sportsmanship; to lead and be a teammate; to perform under pressure; and to face and overcome adversity. Athletics thus serve, like many programs and services a university offers, to help students develop skills that will help them throughout their lives.

Indeed, "[t]he overwhelming majority of America's intercollegiate athletics programs provide student-athletes with a *life-changing* experience during their time on campus. In many instances, graduation rates of student-athletes are higher than those of their student peers across every demographic group." ACE, *The Student-Athlete, Academic Integrity, and Intercollegiate Athletics* 2 (2016) (hereinafter "*Academic Integrity*") (emphasis added), *available at* https://www.acenet.edu/Documents/ACE-Academic-Integrity-Athletics.pdf. Perhaps not surprisingly, then, "[e]ighty-five percent of the athletes in [one survey] rated their experience in intercollegiate athletics as very or somewhat educational." Erianne Allen Weight et. al, *Holistic Education through Athletics:*

---

[5] *See* Gallup, *A Study of NCAA Student Athletes: Undergraduate Experiences and Post-College Outcomes* 9 (2020), *available at* https://www.gallup.com/file/education/312941/NCAA%20Student-Athlete%20Outcomes.pdf ("Among graduates from the last three decades (1990-2019) and over the prior decade and a half (1975-1989), NCAA student-athletes have higher levels of wellbeing than non-athletes."); *id.* at 28 ("In college, NCAA student-athletes are more likely to have had supportive and engaging experiences like mentorship and academic challenge and to have engaged in cocurricular and extracurricular learning and development experiences outside of the classroom.").

Health and Health-Literacy of Intercollegiate Athletes and Active Undergraduate Students, 1 J. Higher Ed. Athletics & Innovation 38, 50 (2016). The specific educational benefits that student-athletes reported "included a mix of personal development (time management, self-confidence, commitment, performance under pressure, accountability, and growth through adversity), and citizenship (teamwork, leadership, and respect for others). These are concepts difficult to teach, but fundamental to holistic student development." *Id.*

The existence of athletic scholarships and other forms of financial aid for student-athletes does not change that reality. Students with diverse talents and interests flock to higher education institutions to learn and develop as citizens. Much learning takes place outside the classroom. Consistent with students' diverse interests and abilities, it occurs in college newspaper pressrooms, campus radio station studios, debate societies, and chess clubs; it happens in music practice rooms, on concert hall stages, and on the sports field.[6] Colleges and universities offer merit and need-based scholarships to many students who

---

[6] *Cf. Regents of Univ. of California* v. *Bakke,* 438 U.S. 265, 313 (1978) ("[A] great deal of learning occurs informally. It occurs through interactions among students * * * who have a wide variety of interests, talents, and perspectives * * * . [T]he unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth.") (quoting Bowen, Admissions and the Relevance of Race, Princeton Alumni Weekly 7. 9 (Sept. 26, 1977)).

bring special perspectives and talents. Scholarships are frequently tied to participation in extracurricular activities—sports and otherwise—not as payment for services but as a means of recruiting talented students to attend without financial barriers. [7]

Nor does it matter that a tiny fraction of sports teams at a tiny fraction of institutions generate significant revenue. To be sure, the massive interest that intercollegiate athletics generates—on the part of participants and spectators, alike—has always posed a risk of subverting education. But the higher education community has likewise remained attuned to that risk and relied on structures like the NCAA to try and keep the gravitational pull of market economics at bay. *See Bd. of Regents*, 468 U.S. at 122 (White, J., dissenting) ("No single institution could confidently enforce its own standards since it could not trust its competitors to do the same." (citation omitted)).

The commitment to maintaining education as the foundation of intercollegiate athletics has deep roots. For instance, in 1888, a Harvard College committee studied "the whole subject of athletics," including the "total time necessary for practice," before concluding that "athletic sports do not seriously interfere with attendance on College courses." Harvard Coll., *Report Upon Athletics, with Statistics of Athletics and Physical Exercise, and the Votes of the Governing*

---

[7] *See Waldrep* v. *Tex. Emp'rs Ins. Ass'n*, 21 S.W.3d 692, 701 (Tex. Ct. App. 2000) ("Financial-aid awards are given to many college and university students based on their abilities in various areas, including music, academics, art, and athletics."); *United States* v. *Brown Univ.*, 5 F.3d 658, 667–668 (3d Cir. 1993) (treating financial aid as a discount off the cost of educational services).

Boards 7, 20, 22 (1888) (hereinafter "*Report Upon Athletics*").

Through the decades, the higher education community has continued to grapple with how best to keep intercollegiate athletics in right relation with the educational mission of colleges and universities. In 1952, ACE recommended lodging control of athletics in the institution's regular administration and requiring all students to meet standard admissions criteria and make satisfactory academic progress. *See* ACE, *Report of the Special Committee on Athletic Policy* (Feb. 16, 1952). The Committee called for accrediting agencies to adopt and enforce standards on the topic. *Id.* Later, the Knight Commission on Intercollegiate Athletics called for each institution's president to control the athletics program, and endorsed strengthening academic eligibility requirements and financial integrity. *See* Knight Found., *Reports of The Knight Commission on Intercollegiate Athletics* (1991–1993);[8] Knight Found., Comm'n on Intercollegiate Athletics, *A Call To Action: Reconnecting College Sports and Higher Education* (2001);[9] Knight Comm'n on Intercollegiate Athletics, *Restoring the Balance: Dollars, Values, and the Future of College Sports* (2010)[10] (hereinafter "*Restoring the Balance*"); Knight Comm'n on Intercollegiate Athletics, *Transforming the NCAA*

---

[8] *Available at* https://www.knightcommission.org/wp-content/uploads/2008/10/1991-93_kcia_report.pdf.

[9] *Available at* https://www.knightcommission.org/wp-content/uploads/2008/10/2001_knight_report.pdf.

[10] *Available at* https://www.knightcommission.org/restoring-the-balance.

D-I Model: Recommendations for Change (2020) (hereinafter "*Transforming the NCAA D-I Model*")[11]; *see also* ACE, *Academic Integrity*, *supra*, at 3. The Commission has declared: "[P]residents and other leaders of Division I institutions have done much to improve governance policies and to raise academic expectations. The result has been better classroom outcomes for athletes and greater accountability for their coaches, teams, and institutions." *Restoring the Balance*, *supra*, at 1.

Such efforts reflect the higher education community's commitment to maintaining and furthering the primacy of education in athletics. Today, most leading institutional accreditors maintain standards related to athletics that require education to remain at the center. For example, the Western Association of Schools and Colleges Senior College and University Commission (WSCUC) provides that "[s]ports and athletics of all kinds—intercollegiate, intramural, and recreational—are deeply rooted in educational institutions and in American society. Well-conducted programs of athletics add significantly to the educational experience, and to a collegiate atmosphere of wholesome competition." WSCUC, *Collegiate Athletics Policy* 1 (last updated Aug. 22, 2016).[12] To that end, WSCUC reviews whether the "goals and scope of the athletic program reflect institutional purposes" and whether the "program is integrated into the larger educational environment of the institution." *Id.* at 2.

---

[11] *Available at* https://www.knightcommission.org/wp-content/uploads/2020/12/transforming-the-ncaa-d-i-model-recommendations-for-change-1220-01.pdf.

[12] *Available at* https://www.wscuc.org/content/collegiate-athletics-policy.

Similarly, the New England Commission of Higher Education (NECHE) requires that athletics programs be "subordinate to the educational program and conducted in a manner that adheres to institutional mission, sound educational policy, and standards of integrity." NECHE, *Standards for Accreditation* 5.16 (Jan. 1, 2021).[13] The Middle States Commission on Higher Education (MSCHE) provides that "institutional effectiveness rests upon the contribution that each of the institution's programs makes toward achieving the educational objectives of the institution as a whole," and, as such, "athletics programs should be fully integrated into the larger educational environment of the campus and linked to the institutional mission." MSCHE, *Guidelines: Athletic Programs* 1.[14] It stresses that athletics programs "should be in compliance with Title IX provisions and provide broad opportunities for as many students as possible," *id.*, and that "[a]ll expenditures for and income from athletics, from whatever source, and the administration of scholarships, grants, loans, and student employment, should be fully controlled by the institution and included in its regular budgeting, accounting, and auditing procedures." *Id.* at 2. These principles are also reflected in the NCAA's own Constitution and Bylaws. *See Division I Manual*, *supra*, arts. 2, 12.

B. Colleges and Universities Do Not Operate For-Profit Sports Franchises.

Consistent with their obligations as higher education institutions under accreditation standards and

---

[13] *Available at* https://www.neche.org/wp-content/uploads/2020/12/Standards-for-Accreditation-2021.pdf.

[14] *Available at* https://msche.box.com/shared/static/vva7ypvrkqpantfjtvyrx56ujjl0ggsy.pdf (last visited Feb. 8, 2021).

otherwise, colleges and universities do not structure athletics programs to maximize profit. In fact, from 2004 to 2019, among all of the more than 1,100 NCAA member schools across Divisions I, I, and III, the median number of athletics departments whose net revenue simply exceeded expenses was 24 (about 2%). *See Finances of Intercollegiate Athletics*, NCAA, https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics (last visited Feb. 8, 2021). Those 24 schools are in a few Football Bowl Subdivision conferences, and even in those conferences, "median athletics expenses * * * exceeded * * * total generated revenues by roughly $7 million in 2019." *Id.* "Expenses outpaced generated revenues at every [Football Championship Subdivision] institution," every Division I institution without football, and every Division II and Division III institution. *Id.* Simply put, "most institutions require institutional funding to balance their athletics operating budget." *Restoring the Balance*, *supra*, at 6 fig. 3; *accord Transforming the NCAA D-I Model*, *supra*, at 9.

If college and universities functioned as for-profit sports franchises, most of the college sports teams that exist today would be disbanded immediately. From a purely financial perspective, college soccer teams, track and field teams, softball teams, swimming teams, and most others make no sense. It is expensive to employ a coaching staff, maintain training facilities, fields, and pools, and pay for team travel, equipment, and uniforms. If the driving force was to make a profit, schools would offer only the sports with potential to generate significant revenue beyond their

costs: football and basketball (with perhaps just enough additional teams to comply with Title IX).[15]

The reality is much different. For example, Division I member institutions must sponsor a minimum of seven sports for men and seven for women (or six for men and eight for women). *Divisional Differences and the History of Multidivision Classification*, NCAA, https://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification (last visited Feb. 8, 2021). The nearly 350 colleges and universities in Division I field more than 6,000 athletics teams, giving 170,000 student-athletes the opportunity to reap the educational benefits of collegiate athletics. *NCAA Division I*, NCAA, https://www.ncaa.org/about?division=d1 (last visited Feb. 8, 2021). Spending money year in and year out on teams that do not generate revenue may make little sense from the perspective of market economics, but it underscores that higher education institutions are ultimately focused on education, not profit.[16] And, as the COVID-19 pandemic has underscored, resources are not endless; when cost increases become unsustainable, the prospect of elimination of intercollegiate sports teams is very real. *See* Marc Tessier-

---

[15] The U.S. Department of Education's Office of Postsecondary Education publishes college athletics revenues and expenses in its Equity in Athletics Data Analysis (EADA) database. *See Equity in Athletics Data Analysis*, U.S. Dep't of Educ., https://ope.ed.gov/athletics/#/ (last visited Feb. 8, 2021).

[16] For higher education institutions, it is common for some endeavors to generate more revenue than others. The criteria is often pursuit of the institution's educational mission and overall budget. The same goes for intercollegiate athletics.

Lavigne, President, et al., *An open letter to the Stanford community and Stanford Athletics family*, Stanford Univ. (July 8, 2020) (communicating the "extremely difficult news" that Stanford will discontinue 11 varsity sports at the end of 2021 because the "financial model supporting 36 varsity sports is not sustainable" as evidenced by a structural deficit exacerbated by COVID-19);[17] Op-Ed, *An open response to Stanford leadership from the athletic community*, Stanford Daily (July 17, 2020) (lamenting the loss because "[c]ollegiate sports develop the next generation of leaders. They educate outside the classroom and should not be treated as a business within your school.").[18]

C. The Educational Character of Intercollegiate Athletics Depends on Rules That Keep Student-Athletes and Institutions Focused on Education, Not Profit.

From the earliest days of intercollegiate competition, colleges and universities recognized that if athletics is to meet its educational purpose, teams must be composed of *bona fide* students.[19] NCAA eligibility rules are designed to ensure they are. *See, e.g.*, *Bd. of Regents*, 468 U.S. at 101–102 (student-athletes must

---

[17] *Available at* https://news.stanford.edu/2020/07/08/athletics/.

[18] *Available at* https://www.stanforddaily.com/2020/07/17/an-open-response-to-stanford-leadership-from-the-athletic-community.

[19] *E.g.*, Jesse Feiring Williams, *The Crucial Issue in American College Athletics*, 20 The J. of Higher Educ. 12, 17 (1949) ("[S]ince athletics are accepted activities in the education of college students, all bona fide students shall be eligible to participate, and neither scholarship nor social status shall render student ineligible.")

go to class, must not be paid, and must make satisfactory progress toward degree); *see also* W.L. Dudley, *Athletic Control in School and College*, 11 Sch. Rev. 95, 101 (1903) ("[T]eams made up of hirelings * * * might win games, but the real object of college sport—the development of youth—would be entirely eliminated.").

The nations' colleges and universities have long determined that to permit institutions to pay student-athletes would fundamentally transform the institution-student relationship and undercut the educational character of athletics. For example, the total value of compensation—rather than the optimal educational opportunity—would tend to drive prospective student choices. Once on campus, where student-athletes are supposed to pursue vigorously both academics and athletics, there would be powerful incentives to focus only on athletics to maximize compensation (for the student) and to recoup a return on investment (for the institution). Student-athletes would no longer be "ordinary students," playing for the name on the front of the jersey as true members of the educational community the school represents. *See* ACE, *Academic Integrity*, *supra* at 6 ("Every effort should be made so that a student-athlete's life on campus mirrors as closely as possible the life of all students. * * * [S]tudent-athletes are students first * * * ."). Unchecked commercialism could overwhelm greater, common goals—the educational purpose and true value of intercollegiate athletics.

To be sure, some say it already has. Judge Smith wrote in his concurrence below, for example, that "[f]or all their dedication, labor, talent, and personal

sacrifice, Student-Athletes go largely uncompensated," while "coaches and others in the Division I ecosystem make sure that [they] put athletics first" and "the NCAA and Division 1 universities make *billions* of dollars." Pet. App. 53a-54a (No. 20-512) (Smith, J., concurring). But even if that were an accurate and complete characterization, and *amici* do not agree that it is, *amici* do not see how more commercialism is the answer. The Ninth Circuit's wielding of the Sherman Act here—where a single judge's view becomes the litmus test for NCAA rules—will aggravate, not solve the problem.

Because antitrust is a blunt instrument, myopically focused on market economics, it cannot be used to fine tune NCAA eligibility rules. Two common reasons offered for overriding the NCAA's eligibility rules—television revenue generated by some Division I football and basketball conferences, and coaches' salaries—are the result of prior applications of the Sherman Act. *Board of Regents* opened the door essentially to unlimited telecasts of college games. *See* 468 U.S. at 119–120. And *Law* v. *NCAA*, 134 F.3d 1010 (10th Cir. 1998), effectively required institutions to compete with professional sports organizations for coaches. *See id.* at 1024. Neither of those decisions, however, confronted the issue in this case: Whether intercollegiate athletics should be administered by the NCAA, exercising the collective educational judgment of its college and university members and viewing the multisided issues at play, or one district judge in California, invoking the narrow lens of the Sherman Act. The answer should be the former.

II. JUDICIAL MICROMANAGEMENT OF NCAA RULES THROUGH THE SHERMAN ACT RISKS UNDERMINING THE EDUCATIONAL PURPOSE OF HIGHER EDUCATION.

The Ninth Circuit's approach to the Sherman Act would allow a single California judge to usurp the NCAA's role. Such judicial micromanagement of the intercollegiate athletics rules is incompatible with the Sherman Act, subverts the educational judgment of higher education, and sets the stage for endless litigation and a potential rupture of athletics and education.

A. The Ninth Circuit Misapplied the Sherman Act.

The decision below is inconsistent with prevailing Sherman Act principles. To start, horizontal agreements on product-defining rules are necessary for intercollegiate athletics' existence, and no lengthy rule of reason analysis is therefore required to uphold them. *See Bd. of Regents*, 468 U.S. at 101; *Am. Needle, Inc.* v. *NFL*, 560 U.S. 183, 202–203 (2010). Put simply, the NCAA is a joint venture that can offer intercollegiate athletics as a product only if its members act collaboratively, including by agreeing to the scope of limits on student-athlete financial aid and assistance. That is why courts have consistently—except for the Ninth Circuit—found product-defining rules of the NCAA and other sports leagues to be procompetitive on a "quick look." The NCAA's agreed-upon eligibility rules have long defined the NCAA's product and are reasonably related to doing so. NCAA Br. 17-34; Conferences Br. 18-32. As a result, the eligibility rules can, and should, be upheld without resort to full-

blown rule of reason analysis—in the "twinkling of an eye." *Am. Needle*, 560 U.S. at 203 (citation omitted); *see Deppe* v. *NCAA*, 893 F.3d 498, 499, 502 (7th Cir. 2018) (upholding at the motion to dismiss stage the NCAA's "year-in-residence requirement" because it is a "rule clearly meant to preserve the amateur character of college athletics and is therefore presumptively procompetitive under [*Board of Regents*].").

The decision below also erred in steps two and three of its full rule of reason analysis. At step two, although the Ninth Circuit agreed that core components of the NCAA's amateurism rules served a procompetitive purpose (increasing options for sports fans), Pet. App. 34a–36a (No. 20-512), it required the NCAA to prove that each of its individual rules defining the concept were necessary to achieve it, *id.* at 39a–40a. In effect, it required the NCAA to prove that it had adopted the least restrictive (or most procompetitive) rules possible. That is not the correct standard. *See, e.g.*, *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58 n.29 (1977); *NFL* v. *N. Am. Soccer League*, 459 U.S. 1074, 1079 (1982) ("the least restrictive alternative analysis" is improper in a rule of reason case; the "antitrust laws impose a standard of reasonableness, not a standard of absolute necessity") (Rehnquist, J., dissenting from denial of certiorari); *Am. Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1248-49 (3d Cir. 1975) ("In a rule of reason case, the test is not whether the defendant deployed the least restrictive alternative" but "whether the restriction actually implemented is 'fairly necessary' in the circumstances of the particular case" or "exceed(s) the outer limits of restraint reasonably necessary to protect the defendant" (footnotes and citations omitted)); NCAA Br. 41-43; Conferences Br. 39-41.

In deciding whether the NCAA had proved that sports fans care about the minutiae of NCAA rules, the courts felt free to redefine amateurism according to their own view about what fans care about (that student-athletes not receive "unlimited cash payments akin to professional salaries"). Pet. App. 40a (No. 20-512). That is not appropriate: it is for the NCAA to define the product, not the court. It also essentially relieved the plaintiffs of their burden to prove a "substantially" less restrictive alternative. The Sherman Act does not authorize such judicial reinvention of the "product" at issue, just because a judge can conceive of a potentially less restrictive alternative that might still appeal to some portion of the market. Often, judges "can only speculate" about less restrictive alternatives—"a restraint can be 'reasonably necessary' even though some less restrictive alternative exists." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 1505, 1505b (4th ed. 2020 cum. supp.). The court below ignored those principles and took over the NCAA's role in defining intercollegiate athletics.

In addition, the court did so without a persuasive finding that its alternative would be "virtually as effective" and "without significantly increased cost." Pet. App. 40a-41a (No. 20-512) (citation omitted). For example, the lines the injunction drew—"compensation or benefits related to education," among others, *id.* at 167a-170a—are nice sounding but not self-limiting and are open to potential abuse. Practically speaking, the district court has required the build-out of an entirely new framework to define those terms and enforce the limits they set, as evidenced by the Ninth Circuit's opinion below. *See id.* at 47a-48a (parsing the injunction for the district court's intent).

Building a new regulatory framework carries "significantly increased costs" in ordinary circumstances. Even more so here, where the framework must be built under court supervision, with the possibility of a fight with plaintiffs at every step. The Ninth Circuit's claim that it is "[c]ommonsense" that the injunction "will actually save the NCAA resources that it would have otherwise spent on enforcing [existing] caps," rings hollow. *Id.* at 46a.

B. The Collective Judgment of Colleges and Universities Should Not Be Governed By a Single Judge's View of Consumer Preference.

The Ninth Circuit has replaced the collective judgment of the NCAA's members about how to design college athletics programs to support and maintain schools' educational mission with a poor substitute: one district court judge acting as a superintendent. Foreseeable problems with the district court's injunction underscore that the NCAA requires "ample latitude" to superintend college athletics. *Bd. of Regents*, 468 U.S. at 120.

Take, for example, the injunction's foundational requirement that the NCAA may not "fix or limit compensation or benefits related to education." Pet. App. 167a (No. 20-512). This judicially manufactured requirement is conceptionally noble but not administrable. How does one define what counts as bona fide "compensation or benefits related to education" when student-athletes attend school in-person, full-time and everything they do in some sense "relate[s] to education"? Arguments can and will be made that personal assistants, private masseuses, luxury housing, transportation, and sundry equipment and supplies

are "related to education." It is common sense that without some objective measure, the district court's standard works a fundamental transformation and is equivalent to "pay for play." The Ninth Circuit recognized as much: It felt the need to cabin the injunction to "legitimate education-related costs," because it "cannot have been the district court's intent" for "uncapped benefits to be vehicles for unlimited cash payments." *Id.* at 43a-44a (citations and emphasis omitted). But that only begs the question: just what are legitimate "compensation or benefits related to education"?

The NCAA already has a principal measure.[20] The NCAA allows institutions to cover student-athletes' full cost of attendance ("COA") as defined by the Higher Education Act of 1965, as amended. *Division I Manual*, *supra*, §§ 15.01.6, 15.02.2 (incorporating the federal definition), § 15.02.2.1 (permitting adjustments for individual circumstances). Under the federal definition, COA is set by each school, *see* 20 U.S.C. § 1087rr(a), and permits consideration of individual circumstances, *see id.* § 1087tt. COA includes living expenses, in addition to tuition and fees and room and board. *See id.* § 1087*ll*. More specifically, it includes "costs for rental or purchase of any equipment, materials, or supplies required of all students in the same course of study" and "an allowance for books, supplies, transportation, and miscellaneous

[20] Although COA is the principal measure, the NCAA also permits certain other forms of support to cover student-athletes' reasonable and necessary educational expenses (for example, support from the Student Assistance Fund and the Academic Enhancement Fund). The NCAA also permits modest achievement awards. *See* NCAA Br. 7-8.

personal expenses, including a reasonable allowance for the documented rental or purchase of a personal computer." *See id.* § 1087*ll*(1)–(2). It also includes an allowance for "reasonable costs" associated with study abroad. *Id.* § 1087*ll*(7).

The injunction replaces the NCAA's goal of an objectively understandable and administratively measurable standard with a generalization that is neither. Given the existing comprehensive federal COA definition, it is unclear what the district court means when it says the NCAA must permit receipt of "computers, science equipment, musical instruments and other tangible items *not included in the cost of attendance calculation* but nonetheless *related to* the pursuit of academic studies." Pet. App. 167a-168a (No. 20-512) (emphases added). The same goes for "expenses *related to* studying abroad that are *not included in the cost of attendance calculation*." *Id.* (emphasis added). One plausible reading—especially since the court's injunction purports to be a "substantially" less restrictive alternative—is that even if the COA includes a line item for such expenses, the NCAA may not stop an institution from exceeding it by any amount. That would open the door to the equivalent of unlimited cash payments: for example, student-athletes could receive money for a study abroad as part of a scholarship covering COA, and, on top of that, an all-expenses-paid luxury trip abroad.

The court's substitution of its own amorphous "standard" for objective NCAA member-endorsed rules offers other obvious opportunities for students to receive "cash payments similar to those observed in professional sports," *id.* at 109a, notwithstanding the

district court's protestations to the contrary. For example, the injunction requires the NCAA to permit post-eligibility paid internships. *Id.* at 167a-168a. Almost certainly, there are colleges and universities across America with enthusiastic alumni who would welcome the opportunity to offer internships with six figure (or more) salaries to student-athletes in particular sports at their beloved institutions. Guarantees of large payments and lavish housing associated with internships requiring little work could easily move to the forefront of recruiting pitches to high schoolers and potential transfers. This is just the sort of disguised, deferred cash signing bonus arrangement the NCAA has understandably sought to preclude.

What is more, the injunction builds in mechanisms for escalations in "compensation" and judicial micromanagement. Because any party can petition the Court for a modification of the injunction at any time, they can seek to expand the rules. *Id.* For example, after a few years of uncapped paid post-eligibility internships, it is easy to imagine a plaintiff arguing that because fans continued to watch, the court must now permit the same uncapped, paid internships to student-athletes before their eligibility expires too.

Finally, and crucially, as the district court endeavors to resolve disputes about the scope of the injunction, the logic of the underlying decision may constrain it to focus on the likely relative effect of the competing interpretations on viewer preferences. That cramped analysis makes the district court a poor substitute for the NCAA, which can consider all of the educational and other implications of a potential change. Whatever one thinks of the NCAA's eligibil-

ity rules, and there certainly may be room for improvement, condemning them under the Sherman Act and the district court's injunction are not the answer.

C. The Ninth Circuit's Approach Is a Recipe for Endless Litigation, and, Ultimately, a Potential Rupture of Athletics and Education.

If not corrected, the Ninth Circuit's approach sets higher education on an unsustainable path that could result in the rupture of intercollegiate athletics and education.

The decision below, combined with the Ninth Circuit's earlier decision in *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015), creates a situation in which every NCAA eligibility rule is subject to antitrust challenge (and the potential for treble damages). But endless antitrust litigation almost certainly means consumption of significant resources that could be better spent in support of higher education institutions' educational mission and their students. *See, e.g.*, Rick Seltzer, *NCAA Lawyers Up: Spending on outside lawyers jumped by $18 million in two years amid lawsuits*, Inside Higher Ed (July 16, 2019).[21] And any change in financial aid or assistance rules that does not result in lower television ratings sets the predicate for further expansion; and so it goes. If the Ninth Circuit decision is allowed to stand, there would be no

---

[21] *Available at* https://www.insidehighered.com/news/2019/07/16/ncaa-spending-outside-lawyers-rises-50-percent-two-years. The NCAA distributes a significant portion of its revenue to its higher education members and their conferences. *See, e.g.*, NCAA, *2019 Division I Revenue Distribution Plan*, *available at* https://ncaaorg.s3.amazonaws.com/ncaa/finance/d1/2019D1Fin_RevenueDistributionPlan.pdf.

clear outside limit, except, perhaps, as set by sports fans. Educational considerations would count for little, if anything.

This is not mere slippery-slope speculation. The district court here expressly "hoped that gradual change will be instructive." Pet. App. 118a (No. 20-512). "If it were persuaded to do so," the court said, "the NCAA could conduct market research and allow gradual increases in cash compensation to student-athletes to determine an amount that would not be demand-reducing." *Id.*

Amici respectfully submit that if the sea change the Ninth Circuit's approach portends is to come, it should come from a fulsome policy debate. It should not be driven by a misapplication of the Sherman Act.

III. COLLEGES AND UNIVERSITIES, NOT ANTITRUST COURTS, SHOULD SET THE REQUIREMENTS FOR INTERCOLLEGIATE ATHLETICS.

Self-governance and continuous improvement are hallmarks of American higher education and key to its success. For over a century, the higher education community has endeavored to keep education at the heart of intercollegiate athletics.[22]

---

[22] *See, e.g.*, Comm'n on Coll. Basketball, *Report and Recommendations to Address the Issues Facing Collegiate Basketball* (Apr. 2018), *available at* https://www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf; *Restoring the Balance, supra*; *Transforming the NCAA D-I Model*, *supra*; *Report Upon Athletics*, *supra*, at 24 ("Almost every year there are rumors that teams accept players whose connexion with the University is but nominal. * * * The great difficulty with athletic contests, in and out of College, is the passionate desire to win. It

The NCAA is a prime example. It is member-governed, with its Board of Governors "bringing together presidents and chancellors from each division" and volunteers from member schools populating "legislative bodies * * * that govern each division, as well as a group of committees that set association-wide policy."[23] This NCAA self-governance by its college and university members aligns with principles of institutional self-governance that have long-permeated American higher education. Although the rules the NCAA promulgates may be imperfect, colleges and universities acting through the NCAA (and other governing bodies, like the conferences) are far better suited than district courts to set the rules that govern intercollegiate athletics and keep education at its center.

The dynamic process of self-governance is evident in the NCAA rules the Ninth Circuit targeted below. *See* Pet. App. 69a–70a (No. 20-512) (tracing the evolution of the NCAA's approach to athletic scholarships, principally: first forbidding them; then, in 1956, allowing them for tuition and fees, room and board, books, and cash for incidental expenses; eliminating permissibility of cash for incidental expenses in 1976; and increasing the principal overall limit to COA in 2016). The district court erred in viewing these changes over time as evidence supporting Sherman Act liability rather than as part of an ongoing effort by the NCAA to authorize member schools to support student-athletes

---

leads men to strain the rules of the sport and sometimes to break them * * * .").

[23] *Governance*, NCAA, https://www.ncaa.org/governance (last visited Feb. 8, 2021).

in ways consistent with the overall educational mission of higher education. *Id.* at 92a.

However, the changes represent the NCAA's evolving and considered judgment about how institutions can effectively support students in obtaining their education without undermining education as a primary purpose of intercollegiate athletics. As the NCAA establishes rules, it can take into account the many factors and stakeholder interests that are important to its members as educators: history of enforcement and potential for abuse, likely effect on academics, Title IX, and how a change might alter institutions' ability to field a full complement of teams, to name just a few. *See, e.g.*, *Promoting the Well-Being and Academic Success of College Athletes: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 113th Cong. 42, 51–53 (2014) (statement of Dr. Mark A. Emmert, President, NCAA) (supporting increasing permissible athletic scholarships to full cost of attendance but noting effects on less well-resourced institutions and emphasizing the need to make sure efforts do not undermine Title IX).[24] Fan preferences are, at best, one aspect of the assessment, and, from the perspective of institutions' primary missions and obligations to their student-athletes, not the most important. *Cf.* Pet. App. 103a–104a (No. 20-512) (30-year NCAA employee could "not recall any instance in which any study on consumer demand was considered by the NCAA membership when making rules about compensation").

---

[24] *Available at* https://www.govinfo.gov/content/pkg/CHRG-113shrg96246/pdf/CHRG-113shrg96246.pdf.

Courts should not lightly second-guess those assessments, and, for the reasons explained above, the Sherman Act offers no basis to do so here.

Intercollegiate athletics has provided untold educational opportunities for countless student-athletes. *See supra* Part I.A. There have been, and will continue to be, calls for reform.[25] As in the past, reasonable minds can differ, and higher education self-governance structures can and should address legitimate proposals. However, if education through athletics is to have a future, the Ninth Circuit's blunderbuss approach to the Sherman Act cannot.

---

[25] *See, e.g.*, *Transforming the NCAA D-1 Model*, *supra*, at 13 (referring to media and court challenges as well as legislative initiatives, including five states that adopted "Name, Image, Likeness" rules).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

PETER G. MCDONOUGH
AMERICAN COUNCIL ON EDUCATION
One Dupont Circle
Washington, DC 20036
(202) 939-9300

JESSICA L. ELLSWORTH
Counsel of Record
STEPHANIE J. GOLD
JOEL D. BUCKMAN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5886
jessica.ellsworth@hoganlovells.com

Counsel for Amici Curiae American Council on Education and Ten Other Higher Education Associations

FEBRUARY 2021