

Nos. 14-16601, 14-17068

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD O'BANNON, JR.,
ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant-Appellant,

and

ELECTRONIC ARTS, INC.; COLLEGIATE LICENSING COMPANY,
Defendants.

Appeals from the United States District Court for the Northern
District of California, No. 09-cv-03329 (Wilken, C.J.)

BRIEF FOR THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

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CORPORATE DISCLOSURE STATEMENT

The National Collegiate Athletic Association is an unincorporated, non-profit membership association composed of over 1,200 member schools and conferences. It has no corporate parent, and no publicly held corporation owns 10 percent or more of its stock.

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JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337 over plaintiffs' antitrust claims, *see* 15 U.S.C. §§ 1, 26. The court entered judgment and issued a permanent injunction on August 8, 2014. ER7, ER9. The National Collegiate Athletic Association (NCAA) noticed its appeal twelve days later. ER281-282. This Court has jurisdiction over that appeal (No. 14-16601) under 28 U.S.C. § 1292(a)(1).

On October 16, the district court certified its August 8 judgment as final under Federal Rule of Civil Procedure 54(b). ER1. The NCAA noticed a second appeal five days later. ER284-285. This Court has jurisdiction over that appeal (No. 14-17068) under 28 U.S.C. § 1291.

This Court consolidated the two appeals on October 27, 2014.

INTRODUCTION

College sports have a long and cherished history. They contribute to the overall college experience; they play a lasting role for alumni; they attract millions of fans and, at times, large television audiences; and, most significantly, each year they help thousands of people pursue a college education. Today, nearly a half million young men and women compete annually in one (or more) of the 23 championship sports sanctioned by the NCAA.

At the same time, the commercial pressures of college sports present (and have always presented) the risk that an avocation will become a profession and that athletics will become untethered from the academic experience. This case is in significant part about how to address that risk, about how to regulate intercollegiate athletics more generally, and ultimately about who should make those decisions.

The NCAA believes that it and its members should be allowed to regulate intercollegiate sports, and that maintaining its commitment to amateurism—in no small part to address the risks created by commercial pressures—remains as valid a goal today as it was thirty years ago, when the Supreme Court declared that, to “preserve the character and quality of” collegiate sports, “athletes must not be paid.” *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 102 (1984). The NCAA’s amateurism rules are legitimate—and procompetitive—because they

fundamentally define collegiate athletics by ensuring that the players are students and not professionals.

Plaintiffs, in contrast, believe the model of amateur intercollegiate athletics that the NCAA has embraced since its earliest days—under which student-athletes may not be paid to play—is obsolete and should be discarded. And in plaintiffs’ view, antitrust law is the appropriate mechanism for reform, with federal judges, rather than academic institutions, making judgments about basic eligibility rules and thus the nature of college sports. But recognizing that an undisguised claim of pure pay-for-play was unpalatable, plaintiffs brought claims that student-athletes should receive payments for the dissemination of their “name, image, and likeness” (NIL) in sports broadcasts and certain other media. That is a distinction without a difference; pay for use of a player’s “image” *is* pay-for-play.

Plaintiffs’ view of the courts as superintendents of college sports cannot be squared with controlling antitrust precedent. As the Supreme Court proclaimed in *Board of Regents*, “[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports,” and “[t]here can be no question but that it *needs ample latitude* to play that role.” 468 U.S. at 120 (emphasis added). In other words, the NCAA and its members, not the courts, get to establish the rules of the athletic competitions they sponsor, including who is eligible to play. That is what it means to sponsor a distinct form of competition.

Disregarding the Supreme Court’s admonition—and its clear direction that the “preservation of the student-athlete in higher education ... is entirely consistent with the goals of the Sherman Act,” *id.*—the district court supplanted the judgment of the NCAA and its members, and concluded that paying certain student-athletes roughly \$30,000 each over four years for use of their purported NILs would improve competition without harming amateurism. In fact, the court’s decision vitiates amateurism. Those who are paid to play are not amateurs, whether they are paid \$30,000 or \$300,000.

Plaintiffs’ vision of student-athletes as professionals who merely happen to attend a particular school not only departs from Supreme Court precedent but also does nothing to promote the purposes of antitrust law. Plaintiffs’ purported antitrust injury turns on the fact that they are not paid for use of their NILs—most notably in live-game broadcasts. Yet strikingly, after years of litigation, plaintiffs have not identified a single state that has ever recognized NIL rights for participants in broadcasts of team sporting events. Thus, plaintiffs ask this Court to sustain a finding of a Sherman Act violation based on the possibility that a state might someday recognize such a right, despite First Amendment limitations.

The force of the Supreme Court’s caution that the NCAA “needs ample latitude” to protect amateurism in intercollegiate sports is borne out by the district court’s conclusion that, although amateurism is procompetitive, a less-restrictive

alternative could adequately protect that interest. According to the district court, a world in which student-athletes receive deferred payments and a further amount that the court incorrectly labeled “grant-in-aid” is good enough to preserve amateurism. But amateurs who are paid are no longer amateurs; the courts are not free to simply redefine the essential procompetitive characteristics of products (and principles). Just as important, such line drawing is not a proper judicial role, and it is certainly not authorized by the Sherman Act. If it were, the opportunities for judicial micromanagement would be endless. It might be, for example, that more students would have the opportunity to play college football if the NCAA lowered the required grade-point average or permitted six years of eligibility—but courts surely could not properly order the NCAA and its members to make such changes. The changes the district court ordered here are equally unlawful. It is not the role of either plaintiffs or courts to substitute a different model of college athletics for the one that, with the Supreme Court’s blessing, has existed for decades.

ISSUES PRESENTED

1. Whether NCAA rules prohibiting student-athletes from being paid for their athletic play violate the Sherman Act.
2. Whether plaintiffs lack antitrust injury.

STATEMENT

I. THE NCAA AND THE “REVERED TRADITION OF AMATEURISM IN COLLEGE SPORTS”

A. The History Of The NCAA As Regulator Of Amateur College Sports

Intercollegiate sports began in the second half of the nineteenth century, and as their popularity and commercial potential quickly rose, so did concerns about their compatibility with the educational missions of the colleges that organized them. ER266 ¶¶ 1-2. Initially, no rules regulated who could participate in intercollegiate sports; schools fielded not only students but also professionals and even faculty. ER440. They also “hired players and allowed them to compete as non-students” and “purchase[d] players away from other colleges mid-season.” ER266 ¶ 3. These problems, along with the “large number of serious injuries and even fatalities to players,” “prompted concerns among college presidents and faculty members.” *Id.* “By the early twentieth century, there were widespread calls for a national organization to regulate collegiate athletics, especially football, and ensure that it remained compatible with collegiate values.” ER266 ¶ 4.

In 1905, sixty-two academic institutions founded the NCAA (then called the Intercollegiate Athletic Association) to regulate intercollegiate sports and address these problems. *See* ER266-267 ¶¶ 6, 9. “Since its inception ..., the NCAA has played an important role in the regulation of amateur collegiate sports, ... promulgat[ing] playing rules, standards of amateurism, standards for academic

eligibility, regulations concerning recruitment of athletes, and rules regulating the size of athletic squads and coaching staffs.” *Board of Regents*, 468 U.S. at 88. As this language indicates, amateurism was a central feature of college sports from the outset. The year after the NCAA’s founding, for example, it “set forth the ‘Principles of Amateur Sport,’” the core tenet of which was that students not be paid to play intercollegiate athletics. ER267 ¶¶ 7-8; *see also* ER267-268 ¶¶ 11, 13. Thus began what the Supreme Court has called “[t]he NCAA[’s] ... critical role in the maintenance of a revered tradition of amateurism in college sports.” *Board of Regents*, 468 U.S. at 120.

As college sports continued to grow through the middle of the twentieth century, *see* ER267-268 ¶¶ 12, 16, concerns persisted about “commercialism and a negligent attitude toward the educational opportunity for which a college exists,” ER268-269 ¶ 17. In the 1950s, the NCAA revamped its regulatory structure along lines that substantially remain today. It adopted rules relating to “practice seasons and number of games; postseason competition; curriculum matters and academic progress; financial assistance; eligibility; and adherence to the rules.” ER270 ¶ 24. It established committees for ascertaining infractions and enforcing the rules. *Id.* And it “enacted a national standard governing athletic scholarships,” ER270 ¶ 25; ER288-289, which would be given “as an award to a college athlete for ‘commonly accepted educational expenses.’” ER270 ¶ 25.

B. The NCAA And Amateurism Today

The NCAA now “has roughly eleven hundred member schools,” as well as dozens of member conferences, and it “regulates intercollegiate athletic competitions in roughly two dozen sports.” ER10, ER12. Schools are organized into three divisions; Division I schools—of which there are about 350—“provide the greatest number and highest quality of opportunities to participate in intercollegiate athletics because they sponsor more sports teams and provide more financial aid to student-athletes than schools in Divisions II and III.” ER11-12. Division I football is further subdivided into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS) (previously Division I-A and I-AA); FBS schools may offer more full football scholarships and therefore exhibit a “level of football competition ... generally higher than ... FCS” schools. ER12.

As has been true for more than a century, college sports are very popular as entertainment, and over time their commercial side has continued to grow. For example, in the 2012-2013 academic year the football and men’s basketball programs at the 69 major-conference schools collectively had about \$3.5 billion in revenue, mainly through ticket sales, television broadcast contracts, and other licensing. ER278 ¶¶ 8-9, ER626-629. This revenue furthers the schools’ educational missions in various ways. For example, it funds athletic scholarships, which annually help thousands of students attend college. ER383-384. It also

helps support other athletic programs, the vast majority of which generate more costs than revenue of their own. *See* ER451, ER485-487, ER500, ER639-746. Having “richness and diversity [in] intercollegiate athletics,” *Board of Regents*, 468 U.S. at 120—which the NCAA deliberately encourages by requiring Division I schools to offer at least 16 different varsity sports, ER437, including women’s teams (as required by Title IX)—helps ensure that competitive athletics is a genuine and widely available component of the college educational experience.

At the same time, the commercial side of college sports, as it has for over a century, exerts pressures that could undermine college sports’ nature and value as a component of the educational experience, by driving college sports away from higher education and towards professionalization. The NCAA thus remains committed to the principle of amateurism, the “basic purpose” of which “is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.” ER610 (Art. 1.3.1). The NCAA Constitution today articulates the Principle of Amateurism in substantially the same terms that it has for nearly a century: “Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate

athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.” ER611 (Art. 2.9). Accordingly, NCAA bylaws state that “[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport,” ER612 (Art. 12.01.1), and they define an amateur as one who is not paid for his or her participation. A student-athlete can thus lose “amateur status” by, for example, using “his or her athletics skill (directly or indirectly) for pay in any form in that sport” or “[a]ccept[ing] a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation.” ER614 (Art. 12.1.2).

Although student-athletes may not be paid to play, they may (as has been true since the 1950s) “receive institutional financial aid based on athletics ability,” including scholarships and grants, in order to cover educational expenses “up to ... a full grant-in-aid, plus ... other financial aid up to the cost of attendance.” ER620 (Art. 15.1). A “full grant-in-aid is financial aid that consists of tuition and fees, room and board, and required course-related books.” ER619 (Art. 15.02.5). The “cost of attendance” includes the expenses covered by full grant-in-aid plus “supplies, transportation, and other expenses related to attendance at the institution.” ER618a (Art. 15.02.2).¹

¹ On August 7, 2014, the NCAA allowed conferences to permit their schools to increase the maximum grant-in-aid up to the cost of attendance.

In short, although the NCAA and college sports have grown considerably over the past hundred years, protecting and promoting amateur collegiate sports as an integral part of the educational experience remain the heart of the NCAA's mission today.

C. The Benefits Of The NCAA's Commitment To Amateurism

As just noted, the NCAA's commitment to amateurism is intended to integrate student-athletes into the broader student body and to clearly demarcate the line between college and professional sports. These goals have important benefits.

Integrating student-athletes into the academic community improves their educational experience. Full participation in that experience—not just meeting academic requirements, but also studying, interacting with faculty and diverse classmates, and receiving academic support such as tutoring and mentoring—generally leads student-athletes, especially those from disadvantaged backgrounds, to reap more from their education, including enjoying higher graduation rates and better job prospects. ER352-368, ER370-394, ER400, ER404-405, ER433-435, ER464-465, ER510-512, ER544-548; *see also* ER94 (“The evidence ... suggests that integrating student-athletes into the academic communities at their schools improves the quality of the educational services that they receive.”).

Paying student-athletes for their play is at odds with NCAA schools' educational mission. The commitment to amateurism is essential to achieving integration of student-athletes into the educational community because if they were paid for their athletic play or otherwise exploited commercially, they might be less likely to take full advantage of their scholastic obligations and opportunities. ER350, ER361-368, ER395-398, ER403-407, ER426-431, ER442-443, ER464-467, ER505-507, ER547-550. Such payments might also "create a wedge" between them and their classmates. ER403-407; *see also* ER361-368, ER426-431, ER464-467, ER507-508. The NCAA's strategy has been successful; for example, most FBS football players and Division I men's basketball players see themselves as part of their school's educational community. *See* ER496, ER607.

Critically (given the antitrust context here), maintaining a clear line between college and professional sports also "widen[s] consumer choice—not only the choices available to sports fans but also those available to athletes." *Board of Regents*, 468 U.S. at 102. Intercollegiate sports involve contests between amateur student representatives of competing schools, not contestants playing as a job, i.e., professionals. The NCAA's commitment to collegiate athletics as an amateur endeavor creates a distinct game that many fans enjoy as such. ER335-341, ER453-460, ER483, ER514-515, ER518-543, ER552-559. It also creates a unique experience that many young men and women seek—one that combines athletics,

academics, and a shared sense of tradition, community, and mission. *See* ER15-20 (“None” of the “potential substitutes ... provides the same combination of goods and services offered by FBS football and Division I basketball schools.”).

II. PROCEEDINGS BELOW

A. Pretrial

Plaintiffs sued the NCAA (along with Electronic Arts (EA) and the Collegiate Licensing Company (CLC)), alleging that its members violated section 1 of the Sherman Act, 15 U.S.C. § 1, by agreeing not to compensate FBS football and Division I men’s basketball players for group licenses for use of their names, images, and likenesses (NILs) in live-game broadcasts, videogames, and certain archival footage. ER9; Dkt. 832 at 4, *Keller v. Electronic Arts, Inc.*, No. 09-1967 (N.D. Cal) (“*Keller Dkt.*”).² The district court certified a declaratory and injunctive class, but declined to certify a damages class. *Keller Dkt.* 893 at 23. Shortly before trial, the named plaintiffs voluntarily dismissed their damages claims with prejudice. Dkt. 198 at 1. Plaintiffs also settled their claims against EA and CLC; the district court has preliminarily approved the settlement. Dkt. 312.

² For much of the pretrial proceedings, this case was consolidated with *Keller v. Electronic Arts*, which involved similar allegations but did not rest on an antitrust theory. *See* Dkt. 139. The cases were deconsolidated shortly before trial, and this appeal pertains only to the antitrust claims against the NCAA.

No NCAA rule specifically prohibits payment for using a student-athlete's NIL. Rather, plaintiffs complained about a particular application of the NCAA's general amateurism rules. Accordingly, the NCAA argued in its pretrial dispositive motions that under *NCAA v. Board of Regents* and its progeny, eligibility rules requiring that student-athletes not be paid to play are procompetitive and therefore valid under the Sherman Act as a matter of law. *See Keller* Dkt. 857 at 2 & 5-7; *Keller* Dkt. 926 at 8. The Supreme Court explained in *Board of Regents* that "identification of [the NCAA's] 'product' with an academic tradition differentiates college [sports] from and makes it more popular than professional sports to which it might otherwise be comparable"; that "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid"; and that by maintaining such amateurism rules, the NCAA's "actions widen consumer choice ... and hence can be viewed as procompetitive." 468 U.S. at 101-102. The NCAA further explained that, consistent with *Board of Regents*, lower courts have consistently "applied the 'twinkling of an eye' approach," i.e., upheld the rules as procompetitive without extended analysis. *Keller* Dkt. 926 at 9 (emphasis omitted) (quoting *Board of Regents*, 468 U.S. at 110 n.39).

The district court denied these dispositive motions, departing from the long line of lower-court decisions the NCAA had cited on the grounds that the relevant portions of *Board of Regents* were supposedly dicta and that times had supposedly

changed in material ways since that case was decided. *See* ER156 n.3 (citing *Keller* Dkt. 876 at 8-16), ER88.

B. Trial And Ruling

The district court conducted a bench trial in June 2014. On August 8, it issued findings of fact and conclusions of law, ruling that “the challenged NCAA rules unreasonably restrain trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools.” ER10.

The court first found that the relevant market is the “college-education” market, “a national market in which NCAA Division I schools compete to sell unique bundles of goods and services to elite football and basketball recruits” in exchange for both the recruits’ “athletic services and acquiesce[nce] in their schools’ use of their names, images, and likenesses while they are enrolled” and their agreement to “pay for any other costs of attendance not covered by their grants-in-aid.” ER59. This bundle, the court found, consists of “the opportunity to earn a higher education while playing for an FBS football or Division I men’s basketball team,” *id.*, and all that comes with that, including “tuition, fees, room and board, books, certain school supplies, tutoring, and academic support services,” as well as “high-quality coaching, medical treatment, state-of-the-art athletic facilities, and opportunities to compete at the highest level of college sports, often in front of large crowds and television audiences,” ER15.

The court then determined that FBS football and Division I men's basketball schools harm the college-education market by "forming an agreement to charge every recruit the same price for the bundle of educational and athletic opportunities that they offer: to wit, the recruit's athletic services along with the use of his name, image, and likeness while he is in school." ER63-64; *see also* ER70-71 (finding harm to "market for recruits' athletic services and licensing rights" under the mirror image "alternative monopsony theory"). The court did not identify any negative effect on output or overall competition in the relevant college-education market.³

Next, the district court considered whether the NCAA had shown that the challenged rules serve legitimate procompetitive ends. It found that they do, in that they both "serve to increase consumer demand" and "integrate student-athletes into the academic communities on their campuses." ER98. But, the court added, while these procompetitive benefits "could justify some limited restrictions on student-athlete compensation, ... [they] do[] not justify the NCAA's sweeping prohibition on FBS football and Division I basketball players receiving any compensation for the use of their" NILs. ER87; *see* ER95-96. The court rejected two other procompetitive justifications the NCAA advanced at trial: that the

³ The court found no harm to competition in the other market plaintiffs alleged, a national "group-licensing" market to use student-athletes' NILs (a market the court analyzed as three distinct sub-markets). ER74-86.

challenged rules promote competitive balance and that they increase output in the college-education market. *See* ER91, ER96.

The court then considered whether the procompetitive justifications that it accepted could be achieved through any less-restrictive alternative. The court identified what it said were two such alternatives: permitting FBS football and Division I men's basketball schools (1) to use revenue from group NIL licensing "to award stipends to student-athletes up to the full cost of attendance, ... to make up for any shortfall in its grants-in-aid"; and (2) "to hold in trust limited and equal shares of its [group NIL] licensing revenue to be distributed to its student-athletes after ... their eligibility expires." ER100. The court rejected a third alternative, permitting student-athletes to receive compensation for school-approved third-party endorsements, because it concluded that approach "would undermine the efforts of both the NCAA and its member schools to protect against the 'commercial exploitation' of student-athletes." ER55.

Based on the foregoing, the court entered judgment for plaintiffs and issued a permanent injunction "[c]onsistent with the less restrictive alternatives found." ER104. Specifically, the injunction requires the NCAA to allow: (1) "deferred compensation in an amount of \$5,000 per year or less (in 2014 dollars) for the licensing or use of prospective, current, or former Division I men's basketball and Football Bowl Subdivision football players' names, images, and likenesses through

a trust fund payable upon expiration of athletic eligibility or graduation, whichever comes first”; and (2) “the inclusion of compensation for the licensing or use of prospective, current, or former Division I men’s basketball and FBS football players’ names, images, and likenesses in the award of a full grant-in-aid, up to the full cost of attending the respective NCAA member school.” ER7-8. The court later clarified that the injunction takes effect August 1, 2015. ER5.

SUMMARY OF ARGUMENT

The district court erred in concluding that the NCAA’s amateurism rules, which prohibit student-athletes from being paid for their athletic play, violate the Sherman Act.

First, as courts have consistently recognized, *Board of Regents* makes clear that the challenged amateurism rules are valid as a matter of law because they are designed to preserve the amateur character of college sports. The Supreme Court recognized that the rule that “athletes must not be paid” “plays a vital role in enabling college [sports] to preserve its character,” and pronounced that “[t]here can be no question but that ... the preservation of the student-athlete in higher education ... is entirely consistent with the goals of the Sherman Act.” 468 U.S. at 102, 120. The district court declined to follow *Board of Regents*, asserting that times have changed, but it failed to identify any pertinent changes.

Second, the Sherman Act does not apply to the challenged rules because they do not regulate “commercial” activity. Whatever economic consequences these rules may have, their purpose is to define who is eligible to play the sports that colleges sponsor. The Third and Sixth Circuits have concluded that similar NCAA eligibility rules do not regulate commercial activity and are therefore outside the scope of the Sherman Act.

Third, plaintiffs lack antitrust injury. Plaintiffs seek NIL payments for live-game broadcasts, videogames, and archival footage uses. But even absent the challenged rules, plaintiffs would receive no such payments. There is simply no publicity right with respect to many of these uses. In particular, no state recognizes such a right in telecasts of games and other claimed non-commercial uses, and the First Amendment and the Copyright Act would bar enforcement of any such right regardless. And the genuinely commercial uses that do implicate recognized publicity rights are limited by independent and unchallenged NCAA policies.

For these reasons, the district court should never have conducted a rule-of-reason analysis. But that analysis was itself flawed. First, it misapprehended and overstated the anticompetitive harms supposedly caused by the challenged rules. With no credible prospect that plaintiffs would be paid for their purported NIL rights absent the challenged rules, it cannot be said that those rules fix NIL prices

in any meaningful way. Moreover, payment for NILs would be, at most, a minor element of the full bundle of education goods and services that schools provide in the relevant college-education market—and the district court found that competition in that market is robust. Second, the court understated the challenged rules’ procompetitive benefits. It did find that promoting amateurism and the integration of student-athletes into the broader academic community justify some limitation on compensation. But it overlooked the role that the NCAA’s commitment to amateurism plays in “widen[ing] consumer choice—not only [for] ... fans but also [for] ... athletes,” *Board of Regents*, 468 U.S. at 102, and was unjustly suspicious of the NCAA’s dedication to preserving amateurism. Third, in assessing whether there are any legitimate less-restrictive alternatives to the challenged rules, the court accorded itself the power to redefine college sports without regard to antitrust principles or the “ample latitude” the NCAA is owed when playing its “critical role in the maintenance of a revered tradition of amateurism in college sports.” *Id.* at 120. Given that there is no legitimate less-restrictive alternative, the challenged rules are valid under the Sherman Act because their procompetitive benefits outweigh any anticompetitive harm they might cause.

STANDARD OF REVIEW

This Court “review[s] a district court’s findings of fact after a bench trial for clear error” and “review[s] the district court’s conclusions of law de novo.” *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 883 (9th Cir. 2014). “Under [the] rule[of reason], the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). But “[w]hether [a] practice[] ... violate[s] the Sherman Act is a question of law, not fact.” *Dunn v. Phoenix Newspapers, Inc.*, 735 F.2d 1184, 1186 (9th Cir. 1984). Likewise, “antitrust standing is a question of law.” *Amarel v. Connell*, 102 F.3d 1494, 1507 (9th Cir. 1997).

ARGUMENT

I. THE NCAA’S AMATEURISM RULES DEFINE COLLEGIATE SPORTS AS A UNIQUE PRODUCT AND ARE THEREFORE VALID AS A MATTER OF LAW

The district court was able to hold the challenged NCAA rules unlawful only by refusing to follow *Board of Regents*. That was error. As other courts have consistently recognized, under *Board of Regents*, NCAA rules that define the essential character and quality of college athletics are procompetitive as a matter of law, and thus can be upheld without “a detailed analysis,” i.e., ““in the twinkling of an eye.”” *American Needle, Inc. v. NFL*, 560 U.S. 183, 203 (2010) (quoting *Board*

of Regents, 468 U.S. at 110 n.39). The Seventh Circuit, for example, recently held that under *Board of Regents*, courts should

find certain NCAA bylaws that “fit into the same mold” as those discussed in *Board of Regents* to be procompetitive ... at the motion-to-dismiss stage. Thus, the first—and possibly only—question to be answered when NCAA bylaws are challenged is whether the[y] ... are of the type that have been blessed by the Supreme Court, making them presumptively procompetitive.

Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012) (citation omitted). And as the Supreme Court and the lower courts have recognized, rules that “fit” into that “mold” include those that prohibit student-athletes from being paid for their athletic play—the very rules challenged here. *See* 468 U.S. at 101-102. The district court erred in failing to uphold the challenged rules as a matter of law under *Board of Regents*.

A. *Board of Regents* Compels The Conclusion That The Challenged Rules Are Valid As A Matter Of Law

In *Board of Regents*, two universities challenged an NCAA limitation on how many football games schools could license for telecast. 468 U.S. at 92-93. The Court held that the limitation violated the Sherman Act. *Id.* at 88. In doing so, however, it made clear that NCAA rules designed to preserve the amateur character of college sports—including the rule prohibiting pay-for-play—are valid under the Sherman Act as a matter of law.

The Court first explained that “it would be inappropriate to apply a *per se* rule to this case” because college sports is “an industry in which horizontal restraints on competition are essential if the product is to be available at all.” *Id.* at 100-101. A sports league, the Court said, is perhaps “the leading example” of an activity that “can only be carried out jointly.” *Id.* at 101 (quotation marks omitted). Although such a league’s rules invariably “restrain the manner in which institutions compete,” a league would be infeasible “if there were no rules on which the competitors agreed to create and define the competition to be marketed.” *Id.*; *see also id.* at 102 (“[I]f an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.”).

The Court then distinguished the television rule at issue from “most of the regulatory controls of the NCAA.” *Id.* at 117. Although it went on to find the former invalid under a standard rule-of-reason analysis, it said that as to the latter, such analysis would be unnecessary; rather, such rules can reasonably be assumed to be “justifiable means of fostering competition among amateur athletic teams and therefore procompetitive.” *Id.*

Board of Regents further explained that the rules falling into this “procompetitive” category include amateurism rules, such as those challenged here. The Court emphasized that “the NCAA seeks to market a particular brand of football—college football,” whose “identification ... with an academic tradition

differentiates [it] from and makes it more popular than professional sports to which it might otherwise be comparable.” *Id.* at 101-102. The Court recognized that, in order “to preserve the character and quality of the ‘product,’” the NCAA must adopt certain rules, such as that “athletes *must not be paid*, must be required to attend class, and the like.” *Id.* at 102 (emphasis added). “Thus,” the Court concluded, “the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.” *Id.* In doing so, it “widen[s] consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.” *Id.* Indeed, the Court admonished, “[t]here can be no question but that ... the preservation of the student-athlete in higher education ... is *entirely consistent* with the goals of the Sherman Act.” *Id.* at 120 (emphasis added).

Under *Board of Regents*, then, the mode of antitrust analysis that applies to an NCAA rule turns on the rule’s nature. Rules that are “not based on a desire to maintain the integrity of college [sports] as a distinct and attractive product,” 468 U.S. at 116, that is, rules not intended to preserve the “tradition of amateurism in college sports,” *id.* at 120—like the television rule at issue there—are subject to standard rule-of-reason analysis. But rules that *are* based on such a desire, including those challenged here, are procompetitive as a matter of law.

B. Courts Have Consistently Recognized That Eligibility Rules Such As Those At Issue Here Are Valid As A Matter of Law Under *Board of Regents*

Until the decision in this case, courts had consistently adhered to the *Board of Regents* framework in recognizing that NCAA rules prohibiting pay-for-play and other rules integral to amateurism should be upheld as a matter of law.⁴

Indeed, plaintiffs have never cited even one case in which a court subjected an amateurism rule to full rule-of-reason analysis, let alone held such a rule to violate the Sherman Act.

The Seventh Circuit's recent decision in *Agnew* is particularly instructive. There, the court read *Board of Regents* to say that NCAA rules “clearly meant to help maintain the ‘revered tradition of amateurism in college sports’ or the ‘preservation of the student-athlete in higher education’” are so plainly lawful that they can be upheld “‘in the twinkling of an eye’—that is, at the motion-to-dismiss stage.” 683 F.3d at 341-342 (quoting *Board of Regents*, 468 U.S. at 110 n.39, and citing *American Needle*, 560 U.S. at 203). Further, the court concluded that among these lawful rules are “eligibility rules,” such as “bylaws eliminating the eligibility of players who receive cash payments beyond the costs attendant to receiving an education—a rule that clearly protects amateurism.” *Id.* at 343. For such rules,

⁴ Many lower court cases *before Board of Regents* likewise applied this analysis. *See Bd. of Regents*, 468 U.S. at 102 n.24 (citing cases).

which “define what it means to be an amateur or a student-athlete,” “proof of [their] procompetitive nature” is not required “on a case-by-case basis”; the question instead is “whether a rule is, on its face, supportive of the ‘no payment’ and ‘student-athlete’ models” because, if they fit that description, then “under *Board of Regents*, they clearly are” procompetitive. *Id.* at 343 & n.7; *see also id.* at 345 (requiring full rule-of-reason analysis because “[t]he Bylaws at issue in this case ... are not directly related to the separation of amateur athletics from pay-for-play athletics”).

Other lower courts have reached the same conclusion. *See, e.g., Smith v. NCAA*, 139 F.3d 180, 186 (3d Cir. 1998) (“[T]he Supreme Court has recognized the procompetitive nature of many of the NCAA’s restraints, including eligibility requirements.”), *vacated on other grounds, NCAA v. Smith*, 525 U.S. 459, 464 n.2 (1999); *McCormack v. NCAA*, 845 F.2d 1338, 1344-1345 (5th Cir. 1988) (“The eligibility rules create the [NCAA’s] product and allow its survival in the face of commercializing pressures. The goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal.” (footnote omitted)). Again, plaintiffs can cite no contrary authority.

C. The District Court Erroneously Disregarded *Board of Regents*

1. The court dismissed the relevant portions of *Board of Regents* as dicta, stating that “*Board of Regents* addressed limits on television broadcasting, not

payments to student-athletes.” ER87. But the Supreme Court’s analysis of eligibility rules, specifically the rule prohibiting pay-for-play, was central to the analytical framework the Court adopted—and to its application of that framework to the television plan at issue. The “fundamental reason” why the Court held that the television plan was unlawful under the rule of reason was that it was “*not* based on a desire to maintain the integrity of college football as a distinct and attractive product” and thus did “*not* ... fit into the same mold as do rules defining the ... eligibility of participants,” 468 U.S. at 116-117 (emphasis added), such as the rule that “athletes must not be paid,” *id.* at 102.⁵

Moreover, the Supreme Court has recently reaffirmed *Board of Regents*’ basic framework. In *American Needle*, the Court stated, quoting *Board of Regents*, that “[w]hen ‘restraints on competition are essential if the product is to be available at all,’ ... the restraint must be judged according to the flexible Rule of Reason” and “is likely to survive And depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it ‘can sometimes

⁵ The district court also said that *Board of Regents* “does not stand for the sweeping proposition that student-athletes must be barred, both during their college years and *forever thereafter*, from receiving any monetary compensation for the commercial use of their names, images, and likenesses.” ER87 (emphasis added). That has never been the NCAA’s position. As the district court recognized, NCAA rules do not prohibit student-athletes from marketing or being paid for use of their NILs after their eligibility expires. ER27, ER54.

be applied in the twinkling of an eye.” 560 U.S. at 203 (quoting 468 U.S. at 101, 110 n.39) (citations omitted). That framework is simply not dicta.

2. The district court also dismissed *Board of Regents* on the ground that “the college sports industry has changed substantially in the thirty years since [the case] was decided.” ER88. The court did not explain what precisely had changed, but its citation of Judge Flaum’s concurring-and-dissenting opinion in *Banks v. NCAA* suggests that it had in mind his contention that “a more innocent era ... where amateurism was more a reality than an ideal” has been replaced by “a vast commercial venture that yields substantial profits for colleges.” 977 F.2d 1081, 1094 n.* (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part). That reasoning fails.

To begin with, even if college sports has changed so dramatically since *Board of Regents* that the Supreme Court’s analysis no longer holds, the district court (and this Court) would still be bound by the decision. *See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam). Judge Flaum himself has recognized as much: Twenty years after *Banks*, he wrote for the unanimous panel in *Agnew*, which adhered to the *Board of Regents* framework.⁶

⁶ Moreover, Judge Flaum discussed the apparent changes in the times for other reasons, not to establish that *Board of Regents* was inapplicable. *See Banks*, 977 F.2d at 1094 n.*.

In any event, the district court yearned for what never was: commercialism and amateurism coexisted at the time of *Board of Regents* just as they do today. Although the revenue generated by FBS football and Division I men's basketball has grown over the years, college sports was highly commercialized when *Board of Regents* was decided—a fact that could not have been lost on the Supreme Court, given that the agreements at issue there called for broadcasters to pay *hundreds of millions of dollars* to broadcast a limited number of college football games in light of college football's ability to “generate an audience uniquely attractive to advertisers.” 468 U.S. at 92-93, 111. Indeed, the district judge in that case had called college football “big business.” *Board of Regents of Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1288 (W.D. Okla. 1982). The reality is that commercialism and its attendant pressures have been a part of college sports from the beginning. *See, e.g.*, ER268-269 ¶ 17 (1929 report commissioned by NCAA and others arguing that “disproportionate time requirements, isolation from the rest of the student body and highly compensated ‘professional’ coaches whose focus often was not on the education of their players” “imposed heavy burdens on the athletes”).

Yet, as it did when *Board of Regents* was decided (and before), the NCAA today manages this commercial pressure by remaining committed to core tenets regarding amateurism and the integration of athletics into the educational

experience. *Compare Justice v. NCAA*, 577 F. Supp. 356, 361 (D. Ariz. 1983) (quoting *1983-84 NCAA Manual*'s definition of "Principle of Amateurism and Student Participation" and rules providing that "a student-athlete shall not be eligible for participation in an intercollegiate sport if the individual: '(1) [t]akes or has taken pay, or ... the promise of pay, in any form, for participation in that sport'"), with ER611 (Art. 2.9), and ER614 (Art. 12.1.2). In fact, "[t]he eligibility rules create the product and allow its survival in the face of commercializing pressures." *McCormack*, 845 F.2d at 1345. Accordingly, despite large television contracts and other "big business" dimensions of college athletics at the time, the Supreme Court in *Board of Regents* emphasized the NCAA's "critical role in the maintenance of a revered tradition of amateurism in college sports." 468 U.S. at 120. It is ironic that the district court pointed to commercial pressures—precisely what the NCAA's rules seek to address—as evidence that those rules are outdated.

The court's emphasis on the commercial side of college sports conflates commercialism with professionalism. As plaintiffs' expert testified, "commercialism does not equal professionalism," and a sport may "be commercialized and still be amateur." ER346-348. Amateurism, like professionalism, defines who may participate in the athletic competition; commercialism refers to an attribute of the larger enterprise. Indeed, many other amateur sports generate substantial amounts of commercial revenue. According to

one of plaintiffs' experts, for example, high school football in Texas is "highly commercialized" even though the athletes are "amateur." ER347-348; *see also* ER317 (high school sports and amateur golf are broadcast). And Little League Baseball—surely an amateur sport—recently entered into an eight-year, \$76 million agreement for the broadcast of its annual tournament. *See* ER318; Peter, *Little League Means Big Business as Revenues Soar*, USA Today (Aug. 22, 2014), available at <http://www.usatoday.com/story/sports/2014/08/22/little-league-world-series-williamsport-pa-steve-keener/14404095/>.

In short, the district court's "times have changed" rationale provides no sound basis to disregard *Board of Regents*.

3. Finally, the district court never grappled with the line of decisions recognizing that, under *Board of Regents*, NCAA amateurism rules should be upheld as a matter of law. Instead, it relied on decisions holding that *other kinds* of NCAA rules—rules that did not define or regulate amateurism—could be anticompetitive. ER70, ER73-74, ER157, ER207-211. Those decisions are irrelevant to this case. The cases that are relevant are those that addressed amateurism rules like those at issue here. And as explained, not one of those cases held an amateurism rule invalid (or agreed with the district court's "times have changed" rationale). The court's holding here to that effect simply departs from *Board of Regents*.

II. THE CHALLENGED NCAA RULES ARE NOT COVERED BY THE SHERMAN ACT BECAUSE THEY DO NOT REGULATE “COMMERCIAL” ACTIVITY

Plaintiffs’ claims independently fail because the challenged rules do not regulate commercial activity and thus are not within the scope of the Sherman Act. The Act encompasses “contract[s] ... in restraint of trade or commerce.” 15 U.S.C. § 1. By its terms, then, it seeks to “prevent[] ... restraints to free competition in business and commercial transactions.” *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940). The NCAA’s amateurism rules do not effect any such restraint.

In determining whether the Sherman Act applies, “the appropriate inquiry is whether the rule itself is commercial, not whether the entity promulgating the rule is.” *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008) (quotation marks omitted). That is important because some NCAA rules *do* pertain to commercial activity, such as the television rule in *Board of Regents*. Those rules are indeed subject to the Sherman Act. The rules challenged here, by contrast, are not commercial. Like most organizations—advocacy groups, religious institutions, clubs of all sorts, Little League, and high school athletic conferences—the NCAA uses these rules to define who may participate in the activities it sponsors. To be sure, many organizations’ eligibility rules have economic consequences, but they are typically motivated by, and define, non-commercial considerations, such as the organization’s organizing principles and mission. The same is true of the

challenged rules—the NCAA exists “primarily to enhance the contribution made by amateur athletic competition to the process of higher education as distinguished from realizing maximum return on it as an entertainment commodity.” *Association for Intercollegiate Athletics for Women v. NCAA*, 558 F. Supp. 487, 494 (D.D.C. 1983), *aff’d*, 735 F.2d 577 (D.C. Cir. 1984). Its eligibility rules are part and parcel of that mission.

Specifically, the challenged rules serve the NCAA’s mission of encouraging athletic endeavors as an integral component of a broader college educational experience, in the face of sometimes significant commercial pressures that could undermine those athletic and educational experiences. The NCAA continues to apply the same core principles it has applied for a century in order to protect the mission of intercollegiate sports—even at the cost of maximizing profit.⁷ The NCAA and similar organizations need the freedom to define their product in a

⁷ If the NCAA were profit-maximizing, it would behave differently. For example, it would allow teams to play many more games each season than it does, *see, e.g.*, ER271 ¶ 28 (in 1990, the NCAA reduced number of regular season games that Division I basketball teams could play), it would not have ceased selling jerseys associated with specific student-athletes, ER475-476, and it would not have “declined to renew its license with EA,” which “the NCAA found ... profitable,” ER25; *see also* ER461-462 (Division I schools must compete in 16 full sports even though sports other than FBS football and men’s basketball are usually not profitable); ER480-481 (NCAA rules reward schools for engaging in the anti-profitable behavior of offering additional sports programs and granting additional scholarships); ER485-486 (overall, NCAA institutions lose money on Division I athletics, spending roughly double what they receive in revenue).

manner consistent with their mission. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (even where strict scrutiny applies, courts have a long “tradition of giving a degree of deference to a university’s academic decisions”).

This Court previously declined to reach this issue, *see Tanaka v. University of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001), but two other circuit courts have held that similar eligibility rules are non-commercial and thus fall outside the Sherman Act despite their obvious economic consequences. In *Smith v. NCAA*, the Third Circuit affirmed the dismissal of a Sherman Act claim challenging an NCAA eligibility rule, specifically eligibility of graduate students. Relying on *Board of Regents* and *Apex Hosiery*, the court “agree[d] with [several district] courts that the eligibility rules are not related to the NCAA’s commercial or business activities.” 139 F.3d at 185. “Rather than intending to provide the NCAA with a commercial advantage,” the court reasoned, “the eligibility rules primarily seek to ensure fair competition in intercollegiate athletics.” *Id.* The court thus held “that the Sherman Act does not apply to the NCAA’s promulgation of eligibility requirements.” *Id.* at 186.⁸

⁸ The *Smith* court ruled against the NCAA on the plaintiff’s Title IX claim. 139 F.3d at 190. The Supreme Court vacated that ruling, *see* 525 U.S. 459, but it “denied certiorari on” the Sherman Act ruling, *id.* at 464 n.2.

The Sixth Circuit embraced *Smith*'s holding in *Bassett*, which affirmed the dismissal of a Sherman Act claim challenging the NCAA's enforcement of rules that prohibit improper recruiting inducements and academic fraud. *See* 528 F.3d at 428-429. The court explained that “[s]imilar to the eligibility rules in *Smith*, NCAA’s rules on recruiting student athletes, specifically those rules prohibiting improper inducements and academic fraud, are all explicitly non-commercial.” *Id.* at 433. Indeed, the court noted, “those rules are *anti-commercial* and designed to promote and ensure competitiveness amongst NCAA member schools.” *Id.*; *see also Gaines v. NCAA*, 746 F. Supp. 738, 743-745 (M.D. Tenn. 1990); *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975); *College Athletic Placement Servs., Inc. v. NCAA*, 1974 WL 998, at *4-5 (D.N.J. Aug. 22, 1974). *But see Agnew*, 683 F.3d at 338-341.

In short, although the NCAA's core amateurism rules would easily survive antitrust scrutiny for the reasons given above (and below), they are non-commercial and thus lie outside the purview of the Sherman Act.

III. PLAINTIFFS LACK ANTITRUST INJURY

Still another reason the district court should not have conducted a rule-of-reason analysis is that plaintiffs have not shown the requisite antitrust injury. An antitrust plaintiff seeking injunctive relief must show “a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation

likely to continue or recur.” *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969); *see also Sundance Land Corp. v. Community First Fed. Sav. & Loan Ass’n*, 840 F.2d 653, 661 (9th Cir. 1988) (“To establish equitable grounds for [injunctive] relief, [an antitrust] claimant must show that he or she has no adequate remedy at law and that denial of the relief sought would cause immediate, irreparable injury.”). Although the analysis varies somewhat depending on the particular NIL use being considered, the bottom line is the same for each use: plaintiffs will not suffer antitrust injury because even if the challenged rules violated antitrust law, there would be no impending application of those rules that would deprive plaintiffs of NIL compensation.⁹

A. Live-Game Broadcasts

1. One of the most remarkable points about this case is that although plaintiffs’ claims depend on the premise that student-athletes have rights in the use of their NILs, there is no real question that, at least as to live-game broadcasts, such rights simply do not exist.

Team sports have been broadcast for almost a century, and many states have granted publicity rights to some extent since those rights were first recognized over

⁹ In addition to the points made below, class members who are former student-athletes—including all of the named plaintiffs—lack antitrust injury because the challenged rules apply only to current student-athletes. ER54, ER305-307.

sixty years ago. *See Haelen Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868-869 (2d Cir. 1953). Yet neither plaintiffs nor the district court ever identified *even one* jurisdiction recognizing a publicity right for the participants in a live-game broadcast. *Cf., e.g., Keller v. Electronic Arts, Inc.*, 724 F.3d 1268, 1282 (9th Cir. 2013) (“[L]iability will not lie for [California] statutory right-of-publicity claims for the ‘use of a name, voice, signature, photograph, or likeness in connection with any ... sports broadcast or account’”); *NFL v. Alley, Inc.*, 624 F. Supp. 6, 10 (S.D. Fla. 1983) (Florida publicity statute exempted game telecast). That should have been the end of plaintiffs’ claims to the extent they involved live-game broadcasts.¹⁰

Without disputing the total lack of state-law recognition, the district court observed that contracts between broadcasters and the NCAA or its members occasionally purport to grant broadcasters the right to use players’ NILs. ER21-23. But the evidence—including both sides’ expert testimony—was clear that broadcasters do not negotiate for NIL rights in *any* live broadcasts of team sporting

¹⁰ The district court earlier asserted that Minnesota might recognize such a right, *see* ER174, based on a misreading of an interlocutory ruling in *Dryer v. NFL*, 689 F. Supp. 2d 1113, 1123 (D. Minn. 2010). The court in *Dryer* subsequently confirmed that the court here had misread the prior *Dryer* ruling, granting the NFL summary judgment on the ground that Minnesota law barred the plaintiff players’ right-of-publicity claims. *See Dryer v. NFL*, 2014 WL 5106738, at *14 (D. Minn. Oct. 10, 2014).

events. *See* ER325-328, ER331-332, ER343. The sophisticated actors that entered into these contracts mention NILs in an abundance of caution, but that is no basis for the court’s conclusion that broadcasters would start paying for NILs if only the NCAA permitted it.

2. Even if any publicity right were recognized with respect to live-game broadcasts, enforcement of such a right would be barred by the First Amendment and preempted by the Copyright Act.

Coverage of sports, like any other kind of news coverage, is “speech on public issues” and thus “occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quotation marks omitted); *Cardtoons, L.C. v. MLB Players Ass’n*, 95 F.3d 959, 969 (10th Cir. 1996). Accordingly, as courts have recognized, the First Amendment bars publicity-right claims with respect to game broadcasts. *See, e.g., Gionfriddo v. MLB*, 114 Cal. Rptr. 2d 307, 314, 318 (Cal. Ct. App. 2001). In concluding otherwise, the district court relied principally on *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). *See* ER163-168. But the plaintiff there, who performed as a human cannonball, was not a mere participant in the performance but rather was—unlike plaintiffs and more like NCAA schools and conferences—the producer/organizer of the event, and thus his economic interest lay in the “right of exclusive control over the publicity given to

his performance”; the “effect of a public broadcast of the performance,” the Court explained, was “similar to preventing petitioner from charging an admission fee.” 433 U.S. at 570, 575-576 (quotation marks omitted). Giving players an enforceable right to compensation for use of their NILs would significantly burden free speech because it would enable holdouts to block speech on public issues. Departing from decades of First Amendment jurisprudence, the district court’s analysis thus sets a dangerous precedent, subjecting actors to antitrust liability for agreeing not to pay others for the “right” to engage in an activity that is already constitutionally protected.

As discussed below, this Court in *Keller v. Electronic Arts* erroneously adopted a transformative-use test to determine whether EA had a First Amendment right to use NCAA athletes’ images and likenesses to define characters in a videogame. But even if *Keller* were correct, applying it to broadcasts of events would make no sense. *See* 724 F.3d at 1283 (“EA’s video game is a means by which users can play their own virtual football games, not a means for obtaining information about real-world football games.”). Requiring broadcasters to pay a license fee to those who appear in any team sports telecast—or, for that matter,

anyone who is in a parade or simply walking down a public street—would prove utterly impracticable and is fundamentally at odds with the First Amendment.¹¹

Moreover, “when defendants’ uses constitute ‘expressive works,’” as opposed to uses “‘for the purposes of trade,’ such as in an advertisement, ... right-of-publicity claims have been preempted” by the Copyright Act. *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1029 (3d Cir. 2008) (citations omitted). As courts have recognized, telecasts of sporting events are expressive works, not advertising, and therefore any state-law publicity right here would be preempted. *See, e.g., Dryer v. NFL*, 2014 WL 5106738, at *17 (D. Minn. Oct. 10, 2014); *Ray v. ESPN, Inc.*, 2014 WL 2766187, at *5 (W.D. Mo. Apr. 8, 2014). The district court disagreed, explaining, “Plaintiffs ... do not seek to protect” any copyright in the telecast, but rather “the right to license the commercial use of their names, images, and likenesses in certain broadcast footage.” ER218. But this Court has twice rejected that precise analysis. *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1139, 1141 (9th Cir. 2006); *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146, 1153 (9th Cir. 2010).

¹¹ Further, unlike the allegations upon which the Court relied in *Keller*, there is no reason to believe here that the “primary motivation” of “a likely purchaser” (or viewer) of a game broadcast would be to obtain “a reproduction” of the student-athletes. 724 F.3d at 1279 n.10 (quotation marks omitted).

3. The district court also speculated that regardless of whether there are actually valid and enforceable publicity rights, the status of those rights is at least “uncertain” and therefore “some television networks ... may still have sought to acquire these rights as a precautionary measure.” ER76. That is wrong. As shown above, there is nothing “uncertain” about the status of plaintiffs’ NIL rights for live-game broadcasts under state law—they simply do not exist. The court’s conjecture is insufficient to conclude that if the challenged rules were lifted, broadcasters would suddenly start paying for something they can obtain for free. *See American Ad Mgmt., Inc. v. General Tel. Co. of Cal.*, 190 F.3d 1051, 1054 (9th Cir. 1999) (the “speculative measure of the harm” is a relevant consideration in determining antitrust injury). It may be that, absent the challenged rules, schools would offer to pay recruits more, but, as plaintiffs’ principal expert witness admitted, the schools would use those payments as general recruitment devices—that is, as veiled pay-for-play—not as compensation for NILs. ER311-312, ER319-320.

B. Videogames

The challenged rules likewise do not cause plaintiffs antitrust injury with regard to videogames. Even in jurisdictions that recognize a relevant publicity right, there is no realistic possibility of videogame makers paying schools to use student-athletes’ NILs (and thus schools sharing that revenue with the student-

athletes) because of NCAA policies that are not challenged here and that would apply regardless of the challenged rules.

The NCAA has never authorized use of student-athletes' NILs in college-sports videogames, nor does it intend to in the future. ER299, ER408-409. To the contrary, the NCAA has long refused to allow videogame producers to include student-athlete NILs. ER566 ¶ 2(f)(7), ER586 ¶ 2(f)(7), ER299, ER418-419. Additionally, a viable college-sports videogame requires "the intellectual property of the colleges and the NCAA." ER291. But the NCAA does not currently license its own intellectual property for use in college-sports videogames, and there is no evidence or indication that it intends to do so in the future. *See* ER468-469, ER264 ¶ 19. Plaintiffs do not contest the lawfulness of these policies, *see* ER300-301, ER303, and the district court held that the NCAA could, consistent with antitrust law, adopt rules "to protect against the 'commercial exploitation' of student-athletes," ER55. That is what these policies do.

Moreover, any relevant state-law NIL rights would be worthless because their enforcement would be preempted by the Copyright Act and barred by the First Amendment, for the reasons discussed above. Although this Court held otherwise with respect to the First Amendment earlier in this litigation, *see Keller*, 724 F.3d 1268, that decision incorrectly relied on a "transformative-use" test that gainsays settled First Amendment doctrine by punishing expression for being

accurate and embracing a subjective and indeterminate standard that will chill protected expression. The NCAA preserves this argument for en banc or Supreme Court review.

C. Archival Footage

Finally, plaintiffs have not shown antitrust injury from the challenged rules with respect to use of their NILs in archival footage. As the district court found, under the contractual terms (unchallenged here) between the NCAA and its licensing agent that restrict the agent's ability to license student-athletes' NILs, "no current ... student-athletes are actually deprived of any compensation for game rebroadcasts or other archival footage." ER85. This finding is fatal to plaintiffs' archival claims. The NCAA notes, however, that the court mistakenly suggested this agreement applies to all archival uses; it applies only to commercial uses of archival footage, such as advertisements and endorsements unrelated to game broadcasts. Regardless, the challenged rules do not cause plaintiffs antitrust injury with respect to *non*-commercial uses of archival footage, such as rebroadcast and highlight clips, for the reasons given regarding live-game broadcast.

IV. THE CHALLENGED NCAA RULES ARE VALID UNDER A RULE-OF-REASON ANALYSIS

Although full rule-of-reason analysis is inappropriate, the challenged rules easily survive such review. "A restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects." *Tanaka*, 252 F.3d at

1063. Under this standard, “[t]he plaintiff bears the initial burden of showing that the restraint produces ‘significant anticompetitive effects’ within ‘a relevant market.’ If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint’s procompetitive effects.” *Id.* at 1063 (citation omitted). If the defendant does so, “[t]he plaintiff must then show that ‘any legitimate objectives can be achieved in a substantially less restrictive manner.’” *Id.*

The district court clearly erred in applying this standard. The court did not identify any significant anticompetitive effects—which alone disposes of plaintiffs’ claim. It then greatly undervalued the challenged rules’ procompetitive benefits, although it correctly determined that the benefits were sufficient to justify a joint restraint on the (supposed) price of student-athletes’ NILs. But instead of stopping there, the court inquired into what that price should be, under the guise of seeking a less-restrictive alternative. In embracing an alternative rule that would merely adjust the limit on NIL prices, the court improperly redefined the NCAA’s product and took on the role of superintendent of collegiate sports. The court’s alternative, moreover, is not legitimate; instead of giving the NCAA “ample latitude,” the court took it upon itself to decide how to structure college sports, and approved an alternative that undermines rather than achieves the important benefits of amateurism. Once these errors are corrected, it is clear that the challenged

rules' procompetitive benefits outweigh any anticompetitive effects they might have.

A. The Challenged Rules Do Not Have Significant Anticompetitive Effects In The Relevant Market

A threshold requirement for finding an antitrust violation under the rule of reason is that the challenged restraint have significant anticompetitive effects in the relevant market. “[R]estrictions qualify as anticompetitive only if they harm both allocative efficiency and raise the prices of goods above competitive levels.” *Cal. Dental Ass’n v. FTC*, 224 F.3d 942, 947 (9th Cir. 2000) (quotation marks and alterations omitted). As explained below, plaintiffs presented no evidence of significant adverse effects on output or price in the relevant market. In fact, the district court’s relevant findings were to the contrary—and show that competition in the relevant market is vigorous.

1. The relevant market, the district court found, is the college-education market, in which student-athletes receive “the opportunity to earn a higher education while playing for an FBS football or Division I men’s basketball team,” with all that that encompasses. ER59. Output in this market thus consists of opportunities for student-athletes to participate in FBS football or Division I men’s basketball. Plaintiffs adduced *no* evidence that the challenged rules reduce the number of those opportunities, and accordingly the court did not find that the rules reduce output in the relevant market. In fact, the court observed that the

opportunities to participate in FBS football and Division I men’s basketball have “increased steadily over time and continue[] to increase today.” ER48; *see also* ER272-273 ¶¶ 42-49. Plaintiffs’ failure to show that the challenged rules reduce output in the relevant market is alone dispositive of their claim. *See Chicago Prof’l Sports Ltd. P’ship v. NBA*, 95 F.3d 593, 597 (7th Cir. 1996) (“The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, *there is no antitrust problem.*” (emphasis added)).

2. The court instead rested its finding of anticompetitive effects on its finding that “FBS football and Division I basketball schools have fixed the price of their product by agreeing not to offer any recruit a share of the licensing revenues derived from the use of his name, image, and likeness.” ER65. That is unsustainable.

First, as shown above, there is (and even absent the challenged rules would be) no market for plaintiffs’ NIL rights, and therefore a prohibition on paying for such rights could have no effect on the level of compensation offered to a student-athlete for NIL use. States do not recognize such rights with respect to broadcasts and non-commercial uses of archival footage; moreover, the First Amendment and the Copyright Act would bar enforcement of such rights if they were recognized. And with respect to videogames and commercial uses of archival footage, even if

states recognize relevant publicity rights, separate and unchallenged NCAA policies would foreclose NIL payments.

Second, even if there were genuine uncertainty about whether such publicity rights exist, the challenged rules would not have substantial adverse effects on prices or competition in the college-education market, where “Division I schools compete to sell unique bundles of goods and services to elite football and basketball recruits.” ER59. These bundles, the district court found, include a broad array of components, including “tuition, fees, room and board, books, certain school supplies, tutoring, and academic support services,” as well as “high-quality coaching, medical treatment, state-of-the-art athletic facilities, and opportunities to compete at the highest level of college sports, often in front of large crowds and television audiences.” ER15. Thus, at most, the challenged rules would have a *de minimis* effect in the relevant market because they would limit only one minor (or non-existent) component of the bundle, while competition in the overall relevant market remains robust.

Indeed, the court did not find, and the evidence at trial did not show, that restricting one putative component of the schools’ bundle—payment for NIL rights—has the effect of fixing the price of the bundle itself or of reducing competition in the college education market. To the contrary, relying on plaintiffs’ expert’s testimony, the court found that schools actually compete vigorously with

respect to other components of the bundle and the bundle as a whole. For example, the court found: “[S]chools are able to spend freely in ... other areas[, which] *cancel[s] out whatever leveling effect the restrictions on student-athlete pay might otherwise have.* The NCAA does not do anything to rein in spending by the high-revenue schools or minimize existing disparities in revenue and recruiting.” ER43 (emphasis added). There is no basis to find significant anticompetitive effects in the market based on the NCAA’s limit on only one potential component in a bundle of benefits. *See Board of Trade of Chi. v. United States*, 246 U.S. 231, 240 (1918) (upholding, under rule of reason, restraint on single dimension of competition that “had no appreciable effect on general market prices” and did not “materially affect the total volume of grain coming to Chicago”); *Board of Regents*, 468 U.S. at 103 (“[A] restraint in a limited aspect of a market may actually enhance marketwide competition.”); IIA Areeda & Hovenkamp, *Antitrust Law* ¶ 404c3 (2d ed. 2002) (“Product complexity, differentiation, [and] variety ... multipl[y] avenues of rivalry Nonprice rivalry can be an indirect form of price competition.”).

The district court relied on *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), for its determination that “the agreement among FBS football and Division I basketball schools not to offer recruits a share of their licensing revenue eliminates one form of price competition” and is thus “sufficient to satisfy

Plaintiffs’ initial burden under the rule of reason” to show substantial anticompetitive effects. ER67. But *Catalano* involved naked collusion that the Supreme Court found illegal *per se*. 446 U.S. at 647. It does not stand for the proposition that an agreement fixing one dimension of competition suffices to show substantial anticompetitive effects for purposes of a *rule-of-reason* analysis, especially where competition clearly continues on many other important dimensions of the product. *See Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1146, *reprinted as amended*, 2003 U.S. App. LEXIS 7731 (9th Cir. 2003) (distinguishing *Catalano* and explaining that “price-fixing structure might well ... collapse[]” where one component of bundle price was fixed but competitors “could compete on price” of other bundle component and thus on price of entire bundle).¹²

B. The Challenged Rules Have Substantial Procompetitive Benefits

The NCAA argued at trial that the challenged rules have four procompetitive benefits: promoting amateurism, facilitating the integration of student-athletes into the academic community, promoting competitive balance among schools, and increasing output in the college-education market. The district court found that the

¹² The district court’s alternative monopsony theory fails for the same reasons. Moreover, that theory was not disclosed in plaintiffs’ expert reports or otherwise raised “prior to trial,” ER74, and thus was not a proper basis for decision. That it was addressed *at and after* trial, *see id.*, is immaterial. In complex antitrust litigation, litigants need an opportunity to develop expert analysis in advance of trial.

rules promote amateurism and facilitate integration, though only to a limited extent, and rejected the other two benefits entirely. ER31-51, ER86-97. The court's failure to credit all four justifications fully was erroneous, but its analysis regarding amateurism is particularly untenable.

The court found amateurism sufficient both to help the NCAA carry its rule-of-reason burden and to “justify a restriction on large payments to student-athletes while in school.” ER90-91. Yet it misapprehended and gave insufficient weight to amateurism as a procompetitive justification for the challenged rules. First, the court reasoned that the amateurism rules “play [only] a limited role in driving consumer demand for FBS football and Division I basketball-related products.” *Id.* Second, the court asserted that “the historical record” undercut the NCAA’s claim of a longstanding commitment to amateurism. ER88; *see also* ER32-35. Neither rationale withstands scrutiny.

As to the first rationale, amateurism’s procompetitive benefits are far more than “driving consumer demand,” ER90, by which the court meant increasing “the popularity of college sports” as a “form[] of entertainment,” ER41, ER86. Amateurism “enables a product to be marketed which might otherwise be unavailable.” *Board of Regents*, 468 U.S. at 102; *accord* ER453-460, ER483, ER553-557, ER558-559, ER754-756. And as *Board of Regents* explained, by “differentiat[ing] college [sports] from ... professional sports,” amateurism

“widen[s] consumer choice—not only [for] ... fans *but also* [for] ... *athletes*.” 468 U.S. at 101-102 (emphasis added); *see also Agnew*, 683 F.3d at 343-345. This widening of consumer choice is, as the Supreme Court held, “procompetitive.” *Board of Regents*, 486 U.S. at 102; *see also Leegin*, 551 U.S. at 890 (restraints affecting price can promote competition where they “give consumers more options”); *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998) (“[W]idening consumer choice ha[s] been accepted by courts as justification[] for otherwise anticompetitive agreements.”). Specifically, the NCAA’s commitment to amateur collegiate athletics makes available the only opportunity that young men and women have to obtain a college education while playing competitive sports *as students*. Indeed, the district court found the opportunity offered by FBS football and Division I men’s basketball to be “unique.” ER15-20 (“None” of the potential substitutes “provides the same combination of goods and services offered by FBS football and Division I basketball schools.”). By focusing exclusively on expanding output for college sports as entertainment, the court failed to credit these crucial aspects of amateurism’s procompetitive benefits.

The court’s skepticism about the NCAA’s commitment to amateurism was likewise flawed. According to the court, “[t]he historical record” “documents how malleable the NCAA’s definition of amateurism has been since its founding.” ER88. To begin with, that view is contrary to the Supreme Court’s recognition

that “[s]ince its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports,” that “the NCAA plays a vital role in enabling college [sports] to preserve its character,” and that the NCAA “plays a critical role in the maintenance of a revered tradition of amateurism in college sports.” *Board of Regents*, 468 U.S. at 88, 102, 120. And it is the Supreme Court’s view, rather than the district court’s, that is faithful to the “historical record.” As detailed above, the NCAA has consistently adhered for decades to the core principle of amateurism: that college athletes “must not be paid” to play. *Id.* at 102.

The district court’s grounds for concluding otherwise are insubstantial. The court pointed to three minor changes the NCAA has made—in the nearly *sixty years* since it “established a national standard governing athletics-based financial aid”—regarding what student-athletes may receive. ER33-34. But none of those changes violated the defining principle of amateurism: students must not be paid to play. One change, for example, allowed student-athletes who were awarded Pell grants to receive those grants without offsetting reductions in their athletics-based financial aid, even if as a result they received more in total than the cost of attendance. *See* ER34, ER88-89. That does not involve pay-for-play; Pell grants are awarded to low-income students based on demonstrated financial need (and it is peculiar to question the NCAA’s commitment to amateurism on the ground that

it opted not to penalize those who had shown sufficient need to receive Pell grants). See Department of Education, *Federal Pell Grant Program* (Apr. 9, 2014), available at <http://www2.ed.gov/programs/fpg/index.html>. Another change allowed a “tennis recruit [to] preserve his amateur status even if he accepts ten thousand dollars in prize money the year before he enrolls in college.” ER34, ER88; see ER616-617 (Art. 12.1.2.4.2). But that rule does not even apply to earnings *during* college. Moreover, it does not authorize colleges to pay for play; it is a practical proxy for reimbursement of the “exorbitant amounts of money” that “[p]rospective student-athletes and their families” often have to spend to cover “expenses related to competing in tennis events.” Final Adoption of Tennis Rule Amending Bylaw 12.1.2.4 (NCAA Division I Proposal 2011-25), “Rationale.” Reimbursement of expenses is fully consistent with the principle of amateurism. See, e.g., ER612 (Art. 12.02.2).

More fundamentally, it is simply implausible to suggest that the NCAA’s commitment to amateurism must not be genuine because over the century in which it has regulated college athletics it has occasionally refined its eligibility rules—either to ease the burden on student-athletes facing unusual circumstances or because time and experience have convinced the organization’s leaders that prior judgments about how to define eligibility consistent with the principle of amateurism needed to be revisited. The antitrust laws do not require organizations

to establish fixed rules and principles on day one, and then stubbornly adhere to them without change, on pain of having those rules and principles condemned as illegitimate by a federal antitrust court. Such an approach would be particularly unwarranted with an organization like the NCAA, which has hundreds of member schools throughout the country and administers about two dozen sports played every year by hundreds of thousands of student-athletes. The willingness of an organization with such diverse membership to adjust its rules over time while at the same time adhering to a set of core principles provides no basis for condemnation.

Finally, even if one accepted that “the NCAA has not distilled amateurism to its purest form,” that “does not mean its attempts ... are unreasonable.” *McCormack*, 845 F.2d at 1345. The district court itself made much the same point in another context, stating that the fact that “the NCAA has not always succeeded in protecting student-athletes from commercial exploitation ... does not justify expanding opportunities for commercial exploitation of student-athletes in the future.” ER55.

C. The Court’s Alternative Rule Is Illegitimate

Because the district court found that the challenged rules have procompetitive benefits, plaintiffs had to demonstrate an alternative rule that “is substantially less restrictive and is virtually as effective in serving the legitimate

objective without significantly increased cost.” *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001) (quotation marks omitted). Purportedly adhering to this standard but actually satisfying none of its elements, the court concluded that antitrust law requires the NCAA to discard its century-old rule that student-athletes must not be paid to play, in favor of a rule allowing a supposedly “limited” amount of compensation—about \$30,000 per student-athlete over four years—for use of their NILs: \$5,000 per year in deferred compensation (via a trust) plus the difference between full grant-in-aid and cost of attendance (via a stipend), all paid from group NIL licensing revenue (if there is such a thing).

As the court stated, the NCAA’s procompetitive justifications (even as grudgingly analyzed by the court) are sufficient to justify allowing the NCAA’s members collectively to restrain the price of NILs. *See, e.g.*, ER42, ER87, ER90-91, ER95-96. The court should have left it at that and upheld the challenged rules. Instead, it took on the question of what the agreed-upon NIL price should be, in the apparent belief that it could divine a compensation limit high enough to spur a little more competition but low enough not to endanger amateurism. The court’s choice of an alternate price point, however, would effect a significant departure from the NCAA’s century-old principle of amateurism, without any basis in antitrust doctrine. Rather than according the NCAA the “ample latitude” the Supreme Court said it “needs” to “play[its] critical role in the maintenance of a revered

tradition of amateurism in college sports,” *Board of Regents*, 468 U.S. at 120, the district court usurped for itself stewardship of that tradition. That was error for several reasons.

To begin with, antitrust law provides no basis to prefer one price over another. “It is competition—not the collusive fixing of prices at levels either low or high—that [section 1] recognize[s] as vital to the public interest.” *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000); *see also, e.g., United States v. Trenton Potteries Co.*, 273 U.S. 392, 398 (1927) (“[W]e should hesitate to adopt a construction [of the Sherman Act] making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable.”); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998). In adjusting the NIL price that NCAA members may agree on, the court thus “act[ed] as [a] central planner[,], identifying the proper price, quantity, and other terms of dealing,” “a role for which [courts] are ill suited.” *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004); *see also In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 445 (9th Cir. 1990) (“judg[ing] what constitutes a ‘fair’ price” is role “federal courts are generally unsuited to”); *Chicago Prof’l Sports*, 95 F.3d at 597 (“[T]he antitrust laws do not deputize district judges as one-man regulatory agencies.”).

The court’s alternative—paying student-athletes thousands of dollars supposedly for use of their NILs—is also not virtually as effective in serving the legitimate objective of amateurism. In fact, it is entirely inconsistent with that principle. Contrary to the court’s view, amateurism is not simply a matter of the amount of any payment. Allowing student-athletes to receive compensation for specific commercial revenue generated via use of their NILs is no less anathema to amateurism than paying football players \$100 per sack. Indeed, out of dozens of amateur-sports organizations surveyed for this case, not one allows amateur athletes to be paid a share of commercial revenue for the use of their NILs. ER316a-316b, ER515a-515l, ER631-32, ER634-38.

The district court tried to justify its alternative by asserting that “[t]he popularity of college sports would not suffer” as a form of entertainment if the court’s alternative were permitted. ER52-54. But the court failed to appreciate that by “differentiat[ing] college [sports] from ... professional sports,” the NCAA’s commitment to amateurism does not just enhance the viewership of collegiate athletics; it “widen[s] consumer choice” for both “sports fans” and “athletes.” *Board of Regents*, 468 U.S. at 101-102. The court’s alternative would blur the clear line between amateur college sports and their professional counterparts and thereby deprive athletes of a genuine choice between the two endeavors. *See, e.g., Agnew*, 683 F.3d at 343-345. Thus, the court’s “alternative is

really no alternative at all.” *Barry v. Blue Cross of Cal.*, 805 F.2d 866, 873 (9th Cir. 1986).

The court’s analysis also improperly fails to defer to the NCAA’s judgment about how best to administer college sports. To be valid under the rule of reason, a restraint ordinarily need only be “reasonably necessary” to achieve the procompetitive end. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967), *overruled on other grounds, Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *see also Anderson v. American Auto. Ass’n*, 454 F.2d 1240, 1246 (9th Cir. 1972). There is no doubt that the NCAA’s ban on pay-for-play is reasonably necessary “to preserve the character and quality of the ‘product’” of college sports. *Board of Regents*, 468 U.S. at 102; *see also McCormack*, 845 F.2d at 1342, 1345 (NCAA’s eligibility rules, including those that “restrict student athletes’ compensation,” “reasonably further th[e] goal” of “integrat[ing] athletics with academics”).

Even if there were such doubt, it should have been resolved in favor of the NCAA, which is entitled to “ample latitude” in maintaining amateurism. *Board of Regents*, 468 U.S. at 120; *see also Law*, 134 F.3d at 1022 n.14 (“[C]ourts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics.”); *cf. Race Tires Am., Inc. v. Hoosier Racing Tire Corp*, 614 F.3d 57, 83 (3d Cir. 2010) (“sports-related organizations should

have the right to determine for themselves the set of rules that they believe best advance their respective sport (and therefore their own business interests)”; *Grutter*, 539 U.S. at 328.

Finally, the implications of the court’s analysis underscore its flaws. That analysis invites an interminable series of lawsuits demanding small changes in basic NCAA rules, through which courts would be able to incrementally overhaul college sports—for example, that student-athletes be reimbursed for optional reading materials and not just required texts, or that the minimum GPA be decreased one-tenth of a point at a time (assuming, of course, that a court found that those rules substantially harm competition in the first place). There would be no principled stopping point for such claims, since those rules are based on judgments by educational experts rather than legal doctrines.

An antitrust regime that required courts to find that “the availability of an alternative means of achieving the asserted business purpose renders the existing arrangement unlawful if that alternative would be less restrictive of competition no matter to how small a degree” “would place an undue burden on the ordinary conduct of business.” *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1995). Procompetitive collaborations would be unable to operate without fear of burdensome litigation and treble damage liability based on post-hoc judicial determinations that the rules defining the product could have been

incrementally less restrictive. *See id.* at 1249-1250; *Continental T.V., Inc. v. G.T.E. Sylvania Inc.*, 694 F.2d 1132, 1138 n.11 (9th Cir. 1982); *cf. Race Tires*, 614 F.3d at 80 (Sports “sanctioning bodies ... deserve a bright-line rule to follow so they can avoid potential antitrust liability as well as time-consuming and expensive antitrust litigation.”). None of this is a proper use of antitrust law.

* * *

The district court’s ill-conceived rule-of-reason analysis amounted to little more than asking whether college sports could still be commercially popular if it became something different from what it has long been. That is not an appropriate inquiry for a federal antitrust court generally, and especially with respect to the “revered tradition of amateurism in college sports” that “[t]he NCAA plays a critical role in maint[aining].” *Board of Regents*, 486 U.S. at 120. As the Supreme Court has held, “the preservation of the student-athlete in higher education ... is entirely consistent with the goals of the Sherman Act.” *Id.* at 120.

CONCLUSION

The district court's judgment should be reversed and the injunction vacated.

Respectfully submitted.

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STATEMENT OF RELATED CASES

The only related case of which the NCAA is aware is *Keller v. Electronic Arts Inc.*, No. 10-15387, which arises from a consolidated district court litigation of which this case was previously a part, *Keller v. Electronic Arts Inc.*, No. 09-1967 (N.D. Cal.). This Court issued its decision in *Keller* on July 31, 2013, but subsequently stayed the issuance of its mandate pending the filing and disposition of a petition for a writ of certiorari. Although that petition has been dismissed, this Court has not yet issued its mandate; hence the case remains “pending in this Court.” Cir. R. 28-2.6. The district court deconsolidated this case from *Keller* on May 23, 2014. See Order, *O’Bannon v. NCAA*, No. 09-3329 (N.D. Cal.).

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i) in that, according to the word-count feature of the word processing system in which the brief was prepared (Microsoft Word), the brief contains 13,758 words, excluding the portions exempted by Rule 32(a)(7)(B). The brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font.

/s/ Seth P. Waxman

SETH P. WAXMAN

CERTIFICATE OF SERVICE

I certify that on this 14th day of November, 2014, I electronically filed the foregoing with the Court using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Seth P. Waxman

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