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, *et al.*,
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.)

NCAA OPPOSITION TO PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The National Collegiate Athletic Association is an unincorporated, non-profit membership association composed of over 1,200 member schools and conferences. It has no corporate parent and no publicly held corporation owns 10 percent or more of its stock.

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Rehearing en banc should be denied. Plaintiffs identify no case, from any court, with which the panel's decision actually conflicts. *See* Fed. R. App. P. 35(b)(1)(A). Nor do they state any "question of exceptional importance" that is supposedly implicated here. Fed. R. App. P. 35(b)(1)(B). All of this is unsurprising: In the portion of the opinion that plaintiffs challenge, the panel applied settled law in concluding that the district court had clearly erred. Plaintiffs' case-specific disagreement with that conclusion provides no basis to expend the substantial judicial resources associated with en banc review. That is particularly true given the alternative arguments that the NCAA would raise in any rehearing, arguments that compel the same invalidation of the district court's $5,000 deferred-compensation order that plaintiffs attack here.

STATEMENT

1.a. In 1905, sixty-two academic institutions founded the NCAA to reform intercollegiate athletics—including addressing the problems of serious injuries to students and the use of hired professionals as players that were plaguing college sports. Op. 8-9. Over the ensuing century, "the NCAA has played an important role in the regulation of amateur collegiate sports, … promulgat[ing] playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment …, and rules regulating the size of athletic squads and coaching staffs." *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 88 (1984).

As this quotation indicates, amateurism has long been a central feature of NCAA-regulated college athletics. *See also* op. 9-11. Just a year after its founding, for example, the NCAA "set forth the 'Principles of Amateur Sport,'" the core tenet of which was that student-athletes not be paid to play. ER267 ¶¶7-8. Thus began what the Supreme Court has called "[t]he NCAA['s] … critical role in the maintenance of a revered tradition of amateurism in college sports." *Board of Regents*, 468 U.S. at 120.

b. The NCAA now has over 1,200 members in three divisions, and it sponsors "intercollegiate athletic competitions in roughly two dozen sports." ER10. A few of those sports are highly popular, and their commercial appeal has steadily grown. But as has been true for decades, that commercial aspect can exert pressures that undermine college sports' unique nature and value as a component of the educational experience, driving the sports towards professionalization and hence away from education. The NCAA therefore remains committed to the principle of amateurism, the "basic purpose" of which "is to maintain inter-collegiate athletics as an integral part of the educational program." ER610. Amateurism benefits student-athletes by integrating them into the broader student body, thereby improving their educational experience, and also preserves a clear line between college and professional sports, so as to "widen consumer choice" for fans and student-athletes alike. *Board of Regents*, 468 U.S. at 102.

To maintain amateurism, NCAA rules prohibit student-athletes from being paid for their athletic participation, including via promises of pay "to be received following completion of intercollegiate athletics participation." ER614. Student-athletes can, however, receive athletics-based scholarships and other aid to defray education-related expenses. ER620. Before August 2014, such scholarships were ordinarily capped at a full "grant in aid" (GIA), which is "tuition and fees, room and board, and required course-related books." ER619. On August 7, 2014, the NCAA voted to allow conferences to permit schools to raise the maximum athletics-based scholarship to a student-athlete's "cost of attendance" (COA), which covers the GIA items plus "supplies, transportation, and other expenses related to attendance at the institution." ER618a.

2.a. Plaintiffs sued the NCAA (along with Electronic Arts (EA) and the Collegiate Licensing Company (CLC)) alleging that the NCAA and its members violated the Sherman Act by agreeing not to compensate Division I men's basketball and Football Bowl Subdivision (FBS) players for the use of their names, images, and likenesses (NILs) in live-game broadcasts, videogames, and certain archival footage. ER9; *accord* op. 12. The district court certified a declaratory and injunctive class, but it declined to certify a damages class. Op. 13-14. Plaintiffs later settled their claims against EA and CLC, and shortly before trial the named plaintiffs voluntarily dismissed their damages claims with prejudice. Op. 14.

After a bench trial, the district court held that certain NCAA rules unreasonably restrain trade. ER10; *see also* op. 15-25. Concluding that there were less-restrictive alternatives to those rules, the court issued a permanent injunction requiring the NCAA to allow schools to pay student-athletes up to their COA plus $5,000 (in 2014 dollars) per year of athletic participation. ER7-8; op. 24-25.

b. A panel of this Court affirmed in part and vacated in part. The panel first rejected three arguments the NCAA had advanced for why the district court had erred in subjecting the challenged NCAA rules to a detailed rule-of-reason analysis: first, that under *Board of Regents* and *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010), NCAA amateurism rules are procompetitive as a matter of law, op. 26-32; second, that NCAA amateurism rules do not regulate commercial activity and therefore fall outside the scope of the Sherman Act, op. 33-37; and third, that plaintiffs failed to demonstrate the requisite antitrust injury, op. 37-43.

Turning to the rule-of-reason analysis, the panel "agree[d] with the district court that the compensation rules have a significant anticompetitive effect," op. 48, and it found no clear error in the court's analysis of the rules' procompetitive effects (though observing that "the district court probably underestimated the NCAA's commitment to amateurism," op. 50). The panel then addressed the less-restrictive-alternative (LRA) analysis. It reaffirmed both that a valid LRA must be "substantially" less restrictive *of competition*, op. 52, and that "plaintiffs must

make a strong evidentiary showing" on this point—not only because "plaintiffs bear the burden at this step" of a rule-of-reason analysis, but also because "the Supreme Court has admonished that [courts] must generally afford the NCAA 'ample latitude' to superintend college athletics," op. 52-53 (quoting *Board of Regents*, 468 U.S. at 120). The panel upheld the district court's ruling that raising the scholarship cap from GIA to COA (typically a difference of a few thousand dollars) would be substantially less restrictive of competition. Op. 54-56. It concluded, however, that payments above COA were not a valid LRA, based on the "self-evident fact that paying students for their NIL rights will vitiate their amateur status." Op. 58; *accord* op. 57 ("not paying student-athletes is *precisely what makes them amateurs*"). It therefore vacated the judgment and injunction to the extent they require the NCAA to allow payments from commercial-revenue streams of "up to $5,000 per year in deferred compensation." Op. 63.

Chief Judge Thomas concurred in part and dissented in part, stating that he would have affirmed the district court in all respects. Op. 64-73.

REASONS FOR DENYING THE PETITION

I. PLAINTIFFS RAISE NO QUESTION WORTHY OF EN BANC REVIEW

In the portion of the decision that plaintiffs challenge, the panel held that "the district court clearly erred in finding it a viable alternative to allow students to receive NIL cash payments untethered to their education expenses." Op. 56.

Allowing cash payments from NIL revenues of up to $5,000 per year above cost of attendance, the panel reasoned, would not be "'virtually as effective' in serving the procompetitive purposes of the NCAA's current rules," as is required for a proposed less-restrictive alternative "to be viable under the Rule of Reason." Op. 52 (quoting *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001)). Put another way, the panel held clearly erroneous the district court's ruling that students would still be amateurs if they were paid for their athletic participation rather than simply having their educational expenses reimbursed.

Plaintiffs raise four intertwined objections to the panel's holding; none raises an issue that warrants en banc review.

A. Plaintiffs' Criticisms Of The Panel's Application Of The Clear-Error Standard Are Unexceptional And Unfounded

Plaintiffs do not assert that the panel misstated the clear-error standard of review. *Compare*, *e.g.*, Pet. 11 ("A district court's findings of fact should be upheld absent a definite and firm conviction that a mistake has been committed."), *with* op. 25 ("[W]e will accept the district court's findings of fact unless we are left with the definite and firm conviction that a mistake has been committed."). Plaintiffs instead object to the panel's *application* of that standard. In particular, plaintiffs assert, the panel "improperly reevaluated the evidence," Pet. 10, offering "terse response[s]" to their arguments, *id.*, and failing to use "the language of clear-error review" in its analysis, Pet. 11. These are utterly routine, fact-bound

complaints. Panels of this Court are frequently asked to set aside factual findings as clearly erroneous; if mere disagreement with how a panel conducted clear-error review were a basis for rehearing en banc, rehearings would be commonplace.

Plaintiffs' arguments also lack merit. The question for the panel was whether the district court clearly erred in ruling that allowing payments to student-athletes of up to $5,000 per year above (and unrelated to) educational costs would be virtually as effective as the challenged NCAA rules *at promoting amateurism* in college sports. That is the pertinent question because the district court found that amateurism is a legitimate procompetitive objective. *See*, *e.g.*, op. 21. Plaintiffs have not challenged that finding, undoubtedly because it follows directly from the Supreme Court's explanation that NCAA rules designed "to preserve the character and quality of" college athletics, including rules that "athletes must not be paid," "widen consumer choice—not only the choices available to sports fans but also those available to athletes." *Board of Regents*, 468 U.S. at 101-102. By thus "enabl[ing] a product to be marketed" (amateur college sports) that is "different[] … from … professional sports" and that "might otherwise be unavailable," the NCAA's no-pay rules "are … procompetitive." *Id.* at 101-102, 117.

The panel rightly held that the district court had clearly erred in answering the key question, because most of the evidence on which the court relied "merely indicates that paying students large compensation payments would harm consumer

demand more than smaller payments would—not that small cash payments will preserve amateurism." Op. 58. For example, Neal Pilson's "offhand comment," op. 60—which formed "the sole support for the district court's $5,000 figure," *id.*—spoke to the relative effect that payments of various sizes would have on the "popularity of college sports" among consumers, op. 60 n.22, rather than the central question of "whether pure cash compensation, of any amount, would affect amateurism," op. 61. "Thus, the evidence was addressed to the wrong question." Op. 58.

Plaintiffs also point (Pet. 10) to evidence regarding the effect on "viewership" of "rising salaries in baseball and the Olympics Committee's inclusion of professional athletes." But the panel correctly concluded that those are "not fit analogues." Op. 59. Professional baseball, for example, is by definition a professional sport. Neither its experience nor that of the Olympics provides any insight into whether allowing student-athletes to be paid would destroy the defining characteristic that makes collegiate athletics an alternative product, and thereby diminish consumer choice.

Rules regarding Pell grants and pre-college tennis prizes (*see* Pet. 10 & n.2), are even farther afield. Those payments, unlike the $5,000 deferred-compensation payments that the district court authorized out of commercial-revenue streams, are designed to defray expenses—a function entirely consistent with amateurism. Op.

61 n.24; *see also* Final Adoption of Tennis Rule Amending Bylaw 12.1.2.4 (NCAA Division I Proposal 2011-25) (tennis rule offsets "exorbitant" costs "related to competing in tennis events" before college). As the panel recognized, the allowance of such expense-defraying payments sheds no light on whether permitting "pure cash compensation," divorced from education expenses, would "erode[] the NCAA's culture of amateurism." Op. 61-62 n.24; *see also* op. 59 n.21.

In sum, plaintiffs adduced little if any evidence bearing on the relevant issue: whether payments above cost of attendance are both substantially less restrictive of competition than, and virtually as effective in preserving amateurism as, the challenged NCAA amateurism rules. The panel therefore correctly held that the district court's approval of such payments was clearly erroneous. But again, these disputes about evidentiary adequacy and the application of clear-error review simply do not call for the attention of the en banc Court.

B. The Panel Did Not "Reformulate" The Less-Restrictive-Alternative Inquiry

Plaintiffs next argue that by examining whether proposed alternatives would preserve amateurism, the panel "re-formulat[ed] … the less-restrictive-alternative inquiry" and "remov[ed] consumer interest from the [rule-of-reason] framework." Pet. 13, 14 (capitalization altered). That is meritless.

The panel explicitly recognized that "[t]he proper inquiry in the Rule of Reason's third step" (the LRA analysis) "is whether the Plaintiffs have shown [that their proffered alternative] will not reduce *consumer demand* (relative to the existing rules)." Op. 62 n.25 (emphasis added); *see also* op. 56-57 & n.20, 59, 61 n.23. But contrary to plaintiffs' suggestion—for which they offer no authority—consumer interest (or consumer demand) is not a one-dimensional concept, such that a court should consider only whether a restraint makes a particular product more popular than it would be absent the restraint. Rather, as the Supreme Court and other courts have explained, a restraint can also satisfy consumer demand (i.e., advance consumer interest) if it "enables a product to be marketed which might otherwise be unavailable" at all. *Board of Regents*, 468 U.S. at 102. In that circumstance, the restraint is "procompetitive" because it "widen[s] consumer choice." *Id.*; *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007) (restraints affecting price can promote competition if they "give consumers more options"); *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998) ("[W]idening consumer choice ha[s] been accepted by courts as justification[] for otherwise anticompetitive agreements.").

The panel here therefore focused on preserving amateurism not because it thought consumer demand irrelevant, but because it recognized that amateurism is an essential part of what makes college sports a different product, i.e., is the "core

element" of the "procompetitive benefit" flowing from the unique type of competition that the NCAA sponsors. Op. 57 n.20. That recognition flows from *Board of Regents*' explanation that the broadening of consumer choice effected by the NCAA's amateurism rules is "procompetitive." 486 U.S. at 102; *see also id.* at 116 (amateurism rules "maintain the integrity of college [sports] as a distinct and attractive product"). Plaintiffs are thus asking the Court to convene en banc so that it can *depart* from the Supreme Court and other courts. That request should be denied, particularly because adopting plaintiffs' view—that consumer demand means nothing more than consumer popularity and that maximizing popularity is the only valid procompetitive benefit—would actually harm consumers, by forcing joint ventures to standardize around whatever might at the time be the most popular form of the product they create, thereby depriving consumers of choice.

C. The Panel's Use of the Words "Patently And Inexplicably Stricter" Does Not Justify Rehearing

Plaintiffs next contend that the panel "upended the Rule of Reason," Pet. 15, by stating that a restraint can be set aside if it is "patently and inexplicably stricter than is necessary to accomplish all of its procompetitive objectives," op. 55. As an initial matter, that statement does not even appear in the portion of the decision regarding payments above cost of attendance. It appears instead in the portion regarding payments up to COA, i.e., the part of the panel's less-restrictive-alternative analysis on which plaintiffs prevailed (and which they of course do not

challenge). That would be a peculiar place to find language that "ratcheted up every antitrust plaintiff's burden under the Rule of Reason to a level previously unimaginable." Pet. 15.

In any event, the panel's statement was not a "new legal standard" (Pet. 4) but merely a recapitulation of the concept that a restraint is subject to invalidation if it is not reasonably necessary to achieve the procompetitive end. Indeed, on the same page the panel made much the same point in the converse, stating that "courts should not use antitrust law to make *marginal* adjustments to broadly reasonable market restraints." Op. 55 (emphasis added) (citing cases). Plaintiffs' hyperbole notwithstanding, then, the panel's statement in no way "nullifies the rule of reason," Pet. 15 (capitalization altered), or otherwise calls for rehearing en banc.

D. The Panel's Reliance On *Board Of Regents* Provides No Basis For Further Review

Lastly, plaintiffs criticize the panel (Pet. 16) for heeding "the Supreme Court's admonition that [courts] must afford the NCAA 'ample latitude' to superintend college athletics," op. 62 (quoting *Board of Regents*, 468 U.S. at 120). This argument—which plaintiffs admit boils down to an everyday claim that "the majority misapplied *BoR*," Pet. 18—also fails to justify rehearing.

Plaintiffs notably do not even suggest that this part of the panel's decision conflicts with any precedent; the only cases they cite in this section (other than *Board of Regents* itself) are ones with which they say the panel's analysis *agrees*.

See Pet. 17. Plaintiffs do assert that it was "unprecedented" for the panel to give weight to Supreme Court dicta, Pet. 18, but that is wrong (even putting aside that the language was not dicta). To the contrary, this Court, like other circuits, has previously recognized that "considered dicta from the Supreme Court" is not to be treated "lightly," but rather deserves "appropriate deference." *United States v. Augustine*, 712 F.3d 1290, 1295 (9th Cir. 2013), *quoted in part in* op. 30; *accord, e.g.*, *United States v. Fields*, 699 F.3d 518, 522 (D.C. Cir. 2012). In fact, other circuits have given similar treatment to this precise language from *Board of Regents*. *See* op. 53 (citing cases). And the notion that the panel erred—let alone committed an error of exceptional importance, warranting en banc review—by declining to disregard an extended analysis by the Supreme Court that is directly relevant to the issues raised in this case is facially absurd.[1]

II. EVEN IF ANY OF PLAINTIFFS' ARGUMENTS HAD MERIT, REHEARING EN BANC WOULD BE UNWARRANTED BECAUSE SEVERAL ALTERNATIVE GROUNDS INDEPENDENTLY REQUIRE REVERSAL

Before undertaking the LRA analysis that plaintiffs challenge, the panel rejected several arguments advanced by the NCAA, each of which would have led either to the same result plaintiffs attack or to invalidation of the entire judgment.

[1] Plaintiffs also wrongly contend (*e.g.*, Pet. 16) that the panel's treatment of *Board of Regents* was inconsistent with earlier portions of its opinion. In fact, the panel's position throughout was that *Board of Regents* does not require that the challenged NCAA rules be upheld as a matter of law, but does require that they receive judicial deference. *See, e.g.*, op. 29-30.

All of these arguments (and others) could be raised if rehearing were granted, and hence they confirm that further review is unwarranted: Had the panel not erroneously rejected the arguments, it would have struck down the $5,000 deferred-compensation remedy without even reaching the issue on which plaintiffs seek rehearing.

For example, the NCAA argued before the panel that under *Board of Regents*, NCAA rules that preserve amateurism (like the rules challenged here) are not subject to detailed rule-of-reason analysis, but rather should be upheld "in the twinkling of an eye." *Board of Regents*, 468 U.S. at 109 n.39, *quoted in American Needle*, 560 U.S. at 203. The NCAA explained that *Board of Regents* established a framework under which some NCAA rules—those that do *not* "maintain the integrity of college football as a distinct and attractive product," 468 U.S. at 116—are subject to full rule-of-reason analysis, while other rules—those that do play that role, including the ones at issue here—"are … procompetitive because they enhance public interest in intercollegiate athletics," *id.* at 117, and should be upheld as a matter of law. The panel's dismissal of the relevant language in *Board of Regents* as dicta was erroneous both because the language was essential to the Supreme Court's analysis and holding regarding the rules at issue in that case, and because the Court has recently reaffirmed that framework in *American Needle*, a case the panel ignored. Had the panel properly applied *Board of Regents*, it would

have reached the result plaintiffs challenge (setting aside the order for payments above cost of attendance) without any less-restrictive-alternative analysis.

The same is true of the NCAA's argument that the plaintiffs suffered no "antitrust injury," that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Op. 37. The panel rejected this argument solely on the ground that "the NCAA's rules … foreclosed the market for their NILs in video games." Op. 38. But even if plaintiffs had any state-law NIL rights, those rights would be worthless because the First Amendment bars their enforcement in the videogame context. This Court held otherwise in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268, 1282 (9th Cir. 2013) (hereafter *Keller*), and thus the panel was bound to reject the NCAA's argument. *See* op. 41 n.13; op. 64 n.1 (Thomas, C.J., concurring in part and dissenting in part). The en banc court, however, could overrule *Keller*—and the NCAA would so urge because *Keller*'s First Amendment analysis is flawed. In particular, *Keller* adopted a "trans-formative use" test, which not only perversely punishes speech for being truthful and accurate, but also is so subjective and unpredictable that it chills large amounts of protected expression. If *Keller* were overruled and the proper test applied (the "*Rogers* test," *see Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989)), there would

be no doubt that plaintiffs lack antitrust injury, and thus that their case would have to be dismissed in its entirety.[2]

Finally, the NCAA argued to the panel that the district court's order was not any less restrictive *of competition*, let alone substantially so, as a valid LRA must be. *See Tuolumne*, 236 F.3d at 1159. Assuming that the challenged rules are properly regarded as a price-fixing agreement, all the district court did was change the price limit on which the NCAA's members could agree. That does not comport with fundamental antitrust principles, because antitrust law is concerned with "competition—not the collusive fixing of prices at levels either low or high." *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000); *see also, e.g., In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 445 (9th Cir. 1990).

The district court, moreover, created dangerous precedent for judicial intrusion into the operational decisions not just of the NCAA but of joint ventures generally. If the mere "availability of an alternative means of achieving the asserted business purpose renders the existing arrangement unlawful [whenever] that alternative would be less restrictive of competition no matter to how small a

[2] A petition for certiorari was filed last month challenging the holding of *Keller*. *See Electronic Arts Inc. v. Davis*, No. 15-424 (U.S.). The possibility that the Supreme Court will abrogate *Keller* provides an additional reason to deny rehearing here, as any resources spent on rehearing would then almost certainly be wasted.

degree," then antitrust law "would place an undue burden on the ordinary conduct of business." *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975). Hence, courts have recognized that "sports-related organizations should have the right to determine for themselves the set of rules that they believe best advance their respective sport (and therefore their own business interests)." *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 83 (3d Cir. 2010); *see also Board of Regents*, 468 U.S. at 120 (NCAA needs "ample latitude" in maintaining amateurism); *Law*, 134 F.3d at 1022 ("[C]ourts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics."); *Agnew v. NCAA*, 683 F.3d 328, 342-343 (7th Cir. 2012) (similar). If the district court's micromanaging were valid, then courts could order changes to myriad other rules—regarding transfer students or roster sizes, for example—merely on the ground that a court thought the revised rule would be more reasonable. That is manifestly improper. Again, however, if the en banc court were to recognize the errors in the district court's LRA analysis, that would lead to the same result regarding the $5,000 order that plaintiffs challenge. Merely changing the basis for a particular result does not justify the Court convening en banc.

CONCLUSION

The petition for rehearing en banc should be denied.

Dated: November 16, 2015

Respectfully submitted,

/s/ Seth P. Waxman

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CERTIFICATE OF COMPLIANCE

The foregoing petition complies with Circuit Rule 40-1(a) and this Court's October 26, 2015, order in these appeals because, according to the word-count function of the word-processing program in which it was written (Microsoft Word), the petition contains 4,057 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Seth P. Waxman
Seth P. Waxman

CERTIFICATE OF SERVICE

On this 16th day of November, 2014, I electronically filed the foregoing using the Court's appellate CM/ECF system. Counsel for all parties to the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Seth P. Waxman
Seth P. Waxman