Nos. 20-512 & 20-520

In The
Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

SHAWNE ALSTON, ET AL.,
Respondents,

AMERICAN ATHLETIC CONFERENCE, ET AL.,
Petitioners,

v.

SHAWNE ALSTON, ET AL.,
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE SPORTS ECONOMISTS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

This brief is submitted by a group of economists, listed in the appendix, with research experience on the economics of sports and/or antitrust economics.[1] The goal of the amici is to demonstrate to the Court the following conclusions from economic analysis: the National Collegiate Athletic Association ("NCAA") is not a league; the NCAA is not a production joint venture; amateur college sports can exist without the NCAA; and the NCAA facilitates a conference and independent member cartel over college athletes.

As citizens and professional economists, amici have a substantial interest in fostering the appropriate use of economics in antitrust. Further to that aim, amici have a substantial interest in assuring that antitrust precedents are not based on economic assumptions that conflict with the consensus from economics research. As sports economists, amici are especially qualified to make these points.

For example, in their brief, other economists have gone to unreasonable lengths to stretch economics to defend the actions of the NCAA and its members. But expertise and even distinction in one area of economics should not be confused with specific knowledge of the economics of college sports. These other economists fail to cite a single research publication in sports economics. For decades, amici have undertaken challenging economic analyses of sports and herein seek to set the record straight by presenting the results of their career-long work in sports economics.

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[1] No counsel for either party was in any way involved in preparing this brief. No person other than amici curiae and their counsel made any financial contribution to pay for the preparation and submission of this brief. None of amici curiae are serving as experts in this matter. Counsel of record gave consent to the filing.

SUMMARY OF ARGUMENT

The consensus of research on the economics of sports flatly rejects the claims by the NCAA that it cannot cause anticompetitive harm by collaborating in core business activities.

The consensus of research in sports economics flatly rejects any claim that cooperation by member conferences of the NCAA in setting and enforcing current limits on the compensation of college athletes is required to create maximally popular college sports. Ignoring this consensus leads to the erroneous conclusion that the NCAA and its members cannot engage in anticompetitive collaboration in "core venture functions." This erroneous assertion, in turn, leads to legal and policy conclusions that are harmful to the competitive process and reduce economic efficiency.

The NCAA cartel reduces competition for athletes, while benefitting NCAA members by fixing the price of college athlete services below a competitively determined level. This anticompetitive outcome causes well-known economic inefficiencies of an input cartel, including lower quality of play.

Amici ask the Court to consider the actual results of economic research on college sports in its consideration of this case. The NCAA is not a league. Instead, the NCAA is an organization created by member colleges and conferences to create uniform playing rules, to regulate the behavior and compensation of college athletes, to organize and to market national championships in some but not all sports (not including the Football Bowl Subdivision ["FBS"] football, the top level of college football), and to wield the monopoly power of those member conferences and independents acting together to exclude competitors in the organization of national championships.

The upshot of these main points is that member conferences collectively use the NCAA for two purposes: as a standards organization to develop common operating rules and as a cartel that fixes the price of college athletes. Operating a price fixing cartel is not a necessary activity in the creation of college sports that are highly popular, but it is economically anticompetitive and inefficient.

ARGUMENT

I. Relevant Economics Research

A. Economics Research on College Sports

Economics research on sports leagues dates to the seminal article by Simon Rottenberg (1956). This article was the first to demonstrate that restrictions on compensation of athletes do not enhance competitive balance within a sports league. Research on the economics of college sports, per se, has been ongoing since the 1980s, covering every aspect of that endeavor. This summary cannot possibly cover all of this work and so offers an overview.

The earliest economic research on college sports analyzed the impacts of *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) on the quantity and price of television broadcasts (Fizel and Bennett [1989]). Fort and Quirk (1999) and Siegfried and Burba (2004) continued that analysis showing how *Board of Regents* led to an enormous increase in the number of college games that are televised, combined with a substantial reduction in television rights fees.

Of course, much has changed since *Board of Regents* and economic research on college sports coalesced around analysis of the core economic issues in college sports. The first comprehensive economic study of college sports was the book by Fleisher, Goff, and Tollison, *The*

National Collegiate Athletic Association: A Study in Cartel Behavior (1992), which described how the NCAA operates as a cartel and identified the inefficiencies created by its cartel operations. Some mathematical rigor, predictive modeling, and comparisons to empirical work by others are in Fort and Quirk (1999). A more recent overview of all aspects of college sports is in the edited volume by Fizel and Fort (2006). Summaries of the cartel behavior of the NCAA and its member conferences appear in Kahn (2007), Siegfried and Sanderson (2015), and Sanderson and Siegfried (2018). An attempt to sort all of this out for the courts is in Fort (2017).

During the past four decades economists have studied all aspects of the structure of college sports, relating the goals of university administrators to their choice to form college sports conferences, and on to their other creation, the NCAA. Goff (2000) identifies the values from college sports to universities. Flynn and Gilbert (2001) and Noll (2003) present detailed analyses of the distinction between efficiency-enhancing league functions and anticompetitive collusion in all sports. Hoffer, Humphreys, Lacomb, and Ruseski (2015) analyze the motivations of sports administrators. Fort and Winfree (2013) and Fort (2016) focus on the actual outcomes of college sports finance, debunking the arms race myth. A rigorous theoretical treatment is in Fort (2018). A review of this literature, plus a refutation of efficiency justifications for the NCAA cartel, appear in Blair and Wang (2018).

B. Relationship of Economics Research to This Case

The relationship of *economics research* to this case is that all of the fundamental economic issues about the operation of college sports have been examined in objective research by sports economists. What objectives

are pursued by those creating and organizing college sports? How are college sports organized to achieve those objectives? What is the impact of the organization of college sports on the product offered to fans and on the athlete labor input to that production process? This brief presents what economics research has to say about the important issues with which the Court is grappling.

II. The NCAA Is Not a Sports League

In virtually all sports, most contests are organized in a league. Typically, leagues adopt common rules of play and player eligibility, and schedule events that culminate in championships. Although seven FBS colleges field football teams that are "independents" (*i.e.*, not members of any conference), in both FBS and Division I more broadly, all colleges belong to a conference for at least some sports. For example, no Division I college currently operates as an independent in men's or women's basketball.

For the vast majority of Division I colleges, conference play is by far the most important part of a season in any sport. Most regular season contests are part of a conference schedule.

The NCAA organizes national championships in several sports, including men's and women's basketball. But post-season tournaments are simply not relevant to most Division I college teams. Most Division I colleges have no realistic chance to win a national championship in men's or women's basketball, or even to qualify for the NCAA post-season championship basketball tournaments. Thus, for the majority of Division I colleges, success or failure during a season — both athletic success and success in attracting and pleasing fans — depends exclusively on success in conference competitions. For

FBS members, the NCAA is not involved in organizing the national championship.

A. Conferences and Independents Perform League Functions in College Sports

Colleges organize almost all sports through conferences because doing so serves their interests. Intercollegiate athletics are valuable to university administrators not as ends in themselves, but because they help generate resources to pursue their primary objectives—research, teaching, and service. The consensus of economic research shows that those resources come from more than just revenues from athletic contests, but also from larger student applicant and faculty hiring pools, alumni and booster political support, and as part of hosting potential donors (Fort and Winfree, 2013, Chapters 1-3).

Originally college sports teams were "independents" (*i.e.*, not members of conferences). But soon most teams chose to join conferences to create values through cooperation that they could not create by themselves.

Cooperation among members makes conference play happen and brands that play as different from other conferences and from independent play. Common rules, a common schedule, and the creation of a conference championship increase consumer demand for college sports, and in so doing raise the value of college sports to universities as they pursue resources for research, teaching, and service. While cooperation within a conference raises the monetary value of play, conference identification also creates interest and value among students and important clientele.

Some conference cooperation occurs through joint ventures that are not required to make and brand play. Instead, they increase revenues.

An obvious example of revenue enhancement through conference cooperation is the joint sale of media rights. As a costless by-product of play, each university can sell media rights on its own. Colleges often did so in the past. For example, they did so briefly after the *Board of Regents* decision. They do so even today, with the most lucrative examples being the University of Notre Dame and Brigham Young University ("BYU") football rights and the University of Texas Longhorn Network. All FBS football teams have enough fans to create at least local broadcast value.

Cooperating in the sale of these rights through a conference results in a higher return to each conference member than each could otherwise obtain acting independently, causing conferences to create their own media networks. Increasing media rights payments via conference marketing reduces the amount that the universities must invest from their general budgets to obtain the research, teaching, and service resources that athletics generates.

One must not ignore independents. In 1973, when NCAA Divisions I, II, and III were created, 36 colleges were independents in football. When Division I-A was distinguished from Division I-AA in 1978, 33 colleges were football independents. However, since then *nearly all independents have decided to join conferences*. Indeed, the Big East Conference formed its FBS version of football in 1991 from members that all had been football independents in 1990 (Boston College, Miami (FL), Pittsburgh, Rutgers, Syracuse, Temple, Virginia Tech, and West Virginia).

At present, seven colleges are independents in FBS football for a variety of reasons. Some are likely to be between conference affiliations or may prefer a conference affiliation but have not been able to obtain

one. Others are independents because they believe that their interests (including revenue maximization) are best served by remaining unaffiliated. All of the service academies were once independent, but only Army (the United States Military Academy) remains so today. For other sports, Army is a member of the Patriot League. BYU and Notre Dame both have substantial nationwide followings; however, both BYU and Notre Dame are members of conferences for sports other than football. BYU plays in the West Coast Conference for basketball and some other sports, and the Mountain Pacific Sports Federation for sports that are not organized by the West Coast Conference. For most sports, Notre Dame belongs to the Atlantic Coast Conference ("ACC"), but also is a member of the Big Ten for hockey. Even for football, Notre Dame joined the ACC during the coronavirus pandemic.

Among the FBS independents, only BYU and Notre Dame field teams of a sufficient quality to be contenders for participation in the College Football Playoff ("CFP"). Army, once a national power, has not won a national championship since 1946. The University of Connecticut, Liberty University, University of Massachusetts, and New Mexico State University have never been contenders to win a national championship in football.

The application of sports economics to the facts about conference membership leads to two important conclusions. First, the "leagues" in college sports are the conferences. College conferences (except for seven independents in football) produce nearly all college sports. They are the source of the cooperatively obtained values created by determining membership, defining rules of play, organizing officiating (and appeals), setting schedules, and determining the structure of their conference championships.

Second, distinguishing joint venture activities that do not increase efficiency from the activities that are required elements of a conference, such as common rules, a common schedule, and a conference championship, is of crucial importance. Noll (2003) reminded us of this distinction, which has become textbook material, literally, since then (*see* Fort, 2018, Chapter 13). The importance of the distinction can be seen in the following example.

In *The Antitrust Paradox* (1978), Robert Bork states: "[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." This is the essence of the cooperation that is required to distinguish league play from independent play.

Bork's statement is not true of everything else that a league or other group of teams might do, that is, all conceivable forms of cooperation. If all of Bork's professional lacrosse teams decided to centralize team merchandise sales in their league, they would not by so doing create the products that bear the names and logos of league members. As a matter of antitrust economics, whether this joint venture harmed competition or enhanced efficiency would have to be assessed through an economic analysis of the competitive effects of pooling rights sales, as set forth in *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010).

Likewise, if the sole professional lacrosse league decided to pool the sale of television rights to all league games, application of antitrust economics would be required to ascertain whether the reduction in competition in the sale of television rights was more

than offset by improved efficiency or was attractive to league members only because it enabled the league to extract monopoly profits in selling those rights. Economic research on this issue has concluded that pooling the sale of television rights for all teams in a sport caused anticompetitive harm (reduced output and higher prices) in professional sports after passage of the Sports Broadcasting Act in 1961, Pub. L. No. 87-331, 75 Stat. 732 (codified as amended 15 U.S.C. § 1291) (granting an antitrust exemption to professional leagues for centralizing the sale of broadcast rights) and NCAA football, findings that are consistent with the decision of the Court in *Board of Regents*.

B. The NCAA Is Not a League

The NCAA errs by claiming that it is a league. Following the conclusions discussed above, the NCAA is a consortium of colleges and conferences that does not perform the core functions of a league. Conference members create conference play and organize the joint venture activities of a league that are described in the preceding section. At the most basic definition of a league, the NCAA does not create what a league is designed to create. Rules, schedules, officiating, and conference championships all are created by member conferences and independents.

What the NCAA actually is can be discerned from what it does. The NCAA facilitates collaboration among conferences and colleges to obtain additional benefits for themselves from cooperation, whether procompetitive or anticompetitive, that its members cannot obtain on their own. Member conferences and independents invented the NCAA. These NCAA members reach cooperative agreements, some of which are joint ventures, through the NCAA. Member conferences and colleges are, in fact, the NCAA.

Each and every NCAA activity actually is an activity by the members. Each activity requires inter-conference cooperation to produce an effective result from the perspective of NCAA members. An example is the adoption of common playing rules across conferences. Early on, the few conferences that existed each developed their own rules. But colleges and their conferences recognized that uniform playing rules enhanced the value of play. To achieve uniformity, colleges cooperated to negotiate common rules. The very first job of the forerunner organization of the NCAA was to facilitate an agreement on the playing rules of football.

Colleges also saw the value of declaring inter-conference "national champions" in each sport. Inter-conference cooperation and agreement on the process of crowning a national champion adds legitimacy in the eyes of member conferences and, more importantly, college sports fans. The result would be that these fans would be willing to pay more to watch national playoff and championship games. That money then is distributed to member conferences and each university can use it to defray the cost of their sports programs, conserving general budget money.

To see that revenue is the motivator, note that the conferences have only agreed to select teams for participation, to market championships, and to sell sponsorships and media rights centrally through their NCAA *for some sports*. The FBS championship is not an NCAA joint venture, handled instead by the College Football Playoff, a separate organization composed of the ten FBS conferences plus independent Notre Dame. Member conferences also do not use their NCAA for national championships in many other sports, including bicycle racing, boxing, e-sports, rowing, roller hockey, rugby, sailing, and squash.

Member conferences and colleges also desired common regulation of the qualification, eligibility, and compensation of athletes. The NCAA seeks to justify some of these regulations as designed to pursue the so-called desire for college sports to remain "amateur" compared to professional leagues. This issue is of such overriding importance, with additional separate economic implications and impacts, that coverage of the economics of "amateurism" is reserved to a later section of this brief.

Acting together under their NCAA identity, member conferences and colleges eliminated other organizations from performing the function of creating a national championship. The women's version of the national basketball championships originally occurred under the auspices of the Commission on Intercollegiate Athletics for Women (1969-1971) and then the Association for Intercollegiate Athletics for Women (1972-1982). The NCAA's Official Final Four Record shows that their first women's championship was in 1982. The Association for Intercollegiate Athletics for Women folded that same year.

The same fate befell the National Invitational Tournament ("NIT"), a competitor in organizing a national championship in men's basketball. After Marquette chose the NIT over the NCAA tournament in 1970, members (via their NCAA) adopted a rule that no member college could accept an invitation to the NIT championship if it also was invited to the NCAA championship. As a result, the NIT rapidly diminished in popularity. The NIT ultimately sued the NCAA under the antitrust laws. In the settlement of that suit, the NCAA simply bought the NIT for a reported $56.5 million (Litsky, 2005).

NCAA members cooperate to control the movement of colleges among Division I (including FCS and FBS

football), Division II, and Division III. This restriction on entry has no efficiency justification. "NCAA approval" is not needed for colleges to move from one conference to another in the same division. A more competitive alternative would be to allow a higher-division conference to invite lower-division teams to join without further scrutiny by the NCAA.

The key lesson from this section is that there is no economic basis for the claim that the NCAA is a league. The NCAA is a collaborative joint venture for obtaining benefits for its members. The NCAA does not achieve these benefits by performing the functions of a league. Instead, the NCAA is cooperatively managed by member conferences and colleges to make rules that they find collectively beneficial. Most notably, its restrictions on the market for athletes benefit its members by reducing the costs of fielding teams.

III. The NCAA Is Not a College Sports Production Joint Venture

A. The NCAA Does Not Produce College Sports

Section I demonstrated that the NCAA is not a league. The NCAA is a creation of university and conference administrators that was created to obtain benefits for its members that they cannot achieve acting alone. The member colleges and conferences are the NCAA, and it is the members that are producing college sports, not the NCAA.

The organization called the NCAA no more produces college sports than a farm cooperative produces grain. In a cooperative, a group of farmers agrees to pool grain sales by storing grain together in an elevator, hoping to release the grain over time at opportune price moments. The grain cooperative is a device invented and

implemented by the actual grain producers. It does not produce any grain.

The NCAA does not produce amateur college sports. Colleges do this production through their conferences or as independents. For example, the Big Ten produces men's and women's basketball games, under rules and player regulations cooperatively designed by the Big Ten and the rest of the member conferences and independents through their NCAA. Indeed, some conferences have rules that are stricter than the rules of the NCAA. It is these conferences (and a few independents) that produce amateur college sports and did so for decades prior to the start of NCAA regulation of athlete compensation in 1956.

B. The Danger of Believing that the NCAA Produces College Sports

Other amici curiae economists, in support of the NCAA, claim that the rulings of courts below tinkered with NCAA sports production, with potentially dire consequences for entrepreneurship and innovation. But those other economists provided no theory or evidence that the NCAA produces college sports in the first place, much less that it has been the source of innovation in college sports. Indeed, since the application of valid economics shows that the NCAA does not produce college sports, those other economists claim a foul that did not and cannot occur. Member conferences and independents have done all of the production and innovation.

Instead, the courts below rightfully and justifiably applied antitrust to cooperatively approved rules, designed and enforced by member conferences via their NCAA, which reduce athlete pay. The overwhelming consensus among sports economists about the

anticompetitive nature of these rules is discussed in the final section of this brief.

Finally, the incentives put in place by legitimizing the false claim that the NCAA engages in sports production are truly harmful. Suppose members of the fast service food industry could form the National Fast Service Association (NFSA) with the sole purpose of reducing worker pay below the prevailing market wage. If by labeling all industry products as "NFSA" fast food they could thereby falsely claim that NFSA is engaged in production, their defense against antitrust claims would be that without the NFSA, an "NFSA hamburger sandwich" is not possible. They further could argue that without the NFSA the value being produced for NFSA hamburger customers would be lost, and if the courts forced them to pay a market wage, they could only do less "NFSA hamburger" production.

This is exactly what NCAA members are doing with their "NCAA as a producer" misdirection. The NCAA is not the producer of college sports.

IV. Amateur College Sports Can Exist Without the NCAA

The primary claim addressed in this section is that "amateur" college sports would cease to exist without the NCAA.

A. The Peculiar Definition of NCAA "Amateurism"

The NCAA defines "amateurism" as compliance with NCAA compensation rules. Hence it claims that if the NCAA were to disappear, so would "amateurism" in college sports. Rascher and Schwarz (2000) demonstrate that this argument is tautological. Simply stating a tautology is not the same thing as proving that amateur

college sports would cease to exist if the NCAA stopped defining the term.

Indeed, the definition of "amateur" jointly arrived at by members and imposed on college athletes via their NCAA is quite peculiar. Originally, the NCAA's definition was zero compensation, consistent with the common understanding of the term amateur. As documented by former NCAA President Walter Byers and C.H. Hammer (1995), the original NCAA definition disappeared permanently in 1956, when the NCAA amended its definition of "amateurism" to allow grants-in-aid. At that time, "amateur" came to mean a cap on compensation that is whatever members, acting together, jointly say it is.

The amateur compensation cap is actually a cap on athletic department spending on athletes. NCAA members, acting jointly, limit both the value of a grant-in-aid and the number of scholarships that can be awarded in each sport. Thus, the amateur compensation cap varies across member institutions, even within the same conference, because colleges differ in the sports that they sponsor and value of a grant-in-aid. As a result, the athlete cap allows the difference between larger-revenue programs and smaller-revenue programs to remain intact. This is demonstrated in the final section of this brief.

Finally, although the cap on compensation is labeled by the NCAA as a "cost of attendance," this label is misleading to the extent that it implies that college athletes are being reimbursed for actual costs. In fact, college athletic grants-in-aid include cash payments that are based on a college's estimate of the cost of the ordinary living expenses of their students, including such things as rent, food, incidental expenses, and allowances for childcare for athletes who are parents. Once the cash payment for a particular student is calculated and

disbursed, how much an athlete actually spends on these items is not controlled or even monitored by the NCAA or colleges. Moreover, compensation is not limited to cost of attendance, but can include additional payments, including rewards for playing in championship events.

Thus, the economically correct way to conceptualize athletic compensation under NCAA rules is that athletes are paid a salary that is based partly on their performance and that is designed to cover the costs of an adequate if spartan standard of living in the community in which the college is located (Federal Student Aid Handbook, 2019).

B. Amateur College Sports Already Exist Without the NCAA

The argument that "amateur" college sports would not exist without cooperation among conference members via the NCAA seeks to equate "amateur" and "NCAA." Accepting this tautology leads to the erroneous conclusion that the only amateur college sports are NCAA sports. But the history of the NCAA betrays this argument.

Inter-conference cooperation via the NCAA is not required to produce amateur college sports. From the creation of the predecessor organization to the NCAA in 1906 until 1956, conferences made and enforced their own "amateur" rules regarding eligibility and scholarships. Even today, conferences can and do set their own compensation rules as long as these rules are at least as restrictive as NCAA rules. An example is the prohibition against athletic scholarships in the Ivy League. It was not until 1956 that the member conferences agreed to institute and enforce a definition of "amateur" competition that was binding on all members. In the decades since, restrictions on the compensation of college athletes have waxed and waned, revealing that

these restrictions are not derived from a coherent, consistent definition of amateurism.

Even beyond this history, it simply is not true that *only* NCAA sports are amateur college sports. Many amateur college sports are managed under a college sports organization other than the NCAA, the National Association of Intercollegiate Athletics ("NAIA"). In addition, colleges often organize amateur college sports outside the structure of a national organization as university sanctioned club sports. Some colleges organize clubs in sports that are as old as sports itself, like golf. Some are brand new, like e-sports (competitions involving video games). And all of these college sports exist without NCAA sanction or involvement. Finally, many sports are managed by a specialized national organization for that sport.

NCAA restrictions on compensation do not apply to sports that are not governed by the NCAA. Many allow participants to earn prize money. In e-sports, some player prize pools have been in the hundreds of thousands of dollars, paid by the creators of the e-games. (Next College Student Athlete, undated; Duran, 2019; Adams, 2020; Sledge, 2020).

Indeed, amateur college sports, consistent with the common meaning of the word, may well have evolved if the NCAA had never entered the picture in the first place. The example of other world sports bears out this idea. When amateur sports organizations in soccer and rugby, for example, faced pressure toward professionalism, the rules were changed to allow amateurs and professionals to play alongside each other. In the case of rugby, the desire of some to play as professionals led to a split between professional "codes"—Rugby *Union* and Rugby *League*. This split occurred in 1895, and not until in 1995 was the amateur Rugby Union code

changed to accept professionals; that is 100 years where professional and amateur codes existed independently without undermining the sport of rugby. In other cases, like golf, swimming, tennis, and track, an athlete has the choice to compete as amateur or professional in the same events. "Amateurism" is only forced on some college athletes by the NCAA.

C. What If the NCAA Version of "Amateur" Sports Disappeared?

The most obvious response to the claim that NCAA's definition of amateur sports would cease to exist without the NCAA is simply, "So what?" Prior to the implementation of athlete compensation caps by member conferences via their NCAA, college football was thriving, growing in popularity and as an economic force. This suggests that substituting NCAA regulation for conference regulation was not necessarily a good thing for sports fans.

Indeed, no research on sports economics supports the idea that college sports fans are better off under the NCAA definition of "amateur" than under the separate definitions of amateurism that were adopted by each conference prior to the adoption of the NCAA's compensation rules. But there is evidence that the popularity of college sports, and competitive balance in college sports, have not been adversely affected by alterations in the compensation received by college athletes (*see* Salaga and Fort [2017], Mills and Winfree [2017], and the extensive bibliographies therein).

The NCAA's amateur compensation cap has been raised repeatedly in the past 40 years, and college sports has only grown more popular, not less. The grant-in-aid cap was initially instituted in 1956. Interest in college sports actually exploded after the implementation of

grants-in-aid, aided by television exposure. The grant-in-aid cap was raised further to include full cost of attendance in 2015. Interest in college sports kept growing. And the compensation cap is currently under pressure to include name, image, and likeness ("NIL") values, with the NCAA agreeing that this should happen (although disagreeing over how). The district court's Findings of Fact is full of examples of NCAA "amateur" compensation worth thousands of dollars not related to educational expense (*e.g.*, bowl gift bags, Olympic athlete prizes). Nothing in the response by fans would indicate that these payments reduce fan interest. The same was true when the Olympics became more popular after the IOC abandoned amateurism (Preuss, 2004).

While amici are not lawyers, amici do understand one of the fundamental considerations behind the Court's deliberations. A joint venture must produce a product that otherwise would not exist but for the existence of the joint venture in order for joint pricing of the product to be allowed. The NCAA fails to demonstrate that this is true for amateur college sports. Amateur college sports existed in the past and do to this very day exist without any involvement by the NCAA.

V. The NCAA Facilitates a Cartel Over College Athletes

Cooperation among conference members is required in order to organize and brand conference play. If some part of this type of cooperation is disallowed, say, by an antitrust decision, play might cease to occur. Courts have rightly been cautious about interfering with this important aspect of college sports conferences.

A. Member Conferences, Independents, and Their NCAA Cartel

Cooperatively setting an athlete compensation cap across conferences is not required to organize or brand conference play. To conclude otherwise is to grant NCAA members carte blanche to ignore the antitrust laws in deciding the scope of their cooperation. Courts are right to scrutinize joint venture cooperation resulting in the compensation cap on college athletes because it falls under this category. The consensus of economic analysis is that the NCAA's compensation cap on college athletes is unnecessary for the continuation of popular college sports and, therefore, has no efficiency benefits and is anticompetitive.

As an analogy, setting interface protocols between computers and printers through cooperatively determined standardization reduces costs for all while adding value for buyers to printers and computers. But this type of cooperation is decidedly different from printer and computer companies getting together to adopt no poaching rules for employees. The latter are anticompetitive because they limit employment opportunities and employee mobility and reduce employee compensation relative to wages in a more competitive labor market.

Additionally, the market power over labor created by member conferences through their NCAA is quite different than *having market power* over inputs due to some innate market characteristic. Member conferences act through their NCAA to rig the college athlete labor market *to create market power through cooperation.* Lower athlete compensation is the result.

Much of the debate over athlete regulation by member conferences via their NCAA focuses only on the amateur compensation cap since it comes first

to mind when discussing an “amateur” requirement. However, the regulation of athletes extends beyond that to restrict and reduce athlete mobility. As with the computer firm analogy, these other rules reduce athlete mobility, opportunities, and compensation relative to a more competitive market.

The mobility restrictions are of two forms. The National Letter of Intent is governed by *member conference commissioners*, that is, the Collegiate Commissioners Association, and then enforced by the same commissioners via the NCAA. The National Letter of Intent locks an athlete to a specific college program prior to their career. The other mobility restriction is NCAA transfer rules. These rules dramatically restrict athlete mobility during their playing career, reducing competitive options. Finally, NCAA rules governing exit toward professional sports restrict mobility at the end of an athlete’s career. And they do this in addition to professional league impositions on players entering their leagues.

A horizontal agreement is a cartel if it fixes prices that would otherwise be set independently by the parties to the agreement. This is precisely what the amateur compensation cap agreement among NCAA members does to the compensation of college athletes. Effective price collusion requires enforcement harsh enough to deter noncompliance with the fixed price. The NCAA enforcement regulations, administered by the Committee on Infractions and enforced by the Office of the Committee on Infractions, satisfy this requirement. Finally, a joint venture that collectively monopolizes joint acquisition of an input is anticompetitive if it does not produce any product that would otherwise not be produced. That the NCAA is not necessary in order to produce amateur college sports was demonstrated earlier in Section III.

In economic terms, the cooperation between member conferences and colleges via their NCAA embodies all of the elements of a cartel. As a result, the NCAA is a textbook example of a cartel, reducing compensation to college athletes.

B. The General Characteristics of Any Cartel

Input cartels have two main characteristics. First, as a result of setting the cartel price below the competitive price, they transfer value from sellers of labor to buyers of labor. That is, labor receives less than the competitive return and buyers of labor keep the difference between the higher competitive price and the lower cartel price.

Second, cartels create inefficiency in the input market. Depending on how cartel price rules are designed, the amount of labor acquired can be inefficient. The amount and quality of labor hired can be less than is efficient. Cartel pricing rules also can distort the incentive facing labor to invest in job skills. Cartel arrangements that reduce competition also cause inefficiency by eliminating gains from exchange between some buyers and some sellers of labor.

C. Transfers, Inefficiency, and the NCAA Cartel Over College Athletes

The NCAA cartel that reduces compensation to college athletes exhibits both of the general features of any input cartel, namely, transfer of value from college athletes to athletic departments and inefficiency. Both are presented in this subsection.

The price reduction and transfer results of the NCAA cartel rules follow from economic assessment of the athlete compensation cap in Fort (2018). Athletic directors ("ADs") care about revenue. Without any athlete compensation cap, they face a competitive supply

of athlete labor. To capture a part of the actual situation, suppose there are two ADs. One directs a department that can only collect less revenue from their output than the other. So, there is a smaller-revenue AD and a larger-revenue AD. The market for athlete labor is the sum of the individual AD demands (derived from the revenue that athletes will produce).

The intersection between market demand and athlete labor supply determines the total amount of athlete labor hired in the market and the price of each unit of athlete labor hired. Each AD then takes that price as given and decides their individual athlete labor hired. As is reasonable to expect, research in sports economics shows that the larger-revenue AD hires more athlete labor than does the smaller-revenue AD. And the sum of their hiring is equal to the market amount.

Moving to the impact of the amateur compensation cap, the first thing to note is that the cap for each AD is different. The maximum allowed number of grants-in-aid is common to both ADs restricted by NCAA rules. But the value of the grant-in-aid varies across institutions. Even if both ADs chose the maximum, their cap would be different because both cost of attendance and additional payments for performance are different at different institutions.

NCAA rules can be chosen to maintain revenue maximization across the two programs. The cap specification simply has to allow each AD to choose the same level of athlete labor as they did without the cap. But since it really is a cap, each AD will spend less on that same amount of athlete labor. Also, because of their different athlete labor demands, the cap will drive the price paid by the smaller-revenue college to be lower than the price paid by the larger-revenue college.

The transfer from athletes to the athletic department is now easy to see. It is just the difference between the competitive price that would have been paid without the amateur compensation cap and the amount that will be paid with the enforcement of the cap. The transfer is smaller from athletes at the smaller-revenue program because, even though the price is lower, less athlete labor is hired there. Further, if ADs are skillful negotiators, they will transfer all of the possible payment down to a level that just keeps the athletes providing their services rather than going to their next best option.

The same analysis can be used on either “average” grant-in-aid recipients or “star” grant-in-aid recipients. It is intuitively obvious that the transfer is larger from those athletes that generate more revenue. A higher amount would be transferred from stars to their athletic departments than from average grant-in-aid recipients under the cartel amateur cap.

Economists have been demonstrating this result of the NCAA cartel transfer from athletes to athletic departments since Brown (1993), as he has updated in Brown (2010). Later, Brown (2012) showed that the typical professional NBA career does not pay enough to offset the payment reduction suffered by college athletes under the amateur compensation cap. The layperson is blinded by the massive returns to superstars, but only a very small percentage of players have careers that generate a big payday.

Moving to the inefficiency results of the amateur compensation cap, remember that the economic story so far compares a world without the cap to a world with the cap. In order to maximize revenue, the same amount of athlete labor is hired under the amateur cap as without it. So, for the NCAA cartel, the inefficiency does not

come from hiring less labor, it comes from lower quality athletes once the amateur cap is in place.

This occurs as potential athletes consider their talent investment under the cartel amateur compensation cap, compared to the competitive situation. Athletes would be expected to invest more in their skill chasing the higher return in the absence of the amateur compensation cap, relative to the lower price paid when the amateur compensation cap is in place. This disincentive confronts athletes prior to their entry into college sports and the economic implication is that investment in athletic skill is lower than it would be under competition.

In the limit, the disincentive may lead some athletes to choose another path with a lower expected return. The potential athletes that would have chosen the added benefits of sports participation at the higher price absent the amateur compensation cap are dissuaded from doing so with the cap in place. The cap reduces investment in the talent that is needed to be a college athlete, and fewer potential athletes offer their services. That is the definition of economic inefficiency.

Another type of inefficiency concerns the fact that ADs, precluded from simply paying athletes, still must compete for athlete talent. In the presence of the amateur compensation cap, ADs allocate part of the transfer from athletes to enticements-in-kind like better housing, workout facilities, locker rooms, and entertainment facilities. There can be inefficiencies associated with enticements-in-kind. There may also be an inefficiently large number of assistant coaching positions relative to the number that would be without the amateur compensation cap. And all athletic department administrators and coaches can be paid more in the presence of the amateur compensation cap than they would be without it.

While the amateur cap, itself, creates inefficiency, so too do the mobility restrictions that are the rest of the cartel impositions on athletes, that is, the National Letter of Intent and transfer restrictions. These restrictions disallow welfare maximizing exchange. When an agreeable buyer and seller exist, but their mutual exchange agreement is precluded, inefficiency occurs. And that is the impact of the member conference agreed-upon NCAA mobility restrictions.

D. Competitive Harm, College Athletes, and College Sports Fans

In the preceding economic assessment of the cartel amateur compensation cap, the motivations of member conferences of the NCAA are beside the point. It does not matter why member conferences calculate and enforce their "amateurism" definition du jour via their NCAA. The effect is the same — a transfer of economic value created by amateurs to the athletic department, incentive inefficiencies in the investment by athletes, and talent inefficiency due to mobility restrictions.

It does not matter that entrepreneurs and innovation occur to the extent that they do in college sports. Innovations in college sports do not change the fact that the same transfers from athletes to their athletic departments occur. Nor does it change the fact that mobility restrictions create exchange inefficiency or that disincentives to invest in being a college athlete, to the point of choosing not to participate at all, result from the amateur restrictions.

Further, it does not matter how university administrators choose to reallocate the transfer from athletes to other purposes. Whether university administrators reallocate the value created by athletes to the university educational mission or leave the money

with the AD to pursue other goals that can be obtained by investment in athletics, the same transfers from athletes were the source of the reallocation. And inefficiency is the result.

While amici are not lawyers, amici are well-aware of the courts' responsibility in weighing the competitive gains of a less restrictive alternative to the amateur compensation cap against fan demand. In the first place, the NCAA economists never studied the relationship between changes in the amateur compensation cap and fan demand. On the other hand, economists for the athletes did study the relationship between changes in the compensation cap and revenues, driven by fan demand, and found no impact. This is consistent with the economics research, cited above, that concludes a less restrictive alternative to the amateur cap has not harmed fan demand.

However, the findings of economists studying sports is that the cartel over college athletes, designed and enforced by member conferences and independents through their NCAA, contains an overlooked contribution that can aid the Court in its deliberation of this important point.

A less restrictive alternative to the amateur compensation cap will *increase fan demand*. The talent investment inefficiency covered in the last section would be removed, raising the quality of the athletes participating and increasing the number of higher-quality athletes. It is well-known from sports economics analysis that willingness-to-pay, as an indicator of fan welfare, is higher for higher-quality play (*see* Fort, 2018, Chapter 2). In the ongoing debate about whether or not removal of the amateur compensation cap will reduce demand, it is clear from basic economics that, quite the opposite

will occur. Fan demand will increase with increased athlete quality.

CONCLUSION

In conclusion:

- The NCAA is not a sports league.
- The NCAA is not a *production* joint venture.
- Amateur college sports can exist without the NCAA.
- The NCAA facilitates a member conference cartel over college athletes.

The upshot of these conclusions is that the "joint venture" NCAA, designed and implemented by member conferences and independents, is a price fixing cartel over college athletes. The collusion of member conferences and independents to fix this input price is not necessary for member conferences and independents to fulfill their necessary function of creating conference and independent play. While most of the debate is about the fairness to athletes, economics adds that there are efficiency losses to this cartel behavior and that removing the cartel actually produces efficiency gains that the courts are not considering yet.

Amici urge the Court to add these conclusions from the economic analysis of sports and reject the erroneous "joint venture" plea by the NCAA.

It is in the interests of society that the full array of antitrust relief be considered in any joint venture activity arousing suspicion of anticompetitive behavior. The demands that no further rule of reason "burden" be put upon "the NCAA", and that member conferences acting via their NCAA deserve even more antitrust leniency, are unsupported by economic findings.

Removing rule of reason scrutiny simply means that joint venture activity that harms competition is treated the same as joint venture activity that creates mutual gain. Setting rules on fair play during games, or the dimensions of playing fields, is one thing. Member conferences of the NCAA acting cooperatively to regulate athlete compensation is quite another. These two types of cooperative activity are not the same thing and should not be lumped together. To do so ignores the very real inefficiency created by the resulting amateur compensation cap and mobility restrictions imposed on athletes by member conferences via their NCAA.

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Appendix

Appendix: Complete List of Amici Curiae Sports Economists

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Allen Sanderson, University of Chicago
Raymond Sauer, Clemson University
John Siegfried, Vanderbilt University
Stefan Szymanski, University of Michigan
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