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This Lawyer Highlighted How The NCAA's Amateurism Rules Disproportionately Affect Black College Athletes

Stris & Maher's Tillman Breckenridge is a self-described "beat-the-drum proponent" of being judicious when it comes to filing amicus briefs. But a brief he filed on behalf of African American antitrust lawyers caught the attention of Justice Brett Kavanaugh in this week's blockbuster NCAA decision.

By Ross Todd
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Tillman Breckenridge is a self-described "beat-the-drum proponent" of being judicious when it comes to filing amicus briefs in the U.S. Supreme Court.

"I used to teach my students at William & Mary that it's really just throwing your work on the fire if you're going to repeat what everyone else is saying," said Breckenridge, a veteran appellate and Supreme Court lawyer now at **Stris & Maher**.

But in the antitrust case against the NCAA that the High Court decided this week, Breckenridge found some friends of the court he thought had something vital to add to the mix. Breckenridge served as counsel of record for a group of African American antitrust lawyers including **Patrick Bradford**, the first African American elevated to partner at **Davis Polk & Wardwell** and a founding partner of New York boutique law firm **Bradford Edwards & Varlack**, **Baker Botts** partner **Heather Souder Choi,** and her colleague, senior associate **Christopher Wilson**, who was a running back on the football team at Penn State as an undergraduate.

In the brief Breckenridge filed in the case, the group of African American antitrust lawyers described themselves as "concerned about both the proper interpretation of the federal antitrust laws and the well-being of the most vulnerable and overlooked people affected by the NCAA's admitted anticompetitive conduct—the thousands of African American student athletes who do not make it to the professional leagues, do not graduate from college, and whose labor is taken without market rate compensation."

I spoke with Breckenridge yesterday, the day after Justice Kavanaugh cited his brief in a concurrence with the unanimous decision against the NCAA. The following has been edited for length and clarity.

Litigation Daily: How did this brief effort come together?

Tillman Breckenridge: I have to give all credit to Patrick Bradford for starting things up and really pushing to get this brief across the finish line and make it happen. It's something that Patrick has felt strongly about for a long time, and so he had the idea of putting together a brief that addressed the inconsistency between the purported pro-competitive justification that the NCAA gave: They tried to justify their admittedly anticompetitive conduct by saying they'd lose viewers. But the NCAA's stated mission isn't to make a lot of money on people watching sports. It's to provide opportunities for athletics in education and to promote the education of the athletes.

Photos: Courtesy/ALM

Tillman Breckenridge, with Stris & Maher.

We wanted to put together a brief that pointed out to the court that those two concepts are at odds. They're not in harmony.

Then also Patrick really wanted to highlight how this really affects the African American community. The labor that is exploited here tends to be mostly African American labor. Yet it's one of the very rare places, as pointed out in Justice Kavanaugh's concurrence, where the labor is allowed to be exploited in such a way. The justification for telling labor that "We're not going to pay you" is just because the people who enjoy the benefits of the labor don't want you to be paid. It's really a notion that just doesn't make sense. Justice Kavanaugh really gave some great examples when he talked about nurses and other professions where you could theoretically say: "People want to be taken care of by nurses who do it for the love of the profession." You couldn't suppress their pay on that theory.

Have you ever filed a brief like this before on behalf of African American lawyers who specialize in a certain field?

No, I have not. I'm actually a big big beat-the-drum proponent of being very judicious in your use of amicus briefing. I've been solely a Supreme Court and appellate lawyer for 15 of my 20 years practicing now. I went back and looked today because somebody asked me "How many merits briefs have you filed for amici in the Supreme Court?" It's only seven.

I used to teach my students at William & Mary that it's really just throwing your work on the fire if you're going to repeat what everyone else is saying. Unless you have something really valuable to say, don't waste your time. The reason the person asked me how many I've filed was because they noted that this was the second time that I'd been cited as an amicus. I was like, "Two of seven: That's not a bad percentage." [Editor's note: Breckenridge's other cited brief was on behalf of law professors in *Riley v. California*, the landmark 2014 case where the court unanimously found that it's unconstitutional to search and seize the digital contents of a cell phone during an arrest without a warrant.]

I don't put them in unless there's something to say that's really going to help the court. In this case, Patrick really brought that idea up to me and then I evaluated whether under my criteria it was worth filing an amicus and decided "absolutely." These are both points that really need to be stated in a certain way and this is a group of lawyers who are in a unique position to be able to state it well.

Do you anticipate doing it again?

If the circumstances make sense, absolutely.

Your brief opened by saying that the way the issues were framed before the court "lacks pragmatism and permits fiction to trump reality, to the detriment of many talented Black athletes and their families." Why was it important to add these voices to the mix?

It was important because they're voices who are not heard and they need to be. They're voices of people who don't always have the means to make change in the more direct legislative ways or otherwise. A lot of times they can't afford lawyers.

Winston & Strawn did an outstanding job representing the athletes in this case. It's good that they've given those athletes a voice as well. But a lot of my work involves representing these kinds of people. I just had **this win in the Fourth Circuit**, where it was people who had fought an environmental torts case where they had been fighting for 30 years. They went to the legislature. They went to regulatory bodies. They would get a regulation in their favor and then the large corporate entity they were against would turn around and get a law passed that ruined it.

It was an opportunity to give voice to people who aren't heard nearly enough and this is their own livelihoods at stake. This is their problem far more than it's the viewers problem or anyone else's problem. They're the ones whose labor is being exploited for compensation that is not what it's purported to be. That was another thing that we wanted to make sure was clear in our brief: The NCAA likes to say, "Hey, we're giving these college scholarships." But even the value of that scholarship isn't as high because of the nature of the athlete-first requirements, particularly in the big money sports. African Americans have lower graduation rates among NCAA football players and men's and women's basketball players. Even if they do graduate, a lot of times that degree is looked on with suspicion. We felt like that point needed to be made.

I think the key to that is that the procompetitive justification—eyeballs on screens—is one of the things that causes them to not be able to get the full educational benefit to which they purportedly are provided. So the justification is not irrelevant, it's just the opposite: It's completely at odds with the stated mission of the NCAA.

You wrote that the "the judicial analysis should acknowledge the great harm to the not-for-profit mission and the evident and concomitant harm facing Division I football and basketball players as the outcome of 'amateurism' in its current form." Did the court, in your opinion, get there in this decision?

Yes and no. The **opinion of the court** doesn't really go into that, and it's completely understandable given the rather narrow injunction on which the case was sitting. So Justice Gorsuch, writing for the court, did a strong job analyzing the issues that were presented directly to it. Our amicus wanted the court to go farther and thankfully Justice Kavanaugh took up that mantle and provided some notice to the NCAA that this is not the end of it. Their restrictions are really suspect when viewed through an antitrust lens.

In his concurrence, Justice Kavanaugh noted that coaches, athletic directors and NCAA executives make six- and seven-figure salaries and colleges spend huge sums on facilities. Citing your brief, he wrote: "But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing." Do you think that your message hit its mark?

Absolutely. And it was great to see Justice Kavanaugh adopt the message. So, I do believe it made an impact. You like to think that all your briefs made an impact, but obviously being cited you can prove it. (Laughs.) So, obviously, it's great to see that.