Case No. 00527

IN THE

DIVISION I INFRACTIONS APPEALS COMMITTEE

OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

UNIVERSITY OF LOUISVILLE

On Appeal from
Committee on Infractions Decision No. 473

SUBMISSION OF THE UNIVERSITY OF LOUISVILLE

August 9, 2017

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INTRODUCTION

The violations uncovered in this case are reprehensible and inexcusable. For over three years, Andre McGee, a staff member on the University of Louisville men's basketball team, engaged in a grotesque scheme of ethical misconduct. During a number of on-campus recruiting visits, he would place unwitting prospects, many of them minors, in a dorm room and produce strippers without warning. He would then invite the prospects to watch striptease dances, hand them cash to convey to the dancers, and offer them sex. Some of the young men reported discomfort and shock; several refused McGee's offers. But for approximately three and a half years, McGee persisted in involving new and unsuspecting prospects in his events.

When the University finally received a tip notifying it of McGee's conduct, it reacted with "disgust, horror and embarrassment." COI Hearing Tr. at 15:22-23. And it took swift action. It informed the NCAA enforcement staff and opened an extensive joint investigation. Upon verifying what had occurred, the University self-imposed the most severe institutional penalties available: banning its men's basketball team—ranked 13th in the nation—from postseason play, revoking scholarships and recruiting opportunities, and paying a fine. The University then adopted sweeping institutional reforms to ensure that similar misconduct could never occur again. The University is deeply embarrassed and apologizes to all of

these young men and to the entire community for these events. As President Postel has said, "[t]here could be no possible excuse." *Id.* at 15:24.

The Committee on Infractions (COI), however, imposed a further and much more draconian set of punishments. In addition to punishing the *institution* for this conduct, it found that the *student-athletes*—the very same "minors" whom the COI rightly thought McGee had taken advantage of—were rendered ineligible by McGee's actions, and that every one of their victories should be vacated and every dollar received from NCAA tournament games in which they participated should be disgorged. That cannot be right. The student-athletes were not culpable for McGee's conduct, and they received no meaningful benefit or advantage from it. Had the University known of what McGee did, it would have quickly obtained their reinstatement—

athlete remaining on the team when the violations came to light. It is unjust, and grossly disproportionate, to wipe away the entirety of these students' collegiate athletic careers because of parties that they had no part in creating and no choice in attending. And it is unquestionably unfair to the many team members who had no involvement in McGee's activities at all.

The COI further erred by issuing these enormous penalties without weighing several critical factors. The Infractions Appeals Committee (IAC) has repeatedly said that the COI "must" assign an institution's corrective and cooperative efforts

and self-imposed punishments "substantial weight"; the COI ignored them entirely. The IAC has also made clear that the COI must point to supporting record evidence, and make various findings, to support the imposition of a financial penalty. The COI failed to do that, too. And the COI must weigh the impact of its punishments to ensure they are proportionate to the severity of the violations. Yet the COI did not even try to determine the magnitude of penalties it imposed or tailor them accordingly, even though they entailed hundreds of thousands of dollars in financial penalties and the vacation of 123 wins, including two Final Four appearances and the 2013 NCAA championship.

Finally, and at a bare minimum, the COI clearly erred by imposing vacation and financial penalties for the 2011-12 and 2012-13 seasons. *None* of student-athletes who competed in these seasons after allegedly attending McGee's events was properly deemed ineligible. left the room before any striptease began; benefits below the NCAA's restitution threshold; shielded by the COI's grant of limited immunity. Furthermore, not one student who later competed in the 2011-12 and 2012-13 seasons engaged in a sex act. Even if these student-athletes were technically ineligible, they would unquestionably have been reinstated. If nothing else, the IAC should reverse the COI's decision to erase these two seasons of play in their entirety.

BACKGROUND

A. McGee's Conduct

Andre McGee became a program assistant for the University of Louisville men's basketball program in January 2010. COI Op. at 4. In April 2012 he was named director of basketball operations. *Id.* For much of that time McGee resided in Minardi Hall, a men's on-campus dormitory occupied by members of the basketball team together with other students. *Id.* at 3, 5.

In December 2010, McGee began organizing a series of striptease shows in Minardi Hall. *Id.* at 7. No one else on the basketball team's staff knew of these events. Many student-athletes living in Minardi Hall never learned of them either. *Id.* at 10. McGee instead held them mainly for visiting prospects, who had no prior knowledge that they would occur, and whom he afterwards instructed to "keep this between us." Interview Tr. at 24; *see* COI Op. at 9.

The basic program of the shows was the same. At night, McGee would invite a visiting prospect into a dormitory room. COI Op. at 8. Then, without warning, strippers would appear from the hallway or a side room. *See, e.g.*, Interview Tr. at 318-319 ("I don't know . . . they appeared there."); Interview Tr. at 20 ("There was like a room where they . . . came out of."). At McGee's direction, the strippers would perform a dance. COI Op. at 8.

Sometimes McGee would provide the prospects cash to "tip" the strippers. *Id.* He would then encourage the prospects to have sex with the women. *Id.*

A large number of prospects were minors when these events occurred—

Several of them expressed shock and discomfort. *See, e.g.*, Interview Tr. at 31 ("We were both kind of shocked at first, like, we're kind of, like—we're teenagers."); Interview Tr. at 28 ("I wasn't really comfortable."); *see* COI Op. at 9. As one prospect later explained, "it made me kind of awkward"; "I'm not someone that really enjoys something like that . . . and I didn't like how that was happening." Interview Tr. at 34. Another prospect, whom McGee handed a condom and directed into a room to have sex, ultimately admitted he was "nervous," "d[id]n't want to" do it, and left. Interview Tr. at 28; *see* COI Op. at 9-10.

Most of the prospects watched passively throughout these events, and left when the dances ended. Some were offered sex but declined. COI Op. at 8. Others attempted to decline, but were "coaxed" by McGee into accepting. *Id.* at 9.

McGee continued holding these events roughly four to five times per year until shortly after he left the University in April 2014. *Id.* at 7, 10. Out of roughly 200 official and unofficial visits by prospects during this period, McGee organized shows during 24 of them. University Resp. at I-4.

B. The Joint Investigation And The University's Corrective Actions

In August 2015, the University received a tip about McGee's actions from a media organization. The organization stated that it was about to publish a book written by Katina Powell, a self-described escort, that purported to detail McGee's activities. *Id.* at 2-3. The University promptly notified NCAA enforcement staff about the matter and opened a cooperative joint investigation. *Id.* at 3.

The investigation was exhaustive. University and NCAA investigators conducted interviews of over 90 persons, including 34 current or former student-athletes, 20 prospects who did not enroll, and 19 current or former staff members. University Resp. at I-2. The University reviewed numerous documents, including text messages, visitor logs, and the available parts of Powell's journal. *Id.* at I-12 to -13. It tried to reconstruct how McGee had gotten strippers into Minardi Hall without detection. *Id.* at II-11 to -15. It ran down numerous leads to figure out where he had procured the money he used for "tips." *Id.* at I-13, II-4. *See* COI Hearing Tr. at 56:4-57:18. Representatives of the University traveled out-of-state repeatedly in an effort to persuade recalcitrant witnesses with no obligation to testify to nonetheless cooperate with the investigation. *See* University Resp. at I-2, I-12 to -13. In addition, the University requested materials from the publisher of Powell's book on behalf of the NCAA, and assembled a chart for the enforcement

staff detailing the name, date, and host of each prospective student-athlete's visit to campus over a four-year period. *See id.* at I-13.

In February 2016, upon definitively concluding that McGee's conduct had occurred, the University self-imposed sweeping penalties. It banned the men's basketball team—ranked 13th in the nation that season, and widely considered a strong prospect for the Division I championship—from NCAA postseason competition. University Resp. at I-13 to -14; *see* COI Hearing Tr. at 397:23-398:11. The University also eliminated two scholarships, reduced recruiting opportunities by 30 days, and forfeited 10 official recruiting visits. University Resp. at II-14. In addition, it permanently disassociated McGee from its athletics program and voluntarily paid a $5,000 fine. *Id.*

Since then, the University has taken further corrective actions to prevent similar events from ever recurring. It disassociated student-athletes whom it found had not cooperated with the joint investigation. COI Hearing Tr. at 395:4-10. It hired outside groups to conduct an independent misconduct risk assessment of the athletics department as well as a Title IX sexual misconduct and sexual harassment review. University Resp. at III-4. It enhanced rules education for student-athlete hosts and persons involved in campus dormitories. *Id.* It improved security at Minardi Hall and required additional training of residence hall staff. *See* COI Hearing Tr. at 92:5-93:22; University Resp. at III-4 to -5. And it

implemented monthly monitoring reports in each athletics program in order to ensure that each team's coaching staff is kept informed of team developments. University Resp. at III-5

C. The Notice Of Allegations

In October 2016, the enforcement staff filed a notice of allegations (NOA) against the University, McGee, head coach Rick Pitino, and a former men's basketball program assistant. The enforcement staff alleged that McGee had involved 20 individuals in his scheme over the course of three and a half years. NOA at 1. Seven of those individuals later played for the men's basketball team. *See* University Resp. at III-12 to -13.[1] Based on a rough estimate of the monetary value of a striptease dance, an offer of sex, a sex act, and the "tips," the enforcement staff estimated that the "benefits" each enrolled student-athlete received ranged from $100 to $480. NOA at 1-3.

student-athletes identified by the enforcement staff competed during the 2011-12 and 2012-13 seasons

See NOA at 2-3 (Allegations 1.b, 1.d, 1.j); University Resp. at III-12 to -13. The NOA did not allege that any of these individuals engaged in sex acts; indeed, it acknowledged had been offered sex and declined. NOA at 2 (Allegation 1.b). Furthermore, during its investigation, the enforcement staff

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See University Resp. at III-13.

granted "limited immunity" so that he would testify fully about McGee's conduct without risk of "be[ing] declared ineligible for intercollegiate competition based on information reported to the enforcement staff." Bylaw 19.3.7(d); *see* Limited Immunity Letter at 1 (Nov. 11, 2015). fulfilled that responsibility, describing in detail what he had witnessed of McGee's scheme, as well as his own and other students' conduct.

The enforcement staff also alleged that student-athletes who competed in the 2013-14 and 2014-15 seasons had been made participants in McGee's scheme *See* NOA at 2-3 (Allegations 1.e, 1.f, 1.j, 1.m); University Resp. at III-13. It found that —had engaged in sex acts at McGee's urging; was at the time, and was . had been offered sex and refused, and he too testified about what occurred under a grant of limited immunity. NOA at 2 (Allegation 1.e); *see* Limited Immunity Letter at 1 (Oct. 7, 2015).

On the basis of these allegations, the enforcement staff recommended that the University's violation be classified as Level I. It also recommended that the University be assigned two mitigating factors. It noted that the University had "publicly confirmed the occurrence of violations" and "accepted responsibility by self-imposing" the penalties of a post-season ban, grant-in-aid reductions, and

recruiting limitations. NOA at 10. It also found that the University had "[a]n established history of self-reporting . . . violations." *Id.*

D. The University's Response

In its response to the NOA, the University agreed with the large majority of the enforcement staff's allegations. It affirmed that McGee's behavior was "appalling and inexcusable," and that the University was "deeply embarrassed by McGee's actions." University Resp. at I-4. "Parents of prospective and enrolled student-athletes at the University," it explained, "have every right to expect exemplary behavior from institutional staff members while their sons (and daughters) are visiting or enrolled in the University, and McGee did not meet those expectations." *Id.* at I-4 to -5.

The University disagreed with the NOA, however, on three specific points regarding its students' participation. First, contrary to the enforcement staff's allegation, the University concluded had not in fact attended any striptease dance hosted by McGee. had denied doing so, explaining that he had been present in a room for five minutes, but quickly left before any show began. *See* Interview Tr. at 9-10 (Q: "[D]id you ever see women performing striptease shows or anything like that?" A: "[At] [o]ne party . . . I think it was heading that way but I wasn't there long enough to actually be a part of it"; "[I] walked in there for about five minutes, stuck around and just left."). Other

individuals suggested have been present for longer, but elsewhere expressed uncertainty or made inconsistent statements. University Resp. at II-36 to -37.[2]

Second, the University concluded that had not attended one of the two events attributed by the enforcement staff. As the University explained, attending only one dance, in 2012. *Id*. at II-28 to -29. The sole evidence that attended a second one came from another student-athlete who indicated uncertainty about participation and could not recall the relevant details with specificity. *Id*. at II-28 to -32. and in the absence of any other information, the University concluded that recollection was more reliable.

Third, the University disputed the dollar values the NOA assigned to some of the "benefits." In several cases the enforcement staff assigned different values to the same act—for instance, valuing a dance at $175 in one case and $125 in another—based on the fact that Powell had notated them differently in her journal. *Id*. at II-3; *see* NOA at 1-3. As the University explained, these differences were arbitrary, and the identical benefits should be valued similarly. University Resp. at

[2] *Compare* Interview Tr. at 64 ("On my visit, came in for about 30 or 40 minutes."), *with id.* at 26, 42 ("I remember came in for a second"; " . . . just peeked head in and just see what was going on."); *and* Interview Tr. at 13 (Q: "[W]hen was there, was there for the whole show?" A: "Yes."), *with id.* at 15 ("I want to honestly say that probably really left before it ended.").

II-1. It therefore determined, among other things, that had received benefits valued at $125, rather than $175, as the enforcement staff alleged. *Id.* at III-12 to -13.

Finally, the University noted that at the time the misconduct was revealed, still competing for the men's basketball team. *Id.* at III-19. It explained that shortly after learning of involvement valued at $205—the University filed a petition for reinstatement. *Id.* The NCAA Student-Athlete Reinstatement staff granted the petition eligibility restored without any loss of competition. *Id.* The NCAA required 20 hours of community service and an on-campus program about respecting women and the dangers of high risk behavior. *Id.*

E. The COI's Decision

The COI issued its decision on June 15, 2017. Consistent with the parties' agreement, the committee found that McGee's conduct had occurred and that it entailed "severe violations" of the NCAA prohibitions on unethical conduct, recruiting inducements, and extra benefits. COI Op. at 14-15. The COI added that this conduct was "repugnant." *Id.* at 15. Particularly objectionable, in its view, was McGee's treatment of prospects who were "minors," whom he had "surprise[d]," manipulated, and "coaxed" into having sex. *Id.* at 9, 15.

The COI did not resolve any of the parties' factual disagreements. It observed that, "[w]ith a few minor exceptions," the University agreed that the acts at issue occurred; it therefore did not address the disputed acts

Id. at 2. Nor did the COI resolve the disagreement over the value of particular benefits. It stated simply that the University "disputed the values the escort placed on some of the activities," but that in the committee's view it was not "necessary to place a precise dollar value" on them. *Id.* at 11.

The COI then classified the case as Level I-Aggravated.[3] As a basis for this classification, the committee simply listed several aggravating factors, and stated that "the number and nature of the aggravating factors outweigh the mitigating factors." *Id.* at 22. The committee did not discuss or weigh the University's extensive cooperation, corrective actions, or self-imposed penalties.

The COI proceeded to impose a number of penalties on the University. In addition to the sanctions the institution had already self-imposed, the COI issued a public reprimand, censure, and four years of probation. *Id*. It revoked an additional four scholarships. *Id.* at 23. And it banned all prospective men's basketball student-athletes on unofficial recruiting visits from staying overnight in any campus dorm or other institution-owned property for four years. *Id.*

[3] Because the incidents occurred both before and after the implementation of the current penalty structure, the COI applied the former penalty structure, which it deemed less stringent. COI Op. at 22.

The COI went further. Notwithstanding its repeated observation that the prospects were "minors" whom McGee had "surprise[d]" with these events, the committee imposed two sweeping penalties based on the participation of those student-athletes. First, it vacated the record of every game in which the student-athletes competed after attending McGee's events. It reasoned that McGee "arranged striptease dances and acts of prostitution for enrolled student-athletes and prospects who eventually enrolled at the institution," and that "[s]ome of the prospects were minors." *Id.* at 26. These violations, it continued, were "serious, intentional, numerous and occurred over multiple years. *Id.* Accordingly, the COI found that "[b]y his actions, the former operations director rendered those student-athletes and prospects ineligible for competition," and it vacated every one of their subsequent victories. *Id.*

Second, the COI required the University to forfeit all of the revenues associated with every NCAA tournament game in which those same student-athletes had participated. Again it reasoned that "[t]he student-athletes who participated" in McGee's events "became ineligible for competition," and that those students "knew or should have known that their actions were contrary to NCAA legislation." *Id.* at 22. It therefore directed the University to "return to the NCAA all of the monies it ha[d] received to date through conference revenue sharing for its appearances in the 2012, 2013, 2014 and 2015 NCAA Men's

Basketball Tournaments" in which those student-athletes participated, as well as "[f]uture revenue distributions" from those appearances. *Id.* at 22-23.

Although the COI did not identify or weigh the magnitude of either of these penalties, both would have a severe impact on the University, its basketball program, and the many student-athletes who had no involvement in McGee's scheme whatever. The financial penalty would require the University to forfeit hundreds of thousands of dollars in conference revenues. And the vacation penalty would require the men's basketball team to erase 108 regular season and conference tournament wins and 15 NCAA wins from its record. *See* University Resp. at III-13. Those wins would include the University's 2012 and 2013 Final Four appearances and its 2013 NCAA championship—the first Division I men's basketball title ever to be vacated.

SUMMARY OF ARGUMENT

The University fully agrees with the COI that McGee committed egregious misconduct. And it does not dispute in the slightest that his actions warranted serious penalties for McGee as well as the University. That is why the University banned its own highly ranked team from the 2015-16 NCAA tournament, voluntarily forfeited multiple scholarships, restricted the team's recruiting opportunities, disassociated McGee student-athletes who had not cooperated with the investigation, and promptly paid a fine. And it is why the

University accepted without challenge most of the penalties the COI imposed, including four years of probation, a public reprimand and censure, the revocation of four additional scholarships, and steep restrictions on the University's recruiting opportunities.

The COI abused its discretion, however, by going further, and imposing the harsh penalties of vacation and financial forfeiture based on the involvement of the University's *student-athletes*. Those student-athletes, many of them minors at the time McGee invited them to stop by a room in Minardi Hall, did not engage in misconduct sufficient to justify those severe sanctions; indeed, it was McGee's manipulation of these young men that made his own misconduct especially reprehensible. What's more, the COI issued those penalties without even considering several factors the IAC has made clear *must* be weighed before imposing any sanction, including the University's own extensive cooperation, corrective actions, and self-imposed penalties. The penalties were particularly excessive as to the 2011-12 and 2012-13 seasons.

I. The bylaws provide that the COI "may" order vacation and financial penalties only upon finding that student-athletes "competed while ineligible." Bylaw 19.9.7. Both penalties hinge on the participation of ineligible student-athletes. Accordingly, the COI has long imposed these sanctions only where it finds that the student-athletes *themselves* were culpable for some misconduct or

received some meaningful benefit. This follows from the purposes of ineligibility, which serves to prevent student-athletes from wrongly competing in intercollegiate play. And it is the only practice that makes sense: Otherwise, a student-athlete's entire collegiate career could be wiped away for misconduct in which he played no meaningful role, from which he received nothing of value, and for which he could have easily been reinstated.

The COI unaccountably abandoned that longstanding practice in this case. It imposed sweeping vacation and financial penalties based on the fact that *McGee* had manipulated students, many of them prospects and minors, in his scheme. But those individuals were not meaningfully culpable for McGee's misconduct. Moreover, they received almost nothing of value from it; indeed, the COI has repeatedly declined to impose vacation or financial penalties in comparable cases involving strippers. And each of those student-athletes could easily have been reinstated, as one of them in fact was when McGee's misconduct finally came to light.

The COI's arguments to the contrary are without merit. It pointed to a handful of precedents to support its decision, but all imposed vacation and financial penalties where, and only where, student-athletes were highly culpable and had received valuable benefits. The COI also relied on the IAC's seven-factor test for identifying when vacation is "likely," but that test has never been applied to

impose vacation in the absence of some substantial underlying culpability or advantage for student-athletes.

II. The COI further abused its discretion by imposing its sweeping vacation and financial penalties without considering several factors the IAC has emphatically instructed the COI it "must" consider before issuing sanctions. For decades, the IAC has said that the COI must accord "substantial weight" to a University's cooperative and corrective efforts, particularly where those efforts include "a powerful self-imposed penalty." *University of Oklahoma* (IAC 2008), at 7. Here, the University engaged in extraordinary efforts to bring its own misconduct to light. And when it did, it imposed the most severe penalty available: banning its highly-ranked team from post-season competition, among other sanctions. The COI ignored these ameliorative efforts entirely, and did not even attempt to weigh them before imposing further severe sanctions. That was unquestionably error.

The COI compounded that inexplicable omission by failing to make any of the findings necessary to issue a financial penalty. It did not point to any evidence in the record to support the counterintuitive assertion that high school prospects "should have known" that their eligibility was permanently tainted by McGee's disgusting conduct. Nor did it apply any of the factors this committee identified in

Purdue University (IAC 2000)—or any other factors, for that matter—to justify the disgorgement of all of the University's conference revenues.

Last, the COI erred by failing to weigh the impact its penalties would have on the University. It did not acknowledge that its financial penalty would require the forfeiture of hundreds of thousands of dollars, or that vacation would require erasure of two Final Four appearances and a Division I men's basketball championship. It was simply impossible to craft a proportionate penalty without considering these basic facts.

III. At a minimum, the COI was wrong to impose vacation and financial penalties for the 2011-12 and 2012-13 seasons. student-athletes who competed in these seasons after allegedly attending McGee's events should have been deemed ineligible: left the sole event attended before a striptease began, and the COI did not find otherwise; only properly found present at one such event, and that benefit was near the "restitution" threshold; and testified about participation under an offer of limited immunity, and so could not be "declared ineligible . . . based on [the] information reported." Bylaw 19.3.7(d). In any event, to the extent these student-athletes was technically ineligible, the penalties imposed for their participation were grossly disproportionate. None of them engaged in sex,

and all would easily have been reinstated. The COI abused its discretion by imposing the harshest available penalties for the seasons in which they competed.

STANDARD OF REVIEW

The IAC may set aside a "penalty prescribed by the [COI], including determinations regarding the existence and weighing of any aggravating or mitigating factors," upon a finding that the COI "abused its discretion." Bylaw 19.10.1.1. The COI abuses its discretion if its decision:

> (1) was not based on a correct legal standard or was based on a misapprehension of the underlying substantive legal principles;
>
> (2) was based on a clearly erroneous factual finding;
>
> (3) failed to consider and weigh material factors;
>
> (4) was based on a clear error of judgment, such that the imposition was arbitrary, capricious, or irrational; or
>
> (5) was based in significant part on one or more irrelevant or improper factors.

University of Hawaii, Manoa (IAC 2016), at 3 (quoting *Alabama State University* (IAC 2009), at 23).

ARGUMENT

I. The COI Erred By Imposing Vacation And Financial Penalties Based On The Participation Of Student-Athletes Who Were Not Culpable, Received Negligible Benefits, And Would Undoubtedly Have Obtained Reinstatement.

The bylaws provide that the COI "may" vacate team victories or require the forfeiture of conference revenues only upon finding that "a student-athlete competed while ineligible." Bylaw 19.9.7(g) (vacation); *see* Bylaw 31.2.2.4 (financial penalty). Both penalties thus hinge on the participation of an ineligible student-athlete. And both are discretionary: Before imposing either penalty, the IAC has repeatedly made clear, the COI must identify considerations that make it appropriate to erase each victory and claw back each dollar of revenue associated with the games in which a student-athlete competed. *See Georgia Institute of Technology* (IAC 2012), at 15; *Purdue University* (IAC 2000), at 14.

Until now, the COI has followed a common-sense principle in exercising that discretion. It has imposed penalties for a student-athlete's participation only where the *student-athlete* did something wrong or received some unwarranted benefit. In contrast, where a student-athlete was not culpable for misconduct, received only a negligible benefit, or could easily have had his eligibility restored, the COI has deemed these penalties inappropriate. That longstanding practice makes good sense. It would be illogical, and profoundly unfair, to wipe away the

entirety of a student-athlete's collegiate career for violations which he played little part in committing, and from which he received nothing of value.

Here, the COI sharply departed from those bedrock principles. It found that vacation and disgorgement were appropriate almost entirely because of the egregious misconduct of McGee. McGee's conduct was indeed reprehensible, and the institution was rightly required to pay a serious penalty as a result. But in deciding whether to order vacation and financial penalties, the COI failed to consider the other half of the equation: whether the *student-athletes* whom McGee brought unwittingly into a dorm room, many while minors and prospects, and exposed without warning to strippers, engaged in sufficiently severe misconduct to justify the forfeiture of the entirety of their collegiate records and the disgorgement of every dollar earned by the institution in connection with NCAA tournament games in which these student-athletes played.

The answer is no. No prior decision has ever imposed vacation or disgorgement because of an extra-benefits or inducement violation for which the student-athletes bore such limited culpability, gained so little of value, and received no advantage. Imposing those penalties here would be grossly disproportionate to the conduct alleged to have rendered the student-athletes ineligible, and untether both punishments from their animating purpose. In imposing the penalties nonetheless, the COI "misapprehen[ded] the underlying

substantive legal principles," "failed to consider and weigh material factors," and committed a "clear error of judgment." *University of Hawaii, Manoa* (IAC 2016), at 3 (quoting *Alabama State University* (IAC 2009), at 23).

A. The COI Must Consider A Student-Athlete's Culpability And The Nature Of The Benefits He Received When Deciding Whether A Vacation Or Financial Penalty Is Appropriate.

1. The NCAA has repeatedly made clear that the purpose of ineligibility is to withhold a student-athlete from competition when he or she either is culpable for misconduct or receives a more-than-minimal competitive advantage or benefit. The Division I Council has been explicit on this point. In 2005, for example, it removed an ineligibility sanction from the bylaws because "[s]tudent-athletes have no culpability for these violations and no competitive advantage is gained"; "[t]herefore . . . this violation should no longer [a]ffect eligibility." Div. I Proposal 2005-24 (amending Bylaw 12.5.1.7). In 2009, it again explained that certain financial-aid violations should not affect eligibility because "institutions do not typically gain a competitive advantage and the student-athlete has no culpability." Div. I Proposal 2009-67 (amending Bylaw 15.3.3.1); *see also* Div. I Proposal 2009-71 (eliminating ineligibility where an institution impermissibly provides postseason practice expenses because, "[i]n such cases, student-athletes do not have culpability"). The council has repeatedly eliminated ineligibility for offenses for which a student-athlete "did not receive a benefit and little or no recruiting or

competitive advantage occurred." Div. I Proposal 1999-26 (amending Bylaws 13.13, 14.1.6.1); *see* Div. I Proposal 2000-99; Div. I Proposal 1999-98; Div. I Proposal 1998-110; Div. I Proposal 1997-23; Div. I Proposal 1997-7. And it has often said that "violations should not affect eligibility" where "the student-athlete [lacks] control over the situation." Div. I Proposal 2007-27 (amending Bylaw 12.5.1.4.1); *see* Div. I Proposal 2009-46; Div. I Proposal 1999-77.

This focus on culpability and the receipt of something meaningful is also evident on the face of the bylaws themselves, which frequently tie ineligibility to some wrongdoing or benefit on the part of the student-athlete. Those rules deem dozens of offenses "[d]e [m]inimis"—and thus provide that they have no effect on "the involved prospective student-athlete's or student-athlete's eligibility," Bylaws at p. x—because they involve little or no fault on the part of the student-athlete. *See, e.g.*, Bylaw 12.5.1.1.6 (advertising engaged in "without the student-athlete's knowledge or consent" is *de minimis*); Bylaws 13.02.5.2, 13.1, 13.4; 13.11 (recruiting contacts unilaterally "made with the prospective student-athlete" are *de minimis*); Bylaws 14.5.6.8, 3.2.4.7 (institution's failure to provide information or certifications necessary to promptly ascertain eligibility is *de minimis*). Similarly, the bylaws provide that recruiting inducements and extra benefits have no effect on eligibility where the monetary value is too low to confer a meaningful benefit—a threshold the Division I Council previously set at $100, but recently increased to

$200 for non-autonomous institutions. *See* Bylaws at p. x, 13.2.1, 16.11.2.1; *see also* Div. I Proposal 2017-3 (raising threshold to $200).

In addition, the same considerations are central factors in *restoring* eligibility. In determining whether reinstatement is appropriate, the Committee on Student-Athlete Reinstatement explains that it examines principally the student-athlete's "culpability," as well as the "[v]alue of benefit" and "advantage [he or she] gained" from it. Div. I Student-Athlete Reinstatement Guidelines (May 2017), at 15-16 (recruiting violations); *id.* at 21-22 (extra-benefit violations). Where a student-athlete receives a benefit of little value—such as a recruiting inducement worth $500 or less—the committee instructs that he should be reinstated without any loss of competition upon repayment. *Id.* at 15.

2. It stands to reason, then, that the COI has long made these same considerations central in deciding whether a vacation or financial penalty is appropriate. Both penalties turn on the fact that a student-athlete "competed while ineligible." The COI has thus consistently declined to impose these penalties where that ineligibility is more technical than substantial—that is, where the violation that disqualified the student-athlete entailed conduct for which he bears little culpability or from which he received little value.

University of Alabama, Tuscaloosa (2009) is illustrative. There, the COI found that the University of Alabama had improperly awarded benefits to

approximately 200 student-athletes by failing to monitor its textbook distribution program. *Id.* at 3. Twenty-two of the student-athletes who received extra benefits engaged in "intentional misconduct": They purposefully "exploited the institution's textbook distribution system" for their own gain. *Id.* The remainder, however, "*unintentionally* received" the materials, through no fault of their own. *Id.* at 4 (emphasis added). Even though both sets of student-athletes received the same benefits, stemming from the same institutional misconduct, and were technically rendered ineligible as a result, the COI found vacation proper only for the ones who were "intentional wrongdoers." *Id.* at 8.

Likewise, in *California State University, Fresno* (2003), the COI imposed vacation and financial penalties in connection with the 1999-2000 men's basketball season after three players competed while ineligible after "conspir[ing]" to commit academic fraud (and other amateurism violations). *Id.* at 9, 25-27. But the COI declined to order vacation or disgorgement in connection with the 2000-01 or 2001-02 seasons, *id.* at 27, during which the relatives and friends of three other players received impermissible extra benefits in the form of numerous complimentary tickets for admission to men's basketball games. *Id.* at 24. The COI thought the harsh vacation and financial penalties inappropriate even though the violations were "major" and the extra benefits resulted in the three players "compet[ing] while ineligible during portions of the 2000-01 season, and . . .

during the *entire* 2001-02 season," *id.* at 18 (emphasis added), where there was no evidence that the players knew of or personally benefitted from those tickets.

Similarly, in *University of Nebraska, Lincoln* (2012), the COI deemed vacation "not warranted" for 492 student-athletes who had received a benefit worth nearly $30,000. *Id.* at 2, 4. The committee explained that the *institution's* violation was a major infraction, in light of "the large number of student-athletes and sports involved," "the fact that the violations occurred over a lengthy period of time," and "an admitted failure to monitor." *Id.* at 3. But the *student-athletes* bore limited responsibility: they had received the benefit "inadvertent[ly]," and "neither resold" the items they received "nor provided them to others." *Id.* Those "mitigating circumstances" militated against vacation. *Id.* at 3-4.

Numerous other cases show the same principle in effect. In *Indiana University-Purdue University, Fort Wayne* (2015), the COI "decided not to prescribe the vacation penalty" for an institution that improperly awarded $42,224 in financial aid to 52 student-athletes because, among other things, "the student-athletes . . . were completely unaware of the violations." *Id.* at 9. In *Morehead State University* (2017), the COI "decline[d] to apply the [vacation] penalty" to dozens of student-athletes who had competed after benefiting from violations of which they "were completely unaware." *Id.* at 6-7. And in *Georgia Institute of Technology* (2011), the COI imposed a vacation penalty for one student-athlete

who had received extra benefits, but refused to impose vacation for another because the committee could not make "conclusions regarding his culpability in violations and subsequent eligibility status." *Id.* at 12.

Furthermore, the COI has made clear that a vacation penalty is inappropriate where the *value* of the benefit the student-athlete received was not meaningful. As the COI has recently and repeatedly explained, it imposes vacation where "student-athletes compet[ed] after receiving extra benefits of *similar monetary values*" to those previously found sufficient to warrant vacation. *Lamar University* (2016), at 12 n.11 (emphasis added); *see Saint Peter's University* (2016), at 12 n.6 (same). Thus, it has found vacation proper where student-athletes received benefits ranging from $400, *see University of Hawaii, Manoa* (2015), to $12,200, *see Lamar University* (2016).[4] But it has consistently declined to impose vacation in cases involving less. In *University of Memphis* (2009), for instance, the COI declined to impose vacation penalties on student-athletes who had received benefits valued at $170 and $230. *Id.* at 2, 5. And in *Coastal Carolina University* (2008), it held that

[4] *See Saint Peter's University* (2016), at 4 ($824 for a single student-athlete); *Syracuse University* (2015) ($8,335 divided among 5 student-athletes); *Wichita State University* (2015) ($7,500 divided among 21 student-athletes). In *Saint Peter's University*, the COI indicated that one student-athlete received a benefit as low as $80. It is clear, however, that the committee did not rely on this lower-end value. The COI has expressly stated that a benefit worth "under $100 . . . generally does not trigger ineligibility." *Coastal Carolina University* (2008), at 6; *see* Bylaw 16.01.1.1. And the COI's discussion of "similar monetary values" would be meaningless if such a *de minimis* value were sufficient.

vacation was unwarranted in a case involving both "serious intentional violations" and "the direct involvement of a coach" because "the payment to [the] student-athlete . . . was under $100." *Id.* at 6.

Finally, the COI has indicated that vacation and financial penalties are inappropriate where a student-athlete would have been reinstated as a matter of course had the institution known of the technical ineligibility. In *University of Wisconsin-Madison* (2001), the COI determined that vacation was "not appropriate" where an athletics representative had provided 39 current student-athletes more than $11,542 in impermissible discounts on athletics merchandise. *Id.* at 6, 15. The committee explained that "the benefits gained by the student-athletes were easily addressed through repayment for the cost of the benefits." *Id.* at 15. Unlike "recent cases in which the committee has required vacation of records," it explained, this case did not "involve[] academic improprieties that had *far-reaching and unrestorable* consequences in terms of initial and continuing eligibility." *Id.* (emphasis added); *cf.* Div. I Proposal 2005-24 (removing ineligibility in part because, "[h]istorically, student-athletes involved in these violations have been reinstated without conditions").

In sum, the bylaws and the precedents have been consistent: The consequences of ineligibility, including vacation and disgorgement, are not appropriate where the student-athlete is neither culpable of misconduct nor

received any meaningful benefit, and where reinstatement would follow as a matter of course. That makes good sense. It would be absurd, and grossly disproportionate, to hold that an individual who receives an unwanted and minor benefit during recruitment—say, a car ride worth $150—should have his entire collegiate record nullified if that conduct is discovered years later. Indeed, the University is unaware of any COI decision, ever, to impose vacation or disgorgement for violations for which the student-athlete was neither culpable nor received some meaningful benefit. That practice is reasonable, longstanding, and correct, and the COI cannot depart from it. *See Syracuse University* (IAC 2015), at 6-7.

B. The Student-Athletes Involved In This Case Were Not Culpable, Did Not Obtain Any Meaningful Benefit, And Would Undoubtedly Have Been Reinstated.

Nonetheless, in the decision below, the COI abandoned this fundamental premise of the penalty system. It imposed sweeping vacation and financial penalties for every game in which seven student-athletes played over four years, including the team's 2012 and 2013 Final Four appearances and its 2013 NCAA national championship. But it hinged those penalties entirely on the misconduct of McGee, not the culpability of the student-athletes or the value of the benefits they received. That was clear error. The very reasons the COI rightly deemed McGee's misconduct so deplorable largely negated the culpability of the student-athletes

involved. Those student-athletes obtained no meaningful benefit or competitive advantage from McGee's scheme. And it is almost certain that these individuals would have been reinstated had the institution learned of McGee's carefully concealed violations sooner.

1. The COI's own findings make clear that the prospects and student-athletes whom McGee unwittingly involved in his schemes bore little culpability. As the committee explained, "[n]one" of these individuals "had prior knowledge that the activities would occur," and "none . . . expected strippers and prostitutes." COI Op. at 9. Instead, the individuals were "surprise[d] and discomfort[ed]" by McGee's actions. *Id.* Some outright refused McGee's offers of sex. *Id.* at 8. McGee manipulated others into accepting them: He "sent" one individual into a room with a condom, and "coaxed" another into receiving oral sex after the prospect had attempted to "le[ave] the room." *Id.* at 9-10. Many of the prospects simply sat in the room watching the dances and then left.

Furthermore, the COI repeatedly emphasized that most of the young men involved were "minors"—some as young as 16. *Id.* at 1, 14, 26. They relied on McGee to protect their interests. *See, e.g.*, Interview Tr. at 31 (" were kind of shocked at first, like, we're kind of, like—we're teenagers."). The NCAA bylaws themselves recognize that athletics and coaching staff must be "teachers of young people" and set a positive example so that "those younger and *more pliable*"

are not negatively influenced. Bylaw 19.01.5 (emphasis added); *see also New Mexico State University* (2001), at 14 (prospect's actions not "voluntary" where "the men's basketball staff took advantage of the young man's ignorance").

COI precedent makes clear that acts of this nature cannot justify a vacation or disgorgement penalty. Time and again the COI has held that violations of which the student-athletes were "unaware" or which they "inadvertently" had foisted on them cannot be the basis for such penalties. *See University of Alabama, Tuscaloosa* (2009), at 8; *University of Nebraska, Lincoln* (2012), at 3; *Indiana University-Purdue University, Fort Wayne* (2015), at 9. And that is true even where the underlying violations are serious and justify a steep penalty on the part of the institution. *See, e.g.*, *University of Nebraska, Lincoln* (2012), at 3 (declining to impose vacation even where the underlying violation is "major" and involved a failure to monitor). Only "intentional wrongdoers" should have their records vacated, and these student-athletes plainly were not. *University of Alabama, Tuscaloosa* (2009), at 9.

The COI, however, turned this principle on its head. Rather than treating the student-athletes' limited culpability as a significant strike against vacation and disgorgement, it treated it as a reason *for* imposing those penalties. The COI's principal justification for vacation was that McGee had "arranged [the] striptease dances and acts of prostitution for enrolled student-athletes and prospects . . .

[s]ome of [whom] were minors," and that those violations were "serious, intentional, numerous and occurred over multiple years." COI Op. at 26. That is an accurate characterization of *McGee*'s conduct. But it is not a remotely fair description of the conduct engaged in by the prospects and student-athletes, who neither "arranged" the events nor "inten[ded]" to commit the violations, and who were themselves the "minors" manipulated by McGee's scheme. It would be profoundly unfair to use the perpetrator's own manipulation of these young men as a basis for vacating their records. No precedent supports that approach, and the COI was simply wrong to adopt it.

2. The COI compounded its error by imposing vacation and financial forfeiture notwithstanding the negligible value of the "benefits" these student-athletes received. It is plain that McGee's conduct did not give the student-athletes any competitive advantage. The COI also did not find—and the enforcement staff did not claim—that it convinced any prospects to attend the University. To the contrary, multiple prospects reported their unease with McGee's actions and were repulsed by them. *See* COI Op. at 9.

What is more, the monetary value of the "benefits" was insubstantial, and did not involve "similar monetary values" to past precedents involving vacation. *Lamar University* (2016), at 12 n.11; *see Saint Peter's University* (2016), at 12 n.6. Most of the cases the COI has cited as "similar" have involved monetary values

stretching into the thousands; the lowest value to date is $400. *See University of Hawaii, Manoa* (2015). In this case, in contrast, the average monetary value was approximately $250, and many individual values were as low as $100 or $125. That is near or below values previously found insufficient to justify a vacation penalty. *See University of Memphis* (2009), at 2, 5 ($170 and $230); *Coastal Carolina University* (2008), at 6 ($100).

Not only are these values unprecedentedly low, but they are also generally below the current threshold for "restitution" set by the Division I Council. As previously noted, the Bylaws provide that "the eligibility of [an] individual shall not be affected" by the receipt of benefits worth $100 or less, provided they are repaid to charity after "the institution has knowledge of the receipt of the impermissible benefit." Bylaws at p. x; *see Coastal Carolina University* (2008), at 6 (stating that a payment "under $100 . . . generally does not trigger ineligibility"). In April, the council deemed that amount out-of-date and increased it to $200, effective immediately for non-autonomous institutions. Div. I Proposal 2017-3. In other words, many of the student-athletes received benefits at values below what the bylaws themselves now deem effectively *de minimis*. Such an insignificant benefit should not even "trigger ineligibility," *Coast Carolina University* (2008), at 6, let alone constitute the sort of meaningful advantage necessary to merit vacation.

Nor did the student-athletes receive any substantial *non*-monetary benefit. As noted above, the "benefits" McGee foisted on these individuals—strippers and offers of sex—disgusted and shocked many of them. In previous cases involving strippers, the COI has never concluded that students received benefits substantial enough to warrant vacation or financial penalties. In *University of Miami* (2013), for example, the COI found that a booster had "regularly" entertained student-athletes over the course of seven years "by paying for their . . . access to private rooms at Miami-area nightclubs and strip clubs." *Id.* at 9. Although the COI concluded that this conduct conferred impermissible "benefits and inducements" on the student-athletes, it did not order vacation or disgorgement. *Id.* at 36-37. Likewise, in *University of Alabama, Tuscaloosa* (2002), the COI did not impose vacation or a financial penalty where an athletics representative entertained prospects and current student-athletes "[o]n several occasions" over two years by presenting them with "female strippers at parties held at an apartment building on the university's campus." *Id.* at 24-25. And in *University of Mississippi* (1994), the COI declined to issue these penalties even though an institution's athletics representatives provided four prospects "entertainment at . . . topless bars or strip clubs." *Id.* at 6. If the provision of strippers in these cases were insufficient, it is plain that the unwanted "benefits" foisted on the basketball team's prospects were not sufficient here, either.

The COI attempted to distinguish these precedents on the ground that the "magnitude" of the offense in this case was greater. COI Op. at 14. It is not clear that is true even of McGee's misconduct. *Cf. University of Miami* (2013), at 3, 9 (describing numerous deplorable and severe violations that occurred over seven years and culminated in the booster's criminal conviction). But, in any event, it is plain that the magnitude of *the student-athletes'* conduct is not more substantial than in prior cases. In *University of Miami*, the booster not only entertained student-athletes at a strip club but gave them "gifts of cash, clothing and other goods (including a television)," and "[i]n some instances, the student-athletes *asked* the booster for the gifts and favors." *Id.* at 9 (emphasis added). Nothing resembling that sort of active participation and widespread profiteering by the students occurred here.

3. Finally, the vacation and financial penalties were improper because the student-athletes' eligibility could easily have been restored—and promptly would have been, had the University known of McGee's scheme. There is no doubt on this point. When the University learned of McGee's conduct, it promptly sought reinstatement remaining on the team received an impermissible benefit. University Resp. at III-19. Although conduct more serious than most—student-athletes who had accepted a sex act before competing on behalf of the

University, and the "benefits" received were valued at $205—the Student-Athlete Reinstatement staff awarded reinstatement without any loss of competition. *Id.*

It follows that every other student-athlete could have obtained reinstatement without loss of competition, too. The reinstatement committee looks to the very same considerations already described—"culpability," the "[v]alue of benefit" received, and the "advantage [the student-athlete] gained" from it—in determining whether reinstatement is warranted. Div. I Student-Athlete Reinstatement Guidelines (May 2017), at 15-16. None of the student-athletes who competed on behalf of the University was culpable for McGee's manipulation,

And none received anything of substantial value: The reinstatement guidelines expressly state that reinstatement without loss of competition is proper for inducements worth $500 or less. *See id.* at 15. Just as in *University of Wisconsin-Madison* (2001), the student-athletes' conduct did not have "far-reaching and *unrestorable* consequences in terms of initial and continuing eligibility," and vacation and financial penalties were accordingly unwarranted. *Id.* at 15.

This case is therefore unlike *Georgia Institute of Technology* (IAC 2012). There the IAC refused to overturn a vacation penalty because there was "no guarantee that the student-athlete would have been reinstated," and because the

institution was aware of the individual's potential ineligibility but "deci[ded] to allow [him] to participate" anyway. *Id.* at 14. It would be "unfair," the IAC explained, to allow an institution to make that decision, and then, when it did not turn out well, to "return" and try to claim exemption from any penalty. *Id.* Here, in contrast, it is entirely clear that the remaining student-athletes, would have been reinstated. And the University did not "deci[de]" to allow any of them to compete while aware of their potential ineligibility; it is uncontested that it knew nothing of McGee's covert behavior. What would be "unfair" here is to hold each of the student-athletes irreparably tainted because McGee concealed his misconduct so successfully and for so long.

C. The COI's Justifications For Imposing Vacation And Financial Penalties Are Without Merit.

The COI offered two rationales for imposing vacation and financial penalties despite these problems. Neither has merit.

1. The COI claimed that the penalties it imposed in this case were "consistent with" those issued in *Syracuse University* (IAC 2015), *University of Memphis* (IAC 2010), and *Purdue University* (IAC 2000). COI Op. at 22, 26. That is simply not so. In each of these cases, the COI found that the student-athletes both were complicit in misconduct and reaped substantial benefits from it.

Take *Syracuse University* (2015). There, the COI imposed and the IAC upheld vacation and financial penalties for student-athletes who knowingly

collected checks for sham "volunteer" work over a period of months or willingly participated in academic fraud. *Id.* at 30, 32-34, 37-40. None of these individuals could possibly object, as here, that they were unwilling participants in a scheme from which they gained negligible benefit. Moreover, in that case—unlike here—the COI found a lack of institutional control and the active participation of at least half a dozen staff members of the men's basketball team over the course of a decade. *See id.* at 1-3, 62. In no sense was the *Syracuse* decision, which hinged on misconduct by the students themselves coupled with these severe aggravators, "consistent with" the penalties imposed here.

The facts of *Purdue University* (1999) are equally inapposite. In that case, the COI imposed vacation and financial penalties because an assistant coach had paid a prospective student-athlete $4,000 in order to "gain his eligibility at Purdue." *Id.* at 7. The student-athlete accepted the gift and made no effort to repay it. *Id.* at 7-8. It is difficult to imagine a circumstance in which the value of the benefit was more clear or the student-athlete's participation more culpable.

University of Memphis (2009), finally, affirmatively undermines the COI's decision. There, the COI vacated the records of a student-athlete who had himself "engaged in unethical conduct . . . in connection with his college entrance examination," causing him to compete for an entire season "while academically ineligible." *Id.* at 12-13. The COI expressly found that vacation was warranted

because of the "competitive advantage" this violation conferred on the institution. *Id.* at 17-18. In contrast, the COI *declined* to impose vacation or financial penalties for numerous other individuals who had received impermissible extra benefits with low dollar values, such as $230 and $170. *See id.* at 2, 5.

Memphis thus makes the proper approach clear: A student-athlete who receives a significant "competitive advantage" and is culpable for misconduct warrants a vacation penalty; student-athletes with limited culpability who receive minor benefits do not. The student-athletes here are plainly analogous to the latter group, right down to the dollar values. The penalties based on their ineligibility cannot be sustained.

2. The COI also claimed that vacation was warranted in this case because "[t]he violations were serious, intentional, numerous and occurred over multiple years." COI Op. at 26. By using this language, the COI appeared to be invoking the non-exhaustive list of seven factors the IAC has developed to identify cases in which "the likelihood of [vacation] is significantly increased." *Georgia Institute of Technology* (IAC 2012), at 14-15; *see also* COI Internal Operating Procedures 4-15-4.[5] To the extent, however, that the COI believed that the presence of these

[5] The seven factors are:

1. Academic fraud;
2. Serious intentional violations;
3. Direct involvement of a coach or high-ranking school administrator;

factors could justify vacation even in the absence of culpability or meaningful benefits on the part of the student-athletes, it was incorrect.

As the IAC has repeatedly made clear, the seven factors listed in *Georgia Institute of Technology* are neither necessary nor sufficient to justify imposition of a vacation penalty. The IAC clarified in *Syracuse University* (IAC 2015) that "[t]hese factors are *not* requirements to identify when a vacation of wins penalty is appropriate in a particular case." *Id.* at 5 (emphasis added). They merely "signal an increased likelihood" that the penalty will be imposed. *Id.* The ultimate question, as always, is whether a penalty is "excessive and [an] abuse of [the COI's] discretion." *Georgia Institute of Technology* (IAC 2012), at 15.

Consistent with that guidance, the COI has repeatedly held that vacation is unwarranted even though multiple of these factors are present, if there is a more fundamental reason for declining to impose the penalty such as lack of culpability or the receipt of no meaningful benefit. In *University of Alabama, Tuscaloosa* (2009), for example, the COI expressly found that two of the seven factors were present for more than 200 student-athletes: (1) "there were a large number of

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4. A large number of violations;
5. Competition while academically ineligible;
6. Ineligible competition in a case that includes a finding of failure to monitor or a lack of institutional control; or
7. When vacation of a similar penalty would be imposed if the underlying violations were secondary.

Georgia Institute of Technology (IAC 2012), at 14-15.

violations" and (2) "the institution admitted that it failed to monitor the student-athlete textbook distribution system." *Id.* at 8. Nonetheless, the COI found that vacation was warranted only for the student-athletes who were themselves "intentional wrongdoers." *Id.* Likewise, in *Coastal Carolina University* (2008), the COI explained that it "*could* have imposed a vacation of records" because the case involved two of the seven factors: "(1) serious intentional violations and (2) the direct involvement of a coach." *Id.* at 6 (emphasis added). But it declined to do so because "the payment to [the] student-athlete . . . was under $100, which generally does not trigger ineligibility."

The COI cannot now abandon that approach, and treat the presence of a handful of the *Georgia Tech* factors as dispositive. Imposing vacation with respect to student-athletes who neither are culpable nor gained a meaningful benefit is inherently "excessive and [an] abuse of [the COI's] discretion." *Georgia Institute of Technology* (IAC 2012), at 15. And it is an unacceptable "departure from precedent," which the COI cannot "ignor[e]" without justification or explanation. *Syracuse University* (IAC 2015), at 6-7.

Indeed, it should be noted that the seven factors themselves are used principally to identify cases in which the student-athletes' own involvement in misconduct is sufficiently severe to justify vacation. Factors 1 and 5, "academic fraud" and "competition while academically ineligible," intrinsically involve

severe culpability on the part of the student-athlete, a substantial unfair advantage (such as competition without meeting basic amateurism requirements), or both. Similarly, factors 2 and 4—"serious intentional violations" and "a large number of violations"—are usually satisfied because the student-athletes *themselves* engaged in deliberate and numerous violations of the rules. *See, e.g.*, *University of Alabama, Tuscaloosa* (2009), at 8 (describing students who were "intentional wrongdoers"). And cases involving the active involvement of a head coach or high-ranking school administrator (factor 3) or a lack of institutional control (factor 6) are typically egregious enough to merit vacation because the institution itself was complicit in granting a student-athlete an advantage or benefit he should not have received. *See, e.g.*, *Georgia Institute of Technology* (IAC 2012), at 15; *Syracuse University* (2015).

This case involves none of those things. There was no academic misconduct or academic ineligibility; no purposeful or widespread wrongdoing on the part of the students or prospects; no finding that the institution itself lacked control or failed to monitor. The IAC has rejected prior efforts to subject an institution and its student-athletes to harsh penalties based on the conduct of a staff member who acted unilaterally, worked to "conceal [his] violations from discovery," and engaged in actions that lacked any "nexus" to the institution's conduct. *University of Hawaii, Manoa* (IAC 2016) at 5-6 (reversing postseason ban and other penalties

that hinged in part on misconduct by the team's director of compliance). The COI's stark departure from precedent should be rejected, and its vacation and financial penalties reversed.

II. The COI Failed To Weigh Or Address Several Critical Considerations and Mitigating Factors.

The COI committed a second set of errors that also, independently warrants reversal of the committee's vacation and financial penalties. The IAC has repeatedly instructed the COI that it must "set forth in its analysis the evaluation and balancing of the factors which this committee has identified as relevant in setting penalties." *University of Memphis* (IAC 2010), at 15-16; *see Florida State University* (IAC 2010), at 11-12. This requirement vindicates foundational values of the NCAA's enforcement system, including "fundamental fairness to the institution, general deterrence and education of the NCAA membership, and facilitation of this committee's appellate review." *University of Memphis* (IAC 2010), at 16.

The COI failed to follow this directive in multiple respects. It entirely ignored the institution's exemplary cooperation, corrective efforts, and sweeping self-imposed penalties—critical considerations to which the IAC has said the COI "must" accord "substantial weight." *Florida State University* (IAC 2010), at 11 (quoting *University of Mississippi* (IAC 1995), at 15). It failed to issue several findings necessary for imposition of a financial penalty. And it made no effort to

weigh the severe "impact" of the various punishments it imposed. Each of these errors was prejudicial, and each entailed a "fail[ure] to consider and weigh material factors." *University of Hawaii, Manoa* (IAC 2016), at 3 (quoting *Alabama State University* (IAC 2009), at 23). They too merit reversal.

A. The COI Clearly Erred By Failing To Consider Or Weigh The University's Corrective Measures, Self-Imposed Penalties, And Extraordinary Cooperation.

The committee's first error is straightforward. In a line of decisions stretching back decades, the IAC has consistently and emphatically held that a University's cooperative efforts and corrective actions "*must* be 'a significant factor and given substantial weight in determining penalties.' " *Florida State University* (IAC 2010), at 11 (emphasis added) (quoting *University of Mississippi* (IAC 1995), at 15); *see also University of Oklahoma* (IAC 2008), at 7; *University of Michigan* (IAC 2003), at 10; *Howard University* (IAC 2002), at 31. Because "[t]he NCAA enforcement process does not include many of the features of a judicial system, such as a subpoena power and testimony under oath," the COI is "required in many instances to rely on the good faith, assistance and cooperation of the institution being investigated." *University of Mississippi* (IAC 1995), at 17. Institutional cooperation is thus "an important element in the NCAA enforcement program" and must therefore "be a factor when the Committee on Infractions imposes penalties." *Id.*

Applying this rule, the IAC has reversed multiple prior penalties on the ground that the COI "did not acknowledge or discuss the nature or extent of the institution's cooperation, nor specify what weight, if any, it was given." *University of Oklahoma* (IAC 2008), at 7-8; *see Alabama State University* (IAC 2009), at 25; *University of Georgia* (IAC 2005), at 28. It has deemed reversal particularly appropriate where the COI failed to acknowledge an institution's "extraordinary" cooperative efforts, *University of Michigan* (IAC 2003), at 10, or did not accord substantial weight to "a powerful self-imposed penalty which seriously affected the [athletics] program," *University of Oklahoma* (IAC 2008), at 7; *see University of Georgia* (IAC 2005), at 28 (same). Moreover, the IAC has repeatedly explained that the COI cannot satisfy this requirement by making "a conclusory assertion that such a factor was considered," *Howard University* (IAC 2002), at 31, or offering a "pro forma reference to the institution's cooperation." *Florida State University* (IAC 2010), at 11. It must expressly "analyze the role that these elements played, [and] the weight they carried, in fashioning . . . penalties." *Id.* at 10.

Here, the University engaged in "extraordinary" efforts to assist the enforcement staff's investigation. When it received a tip concerning McGee's conduct, it promptly informed the NCAA. University Resp. at I-1 to -2. It then worked tirelessly to advance the enforcement staff's investigation and hold itself accountable for the team's conduct. It sent representatives out-of-state to persuade

former student-athletes and staff members who had no obligation to testify to nonetheless cooperate with the NCAA. University Resp. at I-2, I-12 to -13. It engaged in extensive reviews of the visitor logs at Minardi Hall to determine how McGee had gotten strippers into the building. *Id.* It ran down numerous leads to figure out where he had procured the money he used for "tips" and whether they included University funds, *id.* at I-13; COI Hearing Tr. at 56:4-57:18. Working on the NCAA's behalf, the University requested materials from the publisher of Powell's book and assembled a detailed chart for the enforcement staff detailing the name, date, and host of each prospective student-athlete's visit to campus over a four-year period. University Resp. at I-13.

Furthermore, once the University confirmed that McGee's conduct had occurred, it issued "powerful self-imposed penalt[ies] which seriously affected the [basketball] program." *University of Oklahoma* (IAC 2008), at 7. It banned its men's basketball team—ranked thirteenth in the nation—from postseason play in 2015-16, cut the team's scholarships, and eliminated several of its recruiting opportunities. As the University's athletics director later explained, "banish[ing]" the team from postseason play was "the greatest and toughest thing I have ever had to do in 32 years as an A.D." COI Hearing Tr. at 62:18-22. The team had performed exceptionally well that season and its leadership believed "that we could have won a National title." *Id.* at 397:23-398:1. But he concluded that "we made

the mistake, we knew it, we looked at it, and we felt we were the ones that were responsible to fix it." *Id.* at 400:13-17.

In addition, the University responded to these events by strengthening what was already one of the most proactive compliance programs in the country. As the University recently reiterated to the COI, it has long overseen a comprehensive rules education program, conducted regular reviews of its compliance efforts, and has a history of self-reporting violations to the NCAA when they occur. *See* Preliminary Report to the Committee on Infractions at 1-3 (Aug. 1, 2017); NOA at 10 (describing "established history of self-reporting Level III or secondary violations.") Nonetheless, after McGee's conduct came to light, the University took additional corrective actions to ensure similar conduct would never happen again. It engaged in a top-to-bottom review of its recruiting and housing programs. It substantially improved security at Minardi Hall. It dismissed McGee and disassociated student-athletes who had not cooperated with the NCAA's investigation. COI Hearing Tr. at 395:4-10; *see* University Resp. at III-4 to -5.

The enforcement staff itself acknowledged the depth of the University's efforts. It recommended that the University's cooperation and corrective actions qualify it for the mitigating factor of "[p]rompt acknowledgment of the violation, acceptance of responsibility and imposition of meaningful corrective measures and/or penalties." NOA at 10. At the in-person hearing before the COI, the

enforcement staff affirmed that "the institution and enforcement staff . . . worked cooperatively in a thorough and proven fashion throughout th[e] investigation." COI Hearing Tr. at 42:23-43:1. It added that the University's athletics director is "committed to compliance" and "wants his staff to do what they can to help the enforcement staff," which "makes him and his institution really easy to work with." *Id.* at 422:23-423:5. A representative of the Atlantic Coast Conference, who was also a former NCAA staff member, likewise stated that "[t]he Conference . . . view[s] Louisville's compliance efforts in very high regard." COI Hearing Tr. at 424:16-18.

The COI, however, ignored all of these efforts. It did not acknowledge the University's extensive cooperative and corrective efforts. Nor did it discuss the University's severe self-imposed penalty, beyond a conclusory statement that "[t]he institution's corrective actions are contained in the Appendix." COI Op. at 22. Indeed, in determining a penalty level, the COI simply stated that "the aggravating factors outweigh the mitigating factors," without identifying what those mitigating factors were or explaining how the COI weighed them. *Id*. These "pro forma" references to the University's efforts plainly did not discharge the COI's obligation to actually "analyze the role that these elements played, [and] the weight they carried, in fashioning . . . penalties." *Florida State University* (IAC 2010), at 10-11.

That omission, furthermore, was highly prejudicial. The University's efforts matched or exceeded the ameliorative efforts the IAC has previously found to mandate reversal. In *University of Oklahoma* (IAC 2008), the IAC held that vacation of records was an inappropriate penalty where the institution dismissed two members of the football team. In *University of Georgia* (IAC 2005), the IAC reversed the loss of numerous scholarships because the institution released four student-athletes from their obligations to attend. Here, the University did much more: It "banished" its highly-ranked team from the ACC and NCAA tournaments altogether, ensuring that it could not win a conference or national title. And it did so after engaging in "extraordinary" cooperation, much as in *University of Michigan* (IAC 2003), that played a critical role in bringing its own team's misconduct to light. These efforts were entitled to "substantial weight" in the COI's analysis. The committee accorded them none. That alone merits reversal.

B. The COI Failed To Consider Factors Or Make Findings Necessary To Impose A Financial Penalty.

The COI committed a further reversible error by failing to find either of the necessary predicates for a financial penalty: It did not identify record evidence showing that student-athletes "should have known" they were ineligible, and it did not consider, let alone weigh, the factors the IAC has long said are critical in determining whether a financial penalty is appropriate.

1. The bylaws provide that the COI "may assess a financial penalty" only "[w]hen an ineligible student-athlete participates in an NCAA championship and the student-athlete or the institution *knew or had reason to know of the ineligibility."* Bylaw 31.2.2.4 (emphasis added). As the IAC explained in *University of Memphis* (IAC 2010), "the factual predicate" for this penalty is that a student-athlete or institution had " 'reason to know' that [the student-athlete's] eligibility was in question." *Id.* at 14. And the COI cannot simply assert that this predicate is satisfied. Rather, "it is very important" that the COI both "(a) state the [finding] explicitly; and (b) identify the record evidence on which it bases that conclusion." *Id.* at 15-16.

The COI once again failed to satisfy these requirements. It stated that a financial penalty was warranted because "[t]he student athletes . . . knew or should have known that their actions were contrary to NCAA legislation." COI Op. at 22. As an initial matter, the COI's statement that the *students'* actions were contrary to NCAA legislation is difficult to reconcile with the COI's finding that the students were generally minors who lacked any "prior knowledge" of McGee's scheme and were "surprise[d] and discomfort[ed] at what transpired." COI Op. at 9. Indeed, it is entirely unclear what more the COI expected of prospects who refused McGee's offers of sex, who left the event almost immediately and before any striptease began. *See supra* at pp. 8-11.

In any event, the COI did not point to any "record evidence" showing that the student-athletes somehow "knew or should have known" that McGee's conduct rendered them ineligible. The COI assumes that "experienced" or "veteran" coaches are familiar with NCAA rules. *See, e.g.*, *Lamar University* (2016), at 7 ("As a veteran coach, the former head coach knew, or should have known, that he could not supplement student-athletes' financial aid agreements."); *Saint Mary's College of California* (2013), at 19 ("an experienced collegiate coach . . . knew or should have known[] that his actions in sponsoring the prospect were contrary to NCAA rules"). But it does not make the same assumption of student-athletes or prospects. On the contrary, in the rare circumstances in which the COI has found that a student-athlete "should have known" of his ineligibility, it has identified some particularized evidence that the student was placed on notice that his eligibility was at risk. In *University of Memphis* (IAC 2010), for instance, the IAC found that a student-athlete was "aware that his eligibility was in serious jeopardy" because he had received official correspondence informing him that his SAT score was "invalid." *Id.* at 14-15. In contrast, in *Tulane University* (1991), the COI found that a student-athlete "had no reason to know that a violation of NCAA legislation had taken place" when a coach unilaterally deposited more than $4,000 in "wages" into his account. *Id.* at 3.

There is no basis in the record to conclude that the young men McGee involved in his schemes were on notice that their eligibility might be in jeopardy. Unlike in *University of Memphis* (IAC 2010), they did not receive any specific notification that they might have lost eligibility. Nor would it have been self-evident that McGee's conduct rendered these student-athletes ineligible. Much as in *Tulane University* (1991), they may reasonably have assumed that a staff member's unilateral decision to confer a gratuitous "benefit" on them, without their cooperation or approval, would not irrevocably taint their collegiate careers for years down the road. At the very least, the COI could not simply assume to the contrary. Its failure to make any such finding was clear error.

2. The COI erred still further by failing to consider or weigh the factors that the IAC has said it must consult when deciding whether to impose a financial penalty. In *Purdue University* (IAC 2000), the IAC identified "several factors" that should affect the imposition and amount of a financial penalty: "the nature of the violations, the contributions by the ineligible student-athlete toward the success of the team; and the manner in which the university has investigated and corrected the circumstances giving rise to the violations among others." *Id.* at 14. In the years since, the COI has repeatedly relied on this foundational decision and purported to apply its factors. *See, e.g.*, *University of Memphis* (2009), at 19.

In this case, the COI did not consider any of those factors. It failed to consider whether the "nature" of the student-athletes' activities justified the harsh sanction of financial forfeiture (which it surely did not). *See supra* Part I.B. It made no reference whatever to the "contributions by the ineligible student-athlete[s]"—a consideration of particular importance in the 2012-13 season, when

student-athletes were ineligible,

University Resp. at III-12 to -13. And as just discussed, the committee neither acknowledged nor weighed the University's exemplary cooperation in the "investigat[ion]" and its "correct[ive]" efforts.

Nor did the COI identify any other factors that made this penalty proper. It simply recited the requirements in the bylaws. But those cannot be a sufficient basis to justify the COI's exercise of *discretion* to impose a financial penalty, which necessarily requires more than a finding that the mandatory prerequisites for the penalty are satisfied.

Indeed, even if the COI had properly deemed a financial penalty appropriate, the COI's failure to consider these factors prevented it from determining what "amount" was proper. *Purdue University* (IAC 2000), at 14. The COI has repeatedly determined that institutions should forfeit less than 100 percent of conference revenues from games in which ineligible student-athletes played. *See,*

e.g., *Ohio State University* (2006), at 42. Here, the University's extraordinary cooperation, the minimal culpability of the student-athletes, and the limited number of individuals arguably involved made it unreasonable to find that a full penalty was appropriate. And if the COI had some reason for concluding it was, the committee was required to "set forth in its analysis the evaluation and balancing of the factors" which led it to that conclusion. *University of Memphis* (IAC 2010), at 15-16. It did not, and so its penalty cannot be affirmed.

C. The COI Improperly Failed To Weigh The Impact Of The Penalties On The Institution

Finally, the COI erred by failing to consider the impact of the penalties it imposed. A fundamental principle of the penalty system is "proportionality." *University of Texas at El Paso* (IAC 1998), at 23. In order to ensure that a penalty is not "excessive," the COI must ensure that the "totality of the penalties imposed" corresponds to the severity of an institution's offense. *University of Central Florida* (IAC 2013), at 13; *see Saint Mary's College of California* (IAC 2013), at 5.

The COI cannot perform this calibration without examining how a penalty will "impact" an institution. The IAC has stated, for instance, that "[t]he impact of [an institution's] self-imposed probation" is a "material factor" that the COI must "appropriately consider and weigh." *Alabama State University* (IAC 2009), at 25 (deeming the failure to do so "an abuse of discretion"); *see also University of*

Oklahoma (IAC 2008), at 7 (reversing vacation penalty because the COI did not "acknowledge or discuss" a self-imposed penalty that "seriously affected the football program"). It has described probation as "a significant sanction in and of itself" because of its "negative impact on recruitment." *Coastal Carolina University* (IAC 1995), at 8. It has long held that the COI must give "appropriate consideration to the impact of th[e] penalties on innocent student-athletes." *University of California, Los Angeles* (IAC 1997), at 11. And the COI itself has considered "the impact of [a] fine on the institution" in deciding whether it is appropriate. *Georgia Institute of Technology* (2011), at 18.

In this instance, though, the COI did not examine the impact of either the vacation or financial penalties it imposed. It simply listed the years for which it wished the University to pay a financial penalty, and cross-referenced a chart the University had provided listing which years various student-athletes had competed in which they were allegedly ineligible. COI Op. at 23, 26. In fact, each of these penalties would be extremely and unusually harsh. The financial penalty would require the University to forfeit hundreds of thousands of dollars in past and future conference revenues—revenues that support student-athletes in all of the University's men's and women's athletic programs. The vacation penalty, meanwhile, would result in the vacation of 123 games, including two Final Four appearances and the 2013 NCAA championship—the first Division I men's

basketball championship ever vacated. This punishment would have a particularly harsh impact on the numerous "innocent student-athletes" who competed in the various seasons, and who would have their collegiate records erased for acts in which they had no even arguable involvement.

The COI should have factored these severe consequences into its analysis when deciding whether vacation and financial penalties should be imposed, either in whole in or in part. Had it done so, it is likely that it would have concluded that these unprecedentedly large penalties were not a proportionate sanction for the participation of a handful of student-athletes who had been manipulated into being participants in McGee's depredations.

III. At A Minimum, Imposing Vacation And Financial Penalties For The 2011-12 And 2012-13 Seasons Was Excessive.

Whatever else it does, the IAC should at least remove the vacation and financial penalties the COI imposed for the 2011-12 and 2012-13 seasons.

student-athletes competed in those seasons after allegedly being involved in McGee's activities None of these student-athletes should have been deemed ineligible at all. And even if they were, their conduct was plainly insufficient to justify a vacation or financial penalty:

None engaged in sex or received benefits of meaningful value, and each would easily have been reinstated.

A. None Of The Student-Athletes Who Participated In The 2011-12 And 2012-13 Seasons Is Properly Deemed Ineligible.

1. As described above, the University determined that did not participate in any of McGee's events. himself asserted that attended a party for five minutes and left before a striptease began. *See* Interview Tr. at 9-10. Some individuals suggested otherwise, but they backtracked on that testimony or expressed uncertainty. University Resp. at II-36 to -37. The University found testimony more credible and accordingly contended in its response to the NOA that the enforcement staff erred by including in its allegations.

The COI declined to resolve this dispute. Its report nowhere mentions Nor does it analyze the factual allegations on which the enforcement staff based its contested claim. Indeed, the COI appeared to operate under the mistaken impression that it was irrelevant whether deemed ineligible, referring elliptically to a few "minor" factual disputes between the parties. COI Op. at 2.

Accordingly, cannot be held ineligible. The enforcement staff bears the burden of proving allegations against an institution or its students. And where facts necessary for imposition of a penalty are in dispute, the COI must issue findings, on the record, resolving them. Bylaws 19.7.7.4, 19.8.1; *see University of*

Memphis (IAC 2010), at 16 (explaining that the COI must state its finding "explicitly" and "identify the record evidence on which it bases that conclusion."); *University of Mississippi* (IAC 1995), at 9 (discussing need for COI to make specific findings). It cannot simply assume that a student-athlete took part in an egregious violation and vacate his entire collegiate career as a result.

Furthermore, even if engaged in the conduct alleged, the benefit allegedly received was valued at only $100. That value is within the threshold sufficient to obtain reinstatement without loss of competition. Div. I Student-Athlete Reinstatement Guidelines at 21. Indeed, in *Coastal Carolina University* (2008), the COI stated that a payment of $100 or less "generally does not trigger ineligibility" at all. *Id.* at 6; *see* Bylaws at p. x. thus remained eligible throughout the 2011-12 and 2012-13 seasons, and no vacation or financial penalty could be attached conduct.

2. Much the same is true of The enforcement staff alleged participated in

The COI did not resolve the parties' dispute as to the first of these episodes, and the second involved a benefit too insubstantial to justify vacation.

a. With regard to the event, disclaimed participation in any striptease event prior The University found his recollection

particularly credible because admitted to participating in a separate episode and described it in detail. The evidence to the contrary was a student-athlete's hazy and inconsistent recollection that may have joined him at an earlier show. The University reasonably concluded that recollection was the more credible. *See* University Resp. at II-28 to -32.

The enforcement staff, again, disagreed. And the COI again did not resolve the dispute. it therefore could not issue a penalty based on it.

b. As for the 2012-13 season, the University does not dispute that attended an event in at which a striptease occurred. Just like every other such dance, the University valued this "benefit" at $125. The enforcement staff initially disagreed and valued it but that divergence was based simply on the fact that McGee's "escort," Powell, had assigned it that value in her journal, an arbitrary distinction that in no way reflects a difference between this dance and any other. The COI did not resolve the dispute, apparently believing (again) that the parties' disputes over "precise dollar value[s]" was immaterial. COI Op. at 11.

Accordingly, the only benefit was properly found to have received in the 2012-13 season was a dance valued at $125. That is only $25 above the restitution threshold in existence at the time, and $75 *below* the $200 restitution threshold the Division I Council recently adopted. *See* Bylaws at p. x; *see also*

Student-Athlete Reinstatement Guidelines at 21. This miniscule "benefit" cannot possibly justify the difference between no penalty, on one hand, and vacation of dozens of games and an NCAA championship, on the other. That is particularly so because the value assigned to this "benefit" was by necessity rough, reflecting the enforcement staff's ballpark guess of what a private dance might cost. therefore ought not to be deemed ineligible for the 2012-13 season either.

3. Finally, too cannot be declared ineligible for either season. Bylaw 19.3.7(d) provides that a student-athlete granted "limited immunity" by the COI, who then cooperates fully with the enforcement staff's investigation, cannot "be declared ineligible for intercollegiate competition *based on information reported to the enforcement staff*." (Emphasis added). The COI granted "limited immunity" in exchange for cooperation in its investigation. In reliance on that immunity, spoke truthfully and fully to the enforcement staff about teammates' participation in McGee's events. By the plain text of the bylaw, therefore cannot "be declared ineligible" for that conduct.

Remarkably, the COI suggested otherwise. It stated that a student-athlete's immunity pertains only to games in which he competed *after* "the grant of limited immunity" was awarded. COI Op. at 26. But that is plainly not what the bylaw says. It provides categorically cannot "be *declared ineligible . . . based*

on information [he] reported" to the enforcement staff; it does not say that cannot be declared ineligible "for future games" based on that information. Bylaw 19.3.7(d) (emphasis added). Had the NCAA wished to limit the grant of immunity in this way, it could easily have done so: Later in the very same provision, the NCAA made an exception from immunity for a student-athlete's "*future* involvement in violations of NCAA legislation." *Id*. (emphasis added). Likewise, Bylaw 18.4.1.4 states that a student-athlete "shall be declared ineligible *for further participation* in postseason and regular-season competition" if he tests positive for a controlled substance. (Emphasis added). The NCAA did not include similar language in the limited immunity rule, and the COI cannot read it as if it did.[7]

This reading is not only textually compelled; it is also the only one that makes sense. The purpose of limited immunity under NCAA rules is to encourage student-athletes to "cooperate and share information" by ensuring that they do not suffer adverse "eligibility consequences" for telling the truth. Div. I Proposal PP-2011-2. That promise would be empty indeed if it did not shield a student-athlete from the "eligibility consequence" of having his entire collegiate record wiped away for any past misconduct he reveals. Few student-athletes would cooperate

[7] Nor is there any basis for reading the words "declared ineligible" as referring only to future and not past ineligibility. The bylaws expressly state that a declaration of eligibility can be retrospective. *See* Bylaw 31.2.2.3 (providing that "[w]hen a student-athlete . . . is declared ineligible *following* [a] competition," the individual's or team's performance "may be stricken from the championships records").

with COI investigations if that draconian penalty was the inevitable result, and the NCAA disciplinary apparatus—which relies on voluntary cooperation to be effective—would greatly suffer. Moreover, such a reading would violate the "fundamental principle[]" that student-athletes must not be "disadvantaged by their commitment to compliance." Bylaw 19.01.1.

For just that reason, nearly every form of immunity that the law provides is retrospective, and not just prospective, protection for past conduct. *See, e.g.*, *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972). This reflects the widespread understanding that immunity is valueless if it does not protect a person from relevant legal consequences for the information he reveals. There is no basis to conclude that immunity should operate differently in the context of NCAA violations, where it is designed to achieve the same truth-eliciting function. should accordingly have been deemed eligible for the 2011-12 and 2012-13 seasons as well. And with supposed ineligibility eliminated, along with the lack of any valid finding regarding it follows that the COI simply lacked authority to impose vacation and forfeiture for those years.

B. Regardless, Vacation And Financial Penalties Were Unwarranted For These Seasons.

In any event, even if one or more of these student-athletes were technically ineligible, the COI's vacation and financial penalties for the 2011-12 and 2012-13 seasons would be grossly disproportionate to the scope of their acts.

Each of these student-athletes was especially non-culpable and received nothing of value from McGee's conduct. None engaged in a sex act. spent minutes attending a party before leaving the room was offered sex and refused it—the most that could possibly be expected There can be little doubt that each individual would have obtained reinstatement if the University had known of McGee's conduct, given received reinstatement after substantially greater participation.

In contrast, the scale of the penalty imposed for these students' participation was especially harsh. These individuals played in the 2012-13 season, when the team won its Division I title.

In effect, then, the COI took action to deprive the team of its championship because of the participation attended a party for, at most, a few minutes. That is not reasonable or fair. The COI abused its discretion by imposing such sweeping penalties, and its judgment must be reversed at least to that extent.

CONCLUSION

The COI's vacation and financial penalties should be reversed. At a minimum, the vacation and financial penalties imposed in connection with the 2011-12 and 2012-13 men's basketball seasons should be reversed.