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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NO. 09-CV-03329, THE HONORABLE CLAUDIA WILKEN, PRESIDING

BRIEF FOR MARTIN JENKINS AND NIGEL HAYES, AND ALEC JAMES AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are college athletes who have separately filed a putative class action challenging the NCAA's restraints on the compensation that member colleges may pay Division I ("D-I") men's basketball and football players for their revenue-generating athletic services. *Jenkins v. NCAA*, 14-cv-02758-CW (N.D. Cal.).[2] *Amici* are interested in this case because the NCAA here broadly asserts that "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." Br. 14. Indeed, the NCAA insists that any NCAA rule that it characterizes as related to the "eligibility" of college athletes is *per se* lawful—regardless of the rule's effects in markets that generate billions of dollars annually for the NCAA and its members.

That sweeping argument, however, is not supported by the law, and extends far beyond the scope of the record here. The NCAA's position, if extended, could eviscerate the rights of college athletes covered by the *Jenkins* complaint, or other pending actions, to access markets that comply with the Sherman Act's prohibition on unreasonable restraints of trade. 15 U.S.C. § 1.

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[1] Plaintiffs consented to the filing of this brief; the NCAA did not. Thus, *amici* have sought leave to file under Federal Rule of Appellate Procedure 29. No counsel for a party authored this brief in whole or in part; no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no persons other than the *amici curiae* or their counsel made a monetary contribution intended to fund its preparation or submission.

[2] The parties in *Jenkins* have stipulated that, pending court approval, *amicus* Alec James will be added as a class representative.

Recognizing the limited scope of the issue and record before it, the district court properly issued a narrow decision. The court invalidated NCAA rules only insofar as they prohibit athletes within Plaintiffs' class from earning compensation from their schools for the commercial use of their names, images, or likenesses. 7 F. Supp. 3d 955, 1008 (N.D. Cal. 2014). The court carefully tailored its injunction to Plaintiffs' representation that they were "only seeking to enjoin restrictions on the sharing of group licensing revenue," and disclaimed any ruling on any other aspects of the NCAA's rules, "which [were] not challenged." *Id*.

As the NCAA acknowledged below, "[Plaintiffs'] claims are directed at only one aspect of these rules: the rules that prohibit [college athletes] from being paid for the commercial use of their name, image or likeness." NCAA Tr. Br. 1-2, ECF No. 184 (citations omitted). "Indeed," the NCAA stated, "[Plaintiffs] made clear that they are not challenging the NCAA's rules against [the athletes] being paid in other ways." *Id.* at 2. Yet now—hoping to short-circuit litigation challenging its restrictions on compensating college athletes for their revenue-generating *labor*—the NCAA asks this Court to make sweeping rulings that would address antitrust challenges presented in other cases, such as *Jenkins*, where a full record is still being developed.

According to the NCAA, distinctions between antitrust claims seeking compensation for college athletes' labor and antitrust claims seeking compensation for "the dissemination of [college athletes'] 'name, image, and likeness' (NIL) in

sports broadcasts … media" are "distinction[s] without a difference." Br. 3; *see also id.* at 5 (defining the issues to include "[w]hether NCAA rules prohibiting [college] athletes from being paid for their athletic play violate the Sherman Act"). By the NCAA's lights, it should not have to face a "series of lawsuits," such as *Jenkins*, "challenging NCAA rules" that restrain competition outside the context of players marketing their NIL rights. Br. 59. The NCAA deems it irrelevant that these challenges rest on different factual allegations, different types of antitrust injury, different competitive effects, and different markets.

Amici agree with Plaintiffs that the decision below should be affirmed. They file this brief, however, to emphasize that NCAA rules limiting compensation for NIL rights raise issues distinct from those raised by NCAA rules prohibiting members from compensating D-I men's basketball and football players for the billions of dollars they generate for their institutions. The latter issue was not before the court below, and its resolution must await factual and legal developments taking place in other cases. Indeed, were the Court to accept the NCAA's sweeping position that its so-called "eligibility rules" are necessarily "procompetitive" and "therefore valid under the Sherman Act as a matter of law" (Br. 14), that result could, if adopted elsewhere, have unintended effects in numerous factual contexts that the Court cannot evaluate on this record.

Moreover, the NCAA's argument for such a sweeping rule is not remotely justified by dicta from *NCAA v. Board of Regents*, 468 U.S. 85 (1984). The Court

in *Board of Regents* applied the quick-look Rule of Reason to strike down an NCAA restraint governing competition among schools for the sale of football television rights. Further, the Court carefully limited its analysis to the "evidence" of "today's market" (*id.* at 116)—*i.e.*, the market for college football in 1984, which looks decidedly different from the market today.

Since the Rule of Reason analysis applied there was necessarily based on the specific facts before the Court, any dicta in that decision cannot govern the validity of restraints on compensation for D-I men's basketball and football players more than 30 years later. Indeed, the NCAA seems to have lost sight of the fact that the Court in *Board of Regents* rejected its position that its restrictions should be found lawful. For the NCAA to suggest that dicta from its landmark "loss" should be converted into a sweeping rule of *per se* legality for all NCAA restraints on player compensation today is the height of NCAA arrogance.

Not surprisingly, no court has ever applied the *Board of Regents* dicta as the NCAA suggests it should—to give the NCAA blanket immunity for all of its player restraints. Indeed, not even the NCAA's *amici* argue that eligibility rules are *per se* lawful, or that this Court should reach beyond the record to address NCAA player restraints other than those limiting NIL rights.[3]

[3] *See* Br. for Antitrust Scholars 5 n.2 (Amici "do not opine" on the NCAA's contention that its rules are "procompetitive as a matter of law."); Br. for A&E Television Networks, LLC et al. 2-3 ("*Amici* … take no position on the larger question of whether as a matter of antitrust law or public policy student-athletes should be paid

Even more fundamentally, adopting the NCAA's argument for blanket antitrust immunity for every player "eligibility" rule would require accepting the falsehood that the NCAA calls "amateurism." But the NCAA's view of "amateurism" rests on the untenable notion that the athletes who enable NCAA members to conduct billion-dollar businesses must not be paid anything for their services, while the colleges they play for—together with the NCAA, coaches, athletic administrators, sponsors, conferences, broadcasters, and every other party involved in this booming commercial enterprise—reap windfall profits from the fruits of their labors. That notion is contrary to numerous bedrock principles of antitrust law.

It is also contrary to common sense. As Walter Byers, the NCAA Executive Director from 1951 to 1987, has observed, repeated calls for the NCAA to change its myriad rules prohibiting schools from compensating their athletes for the revenues they generate have led the association and its members to "defensive[ly] circl[e] … the wagons." Walter Byers, UNSPORTSMANLIKE CONDUCT 371 (1995). The NCAA's siren song that it must "[p]rotect[] young people from commercial evils," Byers explains, "is a transparent excuse for monopoly operations that benefit others"—"an economic camouflage for monopoly practice." *Id.* at 388, 376. In

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for playing collegiate sports. Indeed, that question is not presented here, because Appellees chose not to assert that they should receive a share of the NCAA's television revenue as payment for playing sports."); Br. for Law and Economics and Antitrust Scholars 2 (addressing the "economic basis" for a court to create "a property right in a student-athlete's name, image, or likeness" used in "broadcasts").

short, the NCAA's appeals to the value of "amateurism" have nothing to do with any genuinely procompetitive objective and cannot justify declaring all NCAA restraints on player compensation lawful.

As in every antitrust case, the validity of the NCAA restraints in the player markets must be decided on a case-by-case basis after development of a full factual record. The Court's decision here should thus be limited to affirming the injunction entered below, which is narrowly tailored to the specific restraints involving player NIL rights addressed at trial.

STATEMENT

On behalf of a class of D-I men's basketball and Football Bowl Subdivision ("FBS") athletes, Plaintiffs seek to enjoin NCAA rules barring college athletes from receiving a share of the revenue generated for the NCAA and its members by the licensing of college athletes' NIL rights in videogames, live game broadcasts, and other video footage. 7 F. Supp. 3d at 963.[4] Following a bench trial, the district court held that the NCAA violated the Sherman Act by agreeing with its members to "restrain their ability to compensate Division I men's basketball and FBS football players" by enforcing the challenged rules. *Id.* at 1008.

Rejecting the NCAA's arguments that the case is governed by dicta from *Board of Regents*, the court found that the NCAA failed to "provide credible evi-

[4] Plaintiffs also sued a videogame manufacturer and trademark licensing company, but those parties settled with Plaintiffs and are not parties to this appeal.

dence that demand for the NCAA's product would decrease" if college athletes received compensation for use of their NILs. *Id.* at 976. Further, the court concluded that the NCAA's evidence of purported consumer preferences did not "justify the rigid prohibition on compensating [college] athletes … with any share of licensing revenue generated from the use of their names, images, and likenesses." *Id.* at 976, 1001. The court also concluded that: (i) "the NCAA may not rely on competitive balance here as a justification for the challenged restraint" (*id.* at 1002); (ii) "the NCAA has not shown that the specific restraints challenged in this case are necessary to achieve" the purported benefits of athlete academic integration (*id.* at 1003); (iii) "the NCAA may not rely on increased output as a justification for the challenged restraint" (*id.* at 1004); and (iv) "a narrowly tailored trust payment system … constitutes a less restrictive means of achieving the NCAA's stated procompetitive goals" (*id.* at 1006-07).

The court thus enjoined "the NCAA from enforcing any rules … that would prohibit its member schools and conferences from offering their FBS football or Division I basketball recruits a limited share" of NIL revenues that were more restrictive than the parameters set forth in the court's opinion. *Id.* at 1007-08.

SUMMARY OF ARGUMENT

The NCAA's view that its interest in promoting "amateurism" warrants a broad and unprecedented antitrust immunity for all of its player restraints rests on two related arguments. First, citing dicta from the Supreme Court's 1984 decision in *Board of Regents*, the NCAA asserts that "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." Br. 14. Second, the NCAA insists that all of its restraints on player compensation simply regulate "eligibility" to play in NCAA athletic competitions—and thus are not restraints on competition in commercial markets subject to the antitrust laws. Both arguments are foreclosed by precedent, antitrust policy, the market realities in 2015, and common sense.

I.A. *Board of Regents* did not consider any of the NCAA rules at issue here or in *Jenkins*, or anything like them. The Court there invalidated, under the quick-look Rule of Reason, an NCAA rule restricting "the number of games that any one [member]" college could televise. 468 U.S. at 94. The Court's holding did not address any NCAA bylaws governing the terms of recruiting, eligibility, or, most importantly, compensating athletes for the use of their NIL rights—let alone for their revenue-generating athletic services (the issue in *Jenkins*). In short, the Court did not—and could not, on the record before it—rule upon how the Rule of Reason would apply to player restraints like those at issue here and in *Jenkins*.

I.B. Aware of this difficulty, the NCAA cites portions of the *Board of Regents* decision mentioning player restrictions designed to preserve the "character" of college sports. Br. 2. But these statements are not only dicta; they are based on the Court's impressions of what it called "today's market"—*i.e.*, the commercial conditions existing in 1984. *Id.* at 116. As the district court recognized, these dicta are detached from "any factual findings" and rest on 30-year-old impressions (7 F. Supp. 3d at 999)—anachronistic views divorced from the billion-dollar businesses now generated by D-I men's basketball and football players.

The landscape surrounding the highest level of these sports in "today's market" of 2015 is decidedly different from that of 1984. In the past decade alone, "there have been corporations and TV networks that are spending billions and billions of dollars on [these two] college sports," so much so "that ESPN spending about $7 billion over 12 years [to televise] the college football playoffs almost seems quaint."[5] In short, "[t]he NCAA continues to purvey … an outmoded image of intercollegiate sports," but "[t]he times have changed." *Banks v. NCAA*, 977 F.2d 1081, 1099 (7th Cir. 1992) (Flaum, J., concurring and dissenting in part).

What's more, a fully developed record would demonstrate that the highest levels of college football and men's basketball have nothing to do with "amateur-

[5] All Things Considered, *College Football Playoffs a Ratings Win on Television*, NPR, Jan. 13, 2015, http://www.npr.org/2015/01/13/377024715/college-football-playoffs-a-ratings-win-on-television.

ism." Instead, as former NCAA Executive Director Byers put it, NCAA members "have expanded their control of athletes in the name of amateurism," but this is "a modern-day misnomer for economic tyranny" and "a transparent excuse for monopoly operations that benefit others." Byers, *supra*, at 347, 388. In short, *Board of Regents* had no factual record on this issue, and it cannot seriously be contended that the Supreme Court meant to create blanket antitrust immunity for all NCAA player restraints under the guise of amateurism, much less in a decision invalidating (not sustaining) another set of NCAA restraints under the Sherman Act.

II.A. Nor does the concept of player "eligibility" support the NCAA's appeal for a rule of *per se* legality for all player restraints. Br. 25. The rules at issue do not even speak to what the Court in *Board of Regents* had in mind—"*academic* eligibility." 468 U.S. at 88 (emphasis added). To the contrary, those rules, like the rules challenged in *Jenkins*, seek to eliminate competition for players in labor markets. As the district court held, the NCAA's bar on compensation for NIL rights is a "price-fixing agreement [that] constitutes a restraint of trade." 7 F. Supp. 3d at 988. The same analytical framework applies to other NCAA restraints on economic competition for players in the D-I men's basketball and football player markets, which generate billions of dollars annually for the NCAA and its members.

II.B-C. Courts and college administrators alike have recognized that such restraints are no different from other restraints on "commercial activity," and thus cannot evade review under the Sherman Act. As the court below put it, "the trans-

actions those schools make with premier athletes … are not noncommercial, since schools can make millions of dollars as a result." 7 F. Supp. 3d at 988-89 (citing *Agnew v. NCAA*, 683 F.3d 328, 340 (7th Cir. 2012)). And the million-dollar salaries paid to athletic administrators and coaches reflects the thoroughly commercial character of these two sports businesses. The money spent on athletic facilities, the investments in the schools' and conferences' own cable television sports channels, and the many other badges of big business that adorn D-I men's basketball and football only reinforce this point. Against this economic backdrop, it is plain that any plea for a rule of *per se* legality for NCAA player restraints should be directed to Congress, not the courts.

In sum, given both the enormous changes in the relevant economic markets since *Board of Regents* and the inherently commercial nature of the player compensation restraints at issue, this Court should reject the NCAA's call for blanket antitrust immunity in this area. Instead, it should affirm the lower court's injunction based on the trial record before it, and reject any legal rule that would seek to protect the NCAA from antitrust scrutiny with respect to player restraints and factual records that are not before the Court in this appeal.

ARGUMENT

I. The Supreme Court's decision in *Board of Regents* does not grant the NCAA blanket antitrust immunity to prohibit all compensation for player NIL rights, revenue-generating athletic services, or otherwise.

The Supreme Court in *Board of Regents* did not address any NCAA rules prohibiting compensation of athletes—or anything like such rules—and it did not remotely hold that all of the NCAA's "amateurism" or "eligibility" rules relating to compensation for players in the big businesses of D-I men's basketball and football are *per se* lawful. Moreover, all of the Court's discussion about the NCAA was limited to what it then described as "today's market." 468 U.S. at 116. Now, as then, evidence concerning "today's market" should govern the antitrust analysis of NCAA rules, and the factual evidence concerning the multi-billion-dollar businesses of D-I men's basketball and football is quite different today from what it was more than three decades ago.

A. *Board of Regents* did not address any player compensation or eligibility restrictions, and the passages from that opinion on which the NCAA relies are both dicta and based on what the Court expressly described as "evidence" of "today's market" in 1984.

1. The Court in *Board of Regents* invalidated NCAA rules restricting "the total amount of televised intercollegiate football," "the number of games that any one [member] team [could] televise," and the "sale of television rights." 468 U.S. at 94. The Court had "no doubt that the challenged practices of the NCAA constitute[d] a 'restraint of trade'" that "limit[ed] members' freedom to negotiate and en-

ter into their own television contracts." *Id*. at 98. Further, the Court found it "undeniable that these practices share[d] characteristics of restraints … previously held unreasonable"—including prohibitions on member institutions "competing against each other on the basis of price" or engaging in "any price negotiation [with] broadcasters." *Id*. at 99.

Although the Court declined to apply a rule of "*per se*" invalidity, the Court went on to strike down the challenged restraints under what has become known as the quick-look version of the Rule of Reason. *Id*. at 100. As the Court explained, the rule "restrain[ed] price and output"—"paradigmatic examples" of what "the Sherman Act was intended to prohibit"—and imposed "anticompetitive consequences." *Id*. at 104, 106, 107-08. Remarkably, the NCAA says this decision—which rejected all of the NCAA's antitrust defenses and repudiated its appeal for immunity from antitrust scrutiny—should be viewed as a "victory" providing that all NCAA restraints on player compensation, no matter how anticompetitive, are forever shielded from antitrust review. That is untenable.

Critically, the Court's decision in *Board of Regents* was based on a careful review of the "evidence" in what it called "***today's market***"—*i.e.*, the market in 1984. *Id*. at 116 (emphasis added). Such a factual review was essential since the Court did not apply any *per se* rule, but rather a version of the Rule of Reason. By necessity, therefore, the Court could only rule upon the antitrust restraints before it based on the accompanying record. In short, it borders on frivolous for the NCAA

to argue that *Board of Regents* actually meant to announce a blanket rule of antitrust immunity for all of the association's player compensation restraints, regardless of their competitive effects and commercial consequences.

According to the NCAA (Br. 21, 25, 27), the district court ignored the antitrust framework articulated in *Board of Regents* and reaffirmed by *American Needle, Inc. v. Nat'l Football League*, where the Court stated: "[D]epending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye.'" 560 U.S. 183, 203 (2010) (internal citation omitted). But that turns those decisions on their heads, as the Court in both cases *rejected* the sports defendants' pleas for antitrust immunity, holding that the Rule of Reason applied.

Indeed, *Board of Regents* announced a quick-look Rule of Reason to strike down NCAA restraints—not to validate them. And in *American Needle*, the restraints at issue were not upheld, but rather sent back to the lower court for a Rule of Reason analysis. Thus, the NCAA can cite not a single precedent where the Supreme Court—or any other court, for that matter—applied a "quick look" to uphold any horizontal restraint on compensation to players. To the contrary, numerous decisions hold that such restraints in the labor market for athletes are subject to the Sherman Act. *See, e.g.*, *Brown v. Pro Football, Inc.*, 518 U.S. 231, 248 (1996); *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996); *Mackey v. NFL*, 543 F.2d 606, 616 n.19, 620 (8th Cir. 1976); *Kapp v. NFL*, 390 F.

Supp. 73 (N.D. Cal. 1974), *aff'd in part, dismissed in part as moot*, 586 F.2d 644 (9th Cir. 1978).

The only type of restraints that *American Needle* suggested might be justified by the "special characteristics" of the sports industry had to do with such matters as cooperation in the production and scheduling of games (*id.* at 203), not the fixing of player wages—where competition was subject to full antitrust review. *Am. Needle*, 560 U.S. at 196-97 (finding that teams could not claim independent action, or exemption from antitrust scrutiny, where they competed for playing personnel). Moreover, the Court there stressed that the "necessity of cooperation" did not "transform[] concerted action into independent action"—the fact that sports entities "operate jointly in some sense does not mean that they are immune." *Am. Needle*, 560 U.S. at 199.

To be sure, the Court's opinion in *Board of Regents* contains dicta stating that, to preserve the "character" of college sports, "athletes must not be paid." 468 U.S. at 102; *see also id*. at 117. But as the district court observed, this "suggestion … was not based on any factual findings in the trial record and did not serve to resolve any disputed issues of law." 7 F. Supp. 3d at 999. Indeed, the Court was careful to state that it was *not* addressing "eligibility" rules—let alone rules governing player compensation—by contrasting the "specific restraints on football telecasts that are challenged" from "rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise

shall share in the responsibilities and the benefits of the total venture." 468 U.S. at 117. In short, the Court in *Board of Regents* had no occasion to consider the validity of anything but the NCAA television restraints then before it—let alone the NCAA's player compensation restrictions three decades later.

2. While acknowledging that the language it relies upon is dictum, the NCAA nonetheless insists, "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." Br. 28. This assertion, however, misunderstands both the holding of *Board of Regents* and the nature of Supreme Court dicta, neither of which "bind" this Court on the record and issues before it.

The Supreme Court's holdings are binding in all cases involving the same legal issues and substantially similar facts. Thus, *Board of Regents* remains binding on lower courts insofar as those courts are addressing the NCAA's television rules (or rules that share the same essential characteristics as those rules), and insofar as "today's market" bears the same characteristics that "today's market" bore in 1984. 468 U.S. at 116. But Supreme Court dicta, while entitled to respectful consideration by the lower courts, are "not binding." *Tyler v. Cain*, 533 U.S. 656, 663 n.4 (2001); *see also, e.g.*, *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006); *Cohens v. Virginia*, 19 U.S. 264 (1821). By definition, "dicta" are a court's *non-binding* statements concerning issues not squarely presented in the case before it or

"unnecessary to the Court's decision." *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972). Such statements "cannot be considered binding authority." *Id*.

The NCAA's own authority, *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983), confirms as much. The Court there criticized a circuit court for "doubt[ing] that [*Louisville & Nashville R.R. Co. v. Rice*, 247 U.S. 201 (1918)], is still good law," stating: "Needless to say, only this Court may overrule one of its precedents. Until that occurs, *Rice* is the law." *Id*. at 535. But the language of *Rice* that the circuit court disregarded in *Thurston* was a *holding*, not dictum. As the Supreme Court put it: "the Court of Appeals … confused the factual contours of *Rice* for its unmistakable holding." *Id*.

Applied here, these principles confirm that *Board of Regents* cannot have set any binding precedent concerning the NCAA's "amateurism" or player "eligibility" rules, which were not before the Court. The Court's holding was limited to the principles governing, and validity of, the "specific restraints on football telecasts" at issue. 468 U.S. at 117. Indeed, the Rule of Reason applied by the Court *necessarily* requires a fact-specific inquiry and holding. Thus, it is not surprising that the Court expressly limited its analysis to what it called the district court's factual findings "in today's market." *Id*. at 116. Moreover, as explained below, insofar as the Court was referencing *other* aspects of the various markets for NCAA sports as they existed in 1984, those markets have changed dramatically in the past 30 years, as D-I men's basketball and football have become multi-billion-dollar businesses.

B. The college sports industry for D-I men's basketball and football has changed dramatically in the three decades since *Board of Regents*.

Although "[t]he NCAA continues to purvey … an outmoded image of intercollegiate sports," that anachronistic view "no longer jibes with reality"—"[t]he times have changed." *Banks*, 977 F.2d at 1099 (Flaum, J., concurring and dissenting in part). When one fairly assesses the "evidence … in today's market" (*Bd. of Regents*, 468 U.S. at 116), there can be no question that D-I men's basketball and football are both big businesses, not some form of amateurism. Together with the NCAA, the five major conferences—the Atlantic Coast, Big Ten, Big 12, Pac 12, and Southeastern Conferences (collectively, "Power Conferences")—and their 65 member schools earn billions of dollars per year from these two businesses.

As the district court found, Plaintiffs presented "ample evidence" of how big-time men's college basketball and football have been transformed in the 30 years since *Board of Regents* was decided. 7 F. Supp. 3d at 1000. Publicly available information confirms this commercial transformation (emphases added):

- In 2010, the NCAA announced a 14-year agreement with CBS and Turner Sports for the rights to broadcast the NCAA basketball tournament on television. The contract is valued at more than ***$11 billion***, and is worth 41% more than the previous broadcast rights contract.[6]

[6] Thomas O'Toole, *NCAA Reaches 14-Year Deal with CBS/Turner for Men's Basketball Tournament, Which Expands to 68 Teams for Now*, USA TODAY, Apr. 22, 2010, http://content.usatoday.com/communities/campusrivalry/post/2010/04/ncaa-reaches-14-year-deal-with-cbsturner/1#.VJ3GVV4AA.

- In November 2012, ESPN agreed to pay ***$5.64 billion*** over 12 years—or ***$470 million*** annually—to broadcast the College Football Playoff ("CFP"), a college football postseason tournament featuring a grand total of ***three games***.[7]

- The inaugural CFP championship game played earlier this month received the highest ratings in the history of cable television, attracting more than 33 million viewers.[8] As a prominent National Public Radio reporter remarked: "[The NCAA's] new playoff system seems to have paid off and ***there are dollar signs everywhere.***"[9]

- Ancillary to the CFP is a series of bowl games in which teams not selected for the CFP may compete. For the 2012-13 season, teams received a combined ***$98.4 million*** just for showing up at these bowl games.[10]

- During the 2014-15 season alone, the Power Conferences and the University of Notre Dame will receive approximately ***$1.1 billion*** in revenue from television partners for regular season football games, not counting the additional revenue generated by the CFP. By the 2019-20 season, that number will grow to ***$1.63 billion.***[11]

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[7] Rachel Bachman, *ESPN Strikes Deal for College Football Playoff*, WALL ST. J., Nov. 21, 2012, http://www.wsj.com/articles/SB10001424127887324851704578133223970790516

[8] Bill Chappell, *College Football Championship Sets a New Cable Ratings Record*, NPR, Jan. 13, 2015, http://www.npr.org/blogs/thetwo-way/2015/01/13/377060626/college-football-championship-sets-a-new-cable-ratings-record.

[9] All Things Considered, *supra* note 5.

[10] Jon Solomon, *NCAA Audit: Every Football Conference Made Money on 2012-13 Bowls*, AL.com, Dec. 11, 2013, http://www.al.com/sports/index.ssf/2013/12/bowl_money_101_ncaa_audit_show.html.

[11] Bill King & Michael Smith, A Pay-for-Play Model, SPORTS BUSINESS JOURNAL, Dec. 2, 2013, http://www.sportsbusinessdaily.com/Journal/Issues/2013/12/02/In-Depth/Main-story.aspx.

- Today, the Power Conferences largely own their own cable television sports networks, further putting them solidly in sports businesses having nothing to do with amateurism or an educational mission.[12]

- The revenues in these two sports have grown so large that top college football and basketball coaches earn millions of dollars each year, rivaling their counterparts in the professional leagues. ***The highest-paid college football coach, Nick Saban, received more than $7 million*** in compensation in 2014, ***at least fifty FBS coaches received at least $2 million***, respectively, and ***the lowest-paid FBS football coach earned $987,000***.[13]

- The University of Michigan recently lured new head coach Jim Harbaugh away from the NFL by offering a seven-year guarantee of at least $5 million annually, and up to $8 million annually with performance incentives and deferred compensation.[14] Indeed, even athletic administrators today earn millions of dollars a year from these sports.[15]

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[12] *See, e.g.*, Clay Travis, *Every SEC School Will Make More TV Money Than Texas, Notre Dame,* OUTKICK THE COVERAGE, July 23, 2014, http://www.foxsports.com/college-football/outkick-the-coverage/every-sec-school-will-make-more-tv-money-than-texas-notre-dame-072314 (explaining the tens-of-millions of dollars paid annually to Power Conference schools through proprietary cable networks or school-exclusive television contracts).

[13] *NCAA Salaries*, USA TODAY, http://sports.usatoday.com/ncaa/salaries/.

[14] Chip Patterson, *Jim Harbaugh's Contract at Michigan: Seven Years, Same Pay as 49ers*, CBS SPORTS, Dec. 30, 2014, http://www.cbssports.com/collegefootball/eye-on-college-football/24923614/jim-harbaughs-michigan-contract-7-years-same-compensation-as-49ers.

[15] NCAA President Mark Emmert earns $1.674 million. Rod Dauster, *Mark Emmert's $1.7 Million Salary Is 46% More Than His Predecessor's*, COLLEGEBASKETBALLTALK, July 15, 2014, http://collegebasketballtalk.nbcsports.com/2014/07/15/mark-emmerts-1-7-million-salary-is-46-more-than-his-predecessors/. Power Conference commissioners earn similar compensation—Big 12 Commissioner Bob Bowlsby receives an estimated $1.8 million. Steve Berkowitz, *Bob Bowlsby's Pay as Big 12 Commissioner Is Revealed*, USA TODAY, May 13, 2014, http://www.usatoday.com/story/sports/college/2014/05/13/bob-bowlsby-salary-big-12-conference-revenue-finances/9020973/.

Comparing "today's market" for D-I men's basketball and football in 2015 with "today's market" in 1984 underscores why the dicta in *Board of Regents* can be given no weight: an antitrust analysis of these issues, under the Rule of Reason, must be based on a factual record that reflects today's market realities. That is precisely the type of analysis that the district court conducted in the trial below.

II. The NCAA rules challenged here are not immune from antitrust scrutiny because they purportedly relate to player "eligibility."

There is simply no legal or factual basis for the NCAA's argument that player compensation "rules such as those at issue here" are mere "eligibility rules" that "are valid as a matter of law." Br. 25; *see also* Br. 32 (asserting that the challenged rules merely regulate "who may participate in the activities it sponsors"). In reality, the NCAA rules at issue in this appeal, like those in *Jenkins*, are anticompetitive restrictions in relevant commercial markets that are subject to antitrust review.

A. The NCAA's NIL rules are not mere "eligibility" rules.

The NCAA rules at issue are economic restraints that bear no resemblance to NCAA "eligibility" rules that set minimum standards for the academic performance of students participating in college sports. When the Court in *Board of Regents* referred to rules "for academic eligibility" (468 U.S. at 88), it was referring to rules such as those requiring students who wish to compete to meet full-time enrollment and minimum academic standards. *See, e.g.*, NCAA Bylaws 14.1 and

14.2.[16] By contrast, one of the rules at issue here precludes college athletes from accepting remuneration for the use of their NILs. Bylaw 12.5.2.1. As the court below recognized, "[t]he recruit provides his athletic performance and the use of his name, image, and likeness. However, the schools agree to value the latter at zero by agreeing not to compete with each other to credit any other value to the recruit in the exchange. This is an anticompetitive effect." 7 F. Supp. 3d at 973.

Rules of this type are commercial restraints in the markets for player services—much like the broadcast rule struck down in *Board of Regents* was commercial. The NCAA cannot shield these rules from antitrust scrutiny by labeling them rules of "eligibility," when in reality they are rules restricting how individual schools can compete economically for the player services that generate billions of dollars in revenue for them.

B. Courts and college administrators alike have recognized the commercial character of the NCAA's so-called "eligibility" rules, which restrict competitors from compensating players for their commercial contributions.

1. Numerous courts have recognized the commercial character of the NCAA's so-called "eligibility" rules when they restrict player compensation, finding that such rules are fully subject to review under the Sherman Act. As the Seventh Circuit put it in *Agnew*, "[d]espite the nonprofit status of NCAA member

[16] The NCAA D-I Manual, which contains all applicable bylaws, is available at http://www.ncaapublications.com/p-4380-2014-2015-ncaa-division-i-manual-october-version.aspx.

schools, the transactions those schools make with premier athletes—full scholarships in exchange for athletic services—are not noncommercial," and "[n]o knowledgeable observer could earnestly assert" otherwise. 683 F.3d at 340. *Accord White v. NCAA*, Case No. 06-999, ECF No. 72, slip op. at 1, 3 (C.D. Cal. Sept. 20, 2006) (denying NCAA's motion to dismiss an antitrust suit challenging "a horizontal agreement to adhere to a grant-in-aid … cap in [schools'] financial aid awards to student athletes."); *Rock v. NCAA*, 928 F. Supp. 2d 1010, 1025-26, 1025 n.10 (S.D. Ind. 2013) (characterizing participation in D-I sports in exchange for an athletics scholarship as "commercial").[17] As the district court here explained, the NCAA's position "mischaracterizes the commercial nature of the transactions between FBS football and Division I basketball schools and their recruits." 7 F. Supp. 3d at 988.

Each of the cases upon which the NCAA relies to argue that horizontal compensation limits to players are non-commercial "eligibility" rules addressed rules quite unlike those challenged here. Both *Banks* and *Gaines*, for example, involved challenges to NCAA rules that disqualified athletes for college competition after entering professional sports drafts and hiring sports agents. *Banks*, 977 F.2d at 1083-84; *Gaines v. NCAA*, 746 F. Supp. 738, 740-41 (M.D. Tenn. 1990). The

[17] *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998), and *McCormack v. NCAA*, 845 F.3d 1338 (5th Cir. 1988), which the NCAA presents as independent sources of authority, simply cite *Board of Regents*' dicta.

court in *Gaines* expressly emphasized that its ruling was "very narrow," and would not apply to other types of NCAA rules—rules that unreasonably restrict the economic competition between schools engaged in big sports businesses:

> This Court agrees with the Fifth Circuit in *Hennessey* that the NCAA, with its multimillion dollar annual budget, is engaged in a business venture and is not entitled to a *total* exemption from antitrust regulation on the ground that its activities and objectives are educational and are carried on for the benefit of amateurism. *See Hennessey*, 564 F.2d at 1148–49. However, by holding that the eligibility Rules challenged by Gaines are not subject to antitrust analysis, this Court is by no means creating a total exemption, but rather a very narrow one.

746 F. Supp. at 744 (citing *Hennessey v. NCAA*, 564 F.2d 1136, 1148-49 (5th Cir. 1977)). *See also Banks*, 977 F.2d at 1093 (court not ruling on or considering "any additional markets or anti-competitive effects upon them alleged outside the amended complaint").

None of the NCAA's cases in which the courts have dismissed antitrust challenges to so-called "eligibility" rules have involved the type of restrictions on player compensation at issue in this litigation or in *Jenkins*. *See e.g.*, *Marucci Sports, LLC v. NCAA*, 751 F.3d 368 (5th Cir. 2014) (challenging NCAA regulations governing use of non-wood bats in baseball games); *Bassett v. NCAA*, 528 F.3d 426 (6th Cir. 2008) (challenging NCAA enforcement activities, not a particular rule); *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998) (same); *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005) (challenging NCAA limits on the number of football scholarships); *Justice v. NCAA*,

577 F. Supp. 356 (D. Ariz. 1983) (challenging NCAA-imposed sanctions on the University of Arizona football team).

The NCAA cites the Sixth Circuit's reasoning in *Bassett* that, 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." 528 F.3d at 433 (quotation marks omitted). That has long been settled. *Board of Regents*, 468 U.S. at 100. Yet the NCAA rules at issue here, like those in *Jenkins*, fail this test. Both sets of rules restrict the commercial competition between the schools to recruit and compensate players in D-I men's basketball and football. The fact that the NCAA calls these "eligibility" rules cannot change their commercial character and anti-competitive effect.

2. As one of the country's leading athletic directors, Notre Dame's Jack Swarbrick, recently explained, so-called NCAA "eligibility" rules that limit athletes' compensation unfairly deprive athletes of commercial opportunities available to their non-athlete counterparts:

> [I]f our standard had been what's the rule for other students, capturing name, image and likeness outside team activity, the musician at school doesn't have that limitation. I'm not sure why the student-athlete should, either. I don't find it inconsistent at all to say we need to get ourselves grounded back in that. I think it would contribute to reducing so many of the problems we have which really spring from this

> situation we created when we say they're not going to be the same as other students.[18]

Swarbrick's candid statement belies the NCAA's assertion that its primary purpose is 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." Br. 33 (citation omitted). Not surprisingly, the court below, after a full trial, found directly to the contrary. 7 F. Supp. 3d at 975, 1007-09. Indeed, as NCAA Executive Vice President Oliver Luck recently observed, "I don't believe that a student-athlete who accepts a grant-in-aid simply waives that right to his or her name, image, likeness," any more than Jodie Foster "waive[d] her right to go appear on Broadway" by "going to the Yale drama school."[19]

Other NCAA Administrators have made similar admissions about the true anti-competitive objective of the NCAA's rules banning all forms of player compensation by the schools. For example, Byers has explained that the NCAA Presidents Commission has been "firmly committed to the neoplantation belief that the

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[18] Jon Solomon, *Notre Dame AD: College Players Should Be Paid for Using Their Name*, CBS SPORTS, Dec. 10, 2014, http://www.cbssports.com/collegefootball/writer/jon-solomon/24879194/notre-dame-ad-college-players-should-be-paid-for-using-their-name.

[19] Steve Berkowitz, *Oliver Luck Brings Own Perspective to NCAA on O'Bannon Name and Likeness Issue*, USA TODAY, Jan. 16, 2015, http://www.usatoday.com/story/sports/college/2015/01/16/ncaa-convention-oliver-luck-obannon-name-and-likeness-court-case/21873331/.

enormous proceeds from college games belong to the overseers (the administrators) and supervisors (coaches)."[20] He concludes: "This system is so biased against human nature and simple fairness in light of today's high-dollar, commercialized marketplace that the ever increasing number of [NCAA rules infractions cases] emerge in the current environment as mostly an indictment of the system itself."[21]

C. The NCAA's plea for a rule of *per se* legality for its player restraints should be directed to Congress, not the courts.

At bottom, the NCAA is asking for a special, judicially created antitrust exemption for NCAA player restraints, so that its lucrative commercial basketball and football businesses can remain free to prohibit all forms of economic competition for the labor force on which they depend. Yet no other businesses enjoy the right to enter agreements eliminating all economic competition for labor without satisfying antitrust scrutiny. *See, e.g.*, *Law*, 134 F.3d at 1020-24; *United States v. Adobe Sys., Inc.*, No. 10-cv-1629, 2011 WL 10883994 (D.D.C. Mar. 18, 2011); *see also Brown*, 518 U.S. at 248; *Chicago Prof'l Sports Ltd. P'ship*, 95 F.3d at 600; *Mackey*, 543 F.2d at 616 n.19, 620. Indeed, in *Law*, the Tenth Circuit specifically rejected the NCAA's argument that it should be able to impose such restraints in the market for assistant basketball coaches. 134 F.3d at 1020-24.

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[20] Byers, *supra*, at 2-3.

[21] *Id.*

If there were any policy basis for granting the NCAA schools antitrust immunity in the name of "amateurism" (there is not), that argument would need to be made to Congress, not the courts. *United States v. Int'l Boxing Club of N.Y.*, 348 U.S. 236, 243 (1955). Indeed, the Supreme Court made that very point in *Board of Regents*. 468 U.S. at 104 n.28, 108 n.35. Absent congressional action, however, the Sherman Act requires sustaining the decision below under the Rule of Reason.

Moreover, the governing antirust principles require that each different type of NCAA player restraint be judged in the context of a full factual record relevant to that restraint. That is the very essence of the Rule of Reason. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); *Cal. ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1134 (9th Cir. 2011). Thus, the decision below should be assessed (and affirmed) on the basis of the record established at trial, not invalidated on the basis of an unjustified blanket rule immunizing from antitrust scrutiny any bylaw that the NCAA can characterize as related to "eligibility."

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6,994 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it was prepared in Times New Roman 14-point typeface using Microsoft Office Word.

/s/ Jeffrey L. Kessler
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CERTIFICATE OF SERVICE

I hereby certify that, on January 28, 2015, I electronically filed the foregoing brief with the Clerk of Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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