
United States Court of Appeals
for the
Third Circuit

Case No. 22-1223

RALPH TREY JOHNSON; CLAUDIA RUIZ; JACOB WILLEBEEK-LEMAIR;
ALEXA COOKE, STEPHANIE KERKELES; RHESA FOSTER; ESTEBAN
SUAREZ; ZACHARY HARRIS; LAURA HAMILTON; MATTHEW
SCHMIDT; LIAM WALSH; GINA SNYDER; TAMARA SCHOEN,
Individually and on Behalf of All Persons Similarly Situated,

Appellees,

v.

NICHOLAS LABELLA; NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION, also known as the NCAA, and the Following NCAA Division
Member Schools as Representatives of a Defendant Class of All Private and
Semi-Public NCAA Division I Member Schools; DREXEL UNIVERSITY;
LAFAYETTE COLLEGE; VILLANOVA UNIVERSITY; UNIVERSITY
OF PENNSYLVANIA; CORNELL UNIVERSITY; SACRED HEART
UNIVERSITY; FORDHAM UNIVERSITY; UNIVERSITY OF OREGON;
TULANE UNIVERSITY; UNIVERSITY OF ARIZONA; PURDUE
UNIVERSITY; DUKE UNIVERSITY; MARIST COLLEGE,

Appellants.

ON APPEAL BY PERMISSION FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
IN CASE NO. 2-19-CV-05230
HONORABLE JOHN R. PADOVA, U.S. DISTRICT JUDGE

**BRIEF FOR AMICI CURIAE AMERICAN COUNCIL
ON EDUCATION AND TWELVE OTHER EDUCATIONAL
ORGANIZATIONS IN SUPPORT OF APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Amici have no parent companies, and no publicly-owned corporation owns 10% or more of their stock.

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INTEREST OF *AMICI CURIAE*

The American Council on Education (“ACE”) is the major coordinating body for American higher education. ACE’s more than 1,700 members reflect the extraordinary breadth and contributions of four year, two year, public, and private colleges and universities. ACE members educate two out of every three students in accredited, degree-granting institutions in the United States. ACE participates as *amicus curiae* on occasions such as this where a case presents issues of substantial importance to institutions of higher education, the students they serve, and their overall educational mission.

The American Association of Community Colleges (“AACC”) is the primary advocacy organization for the nation’s community colleges. It represents more than 1,000 regionally accredited, associate degree-granting institutions.

The American Association of State Colleges and Universities (“AASCU”) is a Washington, D.C.-based higher education association of nearly 400 public colleges, universities, and systems whose members share a learning and teaching-centered culture, a historic commitment to underserved student populations, and a dedication to research and creativity that advances their regions’ economic

¹ All parties have consented to this filing. No party’s counsel authored this brief in whole or in part. No party nor any party’s counsel contributed money that was intended to fund preparing or submitting the brief. No person other than *amici*, their members, and their counsel contributed money related to the preparation or submission of this brief.

progress and cultural development. These institutions are Delivering America's Promise.

The Association of American Universities (“AAU”) was founded in 1900 and is composed of America’s leading research universities. AAU’s research universities transform lives through education, research, and innovation. 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. AAU member universities collectively help shape policy for higher education, science, and innovation; promote best practices in undergraduate and graduate education; and strengthen the contributions of leading research universities to American society.

The Association of Catholic Colleges and Universities (“ACCU”) serves as the collective voice of U.S. Catholic higher education. Through programs and services, ACCU strengthens and promotes the Catholic identity and mission of its member institutions so that all associated with Catholic higher education can contribute to the greater good of the world and the Church.

The Association of Governing Boards of Universities and Colleges (“AGB”) is the premier membership organization that strengthens higher education governing boards and the strategic roles they serve within their organizations.

Through AGB's vast library of resources, educational events, and consulting services, and with 100 years of experience, 40,000 AGB members from more than 2,000 institutions, systems, and foundations are empowered to navigate complex issues, implement leading practices, streamline operations, and govern with confidence. AGB is the trusted resource for board members, chief executives, and key administrators on higher education governance and leadership.

The Association of Jesuit Colleges and Universities (“AJCU”) represents all 27 Jesuit institutions in the U.S. (and one in Belize) and is affiliated with over 100 Jesuit institutions worldwide.

The Association of Public and Land-grant Universities (“APLU”) is a research, policy, and advocacy organization dedicated to strengthening and advancing the work of public universities in the U.S., Canada, and Mexico. With a membership of 244 public research universities, land-grant institutions, state university systems, and affiliated organizations, APLU's agenda is built on the three pillars of increasing degree completion and academic success, advancing scientific research, and expanding engagement. Annually, its 201 U.S. member campuses enroll 4.2 million undergraduates and 1.2 million graduate students, award 1.2 million degrees, employ 1.1 million faculty and staff, and conduct \$46.8 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 33,000 human resources professionals at nearly 2,000 colleges and universities. Its membership includes 92% of all United States doctoral institutions, 76% of all master’s institutions, 56% of all bachelor’s institutions, and over 550 two-year and specialized institutions.

The Council for Christian Colleges & Universities (“CCCU”) is a higher education association of more than 185 Christian institutions around the world, representing 520,000 current students and over 3.6 million alumni. 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. They are committed to graduating students who make a difference for the common good as redemptive voices in the world.

The National Association of College and University Business Officers (“NACUBO”), founded in 1962, is a non-profit professional organization representing chief administrative and financial officers at more than 1,700 colleges and universities across the country. NACUBO works to advance the economic vitality, business practices, and support of higher education institutions in pursuit of their missions.

The National Association of Independent Colleges and Universities (“NAICU”) serves as the unified national voice of private, non-profit higher education in the United States. With more than 5 million students attending 1,700 independent colleges and universities in all 50 states, the private sector of American higher education has a dramatic impact on our nation’s larger public interests.

The Southern Association of Colleges and Schools Commission on Colleges (“SACSCOC”) is the regional body for the accreditation of degree-granting higher education institutions in the Southern states. Its mission is the enhancement of educational quality throughout the region, and it strives to improve the effectiveness of institutions by ensuring that institutions meet standards established by the higher education community that address the needs of society and students.

Each of the *amici* organizations has a strong interest in this case because a decision transforming student-athletes into employees would have a significantly detrimental effect on the educational mission of the colleges and universities that *amici* represent. *Amici* therefore urge the Court to reverse the decision below and make clear that student-athletes are students, not workers.

PRELIMINARY STATEMENT

This lawsuit is built on a false narrative that student-athletes are exploited by colleges and universities for profit. In reality, only about 2% of the NCAA’s 1,100 member institutions had athletics departments that generated enough revenue to cover operating costs in 2019, and the overwhelming majority of the 500,000 student-athletes in the NCAA participate on teams that generate little or no revenue. Those facts should not be surprising given that intercollegiate athletics is not a business but rather a mosaic of programs that, at their core, enrich students’ educational experiences.

The colleges, universities, conferences, and governance organizations that oversee intercollegiate athletics have always emphasized the primacy of education for student-athletes and the contribution to their education that participation in intercollegiate athletics offers. Indeed, student-athletes graduate from four-year colleges and universities at a higher rate than their non-athlete counterparts. Athletics programs have long played a crucial role in a student-athlete’s education. Among other things, student-athletes learn valuable lessons about teamwork, discipline, sportsmanship, and time management. They also receive unique opportunities to engage with their student community, participate in a significant aspect of campus life, and serve as formal and informal leaders among their peers and representatives of their universities.

A ruling that student-athletes are employees of the colleges and universities they attend would radically alter intercollegiate athletics and undermine the many educational benefits intercollegiate athletics provide. Most dramatically, if colleges and universities are forced to pay their student-athletes, it is inevitable that many schools will simply eliminate athletics teams, with non-revenue sports teams the most likely to be on the chopping block. The result would be far fewer opportunities for students to experience the benefits of intercollegiate athletics. At the same time, schools that decide to continue to field teams in revenue-generating sports would be forced to compete for, and retain, athletes by offering higher and higher paychecks—including, potentially, to professional athletes who offer their services to the highest bidder. For athletes participating in those sports, campus life and academics would become an afterthought. If student-athletes are deemed employees, it would fully transform education through athletics into a professional sports business.

Nothing compels those undesirable outcomes. To the contrary, the text, history, and purpose of the Fair Labor Standards Act (“FLSA”), as well as the overwhelming weight of authority, counsel against a radical interpretation of the law that would treat student-athletes as employees. *Amici* therefore respectfully request that the Court reverse the decision of the district court and make it clear that student-athletes are students, not hired hands.

Notably, this case is not limited to student-athletes on revenue-generating intercollegiate teams receiving full, or even partial, athletics scholarships. Rather, the plaintiffs are intentionally representative of the broad spectrum of Division I student-athletes. The Court's answer to the certified employment question would thus apply to *all* Division I student-athletes, from full-scholarship players to walk-ons who receive no scholarships, from quarterbacks to fencers. The decision in this case will also have practical, and perhaps even legal, effects on Division II and Division III student-athletes as well because if Division I student-athletes are deemed employees, it would be difficult to draw lines excluding athletes at other levels. It is therefore fair to say that a ruling for the plaintiffs would upend all of intercollegiate athletics, which would hurt the interests of both student-athletes and the institutions that serve them.

ARGUMENT

I. INTERCOLLEGIATE ATHLETICS IS AN EDUCATIONAL ENDEAVOR, NOT A BUSINESS VENTURE.

A. Participation in Intercollegiate Athletics Enriches Student-Athletes' Educational Experiences.

The college years are a period of tremendous learning and growth. University attendance represents the first time many students venture out on their own, living independently of parents and caretakers. This formative time offers students a new level of autonomy, allowing them to guide their own development as scholars and adults. They choose not only their fields of study but also the

activities they participate in, the communities they join, and how they lead their daily lives on campus.

Accordingly, a critical part of the educational mission of institutions of higher education is providing a rich array of learning opportunities and experiences beyond academics. *See* Rebecca L. Zeidel, *Forecasting Disruption, Forfeiting Speech: Restrictions on Student Speech in Extracurricular Activities*, 53 B.C. L. Rev. 303, 338 (2012). Students can typically aspire to participate in many extracurricular offerings. For example, they can write for a student newspaper; sing or play an instrument in a student musical group; involve themselves in their school's civic life through student governance; participate in political, social, or faith-based student organizations; or join an athletics team, to name a few. Participants in extracurricular activities often are called on to commit significant time and effort on top of their coursework and embrace that opportunity with passion and fervor. In return, they learn life lessons and skills not readily gathered in the classroom—lessons about leadership, time management, and community engagement. They also benefit from the structure and social connections that come with their membership and participation in these pursuits. And student participants become more well-rounded individuals, who are more likely to succeed academically in college and professionally following graduation. *See* Anne E. Lundquist, *The Essential Role of Co-curricular Programs in Student Success*,

Retention, Persistence, and Graduation, Anthology (2020) (collecting sources showing that student co-curricular and extracurricular participation is associated with increased student retention, satisfaction, and academic and post-graduation success)²; Peter Chalfin et al., *The Value of Intercollegiate Athletics Participation from the Perspective of Employers who Target Athletes*, 8 J. Issues in Intercollegiate Athletics 1, 3–4 (2014) (collecting literature tracking additional benefits specifically for student-athletes).

Participation in intercollegiate athletics is demanding and requires commitment, to be sure. But it provides all of the benefits of extracurricular activities and more. Studies show that being a student-athlete builds self-confidence and imparts unique lessons about teamwork, self-discipline, and physical fitness. See 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, 50–52 (2016). Further, as key participants in an integral aspect of student community life, student-athletes are often viewed as campus leaders of their educational institutions. Student-athletes thus report holding more leadership roles in student organizations, having meaningful mentor relationships at higher rates, and

² Available at <https://www.anthology.com/blog/the-essential-role-of-co-curricular-programs-in-student-success-retention-persistence-and-graduation>.

“thriving” in areas of social, community, and physical wellbeing following graduation. Gallup, *A Study of NCAA Student-Athletes: Undergraduate Experiences and Post-College Outcomes* at 2–9, 18–19, 21 (2020).³

Those benefits underscore that intercollegiate athletics are central to the educational mission of colleges and universities, not outside it. Unlike professional sports, whose primary purpose is to generate profits, the various intercollegiate athletics teams at issue in this case exist to provide students with valuable opportunities to pursue development outside the classroom, enriching their college experience. See Weight et al., 1 J. Higher Ed. Athletics & Innovation at 50 (“personal development” and “citizenship” stemming from athletic experiences “are concepts difficult to teach, but fundamental to holistic student development”). Like student musicians, student newspaper reporters, student-body presidents, and student volunteers, student-athletes are *students* first, notwithstanding the time they commit or the benefits they derive from their additional activities.

For most student-athletes, participation in intercollegiate athletics is the culmination of their long-running competitive dreams and aspirations. Only a small fraction of student-athletes expect to have a professional career playing

³ Available at <https://www.ncaa.org/sports/2016/5/3/gallup-study-undergraduate-experiences-and-post-college-outcomes-of-ncaa-student-athletes.aspx>.

sports. *See* Nat'l Coll. Athletic Ass'n, NCAA Recruiting Facts (Aug. 2020).⁴

There is a unique joy of comradery and competition, and a sense of pride, that student-athletes can derive from participating in intercollegiate athletics. If colleges and universities curtail or end athletics programs because they are forced to pay wages to their student-athletes that they cannot afford (*see Point IV, infra*), it would have a devastating impact on generations of young people who would lose the opportunity to compete in college.

This pursuit of intercollegiate student-athlete opportunities is something that high school students do voluntarily and embrace in college out of self-interest. Significantly, more than 40% of Division I students choose to play on their school's team without receiving any athletics scholarship money. *See id.*

B. Division I Student-Athletes Are Students First.

Academics are integral to the student-athlete experience. In fact, the organizations that oversee intercollegiate sports require that student-athletes' *student* experience takes priority over their membership on athletics teams. To that end, the NCAA's constitution states in its preamble that "[m]ember institutions and conferences believe that intercollegiate athletics programs provide student-athletes with the opportunity to participate in sports and compete as a vital, co-curricular

⁴ Available at https://ncaaorg.s3.amazonaws.com/compliance/recruiting/NCAA_RecruitingFactSheet.pdf.

part of their educational experience.” NCAA Constitution, Preamble (Dec. 14, 2021).⁵ The first principle of the NCAA’s constitution—“The Primacy of the Academic Experience”—requires all athletes to be “matriculated, degree-seeking students in good standing with their institutions who choose voluntarily to participate in NCAA sports” and makes it the responsibility of all member institutions to ensure that each “student-athlete’s activities are conducted with the appropriate primary emphasis on the student-athlete’s academic experience.” *Id.* art. I(A). The NCAA also holds student-athletes to academic standards that help them consistently attain higher graduation rates than their non-athlete peers. *See Meghan Durham & Saquandra Heath, College Athletes Continue to Graduate at Record Highs,* NCAA (Dec. 2, 2021).⁶

Major institutional accreditors share the NCAA’s commitment to keeping education at the center of the student-athlete experience. All of the nation’s regional accreditors have implemented standards applicable to athletics, and most have issued standards expressly recognizing that athletics are a component of education. For instance, the New England Association of Schools and Colleges

⁵ Available at <https://www.ncaa.org/news/2022/1/20/media-center-ncaa-members-approve-new-constitution.aspx>.

⁶ Available at <https://www.ncaa.org/news/2021/12/2/general-college-athletes-continue-to-graduate-at-record-highs.aspx>.

requires athletics programs to be “subordinate to the educational program and conducted in a manner that adheres to institutional mission, sound educational policy, and standards of integrity.” New Eng. Ass’n of Schools & Colleges, Commission on Institutions of Higher Education, *Standards for Accreditation* § 5.16 (Jan. 1, 2021).⁷ “The institution maintains the same academic expectations for and affords the same academic opportunities to student athletes as other students.” *Id.* at 16. Likewise, the Western Association of Schools and Colleges Senior College and University Commission (“WSCUC”) acknowledges that intercollegiate athletics “are deeply rooted in educational institutions and in American society,” and that athletics programs “add significantly to the educational experience, and to a collegiate atmosphere of wholesome competition.” WASC Senior College and University Commission, *Collegiate Athletics Policy*.⁸ Accordingly, WSCUC requires athletics programs to be “integrated into the larger educational environment of the institution.” *Id.*; see also Middle States Commission on Higher Education, *Middle States Guidelines: Athletic Programs* 1 (“[A]thletics programs should be fully integrated into the

⁷ Available at <https://www.niche.org/wp-content/uploads/2020/12/Standards-for-Accreditation-2021.pdf>.

⁸ Available at wascseior.app.box.com/s/33cl9a6alde9grzr35bs (last visited June 6, 2022).

larger educational environment of the campus and linked to the institutional mission.”).⁹

Colleges and universities themselves—including those named as defendants in this case—recognize their educational mission as it applies to student-athletes, and they celebrate their student-athletes’ academic progress and achievements.¹⁰ Indeed, many higher education institutions across the spectrum of Division I sports (and beyond) appreciate the practical challenges that a student-athlete may face during the course of an academic year aligning curricular and co-curricular work with athletic teams’ schedules and expectations and have thus

⁹ Available at <https://msche.box.com/shared/static/vva7ypvrkqpantfjtvyrx56ujjl0ggsy.pdf> (last visited June 6, 2022).

¹⁰ See, e.g., Villanova: <https://villanova.com/news/2021/7/20/general-villanova-student-athletes-earn-378-selections-on-big-east-all-academic-team.aspx>; Cornell: <https://cornellbigred.com/news/2021/8/6/general-eighteen-student-athletes-earn-academic-all-ivy-honors.aspx>; Sacred Heart: <https://sacredheartpioneers.com/news/2021/7/29/womens-rowing-pioneers-score-maac-academic-honors.aspx> Seton Hall: <https://shupirates.com/news/2017/5/10/general-shu-athletics-a-leader-in-academic-progress-rate.aspx>; Lafayette: <https://goleopards.com/news/2022/2/21/field-hockey-earns-nfhca-2021-division-i-national-academic-team-award.aspx>; Bucknell: <https://bucknellbison.com/news/2013/7/19/209105068.aspx>; Drexel: <https://drexeldragons.com/news/2022/2/4/drexel-athletics-276-dragons-named-to-2021-fall-commissioners-academic-honor-roll.aspx>; Duquesne: <https://goduquesne.com/news/2021/6/28/general-254-dukes-earn-a-spot-on-the-a-10-commissioners-honor-roll.aspx>; Fairleigh Dickinson: <https://fdudevils.com/news/2022/1/28/general-mac-announces-academic-honor-roll-for-fall-2021-semester.aspx>.

established advisory and support services for student-athletes.¹¹ As one defendant institution declares:

The ultimate objective of Fordham University's Department of Intercollegiate Athletics is to integrate academic and athletic experiences successfully in the Jesuit tradition. Student-athletes are expected to benefit from the educational, professional, and cultural advantages of a university located in New York City. . . . Accordingly, we are committed to broad participation in intercollegiate athletics, with ample opportunity provided for meaningful and successful contributions by men and women of diverse background, culture and experiences. . . . Successfully integrating academics with athletics is the Department's ultimate objective.

Fordham University Athletics, Mission Statement.¹² Among the

enumerated “Objectives” of Fordham’s athletics department are:

- To promote the principle of student-athlete well-being by establishing and maintaining an environment that fosters: the student-athlete educational experience; relationship between student-athlete and coach; fairness; health and safety.
- To employ coaches and other administrative staff members who are capable of performing as professionals in an educational community where high standards of

¹¹ See, e.g., Villanova Univ., *Academic Support for Athletics*, <https://www1.villanova.edu/provost/academicsupport.html> (last visited June 3, 2022); University of Pennsylvania Athletics, *Welcome to the Pottruck Center for Student-Athlete Success!* (Dec. 1, 2021), <https://pennathletics.com/news/2021/12/1/welcome-to-the-center-for-student-athlete-success.aspx>.

¹² Available at https://fordhamsports.com/sports/2013/7/17/GEN_0717132948.aspx.

integrity and ethical behavior, as well as sportsmanship, are expected of its members.

- To recruit student-athletes who are academically prepared for University work.
- To offer an appropriate academic support program and tutoring services to all student-athletes.
- To attain retention rates which at a minimum reflect that of the Fordham University student body as a whole and with the ideal goal of 100% graduation rate within five years of matriculation for student-athletes completing four years of eligibility.
- To promote character development in student-athletes, including cooperation, teamwork, leadership, and loyalty.

Id.

II. GOVERNMENTAL INSTITUTIONS HAVE LONG RECOGNIZED THAT INTERCOLLEGIATE ATHLETICS ARE PART OF AN EDUCATIONAL PROGRAM, NOT EMPLOYMENT.

A. All Three Branches of Government Recognize that Student-Athletes Are Students, Not Employees.

Each of the three branches of the federal government has long understood that intercollegiate athletics belong firmly in the domain of education and do not give rise to an employment relationship. For instance, the majority of courts that have considered the issue hold that student-athletes are not employees. That includes the only two Circuits to have decided the issue under the FLSA. *See Dawson v. NCAA*, 932 F.3d 905 (9th Cir. 2019); *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016). It also includes many courts evaluating the relationship between student-athletes and institutions in the workers' compensation context, *see, e.g.*,

Rensing v. Ind. St. Univ. Bd. of Trs., 444 N.E.2d 1170 (Ind. 1983); *State Comp. Ins. Fund v. Indus. Comm'n*, 314 P.2d 288 (Colo. 1957); *Waldrep v. Tex. Emp'rs Ins. Ass'n*, 21 S.W.3d 692 (Tex. App. 2000); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224 (Mich. Ct. App. 1983); courts examining the designation of student-athletes under state employment statutes, *see, e.g.*, *Shephard v. Loyola Marymount Univ.*, 102 Cal. App. 4th 837 (Cal. Ct. App. 2002); and courts deciding whether a tort claimant may reach beyond the student-athlete tortfeasor to hold his or her affiliated institution liable under a theory of respondeat superior, *see, e.g.*, *Townsend v. State of California*, 191 Cal. App. 3d 1530 (Cal. Ct. App. 1987).

Those court decisions comport with executive branch guidance. The United States Department of Labor has taken the position that student-athletes are not employees under the FLSA. *See* United States Dep't of Labor Wage and Hour Division, Field Operations Handbook (“FOH”) §§ 10b24, 10b03(e).¹³ Specifically, the FOH provides that “University or college students who participate in activities generally recognized as extracurricular are generally not considered to be employees within the meaning of the [FLSA].” FOH § 10b24. It further provides:

As part of their overall educational program, public or private schools and institutions of higher learning may permit or require students to engage in activities in connection with dramatics, student publications, glee

¹³ Available at <https://www.dol.gov/agencies/whd/field-operations-handbook> (last visited June 3, 2022).

clubs, bands, choirs, debating teams, radio stations, intramural and interscholastic athletics and other similar endeavors.

FOH § 10b03(e). Those activities, which are “conducted primarily for the benefit of the participants as part of the educational opportunities provided to the students by the school or institution, *are not work*” under the FLSA. FOH § 10b03(e) (emphasis added); *see also Berger*, 843 F.3d at 292–93 (“Because NCAA-regulated sports are ‘extracurricular,’ ‘interscholastic athletic’ activities, we do not believe that the Department of Labor intended the FLSA to apply to student-athletes. We find the FOH’s interpretation of the student-athlete experience to be persuasive.”).

Like the judicial and executive branches, Congress has acted consistently with the notion that student-athletes are students rather than employees. For example, Congress enacted Title IX protections for intercollegiate athletics instead of relying on Title VII, which already protected against discrimination in employment. In 1974, Congress amended Title IX to specify that it applied to intercollegiate athletics, confirming its belief that Title VII protections for employees did not cover student-athletes. *See* Pub. L. No. 93-380, 88 Stat. 484 (1974).

The position on student-athletes adopted by the three branches of government is consistent with the FLSA, which was never intended to transform student-athletes into employees.

B. The FLSA Was Never Intended to Cover Student-Athletes or Intercollegiate Athletics.

Enacted in 1938 as part of the New Deal, the FLSA revolutionized work in the United States, outlawing child labor, setting a floor for wages, and establishing a multitude of other basic protections for American workers. Peter Cole, *The Law that Changed the American Workplace*, Time, June 24, 2016.¹⁴ Among those protections, the FLSA provides that employers must pay their employees a minimum wage and an overtime premium for hours worked in excess of the statutory workweek of forty hours. *See* 29 U.S.C. §§ 206, 207.

By its terms, the FLSA applies only to “employees.” *See, e.g., id.* The term “employee,” while broad, is not limitless. For example, the Supreme Court has excluded from the definition of “employee” individuals “who, without any express or implied compensation agreement might work for their own advantage on the premises of another.” *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947). To be compensable under the FLSA, “work” must be “pursued necessarily and primarily for the benefit of the employer and his business.” *Tenn. Coal, Iron*

¹⁴ Available at <https://time.com/4376857/flsa-history/>.

& R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944). Those definitions of “employee” and “work” exclude student-athletes, who, as explained above, overwhelmingly participate in sports for myriad reasons unrelated to compensation. *See Point I.A, supra.* While there is no denying that Villanova, for example, and its alumni and students have shared in the joys and benefits of its men’s basketball team’s success, the real beneficiaries of intercollegiate athletics there and throughout Division I sports are the student-athletes themselves, who learn important life lessons and set themselves up for success in life through their participation. *See id.*

Student-athletes are not employees for the additional reason that they do not provide services to their colleges and universities. While institutions employ students to perform certain services—for instance, in dining halls and in a variety of traditional jobs—those roles are readily distinguished from those of student-athletes. Like other participants in extracurricular activities, student-athletes partake in intercollegiate athletics voluntarily. They have no expectation of compensation from their school. Indeed, the NCAA’s constitution forbids it. Participation in college sports is expected to be part of their educational experience.¹⁵

¹⁵ Athletic grants-in-aid, like other scholarships, merely subsidize academic and other associated educational expenses (such as room and board) and are not akin to pay. *See, e.g., Waldrep*, 21 S.W.3d at 701 (“Financial-aid awards are given to

III. THE REVENUES A HANDFUL OF SCHOOLS DERIVE FROM A SMALL NUMBER OF TEAMS DO NOT ALTER THE OVERALL CHARACTER OF INTERCOLLEGIATE ATHLETICS.

Traditional colleges and universities in the United States are either tax-exempt public institutions created under state law or private non-profit entities under 26 U.S.C. § 501(c)(3). Unlike businesses, whose purpose is to generate profits, the mission of such colleges and universities is to educate students. As part of their educational offerings, a large percentage of colleges and universities participate in intercollegiate athletics, and more than 1,100 of those institutions are members of the NCAA.¹⁶

Although a handful of NCAA teams—typically within Division I football and men’s basketball—have garnered widespread popularity and generate sizable revenues, the overwhelming majority of athletics teams and departments across the NCAA membership run deficits each year. For instance, in 2019, only twenty-five schools—or about 2% of all members—had athletics departments that took in more than they spent. *See Trends in Division I Athletics Finances, NCAA Research, at*

many college and university students based on their abilities in various areas, including music, academics, art, and athletics. . . . [S]cholarship recipients are considered to be students seeking advanced educational opportunities and are not considered to be professional athletes, musicians or artists employed by the university for their skill in their respective areas.”).

¹⁶ *See* NCAA Research, NCAA Member Schools (2022), <https://www.ncaa.org/sports/2017/11/28/ncaa-member-schools.aspx>.

3–4, 8–10, 40 (Nov. 2021) (“Division I Trends”);¹⁷ Trends in Division II Athletics Finances, NCAA Research, at 7 (Nov. 2021);¹⁸ Trends in Division III Athletics Finances, NCAA Research, at 7 (Nov. 2021).¹⁹ The other 98% did not bring in sufficient revenues to cover expenses but had to rely on institutional or government funding to cover some portion of their operating costs.²⁰

It is therefore no exaggeration to say that, of the more than 500,000 student-athletes who participate in NCAA sports, only a tiny fraction participates on teams or in athletics departments that take in more than they spend. Indeed, most student-athletes compete in sports that earn little or no revenue for their institutions at all. It would make little sense to read the FLSA as treating student-athletes as employees merely because a small fraction plays on teams that are revenue-positive.

¹⁷ Available at https://ncaaorg.s3.amazonaws.com/research/Finances/2021RES_D1-RevExpReport.pdf.

¹⁸ Available at https://ncaaorg.s3.amazonaws.com/research/Finances/2021RES_D2-RevExpReport.pdf.

¹⁹ Available at https://ncaaorg.s3.amazonaws.com/research/Finances/2021RES_D3-RevExpReport.pdf.

²⁰ See Division I Trends at 3–4. Looking solely at Division I FBS schools, the most financially lucrative subset, individual institutional median operating expenses still outpaced individual median generated revenues by approximately \$19 million. *Id.* at 6.

The fact that public awareness, reputation, alumni giving, or other benefits may be enhanced for a particular institution due to the competitive success of one or more of its athletics teams still would not require treating the student-athletes on those teams as employees:

The benefits that may accrue to a school from the attendance of particularly talented athletes is conceptually no different from the benefits that schools obtain from the attendance of other forms of talented and successful students—both as undergraduates and later alumni, such students enhance the school’s reputation, draw favorable attention to the school, and may increase the school’s ability to raise funds.

Kavanagh v. Trustees of Bos. Univ., 440 Mass. 195, 199 (2003). If the fact that a student-athlete participates on a team that generates revenue or burnishes the school’s reputation were sufficient to transform that student-athlete into an employee, every extracurricular activity that generates revenues to offset costs—for instance, through raising money for student trips, selling tickets to concerts, or selling advertisements for school radio stations—and every extracurricular activity that brings notoriety to the institution would give rise to an employment relationship. Students who sing in a student *a cappella* group, play an instrument in a student orchestra, or star in a campus theatrical production would suddenly become employees. That approach would distort the primary purpose of extracurricular activities, which is not to generate revenue but to contribute to the participants’ educational experience.

IV. A RULING THAT STUDENT-ATHLETES ARE COVERED BY THE FLSA WOULD HAVE SIGNIFICANT, NEGATIVE CONSEQUENCES.

If this Court were to become the first Circuit to rule that student-athletes are employees under the FLSA, it would have severe, negative consequences for student-athletes, schools, and intercollegiate athletics as a whole. Most significantly, schools would inevitably cut many—and perhaps all—of their intercollegiate athletics teams. The cost of compensating all 180,000 Division I athletes is difficult to calculate, but there can be little doubt that it would be prohibitive. Those “salary” costs would come on top of athletics department operating costs that are already outstripping revenues at the vast majority of schools and against a backdrop of broader nationwide concerns about the financial health and stability of higher education. A decision that student-athletes are “employees” would impose other costs on schools beyond paying student-athletes minimum wage (or more), including:

- The potential obligation to pay overtime whenever a student-athlete “works” more than 40 hours per week (which could include time spent traveling to and from athletic competitions);
- Potential tax obligations a school may have to pay, including withholding federal and state income taxes from the wages paid to student-athletes, withholding the student-athletes’ share of social security and Medicare taxes, and potential payments of the school’s matching amount of social security and Medicare taxes;

- Obligations associated with state and federal labor-law compliance, including the detailed tracking of hours, time off, and the provision of various benefits;
- Premiums for workers' compensation and unemployment insurance; and
- Increased liability exposure both from employees bringing claims under labor laws and from tort claimants attempting to impute responsibility for student-athletes' actions to the institutions that "employ" them. *See, e.g., Hanson v. Kynast*, 494 N.E.2d 1091 (Ohio 1986) (unpaid member of university lacrosse team was not agent of university such that it could be held liable under *respondeat superior* doctrine).

Each item on this list would give rise to legal and administrative costs on top of the already-significant direct costs of compensation. For instance, universities would have to establish additional systems to track student-athletes' "work" hours and time off to ensure they are paying minimum wage and overtime. Schools would also need to engage attorneys specializing in state labor and tax laws to administer the labor laws of not only their own state, but also those of states to which their teams might travel for competitions. Given that athletics departments can have operating costs that already exceed their revenues by several million dollars, all of those additional costs would make fielding teams in most sports cost-prohibitive for all but a handful of athletics departments.²¹

²¹ Because many student-athletes do not receive athletic scholarships (*see* page 12, *supra*), schools could not simply repurpose athletic scholarship money to pay the costs associated with treating student-athletes as employees.

The inevitable result is that schools would cut sports teams that do not generate revenue. Many college teams, including crew, field hockey, and track and field, are expensive to field in the first place. If schools have to pay those student-athletes and incur the other expenses associated with treating the student-athletes as employees, schools would simply choose to eliminate the teams, to be replaced by intramural competition or student-run club teams. Student-athletes who participate in those non-revenue sports whose teams are eliminated would doubly lose from an order declaring them “employees”: They would lose the many benefits that derive from participating in intercollegiate sports, and they would not receive any salary.

The concern that schools would cut sports programs if student-athletes are deemed “employees” is not speculative. Dozens of institutions eliminated intercollegiate teams during the COVID-19 pandemic due to financial pressures.

See Business of College Sports, Tracker: College Sports Programs Cut during COVID-19 Pandemic (last updated June 22, 2021) (tracking 77 Division I program cuts across 35 institutions).²² More extensive cuts to athletics programs would become the norm. The elimination of athletics teams would disproportionately

²² Available at <https://businessofcollegesports.com/tracker-college-sports-programs-cut-during-covid-19-pandemic/>.

affect smaller schools, which tend to have fewer resources and whose teams generate less revenue.

There would also be a significant downside for student-athletes who play on the few teams capable of generating revenue. Those student-athletes would be incentivized to choose the school that will pay them the highest salary rather than the one that offers a college experience that best suits them.²³ With intercollegiate athletics transformed into a business venture, academics inevitably would take a back seat to athletics as athletes seek to maximize compensation and institutions are incentivized to focus on the return on investment for the athletes they recruit. Student-athletes would be students in name only, isolating them from the student body and depriving them of the many benefits colleges and universities historically have sought to offer them under the traditional student-athlete model. Coaches would no longer be coaches but *de facto* employers, and players would face the prospect of being cut from a team for economic reasons.

Abandoning the student-athlete model in favor of creating an employment relationship would have consequences outside the realm of athletics, too. Schools

²³ This is arguably already starting to happen for a small subset of student-athletes as a result of regulations concerning name, image, and likeness rights. A ruling deeming student-athletes to be employees would accelerate that trend and turn intercollegiate athletics into a business venture for all student-athletes, with athlete employee compensation competing against other institutional resources and priorities.

forced to cut athletics programs for financial reasons may lose competitive sports that are mainstays of campus culture for large parts of the student body. The loss of such programs also potentially removes a valuable recruiting tool for diverse students whose presence enriches the college learning experience for everyone. Some commentators worry that institutions might also make cuts to other programs, such as need-based financial aid and scholarships.²⁴ Inevitably, many schools that try to compete and survive in a new employee-athlete world would subsidize the increased costs of athletics through increased tuition and fees for all students. There is no doubt that any of those outcomes would harm the educational mission these institutions have pursued for decades. With nationwide college and university enrollments at a historic low,²⁵ the added financial burden of pay requirements for Division I athletes would put institutions' backs to the wall, an outcome that will work to the detriment not only of *every* Division I college and

²⁴ See Angel Pérez, *The Perverse Consequences of the NCAA Ruling*, The Atlantic, July 6, 2021 (“An athletics arms race would, in all likelihood, jeopardize resources currently designated for other student support. Millions of students outside revenue-generating sports programs, including low-income, first-generation students, could be left with a dwindling portion of already insufficient financial aid.”), available at <https://www.theatlantic.com/politics/archive/2021/07/risks-supreme-court-ncaa-decision/619296/>.

²⁵ See Nick Anderson & Danielle Douglas-Gabriel, *Colleges Scramble to Recruit Students as Nationwide Enrollment Plunges*, Washington Post, Mar. 31, 2022, available at <https://www.washingtonpost.com/education/2022/03/31/college-enrollment-down-recruitment-freshmen/>.

university, but also the students they serve. *See generally* Robert Kelchen et al.,

Discussion Paper: The Lingering Fiscal Effects of the COVID-19 Pandemic on Higher Education, Federal Reserve Bank of Philadelphia (May 2021).²⁶

More fundamentally, however, the extension of FLSA protection to student-athletes and beyond calls into question post-secondary education's bedrock notion that education occurs not just in the classroom but also through engagement with one's college community. Compelling compensation for that engagement turns the educational mission of higher education on its head, converting transformational learning opportunities into transactions, and imperiling the availability of those opportunities as a practical matter in the process. The best interests of colleges and universities, student-athletes, and broader student populations would all be served by maintaining the well-established role of student-athletes as students rather than employees. *Amici* therefore urge this Court to reverse, answering the certified question of whether NCAA Division I student-athletes can be employees of the colleges and universities they attend for purposes of the FLSA in the negative.

²⁶ Available at <https://www.philadelphiafed.org/-/media/frbp/assets/consumer-finance/discussion-papers/dp21-01.pdf>.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision and remand with instructions to dismiss the complaint with prejudice for failure to state a claim.

Respectfully submitted,

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CERTIFICATIONS

I hereby certify the following:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit. 3d Cir. L.A.R. 28.3(d).
2. This brief complies with the type-volume limitation of F.R.A.P. 29(a)(5) and 32(a)(7)(B) because this brief contains 5,153 words, excluding the parts of the brief exempted by F.R.A.P. 32(f) and 3d Cir. L.A.R 29.1(b).
3. I served a copy of this brief on all counsel for the parties electronically through this Court's docketing system.
4. The text of the electronic brief is identical to the text in the paper copies. 3d Cir. L.A.R. 31.1(c).
5. The Vipre virus protection program, version 3.1, has been run on this file and no virus was detected. 3d Cir. L.A.R. 31.1(c).
6. This brief complies with the typeface and type-style requirements of F.R.A.P. 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman font.

Dated: June 7, 2022

/s/ Adam M. Lupion
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