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 GEORGIA, ALABAMA, ARKANSAS, MISSISSIPPI, MONTANA, NORTH DAKOTA, SOUTH CAROLINA, AND SOUTH DAKOTA AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Amici are States that share a long, proud commitment to higher education. They fund public universities to afford their citizens the knowledge, training, and skills to help them thrive in today's world. State Higher Education Executive Officers Ass'n, *State Higher Education Finance: FY 2018*, 12, 42 (2019), https://perma.cc/QEG4-67CP (documenting the tens of billions of dollars states contribute to higher education every year). And these States benefit when students graduate ready to lead their economies into the future.

For almost as long as public universities have existed, amateur athletic competition has been an integral part of the educational experience. Student-athletes learn discipline, teamwork, and leadership. Current students and alumni bond over supporting their school in friendly competition. And athletic success boosts the school's profile, which attracts students. For these and other reasons, colleges and universities fund athletic departments—even though, for nearly all schools, the athletic program is a net drain on their resources. *See Restoring the Balance: Dollars, Values, and the Future of College Sports*, Knight Commission on Intercollegiate Athletics at 6 (June 2010), https://perma.cc/AXL3-ZWA3 ("[M]ost institutions require institutional funding to balance their athletics operating budget.").

So it should come as no surprise that states and their educational institutions are actively engaged in the ongoing national discussion about whether

student-athletes should be compensated above their scholarships. Public colleges and universities must balance obligations to their students (both athletes and non-athletes) and to taxpayers. The increased benefits that would flow from the injunction here will require schools to either increase student fees and taxpayer support or cut non-revenue sports and deprive those athletes of the chance to compete at all. The public discussion among all these stakeholders has borne fruit. The NCAA, through its member schools, has been legislating on this and other issues. Some states have passed laws designed to protect student-athletes, and Congress is exploring legislation that would bring uniform national standards.

But this ongoing public debate about the best way forward for the complex issue of student-athlete compensation has been sidelined by a single federal district court in California. Rather than let that debate play out, the decisions below have effectively installed a single federal judge as the sole referee of college amateurism rules, imposing heavy costs—both monetary and opportunity—on the States and their institutions of higher education by judicial fiat. The States' interests in preserving the educational, financial, and intangible benefits offered by college athletics are substantial, and they warrant careful consideration by this Court.

SUMMARY OF THE ARGUMENT

1. Amateur college sports continue to grow in size and popularity. That success has led to debate over whether student-athletes should be compensated in excess of their scholarships for their time and talents. In recent years, the NCAA and its member conferences have increased financial benefits for college athletes. And Congress, the NCAA, and state legislatures are actively debating further changes. But that process, which had been playing out in regulatory and legislative bodies with expert input from the many interested parties, has been cut off at the knees. The courts below declared the NCAA's college-sports model to be anticompetitive and, as a result, effectively installed a single district court as the nation's amateurism czar—with a mandate to force the NCAA to prove that all aspects of its eligibility regulations are strictly necessary, with no conceivable alternatives. That new burden is not only an inappropriate application of the rule of reason, but would also ensure repeated challenges to each and every future attempt to change the existing amateurism model. Whatever the best way forward for student-athlete compensation, this regulation-by-injunction scheme surely is not it.

2. The district court's injunction threatens serious harm to students and schools across the country. Almost every athletic department loses money. Despite that, schools fund athletic programs. Why? Because college sports prepare student-athletes for success in all areas of life. They also bring schools tangible benefits: Besides enriching campus life, athletic programs

attract potential students and enhance their school's reputation. Finally, the revenue-producing sports subsidize non-revenue sports, and sometimes other university initiatives.

The decisions below would undermine these benefits. The injunction would put tremendous pressure on schools to dramatically increase their athletic spending, putting schools in a lose-lose situation. Schools might commit to fully offering the escalating financial benefits. But most athletic departments already run at a deficit, so that decision will force schools to either increase student fees or redirect funds from other university programs to athletics. Schools might also try to limit the injunction's financial hit by cutting non-revenue sports. But this option imposes costs, too, because balancing the ledger will require deep cuts to non-revenue sports (and creates Title IX complications). The injunction will thus end athletic opportunities for thousands of students, in favor of the comparatively few athletes in revenue-generating sports. Or, as a third option, schools might decline to increase benefits at all. But doing so would surely hurt recruiting and retention, and when schools field less competitive teams, the rest of the institution suffers as well. The school's reputation wanes, which leads to fewer students applying for admission. In short, the injunction leaves most schools with only bad options, proving the folly of trying to solve the complex issue of student-athlete compensation by judicial fiat.

ARGUMENT

I. The rulings below override ongoing public debate about whether and how college athletes should receive compensation.

The issue of college-athlete compensation demands nuanced consideration. And that is actively happening not only within the NCAA itself, but also in state legislatures and Congress. So the courts below did not write on a blank slate, or at least they should not have. Those courts' rulings—which effectively vested the administration of NCAA amateurism regulations in a single California district court—threaten to supplant the ongoing national discussion and reform efforts on this complex issue. They also create an impossible standard that incentivizes clever attorneys to challenge each successive iteration of the NCAA's rules and thus attempt to micromanage college athletics. But student-athlete compensation is a complicated issue with substantial economic and institutional implications for everyone involved, and a series of overreaching injunctions issued by a single district court is not the way to solve it.

A. Student-athlete compensation is the subject of ongoing action by Congress, state legislatures, and the NCAA.

College sports enjoy immense popularity, both on campus and among sports fans generally. That attention translates into substantial revenue, at least for a few teams. This revenue, in turn, has led to a robust

public debate about whether and how to compensate student-athletes beyond paying for the costs of their attendance. And the NCAA, along with Congress and state legislatures, is actively engaged in developing an amateurism framework that best accounts for the interests of the various stakeholders, including the athletes, their schools, and the collegiate athletic system as a whole.

These actors, not federal district courts, are best positioned to protect student-athletes while also ensuring the continued health of college sports. To begin with, the NCAA recently overhauled its governing structure to respond to the very concerns raised in this and similar cases. In 2015, the NCAA granted the Power 5 conferences "autonomy." John Wolohan, *What Does Autonomy For the "Power 5" Mean for the NCAA?* LawInSport (Feb. 11, 2015), https://perma.cc/BMY8-WWN2. This "transformational" change gives those conferences—the Big 12, Southeastern, Big Ten, Atlantic Coast, and Pac-12—the ability to "enact legislation granting athletes' financial benefits" that apply only to them. *Id.* Importantly, the autonomy system gives student-athletes a voice in the debate—they make up 15 of the 80 votes on any legislation for the group. *Id*; *see also* Michelle Hosick, *Autonomy schools adopt cost of attendance scholarships*, NCAA (Jan. 18, 2015), https://perma.cc/66NG-FP3P (noting that "[c]ollege athletes' viewpoints dominate[d] business session discussions").

The "autonomy schools" took prompt action to address critics' concerns and protect student-athletes'

interests. They first increased the grant-in-aid limit to encompass the full cost of attendance, rather than just tuition and fees. Steve Berkowitz, *NCAA increases value of scholarships in historic vote*, USA Today (Jan. 17, 2015), https://perma.cc/4G5Y-V2MM. The schools also permitted multi-year scholarships to athletes, preventing coaches from pulling scholarships based on athletic performance. Hosick, *Autonomy schools adopt cost of attendance scholarships*, *supra*. And schools adopted a new concussion management program and authorized student-athletes to borrow against their future earnings to pay for "loss-of-value" insurance. Wolohan, *What Does Autonomy For the "Power 5" Mean for the NCAA*?, *supra.*

These reforms—which came about largely because of public pressure and a national dialogue—show that the NCAA is actively adapting without court intervention. *See id.* (explaining that autonomy was necessary for "survival," to "keep the organization intact, and help the Power Five conferences answer their critics by providing more-equitable treatment to their recruited athletes").

These efforts have not been limited to the NCAA and its member institutions. State legislatures are actively involved in current discussions about whether student-athletes may benefit financially from their name, image, or likeness ("NIL") while playing for their school. For example, at least five states have adopted new laws forbidding schools from preventing student-athletes from receiving NIL benefit, while imposing varying types of safeguards to prevent improper

influence during recruiting and protect amateurism in collegiate sports. *See* Cal. Educ. Code § 67456 (California); Colo. Rev. Stat. Ann. § 23-16-301 (Colorado); Fla. Stat. Ann. § 1006.74 (Florida); Mich. Comp. L. Ann. § 390.1731 *et seq*. (Michigan); Neb. Rev. Stat. § 48-3603 (Nebraska). And over thirty other states are debating similar measures. *See* Rudy Hill & Jonathan D. Wohlwend, *Florida Law Will Allow College Athletes to Profit from Name, Image, and Likeness Starting Summer 2021*, Bradley (June 25, 2020), https://perma.cc/8SG7-X38P; *see also* Kendall Baker, *Colorado joins California in allowing college athletes to profit off name and likeness*, Axios (Mar. 23, 2020), https://perma.cc/B9H9-PHG8 (displaying states that have passed or proposed NIL legislation as of March 2020). These actions are premised at least in part on the notion that if states require their schools to permit athletes to profit off NIL—making those athletes ineligible to participate in NCAA sports under the organization's current rules—the NCAA or autonomy schools will be pressured to adopt comprehensive NIL reform. *Id.*; *see also California forces the NCAA's hand*, Axios (Oct. 29, 2019), https://perma.cc/3Q58-NJB8.

That approach is leading to further changes. "Pressure has continued to build in the past year as more states have written or passed similar laws, and members of Congress have discussed creating a federal law." Dan Murphy & Adam Rittenberg, *NCAA delays vote to change college athlete compensation rules*, ESPN (Jan. 11, 2021), https://perma.cc/XQM2-76UG. In fact, the NCAA was reportedly prepared to

amend its NIL rules in mid-January—but that effort stalled because of the uncertainty created by this case and other threatened litigation. *See id*.; *see also* Dennis Dodd & Matt Norlander, *NCAA expected to table planned vote on name, image, likeness rights amid Supreme Court case, senate changes*, CBS (Jan. 9, 2021), https://perma.cc/F2LW-LBJN.

There is also significant bipartisan interest in federal legislation to address NIL and other student-athlete compensation measures. *See* Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act Into Law*, Sports Illustrated (Sept. 30, 2019), https://perma.cc/E2NK-DCWF. Congress is currently debating how best to approach student-athlete compensation, even beyond NIL. Members are weighing concerns over making collegiate sports de-facto professional, including recruiting abuses that could arise from allowing athlete compensation. *See*, *e.g.*, Dan Murphy, *NCAA, Congress have labyrinth of options, but NIL clock is ticking*, ESPN (Dec. 17, 2020), https://perma.cc/2AJU-LVTH (collecting and comparing various proposals, including a commission to study student-athlete pay issues and drafting uniform laws to be adopted in the states). The NCAA's support of this effort reflects its interest, shared by its member schools, in avoiding a patchwork of state laws thwarting uniform rules, or worse, a web of injunctions by courts across the country. McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act Into Law, supra*.

Simply put, reform is already occurring in a variety of forums, each better suited to resolve the complex issues respondents raise. These alternatives have already proven effective in providing comprehensive reform driven by student-athletes.

B. The decisions below will stand in the way of comprehensive reform.

The courts below have effectively stalled these alternative reform efforts and have given short shrift to the interests represented in those debates. The Ninth Circuit and the district court below ruled that the NCAA would have to prove that every aspect of their amateurism regulations were entirely necessary to further procompetitive benefits. That standard ensures that any attempt at regulation will be subject to endless challenges. And they intend for a single district court in California to decide NCAA policy for all the relevant stakeholders, most of whom had no voice during this litigation. The better path is comprehensive, national regulation that can better account for all the interests at stake.

1. Because "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports" there is no question "that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." *NCAA v. Bd. of Regents of the Univ. of Oklahoma*,

468 U.S. 85, 120 (1984). And the courts of appeals have generally afforded the NCAA that latitude. *See Agnew v. NCAA*, 683 F.3d 328, 343 (7th Cir. 2012) ("Most—if not all—eligibility rules, on the other hand, fall comfortably within the presumption of procompetitiveness afforded to certain NCAA regulations"); *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 80 (3d Cir. 2010) ("[C]ourts have generally accorded sports organizations a certain degree of deference and freedom to act."); *McCormack v. NCAA*, 845 F.2d 1338, 1345 (5th Cir. 1988) ("That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable."). But here, the Ninth Circuit applied the opposite of deferential review, picking apart the amateurism rule and requiring defendants to show each part was necessary to achieve their procompetitive aims.

Antitrust challenges like this one are generally subject to the rule of reason. "To determine whether a restraint violates the rule of reason," courts apply a "three-step, burden-shifting framework." *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018). First, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Id.* Second, "if the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint." *Id.* And third, "[i]f the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the

procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.*

Even assuming the Ninth Circuit should have applied full rule-of-reason review, *see* Pet. Br. 17-34, the court erred by inverting the analysis. The court found that the NCAA's compensation rules have a procompetitive effect (amateurism is *the feature* that distinguishes college sports from professional sports). Pet. App. 34a–35a. At step two, however, the court focused on whether every aspect of the challenged rules was *necessary* to achieve that procompetitive effect. *Id.* at 35a (recognizing that the NCAA's amateurism rules distinguish amateur, collegiate sports from professional sports, but still affirming the trial court's analysis "that only some of the challenged rules serve that procompetitive purpose"); *see also id.* at 35a–40a. That analysis—asking whether the challenged restraints are tailored enough to their procompetitive justification—is a step-three question. But the district court and Ninth Circuit put the burden on the NCAA and conferences to prove that the existing regulations were all necessary to "preserve 'amateurism.'" *Id.* at 34a.

That untenable burden would doom any attempt to limit compensation for student-athletes. If the NCAA and conferences can only defend their rules by proving that every regulation is strictly necessary to further a procompetitive goal, the only barrier to striking them down is the ability of the plaintiff—or the court—to imagine some marginally less-restrictive rule. *See* Phillip Areeda & Herbert Hovenkamp, 11 *Antitrust Law* § 1913b (4th ed. 2018) ("[S]killed lawyer[s]

would have little difficulty imagining possible less restrictive alternatives to most joint arrangements"). Hinging the antitrust analysis on that sort of simple brainstorming exercise will encourage endless challenges to NCAA regulations. The history of this case proves the point. *See* Pet. App. 14a (explaining that "while the NCAA was litigating *O'Bannon I*, FBS football and D1 men's and women's basketball players filed several antitrust actions against the NCAA and eleven D1 Conferences," and that "[r]ather than confining their challenge to rules prohibiting NIL compensation, Student-Athletes sought to dismantle the NCAA's entire compensation framework"). The inevitable result will be an incremental chipping away of any NCAA eligibility rule that attempts to balance the competing values and interests in setting a compensation plan for student-athletes.

2. It gets worse. The injunction below also explicitly contemplates that all future efforts by the NCAA, its conferences, or any member schools "to fix or limit compensation or benefits related to education" can happen only with the district court's approval. Pet. App. 167a. The district court "retain[ed] jurisdiction over the enforcement and amendment of the injunction" and has invited the parties to "seek modification of th[e] Order, at any time, by written motion and for good cause based on changed circumstances or otherwise." *Id.* at 170a. So this single injunction by this one district court in California preempts and controls *all* efforts by the NCAA or any of its schools to "fix or

limit compensation or benefits related to education" in perpetuity. *Id.* at 167a.

But that need not, and should not, be the case. "The antitrust laws do not deputize district judges as one-man regulatory agencies." *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 597 (7th Cir. 1996). Antitrust courts "are ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'" *Pac. Bell. Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 452 (2009) (quoting *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004)); *see also Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.) ("[A]ntitrust courts normally avoid direct price administration," instead "relying on rules and remedies . . . that are easier to administer."). The injunction here does just that, endowing one district court with the power "to assume the day-to-day controls characteristic of a regulatory agency.'" *Pac. Bell*, 555 U.S. at 453.

This Court should not permit a single district court to serve as the NCAA's de facto amateurism czar. Decisions about the future of college athletics—including the issue of student-athlete compensation—should be made by the people and entities best positioned to protect the interests of student-athletes, state universities, and everyone else who depends on and benefits from college athletics. An endless series of district court injunctions is not the answer.

II. The injunction here threatens serious harm to collegiate sports in the *amici* states.

Unintended consequences are the rule rather than the exception when courts try to govern complex economic or social issues by injunction. Just so here. College athletics prepare student-athletes to succeed in life. Sporting events unite the campus, attract new students, and energize alumni. Yet the courts below considered neither the benefits that flow from amateur college athletics to all involved, nor the tremendous costs that will necessarily accompany the injunction. The injunction will force schools to choose between either spending more on their athletic department—which for most schools is already funded by student fees and university support—or cutting sports and becoming less competitive on the field. Either choice will undermine the benefits that college athletics offer to schools and states. The question of how schools should compensate student-athletes is too important, and too complicated, to ignore these realities.

A. Schools fund college athletics because they benefit students, communities, and states, not because they are a money-making endeavor.

The courts below understood college athletics in purely financial terms as a money-making endeavor. Pet. App. 54a (describing the value of athletic departments as coming from "ticket sales, television contracts, merchandise, and other fruits"); *id.* at 55a, 164a–65a (similar). That underlying assumption is

faulty. The vast majority of universities lose money on their athletic programs. Even so, universities fund college athletics. Why? Because college sports are good for student-athletes, other students, and communities generally. The courts below thus paid no heed at all to state universities' essential purpose: educating students and preparing them to succeed in their personal and professional lives.

1. Almost every college athletic department across the country is a net drain on its school's resources. There are 449 Division III schools and 314 Division II schools in the NCAA. *See NCAA Directory*, NCAA, https://perma.cc/CQ2N-MUVW. None of those schools generate net revenue from its athletic department. *Finances of Intercollegiate Athletics*, https://perma.cc/QAC5-FKDQ (finding the median net-loss, per school, per year, to be over $5 million for Division II schools and over $2 million for Division III schools).

The same is true in Division I, the home of the most nationally prominent athletic programs and the focus of the student-athlete compensation debate. Take schools with football programs. NCAA Division I football is divided between football championship subdivision (FCS) and football bowl subdivision (FBS) schools. There are 124 FCS schools in Division I, and the athletic department in every one of them is revenue-negative. *See NCAA Directory, supra*; *15-Year Trends in Division I Athletics Finances*, NCAA, at 10, https://perma.cc/K63T-MX9S. There are 130 FBS schools, 65 of which comprise the "autonomy

conferences"—the five major conferences that generate the most revenue and spend the most on their athletic departments. *NCAA Directory, supra.* Of those nationally competitive programs, only 25 were revenue-positive in 2019. *Finances of Intercollegiate Athletics*, https://perma.cc/QAC5-FKDQ. Many well-known college athletic departments thus depend on their university for funding.[1] And even fewer schools are *reliably* revenue-positive. *See*, *e.g.*, *NCAA Finances*, USA Today, https://perma.cc/KQ2L-8Y3P (estimating the Georgia Institute of Technology was revenue-positive in 2018 ($3 million), but revenue-negative in 2017 ($3 million) and 2019 ($10 million)) (click on "Georgia Tech" on the live page to access data). Of the over one-thousand NCAA member schools with athletic departments, only a few dozen generate revenue for their university.

This is not a recent development. For years, athletic department spending has consistently outpaced revenue growth. *College Sports 101*, *supra*, at 304 ("No matter the size of an athletic department's budget, over the past decade expenditures have been rising dramatically every year and much faster than revenue

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[1] For example, the Ohio State University, the University of Tennessee, and the University of Virginia all lost money during the 2018-19 year. *See College Athletics Financial Information (CAFI) Database—Tennessee*, https://perma.cc/3TP5-XE3Y (The University of Tennessee revenues were $6.48 million below expenses in 2018); *id.*, https://perma.cc/FY7C-KCMB (University of Virginia revenues were $350,000 below expenses in 2018); *id.*, https://perma.cc/7LEQ-LH4J (Ohio State University revenues were $910,000 below expenses in 2018).

is growing."). For example, "[o]nly [eight] athletic programs at public universities broke even or had net operating income on athletics each year from 2005-2009." David Welch Suggs, Jr., *Myth: College Sports Are a Cash Cow*, American Council on Education at 1 (2010), https://perma.cc/8KXE-CDGCc; *see also College Sports 101, supra*, at 3–4 ("The myth of the business model—that football and men's basketball cover their own expenses and fully support non-revenue sports—is put to rest by an NCAA study finding that 93 [of the then 119 FBS] institutions ran a deficit for the 2007-08 school year, averaging losses of $9.9 million.").

To bridge this funding gap, most schools "rely on what the NCAA calls 'allocated revenue.' This includes direct and indirect support from general funds, student fees, and government appropriations." *See* Suggs, *supra*, at 2; *see also Restoring the Balance: Dollars, Values, and the Future of College Sports*, Knight Commission at 6 (June 2010), https://perma.cc/AXL3-ZWA3 (noting "most institutions require institutional funding to balance their athletics operating budget"). In short, most colleges subsidize their athletic department, often in substantial amounts.

2. Why, then, do universities have athletic programs? Simply put, because college athletics are an integral part of the educational and cultural experience on campus.

Athletic competition fosters academic, personal, and social success. This is the core idea behind the NCAA:

> Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.

NCAA Constitution, § 2.9, https://perma.cc/VTK2-73QE; *see also* W.L. Dudley, *Athletic Control in School and College*, 11 The Sch. Rev. 95, 95 (1903) ("The principal object of education" is to prepare students "to be better citizens," and "athletic sport" is "a powerful factor in the physical and moral development of youth.").

There can be no doubt that athletic programs benefit student-athletes. Besides a college education, they receive access to top coaching, facilities, and equipment. *Want to Play College Sports?*, NCAA, https://perma.cc/8QNN-L7JH. And they learn important lessons in discipline, teamwork, leadership, and healthy competition. *See*, *e.g.*, Robert J. Sternberg, *College Athletics: Necessary, Not Just Nice to Have*, NACUBO Business Officer Magazine (Sept. 1, 2011), https://perma.cc/E7B3-HRVS ("[D]one right, participation in competitive athletics is leadership development . . . Students can learn as many lessons about

leadership and life from a great coach as they can from a great professor."); D. Oberteuffer, *The Athlete and His College*, 7 J. of Higher Educ. 437, 439 (1936) (If "[t]he ultimate purpose of education is to teach students to get a better control of life . . . Then what manner of experience are our varsity contests! They most surely are one form of . . . education."); *McCormack*, 845 F.2d at 1345 ("The goal of the NCAA is to integrate athletics with academics."). Student-athletes naturally develop into leaders, which is precisely the type of students that universities seek to attract and cultivate. *See*, *e.g.*, R.P. Dobosz & L.A. Beaty, *The Relationship Between Athletic Participation and High School Students' Leadership Ability*, 34 Adolescence 215 (Spring 1999) (finding high school athletes show much greater leadership ability); *Helpful Tips*, Princeton University Admissions, https://perma.cc/A7XZ-UXJ8 (noting Princeton "look[s] for students with strong personal and extracurricular accomplishments."). Athletics thus prepares students for success just as surely as their time in the classroom.

Taking one prominent example, NCAA athletics has "long been a pipeline to the U.S. national teams and the Olympic Games." Karen Price, *The Relationship Between Colleges and Olympic Sports is Vital. Find Out What the USOC is Doing to Help*, Team USA (Sept. 6, 2018), https://perma.cc/9TPR-TT3R. In the last summer Olympics, current or former college athletes made up almost 80% of the U.S. Olympic team. Scott McDonald, *Nearly 80 Percent of the 2016 U.S. Olympic Team Has Competed in College Sports*,

TeamUSA (Aug. 12, 2016), https://perma.cc/2A-R9-BLRG; *see also* Courtney Martinez, *2016 Rio Olympics: Current NCAA student-athletes competing by school*, NCAA (Aug. 25, 2016), https://perma.cc/N4GJ-ET6H (identifying "168 . . . current student-athletes competing in 15 sports" and "representing 107 countries and 223 NCAA member institutions" for the 2016 games). NCAA athletics has a proven track record of preparing young men and women to perform at the peak of their abilities.

Those benefits extend beyond the playing field. College athletes are uniquely prepared for success in life, and employers have taken notice. "NCAA student-athletes (39%) are more likely to earn an advanced degree than non-student-athletes (32%)" and "are slightly more likely (33%) than their non[-]athlete peers (30%) to have had a good job waiting for them upon their college graduation." *A Study of NCAA Student-Athletes: Undergraduate Experiences and Post-College Outcomes*, Gallup at 3 (2020), https://perma.cc/MZ8N-EHAF; *How Can Winning On the Playing Field Prepare You for Success in the Boardroom*, Ernst & Young (2016), https://perma.cc/J7WL-YDL8 (concluding "[t]he correlation between athletic and business success is undisputable" and noting Ernst & Young has "a global program to support elite [women] athletes as they move from careers in sport to careers in business."); *Enterprise Rent-A-Car Looks to Hire Student-Athletes, Partners with Career Athletes*, Enterprise Holdings (Apr. 25, 2012), https://perma.cc/Q9CB-VMKC (discussing Enterprise Rent-a-Car's

established preference for hiring student-athletes). As this Court put it, amateur "intercollegiate athletics" are "an integral part of the educational program." *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 183 (1988).

The benefits of college athletic programs extend further, to the student body as a whole. College sports "provid[e] a vehicle for a sense of community, promot[e] student commitment to the institution, help[ ] label its graduates as successful, and elevat[e] individuals beyond the limits of mundane real[i]ties to show them what they can be." Donald Chu, *The Character of American Higher Education and Intercollegiate Sport*, at 158 (1989). School pride and shared identity often center on sporting events. And athletic programs boost diversity too—"athletes often bring a completely different set of social, ethnic, economic, and experiential backgrounds to the University." R.H. Frank, *Challenging the Myth: A Review of the Links Among College Athletic Success, Student Quality, and Donations*, Knight Commission on Intercollegiate Athletics at 32 (2004), https://perma.cc/67TQ-4LTM. College athletes thus enrich the student body as a whole.

Schools also benefit when they field competitive teams. "[A]thletic success has a significant impact on the quantity and quality of applicants that a school receives." Doug J. Chung, *The Dynamic Advertising Effect of Collegiate Athletics*, at 5, Harvard Business School (Jan. 25, 2013), https://perma.cc/4RSQ-BHEM; *see also id.* at 8 (finding that "when a school goes from being 'mediocre' to being 'great' on the football field,

applications increase by 18.6 percent"). By one estimate, "being one of the 64 teams in the NCAA tournament yields approximately a 1% increase in applications the following year, making it to the 'Sweet 16' yields a 3% increase, the 'Final Four' a 4-5% increase, and winning the tournament a 7-8% increase." Devin C. Pope & Jaren C. Pope, *The Impact of College Sports Success on the Quantity and Quality of Student Applications*, 75(3) Southern Economic Journal 763 (2009). The same is true for football. *Id.* (finding that ending the season ranked in the top 20 in football yields about a 2.5% increase in applications the next year, ending in the top 10 yields a 3% increase, and winning the football championship a 7% to 8% increase). These extra applications lead to greater enrollment and higher-quality students. *Id.* at 776.

In other words, "everyone wants to associate with a winning program." Deborah A. Katz, *What Are the "Bases" in University Athletics? Comment on "Athletic Reform: Missing the Bases in University Athletics,"* 20 Cap. U. L. Rev. 611, 614 (1991). Because many benefits flow from having successful athletic programs, schools have strong incentives to field competitive teams, even if doing so increases their athletic expenses. Athletic victories "usually translate into more revenue and usually allow a college's admissions team to apply more selective measures in accepting applications." Michael McCann, *The Flutie Effect: How UMBC Can Benefit From a Historic NCAA Tournament Upset* (Mar. 17, 2018), Sports Illustrated, https://perma.cc/76HR-3MSG. This newfound "national footprint . . . can help the school

attract top faculty and administrators, which could make the school even more selective." *Id.* All of this puts pressure on athletic departments to increase benefits to student-athletes in order to stay competitive with other programs. That, in turn, requires many schools to operate their athletic departments at significant cost. And cases like this one only increase the burden of doing so.

3. Finally, a few athletic programs—exclusively in the Power 5 conferences—help fund the universities' other core missions. *Overview of Finances for DI Publics*, Knight Commission on Intercollegiate Athletics at 2 (2018), https://perma.cc/X45C-NGUJ (noting the top quartile of FBS schools on average transfer back millions of dollars to their institutions); *see* Suggs, *supra*, at 2 (noting that the University of Georgia Athletic Association's operating revenue allows "the Athletic Association [to] endow[] professorships and funds a few campus-wide projects."). For athletic programs whose revenues eclipse expenses, institutions can use athletic surpluses to fund other pursuits. Take, as an example, the University of Georgia. The UGA Athletic Association has provided an annual contribution to the UGA Foundation between $4 and $5 million per year, totaling more than $28 million since fiscal year 2007. Stephanie Schupska, *UGA Athletic Association helps 'recruit and retain the very best faculty,'* UGAToday (Sept. 15, 2015), https://perma.cc/T5AU-BYP8; *see also* Leighton Rowell, *Football revenue bolsters athletics, academics*, The Red and Black (Apr. 14, 2016), https://perma.cc/QJ28-29RP (explaining that the UGA

Athletic Association has a "proven commitment to the university's academic mission," and funds student scholarships, academic research, and 24 endowed professorships). For these schools, the athletic department allows the university to pursue scholarship, admit more and better students, and hire stronger professors.

Similarly, in break-even programs, revenue-producing sports—like football and basketball—provide funding for non-revenue sports. Kristi Dosh, *Football and Basketball Financially Support Every Other Sport*, Business of College Sports (Nov. 15, 2015), https://perma.cc/2U29-DFXG ("Generally speaking, football and men's basketball support every other sport within an athletic department."). If revenue dips or expenses increase, these non-revenue sports are the first on the chopping block. *See* Mike Shiers, *Playing the game: Revenue generated by college football funds many additional sports programs*, NBC (July 14, 2020), https://perma.cc/T4B5-638J ("College athletic departments rely on revenue from football to fund other sports programs, and even programs in Power Five conferences are not immune to cuts."); Chris Isidore, *Without college football, many other sports will be on the chopping block*, CNN Business (Aug. 14, 2020), https://perma.cc/3JY9-V35Y (quoting an official at Washington University in St. Louis, Missouri, who stated non-revenue sports will likely be cut because of "the loss of football profits" due to COVID-19). So revenue sports allow many universities to fund additional programs (which bring all the benefits just described)

for a class of athletes that might not otherwise get the chance to compete.

B. The injunction below imperils the many benefits college athletics provide to students, universities, and states.

The decisions below directly threaten all of these benefits. The courts below purported to ask whether the injunction would lead to "significantly increased costs" and found it would not because the NCAA would spend less money enforcing its amateurism regulations. Pet. App. 41a, 46a, 152a. This cramped focus misses the forest for the trees.

The injunction below will dramatically increase spending by schools—most of which already heavily subsidize their athletic departments. These new benefits will have to be subsidized by university funds, requiring increased student fees or support from taxpayers. Nor can a school simply opt out of the new benefits, at least not without greatly diminishing the benefits college athletics provide. That means schools will have to choose: spend more on college athletics (funded by taxpayers and students already paying full tuition) or cut non-revenue sports and field less competitive teams in general. Either way, the costs to students and universities, tangible and intangible, will be weighty. So the courts below were simply wrong to find that there is "no reason to believe" the injunction will impose significant costs. Pet. App. 46a. The decisions

below imperil all the benefits that college athletics provides to students, schools, and communities.

1. The injunction here will inevitably require many universities to divert funds from other pursuits to their athletic departments.

Although the district court's injunction offers only the vaguest definition of "education-related benefits," even conservative estimates place likely new spending by universities in the hundreds of thousands, if not millions, of dollars. First, the injunction forbids any limit on "academic and graduation awards or incentives," of less than $5,980 per student-athlete, per year. Pet. App. 168a; Order Granting Mot. Clarify at 5–6. That is in addition to unrestricted spending on "tangible items" related to the "pursuit of academic studies," an entire universe of potential costs that defies limit. Pet. App. 168a. Under a plain reading of the injunction, the NCAA cannot restrict gifts of electronics (students use them to study), vehicles (students use them to travel to class), or any other item that might somehow be tied to academic studies. *Id.* And the injunction leaves the door open for unrestricted cash payments to students in the form of university-sponsored internships. *Id.* Yet, under the injunction, the NCAA and member conferences are flatly prohibited from creating any regulations or guidelines to prevent abuse of university-funded internships, so long as the internship is plausibly "related to education." *Id.* at 167a–68a. The prospect of deferred payments will be understandably attractive to student-athletes, and so schools will necessarily face pressure to offer escalating payments

for internships with increasingly tenuous connections to education. And these estimates are merely a starting point. *See* Pet. App. 168a (anticipating that "the list of compensation and benefits" will be expanded in the future).

So the injunction will inevitably lead to a groundswell of new spending by athletic departments. Even conservative estimates place the likely cost of new benefits in the tens of thousands of dollars per athlete.

2. That money has to come from somewhere. And for almost all universities, these added expenses will be paid for by the institution, often through fees levied from students paying full tuition.

As already noted, almost every athletic department across the country loses money. In 2019, NCAA member athletic departments reported generated revenues (from outside sources) of $10.5 billion, but reported total expenses of $18.8 billion. *See Finances of Intercollegiate Athletics Database*, https://perma.cc/QAC5-FKDQ (listing generated revenue, including from media deals, ticket sales, royalties, donors) ("view the live page" for interactive version).

The difference is made up by direct institutional support from the university (which, of course, means taxpayer dollars for state schools) and fees imposed on students. In 2019, NCAA member schools received $8,404,972,337 in revenue from just those two sources, meaning just under 45% of funding for NCAA athletics came from the university or student fees. *Id.* For

Division II and III athletic departments, those funding sources provide north of 87% of the money needed for athletes to play. *Id.* For Division I FCS schools, that number is 70%, and for non-autonomy Division I FBS schools, it is 55%. *Id.* And even the autonomy FBS schools (including the two-dozen revenue-positive schools) offset some of their athletic costs with these non-generated funds. *Id.*

In other words, institutional funding and student fees subsidize college athletics at nearly all schools. Thus, the money for the new benefits that will inevitably flow from the injunction here will come mostly from taxpayers and the general student body.

3. And it is no answer to say, as the district court suggested in passing, Pet. App. 124a, that schools can opt out of these new benefits. The decision for schools is not that simple.

The injunction puts schools in a lose-lose situation. They must choose between offering competitive financial benefits (which will require them to redirect funds from other university priorities, including perhaps cutting non-revenue sports) or losing out on the best athletes and becoming less competitive on the field. And, as shown by the hundreds of schools that operate revenue-negative athletic programs, that decision is not just about money.

Schools at all levels pride themselves on having competitive athletic programs. Indeed, as already explained, *supra* II.A, successful athletic programs bring tangible and intangible benefits to schools, particularly

increased student applications. *See* Chung, *supra*, at 5; Pope & Pope, *supra*, at 763; Anderson, *supra*, at 24; Baade & Sundberg, *supra*, 789–803. There is thus significant pressure for schools to maintain parity with their competitors. A school cannot decide to become less competitive on the field without also harming the rest of the institution.

To that end, the Power 5 conferences typically act as one when it comes to increasing financial aid benefits. For example, when the autonomy conferences voted in 2015 to raise the cost-of-attendance scholarship ceiling, every single autonomy school increased its scholarships to that new level, including the forty-plus revenue-negative schools. *See* Blair Kerkhoff and Tod Palmer, *They're not paychecks, but major college athletes got extra scholarship stipends for first time this school year*, The Kansas City Star (June 26, 2016), https://perma.cc/KD59-NRMQ ("All schools in the power five conferences . . . provided full cost of attendance to athletes in all of their sports, at a total cost of about $500,000 to $1.5 million per athletic department."); Jon Solomon, *Cost of attendance results: The chase to pay college players*, CBS (Aug. 20, 2015), https://perma.cc/P74F-3F9Q.

For the same reason, non-autonomy schools inevitably feel pressure to match the financial aid offered by Power 5 conferences to "try to remain, or become, competitive." John O'Connor, *As JMU and W&M are establishing, cost of attendance has become the new ante in Division I*, https://perma.cc/KG6T-HM8F. For instance, more than 30 non-autonomy schools

immediately increased their scholarships to cover at least partial cost of attendance following the autonomy schools' full cost of attendance increase. *See* Jon Solomon, *2015-16 CBS Sports FBS college football cost of attendance database*, CBS (Aug. 20, 2015), https://perma.cc/JL6E-GVEN (listing at least 30 non-autonomy schools that planned to increase their scholarship benefits by six- or seven-figures).

The other option for schools would be to increase benefits only for athletes in revenue-generating sports. But, as the cost-of-attendance scholarship decisions show, schools generally treat all their student-athletes equally, and for good reason. *See* Kerkhoff and Palmer, *supra* at 26 (explaining that the Power 5 conferences increased scholarship benefits to the full cost-of-attendance for all athletes). Equity in athletic opportunities fosters an environment where all students are equally equipped to achieve. *Title IX Frequently Asked Questions*, NCAA, https://perma.cc/KX5C-3AKC ("A continued effort to achieve educational equity has benefited all students by moving toward creation of school environments where all students may learn and achieve the highest standards.").

Indeed, schools are *required* to treat their men's and women's sports equally under Title IX. 34 C.F.R. § 106.41(c) ("A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes."). And that means schools cannot simply increase benefits in sports that produce revenue—that is, football and men's basketball. *See* Brian

D. Shannon, *The Revised NCAA Division I Governance Structure After Three Years: A Scorecard*, 5 Tex. A&M L. Rev. 65, 85 (2017) ("The NCAA could not have realistically—or lawfully—adopted legislation authorizing full cost of attendance scholarships only in [football and men's basketball] because of Title IX."); Erin E. Buzuvis, *Athletic Compensation for Women Too? Title IX Implications of Northwestern and O'Bannon*, 41 J.C. & U.L. 297, 300 (2015) (arguing that if "athletes prevail in any of the litigation challenging [NCAA amateurism regulations] . . . college athletic departments would have a legal obligation under Title IX to provide commensurate compensation for female athletes.").

The injunction, in short, leaves the vast majority of schools with no good options. Some schools may increase the financial benefits they offer to student-athletes by thousands (if not tens of thousands) of dollars like the respondents hope. For most universities, doing so will require increased institutional support or higher student fees. And even for the few revenue-positive schools, the new benefits threshold comes with a cost. *A Call to Action: Reconnecting College Sports and Higher Education*, Knight Commission on Intercollegiate Athletics at 17 (June 2001), https://perma.cc/TX3A-CVJN (noting that "[e]ven some of the 'haves' react to intense financial pressure to control costs by dropping so-called minor sports"). Those athletic departments will have less surplus to redirect back to the university or fund non-revenue sports. So the financial burden of the new benefits will fall mainly on taxpayers and students paying full tuition.

Other schools will be able to offer competitive financial aid only by cutting some of their revenue-negative programs to balance their books and comply with Title IX. This happened last year when COVID decimated athletic department revenues. *See* Bill Whitaker, *Some Colleges Axing "Secondary Sports" Like Gymnastics and Tennis as Pandemic Continues*, CBS News (Dec. 6, 2020), https://perma.cc/EP8K-DM2F ("This year at least 30 universities have cut almost 100 programs; soccer, squash, golf, gymnastics. Football powerhouse Clemson cut men's track and field, Stanford eliminated 11 sports."); Matt Marshall, Daniel Arkin & Kanwal Syed, *College sports cuts in the wake of Covid-19 are clouding the future of Olympics participation*, NBC News (Oct. 17, 2020), https://perma.cc/9LXC-N9BP ("More than 1,500 Division I student-athletes will soon no longer compete at the varsity level at their schools for the most part because of Covid-19-related cuts. And, sometimes, schools face Title IX suits even when they cut both men's and women's sports. For example, Dartmouth recently reversed its budget-driven decision to end "women's and men's swimming and diving, women's and men's golf, and men's lightweight rowing" after being accused of violating Title IX. Associated Press, *Dartmouth reinstates five sports after Title IX concerns*, ESPN (Jan. 29, 2021), https://perma.cc/5HMB-9DD7.

The athletic programs that are break-even or marginally revenue-positive are particularly likely to be forced down this last path. For these schools, the injunction will lead to higher student fees, fewer

student-athletes, and a lessened place for athletics in student life on campus. And the many schools that will be able to afford only a partial increase in financial aid (or no increase) will lose out on the plethora of benefits that competitive athletic programs bring. Fewer top athletes will attend those schools, and so their programs will be less competitive. That will lessen student and alumni engagement with the university.

In sum, the costs the injunction will impose are high. It will significantly increase financial pressure on athletic department budgets which are, for nearly all schools, already under stress. State schools will have to redirect taxpayer funds from academic endeavors to athletics. Student fees will be raised. Some sports will be dropped, meaning athletes in non-revenue sports may lose the chance to compete at all. And the competitive parity of NCAA athletics will be damaged. For the universities that cannot find funding for the escalating financial aid, athletics—and all the benefits it brings for student life, alumni relations, and school reputation—will be diminished. None of this is good, on balance, for athletes, students, or universities.

CONCLUSION

The issue of student-athlete compensation is complex, and it deserves a full, unfettered national discussion to ensure the fair treatment of student-athletes while also protecting the matchless benefits that college athletics provide to institutions of higher education, their students, and the public. The injunction

below cuts off that important discussion based on an untenable view of federal antitrust law. This Court should reverse.

Respectfully submitted.

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