

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 Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF FORMER NCAA EXECUTIVES AS
AMICI CURIAE SUPPORTING RESPONDENT**

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INTEREST OF *AMICI CURIAE*

Amici curiae are former officials of Petitioner National Collegiate Athletic Association (“NCAA”) with personal and professional experience in collegiate sports from the 1980s to the present.¹

Renee Gomila (“Gomila”), who served as an NCAA Associate Director of Enforcement from 2002 to 2014, helped lead multiple investigations of NCAA rule violations and, among other things, liaised and coordinated with the NCAA Recruiting Cabinet and Football Issues Subcommittee and worked with reinstatement staff on eligibility issues. Gomila coordinated the Enforcement Department’s football development plans for Florida and Texas, working directly with college and high school football coaches, college athletes,² and prospective college athletes to provide

¹ Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

² Throughout this brief, the term “college athlete” is used to refer to college students who play NCAA sports. The NCAA’s first executive director, Walter Byers (“Byers”), explained that the NCAA “crafted the term student-athlete” to avoid “the dreaded notion that NCAA athletes could be identified as *employees* by state industrial commissions and the courts.” WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69 (1995). One of the first legal decisions to use the term, *State Compensation Insurance Fund v. Industrial Commission*, 314 P.2d 288 (1957), concerned a workers’ compensation claim involving Ray Dennison, a college athlete who was fatally injured while playing football for Fort Lewis A&M College. *Id.* at 289. His widow was awarded workers’ compensation benefits by the Industrial Commission of the State of Colorado, but the Colorado Supreme Court reversed, finding that “the college was not in the football business and received no benefit from this field of

NCAA rule interpretations and address recruiting and eligibility issues. Prior to joining the NCAA, Gomila was a Compliance Assistant at the University of Colorado, where she monitored recruitment, eligibility, agent issues, and financial aid programs to ensure NCAA compliance. Gomila received her law degree from Tulane University School of Law in 2000 and currently operates RG Sports Consulting, where she provides legal and compliance management advice on NCAA rules to college and high school coaches, college athletes, prospective college athletes, and institutional administrators. Gomila also works with an insurance group, James D. Edgeworth, Jr. and Associates, LLC, to advocate for insurance and related benefits for college athletes, and consults with finan-

recreation,” and that the state’s workers’ compensation fund was not intended to be “a pension fund for all student athletes attending our state educational institutions.” *Id.* at 290. As Pulitzer Prize-winning author Taylor Branch has explained:

The term student-athlete was deliberately ambiguous. College players were not students at play (which might understate their athletic obligations), nor were they just athletes in college (which might imply they were professionals). That they were high-performance athletes meant they could be forgiven for not meeting the academic standards of their peers; that they were students meant they did not have to be compensated, ever, for anything more than the cost of their studies.

Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), available at <https://perma.cc/AZM4-CYZ8>. In the years since the Dennison case, “[u]sing the ‘student-athlete’ defense, colleges have compiled a string of victories in liability cases” and the NCAA “continues to invoke it as both a legalistic defense and a noble ideal.” *Id.* In light of its historical and continued use by the NCAA to avoid liability and justify the NCAA’s refusal to provide benefits to college athletes, the term “student-athlete” is only used here when quoting material from another source.

cial firms to assess legal and risk management issues within football, men's basketball, and other youth and collegiate sports.

Mark Lewis ("Lewis") is a former college athlete who played NCAA Division I football for the University of Georgia, where he obtained his undergraduate degree in 1988 and his law degree in 1992. Lewis served as the NCAA's Executive Vice President for Championships and Alliances from 2012 to 2016. At the time he joined the NCAA, Lewis had nearly two decades of experience in sports marketing. Among other things, he was a Senior Vice President of Business Affairs at Meridian Management SA, which, at the time of his employment, served as the exclusive manager of The Olympic Partner ("TOP") sponsorship program of the International Olympic Committee ("IOC"). He also served as President of the Olympic Properties of the United States LLC, a joint venture between the United States Olympic Committee ("USOC") and the Salt Lake City Olympic Organizing Committee that raised more than \$1.5 billion in sponsorships with more than seventy corporations.

Angela O'Neal ("O'Neal") served as an Assistant Director of Enforcement for the NCAA from 2007 to 2008. In her enforcement capacity, she investigated multiple potential violations of NCAA rules. Prior to joining the NCAA, she earned her law degree from the University of Tennessee College of Law and worked in the athletics departments of NCAA Division I schools, serving as Assistant Athletics Director and Director of Women's Basketball Operations for the University of Kentucky and Director of Women's Basketball Operations for the University of South Carolina. Currently, O'Neal serves as Director of Nextra Solutions, an

information management provider for corporations, law firms, and government agencies.

Mark Neyland (“Neyland”) served as an NCAA Assistant Director of Enforcement from 2006 to 2009. He led a high-profile investigation of NCAA recruiting violations by the coaching staff of a storied NCAA Division I basketball program and presented evidence to the NCAA Division I Committee on Infractions. He also investigated multiple allegations of college athletes’ violations of NCAA rules relating to the receipt of benefits that had the potential to impact their eligibility to participate in NCAA sports. After leaving the NCAA, Neyland was the Senior Counsel in the college sports practice of the law firm Ice Miller, LLP, where he represented NCAA members during NCAA investigations and advised clients, including NCAA member institutions, regarding NCAA rule compliance and infractions.

Tim Nevius (“Nevius”) is a former college athlete who played NCAA Division I baseball at the University of Dayton. After obtaining his undergraduate and law degrees, Nevius joined the NCAA, where he worked as an Assistant and then Associate Director of Enforcement from 2007 to 2012. In those roles, he helped lead multiple high-profile enforcement cases, including cases against the University of Connecticut men’s basketball program and The Ohio State University football program. He also served as a liaison to the Division I Student-Athlete Advisory Committee, where he worked with athletes from every NCAA Division I conference on NCAA legislation and policy considerations affecting athletes. After working at the NCAA, Nevius founded and co-chaired the college sports practice of the law firm Winston & Strawn LLP, where he advised high school, college and

Olympic athletes and their families on NCAA rules and eligibility issues. He later founded Nevius Legal, which focuses on advising current and prospective college athletes and their families on NCAA matters, including initial eligibility, scholarship cancellations, hardship waivers, transfer cases, drug appeals, and NCAA investigations. He is also the Founder and Executive Director of the College Athlete Advocacy Initiative at the Urban Justice Center, a nonprofit organization that represents college athletes on NCAA-related matters and advocates for college sports reform.

Jasmine Williams (“Williams”) served in several roles at the NCAA from 2006-2012, including as an Assistant Director of Enforcement Technology/Business Analyst. During her tenure, she developed a comprehensive knowledge and information management strategy for the NCAA’s Enforcement division. She also created a new business unit, the Information Management Group, in the NCAA’s Enforcement division to centralize the operational aspects of the work, increase efficiency of investigators, and provide a “hub” of information resources.

Amici’s personal and professional experience with NCAA Division I athletics and the operations and business of the NCAA itself renders them uniquely positioned to explain how collegiate sports have changed since this Court’s decision in *NCAA v. Board of Regents of University of Oklahoma* (“*Board of Regents*”), 468 U.S. 85 (1984).

SUMMARY OF ARGUMENT

As a result of the continued growth in popularity and dramatic increase in amounts of revenue generated by collegiate sports over the more than thirty-five years since *Board of Regents*, the NCAA now operates in a manner akin to a commercial enterprise and has shifted its focus from making athletics an integral part of the educational experience of college athletes to generating profits for itself and its members. With this shift in focus, the NCAA's professed commitment to "amateurism" has become a way of preserving the market that the NCAA has come to dominate, rather than a means of protecting and benefitting college athletes. Thus, though they once supported and enforced all of the NCAA's rules, with the benefit of further experience and hindsight, *amici* have come to believe that the NCAA's current restrictions on college athletes' receipt of education-related benefits do not promote "amateurism," which the NCAA itself has admitted has no fixed definition. Restrictions on education-related benefits are also unnecessary to preserve consumer demand, serve to perpetuate the NCAA's improper focus on generating revenue to benefit member schools, and are simply unfair to participating college athletes.

Accordingly, *amici* respectfully urge this Court to affirm the judgment of the Ninth Circuit Court of Appeals finding that the NCAA's professed commitment to "amateurism" does not provide a procompetitive justification for the NCAA's restrictions on college athletes' receipt of education-related benefits and upholding the injunction entered by the district court.

ARGUMENT**I. THE DRAMATIC INCREASE IN THE NCAA'S AND ITS MEMBERS' REVENUE HAS TRANSFORMED THE MARKET FOR COLLEGE SPORTS**

The NCAA and its members have seen their revenues dramatically increase since the 1980s, and today's market for college sports is therefore radically different than it was when this Court issued its 1984 decision in *Board of Regents*. In 1985, NCAA Class A schools, which had Division I football, raised \$922 million, and Class D schools, which had Division I basketball but did not offer football, raised more than \$41 million.³ In 2016, NCAA Division I schools raised more than \$13.5 billion.⁴ The same year, the NCAA “negotiated an eight-year extension of its multimedia contract for the broadcasting rights to March Madness, the annual DI men’s basketball tournament.” App. 10a. From 1982 to 1984, CBS paid \$16 million a year to televise the tournament.⁵ The total value of the current contract, which extends through 2032, is \$19.6 billion. App. 68a.

³ Mitchell H. Railborn, NCAA, *Revenues and Expenses of Intercollegiate Athletics Program: Analysis of Financial Trends and Relationships 1981-1985* 9 (1986).

⁴ *Where the Money Comes From (Revenues)*, Finances of Intercollegiate Athletes Database, NCAA (Sept. 2020), <https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics-database> [hereinafter “NCAA Finances Database”].

⁵ Brent Schrottenboer, *College Football Playoff Business is Booming at Halfway Point, but Expansion Looms*, USA TODAY (Jan. 9, 2020), <https://www.usatoday.com/story/sports/ncaaf/2020/01/09/college-football-playoff-financial-success-expansion-future/2838495001>.

In recent years, the NCAA's and its members' revenue has continued to increase. In 2019, NCAA members raised more than \$18.9 billion.⁶ As a point of comparison, the National Basketball Association generated \$8.3 billion for the 2019-20 season.⁷ In other words, notwithstanding the NCAA's professed commitment to amateurism, NCAA members raise more revenue from Division I sports than some professional sports leagues.

Further, "Division I conferences negotiate their own contracts and generate their own revenues from regular and post-season [Football Bowl Subdivision ('FBS')] football." App. 68a. "The FBS conferences have a multi-year media contract with ESPN for the College Football Playoff, the total value of which is \$5.64 billion." *Id.* "[T]he Power Five . . . each generate hundreds of millions of dollars in revenues per year, in addition to the money that the NCAA distributes to them." *Id.* Like the revenue generated by the NCAA, "[t]he revenues of the Power Five have increased over time and are projected to continue to increase." *Id.* In the 2015-16 academic year, "D1 basketball and FBS football . . . generated \$4.3 billion in revenue (a \$300 million increase from the previous year) for the Power Five." App. 10a. Overall, "FBS conference revenues rose . . . \$250 million (11 percent), including an increase of nearly \$45 million (24 percent) among schools in FBS conferences other than the Power Five." D.Ct. Dkt. 995 ¶ 115. Among the five FBS conferences for which data are available for 2016-17,

⁶ NCAA Finances Database.

⁷ Adrian Wojnarowski & Zach Lowe, *NBA Revenue for 2019-20 Season Dropped 10% to \$8.3 Billion, Sources Say*, ESPN (Oct. 28, 2020), https://www.espn.com/nba/story?id=30211678&_slug_=nba-revenue-2019-20-season-dropped-10-83-billion-sources-say.

revenues increased again for four of the five FBS conferences[.]” *Id.* “In 2017-18, each Power Five conference distributed over \$25 million to its members, the Big Ten disbursed over \$50 million to its members, and three of the four other Power Five conferences expect to reach \$40 million per member soon.” *Id.* In 2019, the Power Five had more than \$2.9 billion in revenue.⁸ In sum, “[t]he NCAA and Division I universities make *billions* of dollars from ticket sales, television contracts, merchandise, and other fruits that directly flow from the labors of college athletes.” App. 54a.

II. WHEN COUPLED WITH ITS COMPENSATION RESTRICTIONS, THE NCAA’S INCREASED REVENUE BENEFITS SCHOOLS AND COACHES RATHER THAN COLLEGE ATHLETES

Perhaps unsurprisingly, as the revenue generated by college sports has increased, the time that college athletes are expected to devote to their sports has also increased. Throughout the 1980s, football and basketball players at Division I schools spent approximately 30 hours per week on their sports in season.⁹ The NCAA’s 2019 Growth, Opportunities, Aspirations and Learning of Students in College (“GOALS”) study found that the time that Division I football players

⁸ Steve Berkowitz, *Power Five Conferences Had Over \$2.9 Billion in Revenue in Fiscal 2019, New Tax Records Show*, USA TODAY (July 10, 2020; 2:00 PM), <https://www.usatoday.com/story/sports/college/2020/07/10/power-five-conference-revenue-fiscal-year-2019/5414405002>.

⁹ Knight Found. Comm’n on Intercollegiate Athletics, *Keeping Faith with the Student-Athlete: A New Model for Intercollegiate Athletics* 28-29 (Mar. 1991), https://www.knightcommission.org/wp-content/uploads/2008/10/1991-93_kcia_report.pdf.

spent on athletics in season is equivalent to a full-time job (40 hours per week for college in the FBS and 37 hours for college athletes in the Football Championship Subdivision (“FCS”)) more time than they spent on academics (35 hours per week for FBS and 34 hours for FCS). Although men’s and women’s basketball college athletes spent slightly less time on in-season athletics, their time commitments were still nearly equivalent to a full-time job (32 hours for men and 35 hours for women), and their academic time commitments were similar (34 hours for men and 38 hours for women).¹⁰ In other words, playing Division I football or basketball while attending college is roughly equivalent to two full-time jobs. Given these significant demands, it is hardly surprising that among Division I male college athletes in the 2017-20 class, those in football had lower graduation success rates than any other sport (78% for FCS and 80% for FBS).¹¹

Even when college athletes are able to perform well academically, these demands on college athletes’ time take a toll on their mental health, and that toll has increased over time. In 1986, nearly 20% of NCAA college athletes felt “frequently overwhelmed,” compared to nearly 40% in 2018. In 2019, nearly half (45%) of NCAA Division I women’s basketball players and roughly 40% of men’s basketball and football

¹⁰ NCAA, *GOALS Study: Understanding the Student-Athlete Experience* 19, 21 (2020), https://ncaaorg.s3.amazonaws.com/research/goals/2020AWRES_GOALS2020con.pdf.

¹¹ NCAA, *Trends in Graduation Success Rates and Federal Graduation Rates at NCAA Division I Schools* 13 (Nov. 2020), https://ncaaorg.s3.amazonaws.com/research/gradrates/2020/2020D1RES_FedGSRTrends.pdf.

players felt unable to keep up with their classes in season.¹²

Of course, college athletes face physical risks from their sports participation as well. A study of NCAA college athlete injuries in fifteen sports from 1988 through 2004 found that across all divisions, the rate of game injuries was 13.80 per 1,000 athlete exposures, and the rate of practice injuries was 4.00, which equated to one injury every two games and one injury every five practices for a team of fifty participants. The rates for Division I athletes were higher; the game injury rate was 15.47 and the practice injury rate was 4.27.¹³ A study of injuries in twenty-five NCAA sports covering a five-year period from 2009 to 2014 found that college athletes experienced an average of 210,674 injuries per year, and that men's football teams accounted for nearly a quarter (22.4%) of all injuries and more than a third (36.3%) of male injuries.¹⁴

Notably, there is evidence that the health impacts of NCAA Division I sports do not end once college athletes graduate. A study designed to measure the Health-Related Quality of Life ("HRQoL") in former NCAA Division I college athletes aged 40 – 65 found former college athletes scored worse on measures of "physical function, depression, fatigue, sleep disturbance and pain interference compared with their non-

¹² NCAA, *supra* note 10, at 26.

¹³ Jennifer M. Hootman, *Epidemiology of Collegiate Injuries for 15 Sports: Summary and Recommendations for Injury Prevention Initiatives*, 42 J. ATHLETIC TRAINING 312, 312 (2007).

¹⁴ Ctrs. for Disease Control & Prevention, *College Sports-Related Injuries – United States, 2009-10 Through 2013-14 Academic Years* (Dec. 11, 2015), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6448a2.htm>.

athlete counterparts,” and “reported more limitations during daily activity and exercise, more chronic injuries and more major injuries than did nonathletes.” The authors of the study concluded that “some former Division I athletes may sacrifice their future HRQoL for their relatively short athletic careers in collegiate sports.”¹⁵

Of course, if the NCAA were truly concerned with the well-being of these college athletes, it would use its revenue to recognize their dedication and sacrifice by providing them with appropriate levels of financial aid. But despite college athletes’ willingness to devote increasing amounts of time and effort to their sports, the percentage of revenue that the NCAA has devoted to financial aid for college athletes has decreased. In 1985, approximately 27% of the NCAA’s revenue from Class A schools (which offered Division I football) and 42% of its revenue from Class D schools (which offered Division I basketball but did not offer football) was used for grants-in-aid to college athletes.¹⁶ In 2019, the NCAA and its members raised nearly \$15.7 billion in Division I revenue but used less than \$2.85 billion (18.1%) for aid to college athletes.¹⁷ More than two in five (43%) NCAA Division I college athletes did not receive any aid.¹⁸

¹⁵ Janet E. Simon & Carrie L. Doherty, *Current Health-Related Quality of Life is Lower in Former Division I Collegiate Athletes Than in Non-Collegiate Athletes*, 42 AM. J. SPORTS MED. 423, 428 (2014).

¹⁶ Railborn, *supra* note 3, at 33.

¹⁷ NCAA Finances Database.

¹⁸ NCAA Recruiting Facts, NCAA (Aug. 2020), https://ncaa.org.s3.amazonaws.com/compliance/recruiting/NCAA_RecruitingFactSheet.pdf.

Additionally, as the NCAA's revenue has increased, NCAA Division I schools have offered fewer sports. Since 1990, NCAA Division I membership has grown by fifty-eight schools, yet at least eight sports are sponsored by fewer schools today than they were thirty years ago, including men's wrestling, swimming, gymnastics, and tennis. The COVID-19 pandemic appears to have accelerated this trend; in one eight-week period in the first half of 2020, four schools eliminated three sports and a fifth, Brown University, eliminated eight.¹⁹ Because the NCAA bylaws limit the number of students who receive athletics-related financial aid by sport,²⁰ eliminating a sport from a school reduces the number of college athletes from the school who receive athletics-related financial aid.

It is clear that college athletes need such aid. The NCAA's 2015 GOALS study found that approximately 40% of NCAA Division I men's basketball and football college athletes and a third of women's basketball college athletes did *not* agree with the statement, "I usually have enough money to buy the things I *need* (e.g., groceries)."²¹ More recently, a 2020 survey by The Hope Center for College Community and Justice found nearly a quarter of college athletes at Division I schools had experienced food insecurity in the past

¹⁹ Ross Dellenger & Pat Forde, *A Collegiate Model in Crisis: The Crippling Impact of Schools Cutting Sports*, SPORTS ILLUSTRATED (June 11, 2020), available at <https://www.si.com/college/2020/06/11/college-sports-program-cuts-ncaa-olympics>.

²⁰ NCAA, 2020-21 Division I Manual at 295-306 (2020) [hereinafter "NCAA Division I Manual"], <https://web3.ncaa.org/lstdbi/reports/getReport/90008> (Bylaws §§ 15.5.3 – 15.5.10).

²¹ NCAA, *Results from the 2015 GOALS Study of the Student-Athlete Experience* 112 (Jan. 2016), https://www.ncaa.org/sites/default/files/GOALS_convention_slidebank_jan2016_public.pdf.

thirty days and 14% had experienced homelessness in the past year.²²

Amici have personally spoken with college athletes who have experienced such hardships. On a trip to the University of Georgia with NCAA President Mark Emmert (“Emmert”), Lewis met with several college athletes, one of whom could not afford basic repairs for his car and another who was struggling to afford food for his daughter. Nevius regularly represents college athletes and families who face similar hardships, including one whose family relies on food stamps and government-subsidized housing despite the fact that he plays a starting position for a Power Five football program.

Yet instead of benefitting college athletes, the NCAA’s and its member’s “wealth extracted from . . . young athletes . . . ends up in the hands of better-funded individuals and entities: millionaire coaches and athletic directors, and construction firms (for stadiums, facilities, etc.) and their shareholders.” D.Ct. Dkt. No. 1017 ¶ 24. As noted by University of Nebraska Chancellor Harvey Perlman, NCAA Division I schools “recruit by shifting funds from regulated benefits for student athletes to unregulated frills,” such as opulent athletic facilities. App. 79a-80a. In 2014, the 48 schools in the Power Five at that time spent a combined \$772 million on athletic facilities, an 89% increase from \$408 million spent in 2004,

²² Sara Goldrick-Rab et al., Hope Ctr. for Coll., Cmty. & Just., *Hungry to Win: A First Look at Food and Housing Insecurity Among Student-Athletes* 6, 8 (Apr. 2020), https://hope4college.com/wp-content/uploads/2020/04/2019_StudentAthletes_Report.pdf.

adjusted for inflation.²³ In 2019, the NCAA’s members spent more than \$2.7 billion of their revenue on expenses for such facilities.²⁴

Additionally, in 2019, NCAA members used more than \$3.65 billion of their overall college sports revenue to pay coaches’ compensation. In other words, NCAA members collectively used a greater proportion of their college sports revenue (18.9%) to pay coaches than to provide aid to college athletes (18.1%).²⁵ In fact, “a number of Division I head football coaches take home multimillion-dollar salaries that exceed those of many NFL coaches.” App. 54a. Between 1985 and 2010, the average salaries at public universities, adjusted for inflation, rose 32 percent for full professors, 90 percent for presidents, and 750 percent for football coaches.²⁶ “In 2017, the highest paid public employee in 31 states was a college football coach, and in eight states the highest paid public employee was a college basketball coach, with coaches often earning several times as much salary as any other university employee, including the president.” D.Ct. Dkt. No. 995 ¶ 164. “Among the 39 coaches who are the highest paid state employees, eight earned more than \$5 million and 26 more earned more than \$2 million.” *Id.* The highest paid Division I football head coach, Nick Saban (“Saban”) of the University of Alabama, was

²³ Will Hobson & Steven Rich, *Colleges Spend Fortune on Lavish Athletic Facilities*, CHI. TRIB. (Dec. 23, 2015), available at <https://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html>.

²⁴ NCAA Finances Database.

²⁵ *Id.*

²⁶ CHARLES T. CLOTFELDER, *BIG-TIME SPORTS IN AMERICAN UNIVERSITIES* 106 (2011).

paid \$9.1 million in 2020.²⁷ The highest paid Division I basketball coach, John Calipari of the University of Kentucky, was paid more than \$8 million.²⁸ The ten highest paid football assistant coaches were paid more than \$1.5 million, and the ten highest paid strength training coaches were paid more than \$500,000.²⁹

In *amici*'s experience, these high salaries and potential payouts often attract former professional coaches – including Saban, who was a head coach for the Miami Dolphins³⁰ – who tend to expect college athletes to be as focused on winning and athletic success as professional athletes and, given the time demands, to prioritize athletic success over academic success. Coaches' contracts further incentivize them to focus on athletics by offering significantly greater incentives for athletic performance than academic performance. For example, in 2011, coaches' contracts in six conferences where the conference champion received an automatic bid into a Bowl Championship Series game (the Atlantic Coast, Big East, Big Ten, Big 12, Pac-10/12, and Southeastern Conferences) had athletic performance incentives of \$34,381,569 and academic performance incentives of \$2,922,500.

²⁷ *NCAA Salaries: NCAAF Coaches*, USA TODAY (Nov. 17, 2020), <https://sports.usatoday.com/ncaa/salaries>.

²⁸ *NCAA Salaries: NCAAB Coaches*, USA TODAY (Feb. 27, 2020), <https://sports.usatoday.com/ncaa/salaries/mens-basketball/coach>.

²⁹ *NCAA Salaries NCAAF Assistant Coaches* (Dec. 16, 2020), <https://sports.usatoday.com/ncaa/salaries/football/assistant>; *NCAA Salaries: NCAAF Strength Coaches*, USA TODAY (Dec. 16, 2020), <https://sports.usatoday.com/ncaa/salaries/football/strength>.

³⁰ See Charlie Nobles, *Saban Leaving the Dolphins for Alabama*, N.Y. TIMES (Jan. 4, 2007), <https://www.nytimes.com/2007/01/04/sports/ncaaf/04saban.html>.

Coaches' contracts with schools in five other conferences that did not receive an automatic bid (Conference USA and the Mountain West, Mid-American, Sun Belt, and Western Athletic Conferences) had athletic performance incentives of \$10,488,621 and academic performance incentives of \$903,103. In other words, for schools in both types of conferences, the value of coaches' athletic performance incentives was more than *ten times* higher than academic performance incentives.³¹

A 2016 review of 234 head-coaching contracts from twelve Big Ten universities found all had incentives for athletic performance, but that nearly two-thirds (63%) had no incentives for academic performance.³² Contracts that coaches have signed in more recent years indicate that this trend has continued. For example, in 2021, Saban will earn a maximum of \$100,000 as an academic bonus (if his team's graduation rate is in the top four of the Southeastern Conference ("SEC") – a fraction of the \$800,000 he earned by winning the College Football Playoff, in addition to the \$125,000 he earned when Alabama won the SEC and \$25,000 he earned as Conference Coach of the Year.³³

³¹ Matt Wilson, *NCAA Division I Football Coaching Contracts: A Comparative Analysis of Incentives for Athletic and Academic Team Performance from 2006, 2009 and 2011*, 11 J. CONTEMP. ATHLETICS 237, 247-48 (2017).

³² Kevin Stankiewicz, *Review of Big Ten Athletic Contracts Finds Team Performance Valued More Than Athletic Performance*, THE LANTERN (Dec. 5, 2016), <https://www.thelantern.com/2016/12/review-of-big-ten-athletic-contracts-finds-team-performance-valued-more-than-academic-performance>.

³³ Lev Akabas & Daniel Libit, *Saban and Day Contracts Reveal Money on the Line in Championship Game: Data Viz*,

In view of these incentives, it is hardly surprising that “academic policies at some Division I schools indicate[] that [their] commitment to the academic success of college athletes is ambivalent at best” and that “some students who have difficulty with academics are steered into courses (some fraudulent) to keep them eligible.” D.Ct. Dkt. No. 995 ¶ 18. A 2018 report by the Commission on College Basketball noted “there are multiple cases of compromised academic standards and institutional integrity to keep the money and talent flowing.”³⁴ Remarkably, Petitioners claim that the NCAA “serves a societally important, non-commercial objective: higher education.” Petitioner NCAA Br. at 3. But when educational scandals arise – like the academic fraud at the University of North Carolina (“UNC”) designed to ensure that Division I college athletes remained eligible to play – the NCAA publicly disavows any responsibility for college athletes’ education. In defending itself in an action relating to the UNC fraud, the NCAA claimed that “the NCAA’s regulation of intercollegiate athletics” does not “ensure the quality of [college athletes’] educational experience.” Mem. ISO Defs.’ Mot. to Dismiss at 15, *McCants v. NCAA et al.*, No. 15-cv-00176 (M.D.N.C. Mar. 30, 2015), ECF No. 21.

SPORTICO (Jan. 11, 2021; 10:43 AM), <https://www.sportico.com/leagues/college-sports/2021/saban-day-championship-1234620074>.

³⁴ Comm’n on Coll. Basketball, *Report and Recommendations to Address the Issues Facing Collegiate Basketball 2* (April 2018), https://www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf.

III. THE NCAA HAS NO FIXED DEFINITION OF AMATEURISM

Petitioners argue that the NCAA's eligibility rules restricting the amount of compensation that college athletes may receive are necessary to "preserve amateurism" and that "the NCAA's conception of amateurism is procompetitive." Petitioner NCAA Br. at 2, 43; *see also* Petitioners The Big Ten Conference Inc. et al. Br. at 2. In support of their argument, Petitioners rely on language from *Board of Regents*, in which this Court noted that "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports." 468 U.S. at 120. However, this Court made clear in *Board of Regents* that its decision was "*not* based on ... respect for the NCAA's historic role in the preservation and encouragement of intercollegiate athletics." *Id.* at 100-101 (emphasis added).

And even if *Board of Regents* were based on the concept of "amateurism" as it existed in 1984, that would not make it relevant today, because NCAA President Emmert admitted that the definition of amateurism "has evolved and constantly does." ER684-85. In other words, "[a]mateurism does not have a fixed definition, as NCAA officials themselves have conceded."³⁵ App. 38a. In addition to Emmert, former NCAA Vice President David Berst admitted that the NCAA's definition of an "amateur" is "not steeped in any sacred principle that had to be

³⁵ While the NCAA Division I constitution describes a "Principle of Amateurism," that principle does not define what "amateurism" is. NCAA Division I Manual at 4 (Const. art. 2.9). And, as the district court noted, "the principle does not mention or address compensation, nor does it prohibit or even discourage compensation. Accordingly, no link appears between this principle and the challenged compensation limits." App. 141a.

preserved.” ER681. Mike Slive, who served as commissioner of the SEC, one of the Power Five, from 2002 to 2015, testified that amateurism is “just a concept that I don’t even know what it means” and that he had “never been clear on . . . what is really meant by amateurism.” App. 68a, 84a.

“Though the NCAA defined amateurism during this litigation as ‘not paying the participants,’ the district court observed that this purported pay-for-play prohibition is riddled with exceptions.” App. 19a. In its decision, the district court engaged in a detailed discussion of many “forms of payment, often in unrestricted cash, from schools and other sources, are allowed by the NCAA as ‘not pay,’ and thus as not inconsistent with amateurism,” some of which are “provided for student-athletes in exchange for their athletic performance, making it similar to what a reasonable person could consider to be ‘pay for play,’” App. 85a-92a, and concluded that the NCAA’s limitations on college athletes’ compensation “do not follow any coherent definition of amateurism, including Defendants’ proffered definition of no ‘pay for play’ or even ‘pay.’ The only common thread underlying all forms and amounts of currently permissible compensation is that the NCAA has decided to allow it.” App. 92a. For example, the NCAA bylaws provide that “[i]n tennis, prior to full-time collegiate enrollment, an individual may accept up to \$10,000 per calendar year in prize money based on place finish or performance in athletics events,” but provide no similar exception for any other sports.³⁶

Additionally, college athletes are permitted to earn professional-level compensation in one sport while

³⁶ NCAA Division I Manual at 86 (Bylaw § 12.1.2.4.1).

playing as a college athlete in another.³⁷ *Amici*'s experience demonstrates that receiving such compensation does not erode the distinction between college athletes and professionals. Cris Carpenter ("Carpenter"), a teammate of *amicus* Lewis, played NCAA Division I football for the University of Georgia and was drafted to play professional baseball by the St. Louis Cardinals, who paid him a signing bonus of \$160,000.³⁸ Lewis never observed Carpenter being treated any differently than himself or his teammates by fans, coaches or other players, and Lewis perceived both Carpenter and himself as college athletes because they were both attending the University of Georgia while playing on its football team. Lewis' view is consistent with testimony of other NCAA officials, who "testified that consumer demand for Division I basketball and FBS football is driven by consumers' perception that student-athletes are, in fact, students." App. 107a; App. 146a ("Some witnesses testified that consumers enjoy college sports because of the difference between college sports and professional sports" and "[m]uch of this difference is based in the fact that student-athletes are students playing for their school"). And his view is also consistent with the trial testimony below. Plaintiff Martin Jenkins testified that the starting quarterback on his Clemson football team received a signing bonus worth more than \$1 million after being drafted by a Major League Baseball team, yet this payment did not undermine the perception or reality that Jenkins' teammate remained a college athlete. Pet. App. 113a.

³⁷ *Id.* at 89 (Bylaw § 12.1.3).

³⁸ *Big Bonus to Carpenter*, N.Y. TIMES (Sept. 2, 1987), <https://www.nytimes.com/1987/09/02/sports/sports-people-big-bonus-to-carpenter.html>.

Because college athletes are perceived as such due to their status as college students, the distinction between amateurs and professionals is not based on the *amount* of compensation that they receive, but on the *purpose* and *nature* of that compensation. As Lewis has explained, compensation received by professionals is “not about . . . going to school, . . . it’s about paying somebody to play a sport.” App. 107a.

IV. THE NCAA’S COMPENSATION RESTRICTIONS DO NOT PRESERVE CONSUMER DEMAND

The NCAA argues that its compensation restrictions “are procompetitive because they promote the principle of amateurism, which enhances consumer demand.” *Id.* But as the district court noted, “the challenged limits on compensation cannot be deemed procompetitive simply because they promote or are consistent with amateurism. To be procompetitive, they must have some procompetitive effect on the relevant market.” App. 141a. Given the NCAA’s admissions that consumer demand for college sports is driven by consumers’ perceptions of college athletes as *students*, “the district court reasonably concluded that market competition in connection with education-related benefits will only reinforce consumers’ perception of college athletes as students, thereby preserving demand.” App. 43a. To the extent that the NCAA’s “amateurism” argument is based on the Principle of Amateurism in its constitution, providing additional education-related compensation to students is also consistent with that Principle. As the district court noted, “[t]he Principle of Amateurism in [the NCAA’s] constitution . . . holds that amateur student-athletes should be motivated primarily by education. Education-

related compensation and benefits would enhance the student-athletes' connection to academics." App. 121a.

The district court also found that the NCAA did not otherwise "offer evidence to establish that the challenged compensation rules, in and of themselves, have any direct connection to consumer demand." App. 83a. In fact, "[t]he only economic analysis in the record that specifically speaks to the effects of compensation amounts on consumer demand is that by Dr. [Daniel] Rascher," Respondents' economics expert, who determined that "revenues, which are an indicator of demand, at the NCAA, conference, and school levels have increased since 2015, when [college athletes'] permissible compensation increased significantly as a result of the change to the grant-in-aid limit that year and the expansion or creation of other benefits that schools can provide on top of a full grant-in-aid." App. 144-45a. Respondents' survey expert, Dr. Hal Poret, determined that "viewership and attendance would not be negatively impacted" if eight types of compensation currently prohibited or limited by NCAA rules were permitted. App. 102-03a. Petitioners presented no contrary analyses, and Kevin Lennon, who "worked for the NCAA for more than thirty years, testified that he does not recall any instance in which any study on consumer demand was considered by the NCAA membership when making rules about compensation." 103-104a. The Ninth Circuit found that this record "amply support[ed]" the district court's finding "that caps on non-cash, education-related benefits have no demand-preserving effect and, therefore, lack a procompetitive justification." App. 36a.

It is also notable that "student-athletes' receipt of . . . compensation in excess of the cost of attendance . . .

has not led to a reduction in consumer demand for college sports as a distinct product” even when that compensation is *not* related to education. App. 143a. In 1957, an Official Interpretation published by the NCAA rules permitted college athletes to receive “laundry money” – \$15 a month for incidental expenses.³⁹ Although “laundry money” was disallowed in 1975, supposedly as a cost-cutting measure, former NCAA Executive Director Byers later admitted that he had no indication that laundry money “lessened the popularity or demand for football or college basketball” and that he did not believe “the NCAA needs to restrict grants-in-aid so that they do not cover incidental expenses in order for amateur college athletics to exist.”⁴⁰

More recently, “since 2015, international student-athletes have been allowed to receive unlimited payment from their national Olympic governing body in exchange for their performance at certain international competitions. And student-athletes continue to receive unlimited funds from the U.S. Olympic Committee for their performance in the Olympics.” App. 91a. While the NCAA Bylaws provide no explanation why college athletes are permitted to receive such compensation, Lewis’ decades-long experience with the Olympic Games suggests that there is an important parallel between college athletes and Olympic athletes. The popularity of the Olympic Games is rooted in the fact that viewers feel pride for their countries and perceive Olympic athletes as being motivated to compete by a similar pride, not by any

³⁹ GERALD GURNEY ET AL., UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT 13 (2017).

⁴⁰ JOE NOCERA & BEN STRAUSS, INDENTURED: THE INSIDE STORY OF THE REBELLION AGAINST THE NCAA 145 (2016).

promise of sponsorship or compensation. There is evidence to suggest that the popularity of college sports is analogously rooted in the fact that students and alumni feel pride for their school and perceive college athletes as being motivated to compete by a similar pride, not by any compensation they may receive. *See* App. 11a (noting that the district court in *O'Bannon* found “evidence that ‘school loyalty and geography’ primarily drive consumer demand”) (quoting *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1001 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015)). This evidence suggests that so long as consumers perceive college athletes – and themselves – as being motivated by school spirit, rather than by compensation they receive for their play, increasing the amount of compensation that college athletes receive will not suddenly transform them into professionals.

Although many athletes who compete in the Olympics are not college athletes, the history of the Olympics themselves further demonstrates that providing athletes with compensation does not inherently reduce consumer demand. At the dawn of the modern Olympics, competitors were prohibited from receiving compensation for their sports. Jim Thorpe was famously stripped of two Olympic gold medals that he won in the 1912 Olympics because in the summer of 1910 he had played baseball for \$2.00 a game.⁴¹ The IOC later eliminated its ban on athlete compensation, and in 1994, the USOC announced it would award athletes \$15,000 for earning a gold medal, \$10,000 for a silver

⁴¹ J. G. Joakim Soederbaum, *Leveling the Playing Field – Balancing Student Athletes’ Short and Long-Term Financial Interests with Educational Institutions’ Interests in Avoiding NCAA Sanctions*, 24 MARQ. SPORTS L. REV. 261, 287 (2013).

medal, and \$7,500 for a bronze medal.⁴² By 2016, the amounts had increased to \$25,000 for gold, \$15,000 for silver, and \$10,000 for bronze.⁴³ Other countries pay considerably larger awards. For example, Singaporean athlete Joseph Schooling received an award of \$1 million Singaporean dollars (approximately \$750,000 USD) for a gold medal in the 2016 Rio Olympic Games.⁴⁴ As noted above, the NCAA's bylaws permit college athletes to accept this compensation for athletic performance, even though it would seem to epitomize what the NCAA otherwise calls "pay-for-play."

Consistently rising revenues generated by the Olympics reflect that compensating Olympic athletes has had no negative impact on consumer demand, and that consumer demand has continued to increase even as athletes' compensation increased. During the three-year period from 1993 to 1996, the first period in which such payments were permitted, IOC's TOP sponsorship program, which raises revenue in three-year cycles, had ten sponsors who provided \$279 million in revenue. During the period from 2013 to 2016, TOP had twelve sponsors who provided over \$1

⁴² Christine Brennan, *U.S. Athletes to Earn \$15,000 for Each Olympic Gold Medal*, WASH. POST (May 12, 1993), <https://www.washingtonpost.com/archive/politics/1993/05/12/us-athletes-to-earn-15000-for-each-olympic-gold-medal/db9cd218-7f65-4148-9364-3b130cfbb286>.

⁴³ *Id.* Currently, the awards are \$37,500 for gold, \$22,500 for silver, and \$15,000 for bronze. *Athlete Services*, TEAM USA (2021), <https://www.teamusa.org/Team-USA-Athlete-Services/Financial-Resources>.

⁴⁴ Tales Azzoni, *Gold Medal Not the Only Prize for Most Olympic Champions*, ASSOC. PRESS (Aug. 26, 2016), <https://apnews.com/article/42a93d5073ff64d53a842421e4b16d5ec>.

billion.⁴⁵ Broadcast revenue has similarly increased. In 1992, the Barcelona Olympic Games were broadcast in 193 countries and generated \$88 million in broadcast revenue. In 2016, the Rio Olympic Games were broadcast in 220 countries, where they were watched by half the world's population and generated nearly \$2.9 billion in broadcast revenue.⁴⁶ As Olympic historian Bill Mallon recently explained, "If anything, the Olympics are more popular and powerful than ever. It has been decades since they opened up the Games to the professionals, and they're still going strong."⁴⁷

The district court found that in college athletics, as with the Olympics, payments of compensation do not inherently reduce consumer demand, because "compensation has been paid and increased while college athletics," like the Olympics, "has become and remains exceedingly popular and revenue-producing." App. 92a.

CONCLUSION

In sum, *amici's* experiences indicate that college sports have been radically transformed since the time that this Court decided *Board of Regents* in 1984. While the NCAA still refers to college athletes as "amateurs," the market in which they compete has generated ever-increasing amounts of revenue comparable to those earned by professional sports, and the

⁴⁵ Int'l Olympic Comm., Olympic Marketing Fact File 8 (2020).

⁴⁶ *Id.* at 24, 27, 30.

⁴⁷ Patrick Hruby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, THE ATLANTIC (July 25, 2012), <https://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275>.

NCAA and its members have shifted their focus from benefitting college athletes to enriching themselves at college athletes' expense. The NCAA's concept of "amateurism" has no fixed definition, and in today's changed world, amounts to little more than a tool that the NCAA and its members use to maintain their dominance in the increasingly popular market for college sports. The NCAA has offered no evidence that its limitations on college athletes' receipt of education-related benefits are necessary to preserve consumer demand in this market and, in fact, permitting college athletes to receive such benefits may actually strengthen consumers' perceptions of college athletes as college *students*. More importantly, permitting college athletes to receive additional education-related benefits will level the playing field between college athletes and the schools who benefit from their labor. Accordingly, *amici* respectfully urge this Court to affirm the Ninth Circuit Court of Appeals' decision upholding the district court's injunction.

Respectfully submitted,

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