Case Nos. 19-15566, 19-15662

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION

SHAWNE ALSTON, *et al.*,

Plaintiffs-Appellees-Cross-Appellants,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Defendants-Appellants-Cross-Appellees.

Appeal from the United States District Court,
Northern District of California, No. 4:14-md-2541 (Wilken, J.)

BRIEF OF *AMICI CURIAE* THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION AND THE NATIONAL BASKETBALL PLAYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A): The National Football League Players Association certifies that it has no parent corporation and no publicly held corporation owns ten percent or more of its stock. The National Basketball Players Association certifies that it has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

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INTEREST OF *AMICI CURIAE*

The National Football League Players Association and the National Basketball Players Association (collectively, the "Associations") are the exclusive collective bargaining representatives of players in the National Football League and the National Basketball Association. Most of the Associations' members are former Division I football and basketball players. The Associations have a strong interest in ensuring that incoming members receive adequate compensation and educational opportunities during college. The Associations also have unique insights into the experiences of college athletes and the difficulties they face during and after college.[1]

INTRODUCTION

For years, the National Collegiate Athletic Association ("NCAA") has repeated the marketing mantra that most of its athletes "will go pro in something other than sports." That catchphrase ignores the reality that college athletes already *are* professionals—just overworked and underpaid ones. They labor close to 80 hours a week—more than twice as many hours as the average American worker—training, practicing, performing, and studying.

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[1] This brief is filed with the consent of all parties. No counsel for a party authored this brief in whole or in part. No person other than *amici curiae*, their members, or their counsel contributed money to fund this brief's preparation or submission.

These demands require college athletes to make enormous academic, physical, and personal sacrifices. College athletes frequently lack the flexibility to choose the majors or courses they want. They lack time to study, participate in extracurricular activities, or obtain part-time employment. And too many suffer from sleep deprivation, extreme stress, and long-term physical ailments, some of which can be career ending and life altering.

The NCAA's amateurism rules compound these problems by restricting athletes' opportunities for intellectual, social, and personal growth during and after college. The rules discourage athletes from starting their own businesses, publishing books, and—worst of all—graduating. Denying college athletes basic economic freedoms is an insult to the American ideal, particularly when most college athletes will never play professional sports after college. By contrast, the district court's limited remedy—which alleviates artificial caps on education-related benefits—is at the very least a step toward sanity: The order will enhance athletes' educational opportunities and align the NCAA's rules more closely with its stated academic mission. This Court should affirm that remedy.

The district court's order, however, does not go far enough. The court did not squarely acknowledge what most Americans plainly see: that the foundation of the NCAA's argument for denying compensation—the slippery concept of "amateurism"—is "a fraudulent word perpetrated by the NCAA to prevent players

from monetizing their skills, while lining [its] own pockets with the work product of those skills." Sally Jenkins, *Commentary: College Sports' Real Criminals: Higher-Ups Getting Rich Under Guise of 'Amateurism,'* The Morning Call (Nov. 25, 2017), https://bit.ly/2MJYVfd.

Modern antitrust doctrine does not permit this hollowed-out concept to justify the price-fixing arrangement that deprives college athletes from receiving value for their labor. This Court should therefore hold that "amateurism" is no longer a valid justification for denying college athletes the same right to earn as every other American.

ARGUMENT

I. College Athletes Are Professionals Who Sacrifice Enormously To Participate In Division I Sports.

While the NCAA professes concern that but for "amateurism" rules college sports would become the "minor leagues" of professional baseball and basketball, NCAA Br. 44, the undeniable reality is that college athletes are *already* overworked, unpaid professionals. They deserve to be compensated for the work they do and the enormous sacrifices they make, particularly because most will not have another opportunity to monetize their athletic talents after college.

A. College Athletes Are Overworked Professionals.

Being a Division I college athlete is more than a full-time job. Division I football players, for example, spend *on average* over 40 hours per week on athletic

activities during the football season, while Division I men's and women's basketball players average nearly 35 hours per week. Pls.' Trial Ex. 0059-0016 (NCAA GOALS study). That is far from atypical—indeed, at many schools and for many individuals, the in-season workload is much greater. Jt. Trial Ex. 0014-0006 (Pac-12 report finding that athletes averaged 50 hours a week on athletics during seasons).

When combined with academic duties, college athletes end up working 75-to-80 hour weeks, on average, *every week* during their months-long seasons. Pls.' Trial Ex. 0059-0019 (NCAA GOALS study). That is more than double the length of the average workweek for the typical worker in the United States (34 hours). *See* Bureau of Labor Statistics, Table B-2 *Average Weekly Hours and Overtime of All Employees on Private Nonfarm Payrolls by Industry Sector, Seasonally Adjusted* (Oct. 4, 2019), https://bit.ly/2GIhQ9a.

One of the plaintiffs in this case, a football player for the University of Wisconsin, illustrated what this grueling workload looks like day to day:

> I usually woke up at six, we would have film at seven. I think that would last about an hour. And then I'd … have class from around 9:30 to 2:30. And then come back to the stadium. Practice prep from 2:30 to 2:45, have some position meeting until about four o'clock, and then practice from four to, say about six. And then shower, change, go to tutor or, if you're a freshman, study table, until … usually an hour to two hours, and then go home.

Alec James Depo. at 245, ECF No. 1116-13. Other athletes recounted similar experiences. *See* ECF No. 1041, at 747-751 ("Trial Tr.") (Clemson football player

Martin Jenkins describing daily routine that would begin at 6:00 am and last until after 9:00 pm).

For most athletes, it doesn't get any easier in the offseason. NCAA data show that more than two-thirds of Division I football players and Division I men's basketball players report spending as much or more time on athletic activities in the offseason. Pls.' Trial Ex. 0059-0020 (NCAA GOALS study). Almost 60% of Division I women's basketball players report the same. *Id.* Much of this time is spent participating in "voluntary" activities—like informal practice sessions, weight training, and recruiting functions—that "aren't truly voluntary" because "failure to participate in them is noted by coaches and can have negative consequences." Jt. Trial Ex. 0014-0006 (Pac-12 report).

Thus, college athletics is a year-round, in-school and out-of-school, full-time commitment. It is, in other words, a profession.

B. College Athletes Sacrifice Their Minds and Bodies to Participate in College Sports.

It should come as no surprise that repeatedly spending upwards of 40 hours per week on athletics, including many hours of intense physical exertion, exacts a toll on these students, causing them to sacrifice their academic goals, their extracurricular pursuits, and their own mental and physical health.

First, for many college athletes academics necessarily takes a backseat to athletics. Indeed, the demands of Division I athletics all but guarantee that outcome.

Whereas attending practice, games, and meetings is almost always either officially or practically mandatory, athletes have more flexibility in choosing, attending, and studying for classes. It is only natural for the discretionary to give way to the obligatory, particularly when athletes are told by their coaches and others that their "primary focus" should be athletics. Trial Tr. (Shawne Alston) 670:12-21. The primacy of athletics inevitably leads to "academic sacrifices." Jt. Trial Ex. 0014-0016 (Pac-12 report).

Among the most problematic of these sacrifices is athletes' limited ability to choose their preferred majors and classes. NCAA data reveal that athletic commitments prevented 51% of Division I women's basketball players, 50% of Division I Football Bowl Subdivision ("FBS") football players, and 34% of Division I men's basketball players from enrolling in the classes they wanted. Pls.' Trial Ex. 0059-0006 (NCAA GOALS study). More poignantly, a Pac-12 report found that athletes are "discouraged from taking certain majors from the outset [of college] due to their athletic demands" and often "change their majors … either because they cannot schedule the classes and other requirements they need, or they cannot keep up with their academic demands due to their sport's time demands." Jt. Trial Ex. 0014-0016.

For the courses in which athletes do enroll, they "miss[] significant class time due to travel and competition." Jt. Trial Ex. 0014-0016 (Pac-12 report). Former

West Virginia University football player Shawne Alston, one of the plaintiffs in this case, testified that all West Virginia football players "were excused from class on Fridays" for every away game. Trial Tr. 674:22-25. Division I basketball players, who can travel for up to 20 games a season, often miss even more class time. Mandatory and time-intensive practice schedules also cause athletes to miss class. For example, plaintiff Justine Hartman, a former basketball player at U.C. Berkeley, testified at trial that because of her six-hours-per-day practice routine, she would often "literally have to run to make it to class," and that "sometimes it would be pointless" because class would have "another 20 minutes left, and I hadn't showered or eaten." Trial Tr. 797:20-23.

The upshot, as multiple plaintiffs testified, is that there is simply "not enough time to devote to studies." Trial Tr. (Jenkins) 752:9-753:1; *see also* Trial Tr. (Alston) 670:12-21 (same); Trial Tr. (Hartman) 797:24-25 (same). It is no surprise, then, that studies have found a negative relationship between athletic participation and academic performance, particularly in revenue-producing college sports. *See, e.g.*, Michael T. Maloney & Robert E. McCormick, *An Examination of the Role that Intercollegiate Athletic Participation Plays in Academic Achievement*, 28 J. Hum. Resources 555 (1993), https://bit.ly/2MMmdkJ.

Second, the athletic demands placed upon college athletes significantly limit their opportunities outside the classroom. Most athletes, for example, "don't have

the time" to get even part-time jobs. Trial Tr. (Hartman) 810:15. Part-time employment is something athletes consistently say they desire. *See* Jt. Trial Ex. 0014-0006 (Pac-12 report) ("In terms of potential reforms, student-athletes are most interested in making it easier to find part-time jobs …."). And it is easy to see why. Deprived by the NCAA's amateurism rules of the ability to earn income based on their athletic (or other) talents, many athletes cannot participate in normal social activities like eating out with friends or going on dates. Indeed, many cannot purchase even basic necessities: More than 40% of Division I football and men's basketball players report not having "enough money to buy the things I need (e.g. groceries)." Pls.' Trial Ex. 0059-0041 (NCAA GOALS study) (emphasis omitted). Athletes also lack the time and resources to visit family and friends, even on holidays or when school is out, which more than two-thirds of Division I athletes wish they could do more often. *See id.* at 0023.

Other extracurricular activities are unavailable to many college athletes. The Pac-12 found that time commitments make it "very difficult" for athletes to participate in internships. Jt. Trial Ex. 0014-0016. The story is the same for student clubs and organizations. Plaintiff Martin Jenkins testified that "football time requirements" prevented him from remaining a part of Clemson's entrepreneurship club. *See* Trial Tr. 791:3-20; *see also* Trial Tr. (Hartman) 810:12-12.

Third, the rigors of college athletics can cause athletes' health to suffer, both during and after college. The Pac-12 found that, during college, the "number-one thing time demands keep [athletes] from doing is getting adequate sleep." Jt. Trial Ex. 0014-0006. NCAA data and academic studies back up that finding. Division I football and basketball players average less than 6.2 hours of sleep per night, with Division I football players getting *less than 5.7 hours a night*. Pls.' Trial Ex. 0059-0025 (NCAA GOALS study). As a result, almost half of Division I football and basketball players are so tired from the physical demands of their sports that they "struggle to find energy to do other things." *Id.* at 0044; *see also* Cheri D. Mah et al., *Poor Sleep Quality and Insufficient Sleep of a Collegiate Student-Athlete Population*, 4 Sleep Health 251 (2018), https://bit.ly/2B2xHtR ("Collegiate athletes frequently experience poor sleep quality, regularly obtain insufficient sleep, and commonly exhibit daytime sleepiness.").

Sleep deprivation, combined with extreme time pressure, naturally can adversely affect athletes' mental health. According to NCAA data, more than a third of Division I men's basketball and football players experience intense stress, feeling that "difficulties were piling up so high that [they] could not overcome them." Pls.' Trial Ex. 0059-0043 (NCAA GOALS study). Other studies have found that college athletes report more stress than non-athletes across a "wide variety of variables," including "having a lot of responsibilities," "not getting enough time for sleep," and

"having heavy demands from extracurricular activities." Gregory Wilson & Mary Pritchard, *Comparing Sources of Stress in College Student Athletes and Non-Athletes*, 7 Athletic Insight 1, 4 (2005), https://bit.ly/2Mcp9XD.

Athletes' physical health is also consistently, and unavoidably, at risk. The grueling physical activity required to be a Division I athlete leads to higher rates of injuries—some of which can be career ending and permanently life altering. According to one study of hundreds of former Division I athletes between ages 40 and 65, more than twice as many athletes reported sustaining major injuries and experiencing chronic injuries compared to non-athletes. *See* Janet E. Simon & Carrie L. Docherty, *Current Health-Related Quality of Life Is Lower in Former Division I Collegiate Athletes than in Non-Collegiate Athletes*, Am. J. Sports Medicine (2013), https://bit.ly/335vpWU. And research continues to confirm that football players disproportionately suffer from chronic traumatic encephalopathy (CTE). *See* Ken Belson, *Players with C.T.E. Doubled Risk with Every 5.3 Years in Football*, N.Y. Times (Oct. 10, 2019), https://nyti.ms/2PmRpsm. In short, college athletes carry the heavy consequences of their labors in their bodies and minds for the rest of their lives.

C. Most College Athletes Have Bleak Professional Prospects After College.

College athletes, and especially Division I college athletes, make these sacrifices for a variety of reasons, but many do so because they aspire to play

professional sports after college. The NCAA found that 73% of Division I men's basketball players, 64% of FBS football players, 50% of Football Championship Subdivision ("FCS") football players, and 47% of Division I women's basketball players believe it is at least "somewhat likely" that they will play professional sports. Pls.' Trial Ex. 0059-0033–34 (NCAA GOALS study).

But those perceptions could hardly be farther from reality. In 2018, just over 4% of draft-eligible Division I men's basketball players were selected in the NBA draft; less than 4% of draft-eligible Division I football players were selected in the NFL draft; and less than 3% of draft-eligible Division I women's basketball players were selected in the WNBA draft. *See* NCAA, *Estimated Probability of Competing in Professional Athletics* (Apr. 3, 2019), https://bit.ly/21wK3jx.

For the small percentage who are drafted, their careers tend to be almost pitiably short. The average career in the NFL, for example, is 3.3 years. *See* Colleen Kane, *How NFL Players Approach Their Short Shelf Lives*, Chi. Tribune (Sept. 1, 2018), https://bit.ly/2OOM2C8. Careers in the NBA can be similarly fleeting. *See* Michael Wilczynski, *Average NBA Career Length for Players – Details*, Weak Side Awareness (Nov. 22, 2011), https://bit.ly/2ORspJC.

Thus, depriving athletes of compensation while in college is particularly problematic because, for most athletes, college sports provide their *only* opportunity to monetize their athletic talents.

II. The NCAA's Amateurism Rules Undermine Its Stated Mission by Limiting Athletes' Opportunities for Academic, Social, and Personal Enrichment.

Compensating athletes is also consistent with the ultimate mission of the NCAA and its member colleges and universities: to broaden the minds of young men and women and to enhance their life prospects in post-college pursuits.

The NCAA has acknowledged that its mission is ultimately educational. In its bylaws, the NCAA states that it seeks to "provid[e] student-athletes with exemplary educational and intercollegiate-athletics experiences in an environment that recognizes and supports *the primacy of the academic mission* of its member institutions, while enhancing the ability of male and female student-athletes to earn a four-year degree." 2018-2019 NCAA Division I Manual § 14.01.4, https://bit.ly/2JhuU4m (emphasis added) ("Division I Manual").

That education-focused mission is a reflection of the fact that the NCAA's members are academic institutions whose principal purpose is to educate students and prepare them to thrive in life after college. The "mission statements" of universities with major athletics programs support this point:

- The University of Oklahoma: "The mission of the University of Oklahoma is to provide the best possible educational experience for our students through excellence in teaching, research and creative activity, and service to the state and society." Mission Statements, https://bit.ly/2PruMTZ.

- The University of Michigan: "The mission of the University of Michigan is to … develop[] leaders and citizens who will challenge the present and enrich the future." Mission, https://bit.ly/31YqFSz.

- Florida State University: "The university strives to instill the strength, skill, and character essential for lifelong learning, personal responsibility, and sustained achievement within a community that fosters free inquiry and embraces diversity." Mission, https://fla.st/329IiPA.

- Stanford University: The school's mission is to "[p]repare students to think broadly, deeply and critically, and to contribute to the world." Mission & Values, https://stanford.io/320bcS3.

The NCAA claims that its amateurism rules are "essential to the educational role college sports plays for student-athletes." NCAA Br. 8. But in fact those rules *limit* athletes' opportunities to engage in enriching extracurricular and academic activities, to a farcical degree.

Take Division I bylaw 12.5.2.1, which prohibits athletes from receiving money for promoting any "commercial product." The NCAA has interpreted that bylaw to prohibit a University of Oklahoma baseball player from promoting his own book about overcoming brain cancer and losing his father to leukemia. *See* Christian Dennie, *Amateurism Stifles a Student-Athlete's Dream*, 12 Sports Law J. 221, 235–37 (2005). The NCAA has also tried to use the bylaw to bar a Northwestern University football player—and theater major—from appearing in a feature film. *See* Christoper A. Callanan, *Advice for the Next Jeremy Bloom: An Elite Athlete's Guide to NCAA Amateurism Regulations*, 56 Case Western Reserve L. Rev. 687, 691–92 (2006). Or consider Division I bylaw 12.4.4, which prohibits college athletes who start a business from using their "name, photograph, appearance or

athletics reputation" to promote the business. Athletes who have been caught in the crosshairs of this rule include two swimmers from the University of Iowa who started a T-shirt screening business, and a cross-country runner at Texas A&M who started a water bottle company. *See* Brian Rosenberg, *How the N.C.A.A. Cheats College Athletes*, N.Y. Times (Oct. 3, 2017), https://nyti.ms/2xR9VhV.

Normally, colleges and universities would laud and encourage exceptional extracurricular accomplishments such as these; the NCAA responds instead with threats of athletic ineligibility. None of this is lost on college athletes, who, stripped of economic opportunities by the NCAA, can only marvel as they pass by the school bookstore with their jersey number hanging for sale in the window, just one consequence of multiple NCAA bylaws that expressly *authorize* the NCAA and its member institutions to use athletes to endorse *their* products and activities in a wide variety of circumstances. *See* Division I Manual § 12.5.1. "Amateurism" can have no integrity in the eyes of athletes whose earning potential has been taken from them in a context so laden with contradictions.

Most disturbingly, the NCAA's amateurism rules also hamper academic achievement. This is not an exaggeration, or a surmise, but a *fact* admitted by the NCAA. The NCAA admitted *in this case* that voiding its amateurism rules and increasing athlete compensation would *increase* graduation rates. *See* Defs.' Opp'n to Pls.' Am. Joint Mot. for Class Cert. at 11, ECF No. 216. The NCAA admitted

that "many of those student-athletes who now leave college to play professional football or basketball would, if they were paid to play college sports, *stay in school longer*." *Id.* (emphasis added). The NCAA is not alone in that position; this Court also has recognized that by "loosening or abandoning the compensation rules," "athletes might well be more likely to attend college, and stay there longer." *O'Bannon v. NCAA*, 802 F.3d 1049, 1073 (9th Cir. 2015). Antitrust doctrine has gone topsy-turvy when the amateurism rationale for price-fixing *also* works to the detriment of students' *academic* lives.

As the district court recognized, other aspects of the NCAA's amateurism rules discourage academic achievement and limit academic opportunity. The NCAA's rules allow performance awards for athletic, but not *academic*, achievement—in effect telling time-crunched athletes, in dollars-and-cents terms, that sports are more important than education. *See* ER22–23. The NCAA also limits post-eligibility graduate school scholarships that can be used at any institution, allowing each school to offer *just two* such scholarships per year. ER26–27. The NCAA has "not provided any cogent explanation" for these arbitrary limitations, much less explained how they are consistent with an educational mission. ER32.

In contrast to the NCAA's amateurism rules, the district court's remedy—which eliminates artificial caps on certain education-related benefits—directly advances the missions of the NCAA and its member institutions. It will enhance

athletes' educational opportunities, helping to make athletes the vibrant citizens that the NCAA and its members say they are trying to mold. The NCAA should welcome it with open arms—and it seemed to, at least initially. In the wake of the district court's ruling, the NCAA's President, Mark Emmert, acknowledged publicly that "the way [the district court] wrote what could and could not be prohibited by the NCAA is not in any way fundamentally inconsistent with what we've been doing for about a decade now…. Having [the conferences] compete over who can provide the best educational experience is an inherently good thing, not a bad thing from my point of view." *Emmert: Ruling Reinforced Fundamentals of NCAA*, ESPN.com (Apr. 4, 2019), https://es.pn/2qHyluS (alteration omitted). This Court should be reluctant to disturb a remedy that the NCAA has publicly acknowledged is "consistent" with its mission of enhancing *academic* opportunities for college athletes.

On appeal, the NCAA has regrettably but predictably changed its tune, and trots out a parade of horribles it warns will ensue if its artificial caps on education benefits are eliminated. NCAA Br. 60–61 (suggesting schools will offer athletes "tens or perhaps hundreds of thousands of dollars' worth" of "high-end computers," "musical instruments," and "vehicles"). But the NCAA's anxieties are not supported by any record evidence and, as with "most arguments against the free

market," reflect "a lack of belief in freedom itself." Milton Friedman, *Capitalism and Freedom* 15 (1962).

Free markets have elevated the well-being of mankind for centuries. While the introduction of limited market forces may change the status quo in ways that are uncomfortable for the NCAA, there is every reason in law and in history to trust that the elimination of anticompetitive constraints will lead to the betterment of collegiate sports and "promote the General Welfare." U.S. Const. pmbl.

Nor do the NCAA's speculative threats hold a candle to the seemingly endless scandals that *have* proliferated under its current philosophy.[2] Much less do they acknowledge the market competition "hiding in plain sight" when colleges outdo one another to recruit athletes by constructing elaborate "city-state"-like athletic and dorm facilities, from which the "student athlete" almost never need leave (and that further isolate college athletes from the social and intellectual life of college). *See* Will Hobson & Steven Rich, *Colleges Spend Fortunes on Lavish Athletic Facilities*,

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[2] *See, e.g.*, Andy Staples, *What Has the NCAA—or Anyone—Learned from the College Basketball Black Market's Time on Trial?*, Sports Illustrated (May 9, 2019), https://bit.ly/32yR3CJ (reviewing fallout of federal government's investigation into college basketball bribery scandal); Charles Robinson, *Renegade Miami Football Booster Spells Out Illicit Benefits to Players*, Yahoo Sports (Aug. 16, 2011), https://yhoo.it/2BC1D0V (University of Miami booster "provided thousands of impermissible benefits to at least 72 athletes from 2002 through 2010"); *Ohio State Football Players Sanctioned*, ESPN.com (Dec. 23, 2010), https://es.pn/2J7tdq4 (Ohio State football players suspended "for selling championship rings, jerseys and awards").

Chi. Tribune (Dec. 23, 2015), https://bit.ly/2otXwQS (describing athletic facility with "sand volleyball courts, laser tag, movie theater, bowling lanes, barber shop and other amenities").

III. Amateurism Is an Arbitrary and Empty Justification That Cannot Be Squared with the Antitrust Laws.

The district court's decision, while a necessary step in the right direction, should have gone further. The validity of the NCAA's compensation rules rests entirely on the premise that the principle of "amateurism"—the idea that college athletes *should* be unpaid—can justify a naked restraint on athlete compensation imposed by a cartel. The concept of amateurism is arbitrary and contrary to the American ideal. It cannot justify the NCAA's restraint of trade.

A. Amateurism Is an Elastic and Arbitrary Justification.

The NCAA's bylaws, spanning hundreds of pages, contain many definitions. Conspicuously missing, however, is any definition of the word "amateurism." Instead, the NCAA defines amateurism "by reference to what they say it is not: namely, amateurism is not 'pay for play.'" ER25. But even that is not entirely accurate—athletes do receive *some* compensation in exchange for their services. *See* ER27–33 (grants-in-aid up to cost of attendance, monetary awards "incidental to athletics participation"). Thus, the NCAA's definition of amateurism is a "know it when we see it" definition: Some arbitrary amount of compensation is too much, and only the NCAA can determine the magic number. *See* ER33.

For almost a century, the NCAA has clung to that notion of amateurism, not out of reverence for any Olympic ideal or to "protect" athletes from commercialism, but instead, as its own former Executive Director put it, as "a transparent excuse for monopoly operations that benefit [non-athletes]." Walter Byers & Charles H. Hammer, *Unsportsmanlike Conduct* 388 (1995). That much was clear at least as far back as 1929, when a comprehensive report on college athletics described "the university of the present day" as "eagerly" embracing amateur football because it "wants popularity, but above all it wants money and always more money. The athlete is the most available publicity material the college has." Howard J. Savage et al., *American College Athletics* xv, Carnegie Foundation for the Advancement of Teaching (1929) ("Carnegie Report").

Today, the NCAA and its member institutions continue to invoke "traditional amateurism principles" (NCAA Br. 59) while the money they derive from college athletes increases exponentially. The Power Five conferences alone generate well in excess of $4.3 billion annually from football and basketball, revenues that very nearly place them in the Fortune 500. *See* ECF No. 1014 at 28; *see also* Fortune.com, Fortune 500, https://bit.ly/2ml9TNy. NCAA executives, conference commissioners, coaches, and other administrators make multimillion-dollar salaries and lead comfortable lives, if not lives of luxury. Sally Jenkins, *The College*

Football Playoff Won't Pay Athletes, While Its Selection Committee Stays at the Ritz, Wash. Post (Aug. 22, 2019), https://wapo.st/2NzDgr3.

In Division I college football, for example, total annual pay for head coaches can approach $11 million per year—more than most NFL head coaches and nearly as much as the average CEO at an S&P 500 company;[3] assistant coaches' salaries now top $2.5 million per year,[4] with even strength coaches making almost $750,000;[5] and boosters often supplement these salaries by providing coaches millions more in direct payment.[6] Meanwhile, the athletes whose hard work pays for these salaries are told to find fulfillment from the "physical, mental, and social benefits to be derived" from athletics (Division I Manual § 2.9), and are punished

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[3] Steve Berkovitz et al., *Top NCAAF Coach Pay*, USA Today, https://bit.ly/2pPIHs5; Julia Mullaney, *These Are the Highest Paid NFL Coaches in 2018 (Plus, How They Compare to College Football Coaches' Salaries)*, Sportscasting (Nov. 9, 2018), https://bit.ly/2W9rS7w (estimating that only one NFL coach makes more than $10 million); Theo Francis, *Many S&P 500 CEOs Got a Raise in 2018 That Lifted Their Pay to $1 Million a Month*, Wall St. J. (Mar. 17, 2019), https://on.wsj.com/2WfhBGT.

[4] Steve Berkovitz et al., *Top NCAAF Assistant Coach Pay*, USA Today, https://bit.ly/2PmGrDy.

[5] Steve Berkovitz et al., *Top NCAAF Strength Coach Pay*, USA Today, https://bit.ly/33JLD8g.

[6] *See* Alex Scarborough, *Bama Boosters Pay Off Saban's Home*, ESPN.com (Oct. 27, 2014), https://es.pn/2BSG5MJ ("the Crimson Tide Foundation paid off [head coach Nick] Saban's $3.1 million home in January 2013").

for being "overpaid" by a few hundred dollars for gainful employment. *See DeVier Posey, Three Others Suspended*, ESPN.com (Oct. 7, 2011), https://es.pn/2P1hU6z.

The NCAA's amateurism rules contravene a basic moral precept: that individuals are entitled to freely employ their talents and to reap the fruits of their labors. That natural right is foundational to Western legal and philosophical thought. *See* John Locke, *Second Treatise of Government* 17 (T. Peardon ed., 1952) ("The labour of his body, and the work of his hands, we may say, are properly his."); *see also* James Madison, *Speech in Virginia Convention* (Dec. 2, 1829) (the "personal right to acquire property … is a natural right").

It is also a cornerstone upon which this nation was constituted. Our Founders believed that "the first object of government" was to protect the "diversity in the faculties of men, from which the rights of property originate." Federalist No. 10, at 73 (James Madison) (Clinton Rossiter ed., 1961). Seminal founding documents such as the Virginia Declaration of Rights thus declared that "all men are by nature equally free and independent and have certain inherent rights … namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursing and obtaining happiness and safety." Va. Decl. Rights Art. 1 (1776); *see also* Mass. Decl. of Rights Art. 1 (1780) ("All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right … of acquiring, possessing and protecting property.").

The NCAA's incantation of amateurism is at bottom a rejection of that deep-rooted American value. It makes college sports perhaps the only sector of American society where adults are unable to freely monetize their labor and talents. And it makes college athletes uniquely disadvantaged among their peers: A university may compensate the student inventor or provide a grant to the student entrepreneur, but it can never pay the "student athlete."

B. Amateurism Cannot Justify the Anticompetitive Effects of the NCAA's Price-Fixing Scheme.

The NCAA's compensation rules are also illegal under a proper understanding of antitrust principles. The rules are an anticompetitive price-fixing scheme. Even the NCAA seems to at least tacitly acknowledge (as it must) that its compensation rules are "a restraint with significant anticompetitive effects" in the market for the labor of college athletes. NCAA Br. 38.

Although such naked restraints on competition usually are per se illegal, the Supreme Court has carved out a narrow exception for the NCAA, applying the rule of reason because, according to the Court, the NCAA would be "completely ineffective if there were no rules on which the competitors agreed." *NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 101 (1984). Under the rule-of-reason framework, the critical question is whether the anticompetitive effects of the NCAA's price-fixing scheme are outweighed by the restraint's procompetitive benefits.

On appeal, the NCAA has identified a single procompetitive justification for its compensation rules: they "preserve amateurism." NCAA Br. 47. Of course, preserving amateurism for its own sake cannot justify the NCAA's compensation rules. As this Court has explained, amateurism is merely a euphemism for price fixing: "not paying student-athletes is *precisely what makes them amateurs*." *E.g.*, NCAA Br. 44 (quoting *O'Bannon*, 802 F.3d at 1076). And it is self-evident (and settled law) that price fixing cannot be self-justifying. *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 696 (1978) ("[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.").

The NCAA instead contends that amateurism (*i.e.*, price fixing) has two interrelated procompetitive effects: It "widen[s] consumer choice" by creating a product (college sports) that would otherwise be unavailable, and it "increase[s] the[] appeal" of college sports to consumers, thereby increasing demand for college sports. NCAA Br. 44 (quotation marks omitted). But both of those justifications suffer from fatal flaws.

As for the first justification—that amateurism creates a new product—the Supreme Court has held only that price fixing *might* be justifiable where "the agreement on price is *necessary* to market the product *at all*." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) (emphases added). That is manifestly not the case here. As the district court recognized, college sports are a

distinct product principally because "student-athletes are, in fact, students," not because they are unpaid. ER48. Student-athletes "would continue to be students in the absence of the challenged rules"—indeed, even absent the NCAA. ER49. College sports played by students flourished for decades before the NCAA came into existence and continued to grow explosively up until the early 1950s when the NCAA first enforced its compensation rules. *See* Carnegie Report at 13–33. Eliminating the NCAA's compensation rules would not require colleges to change that aspect of college sports, and there is no evidence, much less *any* reason to believe, that colleges would abandon their athletic programs once procompetitive forces are introduced.

More fundamentally, it would make "a mockery of the antitrust laws" to allow the NCAA to incorporate amateurism (*i.e.*, price fixing) as an essential element of its "product." Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play*, 65 Notre Dame L. Rev. 206, 236 (1990). Indeed, in other contexts, that argument would be mocked. A group of beef producers, for example, could not justify an agreement to fix an inflated price for "premium" beef on the ground that the price restraint helps distinguish premium beef from regular beef. *See* Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 Hamline L. Rev. 24, 66 (2000). Nor could concert venues around the country justify an agreement to limit payments

to non-headliner bands on the ground that they are creating a new category of "amateur" concerts. *See id.* The NCAA peddled a version of this argument when it restricted assistant coaches' salaries on the ground that doing so preserved "entry-level coaching position[s]." *Law v. NCAA*, 134 F.3d 1010, 1021 (10th Cir. 1998). The Tenth Circuit rejected that rationale as sophistry. *Id.* The NCAA's amateurism-as-a-product argument is no less specious.

The NCAA's second justification—that amateurism (*i.e.*, price fixing) appeals to consumers—suffers from the same fundamental defect as the first: the "justification offers no boundaries." Goldman, *supra*, at 238. If the NCAA can justify a price restraint on the ground that consumers want to watch unpaid athletes, then a group of supermarkets could justify fixing prices paid to cattle ranchers on the ground that "[c]onsumers prefer supermarkets with low beef prices," and a group of private schools could justify restricting teacher salaries on the ground that consumers and families prefer when "teachers work for the love of teaching." *Id.* The NCAA's "consumers like it" rationale is boundless.

Moreover, even assuming that price fixing could in theory be procompetitive because it helps define a unique product or spur consumer demand, the NCAA still must empirically *prove* that effect. *See Bd. of Regents*, 468 U.S. at 113 (defendant faces "a heavy burden of establishing an affirmative defense" to restraint on trade). That is especially significant in an appeal like this one following a trial. Here, the

NCAA failed to *prove* that amateurism stimulates consumer demand for a simple reason: The NCAA's "know it when we see it" definition of amateurism is too gossamer a concept to be susceptible to any rigorous empirical proof. *See* ER25 (former SEC Commissioner: "I've never been clear on … what is really meant by amateurism."). Amateurism simply provides no discernible or intelligible principle for determining whether the magic line of "professionalism" is crossed at two post-eligibility scholarships or twenty (ER32); whether athletic-performance awards should be capped at $5,000 or $100,000 (ER27–28); or whether schools should be allowed to pay for athletes' loss-of-value insurance premiums (ER30).[7] As a result, all the NCAA could offer in this case is "hopelessly ambiguous," made-for-litigation survey and anecdotal evidence about the connection between amateurism and consumer demand, ER41–42, which is insufficient to satisfy its *evidentiary* burden under the antitrust laws. The NCAA's paper-thin empirical evidence is a shame given the weighty moral and human costs its rules exact.

Finally, both of the NCAA's justifications suffer from the flaw that they seek to use a procompetitive benefit in one market (the market for college sports) to justify a restraint in a separate market (the market for the labor of college athletes).

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[7] The concept of "pay for play" is just as malleable as any other principle the NCAA has stood behind. As the record in this case shows, that line is full of holes, contradictions, and inconsistencies. *See* ER25–33 (describing the numerous and arbitrary categories of compensation permitted by NCAA bylaws).

The Supreme Court and this Court have recognized that competition "cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972); *see also L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1392 (9th Cir. 1984) ("The relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue.").[8]

Notwithstanding the inherent problems with "amateurism" as a procompetitive justification, this Court *assumed* in *O'Bannon* that the NCAA's compensation rules can serve the procompetitive purpose of "preserving the popularity of the NCAA's product by promoting its current understanding of amateurism." 802 F.3d at 1073. *O'Bannon* did not test that assumption against any of the arguments just discussed because the plaintiffs in that case *did not argue* that amateurism is an invalid procompetitive justification; they argued only that there was no evidentiary support for the NCAA's definition of amateurism. *O'Bannon* thus does not bind this Court on whether amateurism has sufficient doctrinal and

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[8] Other courts have applied this principle in the context of college sports in particular. *See, e.g.*, *Law v. NCAA*, 902 F. Supp. 1394, 1406 (D. Kan. 1995) ("The market for coaching services is different from the market for intercollegiate sports.... Procompetitive justifications for price-fixing must apply to the same market in which the restraint is found, not to some other market."), *aff'd*, 134 F.3d 1010 (10th Cir. 1998).

factual support to be a "procompetitive justification," or how much competition such an elastic concept can suppress: It is "axiomatic that cases are not authority for issues not considered." *Khrapunov v. Prosyankin*, 931 F.3d 922, 933 (9th Cir. 2019).

Even if *O'Bannon*'s assumption about amateurism were binding, moreover, this Court need not and should not extend its reasoning to the distinct facts of this case. *O'Bannon*'s assumption rests entirely on dicta from the Supreme Court's *Board of Regents* decision—dicta that has somehow "managed to survive decades of ridicule and criticism." Gabe Feldman, *A Modest Proposal for Taming the Antitrust Beast*, 41 Pepp. L. Rev. 249, 251 (2013).

The Court in *Board of Regents* held that the NCAA's restrictions on the number of annually televised college football games violated the antitrust laws. 468 U.S. at 105–13. In the course of so holding, the Court concluded that the NCAA's restraint was subject to rule-of-reason analysis, rather than per se illegality, because NCAA rules "enable[] a product to be marketed which might otherwise be unavailable ... and hence *can be viewed* as procompetitive." *Id.* at 102 (emphasis added). The Court first cited a "myriad of rules" that "must be agreed upon" to enable competition, including "such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed." *Id.* at 101. The Court then discussed other NCAA rules that appeared to help the NCAA preserve the identity of college sports, which the Court understood

to be a "product with an academic tradition." *Id.* (quotation marks omitted). To preserve that product, the Court said, "*athletes must not be paid*, must be required to attend class, and the like." *Id.* at 102 (emphasis added). It is this last observation that has formed the entire basis for the NCAA's amateurism defense in the decades since.

That passing observation simply cannot bear the legal and factual weight the NCAA has placed upon it. *See* NCAA Br. 1, 8, 44, 47. The Supreme Court did *not* hold that any of the NCAA's rules actually have procompetitive benefits, just that the rules as a whole "*can be viewed*" that way and therefore are subject to rule-of-reason analysis rather than per se illegality. 468 U.S. at 102 (emphasis added). The Supreme Court came nowhere close to holding that the NCAA's compensation caps, in particular, have procompetitive benefits. Those rules were not at issue in that case. The Court's dicta, moreover, has been "criticized frequently and consistently," and there is no reason to think the Court would adhere to it today given its inconsistency with modern antitrust doctrine and requirements for empirical proof. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 Or. L. Rev. 329, 353 (2007) (collecting sources). The "can be viewed" language from *Board of Regents* has "earned its retirement." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

O'Bannon's endorsement of the *Board of Regents* dicta also "can be viewed" (468 U.S. at 102)—and should be viewed—as "confined to its facts." *L'Eggs Prods., Inc. v. NLRB*, 619 F.2d 1337, 1342 (9th Cir. 1980). This Court should decline to extend it to this new context involving different claims, different NCAA rules, different NCAA behavior, and changed markets. *See United States v. Lesoine*, 203 F.2d 123, 127 (9th Cir. 1953) (principle of earlier case had "met with disapproval" and "was limited strictly to its facts"). Far from being "*O'Bannon* all over again," NCAA Br. 2, this case makes clear that amateurism cannot do the analytical work to support the price-fixing practices challenged here.

CONCLUSION

This Court should reject amateurism as an argument sufficient to justify price fixing under the antitrust laws. It should affirm the district court's remedy and grant the players relief on their cross-appeal.

Dated: October 30, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29, I certify that the attached brief is proportionately spaced, has a typeface of 14 points, and complies with the word count limitations set forth in Fed. R. App. P. 29(a)(5). This brief has 6,996 words, excluding the portions exempted by Fed. R. App. P. 32, according to the word count feature of Microsoft Word used to generate this brief.

Dated: October 30, 2019 By: /s/ Andrew S. Tulumello
Andrew S. Tulumello

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 30, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 30, 2019 By: /s/ Andrew S. Tulumello
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