Nos. 14-16601 & 14-17068

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendant-Appellant,

vs.

MR. EDWARD C. O'BANNON, JR., et al.,

On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellees.

Appeals from the United States District Court
for the Northern District of California
The Honorable Claudia Wilken, Chief Judge
Case Nos. 09-cv-1967 CW & 09-cv-3329 CW

Brief & Request for Oral Argument for College Athlete Advocate Mr. Andrew A. Oliver as Amicus Curiae in Support of the Plaintiffs-Appellees

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Statement of Amicus Curiae & Request for Oral Argument

Pursuant to Federal Rule of Appellate Procedure 29(c)(4), Mr. Andrew A. Oliver, a.k.a. Andy Oliver, is a college athlete advocate, who was the first college athlete to ever get to  trial against the NCAA, he was the first to win, he is the only one to ever have had its by-laws declared invalid, and he was the first to obtain a permanent injunction against the NCAA, all while attending Oklahoma State University ("OSU") his junior year.[1]

[1] *Oliver v. NCAA*, 920 N.E.2d 196 (Ohio Com. Pl. 2008) (denying motion to dismiss), 920 N.E.2d 190 (Ohio Com. Pl. 2008) (denying motion for summary judgment), 920 N.E.2d 203 (Ohio Com. Pl. 2009) (bench trial judgment granting declaratory and permanent injunctive relief).

For a complete discussion of the *Oliver* case, please see Richard G. Johnson, *Submarining Due Process: How the NCAA Uses its Restitution Rule to Deprive College Athletes of their Right of Access to the Courts ... Until Oliver v. NCAA*, 11 FLA. COASTAL L. REV. 459 (2010), *available at* https://www.fcsl.edu/sites/fcsl.edu/files/Johnson.pdf.

For student commentary, please see Virginia A. Fitt, Note, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555 (2009); James Halt, Comment, *Andy Oliver Strikes Out the NCAA's "No-Agent" Rule for College Baseball*, 19 J. LEGAL ASPECTS OF SPORT 185 (2009); T. Matthew Lockhart, Note, *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA's "Veil of Amateurism*," 35 U. DAYTON L. REV. 175 (2010); and Brandon D. Morgan, Comment, *Oliver v. NCAA: NCAA's No Agent Rule Called Out, But Remains Safe*, 17 SPORTS LAW. J. 303 (2010).

The *Oliver* case was covered extensively by the *National Law Journal* as well as the *New York Times*, it was reported in thousands of blogs, news stories, sports commentaries, etc., which are easily searchable on the web, and it is now cited and discussed in over four dozen secondary legal resources and taught in all sports law

None of that had ever happened before, and the current *O'Bannon* case is only the second time that college athletes have even been able to get to trial, let alone win and obtain a permanent injunction, which is a testament to the courage, financial sacrifice, and legal expertise of lead counsel for the class, as well as to the backbone of Mr. O'Bannon and his fellow class representatives.

Andy was the catalyst for this case as well as the other pending cases against the NCAA,[2] and he provided the initial background for Taylor Branch's ground-breaking expose on the exploitation of college athletes, which also featured Andy's story, and which itself became a further major catalyst for the college athlete rights litigation now unfolding.[3]

Andy has an insider's perspective as to how college athletes are really treated by the NCAA and the so-called Power Five Conferences, and he has a strong interest in seeing that the march towards recognition of full civil rights for college

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courses. The most recent such commentary came out earlier this month. *See* Kelli Rodriguez Currie, Note, *National Collegiate Sports Counseling Center: Providing Student-Athletes with Comprehensive Advocacy Throughout Their Collegiate Career*, 12 SEATTLE J. SOC. JUST. 1129 (2014), *available at* http://digitalcommons.law.seattleu.edu/sjsj/vol12/iss3/12.

[2] *E.g.*, Todd Jones, *Ohio Case Paved Way for O'Bannon v. NCAA*, COLUMBUS DISPATCH, June 19, 2014, at ___, *available at* http://buckeyextra.dispatch.com/content/stories/2014/06/19/ohio-case-paved-way-for-obannons-ncaa-lawsuit.html.

[3] Taylor Branch, *The Shame of College Sports*, THE ATLANTIC MAG., Oct. 2011, at 80, *available* at http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.

athletes continues.[4]

Four *amici* briefs have been filed in favor of the NCAA, but the two antitrust and economic ones as well as the educational one are all on behalf of members of the NCAA or employees thereof, plus they bring nothing additional to the table; the one filed by the broadcasters, many of whom are being sued for paying billions of dollars to the NCAA and its members without paying one penny to the talent, clearly have their own agenda. Apart from being a former victim of the abuses of the NCAA, Andy has no skin in this game apart from his very real concern that college athletes' voices be heard by this court and not be drowned out by the powerful and wealthy interested in maintaining the unconscionable status quo.

Andy is a professional baseball player (LHP), who was drafted out of high school by the Minnesota Twins  in 2006. He turned down that offer and attended OSU, and then was later drafted as a junior by the Detroit Tigers in 2009, for whom he played until 2013, when he was traded to the Pittsburgh Pirates. He is now with the Philadelphia Phillies, and he starts Spring training in February.

[4] David Wade, *Inside the Rules: The NCAA "No Agent" Rule*, HARDBALL TIMES, Feb. 8, 2011 ("'Make no mistake, this is a civil rights struggle, where there are vested moneyed interests powerfully aligned against [college] athletes, who generally have no ability to fight the system on their own, and who for some reason have not been organized, so that they can fight as a group.'") (quoting Richard G. Johnson), *available at* http://www.hardballtimes.com/inside-the-rules-ncaa-no-agent-rule/.

Pursuant to Federal Rule of Appellate Procedure 29(a), both parties' counsel have consented to the filing of this brief.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no one contributed any money that was intended to fund preparing or submitting this brief, because this representation was performed *pro bono*, and because the only expense expected to be incurred by counsel is nominal paper and postage or delivery charges.

Pursuant to Federal Rule of Appellate Procedure 29(g), this Court's permission is hereby requested for this Amicus Curiae to participate in oral argument, and Andy respectfully suggests that additional time be allotted for the same rather than subtracting any time from the Plaintiffs-Appellees.

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Argument

I. Prelude—

A. The Antitrust Trilogy—

This case is the third part of an antitrust trilogy, and it is far less complicated than all the briefs would make it seem, presenting a simple issue: Will this court uphold the NCAA's and its members' business plan of paying its player labor zero?

The trilogy begins first with *NCAA v. Board of Regents of the University of Oklahoma*,[5] where the football powerhouse schools at the time rested control over their broadcast rights from the NCAA. Second, in *Law v. NCAA*,[6] college coaches at the powerhouse schools rested control over their salaries from the NCAA. Third, in *White v. NCAA*,[7] college athletes attempted to rest control over their grants-in-aid from the NCAA, but the settlement in that case, which was supposed to address the problem of grants-in-aid not covering the full cost of attendance, did not, so here were are again, a decade later, trying to fix in part what was supposed to have been already fixed.

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[5] 468 U.S. 85 (1984).

[6] 134 F.3d 1010 (10th Cir. (Kan.) 1988), *cert. denied*, 525 U.S. 822 (1998).

[7] No. 06-cv-0999 VBF (C.D. Cal., settlement approved Aug. 5, 2008), *available at* http://www.ncaaclassaction.com/index.php3.

For a discussion of the *White* case, see Thomas A. Baker III, Joel G. Maxcy & Cyntrice Thomas, *White v. NCAA: A Chink in the Antirust Armor*, 21 J. LEG. ASPECTS OF SPORT 75 (2011).

Of course, the current *O'Bannon* case goes much further than what *White* requested, but had the NCAA and its members embraced the spirit of *White*, maybe natural progression might have produced a much more fair college athlete landscape by now. Since they did not, here we are now with the college athletes asking this court to uphold their fundamental property rights in their names, images, and likenesses—just like everyone else has.

B. The Derogatory Term "Student-Athlete"—

For this court to hear the plea of past, present, and future college athletes, it must understand from the get-go that the NCAA invented the term "student-athlete" as propaganda in the late 1950s to counter efforts by disabled players to obtain workmen's compensation and other employee rights.[8]

According to Mr. Walter Byers, the first Executive Director of the NCAA

[8] Ellen J. Staurowsky, *College Football Players as Employees: About This There Should Be No Debate*, HUFFINGTON POST, Jan. 20, 2015, *available at* http://www.huffingtonpost.com/ellen-j-staurowsky/college-football-players-_1_b_6506392.html.

For a discussion of this larger college athlete employment issue, please see Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 497 (2008), and Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 80-81 (2006). *See also* Virginia A. Fitt, Note, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 573-76 (2009) (discussing and reviewing the college athlete employment issue).

from 1952 to 1988, who essentially built the modern NCAA,[9] in describing the environment in the 1950s, where grants-in-aid were still considered to be pay-to-play:

> It was then that they came face to face with a serious, external threat that prompted most of the colleges to unite and insist with one voice that, grant-in-aid or not, college sports still were only for "amateurs."
>
> That threat was the dreaded notion that NCAA athletes could be identified as employees by state industrial commissions and the courts.
>
> We crafted the term student-athlete, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes. We told college publicists to speak of "college teams," not football or basketball "clubs," a word common to the pros.
>
> I suppose none of us wanted to accept what was really happening. That was apparent in behind-the-scenes agonizing over the issue of workmen's compensation for players. I had reluctantly accepted the professed purpose of the full-ride grant-in-aid as a device to clean up sports. I was shocked that outsiders could believe that young men on grants-in-aid playing college sports should be classified as workers.
>
> The argument, however, was compelling. In a nutshell: the performance of football and basketball players frequently paid the salaries and workmen's compensation expenses of stadium employees, field house ticket takers, and restroom attendants, but the players themselves were not covered. Even today, the university's player insurance covers medical expenses for athletes, but its workmen's compensation plan provides no coverage for disabling injuries they may suffer. There is limited disability insurance available through the

[9] JOSEPH N. CROWLEY, IN THE ARENA: THE NCAA'S FIRST CENTURY 31 (2006) (discussing the Byers years).

NCAA.[10]

Suffice it to say, college athletes should be called what they are—*college athletes*—and academics, attorneys, and judges should stop using the propaganda term henceforth.[11] To say that it is disappointing that the trial court referred to them here as "student-athletes" some 258 times in its opinion would be an understatement.

II. What's the Problem and How Do We Define It?—

A. Vast Commercialization of College Sports by the Very Few—

The most basic problem with college sports is that the NCAA and a small percentage of its some twelve hundred or so members, which includes the bowls and conferences, have commercialized college sports to the tune of billions of dollars a year, but they do not wish to share this largess with the college athletes who produce this value. We are talking big money here: For instance and most recently, ESPN paid $7.3BB for rights to telecast the new College Football Playoff over

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[10] WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69 (1995).

[11] *See* Ellen J. Staurowsky & Allen L. Sack, *Reconsidering the Use of the Term Student-Athlete in Academic Research*, 19 J. SPORTS MGMT. 103 (2005) (explaining the relationship between this propaganda term and exploitation of college athletes), *available at* http://journals.humankinetics.com/jsm-back-issues/JSMVolume19Issue2April/ReconsideringtheUseoftheTermStudentAthleteinAcademicResearch.

the next twelve years.[12]

B. Distorted Labor Market—

However, the NCAA and its members are happy to share this largess with themselves and their coaches, which has produced a distorted labor market for college coaches, with many of them earning more than their counter-parts in the NFL and NBA, because, unlike the pros, college sports has a zero labor cost for players, whereas the NFL players get about 55% of national media revenue, and the NBA players get about 51% of the same.[13]

This labor market distortion artificially inflates the salaries of college coaches and assistant coaches in the sub-classes at issue here, and drastically so, where assistant coaches are paid in the mid-to-high-six-figures, and coaches are paid in the low-to-mid-seven-figures. This occurs within a supposedly educational market, where the full, associate, and assistant professors earn but a small fraction of these amounts, which leads to faculty resentment of college athletics, to put it mildly.

C. The Defined Sub-Classes—

As defined in this lawsuit, the class is subdivided into the FBS sub-class and

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[12] Joe Nocera, *Playing College Moneyball*, NEW YORK TIMES, Jan. 13, 2015, at A-27, *available at* http://www.nytimes.com/2015/01/13/opinion/joe-nocera-playing-college-moneyball.html.

[13] W.R. Hambrecht & Co., U.S. Professional Sports Market & Franchise Value Report (2012), *available at* https://www.wrhambrecht.com/wp-content/uploads/2013/09/SportsMarketReport_2012.pdf.

the Men's D-I Basketball sub-class. FBS consists of ten conferences, but the Power Five Conferences now have autonomy and are significantly different from the remainder of that sub-class.[14] D-I BB consists of the Major Conferences (essentially the FBS conferences) and the Middle-Market Conferences (essentially the FCS conferences, or everyone else in D-I).

D. Aren't These Policy Questions for Congress?—

Going back almost five decades, since 1965, Congress has held about thirty separate formal hearings on the NCAA and/or amateur or collegiate athletics, and Congress has produced no less than seventeen reports regarding the NCAA and these related topics during that timeframe, yet Congress has enacted no legislation to regulate the NCAA, while somehow finding time to regulate agents and gambling related to college sports.[15] Whether this is a result of the NCAA's illicit lob-

[14] The Power Five Conferences were granted autonomy one day before the trial court released it's opinion in this case, and they formally adopted their own rules at the January 2015 NCAA Annual Meeting. Marc Tracy, *Top Conferences to Allow Aid for Athlete's Full Bills*, NEW YORK TIMES, Jan. 17, 2015, at SP-8, *available at* http://www.nytimes.com/2015/01/18/sports/ncaas-top-conferences-to-allow-aid-for-athletes-full-bills.html?_r=0.

[15] Richard G. Johnson, *The NCAA Has Never Been Regulated by Congress, So Will Congress Finally Man-Up with Proposed New Legislation?*, SPORTS LAW BLOG, Aug. 22, 2013, *available at* http://sports-law.blogspot.com/2013/08/the-ncaa-has-never-been-regulated-by.html; *see also* Richard G. Johnson, *Why Congressional Regulation Should Be Embraced by the NCAA*, SPORTS LAW BLOG, Sept. 30, 2013, *available at* http://sports-law.blogspot.com/2013/09/why-congressional-regulation-should-be.html; *see generally* Richard G. Johnson, Opinion: *Call to Action: Time for Congress to Govern College Sports*, SPORTS BUS. J., May. 5, 2014, at 21, *available at*

bying and public relations efforts will never be known.[16] Congress does get credit for enacting Title IX.

E. What Kind of Numbers Are We Talking About?—

According to data downloaded from the U.S. Department of Education Office of Postsecondary Education,[17] in 2013–14, college sports accounted for about $15BB in annual revenue, about $11BB of which comes from Division I, and within that Division, about $5.8BB or 52% of that money is generated by the Power Five Conferences and their members, with football and basketball combined constituting about $4.9BB or 84% of that amount, and with football contributing about 79% and basketball contributing about 21% of that amount. Comparing to all of Division I, Power Five football is about 73% of total football revenue, Power Five basketball is about 53% of total basketball revenue, and Power Five football and basketball combined are 68% of total football and basketball revenue. It is this concentration of wealth that is at issue in this case, and it explains why the Power

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http://www.sportsbusinessdaily.com/Journal/Issues/2014/05/05/Opinion/Richard-Johnson.aspx; Richard G. Johnson, Opinion: *Solution to NCAA: Legislate Free Market into College Sports*, SPORTS BUS. J., Sept. 19, 2011, at 29, *available at* http://www.sportsbusinessdaily.com/Journal/Issues/2011/09/19/Opinion/Richard-Johnson.aspx.

[16] Steve Berkowitz, *NCAA Drastically Increases its Spending on Lobbying*, USA TODAY, Jan. 20, 2015, at __, *available at* http://www.usatoday.com/story/sports/college/2015/01/20/ncaa-lobbying-expenditures-congress-capitol-hill-washington/22078773/.

[17] To download this data, one uses the Office's Equity in Athletics Data Analysis Cutting Tool, *available at* http://ope.ed.gov/athletics/.

Five Conferences now have autonomy from the NCAA.[18]

In addition to revenue, these football teams have stand-alone values that are astronomical, with Ohio State passing the billion dollar mark this year according to the Wall Street Journal.[19] However, basketball team valuations are much, much lower.[20]

On top of all the money already discussed above, gambling on college sports is estimated to be $60BB–$70BB or more annually, far surpassing the college sports industry, itself, which explains why New Jersey and other states are in court fighting to be able to offer gambling on college sports.[21]

F. Who Appointed the NCAA to Regulate College Sports?—

A point that seems to be missed is that neither the states nor the federal government have delegated the regulation of college sports to the NCAA, but by historical accident and Congressional apathy, the NCAA presumes to regulate close to

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[18] For a summary table of all of this information, as well as detailed instructions on how to download and organize the data, please see Andy Schwartz, Some Quick Tallies of the 2013–2014 EADA Data, SPORTSGEEKONOMICS BLOG, *available at* http://sportsgeekonomics.tumblr.com/post/109318798018/some-quick-tallies-of-the-2013-2014-eada-data.

[19] Jared Diamond, *What's Your College Team Worth?*, WALL ST. J., Jan. 12, 2015, *available at* http://www.wsj.com/articles/whats-your-college-team-worth-1421081367?keywords=what+is+your+team+worth.

[20] Chris Smith, *College Basketball's Most Valuable Teams*, FORBES, Mar. 17, 2014, *available at* http://www.forbes.com/sites/chrissmith/2014/03/17/college-basketballs-most-valuable-teams-2014-louisville-cardinals-on-top-again/.

[21] Sue Schneider, *Better Odds for Sports Betting*, FOX SPORTS, June 6, 2014, *available at* http://www.foxsports.com/collegefootball/story/Better-odds-for-sports-betting-24597646.

a half million college athletes every year, not to mention all the athletic department employees, while not allowing those athletes or employees membership in the NCAA or any say in how they are governed. Adding insult to injury, the NCAA disclaims any legal relationship with college athletes and employees.

Even worse, when college athletes sign a National Letter of Intent ("NLI"),[22] which is treated sort of like the college draft, they are prohibited from changing their minds, and they are prohibited from transferring schools without permission. If someone interferes with the schools' property—the college athlete's athletic eligibility, the members of the NCAA have monetary claims to bring against those persons under the Uniform Athlete Agent Act as well as under the Sports Agent Responsibility and Trust Act.[23]

At the same time, the NCAA forbids college athletes from having agents or attorneys gauge their professional market value, so that they would know whether or not it was a good time to go pro, which is what Andy Oliver's case was all about.

In concert with the NBA and NFL, the NCAA has been successful in getting those organizations to raise their draft ages, as the Power Five Conferences act as the minor leagues for those professional sports.

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[22] For information about the NLI, see http://www.nationalletter.org.

[23] For information on these acts, see http://www.ncaa.org/enforcement/agents-and-amateurism-0?division=d2.

Functionally, then college athletes become indentured servants, once they sign their NLIs, because they cannot transfer anyplace else without giving up their eligibility to play their college sport, and because most of them have only one-year grants-in-aid that historically have been at the whim of the coaches. So much for academic freedom.

G. Shouldn't the NCAA and its Members Be Paying Taxes?—

Non-profits all, the NCAA and its member conferences, bowls, colleges, and universities, this commercial revenue should be taxed under the UBIT theory, but the IRS seems not to care, and current assessments would be difficult to even determine, as there is hardly uniform accounting for college sports. How does the NCAA maintain its IRS Section 501(c)(3) charitable, nonprofit status, when it is not incorporated as a nonprofit, and when it engages in political lobbying—both of which disqualify it as a Section 501(c)(3), before we even get to the fact that it spends almost nothing on its tax-exempt purpose? In fact, the NCAA is a pass-through entity, where most of its money is distributed to its members, and it functions much like a trade association governed by Section 501(c)(6), handling similar organization tasks as do the NFL and NBA trade associations.[24]

[24] For a discussion of this issue, see Richard G. Johnson, *Submarining Due Process: How the NCAA Uses its Restitution Rule to Deprive College Athletes of their Right of Access to the Courts ... Until Oliver v. NCAA*, 11 FLA. COASTAL L. REV. 459, 596 n.250 (2010), *available at* https://www.fcsl.edu/sites/fcsl.edu/files/Johnson.pdf.

Further, by not incorporating, the NCAA escapes oversight by any state attorney general. In fact, the NCAA is regulated by no one at all, and it perceives itself to be a sovereign fifty-first state, with its telephone-book-size rulebook of "legislation," which even includes at the beginning a "constitution!"[25]

H. What Do Funding and Graduation Rates Really Look Like?—

When one looks at this problem in the context of overall undergraduate funding, sports revenue is largely irrelevant to the big picture of college finances:

> The federal government provides the majority of financial aid received by undergraduates in the United States. In 2009–2010, an estimated $173 billion in financial aid was distributed to undergraduates, representing 77 percent of aggregate spending on undergraduate education. The federal government provided $124 billion in student aid through grants, loans, and work-study, representing 55 percent of aggregate spending on undergraduate education and 72 percent of all spending on student financial aid. The remaining $49 billion in financial aid was provided by state and local governments, the schools themselves, and private lenders or donors. The total cost of college (i.e., tuition plus room and board) in that year was an estimated $227 billion.[26]

What do we get for all of this government spending? Abysmal graduation rates for Division I football and basketball, with the latest federal graduation data

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[25] *Id*.

[26] The Economics of Higher Education: A Report Prepared by the Department of the Treasury with the Department of Education 25 (December 2012) (figure and footnotes omitted), *available at* http://www.treasury.gov/connect/blog/documents/20121212_economics_of_higher ed_vfinal.pdf.

showing graduation rates of 59% for FBS and 47% for D-I BB.[27] These are graduation rates over six years.[28] For those that believe the "free college ride" myth, well, quite a few young men just are not getting that supposedly valuable degree let alone an education, and as discussed below, there is a huge disparate impact upon black college athletes.

When one looks at the mythology of amateurism, one would expect participation in sports to increase the academic experience, but at the top programs, it does not. According to the College Sports Research Institute's 2014 FBS football report,[29] 20% fewer men graduated in the FBS Power Five Conferences than their full-time student counter-parts, and for black men, the number falls to 26% fewer, whereas for white men, the number was only 7% fewer. If you compare that to the less lucrative remaining conferences in the FBS, the gap lowers to 15%, 21%, and 7% fewer, respectively, which makes sense, because those guys have much less hope of ever being drafted (the draft rate for all of NCAA football is 1.6%, so this

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[27] NCAA Research Staff, Trends in Graduation-Success Rates and Federal Graduation Rates at NCAA Division I Institutions 19 (October 2014), *available at* http://www.ncaa.org/sites/default/files/2014-d1-grad-rate-trends.pdf.

[28] To see how the NCAA misstates graduation rates, see Assoc. Press, *NCAA Graduation Rates Improve; Critics Cry Foul*, NEW YORK TIMES, Oct. 28, 2014, at __, *available at* http://www.nytimes.com/aponline/2014/10/28/us/ap-us-ncaa-grad-rates.html.

[29] CSRI, Adjusted Graduation Gap Report: NCAA FBS Football 6–7 (Oct. 5, 2014), *available at* http://csri-sc.org/wp-content/uploads/2013/09/2014-FOOTBALL-AGG-REPORT_10-7-14.pdf.

hope is illusory for almost everyone).[30]

And if you look at men's basketball, the numbers get worse. According to the College Sports Research Institute's 2014 Division I basketball report,[31] 31.5% fewer men graduated in the Major Conferences (these approximate the FBS) than their full-time student counter-parts, and for black men, the number falls to 37% fewer, whereas for white men, the number was only 22.3% fewer. If you compare that to the less lucrative Mid-Major conferences, the gap lowers to 17.2%, 20.6%, and 15.2% fewer, respectively, which makes sense, because those guys have much less hope of ever being drafted (the draft rate for all of NCAA basketball is 1.2%, so this hope is illusory for almost everyone).[32]

Making a mockery of the whole charade is the University of Connecticut Huskies, who won the 2014 Final Four, even though they had a 0% federal graduation rate, which the NCAA was kind enough to adjust upwards to 8%![33]

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[30] NCAA Research, Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level (Sept. 24, 2013), *available at* https://www.ncaa.org/sites/default/files/Probability-of-going-pro-methodology_Update2013.pdf.

[31] CSRI, Adjusted Graduation Gap Report: NCAA D-I Basketball 7, 9 (Mar. 12, 2014), *available at* http://csri-sc.org/wp-content/uploads/2014/03/2013-14_MBB-WBB_AGG-Report_3-12-14.pdf.

[32] NCAA Research, Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level (Sept. 24, 2013), *available at* https://www.ncaa.org/sites/default/files/Probability-of-going-pro-methodology_Update2013.pdf.

[33] *See* James Joyner, *UConn Dominates College Basketball … Not So Much College Itself*, OUTSIDE THE BELTWAY BLOG, Apr. 9, 2014 (noting that the adjusted

> "Even the players who graduate often don't really get an education," [Kain] Colter noted.
>
> Michigan offers a case in point. So high are its academic standards that it is often referred to as a public Ivy. Yet only 69 percent of football players graduate.
>
> Michigan's new president, Mark Schlissel, a former provost at Brown University, recently committed the sin of talking honestly. "We admit students who aren't as qualified, and it's probably the kids that we admit that can't honestly, even with lots of help, do the amount of work and the quality of work it takes to make progression from year to year."
>
> Such candor mortified alumni, who speculated that Schlissel was an Ivy League pinhead, or perhaps simply barking mad. The president soon backpedaled, proclaiming his allegiance to the athletic department, which—like those at Oregon and Ohio State—has budgets and revenues in the many tens of millions of dollars.[34]

In responding to another lawsuit filed by lead class counsel herein against the NCAA and the University of North Carolina for academic fraud, the current and third President of the NCAA, Dr. Mark Emmert, said that "there were growing concerns over academic problems. He mentioned that participation limits for ath-

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rates for the other Final Four were 44% for Wisconsin, 60% for Florida, and 82% for Kentucky), *available at* http://www.outsidethebeltway.com/uconn-dominates-college-basketball-not-so-much-college-itself/; *see also* Dom Amore, *UConn Men's Basketball Scores an 8 Percent Graduation Rate*, HARTFORD COURANT, Oct. 24. 2013 (discussing team history in context), at __, *available at* http://articles.courant.com/2013-10-24/sports/hc-uconn-men-1025-20131024_1_uconn-men-gsr-basketball.

[34] Michael Powell, *A Threat to Unionize, and then Benefits Trickle in for Players*, NEW YORK TIMES, Jan. 13, 2015, at B-13, *available at* http://www.nytimes.com/2015/01/13/sports/ncaafootball/with-threat-of-union-comes-a-trickle-of-benefits-to-college-football-players.html.

letes and lowered admission standards had led to unprepared students."[35]

In today's *New York Times*, in an editorial entitled "The Fraud of the Student-Athlete Claim," its Editorial Board said in total:

> Two former athletes at the University of North Carolina have filed a lawsuit against their alma mater and the National Collegiate Athletic Association, accusing them of academic fraud. College athletes who sue for compensation is an old story. But, in this instance, Rashanda McCants, a former women's basketball player, and Devon Ramsay, who played football, are suing because, they say, they didn't receive a meaningful education. They are seeking class-action status, damages for some athletes and changes in academic oversight.
>
> They have a credible case. In October, the university released a report by Kenneth Wainstein, a former general counsel at the Federal Bureau of Investigation, finding that from 1993 to 2011 thousands of students, almost half of them athletes, took classes that did not require work or that didn't really exist. Students signed up for "independent study" courses in which they never met their professors and for lecture classes that never took place.
>
> The failure to treat "student-athletes" as actual students goes beyond North Carolina. The lawyers representing Ms. McCants and Mr. Ramsay know that and take a swipe at the whole collegiate-athletic system: "The N.C.A.A. and its member schools insist that their mission and purpose is to educate and to prevent the exploitation of college athletes," the lawsuit states. "Yet it is the schools, the conferences, and the N.C.A.A. that are engaging in exploitation, subverting the educational mission in the service of the big business of college athletics."
>
> Though it has yet to comment, the N.C.A.A. is well aware that it has a problem: It is investigating 20 universities on suspicion of academic misconduct, according to The Chronicle of Higher Education.

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[35] Ben Strauss, *Claiming Academic Fraud, Ex-Athletes Sue North Carolina and NCAA*, NEW YORK TIMES, Jan. 23, 2015, at B-16, *available at* http://www.nytimes.com/2015/01/23/sports/former-athletes-sue-north-carolina-over-academic-fraud.html?nlid=37996185&src=recpb.

> At a convention this month, the N.C.A.A.'s president, Mark Emmert, said the association had to "emphasize the centrality of academic success as the touchstone for why we participate in collegiate athletics" and wondered whether it needed to "consider new approaches—bolder, broader approaches?"
>
> That rhetoric sounds nice, but the N.C.A.A. has historically stood in the way of reform by perpetuating the myth that being a "student" is always compatible with being an "athlete." A swimmer, for instance, might manage to split time between the library and the pool, but a quarterback at one of the Big Five conferences probably can't pull that off. The latter is an unpaid professional: He generates money for his coach, his athletic director, his university's administrators—everyone but himself—and is expected to practice up to 50 hours a week during the football season.
>
> What happened at North Carolina is shameful but not surprising. Until the N.C.A.A. recognizes that some players are essentially professionals, universities will continue to treat their education like the fig leaf it is. Young people enticed by the fantasy that they can play and learn at a high level will continue to suffer the consequences.[36]

I. What's the Explanation for Converting the Player's NIL's?—

At the end of the day, in regards to the licensing of broadcast rights, which is a large percentage of the money, nobody can explain how the NCAA or its members—which include the bowls and conferences—have the exclusive right to be paid for recording or televising college athletes at play, since they do not receive releases from, or pay any consideration to, any of them for this. Essentially, the networks just assume that they can contract solely with the NCAA and its members

[36] Editorial, *The Fraud of the Student-Athlete Claim*, NEW YORK TIMES, Jan. 28, 2015, at A-22, *available at* http://www.nytimes.com/2015/01/28/opinion/the-fraud-of-the-student-athlete-claim.html?emc=edit_th_20150128&nl=todaysheadlines&nlid=37996185.

without ever having considered why that would be so. In all the briefs filed, no one has explained how they have acquired such rights, instead, they simply brief why they think the college athletes cannot do anything about it.

Moreover, if the NCAA and its members tried to obtain such rights going forward without paying for them, there would be no consideration for such a maneuver, plus, since the NIL's are more valuable for this class than the value of the grants-in-aid, the college athletes would be essentially paying to play a college sport, rather than getting the supposed benefits of a free education.

J. Division I Adopted a Business Model in the 1970's—

According to Mr. Cedric Dempsey, the third and last Executive Director as well as first President of the NCAA (the title changed in 1998):

> In the late 1970's, NCAA Division I institutions established a principle of self-sufficiency for its ICA [intercollegiate athletics] programs. As a result, the Division I top tier level moved away from the "educational model" of athletics toward the "business model". At many institutions, especially those at the highest Division I level, athletics programs are treated as auxiliary enterprises within the university. This model has resulted in successful programs placing an emphasis upon potential revenue generating sports by reinvesting their resources to insure those sports that have the potential to generate income receive competitive funding to be successful.[37]

This came from:

> a strategic report written in 2011 for the University of California at Davis by [Mr.] Dempsey. Davis had recently moved up from Divi-

[37] Cedric Dempsey, U.C. Davis Athletics Strategic Audit 2011, at 2, *available at* http://chancellor.ucdavis.edu/local_resources/pdfs/ICA_TOC_ES.pdf.

> sion II to Division I, and the partly related fallout—specifically, the decision to cut some non-revenue-generating sports—had kicked up controversy on campus. Dempsey, who had become a consultant after leaving the NCAA, was hired to explain to everyone how the world of big-time college sports works. As he put it, Division II still uses an "educational model" that relishes "the history of noble amateurism." Division I, by contrast, is run on more of a "business model," with schools investing resources in the sports with the greatest potential to generate revenue.[38]

According to Dr. Myles Brand, the second President of the NCAA: "In a 2006 speech to NCAA members, Brand explained that "commercial activity"—like selling broadcast rights—is mandated by the "business plan." The failure to "maximize revenues," he said, would be "incompetence at best and malfeasance at worst."[39]

When he tried to explain why college athletes are not paid, this was his explanation:

> The fundamental reason we do not pay student-athletes to play is because they are students. This commitment is captured in the first principle of the collegiate model. The participants in intercollegiate athletics are students. They are not, in their roles as athletes, employees of the university. They are students who participate in athletics as part of their educational experience. This is the heart of the enter-

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[38] Jonathan Mahler, *Since When Is College Football Not a Business?*, BLOOMBERG VIEW, Feb. 13, 2014, *available at* http://www.bloombergview.com/articles/2014-02-13/since-when-is-college-football-not-a-business-.

39 *Id*. (quoting Dr. Myles Brand, Speech, *Brand Charts Course for Collegiate Model's Next Century*, NCAA NEWS ARCHIVES, Jan. 16, 2006, available at http://fs.ncaa.org/Docs/NCAANewsArchive/2006/Association-wide/brand%2Bcharts%2Bcourse%2Bfor%2Bcollegiate%2Bmodel_s%2Bnext%2Bcentury%2B-%2B1-16-06%2Bncaa%2Bnews.html.

prise.[40]

This, then, in a nutshell is the problem with the NCAA and its members: They don't want to share their largess, and whether they educate their students or not, and whether they commercialize them beyond belief, it's "nope, can't pay 'ya 'cause you're a student, and we don't pay students!" Basically, their business plan is to have a zero labor cost, and that is what they are asking this court to uphold, even though that is not allowed by the U.S. Department of Labor.[41]

III. Why Is the NCAA Appealing?

It seems clear that the NCAA really won the underlying case, and that much of the so-called relief awarded the class was mooted by the Autonomy movement of the Power Five Conferences.[42]

IV. The Trial Court's Findings Against the Class Are Plain Error—

A. No Class Certification on Damages—

In the trial court's order denying in part class certification on damages, dated November 8, 2013, at 17–22, it basically said that the proposed class would be unmanageable, because the class had not shown how to identify which members

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[40] *Id*.

[41] U.S. Dep't of Labor, Wage and Hour Division, *available at* http://www.dol.gov/whd/.

[42] *See* Richard G. Johnson, Opinion: *When a Loss Is Really a Win, and the Future of the NCAA*, SPORTS BUS. J., Sept. 1, 2014, at 39, *available at* http://www.sportsbusinessdaily.com/Journal/Issues/2014/09/01/Opinion/Richard-Johnson.aspx.

had suffered damages, yet in its bench trial decision, dated August 8, 2014, at 45 & 97, it said that each college athlete had to be paid the same, which must mean their damages are all the same. Once the trial court came to this conclusion, it was incumbent on the trial court to revisit its class certification ruling and certify the class, since every class member would be paid on a per capita basis, and its failure to do so was plain error.

Moreover, in failing to protect the class, by identifying a harm without providing a remedy, the trial court violated one of the most fundamental maxims of our legal system, which is that there are no rights without remedies. This was also plain error.

Certainly, if the trial court thought it would be difficult for a college athlete to prove if he was damaged as part of a class, how would that same athlete be able to prove it in an individual lawsuit, which would be prohibitively expensive for any single college athlete to bring in the first place? Again, plain error.

As an aside, it is unclear why the trial court thought it would be so hard to identify who was on any team at any time, because the NCAA requires such identification:

> 1**2.10.2 Squad-List Form.** The institution's athletics director shall compile on a form maintained by the Awards, Benefits, Expenses and Financial Aid Cabinet and approved by the Legislative Council a list of the squad members in each sport on the first day of competition and shall indicate thereon the status of each member in the designated categories. A student-athlete's name must be on the official institutional

> form in order for the student to be eligible to represent the institution in intercollegiate competition. Violations of this bylaw do not affect a student-athlete's eligibility if the violation occurred due to an institutional administrative error or oversight and the student-athlete is subsequently added to the form; however, the violation shall be considered an institutional violation per Constitution 2.8.1. (See Bylaw 15.5.11 for details about the administration of the squad list.) (Revised: 1/14/97, 11/1/07 effective 8/1/08, 7/31/14)[43]

B. No Remedy for Conversion or Unlawful Conduct—

Likewise, in its bench trial decision, at 72, the trial court stated:

> The first set of potential buyers—the television networks—already compete freely against one another for the rights to use student-athletes' names, images, and likenesses in live game telecasts. Although they may not be able to purchase these rights directly from the student-athletes, they nevertheless compete to acquire these rights from other sources, such as schools and conferences. The fact that the networks do not compete to purchase these rights directly from the student-athletes is due to the assurances by the schools, conferences, and NCAA that they have the authority to grant these rights. Such assurances might constitute conversion by the schools of the student-athletes' rights, or otherwise be unlawful, but they are not anticompetitive because they do not inhibit any form of competition that would otherwise exist.

In footnote 12 on that same page, the trial court stated that: "Plaintiffs voluntarily dismissed all of their claims against the NCAA for 'individual damages, disgorgement of profits, and an accounting.' … They also dismissed their claims for unjust enrichment. Accordingly, the Court does not consider these claims here."

What is wrong with that is that the only claims the Plaintiffs dismissed were

[43] NCAA Division I Manual 85 (2014–2015).

their *individual* claims that were too expensive to try for too little return, after the trial court denied class certification on damages. Nowhere does it say that the class dismissed its claims, and since class certification on damages had not been granted, it would have been impossible for the class to dismiss a claim it did not yet have.

Again, once the trial court came to this conclusion, it was incumbent on the trial court to revisit its class certification ruling and certify the class on damages, since every class member would be paid on a per capita basis for this tortious conduct, and its failure to do so was plain error.

If the trial court thought that it had allowed the lead class counsel to dismiss these class claims, and if it had then determined that those claims had value, the trial court would have been compelled to take some remedial action to remedy this situation, even if it called for a mistrial, rather than simply note as it did with a shrug of the shoulders, since the trial court has supervisory responsibility over class counsel, and its failure to do so would have been plain error in that event.

C. College Athletes' NIL's Are Their Property—

No one disputes the fact that college athletes own their own name, images, and likenesses, and according to the NCAA's new incoming executive vice-president for regulatory affairs, Oliver Luck, college "athletes ha[ve] a 'fundamental right' to their names, images and likenesses, even though the [NCAA] prevents

athletes from cashing in on them."[44] The NCAA and its members converted this property to their own and sold it to the broadcasters.

As such, a property holder has the right to decide if and at what price to sell his property. Here, the trial court has determined that the NCAA and its members can steal this property and then set the price, and even more outlandishly, that they can conspire to set a price of zero, because it's pro-competitive to the extent that consumers will buy more of the product, if the victims are compensated less or nothing against their will. Decision, at 82. This is an astonishing view of the law, which is, well, astonishing. There is no case before this one that stands for such an outlandish proposition.

Likewise, the trial court found it was pro-competitive to pay the victims less for their stolen property, so that college athletes would not be "cut off from the broader campus community[,]" Decision at 87, yet the trial court never even said what that meant, let alone how that would justify the thief setting the price. Decision at 37–40 & 86–88.

In short, there are, in fact, no pro-competitive aspects to converting or stealing college athletes names, images, likenesses, and what the underlying decision reveals is a level of paternalism that is endemic to discussions about college ath-

[44] Marc Tracy, *Oliver Luck, NCAA's Newest Employee, Brings Interdisciplinary Expertise*, NEW YORK TIMES, Jan. 17, 2015, at D-2, *available at* http://www.nytimes.com/2015/01/16/sports/oliver-luck-ncaas-newest-employee-brings-interdisciplinary-expertise.html?_r=0.

letes rights, because when you examine the justifications, they seem silly when called for what they are. Needless to say, the trial court committed plain error in arriving at these conclusions.

As explained by Professor Richard T. Karcher, who created the damages model in Andy's case, while antitrust may provide a remedy, the far easier and more straightforward claim is for unjust enrichment under the facts of this case.[45]

D. Is There Such a Thing as Commercial Exploitation?—

College athletes are adults, and, among the rights that all adults have, is the right to license their names, images, and likenesses. There is not one case that stands for the proposition contra.

Commercial exploitation occurs when someone takes your property without your permission or without adequate compensation. It also refers to the act of bringing a product to market as well as the process along the way, like product development.

The NCAA and its members have commercialized college football and basketball without a doubt. They have taken the college athletes' NIL's and sold them to the broadcasters, thereby converting such property. They have not paid the college athletes. That's the definition of commercial exploitation. Not vice versa.

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[45] Richard T. Karcher, *Broadcast Rights, Unjust Enrichment, and the Student-Athlete*, 34 CARDOZO LAW REVIEW 107 (2012) (quoting article abstract), *available at* http://cardozolawreview.com/content/34-1/Karcher.34.1.pdf.

Notwithstanding that, the trial court said that college athletes cannot make endorsements, because they would be commercially exploited, but the trial court never even defined "commercial exploitation" let alone explained how a college athlete could be exploited by being paid. Decision, at 47. That is because the idea is preposterous: Any college athlete would be happy to negotiate the use of his NIL and negotiate the consideration to be paid for it—nowhere in such a transaction is there any exploitation at all—it is merely capitalism at work, which the NCAA and its members embrace for themselves.

The NCAA and its members engage in quite a bit of licensing, and the only reason that they do not want their non-member college athletes from engaging in endorsements is because it hurts their business model by providing competition to that very licensing. Circle back to how it should work: A union negotiates with the NCAA and its members to license the college athletes' NIL's in return for payments for those licenses. Here, there is no negotiating, there is no fair play, and there is no payment; instead, there is just the taking.

This is not an esoteric issue: Endorsements are how many world-class and Olympic athletes support themselves and their quest for the gold, and the case of Jeremy Bloom, the World Champion, World Cup, and Olympic skier is a case in point, where he was not allowed to play football, because he was the Tommy Hilfiger model, which provided him the money to live and train for the Olympics and

World Cup.[46] Here, without any analysis at all, the trial court judge just dismissed the entire idea as being exploitive, yet what is exploitive about being paid to be a professional model as a young man, so that you can support yourself to become a world-class skier? The answer is obviously nothing. When the trial court engaged in no analysis to reach a conclusion that is nothing but paternalistic and unsupported by any authority, that is plain error.

E. The Trial Court Is Not the College Athletes' Union—

As discussed above, the Trial Court determined that every player had to be paid the same, and by doing so, it inserted itself as the college athletes' *de facto* union. Without any justification as to why it would be so, the Trial Court just determined what the forced price would be.

In the real world, athletes of different skills and availability are worth different prices, and this is common knowledge for anyone who follows any professional

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[46] *Bloom v. NCAA*, 93 P.3d 621, 628 (Colo. App. 2004).

For a broader discussion of the *Bloom* case and its implications, see Lisa K. Levine, *Jeremy Bloom v. National Collegiate Athletic Association and the University of Colorado: All Sports Are Created Equal; Some Are Just More Equal than Others*, 56 CASE W. RES. L. REV. 721 (2006); see also Christopher A. Callanan, *Advice for the Next Jeremy Bloom: An Elite Athlete's Guide to NCAA Amateurism Regulations*, 56 CASE W. RES. L. REV. 687 (2006); Christian Dennie, *Amateurism Stifles a Student-Athlete's Dream*, 12 SPORTS LAW. J. 221 (2005); Alain Lapter, *Bloom v. NCAA: A Procedural Due Process Analysis and the Need for Reform*, 12 SPORTS LAW. J. 255 (2005); Joel Eckert, Note, *Student-Athlete Contract Rights In the Aftermath of Bloom v. NCAA*, 59 VAND. L. REV. 905 (2006); Gordon E. Gouveia, Note, *Making a Mountain Out of a Mogul: Jeremy Bloom v. NCAA and Unjustified Denial of Compensation Under NCAA Amateurism Rules*, 6 VAND. J. ENT. L. & PRAC. 22 (2003).

sports team. The players in any compensated professional sport are usually represented by a union, which negotiates a collective bargaining agreement that in-and-of-itself is insulated from antitrust concerns.

Not only is there no basis for the trial court intervening in such a dramatic and condescending way on behalf of college athletes and unilaterally declaring that they cannot be worth more than five thousand dollars, it has interfered with what would be the natural progression, were this antitrust monopoly blown-up once and for all, namely a players union for college athletes.[47]

Instead, unless this court determines to review the underlying decision to see if the trial court adequately protected the class, case after case is lining up on the trial court's docket involving the same issue, this case has taken five years so far, and it's been a decade since *White*. When will the courts call the kettle black, call the commercialization of college sports what it is, and address college athletes as adults with full legal rights rather than as patronized children?

V. Statement in Support of Class Counsel—

As was stated above, the current *O'Bannon* case is only the second time that college athletes have even been able to get to trial, let alone win and obtain a permanent injunction, which is a testament to the courage, financial sacrifice, and le-

[47] Michael Powell, *A Threat to Unionize, and then Benefits Trickle in for Players*, NEW YORK TIMES, Jan. 13, 2015, at B-13, *available at* http://www.nytimes.com/2015/01/13/sports/ncaafootball/with-threat-of-union-comes-a-trickle-of-benefits-to-college-football-players.html.

gal expertise of lead counsel for the class, as well as to the backbone of Mr. O'Bannon and his fellow class representatives.

It is apparent that the trial court pulled the rug out from that counsel by denying class certification on damages, which was objectively unfair and wrong, and then the trial court tried to make it seem like it was that counsel's fault by refusing to consider any remedy for the conversion that it later identified of college athlete's NIL's.

Lead counsel for the class is nationally and internationally renown and respected, as he should be, and the criticism here is not directed at him whatsoever, but at the trial court, whose obligation it was to protect the class; however, the trial court did not do do, choosing instead to patronize college athletes 258 times with the pejorative "student-athlete" term that was invented to disempower them by the NCAA.

What this court chooses to do about this, if anything, is up to it, but the trial court's decision is wrong as wrong can be, not on any findings against the NCAA or its members, but solely on the findings identified above that were outcome dispositive to denying any real substantive relief to this class of victimized college athletes.

VI. Conclusion—

Six years ago now, a small town Ohio judge saw the transparent truth and

provided justice to a single college athlete against the behemoth NCAA, and Andy hopes that this court will provide this same simple justice to his brother college athletes, who ask nothing more than to be treated as adults and accorded the same rights as everyone else now enjoys.

At the very least, this court should uphold the trial court's rulings below, but to the extent that it can modify plain error detrimental to the class, it should consider doing so. In whatever further orders or decisions are released, it is respectfully requested that this court not use the term "student-athlete," which is disrespectful to college athletes.

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Certificate of Compliance & Service

Pursuant to Federal Rules of Appellate Procedure 29(c)(7) & 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 5,759 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.

Pursuant to Federal Rule of Civil Procedure 25(d), I certify that on this 28th day of January, 2015, 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.

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