Nos. 20-512, 20-520

IN THE

Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

SHAWN ALSTON, ET AL.
Respondents.

AMERICAN ATHLETIC CONFERENCE, ET AL.,
Petitioner,

v.

SHAWN ALSTON, ET AL.
Respondents.

ON WRITS OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF PLAINTIFF CLASS REPRESENTATIVES ON BEHALF OF THE CERTIFIED CLASS IN *O'BANNON v. NCAA* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Ninth Circuit erroneously held, in conflict with decisions of other circuits and general antitrust principles, that the National Collegiate Athletic Association eligibility rules regarding compensation of student-athletes violate federal antitrust law.

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INTEREST OF *AMICI CURIAE*

Amici have a strong interest in the Question Presented because they have direct personal experience with the restraint of trade at issue in this case. [1] *Amici* include former NCAA Division I ("DI") men's basketball and Football Bowl Series ("FBS") football players who have intimate familiarity with the multi-billion-dollar business of college athletics. A full list of *amici* is provided in the Addendum to this Brief.

Amici file this brief in their capacity as representatives of a plaintiff class that successfully sued the NCAA for violations of Section 1 of the Sherman Act and won ongoing injunctive in *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S.Ct. 277 (2016). *Amici* prevailed after a 15-day bench trial in the district court that involved 23 witnesses and 287 trial exhibits and produced a transcript of 3,395 pages and a written decision of 99 pages. That record refutes the NCAA's defense of "amateurism" in this Court.

Amici have seen and experienced first-hand the unjust results of the NCAA's untenable position that it may prohibit its member schools from competing for the talents and services of the young athletes who make this billion-dollar business possible – while, at

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[1] All parties have submitted letters to the Clerk granting blanket consent to the filing of amicus curiae briefs. Pursuant to U.S. Sup. Ct. R. 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or its counsel made such a monetary contribution.

the same time, permitting all others connected with the fruits of the athletes' contributions, including coaches, administrators, videogame makers, sponsors, and broadcasters, to reap astronomical economic returns from the enterprise. This Court should reject the NCAA's purported justification of "amateurism" and affirm the judgment below.

It is no accident that the highest-paid state employees in 40 states across America are not governors, university presidents, or scientists working on critical discoveries but rather head coaches of NCAA football and basketball athletic programs. Head coach salaries (let alone total compensation) frequently run into seven figures. And the second- and third-most-highly compensated public officials in many states are assistant coaches at the flagship state university, football and basketball coaches at rivals to the flagship school, and others benefitting from the multi-billion-dollar business of NCAA sports. At the University of Kentucky, *every* varsity coach earns more than the school's average salary for tenured professors.[2]

Amici are aware that certain former student-athletes have filed an *amici curiae* brief in support of Petitioners, and further that a press report has raised questions concerning that brief.[3] *Amici* are confident

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[2] Direct Testimony of Daniel Rascher, *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541-CW (N.D. Cal.) (ECF No. 994) at ¶ 49.

[3] See Daniel Libit, *Pro-NCAA Athletes Petitioning SCOTUS Struggle to Stay on Message*, SPORTICO (Mar. 2, 2021), https://www.sportico.com/leagues/college-sports/2021/pro-ncaa-athletes-petitioning-scotus-struggle-to-stay-on-message-1234623765/ (reporting that "in recent interviews, several of the brief's signatories, including its most high-profile name—two-

that the class representatives from the *O'Bannon* litigation represent the best interests of student-athletes in this litigation.

SUMMARY OF ARGUMENT

I. The *O'Bannon* case created an extensive factual record documenting the anticompetitive impact of the NCAA's restraint of trade and the absence of procompetitive justifications, unlike *NCAA v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984), which lacked any relevant factual record on "amateurism." In *O'Bannon*, the Ninth Circuit unanimously affirmed the NCAA's antitrust liability and properly rejected the NCAA's claim to effective immunity under *Board of Regents*. 802 F.3d 1049. Indeed, the Ninth Circuit explained that the "[b]y and

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time Heisman Trophy runner-up and retired NFL running back Darren McFadden—suggested they weren't actually clear with which side they were on, at least when it comes to amateurism, or had joined in the effort for largely peripheral reasons. . . . In a telephone conversation last week, McFadden indicated that he was largely unaware of what the grant-in-aid litigation was about and gave indications that his intuitions were more in line with the plaintiffs. 'Once you are an adult, you want to make sure you can take care of your family…. You don't really get that opportunity to help your family out [while in college],' McFadden said, later adding that he supported college athletes getting an additional stipend to their scholarship. When asked about what personal experiences had informed his perspective on the subject of college athlete compensation, McFadden spoke about being an SEC football star who was unable to afford paying a $50 parking ticket. In a separate interview, Walter Bond, a former basketball star at Minnesota who played four seasons in the NBA, said that despite being part of the *amici curiae*, he believed college athletes were, in fact, employees of the universities they played for—a nonstarter for any legal defense of amateurism. 'I think I must have misunderstood,' Bond later said about the case, acknowledging that it was possible he didn't actually agree with the NCAA's position.").

large, the NCAA does not challenge the district court's findings." *Id.* at 1070.

The *O'Bannon* record refutes the NCAA's asserted procompetitive benefit of "amateurism" and proves that there is a complete disconnect between that so-called "revered tradition" and the reality of college sports. College football and basketball became widely popular and commercially successful long before the NCAA even attempted to enforce restrictions on the compensation of athletes. Indeed, during the "golden age" of college football and basketball (from the 1920s to 1950s, when they were more popular than the NFL or NBA), athletes at many colleges could and did receive compensation and benefits from their schools, as well as from third parties. The NCAA did not begin to impose enforceable rules restricting the compensation and benefits of college athletes until 1957, long after college sports had become a cherished part of American life. And those rules were adopted not to protect student-athletes. Rather, they were created as part of a legal strategy to prevent federal and state governments from treating college athletes as employees in order to avoid workers' compensation and other labor regulation.

The *O'Bannon* record shows that the NCAA cannot meet its burden of showing that its restraint of trade is "essential if the product is to be available at all." *Board of Regents*, 468 U.S. at 101. The *O'Bannon* court found that "the evidence presented at trial suggests that consumer demand for FBS football and Division I basketball-related products *is not* driven by the restrictions on student-athlete compensation but instead by other factors, such as school loyalty and geography." 7 F. Supp.3d at 1001 (emphasis added). This finding has been strengthened by the subsequent conclusions of a commission chaired by former

Secretary of State Condoleezza Rice. Even widespread scandals and payments to student-athletes have not depressed consumer demand for college football and basketball – let alone shown that the NCAA's restraint of trade is "essential" to its product.

II. History shows that, whenever its restraint of trade is challenged, the NCAA responds with dire predictions that any changes will lead to the destruction of college athletics. For example, in the *Board of Regents* case, the NCAA told this Court that permitting schools freely to compete to sell their broadcast rights would be an existential threat to college sports and consumer demand. Yet the NCAA's predictions have never come to pass. In fact, the opposite has been true. Thanks to the relief won in the *O'Bannon* case, college sports have never been more popular.

Indeed, after arguing in *O'Bannon* that *any* payment to student-athletes for use of their name, likeness, and image (NIL) would be anathema under principles of "amateurism," the NCAA's governing body voted unanimously in 2019 to permit NIL payments — in direct contradiction to its position in *O'Bannon.*

III. The real-world impact of the judicial relief granted in the *O'Bannon* litigation further refutes the NCAA's "amateurism" theory. As a result of rule changes in response to the *O'Bannon* case, college athletes receive thousands of dollars in additional benefits each year. Students have received reimbursement for such purposes as apparel, equipment and supplies, transportation and lodging for families to attend championship games, entry fees and facilities use, expenses in connection with

championship events, Olympics and national team tryouts, fees for conditioning activities, participation awards such as "gift suites," and insurance policies to cover risk of professional earnings loss. Some of these benefits amount to tens of thousands or even hundreds of thousands of dollars in value.

This development has created a natural experiment testing the impact of compensation on consumer demand or the health of college sports. And the answer is clear: there been no injury or impairment – let alone any indication that the NCAA's restraint of trade could somehow be "essential" to its product. The NCAA's "amateurism" defense should once again be rejected and the judgment below affirmed.

ARGUMENT

I. The Exhaustive Factual Record of the *O'Bannon* Case Refutes the NCAA's Asserted Defense of "Amateurism."

The NCAA's legal burden before this Court is substantial: in arguing that its restraint of trade passes muster under the Rule of Reason, it must show that the restraint is "essential if the product is to be available at all." *Board of Regents*, 468 U.S. at 101; *see also American Needle, Inc. v. National Football League*, 560 U.S. 183, 203 (2010) (agreement in restraint of trade may not be unlawful under the Rule of Reason where "the agreement ... is necessary to market the product at all") (internal quotation marks and citation omitted).[4]

[4] The NCAA seizes on a snippet from *Board of Regents* in which this Court explained that, "[i]n order to preserve the character and quality of the 'product,' athletes must not be

The record in the *O'Bannon* case makes clear that the NCAA cannot meet this burden. *O'Bannon* was the subject of a 15-day bench trial in the Northern District of California, which included the testimony of 23 witnesses and 287 exhibits and generated a transcript of 3,395 pages and a written decision of 99 pages. The NCAA also agreed to a long list of stipulated facts. Thus, the *O'Bannon* case created an extensive factual record on the anticompetitive impact of the NCAA's restraint of trade and the absence of procompetitive justifications, unlike *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), which lacked any relevant factual record on "amateurism."

The district court concluded that the NCAA's restraint of trade was an anticompetitive violation of Section 1 of the Sherman Act and found insufficient evidence to support the NCAA's proffered justifications, including "amateurism." The *O'Bannon*

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paid . . . ." 468 U.S. at 102. But the NCAA ignores the rest of the sentence: "*must be required to attend class*, and the like." *Id.* (emphasis added). This passage, which was part of this Court's explanation for applying Rule of Reason (and not some lesser degree of scrutiny) to strike down the NCAA's restraint of trade, does not support the NCAA here. This case does not involve safeguards to ensure that student-athletes attend class and the like, which was the focus of the snippet on which the NCAA relies. Indeed, the NCAA's restraint of trade has produced a system in which Division I college football and basketball require a 40-hours-per-week (or more) time commitment that dictates academic major selection and course scheduling, entails missing class, demands substantial time away from campus for games (usually to accommodate profit-driven television scheduling), and often results in lower graduation rates. *See* Jim Delaney, *Education First, Athletics Second: The Time for a National Discussion is Upon Us* (2015), http://files.ctctcdn.com/c7876417001/2bfcbc02-7b5f-4ff5-9229-4f2a0f2d620e.pdf.

district court found that the members of NCAA Division I are "buyers of labor" who "are competing for the labor of the sellers (the prospective student-athletes)" in "a market for athletic services." 7 F. Supp. 3d at 991 (internal quotation marks and citation omitted).

The NCAA's own economic expert in *O'Bannon*, Dr. Daniel Rubinfeld, testified that "the NCAA does impose a restraint" on its members in the market for recruits. In fact, his own economics textbook specifically refers to the NCAA as a "cartel," which he defined during his testimony as "a group of firms that impose a restraint." *Id.* at 972.

The *O'Bannon* district court found that, "[i]n the absence of this restraint, schools would compete against one another by offering to pay more for the best recruits' athletic services and licensing rights — that is, they would engage in price competition." *Id.* at 991-92. Thus, "student-athletes themselves are harmed by the price-fixing agreement among FBS football and Division I basketball schools." *Id.* at 973. "[T]he school provides tuition, room and board, fees, and book expenses, often at little or no cost to the school. The recruit provides his athletic performance and the use of his name, image, and likeness. However, the schools agree to value the latter at zero by agreeing not to compete with each other to credit any other value to the recruit in the exchange. This is an anticompetitive effect." *Id.*

At various junctures, the District Court found the NCAA's evidence "unpersuasive," "not sufficient," "flaw[ed]," and "not credible." 7 F. Supp. 3d at 975, 976, 1000, 1002. After entering judgment against the NCAA, the district Court permanently enjoined it from prohibiting its member schools from awarding

scholarships up to the full cost of attendance or from providing up to $5,000 per year in deferred payments to athletes. *Id.* at 1007-08.

The Ninth Circuit unanimously affirmed the NCAA's antitrust liability and properly rejected the NCAA's claim to immunity under *Board of Regents*. 802 F.3d 1049. The Court of Appeals opined that "the NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules." *Id.* at 1079.

The Ninth Circuit explained that the "[b]y and large, the NCAA does not challenge the district court's findings." *Id.* at 1070. The Ninth Circuit recognized that the NCAA's restraint of trade imposed a "significant anticompetitive effect on the college education market." *Id.* The Court found that the NCAA had engaged in a "price fixing agreement" governing "one component of an overall price" (*id.* at 1071) and that the harm suffered by college athletes "satisfied the plaintiffs' initial burden under the Rule of Reason." *Id.* The Ninth Circuit agreed with the district court that the restraint of trade was not justified by the supposed benefits of "the promotion of amateurism," and upheld part of its injunctive remedy. *Id.* at 1072.[5]

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[5] The Ninth Circuit upheld the district court's finding that allowing NCAA member schools to award grants-in-aid up to the full cost of attendance "would be a substantially less restrictive alternative to the current compensation rules." 802 F.3d at 1074. The Court of Appeals explained:

> All of the evidence before the district court indicated that raising the grant-in-aid cap to the cost of attendance would have virtually no impact on amateurism: Dr. Mark Emmert, the president of the NCAA, testified at

The *O'Bannon* record debunks the NCAA's asserted procompetitive benefit of "amateurism."

A. The NCAA Was Not The Genesis of College Sports.

The NCAA stipulated in *O'Bannon* that college sports predated the NCAA by decades. The first inter-collegiate football competition in American history occurred on November 6, 1869, when Rutgers and Princeton met in New Brunswick, New Jersey.[6] "College football was well-established as a popular spectator sport by the 1890s, drawing large crowds to

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> trial that giving student-athletes scholarships up to their full costs of attendance would not violate the NCAA's principles of amateurism because all the money given to students would be going to cover their "legitimate costs" to attend school. Other NCAA witnesses agreed with that assessment. Nothing in the record, moreover, suggested that consumers of college sports would become less interested in those sports if athletes' scholarships covered their full cost of attendance, or that an increase in the grant-in-aid cap would impede the integration of student-athletes into their academic communities.

Id. at 1074-75. Accordingly, the Ninth Circuit correctly affirmed the District Court's injunction allowing NCAA schools to award grants-in-aid that cover the full cost of attending college, rather than simply tuition, room, board and books. *Id.* at 1075. However, the Ninth Circuit rejected the second part of the relief ordered by the District Court: the portion of the injunction allowing NCAA schools to pay college athletes up to $5,000 in deferred compensation. *Id.* at 1076-78.

[6] Stipulation Regarding Undisputed Facts, *O'Bannon v. NCAA*, No. 09-3329-CW (N.D. Cal.) (ECF No. 189) at ¶ 1 ("*O'Bannon* Stipulation").

games."[7] "College football in the late nineteenth century was beset by a large number of serious injuries and even fatalities to players. At the same time, the organizers of teams at many colleges hired players and allowed them to compete as non-students. It was common for colleges to purchase players away from other colleges mid-season. These problems prompted concerns among college presidents and faculty members, and prompted some to call for the abolition of college football."[8] "In 1905, President Theodore Roosevelt convened a White House conference with the Presidents of Harvard, Princeton and Yale to discuss the injuries and deaths associated with college football."[9] "In that same year, representatives of 62 colleges and universities met to appoint a rules committee for intercollegiate football. They created the Intercollegiate Athletic Association ('IAA') with 62 charter member institutions. The IAA issued its first constitution and bylaws the following year."[10] The IAA changed its named to the NCAA in 1910.[11]

Thus, the NCAA did not create college athletics. Rather, it was established to protect the health and safety of students. The IAA "was created in 1906 to deal with violence in intercollegiate sports by adopting 'rules relating to roughness, holding, and

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[7] *Id.* at ¶ 2.

[8] *Id.* at ¶ 3.

[9] *Id.* at ¶ 5.

[10] *Id.* at ¶ 6.

[11] *Id.* at ¶ 9.

foul play.'"[12] Sadly, the NCAA has been transformed into an engine of exploitation that fails to protect the economic well-being of student-athletes.

B. The NCAA's History Refutes Its Asserted Procompetitive Benefit of "Amateurism."

As explained by Roger Noll, Professor Emeritus of Economics at Stanford University and Senior Fellow at the American Antitrust Institute, "college football and basketball became widely popular and commercially successful before the NCAA even attempted to enforce restrictions on the compensation of athletes. During this earlier period, athletes at some colleges could and did receive compensation from third parties and held campus jobs without limits on their total compensation."[13] In fact, from the origin of the NCAA until after World War II, conferences adopted their own rules about the amount of financial assistance that could be given to a student for participating on a college athletic team. Colleges that did not belong to a conference, or that were members of a conference that lacked financial aid rules, made up their own policies about the compensation of their athletes. This system of decentralized rule-making by conferences and individual colleges, persisted until 1956.[14]

Thus, in 1929, a Carnegie Foundation report found that of the 112 schools surveyed, 81 provided inducements to students ranging from open payrolls

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[12] Direct Testimony of Roger Noll, *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541-CW (N.D. Cal.) (ECF No. 995) at ¶ 30 (citation omitted) ("Noll Testimony").

[13] Noll Testimony, ¶ 16.

[14] Noll Testimony, ¶ 31.

and disguised booster funds to no-show jobs at movie studios.[15] Yet during this time, college football was the most popular sport in the United States, except for major league baseball (the "national pastime"). [16]

In 1948, the NCAA enacted the "Sanity Code" to "alleviate the proliferation of exploitive practices in the recruitment of student-athletes."[17] Under the Sanity Code, contrary to the present system, financial aid was to be awarded without consideration for athletic ability. In 1950, seven schools were found to be in violation of the Sanity Code, and a year later, it was repealed.[18]

In 1951, Judge Saul Streit of the New York Court of General Sessions mounted a probe into gambling on college athletics. Streit found that commercialism in football and basketball was "rampant," and they were "no longer amateur sports." Athletes were "bought and paid for." Scouting and recruiting violations were "almost universal." Academic standards were evaded through "trickery, devices,

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[15] Howard J. Savage, et al., *American College Athletics, Bulletin No. 23*, Carnegie Foundation for the Advancement of Teaching, 1929, Chapter II.

[16] Direct Testimony of Daniel Rascher, *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541-CW (N.D. Cal.) (ECF No. 994) at ¶ 93 ("Rascher Testimony").

[17] *Colleges Adopt the 'Sanity Code' to Govern Sports*, NEW YORK TIMES (Jan. 11, 1948), https://www.nytimes.com/1948/01/11/archives/colleges-adopt-the-sanity-code-to-govern-sportsncaa-bans.html.

[18] *N.C.A.A. Drops Sanity Code Control of Financial Aid to Athletes*, NEW YORK TIMES (Jan. 13, 1951), https://www.nytimes.com/1951/01/13/archives/ncaa-drops-sanity-codecontrol-of-financial-aid-to-athletes.html.

frauds, and forgery." Responsibility for these scandals, Streit concluded, must be shared by the "college administrators, coaches and alumni groups who participate[d] in this evil system."

Thus, far from being a revered tradition, "amateurism," even as defined by the NCAA, was often contravened or ignored – and yet college sports became ever more popular and commercially successful. In fact, "the term 'student-athlete' is not 100 years old, but was invented in the 1950s as part of a legal strategy to prevent federal and state governments from treating college athletes as employees and scholarships as wages," in order to avoid workers' compensation and other labor regulation.[19] The NCAA did not begin to impose enforceable rules restricting the compensation and benefits of college athletes until 1957, long after college sports had become a cherished part of American life. Indeed, it was only after the adoption of the NCAA's restriction on compensation that the NFL and NBA surpassed college football and basketball in terms of consumer demand.[20]

C. The Absence of Evidence Supporting the NCAA's Asserted Interest in "Amateurism."

The *O'Bannon* court found that the NCAA's conclusory assertions of procompetitive benefit were not supported by the evidence. The district court found that the evidence "does not justify the NCAA's sweeping prohibition on FBS football and Division I basketball players receiving any compensation." 7 F. Supp.3d at 999. The district court noted that "the NCAA has revised its rules governing student-athlete

[19] Noll Testimony, ¶ 27.

[20] Rascher Testimony, ¶ 93.

compensation numerous times over the years, sometimes in significant and contradictory ways" and that "[r]ather than evincing the association's adherence to a set of core principles, this history documents how malleable the NCAA's definition of amateurism has been since its founding." *Id.* at 1000.

The district court found that, "even today, the NCAA does not consistently adhere to a single definition of amateurism." *Id.* at 1000. For example, a Division I tennis recruit can preserve her amateur status even if she accepts ten thousand dollars in prize money the year before she enrolls in college. A Division I track and field recruit, however, would forfeit her athletic eligibility if she did the same. *Id.*

Rather than protecting athletes from commercial exploitation, the NCAA and its members themselves take advantage of football and basketball players to support a professionalized, multi-billion-dollar business enterprise. The NCAA's own documents show, for example, that each school on average uses athletes' names, likeness, and images in 20 promotions annually, with many schools reporting 100 or more.[21] The latest piece of evidence to confirm the hollowness of the NCAA's purported justification of "amateurism" is the February 2, 2021 announcement by EA Sports that it will re-launch a college football videogame featuring over 100 college teams, to whom EA Sports will pay substantial licensing fees for the use of the names of FBS schools,

[21] Supplemental Excerpts of Record, *O'Bannon v. NCAA*, Nos. 14–16601, 14–17068, at SER513-14 (9th Cir.) ("*O'Bannon* CA9 Supplemental Excerpts of Record").

uniforms, and even playbooks.[22] Notre Dame has announced that it will not participate in the EA Sports video game unless and unless its athletes can also benefit financially – further demonstrating the anticompetitive effects of the NCAA's restraint of trade and the degree to which it harms consumers by deterring the development of new products.[23]

A commission chaired by former Secretary of State Condoleezza Rice cited "big money and corruption" and found that "the state of men's college basketball is deeply troubled. The levels of corruption and deception are now at a point that they threaten the very survival of the college game as we know it."[24] "Millions of dollars are now generated by television contracts and apparel sponsorship for the NCAA, universities and coaches. The financial stake in success has grown exponentially; and thus, there is an arms race to recruit the best talent – and if you are a coach – to keep your job. Future stars and their families know their value – and can be tempted to

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[22] Michael Rothstein, *EA Sports to do college football video game*, ESPN, Feb. 2, 2021, https://www.espn.com/college-football/story/_/id/30821045/school-plan-ea-sports-do-college-football.

[23] *See* Eric Hansen, *Notre Dame won't be EA Sports' college football video game without player benefits*, USA TODAY, Feb. 22, 2021, https://www.usatoday.com/story/sports/ncaaf/2021/02/22/notre-dame-wont-participate-ea-sports-college-football-video-game/4543815001/.

[24] Commission on College Basketball, *Report And Recommendations To NCAA Board Of Governors, Division I Board Of Directors and NCAA President Emmert* 1, 2 (April 2018), https://www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf ("Rice Report").

monetize their worth as soon as possible since they will not be compensated in college. Some agents, summer coaches and other third parties act as intermediaries and facilitators. In other words, the environment surrounding college basketball is a toxic mix of perverse incentives to cheat."[25] Meanwhile, "the NCAA, as an enforcement entity, has little credibility with the public and its members, and what it has continues to dwindle. There are multiple cases of compromised academic standards and institutional integrity to keep the money and talent flowing."[26]

The NCAA's leadership has admitted that the tidal wave of money flowing into college sports greatly undermines any claims of "amateurism." Walter Byers, NCAA Executive Director from 1951 to 1987, explained that amateurism has become "a transparent excuse for monopoly operations that benefit others" — "an economic camouflage for monopoly practice."[27] Long-time NCAA senior official Wallace Renfro acknowledged that "[t]here is a general sense that intercollegiate athletics is as thoroughly commercialized as professional sports" and that "the notion that athletes are students is the great hypocrisy of intercollegiate athletics."[28] Renfro added that "the development of increased dollars

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[25] *Id.* at 2.

[26] *Id.*

[27] Walter Byers, UNSPORTSMANLIKE CONDUCT 388, 376 (1995).

[28] *O'Bannon* CA9 Supplemental Excerpts of Record at SER413-14.

acquired through corporate relationships does not square with the principle of amateurism."[29]

According to former NCAA President Myles Brand, amateurism has been inaccurately romanticized as a "halcyon ideal that college sports can operate without commercial support and indifferent to the realities of a modern business model." [30] As Dr. Brand explained, "[s]ome believe that intercollegiate athletics should be totally devoid of commercial interests. . . . This idealistic approach may work in the cases of recreational and club sports, but not for competitive, organized sports, including intercollegiate athletics."[31] "[C]ompetitive Division I athletics programs are possible only if there is revenue from commercial activity."[32] Dr. Brand explained that "once the status of the participants is bracketed, the differences between professional sports and intercollegiate athletics tend to be one of degree, not kind."[33]

Dr. Brand pointed to sources of consumer demand for college sports having nothing to do with the NCAA's no-pay restraint of trade. "[T]here have been dramatic changes in the media, including especially the sports media, that have generated new and more opportunities for commercial activity associated with

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[29] *Id.* at SER535.

[30] *Id.* at SER438.

[31] Dr. Myles Brand, *State of the Association 2009: The Challenges of Commercial Activity*, Trial Ex. 2293, at 3, *O'Bannon v. NCAA*, No. 09-3329-CW (N.D. Cal.).

[32] *Id.*

[33] *Id.* at 7.

athletics." [34] "We are in the midst of a media revolution" and "increased commercial activity is related to the expansion of the sports media." [35] "It is not an exaggeration to say that ESPN has shaped an entire generation in how sports are consumed."[36] "Media presentation of sports is big – very big – business. That pertains not only to professional sports, but also to college sports. The desire of media outlets to obtain college sports content and to use it as a platform to sell advertising sometimes seems limitless." [37]

Universities have exploited these commercial opportunities with little regard for "amateurism." Dr. Brand explained that "[t]he broadcast presentation and distribution of a school's athletic events can increase its visibility and name recognition. Athletics is one good way to market the university."[38] Instead of treating student-athletes as scholars first, universities "mov[e] the day of the week and the time [of the game] to accommodate broadcast schedules." [39] "If a person of authority asks a student-athlete to pose for pictures which, either intentionally or not, are endorsing a product or service, it is almost impossible for the student-athlete to resist that request."[40] "In general, the NCAA does little to regulate athletics

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[34] *Id.* at 3.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 5.

departments or institutions; rather, the NCAA rules are mostly designed to regulate student-athletes."[41]

Jim Delaney, former commissioner of the Big Ten conference, conceded that "those who suggest college football and men's basketball are already more commercial than educational can find facts to support their argument," noting that average football attendance for each of the five "power" conferences (ACC, Big Ten, Big 12, Pac 12, and SEC, which together include 64 institutions) equals or exceeds NFL attendance; that men's Division I basketball averages almost the same number of fans per game as the NBA; and that television and multi-platform media coverage is similarly ubiquitous at both the college and professional level.[42]

William Gerberding, former president of the University of Washington, explained that "amateurism is surrounded by myth, self-delusion, and hypocrisy. It originated in England in the 19th century and initially was an instrument of discrimination against the working classes; it remains today an excuse for exploitation of disadvantaged people."[43] The NCAA's incantations of "amateurism" are reminiscent of the hypocrisies of

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[41] *Id.*

[42] Jim Delaney, *Education First, Athletics Second: The Time for a National Discussion is Upon Us* 3 (2015), http://files.ctctcdn.com/c7876417001/2bfcbc02-7b5f-4ff5-9229-4f2a0f2d620e.pdf.

[43] William Gerberding, *Historical Perspective of Amateurism*, 22 J.C. & U.L. 11, 11 (1995).

college officials exposed in the 1981 Oscar-winning film *Chariots of Fire.*[44]

Throughout its history, the NCAA has created numerous exceptions to its no-pay rule so that, at bottom, "amateurism" is a manipulable term that means whatever the NCAA says it means. At the *O'Bannon* trial, NCAA President Mark Emmert admitted that NCAA bylaws and rules do not contain a definition of "amateurism."[45] Emmert acknowledged in a 2013 speech: "we have problems and challenges around things like the definition of amateurism and how we establish it and how we don't. *It is not at all like it was not long ago*."[46] David Berst, Vice President for the NCAA's Division I, conducted a study of amateurism and in January 2008 concluded that it was "a definition that was *not* steeped in any sacred absolute principle that had to be preserved . . . and *can be modified as views change*." [47]

In 2013, during the *O'Bannon* litigation, the five power conferences submitted a proposal to the NCAA seeking flexibility under the NCAA's structure to provide greater financial compensation to student-

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[44] CHARIOTS OF FIRE (Warner Bros. 1981), chronicled the career of Harold Abrahams, a champion sprinter at the University of Cambridge initially criticized by university officials for hiring a professional coach, on the ground that he had departed from "the way of the amateur" – but then toasted by those same officials upon his eventual success. Abrahams ultimately became a leading figure in British sports.

[45] *O'Bannon* CA9 Supplemental Excerpts of Record at SER323-24.

[46] *Id.* at SER752 (emphasis added).

[47] *Id.* at SER508 (emphasis added).

athletes.[48] The power five conferences proposed that they be allowed to decide for themselves "[t]he definition of permissible benefits that institutions could offer to student athletes," including "[i]nsurance or other financial support to address the health and safety needs of student athletes," "[s]upport in recruiting to permit families of student athletes to accompany and advise student athletes on official visits," and "[r]elaxation of rules restricting food and other support provided to student athletes during their playing careers."[49] The power five conferences did not view any of these forms of compensation as impairing "amateurism" or consumer demand for college sports – quite the opposite: "because of efforts to create 'a level playing field' we can spend [financial] resources in almost any way we want EXCEPT to improve support for student athletes. Too often, our efforts to improve the lives of student athletes have been deflected because of cost implications that are manageable by our institutions but not by institutions with less resources. *This cannot continue without jeopardizing the entire enterprise of intercollegiate athletics.*"[50] As Dr. Noll testified, the power five proposal was, in effect, "we want the constraint to be less binding for us. We would like to be able to pay student athletes more than . . . is currently permitted under NCAA bylaws."[51]

At the *O'Bannon* trial, the NCAA's own experts in testified that providing student-athletes with

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[48] *Id.* at SER541.

[49] *Id.* at SER544.

[50] *Id.* at SER543 (emphasis added).

[51] Tr. of Record (Trial Testimony of Roger Noll) at 209, *O'Bannon v. NCAA* (No. 09-3329-CW (N.D. Cal.)).

compensation above their cost of attendance would not likely have a significant impact on consumer demand. For example, the NCAA's own expert witness, Neal Pilson, testified that "a million dollars would trouble me and $5000 wouldn't, but that's a pretty good range."[52] Bernard Muir of Stanford testified that while payments of six or seven figures per athlete would be too high, some lesser sum would not undermine "amateurism."[53]

D. The NCAA's Restraint of Trade Is Not Essential to the Product in Question.

The NCAA cannot meet its legal burden of demonstrating that its restraint of trade is "essential if the product is to be available at all." *Board of Regents*, 468 U.S. at 101. The *O'Bannon* district court found that "the evidence presented at trial suggests that consumer demand for FBS football and Division I basketball-related products *is not* driven by the restrictions on student-athlete compensation but instead by other factors, such as school loyalty and geography." 7 F. Supp.3d at 1001 (emphasis added). As this Court observed in *Board of Regents*, college football viewership is primarily driven by the teams that are competing -- by who is playing whom. 468 U.S. at 107 n.34. Considerations of "amateurism" do not drive consumer demand.

Indeed, Dr. Daniel Rascher of the University of San Francisco, who serves as Director of Academic Programs for the Sports Management Master's Program at the University, testified that consumer interest in major league baseball and the Olympics

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[52] *O'Bannon* CA9 Supplemental Excerpts of Record at SER180.

[53] *Id.* at SER365.

increased after baseball players' salaries rose and professional athletes were allowed to compete in the Olympics. 7 F. Supp.3d at 1000. Prior to 1975, the "reserve clause" in major league baseball reflected the agreement among teams not to compete for "free agents" who had completed their contract terms; "[d]espite the claim that consumers would stop paying for baseball tickets or watching on TV if free competition was permitted for baseball players and players earned substantially more compensation, baseball revenue exploded even as competition was permitted and led to rapid growth in athlete pay."[54] Similarly, the district court noted that "the Olympics are much more popular now than they were" when only "amateurs" were allowed to compete. 7 F. Supp.3d at 977 (internal quotation marks and citation omitted).

In addition, Dr. Rascher noted that consumer demand in sports such as tennis and rugby increased after the sports' governing boards permitted athletes to receive payment. *Id.* Amateurs compete along professionals in major television events such as golf's U.S. Open and the Masters.[55] National soccer competitions such as England's FA Cup and France's Coupe de France are prestigious tournaments featuring amateur, semi-professional, and professional teams competing against each other.[56]

In short, the evidence, including the exhaustive factual record compiled in the *O'Bannon* case, refutes the NCAA's often asserted defense of "amateurism.

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[54] Rascher Testimony, ¶ 117.

[55] Rascher Testimony, ¶ 104.

[56] *Id.*

II. The Pattern of the NCAA's Repeated "Sky-Is-Falling" Predictions Demonstrate That Its Predictions Lack Foundation.

There is another reason to reject the NCAA's purported procompetitive benefit of "amateurism": the NCAA has trotted out the same pretext every time its restraint of trade has been challenged, coupled with dire predictions about the peril to college athletics if its argument is not accepted. Yet the NCAA's parade of horribles has never come to pass, despite 40 years of incantation. In prior antitrust cases, this Court has rejected similarly unsupported predictions that economic competition will lead to social harms, and it should do the same here.[57]

The NCAA's unfounded predictions follow the same pattern. For example, in the *Board of Regents* case, the NCAA argued that permitting schools freely to compete to sell their broadcast rights would be an existential threat to college sports and consumer demand. Today, Division I basketball and FBS football engage in such competition and enjoy billions of dollars in broadcast revenue – and yet consumer demand still flourishes. Indeed, in *Board of Regents,*

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[57] See *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 463 (1986) (argument that "an unrestrained market" would produce social ills "amounts to 'nothing less than a frontal assault on the basic policy of the Sherman Act.'") (citation omitted); *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 695-96 (1978) (rejecting "public safety" exception to Sherman Act: "The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers."); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 786 (1975) (rejecting "learned professions" exception to antitrust laws and holding that a bar association's rule prescribing minimum fees for legal services violated § 1 of the Sherman Act).

the NCAA repeatedly cited the virtues of amateur sports, as if that might bear on the economic harms of stifling competition.[58] Nevertheless, this Court held that the NCAA's plan for televising college football games was a horizontal agreement in restraint of trade and invalid under the Sherman Act. *See* 468 U.S. at 100-01 (declining to defer to "the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics").

The same pattern arises every time the NCAA's restraints of trade have been challenged in court. In *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998), the NCAA opposed allowing schools to compete in compensating assistant basketball coaches as contrary to the collegiate model. The Tenth Circuit nonetheless affirmed an antitrust judgment against the NCAA and rejected the NCAA's argument that "[f]inancial pressures upon many members, not merely to 'catch up' but to 'keep up,' were beginning to threaten both the competitive, and the amateur, nature of the programs, leading quite possibly to abandonment by many." *Id.* at 1023. Today, however, competition for coaches is unrestrained, assistant

[58] *See* Brief for Petitioner, *NCAA v. Board of Regents*, No. 83-271, 1983 WL 919058 (U.S., 1983), *2 ("payment to student-athletes" "would violate the amateurism policy"); *id.* at *8 (citing "the amateur and educational nature of college football"); *id.* at *15 ("the NCAA is a lawful joint venture," with "rules governing play, recruiting, amateurism, and so on"). Tellingly, at oral argument, the NCAA's counsel (now-Judge Frank Easterbook) conceded that the NCAA "might be able to get more viewers and so on if it had semi-professional clubs rather than amateur clubs." *O'Bannon*, 7 F. Supp. 3d at 999 (citing Oral Arg. Tr. at 29:48, *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (2006) (No. 83-271), https://www.oyez.org/cases/1983/83-271).

coaches often earn millions, and consumer demand still flourishes.

In *White v. National Collegiate Athletic Ass'n*, No. CV 06-999-RGK, 2006 WL 8066802 (C.D. Cal. Sept. 21, 2006), the NCAA claimed that allowing schools to compete by offering cost-of-attendance scholarships would amount to "pay for play." Today, such compensation is commonplace, with no discernible impact on consumer demand.

In *O'Bannon*, the NCAA strenuously argued in the district court that "the fundamental rule of amateurism" that "athletes must not be paid" was "at the core of the NCAA's 'particular brand.'"[59] The NCAA contended that its "no payment rules"—including its prohibition on compensation for use of a student's name, likeness, and image ("NIL") — were "undisputedly at the core of the definition of amateur sports."[60] In the Ninth Circuit, the NCAA argued that permitting *any* payments, regardless of size, would violate the principle of amateurism and threaten consumer demand for college sports:

> Contrary to the [district] court's view, *amateurism is not simply a matter of the amount of any payment*. Allowing student-athletes to receive compensation for specific commercial revenue generated via use of their

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[59] Defendant NCAA's Post-Trial Brief, *O'Bannon v. NCAA*, No. 09-3329-CW (N.D. Cal.) (ECF No. 279) at 2.

[60] *Id.* at 3.

> NILs is no less anathema to amateurism than paying football players $100 per sack. [61]

In 2019, in response to the California Fair Pay to Play Act,[62] which allows college athletes in California to be compensated for their name, image and likeness beginning in 2023, the NCAA's governing body indicated unanimous support for NIL payments — in direct contradiction to its position in *O'Bannon.* The NCAA Board of Governors "voted unanimously to permit students participating in athletics the opportunity to benefit from the use of their name, image and likeness in a manner consistent with the collegiate model."[63] This unanimous vote was, in turn, "based on comprehensive recommendations from the NCAA Board of Governors Federal and State Legislation Working Group, which includes presidents, commissioners, athletics directors, administrators and student-athletes."[64] The Board's Chair (the President of The Ohio State University) said "[w]e must embrace change to provide the best possible experience for college athletes . . . . Additional flexibility in this area can and must continue to support college sports as a part of higher education."[65]

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[61] Brief for Appellant NCAA, *O'Bannon v. NCAA*, Nos. 14–16601, 14–17068 (9th Cir.) (ECF No. 13-1) at 57 (emphasis added).

[62] Cal. Educ. Code § 67456.

[63] NCAA, *Board of Governors starts process to enhance name, image and likeness opportunities* (Oct. 29, 2019), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities (last visited Mar. 5, 2021).

[64] *Id.*

[65] *Id.*

The NCAA's about-face in *O'Bannon* is only the latest in a long string of unfounded predictions about the supposed need for the NCAA's restraint of trade. The Rule of Reason enables the NCAA to make the argument that the procompetitive aspects of amateurism overcome the anticompetitive consequences of its restraint of trade, and yet the NCAA never satisfies that empirical test. Despite judicial scrutiny, as well as corruption and scandals such as those documented in the Rice Report, consumer demand, popularity, and output have only increased.

III. Post-*O'Bannon* Experience Further Refutes The NCAA's "Amateurism" Argument.

The real-world impact of the judicial relief granted in the *O'Bannon* litigation further refutes the NCAA's "amateurism" theory. Prior to the district court's ruling in *O'Bannon*, the NCAA warned that any departure from its restraint of trade would threaten amateurism and college sports.[66]

Yet in August 2014 – facing mounting pressure created by the *O'Bannon* trial two months earlier (and the resulting permanent injunction) – the NCAA announced it would allow athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance. *See* 802 F.3d at 1054-55. Five months later, the 80 member schools of the five largest athletic conferences voted to take that step, and the scholarship cap at those schools now allows athletes to receive several

[66] Defendant NCAA's Post-Trial Brief, *O'Bannon v. NCAA*, No. 09-3329-CW (N.D. Cal.) (ECF No. 279) at 3 ("no pay" rules "are undisputedly at the core of the definition of amateur sports").

thousand dollars in payments each year to cover supplies, transportation, and other expenses related to school attendance that exceed a student's grant-in-aid. *Id.* at 1054 n.3.

These changes in compensation rules "increased the amount that most scholarship athletes receive by several thousand dollars in unencumbered and unmonitored spending money."[67] Students have received compensation for such purposes as apparel, equipment and supplies, transportation and lodging for families to attend championship games, entry fees and facilities use, expenses in connection with championship events, Olympics and national team tryouts, fees for conditioning activities, participation awards such as "gift suites," and insurance policies to cover risk of professional earnings loss.[68] In the first year in which such compensation was available (2015-16), NCAA members paid it to over 3,000 athletes in the Power 5 conferences (nearly 45% of all athletes in those conferences), as well as to more than 1,000 athletes outside the Power 5 conferences.[69] There can be no doubt the numbers have grown since then. And some forms of compensation are quite substantial. Students have received "bowl gifts" worth hundreds of thousands of dollars, insurance policies to cover risk of future earnings loss costing tens of thousands of dollars, and Olympic incentive payments totaling tens or even hundreds of thousands of dollars.[70]

This development has created a natural experiment testing whether compensation in excess of

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[67] Noll Testimony, ¶ 12.

[68] Rascher Testimony, ¶ 46.

[69] *Id.* at ¶ 55.

[70] *Id.* at ¶ 53.

cost of attendance ("COA") has any impact on consumer demand or the health of college sports. As explained by Professor Noll, "the rules that were adopted in 2015 allowed colleges to increase the value of an athletic scholarship substantially above the amounts that were expected. Consequently, the new rules created a situation in which most athletes who have a full athletic scholarship receive compensation that substantially exceeds the NCAA's own definition of amateurism."[71]

Yet there has been no evident harm to college sports since 2015, which have proven resilient and extremely popular even during the COVID-19 pandemic. "[T]he compensation rules adopted in 2015 propelled the compensation of many college athletes, especially at most FBS schools, far above any plausible estimate of [cost of attendance] plus participation in sports. Meanwhile the revenues of college sports continue to increase."[72] In fact, a study designed to test whether the post-2015 compensation system affected the popularity of college sports found that it *did not;* football attendance and television ratings of the schools implementing increased compensation were unaffected.[73] Conference revenues (particularly television revenues) have risen rapidly since the 2015 compensation changes, debunking the NCAA's unsupported assertion that

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[71] Noll Testimony, ¶ 13.

[72] *Id.* at ¶ 16.

[73] *Id.* at ¶ 112 (citing Thomas A. Baker III, Marc Edelman, and Nicholas M. Watanabe, "Debunking the NCAA's Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis," at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3072641).

the restraint of trade is necessary to preserve the product it offers to consumers.[74]

Dr. Daniel Rascher has closely examined the impact of the 2015 changes and found that it refutes the NCAA's position. According to Dr. Rascher, the economic evidence developed since the decision in *O'Bannon* shows that, while the NCAA has permitted thousands of athletes to receive compensation and benefits in excess of COA, "those increases have not had any adverse impact on relevant measures of consumer demand such as revenues. . . . The economic evidence on this critical point is entirely one-sided in support of the conclusion that the challenged restraints are not necessary to maintain consumer demand."[75] "[T]he economic evidence shows that consumer demand has only increased – not decreased – since the rules that allowed pervasive above-COA payments were adopted after *O'Bannon.*"[76] "Since *O'Bannon*, extensive new evidence shows that the COA line has been crossed, repeatedly, with zero impact on demand."[77]

The NCAA's asserted interest in protecting "amateurism" is thus historically inaccurate, utterly hypocritical, and completely refuted by the evidence.

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[74] *Id.* at ¶¶ 115-116.

[75] Rascher Testimony, ¶ 45.

[76] *Id.* at ¶ 46.

[77] *Id.* at ¶ 54.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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ADDENDUM LISTING *AMICI CURIAE*

- Ray Ellis played defensive back for The Ohio State University's men's football team from 1976-1979.

- Chase Garnham was a middle linebacker for Vanderbilt University's men's football team from 2000-2013.

- Alex Gilbert competed for Indiana State University men's NCAA Division I basketball team in the 1978-79 and 1979-80 seasons.

- Patrick Maynor competed on the Stanford University football team from 2004-08 as a linebacker.

- Tyrone Prothro was a wide receiver and kick returner for University of Alabama's men's football team from 2003-2005.

- Darius Robinson was a cornerback for Clemson University's men's football team from 2010-2013.

- Jake Smith competed as a kicker for the University of Arizona's men's football team in 2013. Before transferring to the University of Arizona, he played football for Youngstown State and Syracuse University.

- Bob Tallent competed for the University of Kentucky's men's Division I basketball team in the 1965-66 and 1966-67 seasons. He also played for George Washington University's men's Division I basketball team for the 1968-69 season.

- Danny Wimprine played quarterback for the University of Memphis men's football team from 2001-2004.