

No. 20-512

**In The
Supreme Court of the United States**

————— ◆ —————
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

SHAWNE ALSTON, et al.,
Respondents.

————— ◆ —————
**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

————— ◆ —————
**BRIEF FOR *AMICUS CURIAE* NATIONAL
FEDERATION OF STATE HIGH SCHOOL
ASSOCIATIONS IN SUPPORT OF PETITIONER**

————— ◆ —————
YEN-SHYANG TSENG
Counsel of Record
BRADLEY S. PAULEY
SARAH E. HAMILL
HORVITZ & LEVY LLP
3601 West Olive Ave., 8th Floor
Burbank, California 91505
(818) 995-0800
ytseng@horvitzlevy.com

Counsel for Amicus Curiae
**NATIONAL FEDERATION OF STATE
HIGH SCHOOL ASSOCIATIONS**

CORPORATE DISCLOSURE STATEMENT

The National Federation of State High School Associations is an Illinois not-for-profit corporation. It has no corporate parent, and no publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	3
I. Amateurism—the principle that the dedicated pursuit of excellence in sports for nonmonetary reasons develops well- rounded young men and women— benefits students, schools, and the community	3
II. Allowing compensation of college athletes threatens to undermine amateurism in high school athletics	7
CONCLUSION	12

TABLE OF AUTHORITIES

Page(s)

CASES

<i>In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.</i> , 958 F.3d 1239 (9th Cir. 2020).....	2
<i>Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.</i> , 468 U.S. 85 (1984).....	2, 4, 12
<i>O’Bannon v. Nat’l Collegiate Athletic Ass’n</i> , 802 F.3d 1049 (9th Cir. 2015).....	4, 10

MISCELLANEOUS

<i>Amateur</i> , Merriam Webster’s Collegiate Dictionary (11th ed. 2007).....	3
Cody J. McDavis, Comment, <i>The Value of Amateurism</i> , 29 Marq. Sports L. Rev. 275 (2018)	8
Comm’n on Coll. Basketball, <i>Report and Recommendations to Address the Issues Facing Collegiate Basketball</i> (2018), https://bit.ly/3sUeS5T	7, 11
Editorial, Minn. Mag., Sept. 1900, https://bit.ly/3qCSNXk	5

- Isa Qasim, *Qasim: The Value of Amateurism*, Yale Daily News (Jan. 15, 2015, 2:06 AM), <https://bit.ly/3iAH09n>4, 5
- Lee Green, *Impact of California's 'Fair Pay to Play Act' on High School Athletes*, NFHS (Nov. 13, 2019), <https://bit.ly/2KD66Yu>.....10
- Nat'l Fed'n of State High Sch. Ass'ns, *2020-21 NFHS Handbook* (Bruce Howard ed., 2020), <https://bit.ly/39VaavJ>4, 7, 8, 9, 10
- PowerPoint prepared by NCAA Rsch. for Comm'n on Coll. Basketball, *Division I Men's Basketball Study on Youth Sport, Recruiting and College Choice* (2017), <https://bit.ly/3iQUduU>8
- President Theodore Roosevelt, Address at the Harvard Union (Feb. 23, 1907), in *Pres. Roosevelt's Address: In Union on Saturday on Questions of Local and National Interest*, Harvard Crimson, Feb. 25, 1907, <https://bit.ly/3p8jGC8>6
- Student-Athletes*, NCAA, ncaa.org/student-athletes5, 6

The Case for High School Activities,
Nat'l Fed'n of State High Sch.
Ass'ns, <https://bit.ly/2dSKvJ2>5

Troy Herring, *Forecast: How Paying*
Collegiate Athletes Could Affect High
School Athletics, Orange Observer
(Jan. 9, 2020),
<https://bit.ly/3izMPUu>7, 10, 11

STATEMENT OF INTEREST¹

The National Federation of State High School Associations (NFHS) is the national service and administrative organization of high school athletics and performing arts. Founded in 1920 and headquartered in Indianapolis, the NFHS consists of one high school athletic or activities association in each of the fifty states and the District of Columbia. Around ninety percent of the high schools in the United States are members of state high school athletic or activities associations that are members of the NFHS.

The NFHS's mission is to provide leadership and national coordination for the administration of interscholastic activities, including athletics. The NFHS works to enhance the educational experiences of high school students through their participation in interscholastic athletics and activities. It strives to promote participation and sportsmanship in athletics, to develop good citizens through this participation, and to enrich the educational experience of students. The NFHS also seeks to protect the role that interscholastic athletics play in education and to develop solutions to problems relating to high school athletics.

¹ All parties have submitted letters to the Court Clerk granting blanket consent to the filing of *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part. No entity or person aside from *amicus curiae* or its counsel made a monetary contribution toward the preparation or submission of this brief.

The NFHS and its state association members believe in the value of amateurism as a key aspect of a well-rounded education. The organization is concerned that the Ninth Circuit’s opinion does not fully appreciate either the concept of amateurism or the many benefits it brings to college and high school students and sports.



SUMMARY OF ARGUMENT

Amateurism is a “revered tradition” in education-based sports that “adds richness and diversity to intercollegiate athletics.” *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984). Under this tradition, student athletes compete not for money but for the intrinsic love of the game and to develop positive character traits such as leadership and sportsmanship. Amateurism promotes participation in many different sports by athletes of varying skill levels, benefitting student bodies, academic institutions, and communities. The survival of, and continued community support for, amateurism is critical to high schools’ missions to develop their students’ character while offering an array of athletic opportunities to the greatest number of students.

The Ninth Circuit’s opinion threatens the future of amateurism by holding the NCAA’s rules limiting “education-related benefits” invalid. *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1243–44 (9th Cir. 2020). Without that limitation, college athletes can be

paid any amount so long as such payments can be described as bearing some relation to education.

The NFHS is concerned that the Ninth Circuit’s decision, if affirmed, will not only transform college athletics, but will permanently change the character of high school sports as well. Under this new paradigm, many premier high school student athletes would become motivated less by their love of sports and more by the prospect of being rewarded handsomely to play certain sports in college. Consequently, the “lesser” sports would lose status within schools (which are highly status-conscious places) to the detriment of the majority of student athletes. In short, high school athletics might become less about developing positive character traits and skills, and more about training a small cadre of talented young athletes for brief careers in revenue-generating college sports.

The NFHS urges this Court to reaffirm the importance of amateurism in American education.



ARGUMENT

I. Amateurism—the principle that the dedicated pursuit of excellence in sports for nonmonetary reasons develops well-rounded young men and women—benefits students, schools, and the community.

Merriam Webster’s dictionary defines “amateur” as “one who engages in a pursuit, study, science, or sport as a pastime rather than as a profession.” *Amateur*, *Merriam Webster’s Collegiate Dictionary*

(11th ed. 2007). Courts have also defined amateurs by what they are *not*—paid professionals. As the Ninth Circuit succinctly stated, “not paying student-athletes is *precisely what makes them amateurs.*” *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1076 (9th Cir. 2015); *see id.* at 1076 n.20 (“[I]f you’re paid for performance, you’re not an amateur.”).

This Court recognized the importance of amateurism in American sports in *Board of Regents*, 468 U.S. at 120, describing it as a “revered tradition” that “adds richness and diversity to intercollegiate athletics.” And for good reason. Amateurism is rooted in the age-old belief that the dedicated pursuit of excellence can help athletes develop a strong work ethic, learn fair play and good sportsmanship, develop leadership skills, understand the importance of teamwork, achieve focus, cultivate time management skills, and generally become more well-rounded people. *See* Nat’l Fed’n of State High Sch. Ass’ns, *2020-21 NFHS Handbook* 19 (Bruce Howard ed., 2020), <https://bit.ly/39VaavJ> [hereinafter *NFHS Handbook*]. These benefits come from pursuing athletic accomplishments for their own sake rather than for financial gain. *See* Isa Qasim, *Qasim: The Value of Amateurism*, Yale Daily News (Jan. 15, 2015, 2:06 AM), <https://bit.ly/3iAH09n> (“Amateurism ingrains the ability to work very hard to achieve a distant goal with no expectation of external recompense. . . . It pushes us to meld into a team and to act without ego. In a world where the value of things is boiled down to dollars and cents, amateurism reaffirms that some things cannot be so reduced.”).

Statistics confirm that amateur student athletes reap these physical, mental, and social benefits. “Students who compete in high school activity programs have better educational outcomes, including higher grades, higher achievement test scores, and higher educational expectations beyond high school.” *The Case for High School Activities*, Nat’l Fed’n of State High Sch. Ass’ns, <https://bit.ly/2dSKvJ2> (last visited Jan. 29, 2021). And at the college level, “[m]ore than eight out of 10 student-athletes will earn a bachelor’s degree, and more than 35 percent will earn a postgraduate degree.” *Student-Athletes*, NCAA, [ncaa.org/student-athletes](https://www.ncaa.org/student-athletes) (last visited Jan. 29, 2021).

For other students and the broader community, too, amateurism sets a positive example. One cannot help but be inspired by young athletes pursuing excellence as a team in support of a common goal without expectation of recompense. Amateurism also promotes school spirit by fostering an environment in which students support their fellow students’ athletic exertions and celebrate their success. In education-based football, for example, the crowd’s integral role has long been recognized as the “twelfth man” (there being eleven players per side in an American football game). See Editorial, *Minn. Mag.*, Sept. 1900, at 32, <https://bit.ly/3qCSNXk> (noting “[t]he mysterious influence of the twelfth man on the team, the rooter”). This connection between amateur athletics and community identity has a lasting resonance in American culture, as shown by the Beach Boys’ 1963 top-ten hit “Be True to Your School,” the 1986 film *Hoosiers*, and the 2004 film *Friday Night Lights*. Cf. Qasim, *supra* (discussing the value of amateurism and stating, “the primary benefit of athletics lies in the

personal development it engenders in the participants and that is then brought to the larger community”).

Amateurism also promotes widespread participation—a founding principle and perennial feature of both college and high school athletics. President Theodore Roosevelt, who played a major role in the creation of the NCAA, declared more than a century ago: “Our chief interest should not lie in the great champions in sport. On the contrary, our concern should be most of all to widen the base, the foundation in athletic sports; to encourage in every way a healthy rivalry which shall give to the largest possible number of students the chance to take part in vigorous outdoor games.” President Theodore Roosevelt, Address at the Harvard Union (Feb. 23, 1907), in *Pres. Roosevelt’s Address: In Union on Saturday on Questions of Local and National Interest*, Harvard Crimson, Feb. 25, 1907, <https://bit.ly/3p8jGC8>.

Indeed, under the amateurism model, colleges distribute funds more equitably between nonrevenue and revenue sports than they would under a model in which student athletes’ compensation dictates budgetary decisions. By maintaining amateurism, colleges create opportunities for student athletes of all stripes in many athletic endeavors, not just the most lucrative ones: “Nearly half a million student-athletes – more than ever before – compete in 24 sports every year.” *Student-Athletes, supra*.

II. Allowing compensation of college athletes threatens to undermine amateurism in high school athletics.

High school athletics benefit from amateurism too. *See NFHS Handbook, supra*, at 19–21 (describing rationales for high school eligibility rules). Recognizing the link between amateur sports and the academic community, for example, the NFHS guidelines include a student enrollment requirement intended to “promote[] loyalty and school spirit which lends itself to cohesion of the student body” and to “promote amateurism by drawing athletes only from each school’s student population.” *Id.* at 19. The NFHS recognizes that amateurism “stimulates participation for the sake of the game itself . . . and encourages students to engage in athletic competition for physical, mental[,] and social benefits.” *Id.* at 21.

The Ninth Circuit’s opinion allows colleges to expend substantial additional resources on education-related matters, seemingly limited only by the imaginations of college administrators. The NFHS finds this troubling because high school and college athletics are inextricably linked, with high schools being the main source of new college athletes. Left undisturbed, the Ninth Circuit’s holding will erode the benefits of amateurism not only at the collegiate level but also at the high school level. *See* Troy Herring, *Forecast: How Paying Collegiate Athletes Could Affect High School Athletics*, Orange Observer (Jan. 9, 2020), <https://bit.ly/3izMPUu> (“High school athletes and coaches are watching, because the inevitable trickle-down effect certainly will have ramifications at the local level.”); Comm’n on Coll. Basketball, *Report and*

Recommendations to Address the Issues Facing Collegiate Basketball 28 (2018), <https://bit.ly/3sUeS5T> (“The Commission recognizes that Division I men’s college basketball is just one part of a much larger ecosystem that includes Youth, High School, Non-Scholastic and Professional Basketball.”).

The NFHS encourages participation in high school athletics for the mental, physical, and social benefits they offer. *See NFHS Handbook, supra*, at 19, 21. NFHS eligibility rules thus seek to “enhance[] the opportunity for more students to participate.” *Id.* at 19. Without amateurism as the foundation of college sports, however, colleges will likely invest disproportionately in high-profile revenue sports (and in the athletes who play those sports) at the cost of nonrevenue sports. *See* Cody J. McDavis, Comment, *The Value of Amateurism*, 29 Marq. Sports L. Rev. 275, 282, 331–32 (2018). The NFHS fears that high school students must then compete for limited spots in the few college revenue sports still supported. Some might even switch sports completely, giving up their passion for a lower revenue sport to become a paid college athlete in a higher revenue one. *Cf.* PowerPoint prepared by NCAA Rsch. for Comm’n on Coll. Basketball, *Division I Men’s Basketball Study on Youth Sport, Recruiting and College Choice* 4 (2017), <https://bit.ly/3iQUduU> (highlighting that college male basketball players “reported high parental/family expectations of playing college and/or professional basketball that started at a young age”). A system that induces high school students to make these consequential decisions could change high school sports permanently. At minimum, compensating college athletes will lead to reduced interest in

nonrevenue sports and lower investment in nonrevenue youth sports programs. This threatens to undermine the broad diversity of sports and athletes that has long been a hallmark of our high school education system.

In addition, the NFHS believes that “[t]he primary purpose of high schools is to academically prepare students for productive contributions in their future lives as citizens” and that “[i]nterscholastic activity programs are an extension of the classroom.” *NFHS Handbook, supra*, at 20. “[I]nterscholastic activity programs assist in the educational development of all participants” and “interscholastic participation [is] a motivator for improved classroom performance.” *Id.* The primacy of academics in high schools cannot be overstated. *See id.* Because high school athletic programs are extensions of the classroom, the NFHS’s eligibility rules discourage high schools from overemphasizing their athletic programs and from allowing the exploitation of their student athletes. *See id.* at 19–21. Diminishing amateurism at the college level will undermine these goals by leading students to focus on athletics over academics, driving high schools to overemphasize certain athletic programs, and encouraging talented students’ parents to “team-shop” among high schools for their athletically gifted children.

The erosion of amateurism at the college level also creates the risk of high school athletics becoming a mere training ground for professional college athletes. Such a shift in focus towards elite athletes who can compete at the collegiate level risks leaving average student athletes behind, discouraging broad

participation in high school athletics. *See id.* at 19, 21 (seeking to “allow[] the participation of younger and less experienced players,” “enhance[] the opportunity for more students to participate,” and “give[] average student-athletes more opportunity to participate”).

The derogation of amateurism at the college level will also place enormous pressure on high school athletes. Colleges will compete even more intensely for the most talented athletes, and those athletes may place their potential earnings, rather than academics, at the heart of their college selection process. *See id.* at 19; *cf. O’Bannon*, 802 F.3d at 1054 (noting Union College President C.A. Richmond’s comment in 1921 that “the competition among colleges to acquire the best players had come to resemble ‘the contest in dreadnoughts’ that had led to World War I”); Herring, *supra* (“[W]ith the lack of regulations and possible money differential between Power 5 schools and smaller conferences, the payment of players could affect how players choose their respective schools.”).

Observers have already sounded the alarm, commenting that, without safeguards, the weakening of amateurism and the further commercialization of college sports will lead to the earlier recruitment and greater exploitation of high school athletes. *See Lee Green, Impact of California’s ‘Fair Pay to Play Act’ on High School Athletes*, NFHS (Nov. 13, 2019), <https://bit.ly/2KD66Yu> (“[A]s has repeatedly been demonstrated over the years, scholastic athletic personnel are limited in their ability to hold back the tsunami of economic forces at work in the marketplace and will need extensive assistance from legislatures and state associations to enact safeguards to protect

high school and middle school student-athletes.”); Comm’n on Coll. Basketball, *supra*, at 49 (“Protecting, educating[,] and developing youthful players – from the time they first enter high school – is likely to be among the most challenging and important tasks ahead.”).

If this Court were to affirm the Ninth Circuit’s ruling, colleges would recruit elite high school athletes with promises of substantial compensation. This naturally would impair the unity and cohesiveness of high school sports teams, with a few star athletes being promised substantial future compensation in college while their teammates are left out. See Herring, *supra* (“The recruiting world right now is crazy enough for these kids; [switching from amateurism to professionalism is] just going to add on another stage of craziness Now, how do you like being a high school coach, when you have a sophomore who gets an offer and who is going to get paid, and you’re trying to preach team and unity as a high school coach?”). Similar friction is predictable between elite athletes and their high schools’ broader student bodies. Such a development would threaten the school spirit and camaraderie that the NFHS seeks to foster and that is a primary goal of amateurism.

High school athletics are intended to be an end in themselves; they give a broad range of students the opportunity to participate in a variety of sports. Most of these students, whatever their dreams, will finish their organized sports careers when they leave high school. The overwhelming majority of high school athletes have had positive experiences to date. This

Court should view with skepticism any changes that would limit or reconfigure those positive experiences.



CONCLUSION

This Court should uphold the “revered tradition” of amateurism and all the benefits it confers. *Bd. of Regents*, 468 U.S. at 120. It should afford the NCAA the freedom to define amateurism in a way that preserves the ideal of the student athlete while also meeting the present needs of its member schools, conferences, and student athletes.

Respectfully submitted,

YEN-SHYANG TSENG
Counsel of Record

BRADLEY S. PAULEY
SARAH E. HAMILL

HORVITZ & LEVY LLP
3601 West Olive Ave., 8th Floor
Burbank, California 91505
(818) 995-0800
ytseng@horvitzlevy.com

Counsel for Amicus Curiae
**NATIONAL FEDERATION OF STATE
HIGH SCHOOL ASSOCIATIONS**

February 5, 2021