Nos. 14-16601, 14-17068

IN THE

United States Court of Appeals for the Ninth Circuit

EDWARD C. 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.

On Appeal from the United States District Court
for the Northern District of California, No. 4:09-cv-03329-CW

BRIEF AMICI CURIAE OF AMERICAN COUNCIL ON EDUCATION, ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES, AND NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, Amici Curiae American Council on Education, Association of Governing Boards of Universities and Colleges, and National Association of Independent Colleges and Universities state that they are non-profit associations or corporations with no parent corporations and no privately-owned stock.

/s/ Martin Michaelson
Martin Michaelson

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STATEMENT OF INTEREST OF AMICI CURIAE

Amicus American Council on Education ("ACE") represents all higher education sectors.[1] Its approximately 1,800 members include a substantial majority of United States colleges and universities. Founded in 1918, ACE seeks to foster high standards in higher education, believing a strong higher education

[1] No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than Amici or their counsel made a monetary contribution to the brief. This brief is filed under Federal Rule of Appellate Procedure 29(a) with the consent of all parties.

system the cornerstone of a democratic society. ACE regularly contributes amicus briefs on issues of importance to the education sector.

Amicus the Association of Governing Boards of Universities and Colleges ("AGB") serves the interests and needs of academic governing boards, boards of institutionally related foundations, and campus CEOs and other senior-level administrators on issues related to higher education governance and leadership. Its mission is to strengthen, protect and advocate on behalf of citizen trusteeship that supports and advances higher education. Governing board accountability includes the protection of higher education's central value of academic freedom, which is at the heart of our mission. AGB has consistently conveyed its commitment to ensure the integrity of intercollegiate athletics, most recently through a Report in November, 2012, on "Governance and Intercollegiate Athletics: Boards Must Know the Score."

Amicus the National Association of Independent Colleges and Universities ("NAICU") serves as the unified national voice of private, nonprofit higher education in the United States. It has more than 1,000 members nationwide, including traditional liberal arts colleges, major research universities, special service educational institutions, and schools of law, medicine, engineering, business, and other professions. NAICU represents these institutions on policy

issues primarily with the federal government, such as those affecting student aid, taxation, and government regulation.

SUMMARY OF ARGUMENT

Preservation of amateurism in intercollegiate athletics is a vital and historic interest of the national higher education community Amici represent. Colleges and universities exist to educate students in preparation for life's work. Intercollegiate athletics advances that mission. The precise contours of amateurism in intercollegiate athletics have evolved over time, but its necessity and basic features have not. College athletes must be enrolled at the institutions for which they compete, must attend class, and must make satisfactory progress toward their degrees. They may not receive payment for participation in athletics or for their athletic reputations, and may not receive scholarships that exceed amounts National Collegiate Athletic Association ("NCAA") rules permit. Although intercollegiate athletics faces challenges, amateurism accounts for preservation of its educational purpose. To undercut amateurism would undercut education.

The district court in this antitrust case viewed amateurism through the lens of economics and found that NCAA amateurism rules serve the procompetitive purpose of driving in part "consumer demand for FBS football and Division I basketball-created products." ECF No. 291, at 82. The district court also acknowledged that NCAA amateurism rules promote integration of student-

athletes into the student body and thus preserve educational quality. ECF No. 291, at 39, 90.

Despite those findings, the district court replaced NCAA's calibrated definition of amateurism with compensation terms and on conditions the court prefers. Under its injunction, student-athletes may receive athletic scholarships up to the full cost of attendance, plus payments up to $20,000 held in trust and released to student-athletes after their athletic eligibility expires. The district court erred both by supplanting an educational judgment with an economic one and disregarding a long-established antitrust-law tenet: A court may enjoin a procompetitive restraint only if the alternative achieves the same benefits substantially less restrictively.

The district court's alternative violates that principle. It transforms amateur student-athletes into paid professionals. Even if the transformation did not fully manifest immediately, it would over time. Among harmful effects of the ruling are the prospect of focus on payment, rather than educational quality; the likelihood the ruling would reduce athletics opportunities overall; and a risk of worse educational outcomes. The district court ruling would also impede achievement of procompetitive effects of NCAA's amateurism rules. The judgment should be reversed.

ARGUMENT

I. AMATEURISM GUARDS THE EDUCATIONAL PURPOSE OF INTERCOLLEGIATE ATHLETICS.

The district court analysis in this case hinges on a view of intercollegiate athletics at odds with education and the basic reason colleges and universities exist. The district court conceived intercollegiate athletics as little more than a side-business. In fact, intercollegiate athletics is an educational opportunity colleges and universities provide in which some students participate as part of their higher education. Amateurism guards that purpose.

A. Colleges' and Universities' Mission Is Education, Not Sports.

The mission of a higher education institution is to provide education, not to profit by pleasing sports fans. Intercollegiate athletics is therefore not a commercial activity typical of Sherman Act cases.

1. Intercollegiate Athletics is a Component of Education.

Students with diverse talents and interests come to the nation's colleges and universities to learn and to develop as citizens. Much of that learning takes place outside the classroom. It occurs in college newspaper pressrooms, campus radio station studios, debate societies, and chess clubs; it happens in music practice rooms, on concert hall stages, and on the sports field. Colleges and universities offer merit and need-based scholarships to many students who bring special perspectives and talents. Scholarships often relate to participation in an

extracurricular activity.[2] The goal is to engage each student and educate the whole person. Educational opportunities beyond the classroom help students prepare for life's work.

Athletics is a venerable component of education. In The Republic, Plato has Socrates emphasize physical training—"gymnastics"—as integral to education. For more than a century, our nation's colleges and universities have embraced athletics for that reason. "The principal object of education" is to prepare students "to be better citizens," and "athletic sport" is "a powerful factor in the physical and moral development of youth." W.L. Dudley, Athletic Control in School and College, 11 The Sch. Rev. 95, 95 (1903) (internal quotations and citation omitted). If "[t]he ultimate purpose of education is to teach students to get a better control of

[2] See, e.g., Baylor University, Glenn R. Capp Fellows Scholarship, http://www.baylor.edu/communication/index.php?id=64867 (describing scholarship limited to students "active in the Baylor debate program" who maintain a 3.0 grade-point average) (last visited Nov. 11, 2014); Lehigh University, Undergraduate Admissions Types of Aid, Snyder Family Marching 97 Scholarships, http://www4.lehigh.edu/admissions/undergrad/tuition/aidtypes.aspx (scholarship for those who "agree to participate fully in the Marching Band" and "maintain at least a 2.8 grade point average") (last visited Nov. 11, 2014); Purdue University, Purdue Musical Organizations, http://www.purdue.edu/pmo/faq.shtml (separate scholarships for Glee Club members and members of other Purdue Music Organizations) (last visited Nov. 11, 2014); University of Illinois, Scholarships for the College of Fine and Applied Arts, School of Art and Design (A&D), http://admissions.illinois.edu/cost/scholarships_FAA.html (tuition waiver for students "based on the quality of their portfolio") (last visited Nov. 11, 2014); William & Mary Law School, Scholarships, https://law.wm.edu/admissions/financialaid/scholarships/index.php (scholarship for the law review editor-in-chief) (last visited Nov. 11, 2014).

life . . . . Then what manner of experience are our varsity contests! They most surely are one form of . . . education." D. Oberteuffer, The Athlete and His College, 7 J. of Higher Educ. 437, 439 (1936).

Higher education's commitment to maintaining education as the foundation of intercollegiate athletics is long-rooted. For instance, in 1888 a Harvard College committee studied "the whole subject of athletics," including the "total time necessary for practice," and found that 21 hours per week of "training . . . is not so severe as to make the time devoted to study of less value to members of teams than to other students." Harvard College, Report Upon Athletics, with Statistics of Athletics and Physical Exercise, and the Votes of the Governing Boards 20 (1888). The Committee concluded that "athletic sports do not seriously interfere with attendance on College courses." Id. at 17.

Educators have long grappled with how best to keep students focused on course studies while they participate in and benefit from intercollegiate athletics. Over the decades, Amici and their members have looked critically at this. In 1952, ACE recommended lodging control of athletics in the institution's regular administration and requiring all students to meet standard admissions criteria and make satisfactory academic progress. See ACE, Report of the Special Committee on Athletic Policy (Feb. 16, 1952). The Committee called for accrediting agencies to adopt and enforce standards on the topic. Id. Later, the Knight Commission on

Intercollegiate Athletics called for the institution's president to control the athletics program, and endorsed strengthening academic eligibility requirements and financial integrity. See Reports of Knight Foundation Commission on Intercollegiate Athletics (1991–1993);[3] A Call To Action: Reconnecting College Sports and Higher Education (2001);[4] Restoring the Balance: Dollars, Values, and the Future of College Sports (2010) (hereafter "Restoring the Balance").[5] The Commission declared: "[P]residents and other leaders of Division I institutions have done much to improve governance policies and to raise academic expectations. The result has been better classroom outcomes for athletes and greater accountability for their coaches, teams, and institutions." Restoring the Balance at 1.

Such efforts reflect the higher education community's commitment to maintaining and furthering the primacy of education in athletics. Today, all of the nation's higher education regional accreditors maintain standards on athletics. For example, the Western Association of Schools and Colleges ("WASC") provides that "[s]ports and athletics of all kinds—intercollegiate, intramural, and

[3] Available at http://www.knightcommission.org/academic-integrity/academic-integrity-commission-report.

[4] Available at http://www.knightcommission.org/images/pdfs/2001_knight_report.pdf.

[5] Available at http://www.knightcommission.org/images/restoringbalance/KCIA_Report_F.pdf.

recreational—are deeply rooted in educational institutions and in American society. Well-conducted programs of athletics add significantly to the educational experience, and to a collegiate atmosphere of wholesome competition." WASC, Collegiate Athletics Policy (last modified July 2, 2014).[6] To that end, WASC reviews whether athletics programs are "integrated into the larger educational environment of the campus." Id. The New England Association of Schools and Colleges ("NEASC") similarly requires that athletics programs be "conducted in a manner consistent with sound educational policy, standards of integrity, and the institution's purposes." NEASC, Commission on Institutions of Higher Education, Standards for Accreditation, 6.16 (July 1, 2011).[7] "Educational programs and academic expectations" must be the "same for student athletes as for other students." Id. at 18. The Middle States Commission on Higher Education ("MSCHE") provides that "athletics programs should be fully integrated into the larger educational environment of the campus and linked to the institutional mission." Middle States Guidelines: Athletic Programs, 1.[8] "All expenditures for and income from athletics, from whatever source, and the administration of scholarships, grants, loans, and student employment, should be fully controlled by

[6] Available at http://www.wascsenior.org/content/collegiate-athletics-policy.

[7] Available at http://cihe.neasc.org/downloads/Standards/Standards_for_Accreditation.pdf.

[8] Available at https://www.msche.org/documents/P3.3-AthleticPrograms.doc.

the institution and included in its regular budgeting, accounting, and auditing procedures."[9] Id. at 2. These principles are also set out in NCAA's Constitution and Bylaws. NCAA, 2014–15 Division I Manual, § 1-2 (Aug. 1, 2014); id. art. 12.

2. The Purpose of Intercollegiate Athletics Is Education, Not Profit.

Contrary to a canard, at nearly all colleges and universities the athletics program does not generate net income. Only a tiny fraction of athletics programs at a tiny fraction of colleges and universities do. See, e.g., David Welch Suggs, Jr., Ph.D., Myth: College Sports Are a Cash Cow, The Presidency (Spring 2012); cf. Prepared Statement of Harvey Perlman, BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field, Hearing Before the Committee on the Judiciary, United States Senate at 72 (October 29, 2003).[10] "[M]ost institutions require institutional funding to balance their athletics operating budget." Restoring the Balance, supra, at 6. This economic reality is very unlikely

[9] The Southern Association of Colleges and Schools Commission on Colleges ("SACSCOC") requires that an institution's chief executive officer exercise "ultimate responsibility for, and . . . appropriate administrative and fiscal control over, the institution's intercollegiate athletics program." SACSCOC, The Principles of Accreditation: Foundations for Quality Enhancement 3.2.11 (2012), available at http://www.sacscoc.org/pdf/2012PrinciplesOfAcreditation.pdf. The North Central Association Higher Learning Commission ("HLC") requires that institutions operate athletics programs with integrity. See HLC, Policy Book, CRRT.B.10.010, 2.A (Oct. 2014), available at https://downloadna11.springcm.com/content/DownloadDocuments.ashx?aid=5968&Selection=Document%2C00308f32-9056-e211-9536-0025b3af184e%3B.

[10] Available at http://www.acenet.edu/the-presidency/Pages/Spring-2012.aspx.

to change. "[A]thletics subsidies will continue to grow, both in real terms and as a percentage of institutional budgets." Suggs, Jr., supra.

B. The Educational Character of Intercollegiate Athletics Depends on Amateurism.

From the earliest days of intercollegiate competition, colleges and universities recognized that if athletics is to meet its educational purpose, teams must be composed of *bona fide* students.[11] NCAA amateurism rules ensure they are. See, e.g., NCAA v. Bd. of Regents, 468 U.S. 85, 101–02 (1984) (student-athletes must go to class, must not be paid, and must make satisfactory progress toward degree). "[T]eams made up of hirelings . . . might win games, but the real object of college sport—the development of youth—would be entirely eliminated." Dudley, supra, at 101–02.

To pay student-athletes would undercut the educational character of intercollegiate athletics. Pay-for-play would transform the relationship between the institution and its student-athletes into a business relationship. Where college is supposed to be a place to take risks, to try and fail, and to find one's self, athletes would turn to individual brand management and monetization of athletic

[11] E.g., Jesse Feiring Williams, The Crucial Issue in American College Athletics, 20 The J. of Higher Educ. 12, 17 (1949) ("[S]ince athletics are accepted activities in the education of college students, all bona fide students shall be eligible to participate, and neither scholarship nor social status shall render student ineligible.").

performance. Teamwork, team honor, and collegial tradition would tend to become subordinated to financial profit.[12]

The job of a professional athlete is different from the work of a student. Baseball Hall of Fame member Branch Rickey explained:

> I am in a business called professional baseball where no quarter is asked and no quarter is given,—highly competitive, where we put the dollar mark on the muscle, and try to keep it clean. . . . You are in a business where there should be no dollar marks on the muscles. I am in a game that we can scarcely afford to lose. In your business, you are playing a game which you ought not play if you cannot afford to lose. I am in a game to win, where eyes are on the gate receipts. You are in a game where your eyes are on the achievement of excellence in the formative age of young men. . . . You are directly concerned and should be exclusively concerned with the educational process as related to the functional development of young men and women.

Branch Rickey, What is Amateur Sport? 28 J. of Educ. Sociology 249, 250 (1955). Amateurism preserves the educational relationship between the student-athlete and the institution.

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[12] Cf. University Herald, Frank Kaminsky Details Reason for Staying at Wisconsin in Lengthy Blog Post, Universityherald.com, http://www.universityherald.com/articles/9194/20140501/frank-kaminsky-details-reason-for-staying-at-wisconsin-in-lengthy-blog-post.htm (May 1, 2014) (reporting that a University of Wisconsin basketball player declined to enter the NBA draft early because inter alia "'[t]he University of Wisconsin has provided me with an opportunity to be the best I can be,'" and "'we play in front of nearly 17,000 fans every single time we step onto the court. When we travel, we play in front of sell out crowds who absolutely hate us. Not because of who is on the team, but because of where we go to school.'")

If unchecked, commercialism could overwhelm the educational purpose of intercollegiate athletics. That is the reason for the amateurism rules and why the institutions have worked for the past century to keep education central. A judicial determination that the Sherman Act requires more commercialism in intercollegiate athletics would aggravate, not remedy, the hazards of commercialism.

Antitrust is a blunt instrument that operates on the ruthless logic of market economics. Indeed, two explanations commonly offered for the view that amateurism should be abandoned—television revenue generated by some Division I football and basketball conferences, and coaches' salaries—devolve on application of the Sherman Act. NCAA v. Board of Regents, 468 U.S. 85 (1984), opened the door to unlimited telecasts of college games. See id. at 119–20. Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998), effectively required institutions to compete with professional sports organizations for coaches. See id. at 1024. Neither of those decisions, however, confronted the issue in this case, namely whether the educational value of amateurism will be preserved.

C. Amateurism Rules Have Never Before Been Held to Violate the Sherman Act.

NCAA has refined its amateurism principles for decades, including forbidding compensation for use of student-athletes' names, images, and likenesses. Until the district court's ruling in this case, every prior Sherman Act challenge to

core amateurism rules failed. See, e.g., Smith v. NCAA, 139 F.3d 180, 184, 186–87 (3d Cir. 1998) (affirming grant of motion to dismiss antitrust challenge to "Postbaccalaureate Bylaw" that prohibited graduate student from competing in intercollegiate athletics at an institution other than the student's undergraduate institution; rule is procompetitive effort to foster competition among amateur athletic teams), vacated on other grounds 525 U.S. 459 (1999); Hairston v. Pacific-10 Conference, 101 F.3d 1315, 1319 (9th Cir. 1996) (granting athletic conference summary judgment for sanctions imposed on university for violations of NCAA and conference rules concerning extra benefits; rules served procompetitive purpose of preserving amateurism); Banks v. NCAA, 977 F.2d 1081, 1091–93 (7th Cir. 1992) (upholding "no-draft" and "no-agent" rules in part because they promote amateurism); McCormack v. NCAA, 845 F.2d 1338, 1343–45 (5th Cir. 1988) (granting NCAA's motion to dismiss because amateurism rules prohibiting compensation of student-athletes is reasonable under Sherman Act as a matter of law); Gaines v. NCAA, 746 F. Supp. 738, 745–47 (M.D. Tenn. 1990) (denying preliminary injunction on a Sherman Act challenge to "no-draft" and "no-agent" rules because, among other reasons, they are reasonable as a matter of law); Justice v. NCAA, 577 F. Supp. 356, 382–83 (D. Ariz. 1983) (denying preliminary injunction that challenged NCAA sanctions imposed on University of Arizona for paying extra benefits to current and prospective student-athletes); Jones v. NCAA,

392 F. Supp. 295, 303–04 (D. Mass. 1975) (denying preliminary injunction that sought to prohibit enforcement of NCAA determination that college student was ineligible to play intercollegiate hockey because he received minimal compensation playing junior hockey; no-compensation rules are not commercial in nature and even if treated as such are reasonable because they preserve the amateur character of intercollegiate sports).

As the Supreme Court explained in Board of Regents, "[t]here can be no question but that . . . the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." 468 U.S. at 120. In 2012 the Seventh Circuit recognized that amateurism creates the "product." Agnew v. NCAA, 683 F.3d 328, 343 (7th Cir. 2012). No lengthy analysis is needed to uphold an amateurism rule: "when an NCAA bylaw is clearly meant to help maintain the 'revered tradition of amateurism in college sports' or the 'preservation of the student-athlete in higher education,' the bylaw will be presumed procompetitive." Id. at 342–43 (citation omitted). "[B]ylaws eliminating the eligibility of players who receive cash payments beyond the costs attendant to receiving an education . . . clearly protect[] amateurism." Id. at 343.

The district court injunction, which would permit student-athletes to receive up to $20,000 "beyond the costs attendant to receiving an education," is thus at odds with antitrust jurisprudence.

II. THE DISTRICT COURT INJUNCTION WOULD NOT ACHIEVE IN A SUBSTANTIALLY LESS RESTRICTIVE WAY ACKNOWLEDGED PROCOMPETITIVE BENEFITS OF AMATEURISM.

The district court acknowledged two procompetitive benefits of amateurism: It (1) promotes popularity of intercollegiate athletics, e.g., ECF No. 291, at 82, and (2) facilitates student-athlete integration into the wider student-body and thus educational quality, id. at 87–88. Therefore, absent proof of a substantially less restrictive alternative that achieves the same procompetitive benefits, amateurism rules are lawful. See, e.g., Hairston v. Pacific-10 Conference, 101 F.3d 1315, 1319 (9th Cir. 1996). The approach the district court preferred would redefine intercollegiate athletics and not achieve the same procompetitive benefits.

A. Less-Restrictive-Alternative Analysis is Not a License to Replace a Procompetitive Restraint with a Restraint a District Court Prefers.

Because the district court found that amateurism serves procompetitive purposes, it could issue an injunction only if the plaintiff proved that "'any legitimate objectives can be achieved in a substantially less restrictive manner.'" Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001) (citation omitted). That standard requires a showing that an alternative is "substantially less restrictive

and is virtually as effective in serving the legitimate objective without significantly increased cost." County of Tuolomne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1159 (9th Cir. 2001) (citations omitted; emphasis in original).

For example, in Hairston this Court considered a challenge to the Pacific-10 Conference's ("Pac-10") sanctions against the University of Washington football team. 101 F.3d at 1317–18. In affirming a grant of summary judgment to the Pac-10, the Court noted that the plaintiff's expert deemed the sanctions "within the range of appropriate penalties." 101 F.3d at 1319. Having determined that the restraint served a procompetitive purpose and was within an appropriate range, the Court declined to entertain whether a less restrictive alternative would have achieved the same result. Id.

Less-restrictive-alternative analysis is not a license to supplant a procompetitive restraint with another perceived preferable. Often judges "can only speculate" as to whether an alternative is "slightly less restrictive, slightly more costly, or slightly less effective—or greatly so." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1505 (3d ed. 2006). "[T]hose objecting to a restraint can frequently imagine a less restrictive alternative. But refined comparisons among alternatives are usually impossible." Id. § 1505(b). Therefore, courts "wisely ask only that the challenged restraint be 'reasonably necessary' to achieve a legitimate objective. . . . [A] restraint can be 'reasonably necessary' even though

some less restrictive alternative exists." Id. "[T]he antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute." Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic, 65 F.3d 1406, 1413 (7th Cir. 1996) (Posner, J.); cf. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

The district court did not follow that principle. Misconceiving NCAA's amateurism rules as a price cap on student-athlete salary,[13] the court in effect found the cap necessary to achieve NCAA's procompetitive benefits. ECF No. 291, at 95–98. The antitrust inquiry should have ended there, as in Hairston. Instead, the district court replaced NCAA's "salary cap" amount with a different amount of its own invention. The district court thereby improperly made the Sherman Act a rate-regulation statute and set rates. See Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1224–26 (9th Cir. 1997).

The Sherman Act does not ask whether a court can conceive a "more procompetitive" result. It asks whether the challenged arrangement unreasonably restrained competition. The district court did not observe that distinction.

[13] As explained in part II.B.1, infra, NCAA rules do not in fact permit payments in exchange for athletic services. An athletic scholarship is not a salary.

B. The District Court's Compensation Terms Would Undermine Procompetitive Effects of Amateurism.

The district court offered no persuasive evidence its approach would achieve NCAA's procompetitive objectives or in a substantially less restrictive way. Amici believe it would not.

1. The Injunction Would Make Amateur Student-Athletes Paid Professionals.

The injunction would not achieve NCAA's procompetitive goal of offering a product that would not otherwise exist—amateur intercollegiate athletics—which, as the Supreme Court has recognized, serves the procompetitive goal of "widening consumer choices" for both fans and athletes. NCAA v. Bd. of Regents, 468 U.S. 85, 101–02 (1984).

The distinction between athletic scholarships and the district court's approach is one of kind, not degree. Athletic scholarships reimburse for charges the mandatorily-enrolled student-athlete would otherwise have to pay. Cf. United States v. Brown Univ., 5 F.3d 658, 667–68 (3d Cir. 1993) (treating financial aid as a discount off the cost of educational services). An athletic scholarship is no more payment for services than are other scholarships offered to attract students who bring particular aptitudes to campus. Monetary payment above cost-of-attendance, by contrast, is payment for services rendered. Because the injunction would allow

such payments, it would transmogrify the "product." Cf. McCormack v. NCAA, 845 F.2d 1338, 1345 (5th Cir. 1988).

2. The Injunction Would Weaken Education.

The district court's approach would not achieve NCAA's procompetitive goals of providing high quality athletic and educational opportunities, and would undermine efforts to integrate student-athletes and promote educational quality.

The district court's injunction would create incentives for student-athletes to shift attention from education to salary. NCAA's existing rules generally limit athletic scholarships to tuition and fees, room and board, and required course-related textbooks. NCAA, 2014–15 Division I Manual § 15.02.5 (Aug. 1, 2014. Each of these categories is relatively fixed. By contrast, other components of an institution's cost of attendance are more variable. For example, institutions may include an allowance for transportation and miscellaneous expenses. 20 U.S.C. § 1087*ll*. Each institution may determine for itself estimated costs for each of the categories; there is no federal methodology. See id. § 1087rr(a). (prohibiting U.S. Department of Education from regulating cost of attendance). To permit athletic scholarships to cover such categories could create a loophole for cash payments that are not actual reimbursement. Too, student-athletes who accrue deferred compensation under the injunction may take their studies less seriously. The injunction would also permit structuring the payments as team athletic

performance bonuses, see ECF No. 291, at 97–98, which could alienate student-athletes from the wider academic community.

3. If the Injunction Stands, Amateurism Will Fall.

If the injunction stands, amateurism will be degraded. Enforcement problems and litigation can be expected to result. Use of a trust fund to try and solve the problem of student-athletes receiving compensation while in college would likely backfire. A trust fund is an asset that can be used as collateral for cash loans and other benefits today. It would be difficult if not impossible for NCAA to police effectively improper monetization of trust assets. If NCAA attempted to ban legitimate loans with trust funds as collateral, it could be deemed to take an asset from student-athletes, which may violate law. This Court has previously recognized that it is not the judiciary's role to impose burdensome requirements on enforcement of NCAA amateurism rules. See Shelton v. NCAA, 539 F.2d 1197, 1199 (9th Cir. 1976) (noting that alternative approach to bright-line amateurism rules would likely require "extensive investigations of the facts and time consuming hearings involving the parties" to a particular contract).

The district court's framework also invites litigation to increase the limits on student-athlete compensation, and ultimately to eliminate those limits. Indeed, now pending before the district court are antitrust suits in which plaintiffs seek to enjoin any limits on compensation for student-athletes. See, e.g., In re NCAA

Athletic Grant-in-Aid Cap Antitrust Litig., Nos. 14-md-02541-CW and 14-cv-02758-CW (N.D. Cal.).

Faced with a morass of harmful, unwieldy consequences, including litigation, institutions likely would be forced to administer pay-for-play. Were pay-for-play to go into effect, student-athletes would be compensated professionals; NCAA, athletics conferences and the institutions would be at risk of violating the law by taking action to address ensuing problems; education and therefore students would lose. The Sherman Act does not ordain this.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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Dated: November 21, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 32(a)(5), (a)(6), and (a)(7) of the Federal Rules of Appellate Procedure, I hereby certify that this brief was produced in Times New Roman 14-point typeface using Microsoft Word 2010 and contains 5,203 words (excluding portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii)).

/s/ Martin Michaelson
Martin Michaelson

CERTIFICATE OF SERVICE

I certify that on November 21, 2014, the foregoing was electronically filed through this Court's CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the Court's CM/ECF system.

/s/ Martin Michaelson
Martin Michaelson