**Nos. 14-16601, 14-17068**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

*v.*

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
*Defendant-Appellant*,

*and*

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

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

## REPLY BRIEF FOR THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

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Prior to this litigation, no court had ever held an NCAA amateurism rule to violate the Sherman Act; many had rejected such challenges. They did so because *NCAA v. Board of Regents of the University of Oklahoma* established that such rules "are … procompetitive." 468 U.S. 85, 117 (1984). The district court here reached the result it did only by departing from that binding precedent and embracing an analysis that conflicts with fundamental antitrust principles.

Plaintiffs evidently recognize this, because the focus of their brief is not antitrust law, nor responses to many of the NCAA's arguments. Instead, plaintiffs seek primarily to sow dislike of the NCAA, by cataloguing its every supposed mis-deed—including, curiously, actions that indisputably benefit student-athletes, *see, e.g.*, Pls.' Br. 7 n.2 (lambasting the NCAA for "authoriz[ing] payments of $3000 to cover travel expenses" for the families of" student-athletes participating in certain post-season contests). This effort at misdirection, which fails even on its own terms, *see infra* Part I, should be rejected; plaintiffs cannot prevail simply by (mis-)portraying the NCAA as a bad actor. The issue here is whether the district court erred in finding an antitrust violation. The answer is yes.

## ARGUMENT

### I. THE NCAA'S COMMITMENT TO AMATEURISM IS GENUINE AND LONGSTANDING

1. The heart of plaintiffs' submission is that amateurism is a sham. See, e.g., Br. 4 (labeling the NCAA's conception of amateurism "unfixed, malleable,

and self-serving"). That contention conflicts with *Board of Regents*' recognition that the NCAA "plays a critical role in the maintenance of a revered tradition of amateurism," 468 U.S. at 120, and with a record showing the NCAA's consistent, century-long adherence to amateurism—specifically the principle that college athletes "must not be paid" to play, *id.* at 102; *see also* NCAA Br. 6-11, 51-54.

In arguing otherwise, plaintiffs emphasize (*e.g.*, Br. 6) matters such as reimbursement of student-athletes' expenses. But reimbursement is consistent with amateurism. *See* NCAA Br. 7, 10; ER515a-515j, ER634-638; RER98-102. The rule changes that plaintiffs cite (Br. 5-8) largely reflect the refinement of the NCAA's views, based on experience and changing circumstances, about what expenses could be covered. *See* NCAA Br. 52-53. Such evolution by a large and diverse organization, in response to practical realities (and over the course of decades), is a virtue. Indeed, plaintiffs never even acknowledge the NCAA's point in this regard: "The antitrust laws do not require organizations to establish fixed rules and principles on day one, and then stubbornly adhere to them without change, on pain of having those rules and principles condemned as illegitimate by a federal antitrust court." NCAA Br. 53-54; *see also McCormack v. NCAA*, 845 F.2d 1338, 1345 (5th Cir. 1988), *quoted in* NCAA Br. 54.

2. Plaintiffs also fixate on the undisputed point that Division I men's basketball and FBS football programs have a significant commercial component,

with some generating substantial revenue (revenue often used to further schools' educational missions in various ways, *see* NCAA Br. 8-9). But as the NCAA explained (Br. 30-31), commercialism and amateurism are not incompatible; many amateur sports, such as Little League Baseball, are commercial. In fact, although the dollar amounts have grown over time, commercialism and the NCAA's commitment to amateurism have co-existed for over a century. NCAA Br. 6-10, 29. Hence, the unquestioned increase in commercialism around some college-sports programs does not undermine the NCAA's commitment to amateurism. Rather, the NCAA's amateurism rules prevent college sports from being professionalized in the face of commercial pressures. *See McCormack*, 845 F.2d at 1344; NCAA Br. 11-12, 29-30. Plaintiffs address none of these points.

3. Collecting various statements by NCAA officials, plaintiffs claim that the NCAA itself has recognized that the commercial aspects of some programs "undermine[] its concept of amateurism," Pls.' Br. 3; *see also id.* at 12-14, and has even "consider[ed] … proposals to compensate [student-athletes] for NIL use," *id.* at 17 (capitalization altered). Plaintiffs present these statements as if they reflected the officials' own views, when in reality the officials typically were presenting a "perception," "general sense," or proposal for discussion purposes. *See* SER328, SER380, SER413-414, SER490, SER510, SER516-517, SER535. What these statements reveal, moreover, is that NCAA officials are both clear-eyed about the

pressures commercialism places on amateurism and willing to discuss openly how to responsd to those pressures—consistent with the basic principles of amateurism. *See* SER429-431, SER436-439, SER450-460.

For example, plaintiffs cite (Br. 15-16) "internal NCAA documents" supposedly showing that the NCAA "allowed the use of Plaintiffs' NILs in video-games." As the NCAA explained, however, (Br. 42), it refused to authorize the use of student-athletes' NILs in videogames. (Plaintiffs' dismissal of this statement as "bald" (Br. 15) is curious given that the NCAA provided six record citations—which plaintiffs ignore.) It is true that Electronic Arts, in creating its videogame avatars, took advantage of technological advances to push the limits of the NCAA's refusal. *See*, *e.g.*, SER417-418 (internal email explaining that because NCAA rules "only preclude the actual use of the [student-athletes'] name, picture, or physical likeness in commercial promotions/activities, these computerized video games are basically allowed to do what they are doing"). But as shown in the documents plaintiffs cite, EA's conduct spurred discussions within the NCAA about how to respond in light of concerns about exploitation and inconsistency with amateurism—and ultimately led the NCAA to discontinue licensing its own intellectual property to EA, causing EA to stop making the games. *See* SER417-419, SER328-329, SER423, SER466-467, SER510. The record thus refutes plaintiffs' charge that the NCAA supported commercial

exploitation of student athletes' NILs in videogames. More fundamentally, a joint venture should not, as plaintiffs suggest, be held unlawful because its members transparently discuss and even disagree about how to pursue their joint goal.

4. Finally, plaintiffs argue (Br. 51-55) that Division I men's basketball and FBS football players are "treated similarly to professional athletes" and thus are not genuine students. Notably, the district court made no findings that support this contention. *See* ER48. For good reason: Plaintiffs' statistics and anecdotes regarding student-athletes' academic engagement and performance present a highly distorted picture, because they do not reflect relevant comparisons.

To begin with, the evidence at trial was that Division I men's basketball and FBS football players spend roughly as much time on sports and academics as Division II and Division III athletes (who are undisputedly "non-professional"). RER78-96. As for the claimed "gap between graduation rates for college athletes and the regular student body" (Pls.' Br. 52), that is principally a function of students' backgrounds, including socioeconomic status, race, and family history and income. *See* ER370-377, ER383-384, ER386, ER393. Controlling for those factors, a Nobel-prize-winning economist found that compared to non-athletes, college football and basketball players—especially those from disadvantaged backgrounds—have equivalent or higher graduation rates, as well as more white-collar jobs and higher wages after graduation (even excluding those few who

become professional athletes). *See* ER378-394, SER746-748. By helping integrate student-athletes into the academic community, amateurism contributes to these successes. NCAA Br. 11-12; ER496-498, ER607-608.

## II. *BOARD OF REGENTS* FORECLOSES PLAINTIFFS' CLAIMS

The NCAA's opening brief argued (at 21-31) that under *Board of Regents* and the line of cases following it, NCAA rules designed to preserve the amateur character of college sports, such as those challenged here, are valid under the Sherman Act as a matter of law. Plaintiffs' responses lack merit.

As a threshold matter, plaintiffs assert (Br. 28, 33) that the NCAA's argument is moot because the district court, after rejecting the argument at summary judgment, conducted a trial. That is wrong. The "denial of summary judgment is … review[able] on appeal, despite full trial on the merits, 'where the district court made an error of law that, if not made, would have required the district court to grant the motion.'" *F.B.T. Prods., LLC v. Aftermath Records*, 621 F.3d 958, 963 (9th Cir. 2010). In any event, the NCAA renewed the argument immediately before and after trial, RER2-6, RER10-13, and the court again rejected it, ER 87-88. That independently preserved the argument for appeal. (And either way, review is *de novo*. *See FTC v. BurnLounge, Inc.*, 753 F.3d 878, 883 (9th Cir. 2014).)

### A. Plaintiffs' Interpretation Of *Board Of Regents* Is Untenable

The Supreme Court stated in *Board of Regents* that "to preserve the character and quality of [college athletics], athletes must not be paid." 468 U.S. at 102. Plaintiffs contend (Br. 30) that this pellucid language was merely "part of the Supreme Court's explanation for applying Rule of Reason" to the rules challenged there. That is incorrect. As the Seventh Circuit explained, the Supreme Court's statement and the surrounding discussion delineate the range of NCAA rules for which "no 'detailed analysis,' would be necessary to deem such rules pro-competitive." *Agnew v. NCAA*, 683 F.3d 328, 342-343 (7th Cir. 2012) (quoting *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010)); *see also* NCAA Br. 25-26. Plaintiffs cite no case to support their contrary reading.[1]

Instead, plaintiffs seek to create confusion by characterizing the NCAA's argument as pertaining simply to the proper mode of antitrust analysis. In particular, plaintiffs contend (Br. 28) that the NCAA is asking for "quick look" antitrust review rather than full rule-of-reason analysis. In fact, the NCAA's position is that, whatever the antitrust label—and the Supreme Court has cautioned about placing great weight on those labels, *see California Dental Ass'n v. FTC*,

[1] Plaintiffs accuse the NCAA (Br. 30) of "ignor[ing]" the "attend class" language in the key sentence. While that would have been understandable, because this case is not about class-attendance rules, plaintiffs are mistaken. *See* NCAA Br. 24. Plaintiffs also assert (Br. 31) that "attend class" was the "focus" of the sentence, yet offer nothing to support that claim, nor explain why it would matter if it were true.

526 U.S. 756, 779-781 (1999)—under *Board of Regents* amateurism rules are valid as a matter of law because they "enable[] a product to be marketed which might otherwise be unavailable." 468 U.S. at 102. *Board of Regents*, that is, dictates the *outcome* of the antitrust inquiry, whatever the proper mode of analysis.

Plaintiffs also say (Br. 28) that "[t]he NCAA's argument … turns both *BoR* and *American Needle* on their heads" because both "embraced the Rule of Reason." Again, however, the relevant point is not the label but the outcome dictated by *Board of Regents*. In any event, *Board of Regents* conducted a detailed analysis of the television rules at issue because they were *not* amateurism rules, i.e., did not "fit into the same mold as do rules defining … the eligibility of participants." 468 U.S. at 117. That distinction was critical to the Court's analysis, yet plaintiffs ignore it. The Court did not merely "decline[] to apply a *per se* rule of invalidity" to the challenged television rules. Pls.' Br. 27. It also distinguished NCAA rules that "preserve the character and quality of" college athletics from those that don't. 468 U.S. at 102; *see* NCAA Br. 23-24. An antitrust challenge to the former is unsustainable because they "widen consumer choice … and hence can be viewed as procompetitive." 468 U.S. at 102.[2]

[2] Plaintiffs assert that *Board of Regents* dictates that amateurism rules "'*can* be viewed as procompetitive,' not that they *must* be so viewed." Pls.' Br. 30 (citation omitted). Much of *Board of Regents*' discussion, however, was devoted precisely to explaining why amateurism rules are (not just can be) procompetitive—hence the Court's statement that "[i]t is reasonable to assume that

As for *American Needle*—which like *Board of Regents* did not involve an NCAA amateurism rule—the Court said there, consistent with the NCAA's position, that "restraints on competition [that] are essential if the product is to be available at all" are "likely to survive" antitrust scrutiny, and indeed can sometimes be upheld "in the twinkling of an eye." 560 U.S. at 203. Although plaintiffs note (Br. 29) that the "twinkling" language "was used in *BoR* in the context of *condemning* a restraint of trade," *American Needle* leaves no doubt that restraints can also be upheld "'in the twinkling of an eye'—that is, at the motion-to-dismiss stage." *Agnew*, 683 F.3d at 341; *accord Barry v. Blue Cross of Cal.*, 805 F.2d 866, 871 (9th Cir. 1986) (reaching the same conclusion based on *Board of Regents*).

Because the NCAA's argument concerns the proper result when an NCAA amateurism rule is challenged and not the analytic label, plaintiffs' citation (Br. 30) of cases in which this Court invoked the rule of reason does not help them. In neither case, moreover, did this Court consider the argument here that under *Board of Regents* amateurism rules are always valid as a matter of law. Both cases did, however, hold that the plaintiff's antitrust challenge failed as a matter of law for other reasons. *See Tanaka v. University of S. Cal.*, 252 F.3d 1059, 1063-1065 (9th Cir. 2001); *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1318-1319 (9th Cir. 1996).

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most of the regulatory controls of the NCAA *are* … procompetitive." 468 U.S. at 117 (emphasis added).

Finally, plaintiffs argue (Br. 31) that they "do not attack all rules on eligibility." But again, *Board of Regents* stated that student-athletes "must not be paid," 468 U.S. at 102, and as plaintiffs acknowledge (Br. 31), their claim is directly to the contrary: that "each NCAA DI school should be free to … offer[] compensation for use of [student-athletes'] NILs." Indeed, contrary to plaintiffs' suggestion (Br. 22), this appeal does not involve any "no-compensation-for-use-of-NILs rule"; what plaintiffs actually challenge is an application of the NCAA's general no-pay rules that preserve amateurism. Plaintiffs' claim thus falls squarely within *Board of Regents*' recognition that such claims fail as a matter of law.

### B. Plaintiffs Cannot Distinguish The Numerous Lower-Court Cases That Embrace The NCAA's Reading Of *Board Of Regents*

Plaintiffs assert (Br. 32) that the cases the NCAA cited reading *Board of Regents* as the NCAA does are "[n]ot [p]ersuasive." Plaintiffs thus ask this Court to create a circuit conflict—a step the Court will not take when dealing with a law that is "best applied uniformly" absent "a compelling reason." *Kelton Arms Condo. Owners Ass'n v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003). There is no compelling reason here.

Perhaps recognizing this, plaintiffs attempt to distinguish the cases the NCAA cited. For example, plaintiffs state (Br. 32) that those cases did not involve the exact restraint at issue here. But that is irrelevant; the cases concluded (correctly) that under *Board of Regents*, a particular *category* of NCAA rules—

rules designed to preserve the amateur character of college sports—do not violate the Sherman Act. *See* NCAA Br. 22, 25-26.

Likewise infirm is plaintiffs' argument (Br. 32) that the cases the NCAA cited did not "involve[] a factual record similar to that developed here." Indeed, that is the NCAA's point: Those courts determined that there was no need for trial or extensive discovery because, under *Board of Regents*, amateurism rules are valid as a matter of law. As the Seventh Circuit put it, "the first—and possibly only—question to be answered when NCAA bylaws are challenged is whether the[y] … are of the type that have been blessed by the Supreme Court, making them presumptively procompetitive." *Agnew*, 683 F.3d at 341; *id*. at 341 n.7.[3]

Plaintiffs next contend (Br. 32-33) that *Agnew* stated that "in a different case the NCAA could face antitrust liability." That is true—as *Board of Regents* illustrates. But the question is whether the NCAA can properly "face antitrust liability" in *this* case, where the challenged rules preserve the amateur character of college sports. And *Agnew* made clear that the answer is no: It underscored that correcting the deficiency in the complaint there would "not necessarily mean that

[3] Plaintiffs err in asserting (Br. 33) that *Agnew*'s use of "presumptively" indicated a mere "*pretrial* presumption" that evaporates later in litigation. *Agnew*'s discussion makes clear that what it labeled a presumption is *conclusive*, such that challenges to amateurism rules fail as a matter of law and without the need for factual findings. *Cf. Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341-342 (1990) ("The *per se* rule … [is] a conclusive presumption that the restraint is unreasonable.").

any challenge of any NCAA bylaw will survive the motion-to-dismiss stage. Many NCAA bylaws can be deemed procompetitive 'in the twinkling of an eye.'" 683 F.3d at 347 n.8 (citing *Board of Regents*). That is the holding relevant here.

Lastly, plaintiffs contend (Br. 34-35) that "[t]he NCAA ignores numerous decisions entertaining properly pled antitrust challenges to agreements among colleges artificially to limit the number or amounts of athletic scholarships." But those cases themselves did not consider the rules at issue to be "eligibility rules, []or … inherently or obviously necessary for the preservation of amateurism." *Agnew*, 683 F.3d at 343-344; *see also, e.g.*, *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1149 (W.D. Wash. 2005) ("[T]he numerical scholarship limitation … is not on all fours with those cases which hold that NCAA eligibility rules are not subject to the Sherman Act."). Those courts evidently disagreed, in other words, that scholarship cases may "be fairly analogized to this one." Pls.' Br. 35.

Several of plaintiffs' cases do, however, confirm that under *Board of Regents*, a Sherman Act challenge to a no-pay rule is unsustainable. *Walk-On Football Players*, for example, explained—even before *Agnew* was decided—that "[t]he *law is clear* that athletes may not be 'paid to play.' Accordingly, courts have *regularly* upheld NCAA bylaws protecting amateurism in college athletics." 398 F. Supp. 2d at 1148 (emphases added) (citing *Board of Regents* and over half-

a-dozen lower-court cases). What plaintiffs tellingly cannot cite is *any* prior case holding an amateurism rule invalid under the Sherman Act. *Board of Regents* forecloses such a holding.

### C. Plaintiffs' "Times Have Changed" Argument Lacks Merit

Echoing the district court, plaintiffs argue (Br. 33-34) that *Board of Regents* can be ignored because "the business of intercollegiate DI men's basketball and FBS football is hardly the same as it was 30 years ago." That should be rejected for several reasons.[4]

Most fundamentally, plaintiffs ignore the NCAA's leading—and dispositive—argument (Br. 28): Even if times had changed in a relevant way, *Board of Regents* would still bind this Court. *See, e.g.*, *Smith v. University of Wash., Law Sch.*, 233 F.3d 1188, 1200 (9th Cir. 2000).

Plaintiffs instead argue (Br. 33) that the NCAA has applied "amateurism" "inconsistent[ly]." But as discussed, *see* pp.1-3, that contention is belied by a record showing the NCAA's consistent adherence to the rule, affirmed in *Board of Regents*, that student-athletes "must not be paid." 468 U.S. at 102. Moreover, much of plaintiffs' evidence of supposed inconsistency (*see* Br. 3-9) predates

[4] Plaintiffs rightly do not defend the district court's alternate reasoning that *Board of Regents* can be disregarded because the key language was dicta. *See* NCAA Br. 26-28 (discussing that reasoning).

*Board of Regents*, and thus cannot support a "times have changed" rationale for ignoring it.

Plaintiffs also say (Br. 33-34) that the NCAA has "internal[ly]" recognized that "commercialism … has eroded … the relationship between athletics and academics." But as also discussed, *see* pp.3-5, college sports has always had a commercial dimension, and, as those internal conversations reveal, the NCAA's adherence to amateurism is a response to commercial pressures. Moreover, plaintiffs ignore the NCAA's explanation (Br. 30-31) that commercialism and amateurism are two different things. Increases in *commercialism* since 1984 (when college football was already "big business," according to the district court in *Board of Regents*, *see* NCAA Br. 29) thus do not justify a departure from *Board of Regents*' conclusion about the procompetitive nature of *amateurism*.

Plaintiffs next assert (Br. 34) that the NCAA has recognized "that modest NIL payments would be consistent with even the NCAA's interpretation of 'amateurism.'" As discussed below, *see* p.29; *see also* NCAA Br. 57-58, that is manifestly wrong.

Finally, plaintiffs claim that the foregoing points were not before the many courts holding that under *Board of Regents*, NCAA amateurism rules are valid as a matter of law. That is wrong. In *Agnew*, for example, the court held that *Board of Regents* precludes antitrust challenges to NCAA amateurism rules *despite* the

plaintiffs' allegation—which the court accepted as true, *see* 683 F.3d at 334—"that the NCAA's blanket justification of all of its conduct on the grounds of amateurism is nothing more than a pretext for the commercial interests of the NCAA and its members," Reply Br. 10 n.4, *Agnew*, No. 11-3066 (7th Cir. Dec. 7, 2011), *available at* 2011 WL 6385831. This Court should decline plaintiffs' invitation to create a circuit conflict by becoming the only court, other than the court below, to hold that an NCAA amateurism rule violates the Sherman Act.

## III. THE CHALLENGED RULES DO NOT REGULATE "COMMERCIAL" ACTIVITY

Two other circuits have held that NCAA amateurism rules are outside the scope of the Sherman Act because they do not regulate "commercial" activity. *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008); *Smith v. NCAA*, 139 F.3d 180, 185-186 (3d Cir. 1998) (subsequent history omitted). This Court should do the same.[5]

In contending otherwise, plaintiffs suggest (Br. 22, 35) that this Court has already resolved this issue against the NCAA. That is wrong. In *Hairston*, the parties did not dispute whether the agreement at issue regulated commercial activity. *See* 101 F.3d at 1319. And the Court in *Tanaka* expressly declined to address the district court's conclusion that amateurism rules are not commercial. *See* 252 F.3d at 1062, *cited in* NCAA Br. 34.

[5] Plaintiffs err in asserting (Br. 35) that this argument is waived. The NCAA repeatedly advanced the argument below. *See* RER7-8, RER13 & n.3.

Plaintiffs next seek (Br. 36-37) to distinguish *Bassett* and *Smith*, yet they articulate no meaningful difference; simply observing that different rules were at issue there is inadequate. What matters is that those rules were held not to regulate commercial activity even though they too had potential economic consequences. Indeed, *Bassett* involved rules prohibiting certain recruiting inducements—specifically, "providing remuneration to athletes in exchange for their commitments to … the … football program." 528 F.3d at 433. Such "remuneration" is also at issue here. And *Smith* involved a rule restricting the eligibility of graduate students, which—certainly on plaintiffs' view—would affect a labor market.

Plaintiffs next note (Br. 36) that *Agnew* concluded that NCAA amateurism rules are commercial for this purpose. (Plaintiffs are wrong in asserting (Br. 37) that the Fifth Circuit has concluded likewise. Neither case they cite did so.) *Agnew*'s conclusion rested on the view that the "modern definition of commerce includes almost every activity from which [an] actor anticipates economic gain." 683 F.3d at 340. That sweeping definition would bring huge swaths of non-commercial activity within the regulatory ambit of federal antitrust law, merely because it relates to a commercial enterprise. *Compare Bassett*, 528 F.3d at 433 ("[T]he appropriate inquiry is 'whether the rule itself is commercial, not whether the entity promulgating the rule is.'").

That is no more sensible than deploying the Sherman Act to scrutinize a youth-baseball organization's decision to set age limits, or a blood-bank consortium's decision not to pay donors. Such rules define the organization, making it what its members want. Although they may have commercial implications, such rules do not regulate commercial activity; they rest on organizational philosophy and mission. They are not the kind of decisions to which the Sherman Act was meant to apply. *See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959) ("[T]he Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations … which normally have other objectives.").

## IV. PLAINTIFFS LACK ANTITRUST INJURY

### A. Live-Game Broadcasts

1. The NCAA's opening brief argued (at 36-41) that plaintiffs have not carried their burden to establish antitrust injury (and it *is* their burden, *compare* Pls.' Br. 40-41, *with* NCAA Br. 35-36) because no jurisdiction recognizes NIL rights for live broadcasts of players in team-sporting events. *See also* Networks' Amicus Br. 3-19. Plaintiffs (and their amici) still have not identified any jurisdiction that has ever done so. *Cf.* Pls.' Br. 41-42.[6]

[6] Plaintiffs do argue (Br. 42 n.22) that whereas highlight clips fit within public-interest exemptions to state-law publicity rights, "full game broadcasts are another matter." But courts have rightly rejected the notion that a sporting-event

2. The NCAA also argued (Br. 38-40) that even if a state recognized such publicity rights, the First Amendment would bar enforcement of those rights. None of plaintiffs' precedents supports their contrary position.

For example, plaintiffs' contention (Br. 46) that *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), rejected a First Amendment challenge to a publicity right claimed by a "performer" rather than an "organizer" or "producer" rests on their counting of how many times each of those words appears in the opinion. A more substantive analysis makes clear, as the Networks explain (Br. 12-16), that Zacchini's right was that of the producer or organizer to control the event broadcast. *See also* RER51-57. The same is true, as the Networks also explain (Br. 15-16), of *Wisconsin Interscholastic Athletic Ass'n v. Gannett Co.*, 658 F.3d 614 (7th Cir. 2011); indeed, the court there analogized the sports association asserting the publicity right to the NCAA, not to players, *id*. at 628.

This participant/organizer distinction is constitutionally dispositive. Whereas a participant's interest is merely in "compensat[ion] … for the time and effort invested in his act," the state's interest in recognizing Zacchini's right of

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excerpt is of meaningfully more public interest than the entire event. *See NFL v. Alley, Inc.*, 624 F. Supp. 6, 10 (S.D. Fla. 1983); *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 359-360 (N.Y. 1952). Plaintiffs suggest (Br. 42 n.22) that their argument finds support in *Keller v. Electronic Arts, Inc.*, but there this Court distinguished between "a means for obtaining information about real-world football games" and videogames—not live sports games. 724 F.3d 1268, 1283 (9th Cir. 2013). Live broadcasts are in the former category, and therefore fall within public-interest exemptions.

publicity was to "provide[] an economic incentive for him to make the investment required to *produce* a performance of interest to the public." *Zacchini*, 433 U.S. at 576 (emphasis added). The long history of massive and increasing participation in sports without compensation for NILs confirms that states need not provide additional incentives to participate. *See, e.g.*, ER48; Networks' Amicus Br. 22; Law & Economics Profs.' Amicus Br. 11, 16-17. Given this, and given that enforceable publicity rights would substantially burden protected expression (via holdout risks), the balance between First Amendment interests and any state interest in protecting participants' control over publicity in live-game broadcasts would tip decisively in favor of the former. *See* NCAA Br. 38; Networks' Amicus Br. 17-24; Law & Economics Profs.' Amicus Br. 13-15.[7]

3. The NCAA further argued (Br. 40) that any publicity rights plaintiffs had would be preempted by the Copyright Act. Plaintiffs respond (Br. 48) with non sequiturs. The NCAA does not contend that its copyrights entitle it to restrain trade unreasonably or that plaintiffs' claims are based on misappropriation. The NCAA argues that because of copyright law, plaintiffs have no enforceable

[7] Plaintiffs resist this conclusion on the ground—never raised below and therefore waived—that under *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), broadcast television receives reduced First Amendment protection. But *Red Lion* is limited to "[f]ederal regulation of the broadcast spectrum," *Minority TV Project, Inc. v. FCC*, 736 F.3d 1192, 1200 (9th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 2874 (2014).

publicity rights and therefore are not harmed by any NCAA agreement not to negotiate over such rights.

4. Perhaps recognizing the weakness of their arguments that they have enforceable live-broadcast NIL rights, plaintiffs contend (Br. 37) that the existence of such rights is irrelevant. Like the district court, they speculate (Br. 38-39) that broadcasters might negotiate to eliminate any uncertainty about such rights. For the reasons just discussed, however (and as the Networks confirm) broadcasters are quite certain that these NIL rights do not exist, notwithstanding occasional boilerplate clauses in broadcast contracts referring to participants' "name" or "likeness." NCAA Br. 37-38; Networks' Amicus Br. 24-27; RER15-16, RER23-24, RER27-28, RER 31-32, RER56, RER59-60, RER65-68, RER75-76.

More fundamentally, plaintiffs' assertion that the existence of NIL rights is irrelevant highlights a stark inconsistency in their case, one that has existed from the start but that the district court never required plaintiffs to account for. If the existence of NIL rights is immaterial, then plaintiffs are claiming that they should be paid not because they have such rights but simply because they take part in the

games.[8] Plaintiffs are claiming, in other words, that they should be paid to play. Yet because they realize that a pure pay-for-play claim is precluded by *Board of Regents* (and would in any event likely be a bridge too far for most schools, fans, and courts), plaintiffs have persistently denied that they seek pay-for-play. *See* NCAA Br. 3. They do so again here—precisely in an effort to avoid the force of *Board of Regents*. *See* Br. 31. Yet they fail to explain how, if there are no NIL rights, payment for NIL use is anything other than pay-for-play. Plaintiffs cannot have it both ways. Either they seek payment to compensate for violation of NIL rights, in which case the claim fails because there are no such rights (and in any event because of *Board of Regents*), or they seek payment just for being in the game, i.e., for playing, in which case the claim is unquestionably foreclosed by *Board of Regents*.

**B. Videogames**

Plaintiffs argue (Br. 43) that their claims are not moot with respect to video-games because the district court found that "the NCAA … has not presented any evidence suggesting that it will never enter into such an agreement again." ER25. But whether a possibility of future anticompetitive conduct would protect

[8] The testimony of Roger Noll that plaintiffs cite (Br. 38) confirms this. Noll was testifying about whether schools (not broadcasters) would pay student-athletes—and his point was that even if plaintiffs lack NIL rights, absent the challenged rules they could negotiate with schools to extract payments. But those payments, Noll elaborated, would be compensation for "the *services* of student athletes," not for their NILs. SER159 (emphasis added).

plaintiffs' claims from mootness is irrelevant; the point (*see* NCAA Br. 35-36, 42) is that the court's finding cannot satisfy the antitrust standard for an injunction, which requires that *plaintiffs* show a "significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969). Plaintiffs have not done so.[9]

### C. Archival Footage

Plaintiffs do not deny that, in light of the district court's finding that "no current or former student-athletes are actually deprived of any compensation for game rebroadcasts or other archival footage," ER85, they lack antitrust injury with respect to archival-footage uses. *See* NCAA Br. 43.

## V. THE CHALLENGED RULES ARE VALID UNDER A RULE-OF-REASON ANALYSIS

Even if full rule-of-reason analysis were appropriate for the challenged NCAA rules, *Board of Regents* teaches, at an absolute minimum, that because rules designed to maintain amateurism are "entirely consistent with the goals of the Sherman Act," 468 U.S. at 120, they could be held unlawful only upon a strong

[9] The NCAA also argued that plaintiffs lack videogame-related antitrust injury because the Copyright Act preempts their relevant alleged NIL rights. Plaintiffs' response (Br. 44 n.23) that the NCAA's argument "is entirely undeveloped" is incorrect: The NCAA developed the argument in the context of live-game broadcasts (Br. 40) and then cross-referenced it in addressing videogames (Br. 42).

showing of actual and significant anticompetitive harm or a valid less-restrictive alternative. Instead, the district court devalued the procompetitive benefits of the rules and found anticompetitive harm without searching inquiry. It also embraced an illegitimate alternative. These errors require reversal.

### A. The Rules Have No Significant Anticompetitive Effects

The NCAA's opening brief argued (at 45-49) that plaintiffs failed to prove that the challenged rules have significant anticompetitive effects in the college-education market, for three reasons: 1) there would be no market for plaintiffs' alleged NIL rights absent the rules, so the rules could not restrain their price; 2) at most, the rules limit one component of the "product" offered in the market, i.e., the bundle of collegiate goods and services, not the overall bundle's price; and 3) the rules do not reduce output. Plaintiffs first respond (Br. 49) that there is no "*de minimis* exception" for anticompetitive harm. That argument would fail even if true, because plaintiffs have not shown *any* anticompetitive harm. But it is not true: Plaintiffs' initial rule-of-reason burden is to show "that the restraint produces '*significant* anticompetitive effects' within a 'relevant market.'" *Tanaka*, 252 F.3d at 1063 (emphasis added). Plaintiffs make no effort to show that they proved such effects.[10]

[10] Although not directly relevant here, plaintiffs' statement (Br. 20) that the district court "found" that the NCAA "restrains competition in" the "group licensing market" is wrong; the court found the opposite. *See* ER74-86.

As to price, plaintiffs ignore the district court's finding that even if schools refuse to negotiate any price for NIL rights, they compete vigorously with respect to the actual product in the college-education market, i.e., the bundle. *See* NCAA Br. 47-48. Plaintiffs also ignore the Supreme Court's and this Court's precedents, as well as the leading antitrust treatise, recognizing that a refusal to negotiate the price of one component does not necessarily restrain the bundle's overall price. *See id.* at 48-49.

Plaintiffs' lone response regarding price (Br. 49) is that the "principle" articulated in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980)—a case that involved an illegal *per se* price-fixing agreement, *see* NCAA Br. 49—"is applicable in Rule of Reason cases as well." But both cases that plaintiffs cite involved a direct limit on the *overall* price of the item, rather than a refusal to negotiate one component's price. *See Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 37 (D.C. Cir. 2005); *Law v. NCAA*, 134 F.3d 1010, 1017 (10th Cir. 1998). That is a critical distinction, as this Court recognized in *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1146, *reprinted as amended*, 2003 U.S. App. LEXIS 7731 (9th Cir. 2003).[11]

[11] Ignoring *Freeman* (which the NCAA cited), plaintiffs (Br. 49-50) quote *Law*'s use of the phrase "one of the component items," 134 F.3d at 1017. *Law*, however, was referring not to a component of a competitively priced bundle but to the fact that the salaries limited by the challenged rule were the price of an input in an upstream market (coaches) that later helped create output in a downstream

Plaintiffs' response (Br. 50-51) to the NCAA's output analysis is much the same: They ignore the district court's finding and the precedent the NCAA cited (NCAA Br. 45-46 (citing ER48)). They identify no evidence to support their position (plaintiffs cite only ER27-31, which includes no discussion of output in the college-education market). And in denying that they must show, under full rule-of-reason analysis, that the alleged restraint reduced output, they cite cases, such as *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), that either did not address the issue or considered the separate question of whether the plaintiff had to show harm to a *downstream* market in order to show that a restraint in an *upstream* market violated the Sherman Act. Again, the NCAA's argument focuses on the lack of output effect in the college-education market. *See supra* n.11.[12]

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market (college basketball). *See id.* ("By agreeing to limit the price which NCAA members may pay for the services of restricted-earnings coaches, the REC Rule fixes the cost of one of the component items used … to produce … Division I basketball."). Because it was addressing downstream effects, *Law* does nothing to rebut the NCAA's argument that its alleged refusal to negotiate the price of one component of the bundle it offers in the college-education market did not restrain the overall bundle price *in that same market*.

[12] Moreover, *Mandeville* held that the claim was within the Sherman Act because the refiners "acquired … control of the quantity of sugar manufactured, sold and shipped interstate," 334 U.S. at 241-242—that is, because refiners were able to restrain *output*.

### B. The Rules Have Substantial Procompetitive Benefits

The NCAA's opening brief argued (at 49-54) that for two reasons the district court gave insufficient weight to amateurism as a procompetitive justification. First, the court considered only the extent to which amateurism increases college sports' popularity with fans, overlooking that amateurism "differentiates college [sports] from … professional sports" and thereby "widen[s] consumer choice—not only [for] … fans *but also [for] … athletes*." *Board of Regents*, 468 U.S. at 101-102 (emphasis added). Plaintiffs offer no response.

Second, the court concluded incorrectly that the historical record undermined the NCAA's claim of a longstanding commitment to amateurism. This is where plaintiffs focus their response, asserting that "the NCAA's interpretation of 'amateurism' [is] vague and malleable." Pls.' Br. 51. As shown above, *see* Part I, that argument is contrary to the record and precluded by *Board of Regents*.

### C. The District Court's Alternative Is Illegitimate

Although plaintiffs deny that the district court should have given the procompetitive justifications more weight, they do not challenge the finding that the challenged rules do have procompetitive benefits. Thus, even assuming the rules restrain NIL prices, the only issue is whether there is a substantially less-restrictive alternative that is virtually as effective at serving the procompetitive

justifications. The NCAA explained at length (Br. 54-60) the flaws in the analysis that led the district court to conclude that the answer is yes. Plaintiffs largely ignore that explanation—and a similar explanation by Professor Hovenkamp and his fellow amici (Br. 9-12, 14-16)—offering only glancing responses that often have nothing to do with antitrust law.

For example, the NCAA (Br. 56) cited Supreme Court and Ninth Circuit precedent showing that "antitrust law provides no basis to prefer one price over another" and thus that the district court, in picking what it regarded as a "better" price for NILs, assumed a regulatory role for which courts are ill-suited. Plaintiffs offer no response.[13]

Similarly, the NCAA argued (Br. 59-60) that the district court's analysis would expose the NCAA to a constant barrage of lawsuits seeking minor alterations to other rules governing collegiate athletics, and that such judicial micromanagement would discourage procompetitive collaborations, to the public's detriment. Plaintiffs do not respond.

[13] If the intellectual-property cases that plaintiffs cite (Br. 56-57 n.37) are intended as a response, they are far afield. The issue in those cases was whether a court that was authorized by the parties to engage in price setting had selected a price that was reasonable. Here, the court was *not* authorized by the Sherman Act to set prices, but even if it were, the issue would not be simply the reasonableness of the price selected but rather whether the price-setting was both substantially less restrictive and virtually as effective in serving the procompetitive justifications.

Plaintiffs' silence (here and on many other points) is telling. This is an antitrust case. The district court's judgment should rest on sound antitrust principles. Yet when confronted with important ways in which it does not, plaintiffs evidently have nothing to say.

Even when plaintiffs acknowledge the NCAA's arguments, they offer little of substance. For example, the NCAA argued (Br. 58-59) that in adopting a "modest" (Pls.' Br. 3) adjustment to the NIL price, the district court disregarded *Board of Regents*' admonition—heeded by other courts—that the NCAA "needs ample latitude to play [its] role" in maintaining amateurism, 468 U.S. at 120. Plaintiffs ignore this, resorting (Br. 57-58) to name-calling ("cartel"), other inflammatory rhetoric (NCAA is "a billion-dollar sports business" that "supplants the decision-making authority of educators"), truisms ("The Sherman Act sets limits on what [entities] may … do."), and conclusory statements ("The injunction entered here was a measured and tailored response[.]"). None of that refutes the NCAA's arguments. Indeed, the criticism that the NCAA supplants educators is bizarre given that the NCAA is an organization *of educators*—and if plaintiffs had their way, its key decisions would instead be made by *judges*.

Plaintiffs likewise fail to rebut the NCAA's point (Br. 57) that the district court's alternative is not "virtually as effective in serving the legitimate" pro-competitive justifications. *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d

1148, 1159 (9th Cir. 2001). Plaintiffs note (Br. 18, 56) that Neil Pilson testified that paying student-athletes $5,000 per year would not diminish fans' interest in college sports. But the procompetitive benefits of amateurism are not limited to increasing the public's interest. *See* NCAA Br. 50-51, 57. Amateurism serves to create a product distinct from professional sports, thereby giving consumers—both fans *and athletes*—another distinct option. *See Board of Regents*, 468 U.S. at 101-102. And a key part of what defines that product is the rule that student-athletes "must not be paid." *Id.* at 102. (Other amateur leagues define themselves the same way. *See* NCAA Br. 57.) Once student-athletes *are* paid, their sports are no longer amateur, and thus consumer choice is diminished. The district court was not free to simply redefine amateurism to include a league in which athletes are paid for their NILs. Antitrust law requires only that the rules be "reasonably necessary" to achieve their procompetitive end, NCAA Br. 58—and here they are, despite plaintiffs' ability to conceive of incrementally different rules. Because the court's alternative would be neither substantially less restrictive nor remotely as effective as the challenged rules in serving amateurism (let alone "virtually as effective," *County of Tuolumne*, 236 F.3d at 1159), it is impermissible.

## CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i) in that, according to the word-count function of the word-processing program in which it was prepared (Microsoft Word), the brief contains 6,999 words, excluding the portions exempted by Rule 32(a)(7)(B). The brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font.

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## CERTIFICATE OF SERVICE

I certify that on this 11th day of February 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit 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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