No. 24-6153

United States Court of Appeals for the Sixth Circuit

DIEGO PAVIA,

Plaintiff-Appellee,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Tennessee
Hon. William L. Campbell, Jr.
No. 3:24-cv-01336

BRIEF AMICUS CURIAE OF AMERICAN COUNCIL ON EDUCATION, THE ASSOCIATION OF AMERICAN UNIVERSITIES, THE ASSOCIATION OF PUBLIC AND LAND-GRANT UNIVERSITIES, THE COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES, THE COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, THE SOUTHERN ASSOCIATION OF COLLEGES AND SCHOOLS COMMISSION ON COLLEGES, AND THE THURGOOD MARSHALL COLLEGE FUND IN SUPPORT OF APPELLANT

Jessica L. Ellsworth
Stephanie Gold
Joel Buckman
Reedy C. Swanson
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
jessica.ellsworth@hoganlovells.com

Counsel for Amici Curiae

March 28, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 24-6153 Case Name: Pavia v. NCAA

Name of counsel: Jessica L. Ellsworth

Pursuant to 6th Cir. R. 26.1, American Council on Education et al. (see cover for full list)
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on March 28, 2025 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Jessica L. Ellsworth

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are a group of associations of colleges, universities, educators, trustees, and other representatives of several thousand institutions of higher education in the United States. *Amici* represent public, independent, large, small, urban, rural, denominational, non-denominational, graduate, and undergraduate institutions and faculty. *Amici*'s college and university members offer opportunities for their students to participate in intercollegiate athletics as an extra-curricular that is part of their collegiate experience. As such, intercollegiate athletics programs are an integral part of the overall educational missions of *amici*'s college and university members.

Amici believe that shared governance—in principle and in fact—is critical to the success of higher education. This extends to all extra-curricular offerings. Intercollegiate athletics programs are controlled not only within each institution, but also through colleges' and universities' participation in voluntary associations like the athletics conferences to which they belong and the National Collegiate Athletic Association (NCAA).

The **American Council on Education (ACE)** is a membership organization that leads higher education with a united vision for the future, galvanizing our members to make change and collaborating across the sector to design solutions for today's challenges, serve the needs of a diverse student population, and shape

effective public policy. As the major coordinating body for the nation's colleges and universities, our strength lies in our diverse membership of more than 1,600 colleges and universities, related associations, and other organizations in America and abroad. ACE is the only major higher education association to represent all types of U.S. accredited, degree-granting colleges and universities.

The **Association of American Universities (AAU)** was founded in 1900 and is composed of America's leading research universities. AAU's member universities earn the majority of competitively awarded federal funding for research that improves public health, seeks to address national challenges, and contributes significantly to our economic strength, while educating and training tomorrow's visionary leaders and innovators. Its members include 69 public and private research universities in the United States.

The **Association of Public and Land-grant Universities (APLU)** is a membership organization that fosters a community of university leaders collectively working to advance the mission of public research universities. The association's U.S. membership consists of more than 230 public research universities, land-grant institutions, state university systems, and affiliated organizations spanning across all 50 states, the District of Columbia, and six U.S. territories. The association and its members collectively focus on increasing student success and workforce readiness; promoting pathbreaking scientific research; and bolstering economic and

community engagement. Annually, its U.S. member campuses enroll 4.3 million undergraduates and 1.3 million graduate students, award 1.3 million degrees, employ 1.2 million faculty and staff, and conduct $64 billion in university-based research.

The **College and University Professional Association for Human Resources (CUPA-HR)**, the voice of human resources in higher education, represents more than 41,000 human resources professionals at more than 1,800 colleges and universities. Its membership includes 89 percent of all United States doctoral institutions, 70 percent of all master's institutions, 49 percent of all bachelor's institutions, and over 520 two-year and specialized institutions.

The **Council for Christian Colleges & Universities (CCCU)** is a higher education association of more than 170 institutions around the world, including more than 130 in the United States. Together, they enroll approximately 605,000 students annually and comprise a vibrant network of more than 11 million alumni. As the leading voice of Christian higher education, the CCCU's mission is to advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth. CCCU schools contribute to the common good by graduating students who are equipped with wisdom, critical thinking, and a desire to love and serve their communities.

The **Southern Association of Colleges and Schools Commission on Colleges (SACSCOC)** is a peer driven, membership organization that accredits

public, private, and for-profit degree-granting institutions of higher education primarily throughout the southeastern part of the United States. Its mission is to assure the educational quality and improve the effectiveness of its member institutions.

Established in 1987, the **Thurgood Marshall College Fund (TMCF)** is the nation's largest organization exclusively representing the Black college community. TMCF member-schools include the publicly-supported historically Black colleges and universities (HBCUs), predominantly Black institutions (PBIs), and historically Black community colleges (HBCCs). TMCF member-schools represent 80% of all students attending HBCUs.[1]

INTRODUCTION

The preliminary injunction in this case affects just one Division I rule and one student-athlete, but the implications of the District Court's decision are far more sweeping. Across the NCAA's three divisions, nearly 20,000 teams and over 530,000 students participate in intercollegiate athletics.[2] The vast majority of

[1] This brief is accompanied by a motion for leave to file an amicus brief under Federal Rule of Appellate Procedure 29(a). No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than amici contributed money intended to fund the brief's preparation or submission.

[2] *See* Executive Summary: 2023-24, *NCAA Sports Sponsorship and Participation Rates Database*, NCAA.org, https://perma.cc/8U4Q-AMLW.

student-athletes, in the vast majority of these sports, will earn little—if any—money from name, image, and likeness (NIL) deals, and they will not go on to play professional sports.

The District Court's analysis of the NCAA's eligibility rules overlooked this critical broader context. The NCAA's eligibility rules for each Division do not distinguish between the few student-athletes who may have the potential to enter into financially significant NIL deals and those who do not. Instead, for nearly 100 years, the NCAA has set broadly applicable eligibility rules designed to ensure the primacy of the educational context for the student-athlete experience. These include grade-point-average (GPA) standards, progress-toward-degree requirements, and—most relevant here—time limits. Like the NCAA's other eligibility rules, the challenged five-year time limitation aligns with the educational context for undergraduates (who make up the vast majority of intercollegiate athletes) and prevents intercollegiate athletics from becoming an indefinite detour from—rather than a complement to—education.

The District Court's preliminary injunction threatens to shift the formulation and enforcement of the NCAA's eligibility rules from educators and athletics administrators to federal courts. Deviating from other courts, the District Court's analysis appears to suggest that because the NCAA now allows athletes to pursue NIL deals, *all* of its eligibility rules are automatically "commercial"—regardless of

their purpose or function—and therefore subject to antitrust scrutiny. Moreover, the court shortcut the required rule-of-reason analysis at every step: It forgave the plaintiff for failing to provide evidence to support his alleged market; it found an anticompetitive effect in a different market altogether; and it discounted each of the NCAA's procompetitive justifications without any meaningful analysis of the academic and educational purposes of the challenged eligibility rule.

If affirmed, the court's injunction jeopardizes the NCAA's ability to effectively set and enforce nationwide eligibility rules for intercollegiate athletics. Every student-athlete who is disqualified by a rule—for example, having too low a GPA, or failing too many classes—could run to a federal courthouse in pursuit of an injunction, arguing that the rule has the effect of restricting their ability to pursue NIL deals. A patchwork of ad hoc rule adjustments and waivers granted by judges around the country—rather than by athletics conferences or the NCAA—will replace a nationwide system developed and implemented by the schools and their membership organizations. Federal courts will effectively become courts of appeals for the NCAA—often reviewing cases, as here, in an emergent posture on an underdeveloped record.

This Court should reverse.

ARGUMENT

I. STUDENT-ATHLETE ELIGIBILITY CRITERIA ARE NON-COMMERCIAL RULES.

According to the District Court, "rules regulating who can play" NCAA sports "became 'commercial in nature' " once the NCAA "lifted the restriction on NIL compensation." Op., R. 41, PageID #1405. That conclusion is wrong. Meaningful NIL compensation impacts a tiny sliver of the half-million-plus student-athletes who compete on nearly 20,000 intercollegiate teams. To treat the advent of NIL compensation for some student-athletes at some schools in some sports as fundamentally changing the nature and purpose of the NCAA's eligibility rules *writ large* for the broader intercollegiate athletics landscape requires a highly blinkered—and inaccurate—view of collegiate athletics. To be sure, this case involves a single relatively high profile Division I football player, but the NCAA's eligibility rules—and the ramifications of the legal analysis governing these rules—will apply far beyond him. This Court's assessment of whether an eligibility rule is "commercial" under this Court's precedents should be guided by the full context of that rule, not one exceptional player.

1. From a purely "commercial" perspective, most college sports are not viable. The largest and most well-known athletics programs are concentrated in Division I institutions. Even among those Division I schools, the vast majority do not generate enough direct revenue through ticket sales, broadcast rights, alumni

contributions, and the like to cover their expenses. *See Division I Athletics Finances: 10-Year Trends from 2014 to 2023*, at 6, NCAA.org (Dec. 2024).[3] The reality is that only 24 Division I institutions *in total*—approximately 2% of all NCAA members—managed to bring in enough direct revenue in 2023 to cover their expenses. *See id.* at 8. The situation is even more stark for Division II and III programs: Not a single one of these institutions generated enough revenue to cover expenses. *See Division II Athletics Finances: 10-Year Trends from 2014 to 2023*, at 7, NCAA.org (Dec. 2024)[4]; *Trends in Division III Athletics Finances*, at 7, NCAA.org (Nov. 2021).[5]

Needless to say, if college athletics programs functioned as for-profit enterprises, the vast majority would be disbanded immediately. From a "commercial" standpoint, water polo, gymnastics, track and field, softball, swimming and diving, soccer, and most others are nowhere close to profitable. It is expensive to employ a coaching staff, maintain training facilities, fields, and pools, and pay for team travel, equipment, and uniforms. If money was the motivating force behind these programs, schools would offer little more than football and basketball. The fact that schools continue to offer such a wide array of opportunities

[3] https://perma.cc/TC7Q-Q3Y4.

[4] https://perma.cc/4E8V-K387.

[5] https://perma.cc/M5R5-4FSD.

reflects their alignment with, and support of, these institutions' educational missions—not money.

Schools continue to invest resources in these programs *despite* the financial downside because athletics reinforce their educational mission by helping students develop skills that will benefit them throughout their lives. "The overwhelming majority of America's intercollegiate athletics programs provide student-athletes with a life-changing experience," and "[i]n many instances, graduation rates of student-athletes are higher than those of their student peers across every demographic group." ACE, *The Student-Athlete, Academic Integrity, and Intercollegiate Athletics* 2 (2016).[6] Student-athletes have reported specific benefits including "time management, self-confidence, commitment, performance under pressure, accountability … teamwork, leadership, and respect for others." Erianne Allen Weight et al., *Holistic Education through Athletics: Health and Health-Literacy of Intercollegiate Athletes and Active Undergraduate Students*, 1 J. Higher Ed. Athletics & Innovation 38, 50 (2016). Thus, it should come as no surprise that success on the field or the court can be closely linked to success in the classroom. *See, e.g.*, ESPN, *Pat Summitt's impressive career, by the numbers* (Jun. 28, 2016)

[6] https://perma.cc/2ZEH-GV6X.

(noting that Coach Summit set an all-time record for wins while maintaining a 100% graduation rate).[7]

Through the lens of individual student-athletes, the story is much the same. NIL deals are the exception, and highly concentrated in limited contexts. Just four sports—football, men's and women's basketball, and baseball—account for approximately 70% of all NIL deals. Data Dashboard, NIL Assist, NCAA.org.[8] Moreover, nearly 80% of deals are valued at $1,000 or less. *Id.* The median total earnings for all student-athletes with NIL deals in 2024 was just under $600. *Id.*

2. For nearly 100 years, the NCAA's member schools, as well as athletics conferences, have adopted bylaws and developed rules to govern participation by student-athletes in intercollegiate athletics program offerings. Vaughan Decl. ¶ 4, R. 30-1, PageID #770. The NCAA's eligibility rules are determined by its membership and uniformly applicable to colleges and universities around the country. *See* Membership Directory, NCAA.org.[9]

These NCAA's eligibility rules are heavily informed by the broader educational context for intercollegiate athletics, and serve to reinforce that context. As the preamble to the NCAA's constitution affirms, the "basic purpose" of the

[7] https://perma.cc/VD8S-4YVQ.

[8] https://perma.cc/YQV7-5UUK.

[9] https://perma.cc/UZ58-SUPM.

NCAA—including in setting eligibility rules—"is to support and promote healthy and safe intercollegiate athletics … as an integral part of the education program and the student-athlete as an integral part of the student body." *See* NCAA, *Division I 2024-25 Manual* 1 (hereinafter *Division I Manual*).[10]

The NCAA requires Division I athletes[11] to "be enrolled in at least a minimum full-time program of studies, be in good academic standing and maintain progress toward a baccalaureate or equivalent degree." *Id.* at 139 (§ 14.01.2). Students must meet their institution's expectations for "good academic standing," which "must be at least as demanding as the institutional standard applied to all students to participate in extracurricular activities." *Id.* (§ 14.01.2.1). Incoming freshmen must achieve certain GPA and curricular requirements in high school before they may fully participate in intercollegiate athletics. *See id.* at 145-149 (§ 14.3). Upper-class students must maintain satisfactory "progress toward a baccalaureate or equivalent degree" throughout their enrollment to remain eligible. *See id.* at 150-158 (§ 14.4).

These are not phantom requirements. Institutions must disclose their compliance with the NCAA's academic performance requirements, and failure to do

[10] https://perma.cc/AT78-EC9E.

[11] Because this case involves a Division I athlete, *amici* focus on the rules for Division I. Although the eligibility rules are not precisely the same for Divisions II and III, those divisions similarly maintain a focus on preserving the primacy of education in student athletics.

so disqualifies the offending institution from entering a team or competitor in NCAA postseason competition. *See id.* at 139 (§ 14.01.6). The NCAA also maintains procedures to confirm that institutions do not falsify academic records or otherwise cut corners. *See id.* at 172 (flow chart summarizing the academic integrity analysis).

Importantly, with only minor exceptions not relevant here, these rules are not specific to any particular sport or school. They are baseline expectations that *all* NCAA student-athletes must meet. The five-year time limitation challenged here aligns with these other eligibility rules, and their connectivity with an educational mission. It helps to ensure that the "[t]he student-athlete is considered an integral part of the student body." *Id.* at 33 (§ 12.01.2); *see also* Vaughn Decl. ¶ 20, R. 30-1, PageID #775 ("The bylaws are designed to align the student-athlete[']s period of athletic competition with their anticipated academic achievement and progress towards a college degree."). Consistent with that purpose, waivers may be available for extraordinary circumstances beyond a student's control—such as disaster or major illness—but not for circumstances *within* a student's control—such as "failure to meet … academic requirements." *Division I Manual* 56-57 (§ 12.8.1.7).

3. If some student-athletes choose to pursue financial opportunities, those choices should not turn *all* NCAA's eligibility rules—which govern eligibility for over 530,000 athletes—into "commercial" decisions. Under this Court's precedents, "the appropriate inquiry is whether *the rule itself* is commercial." *Bassett v. NCAA*,

528 F.3d 426, 433 (6th Cir. 2008) (emphasis added and quotation marks omitted). The fact that certain athletes or sports—or even the NCAA itself—generate revenue is not sufficient to turn *all* NCAA rules into commercial ones. *See id.* (finding recruiting rules were not "commercial" even though the complaint "contains considerable information on the size and scope of college football and the revenues generated by it").

In this case, the District Court's analysis suggests a sweeping conclusion that all "rules regulating who can play" are now "commercial" because they indirectly affect who may negotiate for NIL deals. Op., R. 41, PageID #1405. Remarkably, the court did not even acknowledge the extra-curricular nature of intercollegiate athletics or discuss the educational foundation for the NCAA's eligibility rules—including the five-year limitation. *See id.* at PageID #1405-06. The court instead assumed without justification that *all* rules that have any pecuniary effect are "commercial," without regard for this Court's precedent requiring a rule-by-rule approach. The District Court thus seems to contemplate that *all* eligibility rules—including things like GPA and progress-toward-degree requirements—"will be subject to further scrutiny to determine whether they are an undue restraint on trade." *Id.* at PageID #1405.

This Court should reject the District Court's broad-brush approach and adhere to its longstanding, case-by-case assessment of whether the NCAA's rules are

commercial in nature. *See Bassett*, 528 F.3d at 433. That analysis should give significant consideration to the rule's application to all Division I student-athletes—not just football players at Power Four institutions.

Other lower courts have already refused to follow the District Court's reasoning, unpersuaded by its categorical and unprecedented approach. *See Goldstein v. NCAA*, 2025 WL 662809, at *4 (M.D. Ga. Feb. 28, 2025) (holding the five-year rule is not "commercial in nature despite [the plaintiff's] efforts to intertwine [these rules] with what he and his agent swear are 'significant' opportunities to capitalize off his NIL"); *Osuna v. NCAA*, 2025 WL 684271, at *4 (E.D. Tenn. Mar. 3, 2025) ("Readily characterizing all eligibility rules as commercial, which is the logical end to Plaintiff's position, may overextend *Alston* and contravene the Sixth Circuit's instruction to consider only 'the rule itself' when conducting this inquiry."). And the Court should take particular care when evaluating rules that function to incentivize student-athletes to continue to prioritize their education.

II. COURTS SHOULD NOT BE ARBITERS OF WHO QUALIFIES AS A "STUDENT-ATHLETE."

The NCAA's eligibility rules reflect the considered judgment of educators, coaches, athletic directors, student-athletes, and other stakeholders. The District Court was wrong to supplant this informed perspective with its own view of what

will best serve students who also are intercollegiate athletes, particularly on a highly abbreviated record on an emergency motion for a preliminary injunction.

1. In the broader higher education institutional context, principles of shared governance pervade university administration. *See NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680 (1980); *University of S. Cal. v. NLRB*, 918 F.3d 126, 137-138 (D.C. Cir. 2019). This shared-governance heritage was extended to the context of intercollegiate athletics—beginning with the predecessor of the Big Ten Conference's first known act: "restrict[ing] eligibility for athletics to bona fide, full-time students who were not delinquent in their studies." Big Ten History, BigTen.org.[12]

Shared governance reflects and magnifies shared expertise. *See* ACE et al., *Statement on Government of Colleges and Universities* (1966).[13] It facilitates consensus decision-making capable of balancing the many trade-offs that attend the complex universe of college sports. The NCAA's governance structure reflects these principles. Its committee-based system entails representation across member institutions, athletic conferences, student-athletes, and other stakeholders. *See, e.g.*, *NCAA Division I Legislative Process*, NCAA.org.[14] And its highest governing

[12] https://perma.cc/B6RA-68EC.

[13] https://perma.cc/5TA9-RPSL.

[14] https://perma.cc/SEL5-FZNZ.

body—the NCAA Board of Governors—includes a broad mix of voices including university educators, athletics directors, conference leaders, and former student-athletes. *See Who are the NCAA Board of Governors*, NCAA.org.[15]

2. As the Supreme Court has recognized, a critical corollary of shared governance in higher education is that "principles developed for use in the industrial setting cannot be imposed blindly on the academic world." *Yeshiva*, 444 U.S. at 681 (quotation marks omitted). Yet that is exactly what the District Court purported to do here by making the pecuniary effects of the NCAA's eligibility rules for a single plaintiff without giving due consideration to the educational setting for which those rules were developed.

The court's decision invites federal courts around the country to substitute their own judgments for the collective determination of the NCAA and its members in an area fraught with difficult tradeoffs, compromises, and competing interests. That is not just bad policy—it is inconsistent with fundamental principles of antitrust law. As the Supreme Court recently reaffirmed in *NCAA v. Alston*, courts reviewing antitrust claims "must give wide berth" to a defendant's judgment before finding liability. 594 U.S. 69, 102 (2021). That principle was given short shrift below.

[15] https://perma.cc/JW6T-6VYH.

The problems began with the District Court's articulation of the relevant legal standard. The court asked only whether the plaintiff—the party seeking extraordinary injunctive relief—had presented "*some evidence* that the challenged eligibility rules harm competition." Op., R. 41, PageID #1409 (emphasis added). That is not the standard even at the liability phase of an antitrust trial—much less the plaintiff's burden when seeking the extraordinary relief of a mandatory preliminary injunction. *See Alston*, 594 U.S. at 96 (noting the plaintiff "has the initial burden to prove that the challenged restraint has a *substantial* anticompetitive effect" in the relevant market) (emphasis added and quotation marks omitted); *James B. Oswald Co. v. Neate*, 98 F.4th 666, 672 (6th Cir. 2024) ("Before a court may grant a preliminary injunction, it must consider … whether the movant has a *strong likelihood* of success on the merits ….") (emphasis added and quotation marks omitted).

Applying this watered-down standard, the court then proceeded to assume that the challenged rule—and, apparently, *all* NCAA eligibility rules—are necessarily anticompetitive without *any* economic analysis of the effect on the relevant market from the plaintiff. The court thus determined that the rule had the effect of "pushing student-athletes to attend NCAA member institutions" over junior colleges. As the NCAA correctly explains (at 37-39), that effect does not even fall within the plaintiff's asserted market: the labor market for *NCAA Division I* football. Making

matters worse, the court reached this conclusion without attempting to determine how often—if ever—the rule has had this effect in the real world. Op., R. 41, PageID #1409. The court did not point to evidence—and the plaintiff submitted none—that even a single student had decided to pass over a junior college in favor of an NCAA-affiliated school as a result of the challenged five-year rule.

The court then rejected every procompetitive rationale that the NCAA offered, effectively asking whether the rule was a *perfect* fit for the NCAA's proffered purposes—an analysis more resembling strict scrutiny rather than the reasonableness assessment required by controlling precedent. *Compare Alston*, 594 U.S. at 98 ("We agree with the NCAA's premise that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes."), *with* Op., R. 41, PageID #1413 (asking whether "the [challenged] eligibility rules are *necessary* to prevent age and experience disparities" (emphasis added)).

The court's conclusion that the NCAA's "goal of maintaining a 'natural and standard degree progression' also appears pretextual" is particularly baseless. Op., R. 41, PageID #1414. The court relied exclusively on the fact "that the NCAA's Rules concerning the duration of eligibility have evolved over time" to conclude "that strict adherence to the eligibility timeframe … does not have procompetitive benefits." *Id.* But this Court has recognized that changes in policy do not necessarily imply bad faith. *See, e.g.*, *Doherty v. S. College of Optometry*, 862 F.2d 570, 579

(6th Cir. 1988) (noting that refusal to award diploma for failure to satisfy "new requirements" was not evidence that the "action [was] taken in bad faith—it is simply the university exercising its right to make a necessary change in its curriculum in light of the changing practice of optometry"). The District Court cited nothing at all to suggest that the changes it identified were anything other than good faith efforts to adapt the eligibility rules to changing circumstances and evolving understandings of the academic experience. And, in any event, the Court's analysis is once again driven by its mistaken belief that a policy must be "necessary" to achieve a procompetitive justification—a legal standard flatly incompatible with *Alston*. 594 U.S. at 98.

The District Court's approach, if sustained, risks leading to federal courts superintending aspects of intercollegiate athletics that neither the judiciary nor institutions of higher education ever anticipated or ought to want. Federal courts would become the *de facto* appeals body for eligibility determinations for over half a million student-athletes around the country in not only Division I, but also Divisions II and III. This Court should reverse such a flawed approach, consistent with longstanding precedent providing that antitrust courts should not undertake to micromanage operational decisions. As then-Judge Taft warned writing for this Court over a century ago, judges must resist the temptation to "set sail on a sea of doubt," and "assume[] the power to say … how much restraint of competition is in

the public interest, and how much is not." *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283-284 (6th Cir. 1898). "The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it." *Id.* at 284.

That warning is as vital today as it was then. It is not a proper role for courts "to pick and choose the applicable terms and conditions" on which a product is offered or for courts "to become 'central planners.' " *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1073 (10th Cir. 2013) (Gorsuch, J.). Rather, "[t]he problem should be deemed irremediable by antitrust law" when a case "requires the court to assume the day-to-day controls characteristic of a regulatory agency." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 (2004) (cleaned up).

If these principles hold when a case involves a traditional, undeniably commercial enterprise, they are all the more critical in the context of a membership association that plays a substantial role in shaping students' educational experience. "Judges must be mindful … of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate … relationships." *Alston*, 594 U.S. at 106. In this context, in particular, "caution is key." *Id.* Here, the District Court did not give due consideration to the NCAA, its members, and stakeholders regarding how to promote and enable competition in an educational context while ensuring that

academics do not fall by the wayside, and it entered a preliminary injunction imposing that view before it had time to develop the kind of "exhaustive factual record" that normally attends antitrust scrutiny. *Id.* at 107. The court would have been better served to approach the case with the "healthy dose of judicial humility" that the Supreme Court has commended in the past. *Id.*

CONCLUSION

For the foregoing reasons and those in the NCAA's brief, the District Court's preliminary injunction should be reversed.

Respectfully submitted,

March 28, 2025

/s/ Jessica L. Ellsworth
Jessica L. Ellsworth
Stephanie Gold
Joel Buckman
Reedy C. Swanson
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
jessica.ellsworth@hoganlovells.com
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,400 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b).

This brief complies with the typeface and typestyle requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft Office 365 in Times New Roman 14-point font.

March 28, 2025

/s/ Jessica L. Ellsworth
Jessica L. Ellsworth

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on March 28, 2025. 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.

/s/ Jessica L. Ellsworth
Jessica L. Ellsworth