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 IN SUPPORT OF MOTION TO STAY INJUNCTION PENDING DECISION ON APPEAL

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July 28, 2015

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Plaintiffs' opposition provides no sound basis to deny a stay. As they have throughout this appeal (indeed, this litigation), plaintiffs primarily just belittle and demonize the NCAA. *See, e.g.*, Opp. 7; Opp. 12 n.11 (invoking commentators' references to "NCAA Deadenders," and the "'Utter Cowardice' of College Sports"). But neither derision nor anything else in plaintiffs' submission changes the simple fact that the NCAA is asking only to maintain the status quo—which plaintiffs agree involves a "decades-old practice and tradition" (Opp. 13)—until this Court can decide whether the dramatic changes that the district court's unprecedented injunction would engender are in fact supported by the law.[1]

I. LIKELIHOOD OF SUCCESS

Plaintiffs' arguments regarding the NCAA's likelihood of success on the merits of its appeal are unavailing.[2]

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[1] Plaintiffs repeatedly attack the timing of the NCAA's stay request (Opp. 1, 6 n.4). The NCAA filed when it did because it did not want to burden this Court with additional motions practice unless it was absolutely necessary.

[2] In discussing the standards for a stay, plaintiffs present *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315 (1983) (Blackmun, J., in chambers), as an opinion of the Court rather than a single-Justice ruling. To the NCAA's knowledge, neither a majority of the Supreme Court nor this Court has ever held that, as *Ruckelshaus* states, a district court's denial of a stay warrants deference. And even if deference were due when the district court actually analyzed the stay question, that would not justify deference here, where the entirety of the district court's stay analysis was "[t]he injunction will not be stayed pending any appeal of this order but will not take effect until the start of next FBS football and Division I basketball recruiting

- Plaintiffs seek to minimize *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), by arguing (Opp. 3 & n.2) that key language there was dicta. But they ignore the NCAA's explanation (Opening Br. 26-28) of the flaws in that argument—flaws plaintiffs themselves once recognized, as they did not even make this argument in their merits brief. *See* NCAA Reply 13 n.4. Plaintiffs also continue to focus on antitrust labels and analytic frameworks, rather than engaging the NCAA's actual point that the *result* the district court reached cannot be reconciled with *Board of Regents*—or with every prior case involving a challenge to an NCAA amateurism rule. *All* of those cases held that such rules are valid under the Sherman Act as a matter of law (including the two from this Court that plaintiffs cite, *see* Opp. 2-3; *see also* NCAA Reply Br. 9).

- Plaintiffs say (Opp. 4) that this Court should reject the conclusion of two other circuits that the challenged NCAA rules do not regulate commercial activity because of "substantial record evidence," yet they do not cite a single piece of that evidence. They also say (*id.*) that "the NCAA's own *amici*" support plaintiffs' position, but again cite nothing to support that bald assertion.

- As to antitrust injury, plaintiffs first say (Opp. 4) that it does not matter whether any state recognizes the name, image, and likeness rights that underlie their claims. But as the NCAA has explained (Reply Br. 20-21), if that is true then plaintiffs' claims are pure pay-for-play, which is unquestionably foreclosed by *Board of Regents* and its progeny. Plaintiffs also again cite boilerplate language in broadcast contracts (Opp. 4), ignoring both sides' experts' testimony that broadcasters do not negotiate for NIL rights in live broadcasts of team sporting events. *See* NCAA Opening Br. 37-38. And as a fallback, plaintiffs assert (Opp. 4-5) that "a substantial majority of states" recognize NIL rights in this context—without identifying any such state, and in direct contradiction of their (correct) concession at oral argument that no state has done so, *see* Arg. Tr. 34:54-35:25. Finally, plaintiffs do not address the NCAA's argument regarding videogames (Mot. 3), and say nothing at all about archival footage.

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cycle." ER106. (The delayed effective date does, however, suggest the court's recognition that implementation of the injunction should await the completion of appellate review.)

- Plaintiffs' response regarding the district court's rule-of-reason analysis (Opp. 5) consists of little more than empty and conclusory assertions, for example, that the analysis was "thorough and sound" and that the court "considered all the evidence presented." Plaintiffs do not address even *one* of the half dozen specific points the NCAA advanced (Mot. 4) regarding the infirmity of the court's finding of anticompetitive effects and its adoption of a supposed less-restrictive alternative. Such a cursory response is manifestly inadequate to rebut a showing of a "reasonable probability" of success.[3]

- Lastly, plaintiffs say nothing about the critical point (Mot. 4) that *Board of Regents* requires courts to afford the NCAA substantial latitude in adopting eligibility requirements—or the related point (*id.*) that affirming here and thus denying that latitude would lead to an interminable series of similar lawsuits by litigants demanding further judicial management of all aspects of college sports.

II. IRREPARABLE HARM

Plaintiffs' principal argument regarding irreparable harm (Opp. 5-9) is that the NCAA and its members cannot be harmed because the injunction does not *require* schools to make any payments to students. But if that were correct then there would be no harm from removing *all* of the NCAA's limits on compensation. Removing those rules, after all, would not *require* any school to, for example, offer very large compensation packages to high-profile student-athletes. Yet under plaintiffs' reasoning, such a fully unrestrained (i.e., purely professional) system would not cause irreparable harm to the NCAA, its members, or student-athletes.

[3] Citing no case law, plaintiffs assert (Opp. 2) that "[a] stay applicant faces a 'heavy burden' in demonstrating that a stay is warranted." As the NCAA explained, however (Mot. 2), this Court has made clear that the showing required to satisfy the likelihood-of-success prong—"reasonable probability"—means even less than a 50-50 likelihood.

Even the district court rejected that reasoning, in refusing plaintiffs' request to require the NCAA to allow payments above $5,000 per year.[4]

In denying that allowing NIL payments would radically undermine amateurism, plaintiffs also cite (Opp. 7-8) testimony by Neil Pilson, a sports-broadcasting expert, regarding how certain payments could affect college-sports viewership (Tr. 719:25-720:4, 770:4-771:25). But as the NCAA explained in its merits reply brief (at 29), amateurism serves many values beyond maximizing TV ratings. Among those is the creation of a unique product, clearly demarcated from professional sports. *See Bd. of Regents*, 468 U.S. at 102. The injunction would permanently tarnish this unique, longstanding, and essential character of intercollegiate athletics.[5]

Plaintiffs also assert (Opp. 7) that promises of NIL payments will not influence high-school students' decisions of where to attend college. But that assertion is belied by plaintiffs' fundamental position in this case (Opp. 9)—that the injunction they seek would create "vigorous competition" in recruiting.

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[4] The Supreme Court in *Board of Regents* similarly recognized the flaws in the argument that plaintiffs advance, explaining that a sports league is an activity that can only be carried out jointly, and with agreement among the participants not to compete in certain ways. *See* 468 U.S. at 101.

[5] Plaintiffs' observation (Opp. 6 n.4) that the NCAA is studying ways to comply with the injunction is irrelevant to the question of whether the NCAA will suffer irreparable harm if a stay is denied, as is their citation (*id.*) to an NCAA official's purported views regarding potential Supreme Court review.

Indeed, plaintiffs say (*id.*) that even *current* student-athletes would be tempted by NIL payments to transfer to different schools.[6]

Likewise untenable is plaintiffs' response to the NCAA's argument (Mot. 6-8) that in order to continue participating in intercollegiate athletics at the highest level, schools will be forced to redirect substantial resources to NIL payments and to implementing the injunction, and that such resources are likely to come from other academic and athletic programs important to schools' educational mission. Plaintiffs' response is to cite (Opp. 8) evidence regarding the large revenues generated by some Division I men's basketball and FBS football programs. But those revenues do not change the fact that schools would have to obtain the resources needed to implement the injunction from *somewhere*. Even if that money comes from revenues previously redirected to non-revenue-generating sports, the loss of programs and opportunities from that redirection constitutes irreparable harm.[7]

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[6] Plaintiffs argue (Opp. 6) that NIL payments "will undoubtedly aid college athletes in paying for their … family needs (including travel expenses)." Yet when the NCAA sought to assist student-athletes with those expenses, plaintiffs attacked the NCAA for doing so. *See* Pltfs.' Br. 7 n.2.

[7] Plaintiffs misleadingly reduce the NCAA's irreparable harm argument to the point that NIL payments cannot be "claw[ed] back in the event" the injunction is vacated. It is true—as plaintiffs appear to acknowledge—that monetary losses that cannot be recovered can constitute irreparable harm. *See, e.g.*, *Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994). But as explained in the text, plaintiffs offer little in response to the NCAA's further

Finally, the NCAA illustrated the confusion and uncertainty that would attend the implementation of the injunction by raising a series of exemplary questions (Mot. 6-7). Plaintiffs' only response is a footnote asserting that the NCAA and schools "have resolved" some of those questions "with respect to cost-of-attendance stipends." Opp. 6 n.5 (emphasis added). That response of course says nothing about how to answer the questions the NCAA posed (and many others) with respect to the above-COA payments. Plaintiffs inability to say anything about this central point confirms that the NCAA has made the required showing of irreparable harm.

Moreover, NIL payments—even if only up to COA—are very different from *scholarships* up to COA. For example, COA scholarships fall comfortably outside the IRS's definition of income because they are "awarded … primarily to aid the recipients in pursuing their studies," "do[] not represent compensation or payment for services," and do not exceed eligible expenses. Rev. Rul. 77-263, 1977-2 C.B. 47. NIL payments, by contrast, are payments for the (alleged) commercial value of a student-athlete's name, image, and likeness. Thus, even if NIL payments are limited to COA (and of course under the injunction they are not), it is unclear whether they would satisfy the first two criteria outlined above. Similarly, there is

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point that, in order to afford these payments, schools will have to sacrifice educational and athletic opportunities that they would have provided to other students. The loss of these opportunities cannot be remedied by vacating the injunction or through monetary relief, and therefore constitute irreparable harm.

no qualitative difference in how Title IX applies to COA and GIA scholarships, *see* 34 C.F.R. §§ 106.37(c), 106.41(c), but it remains unresolved how NIL payments would fit into this framework.

III. SUBSTANTIAL INJURY TO CLASS MEMBERS

Plaintiffs identify no *substantial* injury that they would suffer from a stay. The injunction essentially requires the NCAA to allow schools to offer two things to class members: (1) a scholarship up to the full cost of attendance (COA), and (2) additional payments of up to an additional $5,000 per year of athletic participation. With regard to the former, schools are now already permitted to offer COA, so a stay would not cause class members any harm. With regards to the latter, class members could not actually receive any payments until after graduation, so again a stay until the completion of this Court's review would not cause any harm.

Disputing this, plaintiffs argue (Opp. 10) that a stay could cause class members to lose the up-to-$5,000 stipend for the coming academic year, because schools would supposedly sign students up for that year under the current rules and thus not have to make any additional payments for the coming year even if the stay were later dissolved. That is meritless. If a school signed up student-athletes under the current rules and the stay was subsequently dissolved, it is not at all clear that the injunction *forbids* that school from later agreeing to pay the $5,000 for the

coming year—and the school might agree to do so in order to dissuade students from transferring to other schools.

Plaintiffs also deny (Opp. 10-11) that any class members would benefit from a stay because the injunction, they assert, would not cause any current student-athletes to be displaced from their roster spots. Their own first argument in this section, however, contradicts that assertion. Plaintiffs say (Opp. 9) that student-athletes "often transfer to another more attractive football or basketball program." And one way in which a program could make itself "more attractive" under the injunction would be to offer a higher payment than a student's current program. But *every such transfer* could cost a current student-athlete his roster spot—and also distort the transferring student's choice of colleges, based on a payment that may ultimately be overturned. That harm to class members must be considered as part of this factor.

IV. PUBLIC INTEREST

Plaintiffs' responses regarding the final stay factor fare no better. Plaintiffs claim, for example (Opp. 13), that there is no support for the NCAA's assertion that its rules "have long protected student-athletes from commercial pressures" (Mot. 9). Indeed, using carefully excerpted quotes from the district court's ruling, plaintiffs imply (Opp. 14) that the court found the opposite. That is wrong: What the court stated was that "the trial record contains evidence … that the NCAA has

not *always* succeeded in protecting student-athletes from commercial exploitation." ER55 (emphasis added). The court thus recognized that NCAA rules have offered such protection—and further recognized that such protection was a legitimate objective of the NCAA, which is why it rejected plaintiffs' "proposed alternative" of allowing student-athletes "to endorse commercial products," stating that that approach would "expand[] opportunities for commercial exploitation of student-athletes." *Id.*[8]

Plaintiffs also contend (Opp. 13) that the NCAA is simply reprising an argument it made at trial about diminishing consumer demand. That too is incorrect. The NCAA's argument rests on the simple point, recognized by the Supreme Court in *Board of Regents*, that the NCAA "widen[s] consumer choice" by offering a "product" that is distinct from professional sports—distinct in part because "athletes [are] not … paid, must … attend class, and the like." 468 U.S. at 102. It is not in the public interest to have that widened choice taken away—and more generally to have fundamental changes made to college athletics—before this

[8] At the same time that they wrongly accuse the NCAA of making "assertions that … were not borne out at trial," Opp. 13, plaintiffs attack the NCAA for supposedly not sharing "with college athletes *any portion*" of schools' sports-related revenues, Opp. 12 (emphasis added). To the contrary, the district court found that "[t]he record in this case shows that … as a result of this growth [in revenues], many schools have invested more heavily in their … athletic facilities, dorms, coaching, and other amenities designed to attract the top student-athletes." ER93. In fact, the court found, the level of this form of sharing of revenue "with college athletes" (Opp. 13) was so high that it "has likely negated whatever equalizing effect the NCAA's restraints … might once have had." *Id.*

Court's review is even complete. Nor is it in the public interest to have high school students making the monumental decision of where to go to college based on promises of money that, if this Court later reverses, may well not be available.

CONCLUSION

The motion for a stay should be granted.

Dated: July 28, 2015

Respectfully submitted,

/s/ SETH P. WAXMAN

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CERTIFICATE OF SERVICE

I certify that on this 28th day of July 2015, I electronically filed the foregoing using the Court's appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by that system.

/s/ Seth P. Waxman
SETH P. WAXMAN