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 AMICI CURIAE AFRICAN AMERICAN ANTITRUST LAWYERS IN SUPPORT OF RESPONDENTS


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## INTEREST OF AMICI CURIAE[1]

This brief is submitted on behalf of a group of African American antitrust lawyers who are concerned about both the proper interpretation of the federal antitrust laws and the well-being of the most vulnerable and overlooked people affected by the NCAA's admitted anticompetitive conduct—the thousands of African American student athletes who do not make it to the professional leagues, do not graduate from college, and whose labor is taken without market rate compensation. Amici have decades of experience as antitrust practitioners—in government enforcement offices, in private practice at some of the nation's largest law firms, and as an antitrust law professor.

Patrick A. Bradford is an Adjunct Professor of Law at Fordham University School of Law, where he teaches Antitrust Law. He also is a Founding Partner of Bradford Edwards & Varlack LLP, where he specializes in complex business and regulatory litigation, including representing clients before the Department of Justice, Securities and Exchange Commission, Federal Trade Commission, and the Financial Industry Regulatory Authority.

Heather Souder Choi is a partner and corporate investigations and competition lawyer at a major international law firm. She represents corporations and individuals in criminal and civil enforcement

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[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.

matters before the Department of Justice, Federal Trade Commission, Securities and Exchange Commission, and other state and federal agencies.

Christopher Wilson is a senior associate and antitrust litigator for an international law firm, and is based in Washington, D.C. Mr. Wilson is also a former Division 1 football player, who played running back and fullback for a university in a Power 5 conference.

Amici believe that the Petitioners' framing of the issues before the Court lacks pragmatism and permits fiction to trump reality, to the detriment of many talented Black athletes and their families. The procompetitive justification stands directly at odds with the NCAA's purported not-for-profit mission—using sport to advance the educational experience of student athletes. As a result, student athletes are used and discarded without any compensation for their full-time jobs as athletes other than, if they graduate, a college education of diminished value due to colleges' insistence on players prioritizing education second to athletic performance.

The pragmatism requested by *amici* is based on several factors, including the record evidence in the district court about racial facts of Division I football and basketball, recent scholarship of African American history, and the Second Civil Rights Movement represented by the casually brutal killing of George Floyd. For decades Black Americans have been saying that our treatment by the larger society is unequally harmful in myriad ways, both large and small. And the insouciant violence and death routinely visited upon Black lives, means that in all matters—hiring, career advancement, schooling,

business funding—African Americans continue to face significant difficulties. "Bird watching while Black," "Fathering while Black," "Jogging while Black," and "Waiting at Starbucks while Black" encapsulate the lived and unequal experiences of even well-educated and wealthy Black Americans. Fortunately, a majority of American citizens now recognize this ongoing racial disparity. And new scholarship documents and clarifies these facts. See, e.g., Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (W. W. Norton & Company, 2017); Keeanga-Yamahtta Taylor *Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership* (University of North Carolina Press, 2020); Isabel Wilkerson *Caste: The Origins of Our Discontent* (Random House, 2020).

With this brief, amici curiae address the irreconcilable conflict between the NCAA's not-for-profit mission and the single procompetitive justification of increased viewership for Division I college football and basketball games. They have an inverse relationship. Thus the procompetitive justification should bear little or no weight in the rule of reason analysis in this case, and the NCAA's limits on player compensation should be deemed unlawful.

## SUMMARY OF ARGUMENT

The Ninth Circuit followed the correct guidance in applying *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984), see also *American Needle* v. *NFL*, 560 U.S. 183 (2010); *O'Bannon* v. *NCAA*, 802 F.3d 1049 (9th Cir. 2015), cert. denied 137 S.Ct. 277 (2016). There is nothing in the Court's jurisprudence that presages the relief requested by Petitioners, that a district court is foreclosed from conducting a full rule of reason

analysis when NCAA rules are challenged. If this were so, the O'Bannon case should have been summarily dismissed. The NCAA's rulemaking scheme is so broad and convoluted, and its reliance on "amateurism" so complete (but only to prevent player compensation), that a grant of the relief requested by Petitioners would be both unprecedented and dangerous.

The NCAA should not be permitted to rely on the myth of amateurism to support a special rule for it and its member organizations. Petitioners seek an exception to antitrust law in their labor market based on a justification that refusing to pay its workers helps it distinguish itself in the collateral consumer market. The Respondents are not pure amateurs under any reasonable analysis, and the district court made findings of fact supporting that analysis after a 10-day trial. Division I football and basketball generate billions of dollars in TV and other revenue for the NCAA and its member colleges and universities. Respondents' Brief, pp. 5-6. But this overwhelming revenue actually harms the not-for-profit mission of the NCAA, and especially harms Black athletes in Division I football and basketball programs.

The more money a school makes, the more its coaches and administrators force student athletes to prioritize athletics over education. If the athletes do not comply, their annual scholarship will not be renewed. This inverse relationship between the NCAA's not-for-profit mission and the commercial, purportedly procompetitive justification of expanded TV audiences and revenue, establishes the procompetitive justification is no justification at all in this case. This inverse relationship warrants a

rejection of the stated procompetitive justification of "amateurism" as relevant to justify the admitted anticompetitive labor conduct.

At a minimum, amici urge the Court to uphold the Ninth Circuit's decision below. This Court's precedent strongly supports the application of a full rule of reason analysis for the NCAA, as a not-for-profit organization. As Judge Smith noted in his concurrence, this Court has never expressly held that a procompetitive justification in an collateral antitrust market is sufficient to permit anticompetitive conduct in a primary antitrust market. Pet. App. 60a. In a case like this, where the procompetitive justification both lies in a collateral market and also thwarts the not-for-profit mission of the organization, the procompetitive justification should be held insufficient to sustain the anticompetitive conduct. Only a procompetitive justification that is, in practice, consistent with the mission of a not-for-profit collective should warrant consideration under a rule of reason analysis. And if a "quick look" applies, it only should apply to recognize the NCAA's conduct is irredeemably anticompetitive and unlawful.

## ARGUMENT

### I. The rule of reason properly guides the analysis here as the myth of amateurism yields to evidence that players are professionals.

The Ninth Circuit's decision should be affirmed. As set forth in Respondents' Brief, the NCAA's horizontal restraints call for a complete rule of reason analysis that centers on the relationship between the conduct and the essential function of the enterprise. *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984); *American Needle* v. *NFL*, 560 U.S. 183 (2010). Nothing in the Court's

jurisprudence requires a "quick look" application of the rule of reason in this case to aid the NCAA's anticompetitive behavior. The rule of reason is an analysis that takes place on a sliding scale, depending on severity of the conduct. In this case the conduct is extremely severe. The NCAA and its member schools are engaged in blatant horizontal price fixing that plainly violates Section 1 of the Sherman Act. And the antitrust harm is significant, as the difference between what the NCAA permits its members to pay Division I football and basketball players, and what the mostly African American players would make in a free market, is likely hundreds of millions of dollars, if not billions. Given these facts, it was well within the discretion of the district court to conduct its searching analysis.

Amateurism in Division I football and basketball has been a myth for decades. The record below establishes the massive amount of money that changes hands based on the entertainment provided by athletes, and the priority the NCAA allows schools to place on athletics over education. E.g. Pet. App. 96a-97a (discussing "very large" overall revenues and television contracts in the billions of dollars).

To support that revenue, Division I football and basketball players are professional athletes, given what is expected of them on and off the field and the forced prioritization of athletics over education, even during the "off-season." Jake New, "What Off-Season?" *Inside Higher Ed* (May 8, 2015),[2] see also Christopher Saffici and Robert Pellegrino, "Inter-

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[2] Available at: https://www.insidehighered.com/news/2015/05/08/college-athletes-say-they-devote-too-much-time-sports-year-round.

collegiate Athletics vs. Academics: The Student-Athlete or the Athlete-Student," *The Sport Journal* (Nov. 19, 2012).[3] In his concurrence in the Ninth Circuit, Judge Smith addressed the myth of amateurism that today defines the college experience of Division I football and basketball players, pointing out how they must prioritize sport over education. Pet. App. 62a. That indictment destroys the NCAA's argument of idyllic amateurism so thoroughly that the American Council on Education specifically challenged Judge Smith's reasoning here. Brief of Amicus Curiae American Council on Education in Support of Petitioners ("Council Br.") at 20-21. But in its brief, even the American Council on Education acknowledged the warring relationship between the NCAA's not-for-profit mission and "[u]nchecked commercialism," which is the cornerstone of the "procompetitive justification" for chasing increased viewership and revenues. *Id*. at 20.

That conflict has only gotten worse over time. In 2016-17, 91,775 men played NCAA football or basketball, but only 303 were drafted by major league professional teams. See "Student Athlete," Directed by Trish Dalton & Sharmeen Obaid-Chinoy (HBO, 2018). A recent documentary produced by Lebron James follows the lives of four African American Division I athletes—Mike Shaw (Illinois and Bradley), Shamar Graves (Rutgers), John Shoop (Purdue) and Silas Nacita (Baylor). Shaw, upon returning home after leaving Bradley without a college degree, speaks with his grandfather, noting that his scholarship was

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[3] Available at https://thesportjournal.org/article/intercollegiate-athletics-vs-academics-the-student-athlete-or-the-athlete-student/.

worth $200,000: "It really wasn't free though . . . . You're like a slave under the coach." *Id.* The documentary also reveals the primacy of athletics over academics. *Id.* "Once they [Shaw, Nacita and Graves] arrived on campus, the were disabused of the idea that they were there for academics. Obtaining a degree was secondary to their obligations to their athletic programs, even if it left them with few options at the end of their eligibility." Soraya Nadia McDonald "'Student Athlete,' the latest doc from LeBron James, examines the exploitation of college athletes," *The Undefeated* (October 2, 2018).[4] See also Patrick Hruby, "Four Years A Student-Athlete: The Racial Injustice of Big-Time College Sports," *Vice* (March 4, 2016);[5] Brandi Collins-Dexter "NCAA's amateurism rule exploits black athletes as slave labor," *The Undefeated* (March 27, 2018);[6] Taylor Branch, "The Shame of College Sports," *The Atlantic* (October 2011).[7]

It is indisputable that the more money the NCAA and its member schools make from increased TV viewership (the collateral market procompetitive justification asserted by the NCAA for its admitted anticompetitive behavior) the more coaches and

[4] Available at: https://theundefeated.com/features/student-athlete-hbo-documentary-from-lebron-james-examines-the-exploitation-of-college-athletes/.

[5] Available at: https://www.vice.com/en/article/ezexjp/four-years-a-student-athlete-the-racial-injustice-of-big-time-college-sports.

[6] Available at: https://theundefeated.com/features/ncaas-amateurism-rule-exploits-black-athletes-as-slave-labor/.

[7] Available at: https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.

administrators will force players to act even less as amateurs and more as professional athletes. This inverse relationship means that harm to the NCAA's not-for-profit mission, student advancement, inevitably will increase as viewership and revenues increase. More money means more time preparing for the next game, to the detriment of all else, including educational matters.

There is simply too much money at stake to permit these young players to put their educations first. The billions in TV and related revenue have put undeniable pressure on everyone responsible for stewarding these young players—coaches, professors, and administrators at NCAA member colleges and universities—to treat the players as professional athletes first, and students second—except on compensation. The facts demonstrating that these young men and women already are treated like professional athletes, to the elimination of any true concern about education, have been clear for years. Academically unfit athletes routinely are accepted for their performance on the field. Academically gifted African American athletes are coerced to change majors so chemistry labs will not conflict with football practice. See, e.g. Ben Strauss "Northwestern Quarterback Makes His Case for a Players' Union," *New York Times* (Feb. 18, 2014) (African American football player Kain Colter entered university intending to become an orthopedic surgeon, but Chemistry class conflicted with football practice and had to change his major to Psychology). The larger the audience for college games, the more money the NCAA and its members receive, the more unavoidable pressure is put on the athlete-students to perform as professionals on and off the field.

The procompetitive justification's unavoidable clash with the NCAA's not-for-profit mission also is evident in the basic fact that the NCAA has fought the injunction at issue all the way to this Court. The district court's injunction only (1) limits caps on "academic or graduation awards or incentives, provided in cash or cash equivalent" insofar as they are dwarfed by allowable athletic awards and incentives and (2) eliminates "limits on other education-related benefits." Pet. App. 163a-64a. The NCAA allows athletic performance awards adding up to thousands of dollars and payment for families' travel to sporting events, Pet App. 86a-89a, and the district court simply recognized that, to the extent the NCAA disallows equivalent educational benefits, it should not be allowed an exception to basic antitrust law in contravention of its own mission, Pet. App. 163a-64a.

Thus, there is an irreconcilable conflict between the NCAA's not-for-profit mission to use sport for the betterment of young student-athletes' educational development, and the billions earned from televising Division I games. As noted in the amicus brief of the American Council on Education the goals of college athletics center on the student-athlete:

> 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 mission of higher education—and

> can have a transformative positive impact on students' academic achievement, citizenship, and growth as leaders and role models.

Council Brief, p. 1. This not-for-profit mission is unchanged since the NCAA's founding in 1905, but the NCAA and its members have changed greatly, reaping billions of dollars in revenue from increased TV viewership. Nowhere does the mission mention "make billions of dollars for the member colleges and universities." Yet, even assuming it is true that refusing to pay players provides significant income benefit to the schools—it does not, Pet. App. 96a-98a—that is not the mission. And any purported viewership revenue decrease (decline in purportedly procompetitive output) would not harm the NCAA's not-for-profit mission. The success of Division II and III makes the point—outsized revenues are not required for intercollegiate athletics that hew to the NCAA's not-for-profit mission.

The NCAA argues that increased viewers (and revenue) justifies its anticompetitive conduct, even though it is not within the primary antitrust market for the athletic labor of the players, but rather in a collateral market. But the NCAA is a not-for-profit organization, as are its member schools. They are not competing with major professional leagues for viewership and revenue to gain profits. Their actions must be in pursuit of their missions. Thus, the procompetitive justification they assert must be related to the non-profit mission, rather than profit generation. *Smith* v. *Pro Football*, 593 F.2d 1173, 1186 (D.C. Cir. 1978). And the judicial analysis should acknowledge the great harm to the not-for-profit mission and the evident and concomitant harm facing Division I football and basketball players as the

outcome of "amateurism" in its current form. The procompetitive justification provides only negative mission impact, and it cannot justify the massive harm. For that reason, it should not be considered an appropriate justification for the NCAA's anticompetitive conduct.

"Unchecked commercialism could overwhelm greater, common goals—the educational purpose and true value of intercollegiate athletics." Council Br. at 20. Amici are among those who recognize 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." Pet. App. 54a. But all the while, everyone else involved shares—unchecked—in the billions of dollars of revenue generated and greatly benefits from the ever-growing commercialism. *Id.*

Division I football and basketball players now support a multi-billion industry for televised games. Whatever the initial intention of the NCAA when first founded, those bucolic times are past for Division I football and basketball players. Today, the indicia of professional athleticism expected from Division I players are well-known. Judge Smith noted this circumstance in his concurrence below. *Id.* Numerous news features and academic studies have detailed the professional nature of Division I college sports.[8] The

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[8] See, e.g. Gatmen, Elisia J.P. (2011), "Academic Exploitation: The Adverse Impact of College Athletics on the Educational Success of Minority Student-Athletes," Seattle Journal for Social Justice: Vol. 10: Iss. 1, Article 31; Murty, Komanduri S. et al. (2014), "Race and Class Exploitation: A Study of Black Male Student Athletes (BSAS) on White Campuses, Jean Ait Belkhir, Race, Gender & Class Journal, Vol. 21, No.3/4; McCormick, Robert A., et al. (2010), "Major College Sports: A Modern

myth of amateurism is also disclosed by the many academically unqualified players who are admitted to colleges and universities solely to play ball. So too the many academically gifted African American players who are made to compromise their academic learning for the "good of the game." And as Respondents point out in their brief, only professional athletes would be called upon to play, and put their lives at risk, in the midst of a once-in-a-century pandemic. Division I football and basketball players are primarily billion-dollar, profit generating players. From the NCAA's perspective, they are students only as an after-thought, if at all.

## II. Applying the myth of amateurism results in significant harm to Black players

This harm caused by the NCAA's market manipulation is exacerbated for Black athletes, who comprise a great majority of the players, but who graduate at a significantly lower rates than their White teammates. NCAA Commissioner Robert A. Bowlsby, II testified here about the changing racial make-up of Division I football and basketball in the 1990s and thereafter, noting that the majority of players are now African American. *In re National Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.* No. 4:14-md-02541, Doc. 1116-7 at 24 (N.D. Cal. Oct. 24, 2018 ("Well, I think it's our football and basketball teams are more populated by minority students athletes than they were in the '80s and '70s."). Bowlsby stated the obvious—African American young men and women dominate Division I foot-

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Apartheid," 12 Tex. Rev. Ent. & Sport L. 13; Jasmine Harris, "College athletes don't have time to be students," Houston Chronicle (Oct. 15, 2018).

ball and basketball. And their dominance correlates with the huge increases in TV and other revenue that for the past two decades have created a $20 billion annual industry. It is an undeniable fact that this multi-billion-dollar business has been built and is maintained by Black labor. It is also true that the Petitioners in this case do not challenge the relevant antitrust market as that for the athletic labor of these mostly Black athletes. The NCAA's admittedly anti-competitive compensation rules thus rob hundreds of millions of dollars from the Black community each year.

While robbing the Black community of fair compensation for labor, the schools are not providing the value they claim. The NCAA points to rising graduation rates, but its most recent data also show that Black Division I football players graduate at a rate significantly lower than their White peers. *In re National Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.*, Joint Exh. 18 (Joint Exh. 18) at J0018-0017. Importantly, the history of this issue is undeniable. Academic qualifications were lowered, yet the admitted students who need more academic help were simply to "shut up and dribble." They were never admitted for any purpose other than playing sports. See, generally, Michael J. Mondello (2000), "An Historical Overview of Student-Athlete Academic Eligibility and the Future Implications of Cureton v. NCAA, 7 Jeffrey S. Moorad Sports L.J.; Shaun R. Harper, "Black Male Student-Athletes and Racial Inequalities in NCAA Division I College Sports," USC Race and Equity Center (2018). In short, for the past 20 years the promise of a college education in exchange for athletic labor has been a ruse for many Black players. The NCAA and its members simply

"use these young men up" and leave them with little to build a financial future upon. *Id*.

The NCAA refuses to pay players in the name of amateurism, undermining the NCAA and its member schools' stated mission—using sport to enhance the educational life of student athletes. The myth is buoyed by the idea that young men and women receive a college education in exchange for their labor on the field. That education should prepare them to make a living after their college playing days are over. This is an incredibly important "exchange," given a tiny percentage of Division I football and basketball players play professionally after college. But 32 percent of Division I athletes also do not graduate. And there is a significant racial disparity—while 27 percent of white players do not graduate, 41 percent of African American players do not graduate. Joint Exh 18 at J0018-0043.

A study at the University of North Carolina found that between 2004 and 2008, 60 percent of football and basketball players read between fourth and eighth-grade levels. Sara Ganim, "CNN analysis: Some college athletes play like adults, read like 5th-graders," *CNN* (Jan. 8, 2014).[9] It would fulfill the NCAA's mission if schools took those students in and educated them. But the procompetitive justification creates incentives to just keep them eligible, rather than help them succeed outside of football or basketball. See *Id*., see also Andrew Graham and Sam Ogozalek, "Some SU athletes said they were

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[9] Available at: https://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/index.html

forced into majors 'they did not want,' following national trend," *The Daily Orange* (Feb 14, 2018).[10]

For those who do graduate, their degrees often are not as valuable as non-athletes. Placing athletes in less time-consuming majors and other measures taken to keep them eligible to play "allow players to get easy degrees that give them little chance of finding a job consistent with their peers, many of whom had more time and academic prowess to spend on more challenging majors or will go to graduate school." Kevin Trahan, "Athletes are getting degrees, but does that actually mean anything?" *SB Nation* (July 9, 2014).[11] While coaching at Stanford University, current University of Michigan Coach Jim Harbaugh stated about his *alma mater*: "Michigan is a good school and I got a good education there . . . but the athletic department has ways to get borderline guys in and, when they're in, they steer them to courses in sports communications. They're adulated when they're playing, but when they get out, the people who adulated them won't hire them." Dave Birkett, "Birk's Eye View: Jim Harbaugh slams the joke that is most non-conference schedules," *The Ann Arbor News* (Aug. 3, 2009).[12]

In other words, the exchange is not fair, and that is self-evident in the fact that the NCAA must enact

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[10] Available at: http://dailyorange.com/2018/02/su-athletes-said-forced-majors-not-want-following-national-trend/

[11] Available at: https://www.sbnation.com/college-football/2014/7/9/5885433/ncaa-trial-student-athletes-education

[12] Available at: http://www.annarbor.com/sports/birks-eye-view-jim-harbaugh-slams-the-joke-that-is-most-non-conference-schedules/

artificial restraints to limit compensation. Those limits do not stop at preventing cash payments. On top of the additional limits discussed above and in the district court's opinion, e.g. Pet. App. 81a, Division I college athletic scholarships generally are only a one-year commitment. A career ending injury, even one received while hustling for the team, means the scholarship often disappears. That is a clear indication of professionalism—the inability to perform athletically ends a player's *academic* career. This breed of "amateurism" is not primarily about education; it is about playing well to increase institutional profits for purportedly non-profit organizations. And African American athletes disproportionately suffer the consequences of this restraint of trade.

## III. The inverse relationship between the NCAA's mission and the procompetitive justification undermines lifting antitrust restrictions on a cartel manipulating the labor market.

The standard antitrust quick look analysis is inapplicable to the current case as the NCAA seeks to apply it. The "quick look" allows courts to quickly determine that restraints violate Section 1. *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 770 (1999). It is not a rubber stamp to shortcut allowing anticompetitive behavior. When the purportedly reasonable justification for restraining trade greatly erodes the mission of a not-for-profit organization, it should not be permitted to justify the anticompetitive conduct. And the not-for-profit NCAA's mission (including its not-for-profit member colleges and universities) is in direct conflict with the purported procompetitive justification (increased TV viewership

and revenue). The old adage that money changes everything is applicable here.

The NCAA fulfilled its student-centric mission for decades, well before there was interest in televising the Division I football and basketball games. Indeed, it apparently still does in its lower divisions. But the billions of dollars in revenue for Division I football and basketball now harms the ability of the NCAA and its member schools to fulfill its not-for-profit mission. The well-being—academic, mental and social—of the players is severely thwarted by the ever-present emphasis to win on the field. Wins bring more money to coaches, athletic directors, and college coffers. Alumni giving explodes when college teams win in televised games.

The Court should reject the NCAA's position that it is entitled to the presumption that any NCAA rule purportedly seeking to maintain its "amateurism" should be allowed. That presumption would give the NCAA and its member schools carte blanche to limit support for players, many of whom need the extra support if they are to graduate with a meaningful education.

The procompetitive justification is an admission that the NCAA and its member schools simply do not want to pay the players so they can keep the billions of dollars in revenue for themselves. Everyone associated with Division I football and basketball is treated as a professional—compensated for his or her labor at market rates—except the athletes who sustain the highly commercial enterprise.

At a minimum the Court should affirm the Ninth Circuit's decision. In addition, the Court should acknowledge the NCAA's procompetitive justification

contradicts the organization's not-for-profit mission. The NCAA simply wants to maintain its source of cheap labor—a practice as old as the nation. And one always done with greater ease when African Americans' labor is exploited.

## CONCLUSION

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

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