UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRENDA MCKINNEY, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendant.

Case No.: 1:23-cv-1372-RLY-MJD

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Plaintiff seeks certification of a class of NCAA Black student-athletes at Division I ("DI") Historically Black Colleges and Universities ("HBCUs") for violations of 42 U.S.C. § 1981 and 1985. With a principal mission to educate Black Americans,[1] HBCUs are focused on the education and support of a community that has been historically discriminated against, largely enrolling low-income, first-generation, and educationally disadvantaged Black students.[2] Despite the NCAA's promises to refrain from racial discrimination and to enact student-athlete academic standards that would be "consistent" with the standards adopted by their institutions for the "student body in general," the NCAA instead implemented a common academic benchmark that applied to every student-athlete regardless of whether they attended Harvard or a state school.

Most recently, in 2004, the NCAA implemented the Academic Performance Program ("APP"), which penalizes a DI team if a prior year's team did not meet certain academic performance benchmarks. The formula on which the APP is based includes metrics that the NCAA knew would discriminate against Black student-athletes at HBCUs. These facts raise questions common to Plaintiff and the Class (defined below), satisfying Fed. R. Civ. P. 23(a) and (b)(2).

First, Plaintiff satisfies Rule 23(a). The proposed Class includes more than 1,600 Black student-athletes. Whether the APP intentionally discriminates against Black student-athletes at HBCUs is the central common question that binds the Class. Plaintiff is typical of the Class members as she was a member of an NCAA DI HBCU basketball team during the 2023-24 school year and thus was subject to the APP. And Plaintiff and her counsel are adequate. Second, Plaintiff

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[1] We use the term "Black" throughout our pleadings to represent African Americans, individuals of African descent, and/or Black people. Where case law has used the term "African American," we have used the court's language.
[2] 20 U.S.C. §§ 1060, 1061(2).

satisfies Rule 23(b)(2), because the APP affects the Class as a whole, so final injunctive relief in the form of a moratorium on the APP and a monitor to review any proposed academic reforms in NCAA athletics is appropriate. Because Rule 23 is satisfied, the Class should be certified.

II. THE PROPOSED CLASS

Plaintiff seeks certification, pursuant to Rule 23(a) and (b)(2) of a class defined as follows:

> All Black student-athletes who are currently members of an NCAA Division I athletic team at an HBCU, or who were members of an NCAA Division I athletic team at an HBCU at any time between August 2023 and May 2024 who still have at least one season of NCAA eligibility remaining ("Class").

III. PROFFER OF FACTS COMMON TO THE CLASS

Set forth below is a non-exhaustive proffer of the proof for trial to demonstrate that Plaintiff's claims can be tried on a class-wide basis and a class-wide trial is manageable.

A. The HBCU mission to counter systemic discrimination through the education of historically disadvantaged Black students is common to the Class.

Historically, education of Black people in the United States, including enslaved persons, was prohibited.[3] The Civil War ended slavery but did not provide Blacks access to white educational systems. HBCUs thus developed as a way to educate formerly enslaved persons and all Blacks, becoming their primary avenue for postsecondary education.[4] In an Executive Order on "Advancing Educational Equity, Excellence, and Economic Opportunity Through Historically Black Colleges and Universities" ("2021 Exec. Order"), President Biden signed a formal policy to "ensure that HBCUs can continue to be engines of opportunity."[5] In addition to recognizing that "HBCUs created pathways to opportunity and educational excellence for Black students" in the

[3] Ex. 1 (PLFS-TM-001887).
[4] Ex. 1 (PLFS-TM-001887).
[5] Ex. 2 (PLFS-TM-002719) (2021 Exec. Order), p. 1.

face of discrimination, the 2021 Exec. Order recognized HBCUs' ongoing and "vital role" in education as a "proven means of advancement for people of all ethnic, racial, and economic backgrounds, especially Black Americans."[6]

Because of our nation's history, evidence shows that "HBCU culture" differs from that of predominantly white institutions ("PWIs"). One HBCU President, Ronald Mason, Jr., explained:

> Q. *** [L]et us know in your opinion the difference between an HBCU culture and a PWI culture?
>
> A. Well, let me see if I could put it in context. So, you know, America's relationship with Black people has not always been, let's say, the most nurturing and embracing relationship, right? …[W]e've had to…learn to take care of each other in…a hostile environment, and so, you know, the culture of HBCUs is reflective of that reality. You know, we give the students that come to us the space to be safe,…to feel loved, and the space to feel at home…in an otherwise…country and environment that can be hostile in many ways, and so it's that embracing of the student as a human being and providing of...the safe haven that gives them time to grow, understand, and learn in ways that they may not be generally able to at non-HBCUs.[7]

President Mason further explained that HBCUs fill a gap in the educational system that nurtures Black students who lacked support "that they should have had in K-12, [HBCUs] have to make up for it when they come to us . . . at the post-secondary level."[8]

Today, there are over 100 HBCUs in 19 states that enroll almost 300,000 students, approximately 75% of whom are Black.[9] HBCUs are recognized as "proven ladders of intergenerational advancement for men and women of all ethnic, racial, and economic

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[6] Ex. 2 (PLFS-TM-002719), § 1.
[7] Ex. 3, Transcript of Deposition of Ronald J. Mason ("Mason Tr."), 33:4-34:6; *see also id.* 35:13-20 (HBCU culture allows Black students "to be themselves without being misinterpreted or misunderstood or reacted to negatively. . . .").
[8] Ex. 3, Mason Tr., 54:18-55:3. *See also* Ex. 4 (PLFS-TM-001899), at PLFS-TM-001915 (recognizing HBCUs' "generally liberal admission policies and their average student's weaker academic profile.").
[9] 34 C.F.R. § 608.2; Ex. 5 (PLFS-TM-002072); Ex. 2 (PLFS-TM-002719) (2021 Exec. Order).

backgrounds, especially African Americans."[10]

B. The NCAA's knowledge that its historical academic programs discriminated against Black student-athletes at HBCUs is a class-wide issue.

The NCAA was established in 1906 as a non-profit association to govern intercollegiate athletics.[11] Unwelcome by the NCAA until the mid-1960s, HBCUs created the first Black athletic conference in 1906.[12] After the entry of HBCUs to the NCAA, the NCAA implemented a successive set of academic programs that penalize HBCUs and Black student-athletes for falling short of academic benchmarks that run contrary to HBCU missions.

In 1965, the NCAA established the "1.6" rule, which determined a student-athlete's initial eligibility by using a combination of GPA and SAT or ACT scores to predict the first year GPA (required to meet or exceed 1.6).[13] But this method "contributed to the objectification of black males and students from lower socio-economic statuses, who, in some cases were 'functionally illiterate' though participants in intercollegiate competition."[14]

In 1983, the NCAA enacted Proposition 48, an initial eligibility rule requiring student-athletes to have a high school GPA of 2.0 and minimum prescribed SAT and ACT scores.[15] The NCAA knew, based on years of collecting admissions data, that Proposition 48 would exclude

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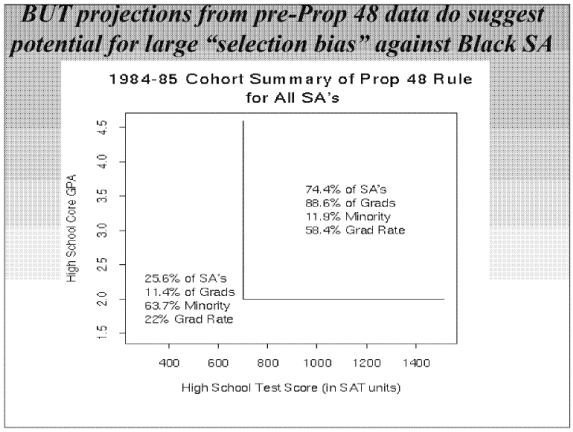
[10] Ex. 6 (PLFS-TM-002711) (2010 Exec. Order).
[11] Ex. 7 (MAN0000069172) (IAAUS was established in 1906, and changed its name to NCAA in 1910); Ex. 8 (MAN0000068906) at, *e.g.*, MAN0000068911, MAN0000068924.
[12] Ex. 9 (PLFS-TM-002676), at PLFS-TM-002677-79; Ex. 10 (PLFS-TM-002104).
[13] Ex. 8 (MAN0000068906), at MAN0000068962-64. In 1973, the NCAA required that student-athletes have a 2.0 high school GPA. Ex. 11 (MAN0000382530), at MAN0000382545-46.
[14] Ex. 11 (MAN0000382530), at MAN0000382545. *See also Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992) (reversing dismissal of college athlete's breach of contract claim against school for failure to educate).
[15] Ex. 12 (MAN0000595934), at MAN0000595955; Ex. 13 (MAN0000468866), at MAN0000468867; Ex. 14 (MAN0000399867), at MAN0000399869.

63.7% of Black student-athletes from eligibility as reflected in this internal NCAA slide:[16]



An HBCU president called Proposition 48 "patently racist,"[17] and the SAT administrator called it "patently discriminatory and racist" and "a disservice to minority athletes."[18] NCAA and other studies confirmed that Proposition 48 in fact had a disproportionate impact on Black student-athletes.[19] In 1989,[20] the NCAA introduced Proposition 42, which removed financial aid for student-athletes who did not fully meet Proposition 48 standards.[21]

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[16] Ex. 15 (MAN0000327073), at MAN0000327088. *See also* Ex. 13 (MAN0000468866), at MAN0000468869 (at time Proposition 48 was implemented, the NCAA knew that "[d]ifferent demographic groups have different distributions of HS GPA and ACT/SAT, so imposition of almost any rule will have differential impacts."); Ex. 12 (MAN0000595934), at MAN0000595972.

[17] Ex. 16 (MAN0000097172), at MAN0000097188.

[18] Ex. 17 (PLFS-TM-002110), at PLFS-TM-002118.

[19] Ex. 18 (MAN0000060110), at MAN0000060110-12; Ex. 19 (PLFS-TM-002135), at PLFS-TM-002136; Ex. 26 (PLFS-TM-002715), at PLFS-TM-002717.

[20] In or about 1989, the NCAA recruited three professors of quantitative psychology, John J. McArdle, John L. Horn, and John R. Nesselroade, to conduct longitudinal research on Proposition 48. Ex. 12 (MAN0000595934), at MAN0000595943; Ex. 20 (MAN0000493568) at MAN0000493568; Ex. 23 (MAN0000281453) at MAN0000281457. Each of these researchers had strong professional ties to psychologist and eugenicist Raymond B. Cattell. Ex. 25 (MAN0002142513), at MAN0002142519 ("Eugenics" is "the bigoted, discredited theory that the human race can be improved through screening and reproducing hereditary traits deemed superior and eliminating those deemed inferior."). In 1993, U.S. Representative Cardiss Collins sent a letter to the NCAA President, contending that the three NCAA researchers "appear to be on the 'self-appointed executive group'" to the "Beyondism Foundation," and referred to Cattell's eugenics-based beliefs as "abhorrent." Ex. 27 (PETR-MANASSA_0000000082), at PETR-MANASSA 0000000085; *see also* Ex. 12 (MAN0000595934), at MAN0000595978 (McArdle reported that Rep. Collins also wrote to him that the link to Cattell "invalidates all the NCAA rules."). The NCAA has acknowledged that the APP, and its predecessors in the 1990s and 2000s, derive from the work done by McArdle and his team. Ex. 23 (MAN0000281453). *See also* Ex. 12 (MAN0000595934), at MAN0000595979-80.

[21] Ex. 14 (MAN0000399867), at MAN0000399869. Ex. 21 (MAN0001399870) (Prop. 42 was rescinded in 1990 in the face of intense opposition and protest).

In 1992, the NCAA implemented Proposition 16, which set initial eligibility standards at a minimum 2.5 GPA and minimum SAT or ACT scores, with certain exceptions.[22] But, at that time, only half of Black college-bound seniors met Proposition 16 requirements, compared to more than two-thirds of white students—an even greater disparity than under Proposition 48.[23] The NCAA admitted: "The enrollment of African-American student-athletes declined dramatically following the implementation of Propositions 48 and 16…."[24]

Against this backdrop, in the 1990s and 2000s, the NCAA imposed additional and increasingly strict requirements for student-athlete eligibility under Proposition 16.[25] As a result, in 1997, more than 19% of Black student-athletes seeking DI initial eligibility were ineligible, as compared to only 3.1% of white student-athletes.[26] In a 1998 memo, the NCAA conceded that:

> the setting of any initial-eligibility standard leads to an essential tension between two conflicting goals: (1) raising of graduation rates, and (2) allowing more individuals access to the finite number of athletics opportunities available. …This tension is heightened by the fact that a disproportionate number of ethnic minorities are affected adversely by the imposition of these rules.[27]

The NCAA also admitted that Black student-athletes "have been disproportionately impacted by Proposition 16 standards."[28]

After a district court held that Proposition 16 violated Title VI and enjoined the NCAA from its further use in 1999, [29] the NCAA's DI Board directed a team to evaluate its initial

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[22] Ex. 14 (MAN0000399867), at MAN0000399869.
[23] Ex. 24 (PLFS-TM-002167), at PLFS-TM-002171-72.
[24] Ex. 14 (MAN0000399867), at MAN0000399870.
[25] *See generally* Ex. 13 (MAN0000468866).
[26] Ex. 14 (MAN0000399867), at MAN0000399872.
[27] Ex. 14 (MAN0000399867), at MAN0000399870-71.
[28] Ex. 14 (MAN0000399867), at MAN0000399873.
[29] *Cureton v. NCAA*, 37 F. Supp. 2d 687 (E.D. Pa.), *rev'd*, 198 F.3d 107 (3d Cir. 1999). Reversing the district court's decision, the Third Circuit held that 42 U.S.C. § 2000d, *et seq*. applied only to programs receiving federal financial assistance and the NCAA did not receive federal funds. *Cureton*, 198 F.3d at 115-16. After the Third Circuit's decision, the NCAA reinstated Proposition 16. Ex. 28 (MAN0000399886).

eligibility standards.[30] This group issued several recommendations, including the development of an "initial-eligibility model, based on research, that employs a weighting scheme that emphasizes black graduates[,]" which "should be used in an effort to reduce adverse impact, while maintaining a similar overall expected graduation rate of Proposition 16."[31] Rejecting this recommendation, the NCAA instead supported "meaningful incentives/disincentives to encourage the recruitment of student-athletes who can have academic success on that campus."[32]

In 2000, another group of Black student-athletes filed a lawsuit challenging Proposition 16 as purposeful, racial discrimination under 42 U.S.C. § 2000d, *et seq*. and 42 U.S.C. § 1981. *Pryor v. NCAA*, 288 F.3d 548, 552 (3d Cir. 2002) (reversing dismissal where "the complaint sufficiently avers that Proposition 16 has adversely impacted the number of black student athletes who qualify for athletic scholarships, and because it alleges the NCAA adopted this otherwise facially neutral policy 'because of' this adverse, racial impact…."). While *Pryor* proceeded, the NCAA investigated alternative academic performance measures.

C. The NCAA's deliberate inclusion of measures that negatively impact Black student-athletes at HBCUs in the APP is a class-wide issue.

In 2002, the NCAA's internal documents noted that the "Purpose of the Historical-Penalty Structure" was to target the "worst-of-the-worst" schools and their athletes.[33] The NCAA's DI Vice President later made clear that "the worst of the worst" referred to HBCUs.[34] The target remained the same in 2004 when the NCAA implemented the APP, which measures a team's academic eligibility rather than an individual's eligibility. Under the APP, the NCAA imposes a progressive, three-level penalty scheme and a separate postseason access penalty (restricting

[30] Ex. 29 (MAN0000487877).
[31] Ex. 29 (MAN0000487877), at MAN0000487879.
[32] Ex. 30 (MAN0000488055).
[33] Ex. 31 (MAN0000513072).
[34] Ex. 32 (MAN0000012293), at MAN0000012294.

access to revenue-generating events such as NCAA championships) on teams who fail to meet the standard based on four years of rolling data.[35] APP penalties are applied in later academic years than they are earned.[36]

The key components of the APP are the Academic Progress Rate ("APR") and the Graduation Success Rate ("GSR"). Intended to be a long-term assessment of student-athlete academic success, the GSR is the NCAA's calculation of student graduation rates.[37] Referred to as a "real-time" assessment of team academic progress,[38] the APR is a team-based measurement of eligibility, retention, and graduation.[39] Each student-athlete who receives athletic financial aid earns one point for continuing as a full-time student and one point for remaining academically eligible. The team's total points are divided by points possible and multiplied by 1000, resulting in the APR.[40] The NCAA contends that a 930 APR is a "proxy" for eventual graduation, representing a projected 50% GSR.[41]

Despite the NCAA's claims that the APP "will produce improved graduation performance . . .without having a disparate impact on ethnic minorities,"[42] the NCAA knew that use of GSRs would have a disparate impact on Black student-athletes. For example, in the 1998-99 school year, the GSR for Black student-athletes was 59% versus 82% for white student-athletes.[43] The following NCAA chart depicts annual GSR rates for certain white student-athletes (solid black

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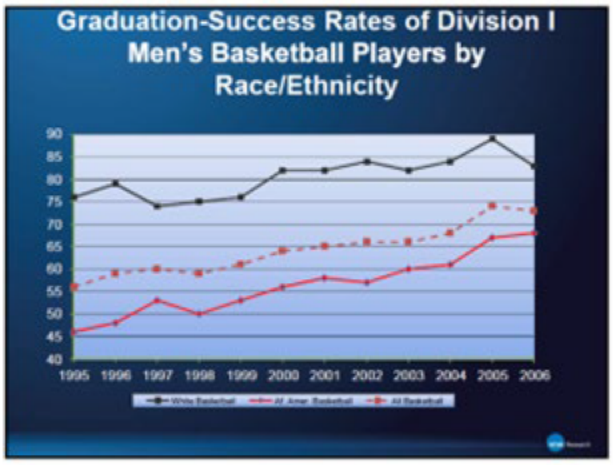
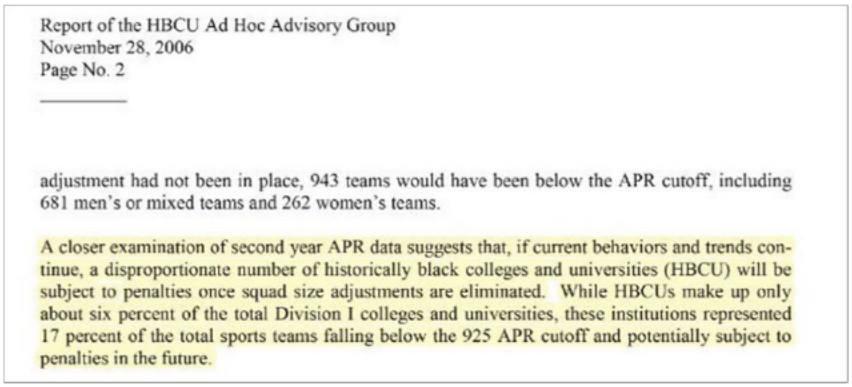
[35] Ex. 33 (MAN0000069446), at MAN0000069480, MAN0000069534-35, MAN0000069560-61.
[36] Ex. 33 (MAN0000069446), at MAN0000069564. *See also* Ex. 63, Expert Report of Bernard R. Siskin, Ph.D. in the matter of McKinney v. NCAA dated June 20, 2024 ("Siskin Rep."), ¶ 16.
[37] Ex. 34 (MAN0000057019), at MAN0000057030, n.1; Ex. 33 (MAN0000069446), at MAN0000069487-88.
[38] Ex. 34 (MAN0000057019), at MAN0000057030; Ex. 33, (MAN0000069446), at MAN0000069479.
[39] Ex. 33 (MAN0000069446), at MAN0000069478-79.
[40] Ex. 33 (MAN0000069446), at MAN0000069479, MAN0000069686.
[41] Ex. 34 (MAN0000057019). *See also* Ex. 35 (NCAA's response to Plaintiff's Interrogatory No. 19 in *Manassa*), at pp. 4-5; Ex. 36 (PLFS-TM-002177), at PLFS-TM-002180.
[42] Ex. 37 (MAN0000063271), at MAN0000063272.
[43] Ex. 38 (PLFS-TM-002738).

line) and Black student-athletes (solid red line), pre- and post-dating the APP:[44]



The NCAA chose to rely upon the GSR despite the negative impact on Black student-athletes.

In 2006, the NCAA HBCU Ad Hoc Advisory Group met with, *inter alia*, the NCAA to discuss the negative impact of APP penalties on HBCUs and their Black student-athletes:[45]



Report of the HBCU Ad Hoc Advisory Group
November 28, 2006
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adjustment had not been in place, 943 teams would have been below the APR cutoff, including 681 men's or mixed teams and 262 women's teams.

A closer examination of second year APR data suggests that, if current behaviors and trends continue, a disproportionate number of historically black colleges and universities (HBCU) will be subject to penalties once squad size adjustments are eliminated. While HBCUs make up only about six percent of the total Division I colleges and universities, these institutions represented 17 percent of the total sports teams falling below the 925 APR cutoff and potentially subject to penalties in the future.

The HBCU representatives explained that "many HBCUs, through open enrollment policies, serve a demographic that may be hampered by inadequate primary and secondary school systems, as well as economic pressures…."[46] However, rather than adjusting the APP, the NCAA merely

[44] Ex. 39 (MAN0000065182), at MAN0000065210 (color version available at: http://web1.ncaa.org/app_data/GSR/qaahad13/GSR_Fed_Trends_2013_Final.pdf). *See also* Ex. 39 (MAN0000065182), at MAN0000065211.
[45] Ex. 40 (MAN0000488547), at MAN0000488548 (highlighting added).
[46] Ex. 40 (MAN0000488547), at MAN0000488548.

established "an ad hoc advisory group" of HBCUs to communicate concerns to the NCAA.[47]

In early 2011, in response to public exposure and criticism of the APP's disparate impact on Black student-athletes, the NCAA discussed the purpose of the APP, graduation targets, and potential changes.[48] The NCAA Director of Academic and Membership Affairs repeated previous criticisms of the APP, i.e., that graduation targets did not correspond with student-body graduation rates and that HBCUs were being penalized as a result. While framing potential ways to address the impact on HBCUs, she suggested that a "new benchmark be established for … HBCU institutions," and asked "How should APP penalties impact HBCUs that may not have the resources to allocate to improving academic performance and have unique academic missions?"[49] The NCAA's Principal Research Scientist responded:

> ***Politically, perhaps better to keep phrasing this as a resource issue in the public forum than as an HBCU issue***. . . . Internally, we can certainly recognize that the HBCUs are struggling to enact necessary changes to hit those academic benchmarks.[50]

He also admitted that some schools (PWIs) got away with low performing students, while others (HBCUs) were penalized despite team performance exceeding their student bodies.[51] However, rather than recognize HBCUs' unique academic mission, he suggested that the NCAA should penalize HBCUs if they did not increase their initial eligibility standards and reduce the number of admitted student-athletes who are "academic risks".[52]

In February 2011, internal NCAA discussions show that it "kn[e]w clearly that a 925 [cut score] would pick up primarily HBCU teams." The DI Committee on Academic Progress had

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[47] Ex. 40 (MAN0000488547), at MAN0000488548.
[48] Ex. 41 (MAN0000065426).
[49] Ex. 41 (MAN0000065426), at MAN0000065429.
[50] Ex. 41 (MAN0000065426), at MAN0000065428 (emphasis added).
[51] Ex. 41 (MAN0000065426).
[52] Ex. 41 (MAN0000065426), at MAN0000065428.

"lengthy conversation about HBCU issues" which resulted in "no specific recommendation as to what to do," and a "[p]hilosophical discussion as to whether we should only be concerned ***with the 'worst of the worst' – those really low performing schools, which would be HBCUs***."[53] Later in 2011, the NCAA increased the APR cut score to 930,[54] knowing it "would pick up [i.e., penalize] primarily HBCU teams."[55] In response, paying lip service to a recommendation to form a group to "assist on issues that impact HBCU institutions,"[56] the NCAA replaced the HBCU Ad Hoc Committee with the HBCU Advisory Group,[57] whose concerns were largely ignored.[58]

In 2012, the NCAA's Principal Research Scientist delivered a keynote in which he stated that the Committee on Academic Progress was concerned about "APR trending" at HBCUs, "some of which have not shown improvement and in some cases have actually regressed in their APRs" due to factors that include "admissions profiles" and "mission."[59] He observed that these trends "should lead to further discussion of tailored approaches to [progress-toward-degree eligibility]."[60] And he suggested that schools consider "capping the number of high-risk student-athletes admitted at any given time"[61] in contradiction to the HBCU mission.

But it was not just the NCAA research scientists setting the discriminatory cut scores. Rather, the research scientists presented the data to NCAA decision-makers to make value judgments about increasing cut scores at the expense of HBCU Black student-athletes.[62] Thus, the

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[53] Ex. 32 (MAN0000012293), at MAN0000012294 (emphasis added).
[54] Ex. 36 (PLFS-TM-002177). *See also* Ex. 63, Siskin Report, ¶ 10 (discussion of APR changing requirements over time).
[55] Ex. 32 (MAN0000012293), at MAN0000012294 (knowing that a "925 [cut score] would pick up primarily HBCU teams"); Ex. 42 (MAN0000527887) at MAN0000527893, MAN0000527900 (ultimately adopting 930 cut score).
[56] Ex. 43 (MAN0000026260), at MAN0000026269.
[57] Ex. 44 (MAN0000764487).
[58] Ex. 44 (MAN0000764487).
[59] Ex. 45 (MAN0000061238), at MAN0000061240-41 .
[60] Ex. 45 (MAN0000061238), at MAN0000061244.
[61] Ex. 34 (MAN0000057019), at MAN0000057030.
[62] Ex. 23 (MAN0000281453), at MAN0000281455 (highlighting added).

increasingly high APR cut scores – which the NCAA knew would disproportionately and adversely affect HBCU Black student-athletes – reflected the NCAA's values.

In 2013, Dr. John Rudley, an HBCU president, chairman of the SWAC Council of Presidents and Chancellors, and former chair of the HBCU Academic Advisory Group (later the HBCU and Low Resource Institution Academic Advisory Group), observed that:

> the voices of the larger schools, the Bowl Championship Series Schools, the wealthier schools, seem to carry more weight than those of us designated as HBCUs…. Our challenge, as we see it, is to express to the NCAA that one size does not fit all. *We contend that the NCAA APR standard conflicts with the mission of our universities. We emphatically state that we are fulfilling our mission*.[63]

In early 2013, NCAA President Mark Emmert fielded calls directly from HBCUs seeking relief from the disproportionate impact of the APP,[64] but the NCAA refused to include all HBCUs in certain penalty relief afforded to other schools.[65] That same year, more than 80% of the teams that received postseason bans were from HBCUs.[66]

A May 2014 NCAA presentation reflected that HBCUs fell below the APR's 930 cut score more than non-HBCU schools, and the number of teams subject to penalties increased from 51 to 170, of which 55% were HBCUs.[67] Moreover, while just 2.7% of all DI teams fell below a 930 APR in multiple years, 25.4% of HBCU teams were in this category.[68] In 2015, 76% of the teams below 930 were HBCUs, and 15 of 21 teams receiving postseason bans were HBCUs.[69]

Yet in 2016, the NCAA again increased initial eligibility requirements, rejecting concerns from the National Association for Coaching Equity and Development about the impact on Black

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[63] Ex. 46 (PLFS-TM-002181), at PFS-TM-002183 (emphasis added).
[64] Ex. 47 (MAN0000185179).
[65] Ex. 47 (MAN0000185179).
[66] Ex. 63, Siskin Report, ¶ 26, Table 1.
[67] Ex. 48 (MAN0000034737), at MAN0000034767, MAN0000034799.
[68] Ex. 48 (MAN0000034737), at MAN0000034801.
[69] Ex. 49 (MAN0000057943), at MAN0000057947; Ex. 50 (PLFS-TM-002185), at PLFS-TM-002186.

student-athletes.[70] Multiple studies confirmed what the NCAA had always known: HBCUs trended well below PWIs in terms of APR, eligibility, retention, and the number of athletes who left high school academically ineligible, and comprised a large percentage of teams with APRs < 930.[71]

In 2018, internal NCAA staff were developing the Board of Directors Strategic Areas of Emphasis for 2018-2023. One draft suggestion was to "[e]xamine the Academic Performance Program . . . to ensure the standards appropriately include institutional mission as part of the criteria for determine [sic] penalized teams or institutions."[72] However, the NCAA has not incorporated the HBCU mission into its performance measures to date.

The APP was temporarily suspended in 2020 due to COVID, but "program penalties and the possible loss of access to postseason competition will resume based on the four-year-cohort scores released in spring 2024," according to the NCAA.[73]

D. Whether the APP deprived the Class from achieving the benefits inherent in participation in NCAA athletics is a class-wide issue.

The rules – and thus terms of the contract – that both the NCAA and the Division I student-athletes agree to follow are contained in the NCAA's DI Manual (the "Manual").[74] The NCAA required that student-athletes sign a Student-Athlete Statement, and thus reaffirm their

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[70] Ex. 51 (MAN0001019111); Ex. 52 (PLFS-TM-002201).
[71] Ex. 53 (PLFS-TM-002190), at PLFS-TM-002195-96. *See also* Ex. 54 (MAN0000029015), at MAN0000029018.
[72] Ex. 55 (MAN0000928198), at MAN0000928200. *See also* Ex. 55 (MAN0000928198) (comment to document appearing in extracted text, not visible on exhibit image); Ex. 22 (MAN0000928198 extracted text).
[73] Ex. 59, "DI Committee on Academics recommends two-year APR penalty suspension," NCAA.org (Oct. 26, 2020), available at https://www.ncaa.org/news/2020/10/26/di-committee-on-academics-recommends-two-year-apr-penalty-suspension.aspx (last accessed June 25, 2024); Ex. 60, "Academic Performance Program penalties to return for 2024-25," NCAA.org (Feb. 10, 2023), available at https://www.ncaa.org/news/2023/2/10/media-center-academic-performance-program-penalties-to-return-for-2024-25.aspx (last accessed June 25, 2024).
[74] Ex. 61, Division I Manual, 2023-24 ("2024 Manual"), also publicly available at https://www.ncaapublications.com/productdownloads/D124.pdf (last accessed June 25, 2024); Ex. 62, Emmert Tr., at 47:23-48:2, 49:18-51:10.

commitment to the rules, annually.[75] In turn, the NCAA promised Plaintiff and Class members benefits associated with NCAA competition, including, for example: (i) providing a "Commitment to Diversity and Inclusion" by "creat[ing] diverse and inclusive environments" that "include diverse perspectives in the pursuit of academic and athletic excellence";[76] (ii) promising an athlete's eligibility for postseason competition and championships if the NCAA's requirements are met;[77] and (iii) enacting student-athlete academic standards that would be "consistent" with the standards adopted by their institutions for the "student body in general."[78] Plaintiff and the Class fulfilled their contractual obligations by providing their services as student-athletes.

E. A generally accepted methodology exists to measure the APP's discriminatory impact on a Class-wide basis.

Plaintiff's expert, Dr. Bernard R. Siskin, has a Ph.D. in Statistics with a minor in Econometrics from the Wharton School of the University of Pennsylvania.[79] Dr. Siskin specializes in the application of statistics in law, particularly in the analysis of data for statistical evidence of discrimination. Dr. Siskin has served as a statistical consultant to the U.S. Department of Justice, Equal Employment Opportunity Commission, and numerous other government agencies, and has frequently been appointed as a neutral expert by federal courts to aid with statistical issues.[80]

Based on his analysis of NCAA and publicly available data in *Manassa* (being used by agreement in this case),[81] Dr. Siskin now opines that:

> A generally accepted methodology exists for conducting quantitative analysis of the APP to determine, on a Class-wide basis, whether the APP process and what in the process causes disparate impact and

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[75] Ex. 62, Emmert Tr. at 57:13-58:7. *See also, e.g.*, Ex. 61, Manual at § 12.7.2.
[76] *See, e.g.,* Ex. __, Ex. 61, Manual at xii; Manual, § 20.10.1.9.
[77] *See, e.g.,* Ex. 61, Manual, at § 18.4.1.
[78] *See, e.g.,* Ex. 61, Manual, at xii; Manual at § 20.10.1.7.
[79] Ex. 63, Siskin Report, ¶ 1.
[80] Ex. 63, Siskin Report, ¶ 1, Appendix A.
[81] Dr. Siskin also served as the expert in *Manassa v. National Collegiate Athletic Assoc.*, No. 1:20-cv-03172-RLY-MJD (S.D. Ind.), which is now pending on appeal, Nos. 24-1371, 24-1372, & 24-1373 (7th Cir.).

> potentially discrimination against Class members. Further I was able to demonstrate based on currently available data that the methodology is workable. The methodology is flexible such that I can incorporate the additional data and information expected to be produced by the NCAA into the existing methodology at the appropriate time.[82]

To conduct his analysis, Dr. Siskin first analyzed (i) the number of Black student athletes at HBCUs and the number of non-Black student athletes at HBCUs or student athletes at non-HBCU teams banned from postseason play[83]; and (ii) the number of Black student athletes at HBCUs and the number of non-Black students at HBCUs or student athletes at non-HBCUs that were subject to the APP process and that could have been banned. [84] Dr. Siskin then computed the statistical significance of the disparity, i.e., the ratio of the rate at which Black student athletes at HBCUs were banned compared to non-Black athletes at HBCUs or student athletes at non-HBCUs were banned, each year and over all the years using Fisher's Exact test. Dr. Siskin also analyzed the statistical significance level overall treating all years as a single year using Fisher's Exact Test and alternatively computed the statistical significance level overall considering year's effect via the Mantel Haenszel Chi Square Test. [85] He investigated whether disparities were driven by neutral variables, e.g., particular sports.[86] And he took into account other APP factors that impact whether a team is banned, e.g., APR scores, filters, waivers, and appeals.[87]

Based on his analysis, Dr. Siskin determined that the APP has a large statistically and practically significant impact on Black student athletes at HBCUs compared to non-Black student athletes at HBCUs or student athletes at non-HBCUs. The impact results in 1,902 more Black student athletes being banned in postseason play than would have been if the APP process did not

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[82] Ex. 63, Siskin Report,¶ 7(a).
[83] Ex. 63, Siskin Report, ¶ 24.
[84] Ex. 63, Siskin Report, ¶ 25.
[85] Ex. 63, Siskin Report, ¶ 25.
[86] *See, e.g.,* Ex. 63, Siskin Report, § VII(B).
[87] *See, e.g.,* Ex. 63, Siskin Report, § VII(C).

have a disparate impact on Black student athletes at HBCUs. In every year and overall, the disparity from what would be expected if the APP process did not have a disparate impact on Black student athletes at HBCUs measured in units of standard deviation exceed 50. A disparity of greater than 8.2 units of standard deviation has a probability of occurring by chance of less than 1 time out of every 4.5 million billion times, and is essentially impossible to have occurred by chance.[88]

Dr. Siskin explained that such an impact on Black student-athletes at HBCUs is the result of having a large statistically and practically significant disparate impact on HBCU teams which are predominately Black. [89] Over the 9 academic years studied, 106 or 3.76 percent of HBCU teams earned a ban which was applied (banned) to postseason play by the APP process compared to 44 or 0.09 percent of non-HBCU teams being banned. While HBCU teams comprise 5.42% of all DI teams, they comprised 70.67% percent of all teams banned from postseason play. In each year, the disparate impact was statistically significant well-above 3 units of standard deviation level, and in 7 of the 9 academic years analyzed, the likelihood of such a large disparity by chance was less than 1 in a million. [90] Thus, Dr. Siskin has demonstrated that a classwide methodology exists to measure the disparate impact of the APP on the Class, the methodology can be (and has been) implemented using existing data, and additional data can be incorporated into the methodology.

F. Plaintiff's experience is typical of Class members' experience.

Plaintiff is a Black student-athlete who played one the basketball team at Grambling State University ("GSU"), an NCAA DI HBCU, during the 2023-24 school year. GSU sports teams have received penalties under the APP in the past, including Level One penalties (reduction in practice

[88] Ex. 63, Siskin Report, ¶ 8(a).
[89] Ex. 63, Siskin Report, ¶ 8(b).
[90] Ex. 63, Siskin Report, ¶ 8(c).

time) and Level Two penalties (postseason competition ban). For example, the NCAA imposed postseason competition bans on three GSU sports teams in 2017, and one GSU sports team in each of 2018, 2019, and 2020.[91] Moreover, the GSU women's basketball team has previously missed the APR benchmark, including in 2016 and 2017.[92]

IV. LEGAL STANDARD

Class certification is appropriate where a plaintiff meets the requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a). And, a plaintiff must satisfy one of the subsections of Rule 23(b). Fed. R. Civ. P. 23(b). Plaintiff bears the burden of demonstrating that certification is proper by a preponderance of the evidence. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). The Court must engage in a "rigorous analysis," resolving material factual disputes where necessary. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011). But "[i]n conducting [the Rule 23] analysis, the court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits." *Messner*, 669 F.3d at 811.

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[91]Ex.64 , "Grambling softball gets postseason ban, football, volleyball hit with APR sanctions," The News Star (May 23, 2018), also available at https://www.thenewsstar.com/story/sports/college/gsu/2018/05/23/grambling-state-football-softball-hit-apr-sanctions/639084002/ (last accessed June 25, 2024); Ex. 65, "Low academic rates cause lost postseason, penalties," NCAA.org (May 8, 2019), available at https://www.ncaa.org/news/2019/5/8/low-academic-rates-cause-lost-postseason-penalties.aspx (last accessed June 25, 2024); Ex. 66, "Division I teams face penalties, loss of postseason due to low APRs," NCAA.org (May 19, 2020), available at https://www.ncaa.org/news/2020/5/19/division-i-teams-face-penalties-loss-of-postseason-due-to-low-aprs.aspx (last accessed June 25, 2024).

[92] Ex. 67, "NCAA Division I 2015-16 Academic Progress Rate Institutional Report for Grambling State University" (September 6, 2017), at 2 (showing multiyear APR of 885 for GSU women's basketball team), available at https://web3.ncaa.org/aprsearch/public_reports/apr2016/261_2016_apr.pdf?v=1719346100267 (last accessed June 25, 2024); Ex. 68, "NCAA Division I 2016-17 Academic Progress Rate Institutional Report for Grambling State University" (April 30, 2018), at 2 (showing multiyear APR of 912 for GSU women's basketball team), available at https://web3.ncaa.org/aprsearch/public_reports/apr2017/261_2017_apr.pdf?v=1719346100267 (last accessed June 25, 2024).

V. ARGUMENT

A. The proposed Class satisfies Rule 23(a).

Rule 23(a) is satisfied if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Plaintiff easily clears the low threshold requirements of Rule 23(a).

1. The Class is sufficiently numerous such that joinder is impracticable.

Numerosity is satisfied where "it's reasonable to believe [the class is] large enough to make joinder impracticable." *Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities Inc.*, 747 F.3d 489, 492 (7th Cir. 2014). Here, the Class consists of thousands of Black student-athletes.

2. Plaintiff raises common questions of law and fact.

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Plaintiff's claims must arise from a "common contention" that is "capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc.*, 564 U.S. at 350. "Commonality is satisfied when there is a common nucleus of operative law or fact, that is, a common question which is at the heart of the case." *Indiana Civ. Liberties Union Found., Inc. v. Superintendent, Indiana State Police*, 336 F.R.D. 165, 174 (S.D. Ind. 2020) (quotations, brackets, and citation omitted).

Commonality exists where allegedly discriminatory general policies are enforced at the corporate level, even where there is some discretion in the policies' execution. *See McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 488-91 (7th Cir. 2012) (allowing class

certification for disparate impact claim challenging company-wide practices that local managers had to follow), *abrogated on other grounds by Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541 (7th Cir. 2016). As the Seventh Circuit explained: "a company-wide practice is appropriate for class challenge even where some decisions in the chain of acts challenged as discriminatory can be exercised by local managers with discretion—at least where the class at issue is affected in a common manner, such as where there is a uniform policy…applied to all." *Chicago Tchrs. Union, Loc. No. 1 v. Bd. of Educ. of City of Chicago*, 797 F.3d 426, 437 (7th Cir. 2015).[93] Here, at the heart of Plaintiff's case is the APP – a single uniform NCAA policy to which all DI schools and their student-athletes, including HBCUs and their Black student-athletes, are subject. The common question presented by Plaintiff's claims that binds the Class is whether the NCAA adopted and implemented the APP with the intent to discriminate against Black student-athletes at DI HBCUs.

a. Plaintiff's Section 1981 claim can be proven on a class-wide basis.

Section 1981, as amended in the Civil Rights Act of 1991, provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a) (1991). Section 1981 defines "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(b). A plaintiff may prove a violation of § 1981 through evidence that: (1) he is a member of a racial minority; (2) the defendant intended to discriminate based on race; and (3) the discrimination concerned one of the activities enumerated in the statute. *Morris v. Off. Max, Inc.*, 89 F.3d 411, 413 (7th Cir.

[93] *See also Kaiser v. Alcoa USA Corp.*, No. 3:20-cv-00278, 2022 WL 18959169, at *3 (S.D. Ind. Sept. 29, 2022) (Young, J.) (commonality existed for class members receiving benefits under substantially similar contracts, certifying class); *Beeler v. Berryhill*, No. 1:15-cv-01481, 2017 WL 9534727, at *2 (S.D. Ind. July 6, 2017) (Dinsmore, J.) (finding commonality existed where central issue was the legality of a provision as to Social Security beneficiaries), *report and recommendation adopted*, 2018 WL 2970995 (S.D. Ind. June 12, 2018).

1996).[94] Plaintiff will use class-wide evidence to prove his § 1981 claim.

First, all Class members, including Plaintiff, are Black and thus members of a racial minority. *Williams v. Lindenwood Univ.*, 288 F.3d 349, 355 (8th Cir. 2002) ("The first element of the prima facie claim of racial discrimination indisputably is met because plaintiff, a black male, is a member of a racial minority.").[95] The race of Class members can also be identified through data collected by each HBCU and submitted annually to the NCAA.[96]

Second, Plaintiff will establish that the NCAA intended to discriminate based on race through evidence of a discriminatory intent or purpose. *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982) (drawing § 1981 standards from the Equal Protection Clause). In *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977), the Supreme Court provided a non-exhaustive summary of the circumstantial evidence that may be considered to determine "whether racially discriminatory intent existed," including, *inter alia*: (i) the impact of the action and "whether it bears more heavily on one race than another," (ii) the existence of "a clear pattern, unexplainable on grounds other than race," (iii) the "historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes," (iv) the "specific sequence of events leading up to the challenged decision," which "may shed some light on the decisionmaker's purpose," and (v) administrative history

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[94] "Analysis of predominance under Rule 23(b)(3) begins, of course, with the elements of the underlying cause of action." *Messner*, 669 F.3d at 815; *Burnett v. CNO Fin. Grp., Inc.*, No. 1:18-cv-00200, 2022 WL 896871, at *6 (S.D. Ind. March 25, 2022) (same).

[95] *See, e.g., Rollins v. Traylor Bros.*, No. C14-1414, 2016 WL 258523, at *4 (W.D. Wash. Jan. 21, 2016) (certifying § 1981 claim, stating: "Despite the vagaries of race, it should not be difficult for the Court and the relevant parties to decide who fits in this category."); *Chalmers v. City of New York*, No. 20-cv-3389, 2022 WL 4330119, at *20 (S.D.N.Y. Sept. 19, 2022) (employees "with an unidentified race may be asked to provide an affidavit stating their racial identification in order to become a subclass member"); *Buchanan v. Tata Consultancy Servs., Ltd.*, No. 15-cv-01696, 2017 WL 6611653, at *21 (N.D. Cal. Dec. 27, 2017) (proof of class membership can require self-identification of race and satisfy Rule 23).

[96] *See* Ex. 71 (PLFS-TM-002704).

reflected in "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 266-68 (internal quotations and citations omitted). This type of evidence is not unique to any class member.

Plaintiff will prove that the NCAA intended to discriminate on the basis of race with class-wide statistical and circumstantial evidence that establishes a reasonable inference of discrimination. *See* Section III.B-D, *supra.* Plaintiff's evidence will include documents and data from the NCAA's files; expert analyses of the NCAA's data; testimony from the NCAA, HBCUs, and other third-party witnesses reflecting the APP's impact on Black student-athletes; the historical background of the NCAA's academic benchmarks which reflect invidious purposes; and history reflected in the NCAA's contemporaneous statements in meeting reports and emails.

For example, Plaintiff will present expert testimony from Dr. Siskin, who has demonstrated that the APP has a disparate impact on the Class based on a class-wide methodology incorporating publicly available and NCAA data. Dr. Siskin will testify that the APP "had a highly statistically significant and large adverse impact on HBCU teams and their predominately Black student-athlete Class members." In statistical terms, the disparity exceeds more than *eight* standard deviations.[97] Thus, class-wide evidence shows that the APP was not race-neutral; race played a role in the NCAA's decision-making process.

In *Zollicoffer v. Gold Standard Baking, Inc*., the plaintiffs moved to certify a class of African American job applicants, alleging that the defendant staffing company systematically steered the applicants away from temporary work assignments at the defendant baking company.

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[97] *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 311 n.14 (1977) (recognizing that standard deviations greater than two to three refute the suggestion that decisions were made without regard to race); *Adams v. Ameritech Servs., Inc*., 231 F.3d 414, 424 (7th Cir. 2000) ("Two standard deviations is normally enough to show that it is extremely unlikely (that is, there is less than a 5% probability) that the disparity is due to chance, giving rise to a reasonable inference that the [challenged practice] was not race-neutral; the more standard deviations away, the less likely the factor in question played no role in the decisionmaking process.") (citations omitted).

335 F.R.D. 126, 133 (N.D. Ill. 2020). To demonstrate that proof of the discriminatory policy could be demonstrated on a class-wide basis, the plaintiffs' labor economist calculated the annual percentage shortfalls between the estimated expected availability of African American workers within a particular region and the estimated actual representation of African American workers referred by the staffing company to the baker, finding statistically significant shortfalls between nine and 12.6 standard deviations over a four-year period. *Id.* at 142-44. Certifying the class, the court held that these standard deviations "are stark figures that suggest a common answer to the central question: why were African American laborers disfavored?" *Id.* at 155 (citing *Wal-Mart Stores, Inc.*, 564 U.S. at 352). Here too, this Court should find that eight standard deviations is a stark figure suggesting a common answer to the central question: why are Black student-athletes at HBCUs disfavored?

In addition to statistical evidence, Plaintiff will also present class-wide circumstantial evidence at trial. This evidence comes from the NCAA's own files. For example, for years, HBCU representatives and experts have called the NCAA's academic performance measures "patently racist," "patently discriminatory and racist," and a "disservice to minority athletes."[98] Class-wide evidence shows that, internally, the NCAA recognized in the early 1980s that the academic performance measures it was using "suggest potential for large 'selection bias' against Black [student-athletes]."[99] Throughout the years, the NCAA internally admitted that the purpose of the penalty structure was to target "the worst of the worst," i.e., HBCUs.[100]

The NCAA also recognized that its uniform standards, including the APP, contradicted HBCUs' missions to serve historically-disadvantaged Black students "that may be hampered by

[98] Ex. 17 (PLFS-TM-002110), at PLFS-TM-002118.
[99] Ex. 15 (MAN0000327073), at MAN0000327088. *See also* Ex. 13 (MAN0000468866), at MAN0000468869.
[100] Ex. 31 (MAN0000513072); Ex. 32 (MAN0000012293).

inadequate primary and secondary school systems" and limited personal financial resources.[101] However, the NCAA – starting with its Presidents – imposed its own values on student-athletes, rewarding PWIs and penalizing HBCUs and Black student-athletes.[102] As the NCAA became savvier about hiding the discrimination however, the NCAA used semantics as cover by "phrasing this as a resource issue in the public forum [rather] than as an HBCU issue. . . ."[103] But this case is not about whether HBCUs have sufficient resources – it is about setting standards that the NCAA knows will discriminate against Black student-athletes at HBCUs. An injunction to prevent this continued discrimination is necessary and appropriate.

The trier of fact will consider whether this common evidence reflects that the NCAA's establishment of the APP based on a foundation of formulae that it knew discriminated against Black student-athletes and supports a finding that the discrimination was intentional. As the Seventh Circuit has explained, it "is more efficient to answer the question 'did these early discriminatory processes have a disparate impact on race' just one time rather than over and over again in multiple separate lawsuits." *Chicago Tchrs. Union, Loc. No. 1*, 797 F.3d at 436 n.5 (finding that objective criteria in first steps of challenged process "narrowed the pool in such a way as to have a disparate impact on African-American teachers," and that a "discriminatory step in a chain of events" provides a common question satisfying Rule 23).

In *Chicago Teachers*, three teachers and the Chicago Teachers Union sought to certify a class of African American teaching staff at public schools (in which the percentage of African American teachers ranged from 26.7 to 88.6%) slated for reconstitution (replacement of principals,

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[101] Ex. 40 (MAN0000488547), at MAN0000488548.
[102] Ex. 23 (MAN0000281453), at MAN0000281454-55.
[103] Ex. 41 (MAN0000065426).

teachers, and local school councils) due to performance. 797 F.3d at 430-32. Schools were chosen for reconstitution in three steps: (1) based on low academic performance; (2) based on certain test scores and graduation rates; and (3) based on information discussed by the CEO and other Board members for individual school analyses. *Id.* at 435. The Board opposed class certification based on the third step, claiming it involved subjective and individualized determinations. *Id.* Reversing the district court's denial of class certification, the Seventh Circuit explained:

> The first question we ask, therefore, is if the latter subjective steps (assuming they are indeed subjective and individualized) destroy the alleged commonality created by the first clearly-objective steps. The Board and the district court's reasoning assume that they do. But this cannot be so. Suppose hypothetically that after the objective first and second steps, all of the schools remaining on the list had 100% African-American teachers, and no schools with white teachers remained on the list. We could undoubtedly conclude that the objective factors had a disparate impact on African-American teachers. Suppose that the Board went on to evaluate those 74 schools with all African-American teachers in a subjective, case-by-case manner to narrow the list from 74 to 10—all of which still were made up of African-American teachers. The introduction of subjective, case-by-case criteria would not alleviate the disparate impact of the initial objective criteria. Surely we would say that the plaintiffs could allege that there was sufficient commonality to establish a class. Every one of those teachers could answer the question, 'why was I disfavored?' by pointing to the initial objective criteria that impacted only African-American teachers.

Chi. Tchrs. Union, Loc. No. 1, 797 F.3d at 435. The Seventh Circuit based its analysis, in part, on the Supreme Court's decision in *Connecticut v. Teal*, 457 U.S. 440 (1982), to demonstrate why a discriminatory intermediate step taints the entire process and is sufficient for the plaintiff to make a prima facie showing of discriminatory impact. *Chicago Tchrs. Union*, *Loc. No. 1*, 797 F.3d at 435-36. The court explained that, in *Teal*, the employer required those seeking a promotion to take a facially objective test that eliminated far more African Americans than white candidates. *Id.* at 435 (citing *Teal*, 457 U.S. at 443-44). Faced with a lawsuit, the employer promoted a disproportionately high number of African Americans to supervisor positions. The *Teal* court

determined that, despite the fact that the bottom-line result was non-discriminatory, the plaintiffs established a prima facie showing of a discriminatory impact. *Chi. Tchrs. Union, Loc. No. 1*, 797 F.3d at 435 (citing *Teal*, 457 U.S. at 455-56). The Seventh Circuit explained that:

> *Teal* helps to answer the question of whether a class can be certified where the alleged class of plaintiffs claims they were all harmed similarly in an early step of the process even if, under *Wal-Mart*, they cannot point to sufficient glue to bind their claims under a later part of the process. *Teal* instructs that an early discriminatory process can taint the entire process, and indeed our hypothetical demonstrates why this must be so. And it certainly is more efficient to answer the question 'did these early discriminatory processes have a disparate impact on race' just one time rather than over and over again in multiple separate lawsuits.
>
> In short, if the plaintiffs allege that the objective criteria in the first two steps narrowed the pool in such a way as to have a disparate impact on African-American teachers (and indeed they do), then this is the glue that binds the claims together without regard to the later, subjective step.

Chicago Tchrs. Union, Loc. No. 1, 797 F.3d at 435-36. The Seventh Circuit stated: "One single question would trigger a liability finding for both the 23(b)(2) and 23(b)(3) class: did the policies and process behind the 2012 reconstitution unlawfully discriminate against African American teachers and staff? And the answer to this question would eliminate the need for repeat adjudication of this question for … injunctive relief." *Id.* at 445.

Chicago Teachers instructs that class certification is appropriate here.[104] The NCAA's use of objective measures in the APP, i.e., the APR and GSR, which target a disproportionate number

[104] The Seventh Circuit's approach in *Chicago Teachers* demonstrates that the denial of class certification in *Pryor v. NCAA*, No. 00-3242, 2004 WL 1207642 (E.D. Pa. March 5, 2004), is not persuasive authority here. In *Pryor*, the court denied certification of a class of Black student-athletes challenging Proposition 16 as discriminatory, holding that whether Proposition 16 discriminated against each class member in the same manner could not be proved by a common set of facts because of a multiple step process involving individual applications for waivers after Proposition 16 non-compliance was found. *Id.* at *5-7. That holding contradicts the Seventh Circuit's guidance that the use of objective criteria in the initial application of a policy "is the glue that binds the claims together without regard to the later, subjective step," supporting predominance. *Chi. Tchrs. Union*, 797 F.3d at 435-36.

of HBCUs and Black student-athletes, taints the entire process of imposing penalties on DI teams and athletes. Thus, like in *Chicago Teachers*, one single question would trigger a liability finding for the 23(b)(2) Class: did the APP unlawfully discriminate against Black student-athletes? The answer to this question will eliminate the need for repeat adjudication of this question for liability or injunctive relief. The Class should be certified.

b. Third element of § 1981 claim: The discrimination concerned one or more of the activities enumerated in the statute.

As to the third element of her § 1981 claim, Plaintiff will establish that the discrimination concerned one or more of the activities enumerated in the statute. NCAA DI student-athletes are entitled to common benefits and privileges in connection with their contractual relationship with the NCAA. The NCAA governs DI intercollegiate competition generally with promises to do so free from discrimination and in the manner described in the Manual.[105] Plaintiff will rely on class-wide evidence at trial – from the NCAA's own documents – to prove her § 1981 claim.

The Seventh Circuit has held that the "fact that the plaintiffs might require individualized relief does not preclude certification of a class for common equitable relief." *Chicago Tchrs. Union, Loc. No. 1*, 797 F.3d at 442-43 (citing *Pella Corp. v. Saltzman*, 606 F.3d 391, 395 (7th Cir. 2010); *Arreola v. Godinez*, 546 F.3d 788, 801 (7th Cir. 2008); *Allen v. Int'l Truck & Engine Corp*., 358 F.3d 469, 471-72 (7th Cir. 2004)). The plaintiffs in *Chicago Teachers* sought certification of a Rule 23(b)(2) class, requesting prospective injunctive relief including a policy moratorium and the appointment of a monitor to evaluate and oversee any new turnaround process. *Chicago Tchrs. Union*, 797 F.3d at 441 (the (b)(2) class did not seek money or individual relief).

The district court denied certification, stating: "'[a]lthough Plaintiffs' request for a

[105] *See generally* Proffer, § III.E.

declaration that the turnaround policy violates federal law would apply class-wide, it would merely be a prelude to further relief [seeking back pay, front pay, or reinstatement], which would be inherently individualized.'" *Chicago Tchrs. Union*, 797 F.3d at 441. Reversing this decision, the Seventh Circuit explained:

> The district court erred, however, by misunderstanding the nature of the relief sought. The proposed 23(b)(2) class did not seek individual relief such as reinstatement or individually calculated damages in the form of back pay and front pay. It asked only that the court issue a declaration that the Board's turnaround practice violated Title VII and 42 U.S.C. §§ 1981 & 1983, and for prospective injunctive relief including a moratorium on turnarounds and the appointment of a monitor to evaluate and oversee any new turnaround process. We agree with the district court that to the extent that 'each individual class member would be entitled to a different injunction or declaratory judgment against the defendant,' 23(b)(2) certification would not be appropriate. But the 23(b)(2) plaintiffs here seek the same declaratory and injunctive relief for everyone.

Id. at 441-42. The Seventh Circuit found injunctive relief "particularly appropriate because the Board did not individually assess any of the putative class members in the process of reconstituting the school and displacing the teachers. Each was displaced because of the Board's uniform reconstitution policies and practices." *Id.*

Just as in *Chicago Teachers*, the NCAA does not individually analyze Plaintiff or any class member in the process of applying the APP and penalizing certain HBCUs. A permanent moratorium on the APP and the appointment of a monitor to evaluate and oversee any new NCAA academic performance review policy or practice that would include Black student-athletes at HBCUs is exactly the type of Rule 23(b)(2) relief approved by the Seventh Circuit.

Moreover, Black student-athletes at HBCUs have faced and continue to face active, ongoing injury because the APR threshold is itself discriminatory. It unfairly and disparately burdens Black student-athletes at HBCUs, requiring them to meet or exceed the academic standards for their schools' general student body, while allowing student-athletes at PWIs to fall

short of their schools' academic standards. Given that the evidence supports a historical and statistical likelihood that the NCAA is continuing, and will continue, to target Black student-athletes,[106] the Class is at risk for actual and imminent future injury.

3. Plaintiff's claims are typical of the Class's claims.

Rule 23(a)(3) requires that a class representative's claims be "typical" of the proposed class's claims. Typicality is satisfied where all class members are subject to the same discriminatory policy. *Porter v. Pipefitters Ass'n Local Union 597*, 208 F. Supp. 3d 894, 908 (N.D. Ill. 2016). *See also Spano v. The Boeing Co*., 633 F.3d 574, 586 (7th Cir. 2011).

The *Porter* court held that Rule 23(a)(3) was met because the plaintiffs' claims were directed at organization-wide policies, which "caused African American pipefitters to receive fewer hours than their white counterparts" in violation of § 1981, and "liability can be established through common proof." *Id.* Just as in *Porter*, Plaintiff's claims are directed at the NCAA's organization-wide policy – the APP, which discriminates against DI HBCU Black student-athletes in violation of § 1981 and § 1985(3). *See Edwards v. Educ. Mgmt. Corp.*, No. 1:18-cv-03170, 2022 WL 3213277, at *3 (S.D. Ind. June 13, 2022) (Young, J.) (typicality existed where plaintiffs and class asserted the same legal theories based on the same practices). Rule 23(a)(3) is satisfied.

4. Plaintiff and Class Counsel are adequate to represent the interests of the Class.

Rule 23(a)(4) requires that (1) the named plaintiff must not have claims in conflict with other class members, and (2) the named plaintiff and proposed class counsel must be able to litigate the case vigorously and competently on behalf of the class. *See Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 679 (7th Cir. 2009). Here, Plaintiff's interests are wholly aligned with those of the

[106] *See* Section III.B-D.

putative class; her claims are not in conflict with class members. Plaintiff has also actively participated in the prosecution of the case and she is represented by skilled counsel who satisfies the factors set forth in Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv). Counsel began investigating the NCAA's application of the APP in May 2020, has devoted substantial time and resources necessary to prosecute the *Manassa* litigation and this action, and has experience in prosecuting complex litigation, including discrimination class actions.[107] Thus, adequacy is satisfied.

B. Rule 23(b)(2) is satisfied where the NCAA has acted by imposing the APP on all DI schools, knowing that it would have a discriminatory impact on HBCU Black student-athletes.

The proposed Class also satisfies Rule 23(b)(2). Rule 23(b)(2) provides for class treatment where the defendant has "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." It requires plaintiffs to (i) allege grounds for liability generally applicable to the class and (ii) seek relief that is predominantly injunctive or declaratory, as opposed to monetary. *See, e.g., Lemon v. Int'l Union of Operating Eng'rs, Local No. 139*, 216 F.3d 577, 580 (7th Cir. 2000).

"The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *K. C. v. Individual Members of Med. Licensing Bd. of Indiana*, 345 F.R.D. 328, 336 (S.D. Ind. 2024) (quoting *Dukes*, 564 U.S. at 360). "In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.*; *see also Chicago Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chicago*, 797 F.3d 426, 441 (7th Cir. 2015) ("[Rule] 23(b)(2) is the appropriate rule to enlist when the plaintiffs' primary goal is not monetary relief, but rather to require the

[107] *See* Ex. 57 (Fegan Scott LLC Firm Resume); Ex. 58 (May Jung LLP's Resumes).

defendant to do or not do something that would benefit the whole class."). Rule 23(b)(2) cases are "less demanding, in a variety of ways, than Rule 23(b)(3) suits." *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 825 (2011).

Here, resolution of the class claims will depend on facts concerning the NCAA's implementation and enforcement of the APP, not the conduct of any individual class member. As such, no individual issues will affect the cohesion of the class action. Instead, if the class prevails on either of the class claims, the proposed injunctive relief would inure to the benefit of all class members through (i) a permanent moratorium on the APP, and (ii) the appointment of a monitor to oversee any NCAA academic programs that would impact Black student-athletes at HBCUs. "Not surprisingly, 'civil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of Rule 23(b)(2) classes." *Chicago Tchrs. Union*, 797 F.3d at 441 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997)). This case fits squarely within this paradigm.

C. The proposed Class is identifiable.

For a proposed class to be ascertainable, "Rule 23 requires that a class be defined, and experience has led courts to require that classes be defined clearly and based on objective criteria." *Mullins v. Direct Digit., LLC*, 795 F.3d 654, 659 (7th Cir. 2015). Here, the proposed class definitions are objective in that they comprise Black student-athletes on DI HBCU athletic teams. None of these criteria are subjective. Indeed, the Class can be objectively identified through NCAA-produced data on each aspect of Class membership – (1) race, and (2) participation on a DI HBCU athletic team. The Class is clearly defined, its members are identified in NCAA data, and the Class is therefore ascertainable.

VI. CONCLUSION

Pursuant to Fed. R. Civ. P. 23 (a) and (b)(2), Plaintiff respectfully requests that the Court

certify the Class, appoint Ms. McKinney as Class Representative, appoint her counsel as Class Counsel, and order that notice be given to the Class.

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Respectfully submitted,

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