

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 FORMER STUDENT-ATHLETES AS AMICI
CURIAE IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICI CURIAE¹

Amici are former student-athletes who played in the NCAA Division I, the highest level of intercollegiate athletics: Melsahn Basabe, Walter Bond, Morgan Chall, Catherine DeSilvester, Kelly Dopke, María Fassi, Jake Gibbons, Kate Hall, Sarana Hyatt, Tre Kelley, Olivia Lubarsky, Cody McDavis, Darren McFadden, Chris Monroe, Jamie Redman, Wallace Spearmon Jr., Kendall Spencer, and Kara Winger. *See App. A.*

Amici participated in college basketball, gymnastics, football, soccer, swimming, golf, rowing, volleyball, and track and field. They include numerous NCAA champions, a two-time Heisman Trophy runner-up and former NFL running back, a former NBA player, and multiple Olympians. Some compete professionally in the United States and abroad. Others have pursued graduate school after college—three are practicing attorneys, one is a medical student, and another is pursuing a master’s degree in sports management. Amici’s lives were forever enriched through their participation in intercollegiate sports, where they honed invaluable skills that have allowed them to thrive and give back to their families and communities. Their interest in this case lies in ensuring the

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

proper adherence to the revered tradition of amateurism and the continued availability of intercollegiate athletics.

Amici are diverse in many ways, but they share a common story: Like the vast majority of student-athletes, amici played college sports not because they wished or expected to be paid. Rather, they played for the love of the game, and for the unique social, educational, and leadership opportunities that intercollegiate athletics affords. Amici also have a deep appreciation for the amateur model of intercollegiate athletics, which they see as the underpinning of the many skills and opportunities they received as scholar-athletes. They are deeply concerned that this model is now under threat. If schools are permitted to offer virtually limitless benefits to recruit and retain top student-athletes, amici fear that future generations of student-athletes may no longer have access to the same opportunities they had—including access to higher education.

As amicus Jake Gibbons—a former swimmer at Texas A&M University—explains, the lower courts' decisions represent an existential threat to intercollegiate athletics:

The outcome of this ruling will decide the fate of thousands of young people who aspire to compete in college in non-revenue generating sports. The outcome of this ruling will decide if an eight-year-old swimmer will be able to dream about competing at the highest level of his or

her sport while preparing ... for a fulfilling career post-graduation.²

Accordingly, amici respectfully ask this Court to preserve intercollegiate sports by reversing the judgment of the court of appeals.

SUMMARY OF ARGUMENT

I. Central to intercollegiate athletics is the fundamental principle of amateurism: Student-athletes, unlike professional athletes, do not get paid to play their sport and must remain academically eligible to play.

A. That principle of amateurism is tremendously beneficial to student-athletes. Through their participation in intercollegiate athletics and integration into the university community, student-athletes learn invaluable lessons of self-discipline, leadership, and time management, while gaining access to the school's network and academic and social opportunities. Unsurprisingly, then, most student-athletes report having a positive academic and social experience and have higher graduation rates than comparable non-athletes.

B. History confirms that, for these benefits to continue, amateurism must be preserved through the careful regulation of intercollegiate athletics. Schools' desire to win at all costs and generate revenue has

² The quoted statements by amici were supplied to undersigned counsel for preparation of this brief, except where otherwise noted.

historically led to practices that have been harmful to student-athletes, including compensating the best athletes and continually blurring the line between amateur and professional athletics. The NCAA was born in the midst of these abuses, in large part to preserve amateurism and protect the viability of intercollegiate athletics. For more than a century, the NCAA, through its member institutions and student-athlete representatives, has therefore required that student-athletes be amateurs in intercollegiate sports—playing for the love of the sport and the desire for a college education, rather than for payment or other compensation. The lower courts’ decisions here, however, threaten to reintroduce precisely the abuses—large cash payments and non-cash benefits to the top few players—that led to the NCAA’s formation in the first place.

C. The NCAA’s compensation caps are a core component of its mission to maintain amateurism in college sports—enabling players to maximize the benefits of their educational experience, while protecting college sports from becoming yet another professional minor league. That the rules have been updated over time only demonstrates that maintaining and preserving amateurism while supporting athletes’ educational experiences requires the careful balancing of many competing interests. The NCAA needs latitude to strike this difficult balance.

II. Disregarding the NCAA’s carefully calibrated compensation rules, the courts below decreed that student-athletes can continue to be amateurs even if they are provided unlimited “education-related” benefits. This amorphous and capacious standard allows

schools to, for example, offer lucrative internships and luxury goods to top student-athletes so long as they are even marginally related to education. The decisions below also make it harder to curtail these abuses, displacing the NCAA's professional judgment with the whims of creative plaintiffs' attorneys. Without these important guardrails, schools will engage in a damaging compensation arms race to recruit and retain top student-athletes.

III. The compensation arms race that will inevitably ensue from the decisions below will harm student-athletes, substantially diminishing both their athletic and educational opportunities.

A. Slashing limits on student-athlete compensation endangers hundreds of non-revenue-generating sports programs. A few schools will be able to spend extravagantly to recruit and retain top athletes, and to keep up, most schools (which almost uniformly lose money on their athletics programs) will be forced divert funds from less popular sports or cut them altogether. This extravagant spending may also drive away fans who watch college sports because they believe students play for the love of the game, not for pay. The greatest casualty will be the hundreds of thousands of athletes in non-revenue-generating sports, who risk seeing their opportunities to participate in intercollegiate athletics evaporate.

B. The decisions below also undermine the educational opportunities available to student-athletes. As schools cut less popular sports to pay for the compensation arms race, so too will they cut the athletics

scholarships that countless student-athletes (especially those from disadvantaged communities) depend on. Those few student-athletes on the receiving end of schools' increased largess will likewise suffer educationally, as they will be forced to prioritize athletics at the expense of their academic experiences and integration into the broader campus community.

ARGUMENT

Thirty-seven years ago, this Court recognized in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma* that the NCAA needs “ample latitude” to fulfill its “critical role in the maintenance of a revered tradition of amateurism in college sports”—a tradition that, absent the NCAA’s regulation, “might otherwise die.” 468 U.S. 85, 102, 120 (1984). Central to maintaining this tradition, the Court explained, are the NCAA’s “standards of amateurism,” which condition students’ eligibility to participate in intercollegiate athletics on the requirement that “athletes must not be paid.” *Id.* at 88, 102. In contrast, the Court found that a television plan challenged on appeal—which operated to “raise prices and reduce output”—did not “fit into the same mold as do rules defining ... the eligibility of participants,” and was therefore subject to rigorous analysis under the antitrust “rule of reason.” *Id.* at 113, 117.

The many NCAA rules that the lower courts invalidated below—setting caps on the types and amount of compensation that can be given to student-athletes and recruits—not only “fit into the same mold” as the “standards of amateurism” approvingly

referenced in *Board of Regents*, but, more importantly, they are that very mold. See Br. for NCAA at 27-28. The rules are the entire bedrock underlying the core principle of amateurism that “athletes must not be paid.” *Board of Regents*, 468 U.S. at 102. Accordingly, these rules are entitled to deference under this Court’s precedent.

The courts below disregarded this Court’s teachings, impermissibly subjecting the NCAA’s compensation rules to demanding rule-of-reason scrutiny and replacing them with an unworkable alternative that redefines the tradition of amateurism beyond recognition. To borrow the words of one former member of this Court and (like amicus Darren McFadden) runner-up for the Heisman Trophy, the consequences of the lower courts’ actions in this case will be profoundly “harmful to students and institutions alike.” *Id.* at 121 (White, J., dissenting).

I. The Revered Tradition Of Amateurism Is Essential To College Sports And Cherished By Student-Athletes.

Intercollegiate athletic competition is deeply engrained in our Nation’s history. For more than 169 years, starting with the 1852 Harvard-Yale regatta held on New Hampshire’s Lake Winnepesaukee, student-athletes have demonstrated their passion for sports while representing their respective schools, student bodies, and alumni.³ Since then, school pride

³ See Harvard Men’s Heavyweight Rowing, *Harvard-Yale Regatta – 150 Years of Tradition*, <https://tinyurl.com/y6j5c5mv> (visited Feb. 8, 2021).

has only grown. Rivalries have emerged. Invaluable lessons of discipline, leadership, teamwork, and friendship have been imparted. And, perhaps most significantly, the doors to higher education have been opened for many.

Central to that history—and essential to the resolution of this case—is the “revered tradition of amateurism.” *Board of Regents*, 468 U.S. at 120. The cornerstone of that tradition is simple: Student-athletes are students *and* amateur athletes; unlike professional athletes, student-athletes do not get paid to play their sport and must remain academically eligible to play. *See id.* at 102.⁴ Amateurism has delivered countless benefits to student-athletes over the years—and, as amici can attest, still does. *Infra* § I.A. History teaches that, for these benefits to endure, the prohibition on pay-for-play must remain a central tenet of the regulation of intercollegiate athletics. *Infra* § I.B. That is precisely what the NCAA has sought to do over the past century.

To reinforce this salutary tradition and ensure the clear demarcation between amateur student-athletes and professional athletes, the NCAA has issued rules limiting the benefits that student-athletes can

⁴ *See also* NCAA Div. I Manual, §§ 12.01.1, 14 (Aug. 21, 2020) (NCAA Bylaws), <https://tinyurl.com/w79kdr2>.

receive. *Infra* § I.C. Reversing the judicial invalidation of those beneficial rules is what this case is about.⁵

A. Student-athletes benefit from amateurism in intercollegiate athletics.

Since its inception, intercollegiate athletics has provided an opportunity for student-athletes to compete in their sport on behalf of their school while pursuing a university degree.

Student-athletes benefit from the revered tradition of amateurism—and the rules that preserve it—in myriad ways. In the late nineteenth century, student-athletes highlighted the “vigor and mental alertness,” “loyalty” and “qualities of leadership that their participation in [intercollegiate] athletics had engendered.”⁶ Modern student-athletes enjoy the same benefits, and much more. By participating in intercollegiate athletics, student-athletes are able to learn more about “exercise, eating habits, and general physical care.” Ex. B., Dir. Test. Decl. of Prof. James J. Heckman, at 14-15, Dkt. 986-2 (Heckman Decl.).⁷ They also have invaluable opportunities to develop

⁵ In contrast, this case is *not* about the rights of student-athletes to be compensated for the commercial use of their names, images, and likeness—or the NCAA’s rules to that effect. See generally NCAA, *Questions and Answers on Name, Image and Likeness* (Jan. 2021), tinyurl.com/1cr09ks9.

⁶ Cody J. McDavis, Comment, *The Value of Amateurism*, 29 Marq. Sports L. Rev. 275, 288 (2018).

⁷ “Dkt.” references are to pleadings filed in *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 4:14-md-02541-CW.

their “self-discipline, leadership, and teamwork ... [and] time management skills.” *Id.* at 7 (cleaned up). Through a strict regimen of athletics training and academic preparation, student-athletes learn how to be leaders in their respective teams, schools, and communities. And, because they are integrated into the university community, student-athletes enjoy the same academic, social, and other developmental opportunities available to their non-athlete peers, including greater “job opportunities,” access to the school’s “networks, and an identity with the school.” Heckman Decl., *supra*, at 7, 14; see NCAA Bylaws § 1.3.1 (“A basic purpose of [the NCAA] is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.”). In short, the benefits of amateurism permeate the life of the student-athlete, adding to the “richness and diversity” of “intercollegiate athletics” and “higher education.” *Board of Regents*, 468 U.S. at 120.

The experience of amicus Jake Gibbons is a paradigmatic example:

The collegiate athletics model is a cornerstone institution for the development of our world’s future leaders. This model supports opportunities for hundreds of thousands of young adults to hone the skills that they will apply at an elite competence for the rest of their lives—in their careers, their communities, and in their households. It is this *unique scholar-athletic system that allows an individual like myself to chase*

my athletic dreams while pursuing a degree that will prepare me for a successful life. ... Swimming for Texas A&M University, I was afforded the opportunity to train in an unmatched facility, alongside Olympians, under the guidance of renowned coaches. Further, I was pursuing a degree in Political Science with no clear career goal yet, but knowing that I eventually would be prepared to serve people meaningfully.

Gibbons's experience is typical of most student-athletes. *See* Heckman Decl., *supra*, at 12-16 (providing a similar account of the long-term benefits student-athletes derive from amateurism). Overall, 82% of student-athletes reported being satisfied or completely satisfied with their campus experience—with 69% indicating a positive academic experience and 77% indicating a positive social experience. *See* Trial Tr., Dir. Test. of Todd Petr at 1828:2-24, Dkt. No. 1066. Furthermore, student-athletes have higher graduation rates than comparable non-athletes, and their graduation rates have increased consistently in the 26 years since the NCAA began to collect this data. *See id.* at 1811:18-1815:1.⁸

All student-athletes can receive these meaningful benefits through their participation in intercollegiate athletics. There are, undoubtedly, some young athletes who would rather focus more on their athletics

⁸ *See also* NCAA, *Graduation Rates*, <https://tinyurl.com/y5ej3d95> (visited Feb. 8, 2021).

and be paid to play their respective sports. Those athletes always have the option to leave college and join the professional league of their choice at any point. Or they may play professionally upon graduating from high school.⁹ But the aforementioned benefits of intercollegiate athletics are only possible because of the carefully delineated incentives that the NCAA's rules establish. Ultimately, if these benefits are to endure, the "preservation of the [amateur] student-athlete in higher education" must remain a central tenet of the regulation of intercollegiate athletics. *Board of Regents*, 468 U.S. at 120. That is precisely what the history of intercollegiate athletics confirms.

⁹ Even for those leagues like the NBA that currently restrict draft eligibility immediately out of high school, there are options. See Michael McCann, *Examining What a Change to the NBA's One-and-Done Rule Could Mean for All Involved*, Sports Illustrated (Mar. 3, 2019), tinyurl.com/1jffn7w3 (further noting that the NBA has proposed "that the eligibility rule be changed by the 2022 NBA Draft"). For example, a basketball player can choose to play for a year in the NBA's minor league (the G League), another domestic professional league, or overseas, and then enter the NBA draft. See *id.* Or he can simply work for a year prior to entering the NBA—as was the case of a current NBA player who decided to skip college and accept a one-million-dollar internship with New Balance prior to joining the NBA. See Marc Stein, *A New Option for N.B.A. Prospects: The Million-Dollar Intern*, The N.Y. Times (Oct. 22, 2018), <https://tinyurl.com/y7qsu5z9>.

B. History confirms the necessity of the NCAA's careful regulation to preserve amateurism in college sports.

Adherence to the ideals of student-athletics has not been without challenges. The “persistent and perhaps inevitable desire to ‘win at all costs’” and “unbridled competition in the economic sphere” leads “to a wide range of competitive excesses that prove harmful to students and institutions alike.” *Id.* at 121 (White, J., dissenting). Here, as is often the case, history bears witness to such excesses and the need for correction.

“At the beginning of intercollegiate athletics[,] some colleges recruited athletes who had no connection to the college,” and who “simply wore the school’s jersey for pay.”¹⁰ One such example: the non-student coxswain that Harvard recruited to beat Yale in the 1852 regatta.¹¹ Some colleges also compensated successful student-athletes with extravagant perks and benefits (many of them under the guise of being education-related) for their athletic performance. An illustrative account: a “successful athlete at Yale” who, “in the latter part of the nineteenth century,” was provided “a suite of rooms in the dorm, free meals at the university club, a one-hundred-dollar scholarship,” and a job as “an agent of the American Tobacco Com-

¹⁰ Robert Sandy, *The Economics of US Intercollegiate Sports and the NCAA*, in HANDBOOK ON THE ECONOMICS OF SPORT 396 (Wladimir Andreff & Stefan Szymanski eds., 2006).

¹¹ See Rodney K. Smith, *The National Collegiate Athletic Association’s Death Penalty: Educators Punish Themselves and Others*, 62 *Ind. L.J.* 985, 989 (1987).

pany” for which he “receiv[ed] a commission on cigarettes sold in New Haven, plus a 10-day paid vacation to Cuba.”¹²

Such excesses, “including the payment of compensation *to the best athletes*,” and no one else, were “well entrenched by the latter part of the nineteenth century.”¹³ Like the amici on this brief, defenders of collegiate athletics in the late nineteenth century, many of whom were former student-athletes, vocally opposed these pay-for-play schemes.¹⁴ These individuals “scoffed at the notion that any college athlete could be paid,” perceiving these excesses as a threat to the very existence of collegiate athletics and to the many positive benefits derived therefrom.¹⁵

Amidst the impending threat to the existence of the student-athlete, and the increasing (sometimes fatal) violence of the infamous “flying wedge formation” in college football, the NCAA was formed.¹⁶

¹² *Id.* at 989 n.23 (quoting B. Spears & R. Swanson, HISTORY OF SPORT AND PHYSICAL ACTIVITY IN THE UNITED STATES 208 (1978)).

¹³ *Id.* at 989 (emphasis added).

¹⁴ See McDavis, *Amateurism*, *supra* note 6, at 288.

¹⁵ *Id.*

¹⁶ See Smith, *supra* note 11, at 990-91 (discussing the reasons for the creation of NCAA). The flying wedge “consisted of players locking arms, then heading upfield in a V-formation with a runner located inside.” Willie T. Smith III, *Tribute to Flying Wedge a Starting Point for NCAA’s Hall*, USA TODAY, Mar. 30, 2000, at 7C. Largely because of this formation, eighteen student-athletes died and over one hundred were injured. See Smith, *supra* note 11, at 990.

When the NCAA was created, it was made clear that one of its primary roles would be, as it is still now, to “preserve amateurism,”¹⁷—“a tradition that might otherwise die” but for its careful and intentional preservation, *Board of Regents*, 468 U.S. at 120. The goal has always been, and still is, to “retain a clear line of demarcation between college athletics and professional sports.” NCAA Bylaws §1.3.1.

To that end, for more than a century, the NCAA, through its member institutions and student-athlete representatives, has required student-athletes to “be amateurs in an intercollegiate sport.” NCAA Bylaws § 2.9; *see also O’Bannon v. NCAA*, 802 F.3d 1049, 1054 (9th Cir. 2015) (“One of the NCAA’s earliest reforms of intercollegiate sports was a requirement that the participants be amateurs.”). The NCAA’s core definition of amateurism has remained remarkably consistent throughout the years. In 1909, the NCAA defined an amateur student-athlete as “one who enters and takes part in athletic contests purely in obedience to the play impulses or for the satisfaction of purely play motives and for the exercise, training, and social pleasure derived”—not for “any material or economic advantage or reward.”¹⁸ Similarly, now, the NCAA mandates that a student-athlete “loses amateur status”—and is thus ineligible to compete in intercollegiate sports—if she or he exchanges “athletics skill ... for pay in any form.” NCAA Bylaws

¹⁷ Smith, *supra* note 11, at 991 (cleaned up).

¹⁸ McDavis, *Amateurism*, *supra* note 6, at 295 (quoting Howard J. Savage et al., *American College Athletics, Report of the Carnegie Foundation for the Advancement of Teaching*, Bulletin No. 23, at 42 (1929)).

§ 12.1.2(a). The rules emphasize that the “participation” of student-athletes in college sports “should be motivated primarily by education and by the physical, mental and social benefits to be derived.” *Id.* § 2.9. And for that reason, all “student-athletes should be protected from exploitation by professional and commercial enterprises.” *Id.*

C. The NCAA’s compensation caps are essential to the tradition of amateurism.

One critical component of the NCAA’s efforts to define and preserve amateurism are its caps on the compensation available to student-athletes. Like all the NCAA’s rules, the compensation caps are designed, adopted, and implemented by the student-athlete representatives and member institutions that comprise the NCAA. The caps represent the judgment of these stakeholders—those affected the most by the NCAA’s rules—that reasonable limits on compensation will enhance student-athletes’ educational experiences without turning college sports into professional “minor league[s].” *Board of Regents*, 468 U.S. at 102.

Consistent with this judgment, the NCAA’s compensation caps are carefully limited. The primary permissible allowance is the “cost of attendance”: Student-athletes may receive financial aid up to the full amount of the cost of attendance at their schools. NCAA Bylaws §§ 2.13, 15.01.06, 15.1; *see also* 20 U.S.C. § 1087kk. The types of benefits available as part of the cost of attendance are set by Congress, though schools can make limited adjustments on a “case-by-case basis.” 20 U.S.C. §§ 1087ll, 1087tt; *see*

also NCAA Bylaws § 15.02.2.1. Schools also may use certain authorized funds to meet student-athletes' actual expenses related to their participation in intercollegiate athletics or academic programs. *See* NCAA Bylaws §§ 15.01.6.1, 16.11.8. For instance, schools may pay for student-athletes' jerseys, equipment, athletics-related medical bills, and expenses associated with travel to games and tournaments. *See, e.g.*, NCAA Bylaws §§ 16.3-16.5, 16.8. Finally, schools may offer small non-cash awards to recognize exceptional academic or athletic achievement. *Id.* § 16.1.

As this Court and others have recognized, these rules (like other related NCAA bylaws) undergird the “revered tradition of amateurism in college sports.” *Board of Regents*, 468 U.S. at 120; *see also Deppe v. NCAA*, 893 F.3d 498, 501-02 (7th Cir. 2018); *Smith v. NCAA*, 139 F.3d 180, 187 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459, 464 n.2 (1999); *McCormack v. NCAA*, 845 F.2d 1338, 1343-1345 (5th Cir. 1988). They do so in at least three ways.

First, by preventing athletes from receiving pay or unlimited benefits, the rules help maintain “a clear line of demarcation between college athletics and professional sports.” *Hennessey v. NCAA*, 564 F.2d 1136, 1153 (5th Cir. 1977); NCAA Bylaws § 1.3.1. As such, the rules embody what this Court has recognized: “[T]o preserve the character and quality of” intercollegiate athletics, student-athletes “must not be paid” to play their sport. *Board of Regents*, 468 U.S. at 102. Distinguishing between impermissible payments and permissible awards and benefits requires careful judgment, since “[t]here comes a point in time when,

by continuing to provide incidental expense[s], you really are crossing over” from amateurism into professionalism. Ex. 35, Dep. of Kevin C. Lennon at 63:17-22, Dkt. No. 704-36.

Second, the limited benefits reinforce amateurism by helping student-athletes meet the expenses of competing in intercollegiate sports and the academic demands of college. Amicus Cody McDavis’s experience typifies the importance of these benefits. As a Division I basketball player at the University of Northern Colorado, McDavis had a full athletic scholarship, his books and meals were paid for, and he received tutoring on campus and even when traveling for games. The benefits enabled McDavis—now a practicing lawyer—to effectively balance his educational objectives with his athletic commitments. These benefits do not erode amateurism in college sports because, simply, “nobody considers the[m] to be pay.” 19-15566 (9th Cir.), Dkt. No. 40, at ER170.

Third, the rules help prevent “[c]olleges with more successful programs” from “taking advantage of their success by expanding their programs, to the ultimate detriment of the whole system of intercollegiate athletics.” *Hennessey*, 564 F.2d at 1153. By limiting the amount of benefits schools can offer top athletic recruits, the rules help control the “[f]inancial pressures upon many members, not merely to ‘catch up’, but to ‘keep up,’” which “threaten both the competitive, and the amateur, nature of the programs.” *Id.*

Unsurprisingly, the NCAA’s rules around amateurism have been updated over the past century to

accommodate new realities and balance the many competing interests at stake—all without altering the fundamental principle that student-athletes do not get paid to play their sport. But these alterations are not an invitation to ignore the revered tradition of amateurism, much less dismiss it as a “pretext” or a “moving goalpost.” Resp’t’s Br. in Opp’n at 7, 9. To the contrary, the ongoing balancing encompassed in these rules reflects the reality that, to preserve amateurism within the boundaries set forth in the Sherman Act, the NCAA needs “ample latitude” to superintend college athletics. *Board of Regents*, 468 U.S. at 120; *Law v. NCAA*, 134 F.3d 1010, 1022 n.14 (10th Cir. 1998) (stating that the NCAA must receive “plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics”); *McCormack*, 845 F.2d at 1345 (“That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable.”). The lower courts’ failure to accord the NCAA this latitude risks undermining the very enterprise of amateur college sports.

II. The Lower Courts’ Rulings Endanger The Tradition Of Amateurism By Inviting A Compensation Arms Race.

The decisions below imperil the tradition of amateurism in college sports in two fundamental ways. First, they toss out several of the NCAA’s carefully calibrated compensation limits, replacing them with an amorphous standard that begs to be exploited. Second, they undermine the Association’s ability to guard against these abuses. Now, freed of any meaningful limits on student-athlete compensation, schools will

compete in an arms race to provide the biggest benefits to recruit and retain a few select student-athletes.

Although it acknowledged that *Board of Regents* “define[s] amateurism to exclude payment for athletic performance,” the Ninth Circuit chose instead to draft its own definition. *In re NCAA Athletic Grant-in-aid Cap Antitrust Litig.*, 958 F.3d 1239, 1258 (9th Cir. 2020) (*Alston*). According to the Ninth Circuit, “Not paying student-athletes unlimited payments unrelated to education is what makes them amateurs.” *Id.* (cleaned up). Applying this novel definition, the court held that nearly all the NCAA’s rules limiting “education-related benefits” are unlawful because they are not needed to prevent schools from offering athletes unlimited payments unrelated to education. *Id.* at 1258-63. The court thus affirmed the district court’s permanent injunction prohibiting the NCAA from limiting any of the following so-called “education-related benefits”:

[C]omputers, science equipment, musical instruments and other items not currently included in the [cost of attendance] but nonetheless related to the pursuit of various academic studies; post-eligibility scholarships for undergraduate, graduate, and vocational programs at any school; tutoring; study-abroad expenses; and paid post-eligibility internships.

Id. at 1251 (quotation marks omitted).

What makes a benefit “education-related” is unclear, and the opportunities for abuse leap off the page. As the NCAA points out, facilitating a \$500,000 Nike internship might be justified, for example, if an athlete were majoring in sports management. See NCAA Pet. at 28. A Mercedes Benz could be offered to help an athlete get to class, or even to practice (after all, a student-athlete’s educational experience involves both academic *and* athletic components). AirPods Max, Fender guitars, and other high-value items all could be on the table under the guise of maximizing the educational experience of these student-athletes, well beyond that of their peers. Even *cash* payments are now permissible, since the injunction further requires the NCAA to allow salary-like “academic achievement” payments of almost \$6,000 to every student-athlete merely for being eligible to play. *Id.* at 1251, 1262 & n.18.

Making matters worse, the lower courts’ decisions hinder the NCAA’s ability to guard against these abuses. Any attempt to define what it means to be “education-related” must be approved by the district court. *In re NCAA Athletic Grant-in-aid Cap Antitrust Litig.*, 4:14-md-02541-CW, 2019 WL 1593939, at *1 (N.D. Cal. Mar. 8, 2019). Yet, under the lower courts’ impermissibly fact-intensive application of this Court’s rule of reason test, *see* Br. for NCAA at 17-34, any such rule risks being struck down if (inevitably) a plaintiff’s attorney can think of an alternative that is even marginally less restrictive on student-athlete’s compensation. The decisions below thus undermine the “ample latitude” the NCAA needs to

maintain amateurism in college sports, *Board of Regents*, 468 U.S. at 120, leaving schools free to spend almost limitlessly on student-athletes' compensation.

Such spending is sure to occur. Schools experience near-constant “pressure to ‘keep up with the Joneses’ by increasing spending on recruiting talented players ... in order to remain competitive with rival schools.” *Law*, 134 F.3d at 1012. To avoid “falling to the bottom line,” schools pour significant sums into “attracting top high-school players,” even when that requires taking on significant debts.¹⁹ These same pressures also lead some schools to circumvent the NCAA’s limitations on compensation. Indeed, schools have been doing so since the NCAA’s inception,²⁰ and modern-day examples are not hard to find.²¹ Without a meaningful limit on the amount of benefits schools may offer top athletes, this “frantic spending race”²² will be much worse.

¹⁹ Andrew Zimbalist, *How Financial Pressures Can Lead to Athletic Scandals*, *The Chronicle of Higher Education* (Nov. 9, 2018), <https://tinyurl.com/y2bn6tgd>.

²⁰ See Alfred C. Yen, *Early Scholarship Offers and the NCAA*, 52 B.C. L. Rev. 585, 595-96 (2011) (noting that many universities failed to abide by the NCAA’s initial regulation, offering “[s]cholarships, under-the-table payments, and special jobs with alumni,” which “made it clear that universities and coaches valued athletic victory and its associated benefits more than any obligation to live up to the ideals of amateur sport”).

²¹ See, e.g., Billy Witz & Adam Zagoria, *Oklahoma State Punished by N.C.A.A. for Role in Basketball Recruiting Scandal*, *The N.Y. Times* (June 5, 2020), tinyurl.com/4ekfd6ys.

²² Will Hobson & Steven Rich, *Playing in the Red*, *The Wash. Post* (Nov. 23, 2015), <https://tinyurl.com/yyj5uva4>.

The Ninth Circuit cursorily dismissed these concerns, speculating that it “cannot have been the district court’s intent” to allow such abuses. *Alston*, 958 F.3d at 1261 (cleaned up). The question is not what the court intended, however; it is what was done. By removing key constraints on schools’ ability to compensate student-athletes, the decisions below will superheat the “financial arms race of big-time college sports,”²³ enabling schools to offer virtually unlimited benefits to recruit and retain “the best athletes”—the very excesses that led to the NCAA’s formation more than 100 years ago.²⁴ As elaborated in the next section, while a few student-athletes may benefit from this compensation arms race, the vast majority will not.

III. A Compensation Arms Race Undermines The Tradition Of Amateurism By Degrading The Athletic And Academic Experiences Of Most Student-Athletes.

The concern with concentrating resources among the top-performing student-athletes at the expense of all others is not new. Addressing a crowd of Harvard students on the eve of the NCAA’s formation, President Theodore Roosevelt cautioned that “the athletic spirit is essentially democratic. Our chief interest should not lie in the great champions in sport”—namely, those who are the most talented, the most

²³ *Id.*

²⁴ Smith, *supra* note 11, at 989.

successful, or those who generate the most revenue.²⁵ “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.”²⁶

The decision below turns the democratic focus of college sports that President Roosevelt envisioned on its head, encouraging schools to bestow extravagant gifts and benefits on a few, elite student-athletes and recruits. Left out in the cold will be the hundreds of thousands of other student-athletes, who risk seeing their athletic programs defunded or cut as schools divert resources to keep up with their rivals’ spending.

Student-athletes’ educational experiences are also at risk. As schools cut non-revenue-generating athletics programs, so too will they cut the scholarships on which countless student-athletes rely. Those lucky enough to be on the receiving end of schools’ increased largess will suffer too, as the pressures to prioritize athletics over education increase.

A. Many college athletics programs risk being defunded or cut.

Only a very few schools turn a profit on their athletics programs, and those profits come almost exclusively from football and men’s basketball. Allowing

²⁵ President Theodore Roosevelt, *Play and Work*, Speech Before Harvard Students (Feb. 23, 1907), *printed in* The Harvard Graduates Magazine 15:57 (1906-1907), at 779.

²⁶ *Id.*

schools to offer student-athletes virtually unlimited educational benefits will exacerbate this system of haves and have-nots. Specifically, it will make it harder for small athletics programs to compete, threaten the viability of non-revenue-generating sports such as baseball and volleyball, and drive away fans who watch college sports precisely because student-athletes play for the love of the game, not for pay.

1. A common refrain, chorused by Respondents and the decisions below, is that “everyone is getting rich off college sports ... except the students.”²⁷ But that is deeply misleading. Of the more than 1,100 colleges and universities competing in NCAA sports (representing almost 20,000 teams and nearly a half million student-athletes),²⁸ only 25 reported net profits from their athletic departments in the 2018-19 season.²⁹ These rarified few have one thing in common: they are part of the so-called Power Five—the nation’s five wealthiest athletic conferences.³⁰ The 65 schools in the Power Five pull in billions more than

²⁷ Rob Goldberg, *US Sen. Chris Murphy Issues Report Calling for NCAA to Pay Student-Athletes*, Bleacher Report (Mar. 28, 2019), <https://tinyurl.com/yxgowj54>.

²⁸ NCAA, *What is the NCAA?*, <https://tinyurl.com/yxm2nogd> (visited Feb. 8, 2021).

²⁹ NCAA, *Finances of Intercollegiate Athletics*, <https://tinyurl.com/y4rzfv8t> (visited Feb. 8, 2021).

³⁰ *Id.*

all the other NCAA schools combined.³¹ Yet, even among the Power Five schools, the median athletics program operates at a net loss of \$7 million.³²

It is worse for everyone else. Every single one of the 285 non-Power Five schools in Division I³³ lost money in 2019, with a median deficit of \$23 million per school.³⁴ And not a single Division II or III school made money on its athletics programs.³⁵ For these universities, “to continue operating means relying on millions of dollars in debt, funding from their main campus and student fees.”³⁶ “[P]oorer departments such as Rutgers have taken millions in mandatory fees from students and siphoned money away from academic budgets to try to keep up” with the few ultra-wealthy athletics departments in the Power Five.³⁷

³¹ Paula Lavigne, *Rich Get Richer in College Sports as Poorer Schools Struggle to Keep Up*, ESPN (Sept. 2, 2016), <https://tinyurl.com/y2sllfhs>.

³² NCAA, *Finances of Intercollegiate Athletics*, *supra* note 29.

³³ NCAA, *DI Non-Autonomy Members*, <https://tinyurl.com/yxaz664o> (visited Feb. 8, 2021).

³⁴ NCAA, *Finances of Intercollegiate Athletics*, *supra* note 29.

³⁵ *Id.*

³⁶ Cody J. McDavis, *Paying Students to Play Would Ruin College Sports*, The N.Y. Times (Feb. 25, 2019), <https://tinyurl.com/y38mm2c3>.

³⁷ Hobson & Rich, *supra* note 22.

Stark disparities also exist across sports. Among the dozens of different NCAA sports, football and basketball are the most profitable by far. Division I football, in particular, garners more revenue than the next 35 other sports combined, grossing an average of \$31.9 million per school.³⁸ By comparison, men’s basketball (the second-highest grossing sport) pulls in a per-school average of \$8.1 million; women’s basketball grosses \$1.8 million; and rowing brings in just \$932,646.³⁹ Schools use most of their revenue from football and men’s basketball to fund less popular sports that tend to lose money.⁴⁰

2. By enabling schools to offer virtually unlimited “educational” benefits, the Ninth Circuit’s decision will further undermine the viability of most athletic programs in the country. The 25 revenue-generating Power Five schools will “be able to easily lure the biggest name recruits to play for” their revenue-generating football and men’s basketball programs based on the promise of exorbitant benefits, “creat[ing] a static environment where the best schools stay on top and

³⁸ Victoria Lee Blackstone, *How Much Money Do College Sports Generate?*, ZACKS (Jan. 28, 2019), <https://tinyurl.com/y3yej4cf>.

³⁹ *Id.*

⁴⁰ Denise-Marie Ordway, *Power Five Colleges Spend Football, Basketball Revenue on Money-losing Sports: Research, Journalist’s Resource* (Sept. 10, 2020), <https://tinyurl.com/y5mfopoh>.

other schools have virtually no chance of ever competing with them.”⁴¹ All other schools will be faced with a choice: find a way to keep up, or risk losing top talent to schools that can. To find the money, these schools may divert funds from less profitable sports programs or cut them altogether.⁴² Even those schools that do earn money on their athletics departments may need to divert money that currently funds non-revenue-generating sports toward increasingly lavish expenditures on their football and men’s basketball programs.⁴³

These risks are not theoretical. After the NCAA began allowing Division I schools to offer stipends to cover certain expenses included in the cost of attendance, schools expanded funding for their revenue-generating sports programs and offset the new costs with cuts to less popular sports. One such example: Shortly after the NCAA loosened its compensation rules, North Dakota State University announced it would offer cost-of-attendance scholarships in 16 sports, at an annual cost of \$600,000. The school’s main rival,

⁴¹ Matt Mikesic, *Paying Student Athletes is Bad News for College Sports*, The Hawk Newspaper (Oct. 8, 2019), <https://tinyurl.com/y4eb2mvg>.

⁴² McDavis, *Paying Students to Play Would Ruin College Sports*, *supra* note 36; *see also* Meghan Lopez, *Should College Athletes Be Paid? Passions High on Both Sides of the Debate*, Denver7 (Mar. 12, 2019), <https://tinyurl.com/y55p63qb> (noting that “paying players big salaries for some sports could mean that other, less profitable programs might be cut”).

⁴³ *See* McDavis, *Amateurism*, *supra* note 6, at 281-82 (2018) (noting that increased costs for men’s basketball and football programs “will inevitably lead” to cuts in other sports subsidized by those programs).

the University of North Dakota, followed suit six days later, cutting five teams to cover the added expense.⁴⁴ The University of Idaho, too, placed its championship-winning women’s soccer program on the chopping block⁴⁵ just a year after the school announced it was expanding its football team and providing recruits full cost-of-attendance scholarships.⁴⁶ The university only changed its mind only after amicus Kelly Dopke—then-captain of the women’s soccer team—persuaded officials that “our success not only on the soccer field, but in the classroom and around this community should not go unnoticed,” and that cutting the program would “leave indelible repercussions on the University as a whole.”

Recent budget cuts further illuminate the chasm between the few revenue-generating sports teams and the rest of intercollegiate athletics. More than 80 Division I programs have been cut in the past year,⁴⁷ most being non-revenue-generating sports like track,

⁴⁴ McDavis, *Paying Students to Play Would Ruin College Sports*, *supra* note 36.

⁴⁵ Chadd Cripe, *U of I Soccer Players Fight to Save Their Program Days After Stunning News*, *Idaho Statesmen* (Apr. 10, 2018), <https://tinyurl.com/y33crzlg>.

⁴⁶ Josh Wright, *Idaho’s Move to FCS Has Big Funding Implications*, *The Spokesman-Review* (Oct. 14, 2016), <https://tinyurl.com/y44uauusq>.

⁴⁷ Emily Giambalvo, *When A College Cuts A Sports Program, These Are The Lives Upended*, *The Wash. Post* (Oct. 6, 2020), <https://tinyurl.com/yy4ogul4>.

gymnastics, and swimming.⁴⁸ These “sports are getting the axe because they don’t generate much revenue,” while “schools that play big-time sports have gone to remarkable lengths to save their football and basketball seasons.”⁴⁹ The loss is particularly pronounced in sports that supply the U.S. Olympic and Paralympic pipeline. In May 2020, for example, the University of Akron eliminated its cross-country program, just four years after its star athlete Clayton Murphy became the first American man to win an Olympic medal in the 800-meter run since 1992.⁵⁰ Murphy was crushed, telling reporters, “They threw away a major part of what made myself and others go to that university.”⁵¹

3. Limitless spending on a few student-athletes may have another consequence: Fans’ interest may wane. Surveys have consistently found that “[t]he appeal of college athletics is driven by” perceptions that

⁴⁸ Bill Whitaker, *Some Colleges Axing “Secondary Sports” Like Gymnastics and Tennis as Pandemic Continues*, 60 Minutes (Dec. 6, 2020), <https://tinyurl.com/y6cvpqvy>.

⁴⁹ *Id.*

⁵⁰ Ross Dellenger & Pat Forde, *A Collegiate Model in Crisis: The Crippling Impact of Schools Cutting Sports*, Sports Illustrated (June 11, 2020), <https://tinyurl.com/y26413r5>.

⁵¹ *Id.* Another example: Clemson recently cut its men’s track program—which has produced 22 Olympians and 16 NCAA championship titles—not long after it opened a new football practice facility with a slide, bowling alleys, and a mini-golf course. See Eben Novy-Williams, *Clemson Track Cuts Reveal Differences in NCAA Budgets and Accounting*, Yahoo! (Nov. 11, 2020), <https://tinyurl.com/y3o95jog>.

athletes are “playing for the love of the sport, teamwork and [not] for pay.” Ex. 72, BIGTEN-GIA 124849, at 853, 860-61, Dkt. 704-73. Indeed, sports fans are more than twice as likely to believe that student-athletes “play for the love of the sport” than professional athletes. Ex. 83, Sports Property Comparison, at 11, Dkt. No. 704-84; *see also O’Bannon*, 802 F.3d at 1073 (“[T]he amateur nature of collegiate sports increases their appeal to consumers.”). These findings are consistent with amici’s personal experiences: Students and alumni want to root for their fellow classmates, not poorly paid professionals.

Ultimately, student-athletes will bear the brunt of these harms. As amicus Cody McDavis puts it, if students are paid money or unlimited benefits, “student-athletes who are working just as hard and have dedicated their lives to it will not have an opportunity to go play the sport they want at the college they choose.”⁵²

B. Student-athletes’ educational experiences will also suffer.

While a few top athletes go to college partly to increase their prospects of playing professional sports, most (if not all) go to college to obtain an education. As President Roosevelt noted in the above-referenced speech, “it is a very poor business indeed for a college man to learn nothing but sport.”⁵³

⁵² Lopez, *supra* note 42.

⁵³ Roosevelt, *supra* note 25, at 780.

The compensation arms race will harm the educational experience of student-athletes in at least three significant ways. First, it will make post-secondary education less accessible, especially to those who can least afford it. Second, it will detract from the due emphasis that must be given to educational objectives. And third, it will further separate the student-athlete from the actual student body and university community.

1. Many student-athletes depend upon their athletic scholarships to receive a college education. But in the fallout from the inevitable compensation arms race that will ensue from the decisions below, schools will struggle to come up with resources to recruit or retain top athletic talent. Not only are non-revenue-generating athletic programs likely to be eliminated (*see* § III.A. above), but many athletic scholarships may also be reduced, if not cut altogether.⁵⁴

Fewer athletic scholarships translates into less access to education. Many student-athletes in high school will no longer be able to pursue a college education. This reality will, of course, have a disproportionate effect on disadvantaged communities that already face significant obstacles to access post-secondary education (and the knowledge, job opportunities, and higher wages that generally come with a college degree). As amici on this brief can personally attest, without access to athletic scholarships, higher education simply would not be a viable option for

⁵⁴ See McDavis, *Amateurism*, *supra* note 6, at 331-32 & n. 420, 422.

many student-athletes. Amicus Kelly Dopke was confronted with this risk first-hand when, as noted above, the University of Idaho informed her that the women’s soccer team would be cut. “Without the opportunity to play soccer collegially,” she told the university at the time, “my academic aspirations to pursue a career in the medical field would not be possible.”

By the same token, schools may also charge students more tuition and fees to cover their increased athletics expenses.⁵⁵ But many students already pay vast sums of money to fund athletic programs—often unknowingly. For example, one junior at James Madison University in Virginia discovered that ten percent of the annual cost of her education went “solely to finance the school’s sports teams,” a fact she only discovered “by visiting and searching the school’s website.”⁵⁶ And other schools use the athletics fees they charge students “to make up for low ticket sales.”⁵⁷ These problems would only be exacerbated under the lower courts’ regime, making college education further inaccessible.

2. The decisions below also create new incentives that prioritize athletic achievement over educational objectives, upsetting the balance the NCAA has sought to strike in its rules.

⁵⁵ *Id.* at 280.

⁵⁶ Merritt Enright et al., *Hidden figures: College Students May Be Paying Thousands in Athletic Fees and Not Know It*, NBC News (Mar. 8, 2020), <https://tinyurl.com/uku9w9s>.

⁵⁷ *Id.*

Amicus Cody McDavis can attest to these powerful incentives. “Being a Division I athlete, I understand how those pressures [to perform athletically] would increase exorbitantly if I was being paid an actual dollar figure,” or equivalent in-kind benefits.⁵⁸ “I would focus less on my academics and more on my athletics”⁵⁹ Because these benefits will be available only to a select few based on their athletic performance, students-athletes will face much more pressure to prioritize their athletics over their education, exacerbating the stress to perform that student-athletes already experience.

Prioritizing athletics over education is harmful for student-athletes because the prospects of going “pro” for most student-athletes are quite low—almost negligible when it comes to playing in the NBA, the WNBA, and the NFL.⁶⁰ And even for those who wind up playing professionally, their average careers are quite limited. “The average NFL career,” for example, “lasts 3.3 years.”⁶¹

Some may cite these facts as a reason to justify the monetization of athletic talent in college. But far from it, they serve to highlight the value of a college education and the need for reasonable regulations

⁵⁸ Lopez, *supra* note 42.

⁵⁹ *Id.*

⁶⁰ See NCAA, *Estimated Probability of Competing in Professional Athletics* (Apr. 8, 2020), <https://tinyurl.com/y4qydstv>.

⁶¹ John Keim, *With Average NFL Career 3.3 years, Players Motivated to Complete MBA Program*, ESPN (July 26, 2016), <https://tinyurl.com/y5wj8zku>.

that balance student-athletes' often competing incentives. As a former NFL quarterback said, "When you focus on football so much, you get blinded to the outside world and what's going on around you," which is "why you keep your mind sharp on other things so that when football is over, you" can say, "OK, now I don't have to start completely anew."⁶²

3. Lastly, the decisions below risk further separating student-athletes from the broader university community, undermining the value of their educational experience. As noted above, one benefit of amateurism is that it allows the integration of student-athletes into the student body. *See* NCAA Bylaws § 1.3.1. But such integration can hardly happen if top student-athletes are further showered with benefits unavailable to the rest of the student body (including most student-athletes)—even less so if the bill is footed through increased (and most likely hidden) tuition and fees. These are the sort of excesses that Justice White described as "harmful to students and institutions alike," and that must be avoided in order to preserve amateurism. *Board of Regents*, 468 U.S. at 121 (White, J., dissenting).

CONCLUSION

The judgment of the court of appeals is harmful to student-athletes and does not afford the NCAA the "ample latitude" this Court has said it needs to superintend college athletics within the boundaries of the Sherman Act. It must be reversed.

⁶² *Id.*

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